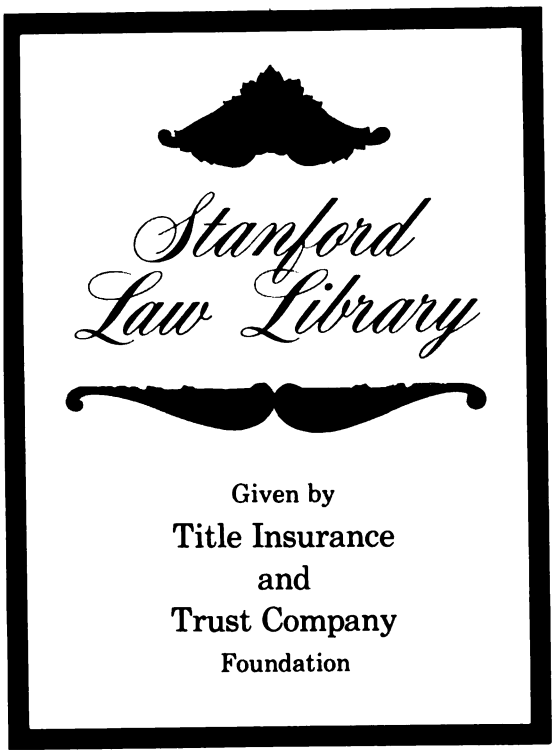

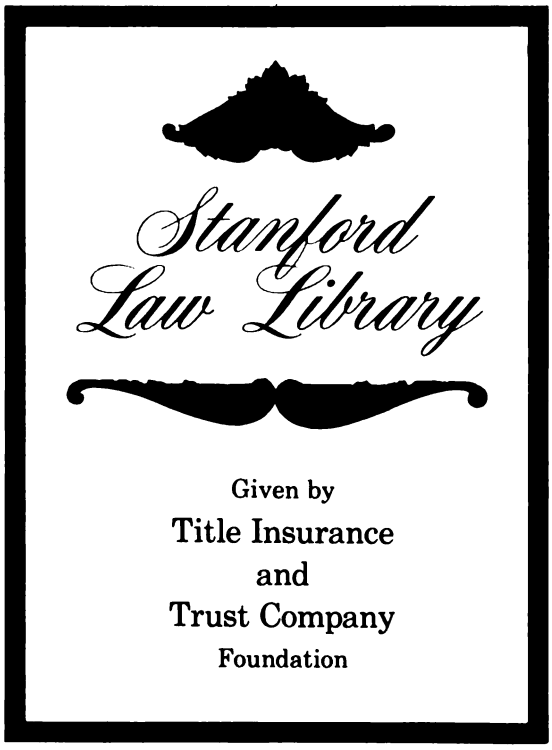

A TREATISE

ON

COPYHOLD,

CUSTOMARY FREEHOLD,

AND

Ancient Demesne Tenure,

WITH THE JURISDICTION OF

COURTS BARON AND COURTS LEET;

ALSO

AN APPENDIX,

CONTAINING

RULES FOR HOLDING CUSTOMARY COURTS, COURTS BARON AND COURTS LEET,

FORMS OF COURT ROLLS, DEPUTATIONS, AND
COPYHOLD ASSURANCES,

AND

EXTRACTS FROM THE RELATIVE ACTS OF PARLIAMENT.

BY

JOHN SCRIVEN,
SERJEANT AT LAW.

THE FOURTH EDITION,

EMBRACING ALL THE AUTHORITIES TO THE PRESENT PERIOD,

BY

HENRY STALMAN, ESQ.
OF THE INNER TEMPLE, BARRISTER AT LAW.

IN TWO VOLUMES.

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PREFACE

TO THE FOURTH EDITION.

THE death of the Author of the present treatise was a loss to the Profession, especially that portion of it whose more immediate duty it is to be conversant with the law of copyhold property, since he enjoyed the reputation of being the first copyhold authority of his day, and, as the Editor believes, justly so, judging from the numerous cases having reference to copyhold property submitted to him for his opinion, and the notes of many of which have come into the Editor's hands.

The third edition of this work was published in 1834, and had been for some time out of print. Several statutes having been passed and cases decided, having reference to the subjects of the treatise, the Author, in Hilary Term, 1842, published a supplement to the treatise, embracing all the authorities on the subjects of it, and the relative acts of parliament, since the publication of the third edition, with additional precedents: this supplement the Editor has incorporated with the present edition, together with some few additional statutes and cases.

Inasmuch as the various alterations which the law of copyholds has undergone are but of recent occurrence, the Editor has thought it best not to withdraw any considerable portions of the treatise from the present edition.

It may be proper to make a few observations respecting the commutation and enfranchisement acts. The Editor has not thought it requisite to give the forms of procedure framed by the copyhold commissioners under those acts; first, because they are readily obtainable at the office of the commissioners; secondly, because he observes from the

reports of the commissioners that they have had to deal with one solitary case only under the commutation clauses of the general act, and to which the forms of procedure chiefly relate; and thirdly, because he understands it to be in the contemplation of the commissioners to obtain another act, the effect of which will be to render some alterations in the present forms of procedure necessary.

The Editor has however thought it might be useful to introduce, at the end of the copyhold commutation and enfranchisement acts, two papers which have been put forth by the copyhold commissioners, the one intituled the "Tables of terms on which enfranchisements may be made, with suggestions for general rules," with some preliminary observations; and the other, "Terms for enfranchisements." So far as present experience has gone, the *commutation* clauses of the act have proved all but a dead letter. What copyhold tenants seem to require is, not commutation which perpetuates, but enfranchisement which extinguishes the tenure.

With reference to some of the precedents of Court Rolls contained in the appendix, the reader will bear in mind the enactments of 4 & 5 Vict. c. 35, as to admittances being either in or out of the manor, and without a court,—as to an entry on the Court Rolls being equivalent to a presentment, and as to a presentment not being essential to the validity of admission.

The Editor cannot expect that the present edition will be entirely free from error: but when the difficulty of rendering a work of this nature quite perfect is taken into consideration, he confidently hopes that the profession will extend to him its accustomed indulgence in respect of any such errors or omissions as this edition of the treatise may be chargeable with.

7, Stone Buidings, Lincoln's Inn,
July, 1846.

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ADDENDA.

Memoranda of Cases having reference to the subjects of this Treatise, reported during the progress of the present Edition through the Press, or not noticed therein.

Admission fine.—Mode of assessing copyhold fines, where by the custom of the manor a fine was due on the admission of a remainder-man. Allowance to be made for repairs, &c. Richardson *v.* Kensit, 6 Sc. (N. S.), 419. See vol. 1 of Trea. p. 343.

By-law.—Unreasonableness of. Edward *v.* Bullock, 6 Ad. & El. 340. See vol. 2 of Trea. p. 625.

Common pur cause de vicinage.—Clark *v.* Tinker, B. R. 10 Jur. 263. See vol. 1 of Trea. p. 518.

Copies of Court Roll.—Purchaser not entitled to a covenant for the production of copies of court rolls not in the possession or power of the vendor. Cooper *v.* Emery, 1 Phill. 388. See vol. 1 of Trea. pp. 493, 494.

Copyholds for lives.—Renewal of grant. Wadley *v.* Wadley, 2 Coll. 11.

Court Rolls.—Suit to recover, barred by stat. of limitations. Dean & Chap. of Wells *v.* Doddington, 2 Coll. 73.

Customary estate. Parties to suit.—On a bill filed to recover a customary estate, all parties claiming adversely to the defendant under the custom, or the construction thereof, are necessary parties. Marke *v.* Locke, 2 You. & Coll. 500.

Deodands.—A bill is now in parliament for the abolition of deodands.

Fine arbitrary.—Confirmation of the case of Denny *v.* Lemman, that when a fine is imposed, it is due to the lord of common right, and it is for the tenant to show it was unreasonable. Doe d. Twining *v.* Muscott, 12 Mees. & Wels. 832. See vol. 1 of Trea. p. 355.

Lease without licence. Forfeiture.—A lease granted by a copyholder not warranted by the custom is good against all persons except the lord,

and will enable the lessee and those claiming under him to maintain ejectment. It may also become good as against the lord, since he may waive the forfeiture incurred by the granting of it; but if he dies before entry or seizure, the lord in reversion cannot take advantage of the forfeiture. Doe d. Robinson *v.* Bousfield, 6 Ad. & El. (N. S.) 492. See vol. 1 of Trea. p. 456 et seq.

Markets, &c.—Lockwood *v.* Wood, 6 Ad. & El. (N. S.), 31. See vol. 2 of Trea. p. 656 et. seq.

Mines, Custom.—Hilton *v.* Earl Granville, referred to vol. 1, pp. 432, 535, now reported 5 Ad. & El. (N. S.), 701.

Partition.—Though a court of equity could not have decreed a partition of copyholds before 4 & 5 Vict. c. 35, s. 85, yet where two joint-tenants of copyhold property agreed to make a partition, the court enforced the agreement. Bolton *v.* Ward, 4 Hare, 530. Vide vol. 1 of Trea. p. 87, n. (*y*).

Seizure quousque. Feme covert.—Case of ejectment by lord, having a right to seize quousque pro defectu tenentis, against a feme covert, to enforce payment of fines claimed in respect of copyhold lands to which she had been admitted.—Although the lord proceeds in the first instance on his right to enter and seize quousque pro defectu tenentis, if that be answered, he may nevertheless recover on a right of entry and seizure quousque the fine is satisfied.

The right of entry quousque is not affected by the 9th sec. of 11 Geo. 4 & 1 Will. 4, c. 65. Doe d. Twining *v.* Muscott, 12 Mees. & Wels. 832. See vol. 1 of Trea. p. 341.

Seizure quousque—Receiver—Injunction.—Where a precept had been issued to seize quousque certain copyhold lands of which a receiver had been appointed, and the lord was proceeding to recover the lands by ejectment, he was restrained by injunction from prosecuting the action. Evelyn *v.* Lewis, 3 Hare, 472. See vol. 1 of Trea. p. 285, &c.

Strips of waste land lying by the sides of roads.—The presumption as to ownership does not arise where the whole of the adjoining land belonged to one person, who granted part to one and part to another. White *v.* Hill, 6 Ad. & El. (N. S.) 487; and see Rex *v.* Inhab. of Hatfield, 4 Ad. & El. 156. See vol. 1 of Trea. p. 507.

It may be observed that the bill now before parliament for facilitating the conveyance of property contains, among the forms in column 1 of the schedule, forms applicable to a covenant to surrender copyholds,—to a deed of enfranchisement,—to the power of enfranchisement in settlements and wills, and to covenants for title in purchase and mortgage deeds, and settlements of freeholds and copyholds.

A

TREATISE

ON

COPYHOLD TENURE,

&c. &c. &c.

PART THE FIRST.

CHAP. I.

On the Nature and Properties of a Manor.

THERE has been a variety of conjectures as to the etymology of the term *Manor*. Sir Edward Coke was of opinion, that the term was derived from the French word *Mesner*, signifying to govern or guide, because the lord of the manor had the guiding and directing of all his tenants within the limits of his jurisdiction. See his Copyholder, § 31, where he says, "And this I hold the most probable etymology, and most agreeing with the nature of a manor: *for a manor in these days signifieth the jurisdiction and royalty incorporate, rather than the land or site;*" but Bracton and others tell us that it is derived either from the French *manoir*, or from the Latin *manendo*, as the usual residence of the owner on his land (*a*).

A manor is defined to be *nomen collectivum et generale*, comprehending messuages, lands, &c.(*b*), and is the district or aggregate

(*a*) Vide Co. Lit. 58 a; Ib. n. b.

(*b*) Dy. 207; Lex Cust. 4. The following account of the origin of manors is from Perkins's useful little treatise on the laws of England, particularly on the various branches of conveyancing, published in the reign of King Edward VI. (vide pref. to vol. 10, Co. Rep.) "§ 670. And it is to know, that the beginning of a manor was when the king gave a thousand acres of land, or a greater or lesser parcel of land, unto one of his subjects and his heirs, to hold of him and his heirs, which tenure is knight's service at the least. And the donee did perhaps build a mansion-house upon parcel of the same land, and of twenty acres, parcel of that which remained, or of a greater or lesser parcel, before the statute of *quia emptores*, &c. did enfeoff a stranger, to hold of him and his heirs, as of the same mansion-house, to plow ten acres of arable land, parcel of that which remained in his possession, and did enfeoff another of another parcel, &c., to carry his dung unto the land, &c., and did enfeoff another of another parcel thereof, &c., to go with him to war against the *Scots*, &c., and so by continuance of time he made a manor, &c." And see Kitch. (3d ed.) p. 7.

compass of ground, granted by the ancient kings of this realm to the lords or barons (*c*), with liberty to parcel the land out to inferior tenants, reserving such duties and services as they thought convenient, and with power to hold a court, (from thence called the Court Baron,) for redressing misdemeanors, punishing the offences of their tenants, and settling any disputes of property between them (*d*).

Upon the creation of manors, the lords took as much as was necessary for the use of their families into their own hands, or demesnes, distributed other parts among their tenants, and the uncultivated residue was called the lord's waste. In some instances the greater barons granted out smaller manors to others, and then the seigniory of the superior baron, or lord paramount, was frequently termed an honour (*e*).

A manor cannot now be created, not even by the king himself, length of time being the very essence of a manor (*f*); and, as Sir Edward Coke expresses it, such things as receive their perfection by the continuance of time, come not within the compass of a king's prerogative; therefore the king cannot grant freeholds to hold by copy, nor create a custom; and, according to the same author, another cause why a common person cannot create a manor at this day is, that a perfect manor cannot subsist without a perfect tenure (*g*); and as the statute of *quia emptores terrarum* (*h*) directs, that upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee of whom such feoffor himself held it, it follows that a perfect tenure cannot be

(*c*) When William, Duke of Normandy, subdued this kingdom, Lord Moreton, Earl of Cornwall, received, as his share of the spoil, 793 manors; and when Cromwell seized the lands of the Irish royalists, he divided five millions of acres among his adherents. 1 Watk. Cop. 6, (n. 1), 4th ed.

(*d*) A manor may consist of one or more villages and hamlets adjacent, or only of several houses in a village. It is not necessary that the copyholds should be contiguous, for there are many manors where the copyholds lie dispersed at a considerable distance from each other, and frequently in different parishes and hundreds. Kitch. 7, 8; Co. Lit. 58; Fisher, 6, 7.

(*e*) Scrogg's, of Courts, 81.

(*f*) Bro. tit. Tenures, 102, cites 35 H. 8; 2 Roll. Abr. 120 (A.); Kitch. 7; Lex Cust. 5; Cro. Eliz. 38, 39, in Morris *v.* Smith *and* Paget; S. C. (called Marshe *&* Smith), 1 Leo. 26; and see Co. Cop. s. 31, Tr. 53, where it is said, "If the king at this day will grant a great quantity of land to any subject, enjoining him certain duties and services, and withal willeth that this should bear the name of a manor, howsoever this may chance to gain the name of a manor, yet it will not be a manor in the estimation of the law."

(*g*) Co. Cop. s. 31, Tr. 45 to 49.

(*h*) 18 Ed. I., West. 3, c. 1, which statute extends only to grants in fee simple; and when the whole fee is parted with under particular limitations, each particular tenant, as well as the remainder-man in fee, holds of the lord paramount. Co. Lit. 23 a, 43 b, 98 b, 143 a; 2 Inst. 500 to 505; Gilb. Ten. 85; post, tit. "Heriot." And this stat. did not extend to the king's tenants *in capite*. F.N.B. 211 (I.), 235 (A.); 2 Bl. Com. 91, 289.

created at this day between the feoffor and the feoffee; for a grant of any estate less than a fee-simple would create an imperfect tenure only; and it was evidently with this impression that Mr. Justice Blackstone observes, that it is essential to a manor that there be tenants who hold of the lord (*i*).

Mr. Watkins contends that the true reason why a manor cannot now be created is, that copyholds must be held according to the custom of the manor, and that as a person cannot at this day create a custom, so he cannot create a manor, of which copyholds may be held (*k*).

(*i*) 2 Bl. Com. 92. And see Bro. Compris. &c. pl. 31, 34; Fitz. Avowrie, pl. 31; Chetwode v. Crew and others, Willes, 614; Bradshaw & Lawson, 4 T. R. 443.

(*k*) Vol. I. on Cop. 15, 16. It is due to the great merit of Mr. Watkins's Treatise on Copyholds to give the following extract from his observations in support of the above position:—"The statute of *quia emptores*," he says, "did not extend to the tenants *in capite* of the king; and consequently it should seem from the statute *De prerogativa regis* (17 Ed. II. st. 1, cap. 6), that they might have aliened part of their lands even without license, and, from what appears, to have been held of themselves, till the 17th of Edward II.; so that sufficient was left to answer the services due: but yet the statute 34 Ed. III. c. 15, was afterwards enacted, confirming the grants made by such tenants in the time of Henry III., but saving the prerogative of the king, of the times of his grandfather, his father, and of his own time.

"Now the statute of *quia emptores terrarum* is expressly confined to alienations in fee-simple; and it is acknowledged that if a person at this day, seised in fee-simple, give lands to another in tail, or for life, the donee in tail, or grantee for life, shall hold of the donor. Here, then, is a tenure confessedly created. If a person seised in fee-simple of a thousand acres of land, which are held by him of a single lord, should grant out certain portions of such land to twenty persons for life, which he certainly would be warranted in doing, it may be asked, Would he not have a manor? The grantees are *his* tenants; they are not tenants to the lord above. In answer to this, it is said that though he may create a tenure, he cannot create a manor, for a manor cannot be without a court; and a court cannot be but by continuance time out of mind. But, says Sir Martin Wright [Ten. 158-9, n. (h)], it is an obvious objection to this reasoning, that the like reasoning might have prevented any manors at all. And another objection to this reasoning is, that if it be absolutely necessary that a court should have existed time out of mind, the manors to which that court belonged must necessarily have existed time out of mind also; and if so, what becomes of the doctrine, that manors might have been created by a tenant of a common lord, till the statute of *quia emptores*, or by a tenant *in capite* of the king, till the 34 Ed. III.?

"For the truth seems to be, from the very nature of the thing, as well as from historical facts, that the court was dependent upon the manor, and not the manor upon the court. The manor was the principal; the court was only an incident. On the creation of a manor, the Court Baron followed of necessity.

"With respect to the tenant *in capite*, was the stat. 34 Ed. III. a repeal, *ex necessitate*, of the sixth chapter of the statute *De prerogativa regis?* Upon the supposition that it was, it does not follow that the tenant *in capite* might not have aliened *with license*. Even the statute *quia emptores* might, it is said, have been dispensed with by the lord; and the king was within that statute when the lands aliened under

In many places a parsonage is a manor; where, for instance, before the statute of *quia emptores*, the patron, ordinary, and parson granted parcel of the glebe, to hold of the parson by certain services (*l*). The manor of the rectory of Old and New Windsor is one instance of this ecclesiastical seigniory; and the manor of the rectory of Yardley Hastings, in Northamptonshire, another. And a manor oftentimes constitutes part of a bishop's see (*m*).

It frequently happens, even at this day, that a person has a manor, with the profits of court, &c., without possessing a single foot of land within it, and then the manor is termed a seigniory in gross (*n*).

Great difficulty would probably arise in many cases, in proving the actual exercise of manorial rights; but it should seem that reputation alone is admissible evidence of the existence of a manor (*o*).

To every manor a common law Court Baron is incident (*p*), of which the suitors are the judges, as far as relates to any suits pending there; yet the steward of a Court Baron is clearly a constituent part of the court, and, as such, a judicial officer (*q*).

But the court, which is primarily the subject of our consideration, is properly called a Customary Court Baron, and is for those only who hold by copy of court roll, and the lord or steward is the judge of it (*r*). It is incident to every manor within which there are lands of that tenure: and, like the common law Court Baron, may be held at any place within the manor; and though there are not any

it were held of him *in capite ut de honore*, though he was not bound when they were held *in capite ut de coronâ*. It does not, therefore, seem to follow of necessity, that the creation of manors must have ceased in the reign of *Edward I.* For though it is true that it is essential to a manor that there be tenants who hold of the lord, yet the position, that by the operation of the statutes we have cited, no tenant *in capite*, since the accession of *Edward I.*, and no tenant of a common lord, since the statute of *quia emptores*, can create any new tenants to hold of himself, appears diametrically contrary to fact; unless, indeed, we suppose that it be absolutely essential to the very existence of a manor, that the tenants should be tenants in fee, the necessity of which, the whole history of feuds, and the present system of copyholds, seem most completely to negative. But granting even that the tenants must necessarily have held in fee, it appears that the tenant *in capite* might have aliened in fee *with* license after the passing of the latter act."

(*l*) Godb. 3; 1 Nels. Abr. Cop. 523, pl. 5.

(*m*) Dyke and others *v.* The Bishop of Bath and Wells, 6 Bro. P. C. 365.

(*n*) Kitch. 7; F. N. B. 3 C. 8 B.

(*o*) Steel *v.* Prickett and others, 2 Stark. N. P. Ca. 466; Smith *v.* Smith, 2 Pri. 111; Curson *v.* Lomax, 5 Esp. 60; post, tit. "Evidence."

(*p*) 4 Inst. 46, 268; 4 Co. 26 b, in Melwich & Luter; Cro. Jac. 260.

(*q*) Chetwode *v.* Crew and others, Willes, 619; Holroyd *v.* Breare and Holmes, 2 Barn. & Ald. 473; post, tit. "Court Baron."

(*r*) Co. Lit. 58 a; Kitch. 163, 164; Co. Cop. s. 45, Tr. 102; 4 Co. 26 b, in Melwich & Luter; post, tit. "Office and Power of the Steward."

free tenants, yet may the lord hold a Customary Court for his copyholders (*s*).

It is usual and expedient to hold Courts Baron and Customary Courts in the day time, but it would seem that they may be held after sunset (*t*).

Fifteen days is considered to be the proper notice, being the common time between the teste and return of a writ in the Common Pleas; and it is usual to include three Sundays, and to affix the notice to the church door; but six or seven days' notice is said to be sufficient (*u*), and even four days' notice was held to be so in *Taverner & Cromwell* (*x*).

Though courts of this nature are void if holden out of the manor (*y*), yet, by immemorial custom, it will be sufficient if courts for several manors are held together within one of them (*z*).

Although an honour consists of many manors, and there is for all the manors one court only held, yet are they *quasi* several and distinct courts; and so it was in the time of the abbots, who kept but one court for several manors (*a*).

The Customary Court Baron is generally held once in the year, at some period fixed by the custom of the manor, and more usually within a month before or after Michaelmas; and when the custom has not established a fixed period, it is supposed that this court may be held as frequently as the lord pleases (*b*).

But it is apprehended that, in analogy to the Court Baron, the Customary Court would, at least prior to the recent commutation and enfranchisement act, have been lost, had there not been two suitors (*c*).

Special Customary Courts are also oftentimes called for the purpose of effecting the proposed transfer of copyhold property by the admission of the new tenant (the purchaser or mortgagee, or perhaps a

(*s*) Melwich & Luter, sup.; S. C. Cro. Eliz. 102; Calth. Read. 10, 11.

The recent commutation and enfranchisement act, 4 & 5 Vict. c. 35, s. 86, has created a power in the lord, or the steward or his deputy, to hold customary courts without the presence of a homage, or one copyhold tenant, and even if at the time there shall not be a single person holding of the manor by copy of court roll; but it will be afterwards seen that such a court would not be "a good and sufficient customary court" for all purposes. This statute and the subsequent statutes of 6 & 7 Vict. c. 23, and 7 & 8 Vict. c. 55, amending the former statute, will be found in the Appendix.

(*t*) Mo. 68, pl. 185; 6 Vin. Court. (G.) pl. 10.

(*u*) Kitch. 11.

(*x*) Cro. Eliz. 353.

(*y*) But see Scroggs, 88.

(*z*) Co. Lit. 58 a; Co. Cop. s. 31, Tr. 47, 48; Clifton *v.* Molineux, 4 Co. 27; Seagood *v.* Hone, Cro. Car. 367; S. C. Sir Wm. Jones, 342; 2 D'Anvers, 179, 258; Duke of Suffolk's case, cited by Popham, C. J. in Sands *v.* Drury, Cro. Eliz. 814; Scroggs, 79.

(*a*) Scroggs, 81, 82.

(*b*) But see post, tit. "Fealty" and "Court Baron."

(*c*) Lit. 73; Co. Lit. 58; 2 Roll. Abr. 121; Jacob's Law Dict. "Manor."

trustee for particular objects), but at such courts it is not regular to enter any presentment, or make any proclamation in furtherance of the acts of any prior general court; though the author has known instances of the want of attention to this rule, and in which the proceedings might of course be impeached on any adverse question.

It has been sometimes erroneously supposed, that Courts Baron and Customary Courts must be held within a month after Easter and Michaelmas in every year; but those are the periods prescribed by the statute of Magna Charta (*d*), and by 31 Edw. III. c. 15, for the holding of the sheriffs' tourn, and view of frank-pledge (*e*).

The copyholders or tenants attending to do their fealty at this court, are called the homage, and are to be sworn to frame their presentments with impartiality, in the same manner as the homage of the common law Court Baron, or the jury of a Court Leet (*f*).

A manor is absolutely determined if the demesnes or services are once, by the act of the party, severed in fee simple, or if all the services become extinct (*g*): but although the manor is lost as far as relates to the holding of courts, yet it may be a manor by reputation, to sustain minor prescriptive rights (*h*): and notwithstanding a Court Baron is lost (as we shall see hereafter) (*i*), if there are not, at least, two free suitors (*k*), yet if there be but one free tenant, the services as to him will continue (*l*).

(*d*) C. 35; 6 Vin. Court (G.); Nels. Lex Man. 132.

(*e*) See post, Part iii. tit. "Court Leet."

(*f*) For Forms of Precepts, &c., connected with the summoning and holding of Customary Courts Baron, vide Appendix (A.), (B.)

(*g*) Sir Moyle Finch's case, 6 Co. 63-4; Lemon & Blackwell, Skin. 191; The King and the Bishop of Chester, ib. 661; Rex *v.* Staverton, Yelv. 190; and see 2 Roll. Abr. 121-2 (F.); Lit. Rep. 128, in Brockham's case; 1 And. 257; Prior of Bath's case, 4 Leo. 200.

(*h*) See Soane *v.* Ireland, 10 East, 259, which was an action for a false return to a mandamus for appointing a sexton, and the second count stated that *T. S. C.* was seised in fee of the manor of *F. S.* with the appurtenances, and that he and all those whose estate he had, &c., from time immemorial had exercised and enjoyed the privilege of appointing a sexton of the parish of *F. S.* when, &c. It was proved in evidence that *F. S.* had ceased to be a legal manor for some period before the vacancy in question, for want of freehold tenants, and for this objection it was urged that the plaintiff ought to be nonsuited; but Bayley, J., overruled the objection, and on a motion for a new trial the rule was refused, Lord Ellenborough observing, that it was not necessary to prove it a continuing manor for *all* purposes; vide also Smith *v.* Smith, 2 Pri. 104; Steel *v.* Prickett, 2 Stark. 466; Curson *v.* Lomax, 5 Esp. 60; 1 Watk. on Cop. 22, cites Calth. Read. 13; Tr. 9 Ed. IV. pl. 17, f. 17, a. Danby.

(*i*) Post, tit. "Court Baron."

(*k*) "Two freeholders, *holding of the manor subject to escheats.*" Per Lord Kenyon, 3 T. R. 447, in Glover & Cope; and see Willes, 619.

(*l*) See Long *v.* Heminge, Cro. Eliz. 209, 210; 1 Leo. 207; 4 Leo. 216; Sav. 103; 4 Co. 24 b, 25 a; 2 Ld. Raym. 864; 1 And. 257.

One manor may be held by copy (*m*), and become parcel of another manor: and a manor may, by act of law, be divided: a manor may also be suspended, and may cease and revive. These several maxims are thus exemplified:

First—That one manor may be held of and become part of another manor.

If *A.* holds twenty acres of *B.* as of his manor of *C.*, which manor *B.* holds of *D.* as of his manor of *E.*, and the manor of *C.* escheats to *D.*, the twenty acres are still holden of the manor of *C.*, which by the escheat has become part of the manor of *E.*, and by a lease of the latter manor it would pass, but after the escheat two Courts Baron cannot be held, the services being extinct (*n*); and it is only by this means that two manors can be united into one (*o*).

Secondly—That a manor may be divided.

If upon a partition between parceners, parcels of the demesnes and services are allotted to each, each hath a manor, being in by act of law; for they were compellable to make partition at common law (*p*): but the rent and services of any one particular tenement could not be apportioned on such partition (*q*): and after a partition between joint-tenants, each of them hath not a manor, but they must both join in holding courts (*r*).

Although a manor may be divided by act of law, it would seem to be settled that it cannot be divided by the act of the party, and it is clear that the severance by the lord of the freehold, in a copyhold of inheritance, will not determine the customary interest (*s*).

The author will presently state the authorities establishing, as he submits, the above proposition, but he desires first to remind the reader, that prior to the statute of *quia emptores*, 18 Edw. I. st. 1, a manor might have been divided by the act of the party (*t*); and also to call his attention to some few authorities adverse to the doctrine that a manor cannot be divided by the act of the party; and some of which are favourable to the opinion, that if the lord grant the freehold of two or more copyholds to a stranger, the grantee may keep a Customary

(*m*) See 11 Co. 18 a, Sir H. Nevil's case.

(*n*) Marshe & Smith's case, 1 Leo. 28; Sir H. Nevil's case, 11 Co. 17; S. C. (Moore *v.* Goodgame), Cro. Jac. 327; Rex *v.* Staverton, ubi sup.; S. C. (Rex *v.* Stanton) Cro. Jac. 259; 11 Co. 17 a; 32 Hen. 6, f. 9; 13 Hen. 7, 19 b; and see Sav. 21, ca. 52.

(*o*) Co. Cop. s. 31, Tr. 47-8.

(*p*) Sir Moyle Finch's case, and Marshe & Smith's case, ubi sup.; and see 26 Hen. 8, 4; Bro. Manor, 1; Beverley's case, Lat. 224; 15 Viner, Manor, (G.)

(*q*) M. 17 Ed. 3, pl. 102, f. 72, b; 1 Watk. on Cop. 17.

(*r*) Per Periam, J., in Morris *v.* Smith & Paget, or Marche & Smith, Cro. Eliz. 39; 1 Leo. 27.

(*s*) See the second resolution in Melwich & Luter, post; Co. Cop. s. 34, Tr. 69; 8 Co. 64 a; "Severance from the manor hurts not;" Gunn *v.* Buckmaster, Toth. 106.

(*t*) Kitch. 7; 1 Watk. on Cop. 16, cites M. 8, E. 2, f. 250, Mayn.

Court, and regrant the copyholds in case of escheat, &c., and for which this reason is assigned, namely, that, as the copyholders are not parties to the grant, it ought not to operate to their prejudice.

In *Harris* v. *Haies* and *Nichols* (*u*), Meade and Wyndham, Js. held, that if a man hath a manor which doth extend into two towns, and he grants the demesnes and services in one town, the grantee hath a manor in that town, and he may keep a court, and so hath the grantee a manor in the other town, and may keep court therein.

Another authority of a similar nature is *Morris* v. *Smith* and *Paget* (*x*), which was in replevin in the Common Pleas in the 27th Eliz. A special verdict was found, that Sir Francis Ascough, being seised of the manor of Castor, extending into the towns of North Kelsey, South Kelsey, Holton and Grisby, conveyed to *R. B.* in fee his manor of North Kelsey in North Kelsey, as a distinct manor, and the plaintiff, Morris, was distrained for not doing suit at the court of *R. B.*, and it was adjudged by Wyndham and Anderson, Js. (Periam, J. dissenting), that a manor passed to *R. B.*, and that the right to hold a court was incident thereto.

In *Melwich* & *Luter* (*y*) (in ejectment in *B. R.* 30 Eliz.), the second resolution was, that by the severance of the inheritance of copyholds from the manor, the copyholds were not destroyed, but remained of force and effect, which was stated to agree with the judgment in *Murrel's* case (*z*): and the third resolution was, that when the lord of a manor, having many ancient copyholds in one town, grants the inheritance of all the copyholds to another, the grantee may hold court for the copyhold tenements, and take surrenders to the use of others, and make admittances and grants; for although it is not a manor in law, because it wants free tenants, yet as to the copyhold tenants, the feoffee or grantee has such a manor that he may hold a court to make admittances and grants of the copyhold tenements.

And in Sir *Anthony Denny's* case (*a*), in the Common Pleas, 32 Eliz., he being seised in fee of the manor of *C.*, extending into *C.* and the town of *H.*, and also of other lands in *H.*, by his will devised the manor of *C.* to *H. D.*, his son and heir, in tail, and his lands in *H.* to *E. D.*, his younger son, &c.; and it was holden by Walmsley, Periam and Windham (absent Anderson), that the younger son should have that part of the manor of *C.* which lieth in the town of *H.*

(*u*) 25 Eliz. Cro. Eliz. 19.

(*x*) Cro. Eliz. 39; S. C. Ow. 138; S. C. Marsh v. Smith & Paget, 1 Leo. 26.

(*y*) 4 Co. Rep. 26 b; but see this case in error, Cro. Eliz. 103; post, p. 10.

(*z*) But see this case, post.

(*a*) 2 Leo. 190; vide Bro. Done and Remainder, pl. 26: "If a manor extends into four vills, and the owner grants the manor in *A. B.* and *C.*, so much as lies in *D.* will not pass; 5 Ed. 4, 103;" see also Bro. Graunts, pl. 88, citing S. C.; Bro. Fines, pl. 17, citing 43 E. 3, 11.

And in *Neale* v. *Jackson* (*b*) it was adjudged by the Court of Common Pleas that where the lord of a manor demises all his lands granted by copy to another for 2000 years, such lessee may hold a court for the copyholds, according to the resolution of the third point in *Melwich's* case. And it was said to have been so resolved by all the justices in the case of Sir *Christopher Hatton*, late Lord Chancellor of England, touching copyholds in Wellingborough, in Northamptonshire. The report concludes "*Nota* reader, a good difference between these cases which consist upon numbers of copyholds, which may support a custom, and one single case of a copyhold, as in *Murrel's* case before, in which the lord doth not grant *tacite* any Customary Court, nor the grantee, having but one single copyhold, can't hold court."

In *Smith* v. *Bonsall* (*c*) it was said by Walmsley, "If I grant away the moiety of my manor, we shall both keep courts, so if I be disseised of a moiety, or that the moiety be in execution by elegit."

Again in *Gay* & *Kay* (*d*) particular copyhold tenements had been delivered by the sheriff to one *who had recovered her dower of a third part of a manor*, and she kept court, and had granted out one of the tenements for lives in reversion (*e*), and exceptions were taken to the pleadings, that it was not alleged that the services of any of the *freeholders* were allotted to the feme, but the *demesnes* and *copyhold* tenements only, so that she had not any manor, nor could keep any court, nor grant any copies. But Popham held clearly that she might notwithstanding, for although she, having no services, could not have a Court Baron, yet she might have a special court for that purpose, and it was good enough, and said, "So it was adjudged in Sir *Christopher Hatton's* case for Wellingborough, where he had twenty copyhold tenements, parcel of the said manor, granted unto him by the Queen; and because some of them refused to come to his court, they forfeited their copyhold."

And per Ayliff, J., in Lord *Dacre's* case (*f*), "If the lord of *such* a manor [a manor of which copyholds were held] makes a feoffment of a parcel of his manor which is holden by copy for life, and afterwards the copyholder dyeth, although now the lord hath not any court, yet the feoffee may grant over the land by copy again."

And in another case (*g*), in trespass, in the Common Pleas, 29

(*b*) 37 Eliz. 4 Co. 26 b, 27 a. It is to be observed that this was the grant of a chattel interest only.

(*c*) 39 Eliz. Gouldsb. 117, ca. 15. It is proper to observe that this dictum of Walmsley was subsequently to the decision in Murrel & Smith, and Bright & Forth, post.

(*d*) 41 Eliz. Cro. Eliz. 662. And see Bragg's case, Godb. 135.

(*e*) On the question whether such a grant in reversion is good, see this case, post.

(*f*) 1 Leo. 289, B. R. 26 Eliz.

(*g*) Bell & Langlye, 4 Leo. 230; S. C. Beale & Langley, 2 Leo. 209.

Eliz., *A.* was lord of a manor of which *B.* held a copyhold of inheritance, and *A.* conveyed the freehold of it to a stranger. *B.* died, and the point was, whether the customary interest was determined against the heir of *B.* It was moved, that because the feoffee had not any court, the heir of *B.* could not be admitted, nor the death of his ancestor presented, because but one copyholder. But all the court held the contrary, and that the copy should bind the feoffee, and the ceremony of admittance was not necessary; for otherwise every copyholder in England might be defeated by the sole act of the lord, viz., his feoffment. The report concludes, "But the lord by his own act, which shall be accounted his folly, hath lost his advantages, viz., fines, heriots, and such other casualties."

It is material to notice that a writ of error was brought of the judgment in the above-mentioned case of *Melwich & Luter* in the Exchequer Chamber (*h*), and the error assigned in the matter of law; and although no judgment was given, the parties having compounded, agreeing that the plaintiff in the writ of error should have the land, yet all the justices and barons in the Exchequer Chamber held clearly that the grant by copy in that case was void, "for, "being divided from the manor, the custom to demise them is alto- "gether gone and destroyed, so as the estates for life which were *in* "*esse* at the time of the alienation of the freehold of them, and "severance of them, being now determined by surrender, or other- "wise, no new copy can be made; yet the alienation of the freehold "of them doth not destroy the estates of the copyholders then *in* "*esse*, but they shall hold them during their estates, paying their "services, but no new estates may be afterward granted by copy." And on the above case of *Melwich & Luter* being cited in *Bright & Forth* (*i*), it was answered, that "it was a strange judgment, and "never was entered by the direction of the court;" and that error was brought in the Exchequer Chamber, and the opinion of the justices there was that it was erroneous.

The author will now refer the reader to several authorities which appear to have fully decided, that a manor cannot be divided by an act of the party.

In *Murrel & Smith* (*k*), which was a case in trespass in *B. R.* in 33 & 34 Eliz., the Queen, seised in fee of a manor, conveyed the freehold and inheritance of a copyhold tenant to a stranger, and afterwards the copyholder devised to the plaintiff, and, at a court of the Queen, surrendered to the use of his will; and, upon a special verdict, three points were resolved,—1. "That custom has so established and fixed the estate of a copyholder, that by the severance of

(*h*) Cro. Eliz. 103.
(*i*) Ib. 43.
(*k*) 4 Co. 24 b; and see S. C. Cro. Eliz. 252.

the inheritance of the copyhold from the manor the copyhold is not destroyed" (*l*). 2. That the customary lands descended to the defendant, (the heir of the copyholder,) notwithstanding the devise and surrender, "for the surrender, after the severance of the inheritance of the copyhold from the manor, was utterly void, because the lands were not parcel of the manor at the time of the surrender, and the devise alone cannot transfer such customary estate." 3. "That after the severance the copyholder shall pay his rent to the feoffee, and also shall pay and do other services which are due without admittance or holding of any court; as to plough the lord's demesnes, heriot, and such like; but suit of court, and fine upon alienation or admittance are gone; for now the land or tenement can't be aliened; for, as the copyholder has some benefit by the severance, as appears before, so has he great prejudice, for now he can't surrender or alien his estate, because he can't alien it by surrender *in manus domini servitiorum*, as the custom has warranted, and *that* he can't now do; nor can the feoffee make admittance or grant of the copyhold, for *he* is not *dominus pro tempore:* but it was resolved that such forfeitures as were forfeitures before the severance, as the making of a feoffment, lease, waste, denying of rent, or such like, are forfeitures also after the severance (*m*). So, if land was of the nature of *borough-English*, or *gavelkind* before, the same customs, and all other customs which run with the land, shall remain after the severance; and it was said, if such copyholder will alien, there is no means but to have a decree against him and his heirs in Chancery, but thereby the interest of the land is not bound, but the person only."

In *Bright* v. *Forth* in *C. B.* 37 Eliz. (*n*), the Earl of Derby had suffered a recovery of his manor of *C.*, which extended over *C.* and *B.*, excepting certain lands in *B.*, and granted copyholds for life. The grants were held to be void, "because a manor could not be severed."

The judgment in the latter case shows, that an exception of part of the demesnes and services out of a grant of the manor operates as a severance equally with a separate grant of such demesnes and services (*o*). But when all the demesnes are excepted, it should seem that the exception is void (*p*). So also is an exception of the Court

(*l*) Vide also Swayne's case, 8 Co. 64 a; Co. Cop. s. 34, Tr. 69, 70.

(*m*) And see per Anderson, J., 2 Leo. 209, in Beale & Langley; but Periam and Windham, Js. holding that the severance destroys the seigniory as to the services.

(*n*) Cro. Eliz. 442.

(*o*) See also Dyke & Bishop of Bath and Wells, 6 Bro. P. C. 365.

(*p*) Winch. 23, Mabie's case.

Baron (*q*), although it is thought that the exception, if made by the King in virtue of his prerogative, is good (*r*).

And in Sir Moyle *Finch's* case, decided in *C. B.* 4 Jac. (*s*), it was resolved by the whole court, that if a man has a manor, and he grants part of the demesnes and of the services to another, the grantee shall not have a manor, "for a man, by his own act, cannot create a manor at this day."

According to Hobart (*t*), if you demise a manor, you may, by an exception, pare away as much of the demesnes or services, or both, as you will; but you must leave it still a manor, having some demesnes, some services, and a court.

The case of *Lemon & Blackwell* (*u*) is very decisive on the point under consideration. It was a case in error, upon a judgment in *C. B.* in replevin, where *J. C.*, seised of the manor of *B.*, consisting of services, demesnes, and fifty copyholds, granted to *R.* the moiety of twenty of them, and afterwards confirmed such former grant, and granted the moiety of the manor. *R.'s* estate came to *M.*, and *C.'s* estate to *N.*, and they held a court, and joined in a grant of the copyholds; and the question was, whether this was a good grant. It was urged, that if the grant had been of the entire interest of twenty copyholds, then the grantee might have held courts, and that the difference was between one tenement being granted, and more; and that for all that which was said by Mr. Justice Crook, Cro. Eliz. 102., yet *Melwich's* case was good law, so that if it had been of twenty copyholds, it had been good; and again, that if the grant had been of a moiety of all, then *M.* and *N.* had been tenants in common, and might have joined in keeping courts, and if so, why not when a moiety of twenty was granted. Holt, e contrà. "If all these lands are part of the manor of *B.*, for 'tis agreed *part* is, the moiety of them is actually severed from the manor, for the freehold of copyholds is part of the demesne of the manor, and so is the pleading. If one grant away any part of the demesne in fee, they are severed from the manor, and can never be part of it again, 6 Rep. 65 (*x*); though it be but for an instant. Then the question will be, whether the manor can be divided?—it cannot, 6 Rep. 65, by act of the party; and the reason will be the same of freehold and copyhold, for a manor must be time out of mind, and cannot be created at this day" (*y*).

(*q*) Lord North & Lady Dacre, Cary, 25; Brown *v.* Goldsmith, Mo. 870; S. C. 1 Brownl. 175; S. C. Hob. 108; Wheeler *v.* Twogood, 1 Leo. 118.

(*r*) Sir Robert Acton's case, Dy. 288 b; Hob. 108.

(*s*) 6 Co. 64.

(*t*) P. 170, in Stukeley *v.* Butler, 12 Jac.

(*u*) Skin. 191.

(*x*) Sir Moyle Finch's case, ubi sup.

(*y*) Bright & Forth, ubi sup. was also cited as in point.

And in the case of The *Queen* v. The Duchess of *Bucklew* and others, in *B. R.* in 3d of Anne (*z*), the fifth resolution, by the whole court, was that "a manor is an intire thing, and not severable."

It is quite clear, the author submits, from the above authorities, that since the statute of *quia emptores*, a manor cannot be divided by the act of the party, not even as between joint-tenants (*a*); and the better opinion is, that after a severance of a copyhold tenement from the manor, either under a conveyance of the freehold interest of the lord, or a conveyance of the manor itself, with an exception of the particular copyhold, without, perhaps, the sanction or even the knowledge of the copyholder, the court is lost, as far as respects such copyhold tenement, and that as no admittance could be compelled, so no fine could afterwards be recoverable.

The weight of authorities is also much in favour of a continuance of such services as are not immediately connected with the manor court, as heriot, quit rent, &c.; but this right could only be maintained on the presumption, that the severance of the copyhold from the manor had not destroyed the privity of estate between the lord (in respect of his reversionary freehold interest) and the copyholder.

And there can be but little if any doubt, the author submits, that the subtraction of any services continuing after the severance of a copyhold from the manor, or any attempt to convert the copyhold into freehold tenure, or the committing of waste, would be considered as a cause of forfeiture of the copyhold interest.

In *East* v. *Harding* (*b*), no doubt appears to have been entertained by the Court of *B. R.* as to the continuance of the services after the severance of the copyhold from the manor; the only question with the court was, whether the lessee of the feoffee could take advantage of the alleged forfeiture of the copyhold interest, the whole court agreeing that the feoffee himself, if he had not made the lease, might have done so.

Although (as it was said in *Murrel & Smith*) the copyholder is not without some advantage from the act of severance, as it exonerates him from the customary fine and suit of court, yet he receives a serious prejudice, presuming that an attempt to acquire a freehold title by the only act which could establish it effectually, namely, a

(*z*) 6 Mod. 151; and see 6 Vin. Cop. (H). (S). (Z. d).

(*a*) By Periam, J. in Marshe & Smith, 1 Leo. 27; and Anderson there said there was no difference between coparceners and joint-tenants, both being now equally compellable to make partition. Lex Cust. 6; ante, p. 7.

(*b*) Cro. Eliz. 498. And see 1 Roll. Abr. Cop. (G.), pl. 3, 4; and Wakeford's case, 1 Leo. 102, in which it was held, that a release of the copyhold interest to a grantee of the freehold is an extinguishment equally with a conveyance to the lord. S. P. Anon. Cro. Eliz. 21; post, tit. "Extinguishment."

feoffment, would be a cause of forfeiture; for although his interest would be the subject of an assignment, yet that would bind the person only, and not the land; so that the *legal* title must be left in the copyholder and his heirs; which circumstance would necessarily operate as a clog to the free alienation of the property. In such a case it would be desirable, the author thinks, to take the conveyance by a bargain and sale enrolled, as that form of assurance would not create a forfeiture of the copyhold interest, and it might be the best means of preserving evidence of title, from the period that the court rolls of the manor ceased to be so.

Thirdly—That a manor may be suspended; and may cease and revive.

As copyholds are parcel of the demesnes of a manor, if the lord leaseth for years all the demesnes, it is a suspension of the manor during the term of years (*c*).

So if the king grant the demesnes of a manor for life, the manor is suspended, but after the death of the lessee it becomes a manor again (*d*).

And, if on a partition of a manor between two sisters, *A.* and *B.*, the demesnes are allotted to *A.*, and the services to *B.*, the manor is dissolved; yet if *A.* dies without issue, and her part descends to *B.*, it becomes a manor again (*e*).

It would seem that when one manor is held by copy of another manor, the lord of the customary manor cannot keep Courts Baron, to have forfeitures or hold pleas in a writ of right; the privileges of a court being inconsistent with an estate at will. (*f*)

Demesnes.—When the demesnes are once separated from the manor, so that the custom is destroyed, they are no longer demisable by copy (*g*), and can never re-unite; as if lands are forfeited, or escheat, or otherwise come to the hands of the lord of the manor, and he make a lease for life or for years, or for one year, or half a

(*c*) Marshe & Smith's case, ubi sup.; Pymmock & Hilder, Cro. Jac. 559; and see 2 Ld. Raym. 864.

(*d*) Hartop & Tucke *v.* Dalby, Het. 14; and see Prior of Bath's case, 4 Leo. 199, 200.

(*e*) Thetford's case, 1 Leo. 204; S. C. And. 221; Sir Moyle Finch's case, 6 Co. 64 a; and see 2 Roll. Abr. 122, (F.) pl. 3; Ib. (H.), and the cases there cited from the Year Books; Bro. Extinguishment, 13; Fitz. Extinguishment, 5; 15 Vin. Manor (H). (H. 2).

(*f*) Rex v. Stanton, or Staverton, Cro. Jac. 259; Yelv. 190. Writs of right were abolished by 3 & 4 Wm. 4, c. 27, s. 36.

(*g*) Willes, 323.

year, or other certain time, by deed, or even by parol (*h*); or a feoffment in fee on condition, even though the lord afterwards enter for the condition broken (*i*); but if the lord keep the land in his own hands, or let it *at will*, he or his assigns may regrant at pleasure (*k*), even after a period of twenty years (*l*). And since the statute of frauds, (29 Car. II. c. 3.) (*m*) the author apprehends that a lease by parol (except for a term not exceeding three years, reserving two-thirds at least of the full improved value), which, by the third section of that statute, would have the effect of an estate at will only, would not prevent the lord from making a regrant of the land as copyhold (*n*).

Any lawful interruption, as the lands being extended, or recovered in a writ of dower, is equally a destruction of the demisable quality, though a wrongful interruption, as a disseisin, is not so (*o*).

By a separation of the demesnes, the author conceives, is meant, a separation produced by the act of the person having the fee simple of the manor, though in *Lee & Boothby* (*p*) it is said that a lord *pro tempore* leasing a copyhold is a severance; but the dictum in that

ex Mr Hanley 24 Beav. 311

(*h*) French's case, 18 & 19 Eliz. 4 Co. 31 a; Dounclifle & Minors, 1 Roll. Abr. 498. (B.); S. C. 2 Danv. 176; 6 Vin. Cop. (R.) pl. 1, 2, 3; Lee *v.* Boothby, Cro. Car. 521. And when another person has acquired a term *certain* in copyholds, they surely cease to be demisable; but see Hutchings *v.* Strode, Nels. Ch. R. 26, where equity aided a subsequent grant by copy, under the peculiar circumstances of the case.

(*i*) Co. Cop. s. 62, Tr. 141; French's case, sup.

(*k*) Co. Lit. 58 b; Co. Cop. s. 62, Tr. 141; Dounclifle & Minors, sup; Blemmerhasset *v.* Humberstone, Hut. 65; S. C. Sir W. Jones, 41; French's case, 4 Co. 31; 1 Roll. Abr. 498, Cop. (B.); Taverner and Cromwell, 3 Leo. 108, 2 Sid. 19; Cham *v.* Dover, 1 Leo. 16; Kempe and Carter, 1 Leo. 5, 56; Doe d. Gibbons *v.* Pott and others, 2 Dougl. 720. It should seem that the king is an exception to the rule, that the copyhold interest is destroyed by a demise, and that the king, or his patentee, may afterwards regrant by copy. Cremer *v.* Burnet, Sty. 266; 2 Roll. Abr. 197, (G.), pl. 3, 4; Fulham *v.* Fulham, Mar. 206; Lee *v.* Boothby, 1 Keb. 720; S. C. W. Jones, 449; S. C. (called Cholmly *v.* Cooper & Ward) 3 Keb. 91; S. C. but not S. P. Cro. Car. 521; Gilb. Ten. 304.

(*l*) Pemble *v.* Stern, 2 Keb. 213; S. C. Sir T. Raym. 165; Sid. 316.

(*m*) N. B. a lease void by that statute regulates the terms of the tenancy as to rent, the time of the year for the tenant to quit, &c.; Doe *d.* Rigge *v.* Ball, 5 T. R. 472.

(*n*) But note, what was considered at the time of passing that act as a tenancy at will, is now considered as a tenancy from year to year, which is not necessarily a term, for the meaning of the statute of frauds was, that a void lease or agreement should not operate as a term. See per Lord Kenyon, in Clayton *v.* Blakey, 8 T. R. 3; and in Goodtitle & Herbert, 4 T. R. 681. And note also, that by the recent statute of 7 & 8 Vict. c. 76, for simplifying the transfer of property, no lease in writing of any copyhold land is to be valid as a lease, unless it be by deed. That statute also deprived feoffments of any tortious operation.

(*o*) French's case, sup.; Co. Lit. 58 b, 324 b.

(*p*) Cro. Car. 521.

case is in complete opposition to several authorities, which have established, that a lease by the lord, being tenant in tail, or for life or years only, will not destroy the custom as to the reversioner or remainder man (*q*); and is totally irreconcilable with the case of *Winter & Loveday* (*r*), in which the tenant for life was empowered to lease the settled estates except the demesnes; and the court held that the exception extended to the copyholds as part of the demesnes, (notwithstanding there appeared to be no other land to which the power could apply,) as the rents and services might be demised, though a rent could not be reserved on such a lease; and observed, that the power in question would have enabled the tenant for life to destroy all the copyholds, if it had extended to them, for although a lease of copyhold tenements by a *lessee* of a manor does not operate as an extinguishment, yet, a lessee's demising copyholds *by virtue of a power* derived out of the fee, is an absolute destruction of them.

A distinction is mentioned to have been made by Holt, C. J., in one particular case (*s*), between a tenancy escheating and a purchase by the lord, namely, that in the former case, the land became part of the manor, but that in the latter it was only holden of the manor, and not part of it: this seems quite an anomaly, as it is clear that in both cases the land might be regranted by copy, though in each there was a union of the freehold and copyhold interest; and the author cannot help thinking that there is some misprint in the report.

The above case of *Winter & Loveday* suggests the expediency of excepting copyholds, and the rents and services thereof, out of the usual power of leasing, in all family settlements of manors, to which lands of that tenure are attached, a precaution which is very seldom attended to.

The *Demesnes* of a manor may, however, under an immemorial usage, be granted out to another, and still remain parcel of the manor, which shows, that, exclusive of the transcendent powers vested in the legislature (*t*), there is an exception to the rule, that

(*q*) Rusley & Conesby, 2 Roll. Abr. 271, Prescrip. (T.); S. C. called Conesbie *v.* Rusky, Cro. Eliz. 459 b; Gilb. Ten. 300. Vide also Co. Lit. 58 b, (n. 7); Prior of Bath's case, 4 Leo. 199; post, tit. "Lord of the Manor." "Extinguishment."

(*r*) 1 Comy. 40; S. C. 1 Freem. 507; S. C. Carth. 427; S. C. 1 Lord Raym. 267; S. C. 2 Salk. 537; S. C. 5 Mod. 244, 378; S. C. 12 Mod. 147.

(*s*) Anon. 12 Mod. 138. See also Holmes *v.* Hanby, 1 Sid. 284; S. C. 2 Keb. 28. ["12 Mod. is not a book of any authority." Per Buller, J. 1 Doug. 83.] Vide Sav. 21, ca. 52.

(*t*) See 35 Hen. 8, c. 13, enacting, that the king's manors of Granges, &c. in the county of Norfolk, formerly part of the possessions of the Abbey or Priory of Walsingham, should and might be granted by copy of court roll, in fee simple, or for term of life or lives, by the stewards of the said manors, their under-stewards or de-

copyholds cannot be created at the present day; but this proceeds upon the principle, that the land has been *demisable by copy* from time immemorial (*u*), and, therefore, although newly granted, yet to be considered as much a copyhold tenement as if it had been immemorially holden by copy of court roll, the tenure having its foundation in custom which from time immemorial attached upon the waste (*x*); and this circumstance is to be attended to in pleadings (*y*).

In *Hughes* v. *Games* (*z*), it was admitted that a lord by custom may, *with the consent of the homage*, make new grants of part of the manor, to hold by copy, and a case is mentioned by the reporter to have been cited to that effect; but whether a custom to do it *without the homage* would be good, the Chancellor said was a question which must go to law (*a*). In Lord *Northwick* v. *Stanway* (*b*), which was an action of assumpsit to recover the fine on admission to land in the manor of Harrow, it appeared that the premises were formerly part of the waste, and had been granted by the lord, to hold by copy; and, that there was an immemorial custom for the lord to grant parcels of the waste, *whenever he should think proper*, to hold by copy of court roll. The plaintiff had a verdict for 60*l.*, and afterwards, on a rule obtained for a new trial, one of the grounds of application being that the premises were not of copyhold tenure, the court, relying on the immemorial custom, and adverting to a similar custom in many manors in the north of England, held that the premises were well described as copyhold, although the date of the grant was modern; but the application succeeded upon another and perfectly distinct ground (*c*).

puties, for such rents, services, fines, heriots and customs, as in the said copies should be specified, which copies should be good against the king, his heirs, successors, and assigns. See also 37 Hen. 8, c. 2, enacting, that so much of Hounslow Heath as was the king's inheritance, and was meet for tillage, pasture, meadow, or other several ground, should be of the nature and condition of copyhold land: or the same might be letten by the steward of the manor, at will, or for twenty-one years, which lessee should or might improve it.

(*u*) Bishop of London & Rowe, 3 Keb. 124.

(*x*) Lord Northwick v. Stanway, 3 Bos. & Pul. 347; Co. Lit. 58 b.

(*y*) Kempe & Carter, 1 Leo. 55; Roe & Newman, 2 Wils. 125; Revell v. Jodrell, 2 T. R. 424.

(*z*) Select Ca. Chan. Temp. King, 62; and see Sir Matthew Hale's note (a) to F. N. B. 14. D.; vide also Lady Wentworth v. Clay, Ca. Temp. Finch, 263; but it does not appear whether the ground to be set out by the homage was to be granted to hold by copy of court roll; and see Folkard v. Hemmett, cited 5 T. R. 417, n. and post, at the end of tit. "Pleading," &c.

(*a*) The author will presently show that such a custom would be unreasonable, and therefore bad, post, p. 23.

(*b*) Ubi sup.

(*c*) See S. C. post, tit. "Fine on Admittance."

Again in *Boulcott* v. *Winmill* (*d*), which was an action of trespass for breaking and entering the plaintiff's close, and cutting down and prostrating the pales and fences standing therein, and there was a justification under an alleged right of common of pasture over the *locus in quo*, various instances were proved, from 1632, of grants by the lord of the manor of Westham, *with the assent of the homage*, at the general courts baron or customary courts, of parcels of the waste, some within and others without the ancient forest of Waltham, belonging to the crown, and subject to the jurisdiction of the forest courts, to hold by copy of court roll at the will of the lord, &c., and the *locus in quo* was in that part of the manor which was within the limits of the forest. At the trial, Macdonald, C. B. was of opinion, that the custom was established, and the plaintiff had a verdict; and, on an application to the Court of King's Bench for a rule for a new trial, Lord Ellenborough held that the waste might be legally granted out, though within the forest; and the other judges concurring, a rule was refused.

Length of possession will raise the presumption of a custom for the lord to grant out the waste by copy; see *The King* v. *The Inhabitants of Warblington* (*e*). In that case the lord of the manor of Havant had granted a small part of the waste, to hold by copy of court roll, with these words in the admission,—"fine one shilling, heriot one shilling, quit rent one shilling," and the grantee built a house upon the ground, but there was no proof of any consideration having been paid. An order of removal of the son of the grantee and his family, from Havant to Warblington, (from whence the father came into the parish of Havant with a certificate,) was confirmed by the court of sessions, and on an appeal to the Court of King's Bench, the above grant was not considered to be voluntary; and being a purchase under 30*l.* the court held that it did not give a settlement, since the stat. of 9 Geo. I. c. 7 (*f*). The steward of the manor proved several grants of part of the waste for a pecuniary consideration, and there having been near forty years' possession under the grant, the court deemed it a strong presumption in favour of the custom of granting the waste by copy.

It has been doubted whether the demesnes of a manor could not be granted even without an immemorial custom (*g*), but the author apprehends that the above cases of grants of waste land, and those

(*d*) 2 Campb. 261; see also Steel v. Prickett & others, 2 Stark. 464, 470.

(*e*) 1 T. R. 241.

(*f*) Vide also The King v. The Inhabitants of Wilby, 2 Mau. & Selw. 504; The King v. The Inhabitants of Hornchurch, 2 Barn. & Ald. 189; The King v. The Inhabitants of Horndon on the Hill, 4 Mau. & Selw. 565; The King v. The Inhabitants of Butterton, 6 T. R. 556.

(*g*) See 1 Watk. on Cop. 33 to 36. 3 Bos. & Pul. n. (a).

to which he is about to refer the reader (*h*), have established, beyond all possibility of controversy, that since the statute of *quia emptores*, no new tenure can be created, except by special and immemorial custom, or by legislative enactment, and that no person can reserve to himself a right of escheat.

Of this class of cases is *Revell and others* v. *Jodrell* (*i*), which was an issue to try whether allotments made to copyholders, in respect of their copyholds, on two commons, were freehold or copyhold; and, it appearing that certain woods taken by the copyholders under an agreement, in lieu of their right of common, had been *excepted* out of a grant of the manors under which the defendant claimed, the court held that they were thereby severed from the manor, and that the allotments made to the copyholders were freehold and not copyhold, agreeable to the rule, that a copyhold without custom cannot begin at this day. *Townley* & *Gibson* (*k*), where, under an inclosure act, an allotment of common and waste was to be made to the lady of the manor, in lieu of her right and interest in the soil of the residue of such common and waste (*l*), and then the remainder was to be allotted among the general proprietors, and such allotments were to vest in fee simple, discharged from all customary tenures, rents, &c., but the act was not to prejudice the right of the lady in or to the *seigniories* incident to the manor; on the contrary, she was thereafter to hold and enjoy all *rents, services, royalties,* and manorial jurisdictions whatsoever, and there was a subsisting lease granted by a former lord of the manor of the mines under the waste; and there the court held, that the mines under the waste, being part of the demesnes, and for which the lady received a satisfaction under the act, were not reserved by the clause reserving rents, royalties, &c., and that the tenants held their allotments as freehold estates of inheritance, and would not take them as copyhold unless the act so directed. It was also adjudged, that the lease remained valid, but that the right to the rents of the mines passed to the person in whose favour the allotment was made. The reader will observe, that mines, therefore, are not considered as a distinct right from the right to the soil of the freehold, but are part of the demesnes of a manor, and, consequently, that it is not sufficient, (though frequently relied upon,) when intended to except them out of the grant of waste, or the enfranchisement of copyhold land, to

(*h*) And see Co. Cop. s. 31, Tr. 45, 46; Co. Lit. 58 b; Kitch. 60; Mo. 631, pl. 867; 2 Mau. & Selw. 509; ante, p. 2, 3.

(*i*) 2 T. R. 415.

(*k*) Ib. 701.

(*l*) The lord of a manor is entitled to an allotment under an inclosure act in respect of his *demesnes* of the manor, over and above an allotment to him as owner of the soil of the commonable and waste lands; Arundell *v.* Viscount Falmouth, 2 Mau. & Selw. 440.

reserve to the lord the seigniories, royalties, and jurisdictions, incident to the manor, but that they should, in such a case, be reserved to him in express terms.

Another case of this class is *Doe* d. *Lowes* v. *Davidson*(*m*) which has established, that no private agreement can change freehold into copyhold or customary tenure, and that allotments of land of freehold tenure under an enclosure act will not become of copyhold or customary tenure, without express words making them so; even although the allotments are in lieu of copyhold or customary tenements, or rights appendant thereto; which is, therefore, an exception to the rule, that *accessorium sequitur principale.*

As *Doe* & *Davidson* is a case of considerable interest, and may be the subject of frequent reference, the author proposes to give a full extract from the report of it. It was an ejectment to recover customary lands in the manor of Ridley in Northumberland, where the custom is, that the tenements within the manor pass either by surrender and admittance at the lord's court, or by any species of common-law assurance, accompanied by the licence of the lord; but they are not devisable by will. In 1749, by articles between the lord of the manor and several persons intitled to right of common over two commons within the manor, it was agreed that such commons should be divided and set out by the persons named, who should apportion to the lord, as a recompense for his right in the soil, a certain part of one of those commons, and that the rest should be divided among the lord and the several persons having right of common, according to the yearly value of their tenements; and that, after the division, all rights of common should cease, saving to the lord *all mines*, &c. and all the *royalties* which he and the former lords had enjoyed. An award was made by the commissioners, whereby they allotted part of the commons to *W. L.* in respect of his right of common for his customary estates, and by a subsequent private act of parliament, the above articles and award were confirmed; in which act it was provided, that nothing therein contained should extend to revoke or alter any settlement, &c. of lands so agreed to be inclosed, but that the several allotments should be and enure and be enjoyed to the same uses, &c. as the tenements in respect whereof the allotments were made; and that the act should not prejudice, lessen, or defeat the right of the lord in and to *the seigniories and royalties incident to the manor*, but that he should hold and enjoy *all rents, services, courts, royalties, &c.* (other than and except common right,) in and upon the said commons, as fully

(*m*) 2 Mau. & Selw. 175. See also The King *v.* The Inhabitants of Hornchurch, 2 Barn. & Ald. 189; Doe *d.* Sweeting *v.* Hellard & Griffiths, 9 Barn. & Cress. 795, et seq.

as if the act had not been made. The premises, for which the ejectment was brought, were allotments under the articles and award confirmed by the act, and some of which were awarded to *W. L.*, and others purchased by him after the award, and all which, since the allotment, had been considered as freehold. *W. L.* devised to his eldest son and heir, *J. L.* and his heirs, all his real estates, without mentioning customary estates. *J. L.* was admitted, as heir at law, to the customary tenements of which his father died seised, and by his will devised all his real estate, as well copyhold and customary as freehold, (except certain messuages set apart for payment of his debts,) to his son *W. C. L.* in tail, with remainder to the defendant in fee. *W. C. L.* was the only child of *J. L.*, and he died an infant and without issue. The lessor of the plaintiff was the brother of *J. L.* and uncle and heir of *W. C. L.* At the assizes, a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, whether the custom, not allowing of a disposition by will, extended to the new allotments, or whether they passed by the will of *J. L.*

The court, stopping the counsel for the defendant, and adverting to the above cases of *Revell & Jodrell*, and *Townley & Gibson*, which had decided that customary tenure could not now be created, except by act of parliament, or by custom to warrant the grant of waste, held, that the allotments in question continued to be of the same tenure after the award and act of parliament, as they were before, and must go to those who were intitled to claim them, as passing under the will as freehold, and that the agreement and award could not alter the tenure; neither did the act of parliament alter it, in the construction put upon it by the court, the reservation to the lord being only of the same rights over the freehold land, then become the freehold of the tenants, which he before had enjoyed, as lord, over the same land, when it was his own freehold.

The author thinks it right to notice in this place, that when under a local inclosure act there is no special provision to the contrary, the legal title to an allotment is not acquired by the allottee until the execution and proclamation of the commissioners' award (*n*); and

(*n*) Farrer *v.* Billing, 2 Barn. & Ald. 171; Cane *v.* Baldwin, 1 Stark. 65; Ellis *v.* Arnison, 5 Barn. & Ald. 47. But in Kingsley *v.* Young, 17 Ves. 472, 18 Ves. 207, an objection to the title on the ground that the commissioners' award had not been made, was over-ruled, the act containing a clause, enabling a sale and conveyance before the award. And see Doe *d.* Dixon *v.* Willis, 5 Bing. 441, where the commissioners had made an allotment in respect of R.'s land in 1824, and in the same year a conveyance was made of the same land, it was held that the allotment passed, *although the award was not executed till* 1827; Doe *d.* Milburn *v.* Edgar, 2 Bing.

that an award is rather evidence of title than constituting title (*o*); the courts inclining to consider the legal estate, (after the execution of the award), to be in the same person or persons in succession as the land, &c. in respect whereof the allotment is made. So where the allottee was one of several lives named in a copyhold grant, the court of *B. R.* held, that the effect of the award was to vest the legal estate in the allotment in the several persons intitled in succession (*p*).

THE CUSTOMS of a manor must be immemorial (*q*), reasonable (*r*), and certain (*s*), or they cannot be supported (*t*); and if any part of the custom be bad, it avoids the whole (*u*).

As a custom must be immemorial, so a privilege attached to ancient messuages cannot be claimed in respect of a tenement recently built, and not upon the site of an ancient messuage (*x*).

A custom that a feme covert seised in fee may dispose of her estate, without her husband's assent (*y*), or without the private examination of the wife (*z*), has been held to be bad, being contrary to good policy. So a custom that after the death of a tenant for life, the lord is compellable to grant to a particular person, as to the son, and if no son to the daughter, and so *in perpetuum*, is void, though a custom for a copyholder for life to nominate his successor is good, the former being to compel the lord, who has the intetest, to make a

N.C. 498; vide also Greathead *v.* Morley, and others, inf. Vide also 1 & 2 Geo. 4, c. 23, s. 1, authorising landlords to enter upon land allotted to and demised by them, and distrain for rent, notwithstanding the award of the commissioners shall not have been executed.

(*o*) Kingsley *v.* Young, sup.; Doe *d.* Sweeting *v.* Hellard & Griffiths, 9 Barn. & Cress. 789, 798-9, 806; S. C. 4. Man. & Ry. 736; Greathead *v.* Morley and others, 3 Scott, (N. S.) 538.

(*p*) Doe & Hellard, sup. And see 2 Mau. & Selw. 175, 185, in Doe *d.* Lowes *v.* Davidson; Doe & Jefferson, 2 Bing. 118.

(*q*) Co. Cop. s. 33; Jackman *v.* Hoddesdon, Cro. Eliz. 351. See reference to 2 & 3 Wm. 4, c. 71, "for shortening the time of prescription in certain cases," post, p. 25, n. (*q*).

(*r*) It is sufficient to show that a custom (which must always be alleged in the land) was *reasonable* in its commencement, and it need not be intended to have a lawful beginning by grant, &c., but a prescription (which is alleged in the person) ought to have by common intendment a *lawful* beginning; 6 Co. 60 b, in Gateward's case.

A custom against the king's prerogative is not allowable; Davis's Rep. 33 b.

(*s*) 2 H. 4. 10; Co. Cop. s. 33, Tr. 61, 62, 63; Kit. 204.

(*t*) Whether a custom negativing the right to surrender to the use of a will could be supported, see Tike *v.* White, 3 Bro. C. C. 287; Doe *d.* Edmunds *v.* Llewellin, 2 Cr. Mee. & Ros. 503; post, title "Surrender to Will."

(*u*) Wilkes *v.* Broadbent, 2 Stra. 1225.

(*x*) Dunstan *v.* Tresider, 5 T. R. 2; post, tit. "Pleading," &c.

(*y*) Stevens *d.* Wise *v.* Tyrell, 2 Wils. 1.

(*z*) George *d.* Thornbury *v.* Jew, Amb. 629. But see Skipwith's case, Mo. 123, &c.; post, tit. "Surrender."

grant of it, and the latter compelling an admittance, where the interest is in the copyholder (*a*). But under such a custom the estate could not be divided into fractions, by nominating part to one and part to another (*b*); yet it should seem that, by the custom of *Yelminster Prima*, in Devonshire, the person nominating may except any part of the lands to any other person, but such exception operates on the beneficial interest only, the nominee continuing tenant to the lord for the whole (*c*).

A custom for the lord of a manor to grant leases of the waste lands without restriction, (the effect of which would be to enable him to annihilate the right of common altogether), is too unreasonable to be supported (*d*). So, also, would be a custom to grant out the wastes of a manor by copy of court roll *without the consent of the homage* (*e*); though a custom which does not establish an arbitrary power in the lord, but merely operates as a qualification of the right of the tenants of the manor in favour of the lord, is good. This was fully established in the case of *Bateson & Green* (*f*); and it is to be observed that the extent to which the lord's right had been carried in that case did not appear to be unreasonable (*g*).

It frequently happens that grants are made by the lord of a manor *ex mero motu*, either in fee or for a term of years, to hold by copy of court roll, and where no custom exists for granting out the wastes as copyhold, it is clear that such a grant would not enure as a grant of the *copyhold* interest, by reason of the statute of *quia emptores*, nor as a conveyance to pass a *freehold* interest, for want of livery of seisin, or a statutable possession under a bargain and sale for a year (*h*).

(*a*) Lord Grey's case, Mo. 788, pl. 1088; Ball's case, 4 Leo. 237; Rowles *v.* Mason, 1 Brownl. 132; 2 Brownl. 85, 192; 1 Roll. Abr. 560, pl. 18; Ib. 562, (H.), pl. 1; Devenish *v.* Baines, 2 Eq. Ca. Abr. 43, 44; Pre. Ch. 3; Warne *v.* Sawyer, 1 Roll. Rep. 48, cites Crabb & Bevis. See also Noy, 2. Ford *v.* Hoskins, Cro. Jac. 368; S. C. Mo. 842; S. C. 1 Roll. Rep. 125; S. C. 2 Bulst. 336; 1 Eq. Abr. 118, c. 2; 1 Sid. 267; and see Mardiner & Elliot, 2 T. R. 746. But see Gilb. Ten. 323.

(*b*) 2 Brownl. 199.

(*c*) Devenish *v.* Baines, Pre. Ch. 3; 6 Vin. 54, pl. 7.

(*d*) Badger *v.* Ford, 3 Barn. & Ald. 155; Arlett *v.* Ellis, infra.

(*e*) Arlett *v.* Ellis, 7 Barn. & Cress. 365—8, 372—5; S. C. 9 Dow. & Ry. 897; and see Clarkson *v.* Woodhouse, 5 T. R. 412, n.; Folkard *v.* Hemmett, 5 T. R. 417, n.; but in the latter case the custom was to grant *with* the consent of the homage.

The late *commutation* and *enfranchisement* act, 4 & 5 Vict. c. 35, recognises the custom prevailing in some manors to make grants of waste land as copyhold, *with the consent of the homage*, and restricts such grants to courts summoned and held conformably to ancient usage, with the consent of the homage there assembled. See sect. 91 of the act in the Appendix.

(*f*) 5 T. R. 415.

(*g*) Per Bayley, J. in Arlett *v.* Ellis, 7 Barn. & Cress. 366; 9 Dow. & Ry. 903.

(*h*) The King *v.* The Inhabitants of Wilby, 2 Mau. & Selw. 509. But by 4 & 5 Vict. c. 21, seisin is acquired by a release of freeholds, without a bargain and

Again, a custom that those who claim ought to come into court at the first, second, or third proclamation, to take up their estates, or that they should be forfeited, was held, even before the statute of 9 Geo. I. c. 29, not to extend to an heir beyond sea, or being an infant (*i*).

In *Fenn* d. *Richards* v. *Mariott*(*k*), a custom that the grantee of customary estates, passing either by deed or surrender, must be admitted during the life of the grantor, was held to be good in law; the court observing that it was fit that such grantees should be admitted in some reasonable time, and that the custom had limited that time.

In a recent case(*l*), evidence was given of a custom in the manor of Honiton, Wilts, by which, after the death of the tenant in possession of copyholds held for lives in succession, with a grant in reversion, the life in reversion is entitled to hold the estate beneficially, unless it should appear by the court rolls that a trust was intended for the lives in succession; and the then Vice Chancellor (Sir John Leach) held that the custom was reasonable, as it prevented disputes with regard to secret trusts (*m*).

And in a still more recent case(*n*), the Court of *B. R.* held that a custom which gave the copyholds to the *cestui que vies*, in the event of the grantee dying without having disposed of the estate by will, and therefore extending the principle of general occupancy to copyholds, was a good custom; Holroyd, J. observing, that the only ground on which it could be urged that the custom was bad was, that it was unreasonable, but that could not be unreasonable which merely effected, in copyholds, what the common law had established as to freeholds.

It has also been decided in the same court, that a custom for the

sale for a year. It is also observable that by the recent act for simplifying the transfer of property, 7 & 8 Vict. c. 76, such freehold land as might, before the passing of the act, have been conveyed by lease and release, may be conveyed by any deed without livery of seisin, or inrolment, or a prior lease. The act will be found in the Appendix.

(*i*) King *v.* Dilliston, 3 Mod. 221; S. C. 1 Salk. 386; S. C. 1 Show. 31, 83; and see the references in the margins. Vide also Sir Richard Lechford's case, 8 Co. 99; Whitton *v.* Williams, Cro. Jac. 101; Godb. 268, pl. 371; Smith *v.* Paynton, Cart. 86; 17 Ves. 90.

(*k*) Willes, 430; and see Perryman's case, 5 Co. 84.

(*l*) Edwards *v.* Fidel, 3 Madd. Rep. V. C. Court, 238.

(*m*) But see per M. R. in Lewis *v.* Lane, 2 Myl. & Keen, 455, which case decided that the right to dispose by will of the equitable ownership cannot be controlled by the custom of the manor; and his Honor held that a custom inconsistent with the doctrine of resulting trusts,—for instance, that a person named by the purchaser of a copyhold as the second life, shall take beneficially,—is unreasonable. Post, tit. "Trust Estates."

(*n*) Doe *d.* Nepean, Bart. *v.* Goddard, 1 Barn. & Cress. 522; S. C. 2 Dow. & Ry. 773; post.

steward or his deputy to have the sole right of preparing all the surrenders of copyhold estates within the manor, is a reasonable custom, being a qualification of the power of alienation, and an advantage to the tenant, the steward being bound to prepare the surrender for a fixed fee, and better acquainted with the estate than any stranger could be (*o*).

A custom for the lord and his tenants of collieries to sink pits within the freehold lands for working the same, and to lay the coals, &c. on the lands near to such pits, being customary tenements parcel of the manor, and to lay wood there for the use of the pits, was deemed unreasonable and void (*p*).

And in *Wilson* v. *Willes* (*q*), a custom in the manor of Hampstead in Middlesex, for the customary tenants, having gardens, parcel thereof, to dig and carry away turf fit and proper to be used, as often as occasion required, for making and repairing grass plots in such gardens, was held incapable of being supported, from its not defining what sort of improvement was meant, and which therefore extended to all sorts of fanciful alterations.

A custom that after presentment of the neglect of repairs, the copyhold tenant should be amerced, and that the lord might distrain the beasts as well of the tenant as the under-tenant of such customary tenements, levant and couchant thereon, for the amercement, has been held to be a good custom (*r*).

(*o*) Rex *v.* Rigge, 2 Barn. & Ald. 550; and see Reg. *v.* The Lord of the Manor of Bishopstoke, 8 Dowl. (P. C.), 608; post, tit. "Mandamus;" see also Clayton *v.* Corby, 2 Q. B. Rep. 813.

(*p*) Broadbent *v.* Wilks, Willes, 360; S. C. in error, 1 Wils. 63; S. C. 2 Str. 1224.

A custom that all the tenants and inhabitants of a manor shall grind at the lord's mill all their corn, wherever grown, which should be spent, in a ground state, within their houses, is good, but not to the extent of restraining persons having no corn of their own from using corn grown or ground out of the manor; Neville *v.* Buck, 8 Bro. P. C. 106; Richardson *v.* Walker, 4 Dow. & Ry. 498; and see Cort *v.* Birkbeck, 1 Doug. 218; Higges & Gardener, 1 Roll. Abr. 559, pl. 4; Green *v.* Robinson, Hardr. 174; Duke of Norfolk & Myers, 4 Madd. 83; Walmesly *v.* Marshall, cited ib. 105, n. (b.). Such a custom is suspended by pulling down the mill; Richardson *v.* Capes, 4 Dow. & Ry. 512.

(*q*) 7 East, 121; and see Wilson *v.* Page, 4 Esp. 71; 1 vol. Ca. & Op. 170; see also Bell *v.* Wardell, Willes, 202, and the several authorities mentioned in the notes to that case, and in Broadbent v. Wilks, Willes, 362, 363; see further as to customs, 1 Roll. Abr. 558, et seq. The author apprehends that a claim under a custom similar to that which was relied upon in Wilson & Willes, supra, but rendered reasonable by being confined to "necessary consumption and repairs," (post, tit. "Prescription"), would be held to come within the provisions of the act 2 & 3 Will. 4, c. 71, "For shortening the Time of Prescription in certain cases," (see extract of the act in the Appendix); but, so far from sanctioning an unreasonable custom, the first section of the act expressly provides that "such claim may be defeated in any other way by which the same is now liable to be defeated."

(*r*) Thorne & Tyler, Mar. 161.

A single act, if unresisted, may be evidence of a custom, but will not make a custom (*s*).

One custom may be subservient to another, as in *Bateson* v. *Green* (*t*), where it was held that the lord, having a right to dig clay pits, might do so, or authorize others to do it, to the prejudice of the right of herbage in the commoners.

A custom that lands shall always descend to the heirs male, viz. to the heirs male in the collateral line, excluding females in the lineal, has been held to be good (*u*).

And a custom may be reasonable in its commencement, if it is for the common benefit, though it tends to an individual prejudice; therefore a custom will not be deemed void, merely because it is prejudicial to, or diminishes the lord's casualty or profit as to escheat (*x*).

When a doubt prevails as to the existence of a custom, it is to be tried by a jury of the county, (assisted by the court as to settled rules of evidence (*y*),) and not by the judges, unless the same has been before tried, determined, and recorded in the same court (*z*); and the existence may be established by evidence of practice alone (*a*).

The law takes notice of general customs, such as gavelkind and borough-english, but others must be specially pleaded (*b*), and the

(*s*) Doe v. Mason, 3 Wils. 63; Roe v. Jeffery, 2 Mau. & Selw. 92.

(*t*) 5 T. R. 411; and see Place v. Jackson, 4 Dow. & Ry. 318.

(*u*) Sympson v. Quinley or Quinsey, 1 Vent. 88; S. C. 2 Keb. 672; Newton v. Shafto, post, p. 29. And a custom that an executor or administrator shall have a year in the land of a copyholder, against the wife entitled to freebench, is good. Rennington v. Cole, Noy, 29.

(*x*) Gilb. Ten. (4th ed.), p. 323, et seq.; Fisher, 40, 41; Kit. 204, 205; 2 Ves. 303, in Fawcet & Lowther. A custom giving a right of pre-emption to particular persons, as, for instance, the nearest relation, or next neighbour, &c. has been deemed reasonable; Jenk. 274, pl. 95; 2 Brownl. 196, in Rowles & Mason.

(*y*) See per Lord Loughborough, in Grant v. Astle, post, tit. "Fine."

(*z*) 1 Bl. Com. 76; and see Mortimer v. Petifer, Cro. Jac. 302; Jewell v. Horwood, 1 Roll. Rep. 263; Edwin v. Thomas, 2 Vern. 75; and see Locke v. Colman, 1 Myl. & Keen, 423. N.B. In that case, the jury, by finding for the defendant, negatived the plaintiff's title as customary heir; and the effect of the verdict being to establish within an extensive district a rule of inheritance of which there was no distinct precedent in evidence, the Court of Chancery allowed a second trial. Vide Locke v. Colman, 2 Myl. & Cr. 42. But the jury having again found in favour of the defendant, the Lord Chancellor refused a third new trial; 4 Bing. N. S. 635. A court of equity will refer it to the Master to inquire of an alleged custom, if the parties desire it; Edwards v. Fidel, 3 Madd. 239.

(*a*) Doe v. Mellersh, 5 Adol. & Ell. 541; 1 Nev. & Per. 30.

(*b*) Rob. Gav. b. 1, c. 4, p. 48, (3d ed.); 2 Danv. 184, p. 2; Clements v. Scudamore, 1 Salk. 243, (cites Fane & Barr, Hil. 1659); S. C. 1 P. W. 63; S. C. 6 Mod. 120; S. C. 2 Lord Raym. 1024; Payne v. Barker, Sir O. Bridg. 28, 33, n.; Humfry v. Bathurst, Lutw. 755; Roe & Aistrop, 2 Sir W. Bl. 1228; 1 Bl. Com. 76.

Note.—By the 79th sec. of the late commutation and enfranchisement act, (4 & 5 Vict. c. 35), lands included in any commutation are to continue to be held by

proof rests with him who alleges it (*c*). But one custom may be pleaded against another, where both may stand together (*d*); and it may here be proper to observe, that equity does not require a custom to be set forth with so much exactness as is requisite at law (*e*).

When a custom goes to the making and maintenance of a copyhold estate, it is to be taken favourably (*f*), but all customs in deprivation or bar of a copyholder's estate are to be construed strictly (*g*). So, if the custom is that the first taker may *surrender* to the lord, and destroy the estates in remainder, *a fine* would not have barred the remainders (*h*); and if there is a particular custom as to descent, where the *tenants die seised*, there, according to the case of *Fane* v. *Barr* (*i*), the dying seised is essential to bring the case within the custom. And in cases of descent, if the custom is silent, the common law must regu-

copy of court roll, and to be conveyed by surrender and admittance, or as previously by custom held and conveyed, and to continue parcel of the manor, but thenceforth to cease to be subject to the custom of borough-english or gavelkind, or any other customary descent, or any custom relating to dower or freebench, or tenancy by the curtesy; and the rules of descent, dower, and curtesy in free and common socage to attach thereto; but the provision thereby made as to curtesy, or dower, or freebench, not to apply to any husband or widow married before the final confirmation of the commutation apportionment, or the execution of the deed of voluntary commutation, nor to affect any right which the husband or widow of any person who shall be tenant of a manor at the time of such confirmation would have had if the commutation had not been made.

And the 80th sect. provides that the custom of gavelkind, as it exists and prevails in Kent, shall prevail and continue to be exercised in that county as theretofore. Vide the act in the Appendix.

(*c*) Ewer *v.* Astwicke, 1 And. 192; Rob. Gav. c. 4, p. 38; Roberts *v.* Young, Hob. 286; S. C. 1 Brownl. 172, 173.

(*d*) Kinchin *v.* Knight, 1 Sir W. Bl. 49.

(*e*) Dean and Chapter of Ely *v.* Warren, 2 Atk. 190. It was decided in this case, that a copyholder in fenny counties, after the land is drained, may be entitled to common of turbary, and dig turf by way of compensation.

As to the necessity of setting forth a custom with exactness in pleadings at law, see Griffin *v.* Blandford, Cowp. 63; post, tit. "Pleadings," &c.

(*f*) Per Popham in Baspool *v.* Long, Cro. Eliz. 879.

(*g*) Baspool *v.* Long, sup.; S. C. Yelv. 1; Borneford & Packington, 1 Leo. 1; and see Carter, 88, in Smith *v.* Paynton.

(*h*) Zinzan *v.* Talmadge, Pollexf. 564; S. C. Sir T. Ray. 402; S. C. T. Jones, 142; S. C. 2 Sho. 130; and see Smartle *v.* Penhallow, 6 Mod. 63; S. C. 1 Salk. 188; S. C. 2 Lord Raym. 994; S. C. 3 Salk. 181; Archer *v.* Bokenham, 11 Mod. 160; Rob. Gav. b. 1, c. 6, p. 93 (3d ed.); Prankerd *v.* Prankerd, 1 Sim. & Stu. 1. In Doe *d.* Hamilton and wife *v.* Clift, 12 Adol. & Ell. 506, the eldest sister was held to be entitled to customaryhold land under the special custom as to descent, although the brother, who was entitled as heir, had not been admitted, for having entered he died seised. It seems, however, that if the land had not been customaryhold of inheritance, but held by the brother for the joint lives of himself and the lord, with a tenant right of renewal, there, for want of admittance of the brother, the custom would not have attached, and that the tenement being devisable by the custom, would not have made any difference.

(*i*) Sup.

late the course of it (*k*). If, therefore, there is a recorded custom in the manor, that the land shall descend to the eldest daughter, or eldest sister, in exclusion of younger daughters and sisters, it will not be extended to an eldest niece upon that evidence alone (*l*); and if the custom is for the youngest son to inherit, and a man has two sons and dies, and the land descends to the youngest son, who dies without issue, the eldest son of the eldest brother shall have the land. But the doctrine in *Ratcliffe & Chaplin*, that to prove a custom it must be shown by precedents to have been *put in use*, was overruled in *Roe* d. *Beebee* v. *Parker* (*m*), where an entry on the court rolls was deemed to be admissible evidence of the mode of descent, although no instances were proved of any person having taken according to it. And again, in *Doe* d. *Foster and another* v. *Sisson* (*n*), there was an entry on the rolls, proving a custom in favour of a descent to the eldest sister in exclusion of the others, another entry proving a custom in favour of the eldest daughter, and a third extending the custom to a nephew, and there was evidence of reputation in favour of the eldest daughter and eldest sister respectively, and their respective *descendants;* and the learned judge, at the trial, thought it was admissible evidence for the jury to decide, whether the custom extended to a great nephew, and would have left the case to them on that evidence, but the plaintiff's counsel chose to be nonsuited, intending to take the opinion of the court, whether, as no instance was in fact proved of a descent to a great nephew, the custom, as proved, could be extended so far. And on the argument upon a rule obtained for setting aside the nonsuit, the court held that the reputation was evidence to go to the jury of the larger custom, and observed that if the lessors of the plaintiff had evidence to contradict the reputation, they might bring the question forward again in another ejectment. But reputation *alone* could not be admitted as evidence of a descent varying from the course of descent at common law (*o*). And in *Doe* d. *Mason* v. *Mason* (*p*), where the custom of descent was clearly proved to extend to the youngest son, and if no son, to the youngest brother, and there was one instance only in favour of a youngest *nephew*, the plaintiff, who claimed as youngest nephew and heir by the custom, had a verdict in ejectment, and the court refused a new trial.

(*k*) Ratcliffe & Chaplin's case, 4 Leo. 242; S C. (called Rapley & Chaplein), Godb. 166; Denn *d.* Goodwin *v* Spray, 1 T. R. 466; Co. Cop. s. 33, Tr. 63, 61; ib. s. 50, Tr. 116; 1 Roll. Abr. 624, pl. 2; Brown *v.* Dyer, 11 Mod. 98; S. C. Holt, 165.

(*l*) Denn *d.* Goodwin *v.* Spray, ubi sup.

(*m*) 5 T. R. 26; and see Morewood *v.* Wood, 14 East, 329, n.; Weeks *v.* Sparke, 1 Mau. & Selw. 686.

(*n*) 12 East, 62. Vide this case, post, tit. "Evidence."

(*o*) See per Grose, J. in Roe & Parker, ubi sup.

(*p*) 3 Wils. 63.

But in *Newton* v. *Shafto* (*q*), the continuation of the estate of the husband by the possession of the wife, as in the case of freebench, induced a liberal construction of a custom in favour of a second daughter, who became the eldest by the death of her sister in her mother's lifetime; the custom being, that if the father died leaving no son, but two or more daughters, the eldest daughter should have the land for her life, and that after her death it should descend to the next heir male who could derive through males, and for default of such it should escheat to the lord. This case is also considered as an authority in favour of a custom confining the descent to an heir male (*r*).

Although the common law will prevail in collateral matters, where the custom is silent (*s*), yet a custom will attach to a lineal descent; therefore, if it is in favour of a youngest son, or an eldest or youngest daughter, the issue of such son or daughter will be within the custom (*t*).

The right of representation takes place in descents of gavelkind and borough-english lands, and of copyholds in the nature of those tenures (*u*). And the customary descent of gavelkind extends to collaterals (*x*), but the descent of borough-english does not extend to collaterals, except it be by some special custom (*y*).

It is a rule that a person to take as a purchaser may be described from *every* course of descent, as heir at law, heir in borough-english, heir or heir male of the body (*z*), so that on a devise to the heirs male of the body of *A.*, one who is heir male, and not heir general, shall nevertheless take by purchase (*a*). And it is to be recollected that a person may take as heir in special tail by descent, without being heir general (*b*).

But it is not in the power of any individual to prescribe a mode of descent not sanctioned by the general rule of law, or by custom (*c*). So, if one be seised of copyhold land descendible in a different course from the common law, as in the nature of borough-english, he cannot alter the customary descent; if, therefore, such a person should sur-

(*q*) 1 Lev. 172; S. C. 1 Keb. 925; S. C. 2 Keb. 111, 158; S. C. 1 Sid. 267.

(*r*) See Sympson *v.* Quinley, ubi sup.

(*s*) Ante, p. 27.

(*t*) Clements *v.* Scudamore, infra; Godfrey *v.* Bullock, 1 Roll. Abr. 623, Discent, (A.), pl. 3; 2 Danv. 549, pl. 3.

(*u*) Clements *v.* Scudamore, 2 Lord Raym. 1024; S. C. 1 Salk. 243; S. C. 6 Mod. 120; S. C. 1 P. W. 65; Rob. Gav. b. 1, c. 6, p. 114, et seq.; 1 Roll. Abr. 623, Discent, (A.), pl. 3; Watk. Desc. 89, n. (b).

(*x*) Rob. Gav. b. 1, c. 6, p. 115, et seq. [385, App.]

(*y*) Rob. Gav. b. 1, c. 6, p. 118, [390, 391, App.]; Com. Dig. Boro. Engl. 14; Vin. Heir, (F. 5); Bayly *v.* Stevens, Cro. Jac. 698; 1 T. R. 469.

(*z*) 2 Burr. 1106.

(*a*) Wills *v.* Palmer, 5 Burr. 2615; S. C. 2 Sir W. Bl. 687; Brown *v.* Barkham, 1 Str. 35; 2 P. W. 3, and n. (1).

(*b*) Wills *v.* Palmer, 2 Sir W. Bl. 689.

(*c*) Rob. Gav. b. 1, c. 5, p. 92, 93; Co. Lit. 27; but see post, n. (*g*).

render to the use of himself and his heirs, according to the course of the common law, the words "*according to the course of the common law*," would be void, and the youngest and not the eldest son would take the land (*d*).

The customary descent attaches, the author conceives, to a limitation to one and his heirs *pur auter vie*, and to a rent granted *de novo*, or reserved out of copyhold land (*e*). It also attaches to a resulting use, or reversion in fee of copyholds (*f*). If, however, a remainder be limited of copyhold lands, held of a manor in which the descent is according to the custom of gavelkind or borough-english, to the right heirs of *A.*, without any previous limitation to *A.* himself, the words "right heirs" are only *descriptio personæ*, and the heir of *A.*, according to the rule of descent at common law, shall take (*g*).

The reader may here be reminded, that when a remainder is limited of copyholds in a surrender, or will, to the right heirs of any one to whom a life interest is limited by the same instrument, the two estates unite, and the heir of the surrenderee or devisee will take by descent (*h*).

It would seem that particular customs of descent extend to trust estates (*i*), except when confined to an actual *seisin* at the time of death (*k*); but not to executory or implied trusts (*l*), nor to copyhold

(*d*) Watk. on Desc. 148, and see also the notes; Rob. Gav. 120, n. (x); Dy. 179, pl. 45; Jenk. Cent. 220, ca. 70.

(*e*) Baxter *v.* Dowdswell, 2 Lev. 138; Clements *v.* Scudamore, ubi sup.; Bro. Rents, 10, 13; Rob. Gav. b. 1, c. 5, p. 79, et seq.; Randal *v.* Writtle, 2 Lev. 87; 1 Mod. 96, 112; 3 Keb. 165, 214; Stokes *v.* Verryer, ib. 292; 1 Vern. 489; but see n. 1, Knoles's case, Dy. 5 b; Br. Descent, 11; 1 Co. 100 b; Cary, 15; Randal *v.* Roberts, Noy, 15; Co. Cop. s. 33, Tr. 63, 64.

(*f*) Fawcet *v.* Lowther, 2 Ves. 302; 3 P. W. 63; Rob. Gav. b. 1, c. 5, p. 98; Doe *d.* Eustace *v.* Easley, 1 Cr. Mee. & Ros. (Ex.) 823.

(*g*) Watk. on Desc. 151, 152, and notes. But see 3 & 4 Will. IV. c. 106, "for the amendment of the law of inheritance," (s. 4), which enacts, that where the heirs take by purchase under a limitation to the heirs, or heirs of the body, of their ancestor, contained in an assurance executed after the 31st Dec. 1833, the land shall descend as if the ancestor had been the purchaser.

(*h*) Shelley's case, 1 Co. 104 b; post, "Construction of Surrenders."

(*i*) Roberts *v.* Dixwell, 1 Atk. 610; 1 Co. 100 b, in Shelley's case; Jones & Reasbie, Gilb. Uses, 19; Edwin *v.* Thomas, 1 Vern. 489; 2 Vern. 75; 2 Roll. Abr. 780, (D.); Vin. Abr. Uses, (D.); Rob. Gav. b. 1, c. 5, p. 98, 99; post, tit. "Trust Estates"; vide also Belt's Supp. to Ves. Sen. p. 348, in Fawcet *v.* Lowther; but see Cary, 15; and note in Helley & Helley, Trin. 7 Ann. 2 Eq. Ca. Abr. 509, pl. 4, the Lord Chancellor said, "a surrender to one and his heirs, in trust for another and his heirs, breaks the custom. And if a copyholder in borough-english surrenders in trust for him and his heirs, the trust goes to the heirs at law."

(*k*) Clements *v.* Scudamore, ubi sup.; and see Reeve *v.* Malster, Sir W. Jones, 361; S. C. Cro. Car. 410; 1 Roll. Abr. 624, pl. 1; Newton *v.* Shafto, ubi sup.; 1 P. W. 65.

(*l*) Roberts *v.* Dixwell, ubi sup.; Starkey *v.* Starkey, 7 Bac. Abr. 179; Payne *v.* Barker, Sir Orl. Bridg. 18; vide also Rob. Gav. b. 1, c. 6, p. 156, 157, n. (e); 2 Watk. on Cop. 62; post, tit. "Executory Trusts."

lands purchased by the lord, which, as the author will presently show, go with the manor; nor would a peculiar customary descent attach to waste land allotted upon an inclosure in respect of an ancient copyhold, such waste land vesting in the allottee as *freehold*, and not as copyhold (*m*).

In the above case of *Clements* v. *Scudamore*, Holt, C. J., in delivering the resolution of the court, that the daughter of the youngest son should inherit the copyhold lands purchased by the father, *jure representationis*, (and which lands were of the nature of borough-english), noticed the case of *Fane* & *Barr* (*n*), and that the custom there was, that the copyhold land of every *tenant dying seised* descended to the youngest son; that a surrender had been made to the use of *A.* and his heirs, who died before admittance, and that it was agreed that his youngest son should inherit if *A.* had been admitted, but that he not having been admitted, it was adjudged that the eldest son should inherit, and that was by reason of the strictness of the custom, which required a seisin and a dying seised. The case of *Fane* & *Barr*, noticed by C. J. Holt, is, the author thinks, the same as is reported among the judgments delivered by Sir Orlando Bridgman, when Chief Justice of the Common Pleas, under the name of *Payne* v. *Barker* (*o*), where the custom of the manor, found in a special verdict, was, "that all customary lands have at all times descended, and ought to descend, to the youngest son, youngest brother, or youngest nephew, as the case may be." The report states, that a purchaser of copyhold within the manor died after the surrender by the vendor, but before admittance, leaving a youngest brother and issue of an eldest brother, and the youngest brother aftewards died, leaving three sons: and it was adjudged that the youngest son of the youngest brother was not within the custom, which was to be understood to mean a descent from a copyholder *in facto*, and not from a copyholder *in fieri et in potentiâ* only; and clearly a surrenderee before admittance hath no estate, nor even a right, in the strict notion of the word. But (as was observed by C. J. Bridgman in the above case of *Payne* & *Barker*), a custom may be so laid, that the youngest

(*m*) Post, tit. "Enfranchisement"; Doe & Davidson, 7 Mau. & Selw. 175; Doe & Hellard, 9 Barn. & Cress. 797—9, 802—5; S. C. 4 Man. & Ry. 736; ante, p. 22, et seq.

(*n*) Ante, p. 27; see particularly 1 Salk. 243; 6 Mod. 121.

(*o*) P. 18; [Hill. 1659, Rot. 773]; and see 6 Mod. 121, where Fane & Barr is referred to as of Hil. 1659, Rot. 773; S. C. Pain *v.* Herbert, cited 2 Keb. 158; 5 Burr. 2784; and see 2 Lord Raym. 1025, and 1 P. W. 65, (where the case of Fane & Barr is stated to have been adjudged in 1660, 1661, and to have been entered Hil. 1655, Rot. 779); vide also 1 Salk. 243, where it is referred to as adjudged in 1560, and entered Hil. 1659, Rot. 779. But note, that in 2 Lord Raym. & 1 P. W. the case is called Hale & ——; and see Hargr. MSS. No. 55, fo. 129.

son or brother of a purchaser, though not admitted, may inherit,—as, for instance, if the custom were, that all the customary lands within the manor are of the nature of borough-english or gavelkind tenure (*p*),—for that is a custom fixed in the land, of which the law takes notice (*q*); and yet it is clear, that on the admission of the heir of a surrenderee, the law casts the descent upon him, so as to make the ancestor seised, by relation, from the date of the surrender (*r*).

But it must not be forgotten that the customs of a manor, as to estates held by copy of court roll, are destroyed by enfranchisement or extinguishment; and the author apprehends that this rule extends to copyhold lands descendible by the custom in nature of gavelkind or borough-english, which come to the hands of the lord by escheat or purchase (*s*), subject only to the right of the lord to regrant such lands as copyhold, and so to revive the customary descent (*t*).

But it is proper to observe, that the strength of the authorities is in favour of the opinion that unity of possession in the lord does not destroy the custom of gavelkind or borough-english; so that if gavelkind or borough-english lands (*i. e.* of freehold tenure), holden formerly of a seigniory, which held in knight service, had escheated, the gavelkind or borough-english custom would not have been destroyed (*u*), and that nothing can extinguish the custom of gavelkind but an act of parliament (*x*), although there is much colour for the notion entertained by some eminent lawyers in ancient times, that the land having, by unity of possession, become parcel of a manor so holden by knight service, should partake of the general nature of the whole, and pass with the rest to the eldest son, rather than that the manor should be dismembered by a different descent of the demesnes (*y*).

The reader is here apprised that it is now fully decided, that land gradually and imperceptibly added to the adjoining demesne lands of a manor, and formed by the alluvion and accretion of ooze, soil, sand, &c., cast up from the flux and reflux of the tide, belongs to the

(*p*) See Blunt *v.* Clark, 2 Sid. 61; 5 Burr. 2786; Baker *v.* Dereham, (or Barker *v.* Denham), 1 Mod. 102; Sty. 145; and see 1 Vent. 261; 1 P. W. 66; Reeve *v.* Malster, Cro. Car. 410; S. C. W. Jones, 361; Rob. Gav. b. 1, c. 6, p. 128, (3d ed.); Gilb. Ten. 288; 14 Vin. 259, pl. 6; 1 Sid. 138; 2 Sid. 61; Keilw. 80; Dal. 12.

(*q*) Sir Orl. Bridg. 28; ante, p. 26.

(*r*) Post, tit. "Admittance"; Blunt *v.* Clark, sup.; 5 Burr. 2786, 2787, in Vaughan & Atkins; but see M. 10 Jac. B. R.; 1 Roll. Abr. 502, M. pl. 2; 6 Vin. Cop. (B b 2), pl. 1; vide also the report of Blunt *v.* Clark, 2 Sid. 38.

(*s*) See 2 Watk. on Cop. 66, 67.

(*t*) Post, tit. "Extinguishment"; ante, p. 15.

(*u*) Rob. Gav. b. 1, c. 5, p. 87, et seq. (3d ed.), cites 14 H. 4. 9. b.; Br. Custom, 19; Extinguishment, 14. 17. H. 7, 25 b; 1 Sid. 138, per Twisden, J., Keilw. 80; Dal. 12.

(*x*) Rob. Gav. b. 1, c. 5, p. 93.

(*y*) Somm. 144, 149; Gouldsb. 106; 1 Keb. 505, per Windham, J.; and see Rob. Gav. b. 1, c. 5, p. 88.

lord, and not to the king, being distinguishable from large spaces of land left by the sudden retirement of the sea, such derelict land, in the absence at least of any special custom, clearly belonging to the crown (*z*).

It may now be proper to observe, that any disposition of a manor, whether by way of settlement or mortgage, or by devise, will carry with it any lands held of the manor, that shall be subsequently purchased by and surrendered to the lord. The following cases are authorities on this point; *A.*, the lord of the manor of *S.*, in 1754 mortgaged that manor, with other estates, for a term of years, and in 1755 mortgaged the same estates in fee for securing 20,000*l.*, out of which the first mortgage was discharged, and the term was thereupon assigned to a trustee for better securing the 20,000*l.* *A.* subsequently purchased several copyholds within the manor, which were surrendered to him in fee, and he also purchased a freehold estate in *S.*, and took a conveyance thereof, and afterwards mortgaged the same in fee, for further securing the 20,000*l.* In 1771, upon the then intended marriage of his eldest son, he settled the above manor and estates (subject to certain annuities) to the use of himself for life, remainder to trustees to support, &c., remainder to the use of his said eldest son for life, with several remainders over, and the ultimate remainder to *A.* in fee. In 1772 *A.* made his will, and devised the reversion in fee of the said manor and settled estates to trustees upon certain trusts; and after reciting that he had made several very considerable purchases of *several other real estates* at *S.*, he thereby gave to the same trustees and their heirs all other his messuages, lands, hereditaments and *real estates* at *S.*, (except such parts as were enclosed within his gardens and park), in trust to sell and dispose thereof. In 1776 the mortgage for 20,000*l.* was paid off, and the legal fee conveyed to the uses of the settlement of 1771, and the freehold estate purchased subsequently was also conveyed to the uses of the settlement. *A.* afterwards died without revoking or altering his will, and the surviving trustee under the will, conceiving himself entitled to the premises contained in the above surrenders, and also to the freehold estates purchased after the date of the settlement, contracted for the sale thereof; but the son, who was the heir at law of *A.*, also conceiving himself entitled to the premises, brought an ejectment for the recovery

(*z*) The King *v.* Lord Yarborough, 3 Barn. & Cress. 91; S. C. 4 Dow. & Ry. 790. And note, the judgment of the Court of B. R. was affirmed by the House of Lords, 5 Bing. 163. And see Dy. 326 b; 2 Roll. Abr. 170; Bac. Abr. "Prerogative," (B.) p. 491; Hargr. Tr. p. 12, et seq.; ib. p. 23, et seq.

Where the sea had, by gradual encroachment upon the land of a subject, covered and washed away the part formerly uncovered, so as to render it undistinguishable from the fore-shore, it was held that it became the property of the Crown; Hull and Selby Railway, in re, 5 Mee. & Wel. (Eq.) 327.

thereof, and upon the trial, before Lord Mansfield, at the sittings for Middlesex, a case was reserved for the opinion of the Court of Queen's Bench, the question (so far as relates to the copyholds) being, whether the lessor of the plaintiff, as heir at law of his father, or as tenant for life in possession of the settled estates, was entitled to the premises comprised in the surrenders? The court thought that the copyholds followed the uses of the marriage settlement, and gave, as the grounds of their opinion, the following reasons: viz., that after the mortgage, the mortgagee in fee had a right to the manor and every thing held of it; that in *notion of law* the mortgagor was only tenant at will, or, at most, from year to year: in *equity*, he was lord of the manor, subject to the mortgage, but he could do nothing to weaken the security: that he had the option, *if he had been absolutely tenant in fee*, either to continue the copyholds as parcel of the manor, by granting them out again by copy, because the custom was not broken by their merely having continued in the lord's hand, but they might, notwithstanding, be alleged to have been demised and demisable by copy of court roll, which was all that was necessary, or to sever them from the manor by any common law conveyance, as a lease, &c. (*a*): but that the manor being mortgaged in fee, he could not sever them, because *that* would have diminished the security; for the mortgagee had a right to the services, quit rents, escheats, forfeitures and other casualties: if his legal interest was considered, being only tenant at will, he could not sever the copyholds: that the argument was stronger on the settlement, for the surrenders had then been made, and all was included in the settlement, so that, after *that*, he could not sever in respect of the settlement: that it was plain, on the face of the will of *A.*, that he had no idea of severing the copyholds, for he devised only the *reversion* of the manor, without mentioning the customary lands: therefore, *quâcunque viâ*, they were clearly of opinion that the son was entitled to the copyhold tenements, because, 1st, they were settled as part of the manor, and could not be severed by the will; and, 2dly, if they could have been severed by the will, *that* was not done (*b*).

So it is settled, that if one who has a manor devise it, and afterwards a tenancy escheat, *that* shall pass by the devise as part of the manor(*c*).

And in *Roe* d. *Hale* v. *Wegg and others* (*d*), it was held, that a devise of a manor will pass a copyhold estate held of the manor, and subsequently purchased by and surrendered to the lord, and that a

(*a*) Ante, pp. 14, 15; and see Badger v. Ford, 3 Barn. & Ald. 155.

(*b*) Doe *d.* Gibbons v. Pott and others, 2 Dougl. 710; and see Mo. 94, pl. 233; Sir T. Parker, 193; Ow. 37.

(*c*) See Bunter or Brunker v. Coke, 1 Salk. 238; S. C. Holt, 247; S. C. 11 Mod. 129.

(*d*) 6 T. R. 708.

demise of the estate from year to year did not alter the case, (not operating as a severance), for the will of a freehold is not revoked by a subsequent lease.

The reader is here referred to the case of *Thinne* v. *Thinne* (*e*), in which it was held that lands not actually parcel of a manor, but which were purchased by the lord, and afterwards had been reputed to be so, passed in a recovery deed, and the recovery suffered in pursuance thereof, by the description of the manor and all lands parcel or reputed parcel.

And his attention is also called to the case of *Doe* d. *Watt* v. *Morris* (*f*), which was an action of ejectment to recover possession of land that had been inclosed from the waste, without leave of the crown, more than twenty years before the conveyance of the manor by the commissioners of woods and forests; and the Court of C. B. held, that the inclosed parcels of waste did not pass by the contract and certificate of the commissioners, the court observing, that "the only operative word with respect to the subject of dispute was 'manor;' but that even admitting the generality of that term in its utmost latitude, and holding it to comprise all demesne lands and wastes of the manor, it could not be contended, upon any principle of legal construction, to include land in the possession of strangers, who could not be turned out of possession thereof, except by information or inquest of office."

The author will conclude the subject of the present chapter by observing, that if the lord, having a life interest only in the manor, contracts for the purchase of copyholds within the same manor, and is desirous that the copyhold interest should not be destroyed, he should take the surrender to a trustee, or regrant immediately; as it was decided in the case of *St. Paul* v. *Viscount Dudley and Ward* (*g*), that a surrender in fee by a copyholder to the tenant for life of the manor, although he should afterwards covenant to surrender by way of mortgage, would operate as an extinguishment of the copyhold for the benefit of those entitled to the manor in remainder. In that case the tenant for life had devised all his real estates in trust to pay debts, and subject thereto in trust for *A. B.*, in strict settlement; but as he had not regranted the estate, the Chancellor held, that there was no evidence of intention to raise an equity against the remainder-man, (the then lord of the manor), and that the covenant to surrender to the mortgagee of the freehold did not amount in equity to a regrant,

(*e*) 1 Lev. 27; and see the several books mentioned in the margin of that report; and also Sir Moyle Finch's case, 6 Co. 64, 65; Yelv. 191. See further as to what words will pass a nominal manor, Norris & Le Neve, 3 Atk. 82; Mallet's case, Cro. Eliz. 524; Lex Cust. 7.

(*f*) 2 Bing. N. C. 189.

(*g*) 15 Ves. 167. See also 1 Cas. & Opin. 187.

in favour of a third party (the devisees), as such regrant might have been made without giving them any interest; though he admitted, that if tenant for life, having a power to grant, covenants to make such a grant, it would in equity bind the remainder-man, being in the nature of an execution of the power. The case of a tenant for life, paying off an incumbrance, was noticed, *arguendo*, as favourable to the devisees; but the Chancellor thought the analogy was rather against them; for (he observed) if a tenant for life merges the security, by taking an assignment connecting it with the inheritance, there is *primâ facie* no charge.

The same caution is requisite when the lord is seised in fee, with an executory devise over, as it was decreed in *King* v. *Moody* (*h*), that copyhold lands within the manor purchased by a lord so seised, were extinguished, and passed as freehold to the executory devisee, and that he was therefore entitled to an apportionment of an allotment made under an inclosure act, in respect of the copyhold and of certain freehold land purchased therewith.

The above case of *St. Paul* v. *Lord Dudley and Ward*, and also the case of *Doe & Danvers* (*i*), were cited in the case of *Bingham & Woodgate* (*k*) in favour of the proposition, that the effect of a union of the fee of *customary* tenements with the estate for life of the lord, was the extinguishment of the customary interest. But the Master of the Rolls in that case decided, that the tenements in question were *freehold* (*l*), the custom requiring a conveyance by bargain and sale, as well as a surrender and admittance, to pass the customary tenements; and, therefore, that the above cases had no application.

(*h*) 2 Sim. & Stu. 579. Tenant for life and tenant in fee, with an executory devise over, are also on the same footing with regard to the effect of the discharge of an incumbrance, and the amount belongs to their personal representative, unless a contrary intention is manifested. In the case of a tenant in tail in possession, the law infers that the remainder-man is the object of his choice, inasmuch as he might have made the estate his own by suffering a recovery; Drinkwater *v.* Coombe, 2 Sim. & Stu. 345. But that principle has no application to a tenant in tail in remainder who pays off an incumbrance, although he afterwards comes into possession of the estate; Wigsell *v.* Wigsell, ib. 369.

(*i*) 7 East, 299.

(*k*) 1 Russ. & Mylne, 32.

(*l*) But see the author's observations on this case, post, tit. "Customary Freeholds."

CHAP. II.

Of the Antiquity and distinguishing Properties of Copyhold Tenure.

It would be inconsistent with the nature and object of this treatise, for the author to offer any comments of his own on the origin and antiquity of copyholds; and, as applicable to this country (*a*), it could not perhaps be traced, with any degree of certainty, either from history or law authority; but the records of many manors greatly favour the supposed change of villein tenure into copyhold, by the commutation of base services into specific rents, either in money or money's worth. On this subject, much learned and interesting matter will be found in the works of Littleton and Coke (*b*), and the reader is also referred to the second volume of Mr. Justice Blackstone's Commentaries, p. 92 to 101, and the authorities of Bracton, Britton, Fleta, and others, cited by that much distinguished judge, and from which he draws the conclusion, "that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will."

Sir Martin Wright gives his sanction to the opinion of the learned commentator, in the following interesting conclusion of his most excellent treatise, intitled, "An Introduction to the Law of Tenures" [3rd ed. p. 215.] "Copyholds," he says, "are the remains of villenage (*c*), which, considered as a tenure (*d*), was not intirely Saxon (*e*), Norman (*f*), or Feudal (*g*), but a tenure of a mixed nature, advanced upon the Saxon *bondage*, and which gradually superseded it; so that

(*a*) Lord Coke, in the case of *Bagnal & Tucker*, 2 Brownl. Rep. is stated to have said that the third part of the realm of England consisted of copyholds.

(*b*) See more particularly Co. Litt. 58 a, 61 a; Co. Cop. s. 1 to 9 inclusive, and s. 32; vide also Kitch. p. 174; Vin. Abr. Cop. (A.); 1 Cru. Dig. 54.

"(*c*) Vide F. N. B. 12 C.; 1 Ins. 58 a; Bacon (afterwards Lord Verulam) Use of the Law, 42, 43.

"(*d*) The author of the *Old Tenures*, and Littleton, do both of them treat it not only as a *tenure*, but as a *state of bondage*; vide Old Tenures, and Lit. tit. Villenage.

"(*e*) The termination of *villenage*, and the *fealty* incident to the *tenure*, prove that it was not Saxon, or prior to other *tenures*; and therefore such authors as suppose *villenage* to have been in England before the Conquest must be understood to speak of it as a state of *bondage*, and not as a real *tenure*; vide *Somn. Treat. of Gav.* 65, 66; *Temp. Introd. to the Hist. of Engl.* 59.

"(*f*) There is no title or hint of any such *tenure* in the Custumier of Normandy.

"(*g*) For the Feudists make no mention of any such tenure, and therefore *Crag.* treats it as a tenure peculiar to the English, *et quasi scintilla servitutis apud Anglos adhuc latens*; *Crag. de Jur. Feud.* 71; besides, *Livery* or *Investiture* is wanting, which is clearly necessary to every *fee* or *tenure*.

we must look partly at home for its original, which, though it cannot be traced without running into greater length and nicety than would be agreeable to my present design, may possibly be hinted in a very few words: for if the Normans found, as we are assured they did (*h*), 'a sort of people among us who were, as Sir William Temple says, in a condition of downright servitude, used and employed in the most servile works, and belonged, they, their children and effects, to the lord of the soil, like the rest of the stock or cattle upon it' (*i*); nothing is more likely than that they, who were strangers to any other than a feudal state, should infranchise all such wretched persons as fell to their share, by admitting them to *fealty* (*k*), in respect of the little *livings* they had hitherto been allowed to possess, merely as the scanty supports of their base condition; and which they were still suffered to retain upon the like services as they had in their former servitude been used and employed in: but this possession, as now clothed with *fealty*, and by means thereof advanced into a kind of tenure (*l*), differed very much from the ancient servile possession, and was from henceforth called *villenage*" (*m*).

"Our Saxon ancestors again having, as above, submitted to the feudal law, which was a law of liberty, may be supposed to have imitated, some sooner than others (*n*), the generosity of the Normans,

"(*h*) Vide Temp. Introd. 59; Bacon, Hist. of the Eng. Gov. 56; Brady, Gen. Pref. 26; and Spelm. Gloss. ad Verb. Servus.

"(*i*) Persons of this condition were called by the Saxons *Theow* and *Theowmen*, and in the Latin laws of Will. I. (cap. 65, 66), and of Hen. I. (cap. 77, 78), *Servi*.

"(*k*) That the admission of a *bondman* to *homage* or *fealty* amounted to *infranchisement*, appears from the Mirror (lib. 2, sect. 28, p. 167, 168.) *Devient serfs frank si son seignior preigne lour hommage—ou sufre son serf—jurour entre francs a foyer de frank suchant.* Bracton, therefore, mentions *homage* as a method of *infranchisement* equivalent to *manumission*, viz. Tenementum *nihil confert—personæ, nisi præcedat homagium vel manumissio;* vide Bracton, lib. 2, cap. 8, sect. 1, fo. 24 b. And this seems to be the true sense of Littleton, sect. 206, 207, where it is said, that if the lord give his *villein* any lands in *fee simple, fee tail, for life*, or *for years*, it is an *infranchisement;* but that a lease at will is not. The reason is plain, because a mere tenant at will is not admitted to *fealty;* whereas *fealty* is incident to every other estate, whether in *fee*, for *life*, or for *years*.

"(*l*) Vide Leg. Will. I. cap. 29, 33.

"(*m*) Such tenant seems to have been first called *vilain* in the French laws of William I. (cap. 29), possibly from the Latin word *vilis*. (Vide Cowel Interp. & Skinner, Etymolog. ad Verb. Villain.) He was, however, in the Latin of those times, called *Villanus, a Villâ, quia in Villâ habitavit, et operibus rusticis*, plerumque sordidis, *exercebatur*. Vide Spelm. Gloss. ad Verb. Villanus, and 1 Inst. 116 a. Such tenant had no freehold by the course of the common law (Lit. sect. 81); no vote in the making of laws (Bacon, Hist. of the Eng. Gov. 56); nor could he, before the statutes 1 Rich. 3, cap. 4, 11 Hen. 7, cap. 26, and 19 Hen. 7, cap. 16, be a juryman. (Vide LL. Hen. 1, cap. 29.) Nor was he really of any account in the state; *propriety* being the basis of a feudal policy in England, and of all the rights as well as obligations consequent to it.

"(*n*) *Sub Ricardo secundo pars servorum maxima se in libertatem vindicavit.* (Vide Spelm. Gloss. ad Verb. Lazzi, &

and to have done the like: but neither did our Saxon or Norman ancestors mean to increase or strengthen the possession of their villeins, but meant to leave that altogether as dependent and precarious as before, save only that, as by their admission to *fealty*, their possession was put in some measure upon a feudal foot, their lords could not, in regard to the *fealty* implied on their parts (*o*), deal with them so wantonly as before; nor could they, so long as they answered the services and conditions of their possessions or tenure, in honour or conscience, deprive or remove them (*p*): and yet they were for a long time left merely to the conscience of their lords (*q*), which they might, as they could, awaken by their petitions, but could not otherwise deal with; until the uninterrupted benevolence and good nature of the successive lords of many manors, having time out of mind permitted them, or them and their children, to enjoy their possessions in a course of succession, or for life only, became at length customary and binding upon their successors (*r*), and advanced such possession into the legal interest or estate we now call *Copyhold* (*s*); which yet remains subject to the same servile conditions and forfeitures as before, they being all of them so many branches of that continuance or custom which made it what it is.

"From this view of the original and nature of *copyholds*, we may possibly collect the ground of the great *variety* of *customs* that influence and govern these estates in *different* manors; it following from the preceding account, if true, that they are no other than customary estates, after the ancient will of the first lords, as it is preserved and evidenced by the Rolls, or kept on foot by the constant and uninterrupted usages of the several manors wherein they lie" (*t*).

Somn. Treat. of Gav. 58.) And yet there were *bondmen*, or, as then called, *villeins*, in the time of Hen. 7, as appears from the stat. 19 Hen. 7, cap. 15.

"(*o*) The obligations of *fealty* being mutual.

"(*p*) In this respect, therefore, Sir H. Spelman, speaking of the infant state of feuds, when they were precarious and arbitrary, says truly, that *Priscam eorum Naturam admodum, apud nos hodie exprimit terrarum conditio, quæ, ut loquuntur Forenses nostri, tenentur ad voluntatem per copiam Rotulorum curiæ vulgo* copyholds *nuncupatæ*. Vide Spelm. Gloss. ad Verb. Feudum and Felonia, and LL. Will. 1, c. 33.

"(*q*) Until the time of Edw. 4, and perhaps for some time after, it appearing by Littleton (sect. 77), that it was, even in his time, doubted whether a copyholder had any legal remedy against his lord.

"(*r*) In some manors as early as Henry 3rd's time. Vide Calthorpe's Reading, &c. 3, 4, 7.

"(*s*) Copytenants, copyholders, or tenants *per* copy—*d'ancient temps fuer appelles tenants en villenage—& ceo appiert per les aunciennes tenures, &c.* F. N. B. 12, C. Vide Bro. Tit. Villenage, 63.—Tenants at will, by copy of court roll, being in truth *bondmen* at the beginning, but having obtained freedom of their persons, and gained a custom by use of occupying their lands, they are now called copyholders, and are so privileged, that the lord cannot put them out, and all through custom. Bacon, Use of the Law, 43.

"(*t*) This the author takes to be the sense of Littleton, sects. 73, 75, 77. *Sed quære.*"

The correctness of the above conclusions of Mr. Justice Blackstone and Sir Martin Wright was questioned by the late Lord Loughborough, who, in *Grant & Astle* (*u*), observes, "that copyhold tenures are agreed by all writers to be more ancient than the Norman government (*x*). In some of the most approved authors (he adds), the copyhold tenure of land is derived from the state of *villeinage*, which now happily forms a very obscure title in the law. It is supposed that all copyholders were originally villeins, and that, by the mitigation of villeinage, and the progress of enfranchisement, the estate grew by degrees to be more free and permanent, till it came into the condition of a copyhold. I cannot help doubting," continues his lordship, "whether that deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that, in those parts of Germany from whence the Saxons emigrated into England, there exists *at this day* a species of tenure exactly the same with our copyhold estates, and that there exists likewise *at this day* a complete state of *villeinage*; so that both stand together, and are not one tenure growing out of another, and by degrees assuming its place (*y*). In East Friezeland, the duchy of Brunswick, and other northern parts of Germany, there are villeins in gross, and villeins regardant, with the same rigour which our law formerly knew. There are also copyhold tenants who are freemen, but whose estates are alienable only by licence, and are transmissible by descent; and in both instances they must pass through the courts of the lord. Nay, in the ancient seat of the Anglo-Saxons, there exists at this day that peculiar descent to the youngest son which we call Borough-English, of which the name shows the original.

"What I have stated I found in a very accurate treatise of German law by Selchow, one of the professors of the university of Gottingen, entitled 'Elementa Juris privati Germanici.'

"This seems sufficient to negative the idea that copyholders sprang out of villeins. In England villeinage has ceased, and copyholders remain; but here, as in other countries, they both prevailed at the same time.

"It is not difficult to conceive that whenever agriculture became an object of respect in the northern and western parts of Europe, those who applied themselves to the cultivation of land, though inferior in point of dignity, would be equal in point of freedom to

(*u*) 2 Dougl. 724, n.

(*x*) Kitch. 174, says, "Copyhold lands were before the Conquest, and it was called folk-land in the time of the Saxons, and the charter lands are called bock-land: and also Bracton, b. 4, allows of copyhold land, and says, that, *doing their services and customs, their lords cannot put them out.*"

(*y*) But see Mr. Serjt. Frere's note [F. 1], in *Grant & Astle*, Dougl. 726.

those whose only profession was arms. The copyhold tenants were husbandmen; their persons were free; and in that respect they were as much above the villeins as, in point of consequence, they were inferior, in a military age, to those who had arms in their hands. Their lands were held of a lord who could defend them, and who, in return for that defence, was entitled to certain profits and advantages, founded upon paction express or presumed."

But the late Lord Wynford, when C. J. of the Court of Common Pleas, in the case of *Garland & Jekyll* (*z*), differed in opinion with Lord Loughborough, and gave his sanction to the above-mentioned conclusions of Mr. J. Blackstone and Sir Martin Wright. His lordship observed, "It will be necessary, in the consideration of this case, to see how copyhold tenures arose in this country. They appear to have grown out of a state of pure villeinage: there is no doubt that in the early periods of our history, not only the estate, but the personal property of the villein belonged to the lord. It is said, indeed, in Bracton, and the book called Fleta, that heriots are *ex gratiâ:* but it is difficult to conceive how the doctrine of *ex gratiâ* could be applied to the time I am speaking of: the villein was only giving to the lord that which he might at any time take; for his estate was held not only at the will of the lord, but the personal property of the villein was the property of the lord. It is probable,—though this is mere conjecture, for the history of heriots is so obscure that it is impossible to ascertain how they originated,—it is probable that heriots were originally nothing more than the gift which, in a rude state of society, a person in an inferior situation of life, on approaching one of a superior situation, always offered. We know that in many countries, where knowledge and civilization have not made the progress they have in this happy country, an inferior person cannot approach a superior without the offer of a present: it has occurred to us that heriots were a species of tribute the tenant offered to the lord at the time he approached him, in order to secure his protection, and to pray of the lord to confer on him the interest which had been determined by the decease of his former tenant. Mr. Justice Blackstone, indeed, traces the right of a lord to his heriot to a more advanced period of society; but though he does not use the word tribute, he uses the word donation. He says (*a*), 'This payment was originally a voluntary donation or gratuitous legacy of the tenant, perhaps in acknowledgment of his having been raised a degree above villeinage, when all his goods and chattels were quite at the mercy of the lord.' But whatever the situation of copyholders might have been in the early part of our history, custom has now

(*z*) 2 Bing. 292. (*a*) 2 Bl. Com. 423.

confirmed their interests as tenants, and this same custom has confirmed and established the rights of the lord. This alteration has been brought about by no statute; the statutes to which we refer with so much satisfaction have only secured the rights of men already free. It is to lawyers in Westminster Hall, and I speak it with pride, that slaves, for such was the state of men in pure villeinage, are indebted for the permanency of their property, and for that weight in society which permanency in property has conferred upon them; it is by the establishment of the customs referable to copyholds, as established in courts of justice, that this permanent interest has placed copyholders in the happy situation in which they are now found. The copyholder now has a permanent interest in his estate as long as he performs his services, and the lord has certain rights and dues; and as long as the copyholder performs his services and pays the dues, he has the same permanent interest in his estate as if it were freehold."

The author will only add on this subject that authorities are not wanting to induce the supposition that all lands in England were of gavelkind tenure before the Conquest. C. J. Holt, in *Clements* v. *Scudamore* (*b*), thus concurs in that idea :—"Though Lord Coke (he says) be of another opinion, yet it appears, from the best authors, as Lambard's Saxon Laws, inter leges Gulielmi Primi, 36, fo. 167, and Selden in Eadm. 184, that all the lands in England were at first, and before the Conquest, in nature of gavelkind, and descended equally to all the issue; but this was soon afterwards altered, when tenures by knight's service were introduced for the defence of the realm; for then, in order the better to preserve the family and tenure, the descent was restrained only to the eldest son; but yet, notwithstanding this alteration, the right of representation continued to take place; and, by the common law, if the eldest son happened to die in his father's lifetime, leaving issue a daughter, the inheritance descended to her in preference to any of the other sons, so that the female, by way of representation, was yet preferred to the males, because the right of representation was not altered. This right of representation (he adds) is not peculiar to the laws of England, but has prevailed by the laws of other countries; as may be seen in (*c*) Numb. chap. xxvi. v. 33, and chap. xxxvi. For though by the Jewish law the males inherited exclusively of the females, and the eldest son had a double portion of his father's estate, which was confined to him as the first begotten, yet we find Zelophehad the son of

(*b*) 1 P. W. 64; 2 Lord Raym. 1024. Vide also Blackborough v. Davis, 1 P. W. 49.

(*c*) Hale's Hist. of the Common Law, p. 210.

Hepher died, leaving no sons, but daughters, and the daughters came unto Moses claiming the possession of their father; this being a new case, Moses is said to have brought their cause before the Lord, who commanded him to give them the possession of their father; so that it was here determined that they should take the double portion that belonged to their father, as the eldest son, by right of representation.

"So is Selden de Successionibus apud Hebræos, cap. 23 The same law (he continues) was part of the twelve tables, and from thence came to be observed among the Romans; and here in England the right of representation holds as well in case of inheritances descendible by custom, as by the common law."

We will now proceed to a consideration of the distinguishing properties of copyhold tenure.

Incidental Qualities.

A copyholder has, in judgment of law, but an estate at will (*d*), yet by custom copyhold tenements may be descendible; and the descent of copyholds of inheritance is guided by the maxims and rules of the common law (*e*); therefore, when a man has a copyhold by descent from his mother's side, if he die without issue the land shall go to the heirs *ex parte maternâ*, and shall rather escheat to the lord than go to the heirs *ex parte paternâ*.

And in copyholds, as in freeholds, the heir takes by descent, and not by purchase, where the two rights meet in him (*f*). And an ultimate limitation in a surrender to the right heirs of the copyholder

(*d*) 4 Co. 21 a, 126 b; Co. Lit. 60 a; Cro. Jac. 260; Willes, 325; 3 Burr. 1543.

(*e*) Co. Cop. s. 50, Tr. 116; Brown's case, 4 Co. 22 a; Brown *v.* Dyer, 11 Mod. 98; S. C. Holt, 165; Roe *d.* Crow *v.* Baldwere and others, 5 T. R. 104.

(*f*) Smith *v.* Trigg, 8 Mod. 23; S. C. 1 Stra. 487; Allen *v.* Palmer, 1 Leo. 101. Vide also Hedger *v.* Rowe, 3 Lev. 127; Redding *v.* Royston, 1 Comy. 123; S. C. 2 Lord Raym. 829; S. C. 1 Salk. 242; Clarke *v.* Smith, Lutw. 793; S. C. 1 Salk. 241; S. C. 1 Comy. 72, (and see the pleadings in S. C. Nels. Lex Man. App. pl. 36); Counden *v.* Clerke, Hob. 30; Preston *&* Holmes, Sty. 148; Hurst and another *v.* Earl of Winchelsea et al., 2 Burr. 879; S. C. 1 Sir W. Bl. Rep. 187; Watk. on Desc. 174; Doe *&* Timins, 1 Barn. & Ald. 530; 2 Ves. & Bea. 190, in Welby *v.* Welby; Wood *v.* Skelton, 6 Sim. 176. But, N. B, by the 3rd sect. of 3 & 4 Will. IV. c. 106, "for the amendment of the law of inheritance," the heir will take as devisee, and not by descent, if an estate be devised to him. And by the 6th sect. a lineal ancestor takes as heir in preference to collateral persons, and therefore a father is preferred to a brother or sister; but the act does not extend to any descent before 1st January, 1834.

is part of the old estate, for a man cannot limit an estate in copyholds to his right heirs, as purchasers, any more than in freeholds (*g*).

But the descent will be prevented by a surrender or devise to customary heirs, being daughters, and who would therefore, as heirs, take in coparcenary (*h*), or by words creating a joint tenancy, or tenancy in common, or in the character of heirs of another person (*i*), though not by a devise to the heir upon a condition (*k*); nor by a charge on the land, *that* not altering the tenure (*l*).

There is also the same *jus representationis* in the case of inheritances descendible by custom as by the common law (*m*).

The rules by which the course of descent is continued or broken in respect to freeholds apply equally to copyholds, where the lord cannot be prejudiced; so in *Roe* d. *Crowe* v. *Baldwere and others* (*n*), the court held that such part of a freehold and copyhold estate, which the person suffering a recovery took by purchase, must go to the heir *ex parte paternâ*; and that which she took by descent from the maternal ancestor to the heirs *ex parte maternâ*.

And in *Doe* d. *Harman et ux.* v. *Morgan* (*o*), it was ruled, that a conditional surrender in fee by a person seised *ex parte maternâ*, and admittance of the mortgagee, will break the line of descent, like a feoffment and refeoffment (*p*), and that the estate will go to the heir *ex parte paternâ*.

It may be proper also to notice, that as the 5th sect. of the statute of distributions, 22 & 23 Car. II. c. 10, is silent in respect to lands descending according to the custom of borough-english, or gavelkind, a younger child taking under any such peculiar path of descent, is not compellable to bring a copyhold estate so descending into hotch-pot (*q*).

There may be a *possessio fratris* of a copyhold, even before ad-

(*g*) Post, tit. "Surrender." But by the above act of 3 & 4 Will. IV. c. 106, (s. 3), a limitation by any assurance to the grantor or his heirs will create an estate by purchase.

(*h*) Watk. on Desc. 177, 273.

(*i*) Anon. Cro. Eliz. 431; Swaine v. Burton, 15 Ves. 365.

(*k*) Lutw. 797.

(*l*) Emerson v. Inchbird, 1 Lord Raym. 728; Allam v. Heber, Stra. 1270; S. C. 1 Sir W. Bl. 22; 2 Burr. 880; Watk. on Desc. 174, c. 5; 2 P. W. 135; Clarke v. Smith, ubi sup.; Chaplin v. Leroux, 5 Mau. & Selw. 20; contra, Gilpin's case, Cro. Car. 161; but that case denied to be law, see Comy. 73; Chaplin v. Leroux, sup.

(*m*) Ante, pp. 29, 31.

(*n*) 5 T. R. 104. And see Martin *d.* Tregonwell v. Strachan and others, cited ib. 107; Willes, 444. See also Cru. on Recov. 306.

(*o*) 7 T. R. 103.

(*p*) Co. Lit. 12 b; Price v. Langford, 1 Show. 93; S. C. 1 Salk. 337; S. C. Carth. 141.

(*q*) Pratt v. Pratt, Fitzg. 284; Lutwyche v. Lutwyche, Ca. temp. Talb. 276; Rob. Gav. 403, 3d ed.

mittance (*r*), but it can only be on an actual possession; for it is the entry, and not the admittance, which makes a *possessio fratris* of copyholds (*s*).

The possession of a termor of copyhold, the term being created by surrender, is clearly sufficient to make a *possessio fratris*, and to exclude the half blood (*t*); and according to *Brown's* case (*u*), the possession of a lessee for years, the term being created by a lease made with the licence of the lord, is sufficient to constitute an actual possession in the copyhold heir, and to exclude the half blood. *Brown's* case, as to the present point, was this:—a copyholder in fee by licence made a lease for years, and the lessee entered; the copyholder, having issue a son and a daughter by one *venter*, and a son by another, died; the eldest son died *before admittance;* and it was adjudged that the land should descend to the daughter of the whole blood. *Coke*, in his copyholder (*x*), in noticing this case, with the additional fact that neither entry nor claim was made by the son of the first *venter*, adds, "But if the lease had been determined, living "the son by the first *venter*, and afterwards he had died before any "actual entry made, the law would have fallen out otherwise, because "there was a time when he might have lawfully entered" (*y*).

But in a case reported in 3 Leo. (*z*), where the husband was seised, in right of his wife, of customary lands in fee, he and his wife, by licence of the lord, made a lease for years by indenture rendering rent; they had issue two daughters, the husband died, and the wife took another husband, and they had issue a son and a daughter; the husband and wife died, and the son was admitted to the reversion and died without issue; and it was holden by *Manwood*, that the reversion should descend to all the daughters, for that the possession of the lessee for years, which was an estate at common law, was not the possession of the copyholder, but that if the term had been created by surrender, the sisters of the half blood should not have inherited.

And, according to the decision in *Foxe* v. *Smith* (*a*), a *possessio*

(*r*) Brown's case, 4 Co. 22 b; Dy. 291 b, pl. 69; Cary, 7; Co. Cop. s. 41, Tr. 94, 95; Ib. s. 50, Tr. 116; Co. Lit. 146, n. 6; Bullock *v.* Dibley, Mo. 597; Clarke *v.* Pennifather, 4 Co. 23 b; Mo. 125, pl. 272, in Holmes & Facie; Ib. 272, pl. 425, in Ever *v.* Aston; Horewood's case & Stegnes's case, cited Kitch. 160; Dal. 110, pl. 1; 16 Eliz. Lit. Rep. 234; 4 Bro. C. C. 525; 12 Adol. & Ell. 573, in Doe & Clift.

(*s*) Watk. on Desc. 52, n.; Ib. 63, n.

(*t*) Batmore *v.* Graves, 1 Vent. 261; S.C. (Blackburne *v.* Graves), 1 Mod. 120; S. C. 2 Lev. 107; 3 Leo. 70, ca. cvi.; S. C. 4 Leo. 38, 212.

(*u*) 4 Co. 21 a; see also Holmes & Facie, Mo. 125, pl. 272; Dy. 291 b. pl. 69, marg.; but *qu.* if not the same cases; see 6 Vin. Cop. [D. b.] pl. 2; Com. Dig. Disc. (C. 9.); 12 Adol. & Ell. 577, in Doe & Clift.

(*x*) S. 41, Tr. 95.

(*y*) *Sed qu.?* See Gilb. Ten. 161, 162.

(*z*) P. 69, ca. 106; S. C. 4 Leo. 38, 212; and see Co. Lit. 15 a, n. 2.

(*a*) 1 Freem. 45; Brown *v.* Dyer, ubi sup.

fratris will also be prevented by the possession of the wife when entitled to free-bench: in that case, a copyholder who was seised of lands descendible according to the custom of gavelkind, died, leaving issue a son by one *venter*, and a son and daughter by another *venter*, the wife entered into a moiety, and the two sons into the other moiety, and the sons were admitted to the reversion of the wife's moiety; then the son by the second *venter* died, and afterwards the wife died, and it was adjudged against the defendant, the daughter, that there should not be a *possessio fratris* (*b*).

The possession of the customary guardian will be sufficient to constitute an actual possession, and to exclude the sister or brother of the half blood (*c*); and as there might be a *possessio fratris* of a use at common law (*d*); so the author apprehends it is allowable of a trust of copyholds.

Collateral Qualities.

But the collateral qualities incident to estates at common law, and which do not concern the descent, have no relation to copyhold inheritances, except by special custom (*e*); therefore a wife is not dowable of copyhold lands; nor is the husband tenant by the curtesy (*f*); nor, even before the 3 & 4 Will. IV. c. 27, s. 39, would a descent of copyhold land have tolled the entry of him who had a customary right to it (*g*); nor would the surrender of a copyhold by tenant in tail (*h*), or by a husband seised in right of his

(*b*) Mr. Watkins, in his treatise on Descents, p. 154, n., makes a query as to the authority of this case.

(*c*) Co. Cop. s. 41, Tr. 95; Cary, 8; 6 Vin. Cop. (D. b.) pl. 3; Ib. (C. e.); Batmore *or* Blackborough et ux. *v.* Graves, 1 Vent. 261; 3 Keb. 329; 2 Lev. 107. In Doe *d.* Barnett & others *v.* Keen, 7 T. R. 386, it was decided, that the entry of the guardian in socage of the daughter by a second wife, constituted a sufficient seisin in an infant daughter by a former wife, to create a *possessio fratris*. And see Goodtitle *d.* Newman *v.* Newman, 3 Wils. 516; S. C. 2 Sir W. Bl. 938; Dy. 291 b, 292, a; 4 Bro. C. C. 524; post, tit. "Evidence."

(*d*) Gilb. Uses, 237, 238.

(*e*) Brown's case, 4 Co. 22 a; Cocks *v.* Darson, Hob. 215, 216; S C. Noy, 27; Bird & Kirke, 1 Mod. 200.

(*f*) Brown's case, sup.; Shaw & Thompson, 4 Co. 30 b; Paulter *v.* Cornhill, Cro. Eliz. 361.

(*g*) Gravener & Ted, 4 Co. 23 a; Brown's case, sup.; Lee & Brown, 1 Roll. Abr. 629 (N.); Joyner *v.* Lambert, Cro. Jac. 36; Mar. 6, pl. 13; Doe & Danvers, 7 East, 321.

(*h*) Bullen *v.* Grant, Cro. Eliz. 148; S. C. 1 Leo. 174; Gooles *v.* Grane, Mo. 597; Oldcot *v.* Levell, Mo. 753; Knight *v.* Footman, 1 Leo. 95; Lane & Hills, 35 or 37 Eliz. (cited in Royden & Moulster, Godb. 368, pl. 459); 1 Hughes' Abr. 459; Dell & Rigden, *or* Higden, 4 Co. 23 a; S. C. Mo. 358, pl. 488; Rogers *v.* Powel, Brownl. 36; Clun *v.* Pease & Turner, Cro. Eliz. 391; Co. Lit. 60 a, (n. 3,) cites the last case, and Franklyn & Myn, Hal. MSS.; see also Supp. Co. Cop. s. 12, Tr. 184, 185; sed vide Erish *v.* Rives, Cro. Eliz. 717; Hill *v.* Morse [*or* Upcheir, *or* Upchurch], Mo.

wife (*i*), have caused a discontinuance, so as to put the heir, or the wife, (if she survived the husband,) to a plaint: but although a surrender was not a discontinuance, yet before the abolition of recoveries by 3 & 4 Will. IV. c. 74, it would have barred the issue and remainder-men, when a recovery was not required by the custom of the manor (*k*).

It has been said, that when the custom warranted a recovery, it operated as a discontinuance (*l*): but the better opinion was, that a recovery was more properly a bar than a discontinuance (*m*); and this, principally because the doctrine of warranty did not extend to copyholds (*n*).

Copyholds could not, until lately (*o*), have been taken by the

189; Brownl. 121; 1 Roll. Abr. 506, B. pl. 1; Stephens *v.* Eliot, Cro. Eliz. 483, 484; arg. in Willion *v.* Berkley, 4 Eliz. 6 Vin. Cop. (G. e.) pl. 3; Gurrey *v.* Sanderson, Cro. Eliz. 907, (but the point was not resolved in the latter case)

(*i*) Roswell's case, Dy. 264 a; S. C. Mo. 596; S. C. Poph. 38; Bullock *v.* Dibley, 4 Co. 23 a; Knight *v.* Footman, 1 Leo. 95; Wright *v.* Portman, 4 Co. 23 a; Doe *d.* Smith *v.* Bird, 5 Bar. & Ad. 712; S. C. 2 Nev. & Man. 679; but see Collins *v.* Cancke, Cro. Jac. 105.

(*k*) Vide post, tit. "Estates tail:" and N. B. by the 39 sect. of 3 & 4 W. 4, c. 27, no descent, discontinuance, or warranty, will bar a right of entry for the recovery of *any land:* and by the 3 & 4 W. 4, c. 27, s. 36, all plaints, except a plaint for free-bench or dower, were abolished. By the 7 & 8 Vict. c. 76, s. 7, it was enacted, that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised (as the case may be).

(*l*) Eylet *v.* Lane & Pers, Cro. Eliz. 380; Dell & Rigden (*or* Higden), ubi sup.; Gilb. Ten. 189.

(*m*) Morris's case, Hil. 8 Jac., 2 Danv. 577, E. pl. 1; S. C. 1 Roll. Abr. 506, B, pl. 2; vide also Clun *v.* Pease & Turner, Cro. Eliz. 391, 392.

(*n*) Godb. 368; Eylet *v.* Lane & Pers; Clun *v.* Pease & Turner, sup.; Cru. Dig. 4 vol. p. 431, tit. "Deed;" vide also Goodtitle *v.* Morse, 3 T. R. 368; Brown's case, 4 Co. 23 a; and see the above case of Dell & Higden, in 1 Roll. Abr. 506, B, pl. 2; Gilb. Ten. 191.

And for the effect of a warranty by a tenant in tail of *freehold* lands, vide Doe *d.* Hutchinson *v.* Prestwidge, 4 Mau. & Selw. 178; Goodtitle & Morse, sup.; Cru. Dig. as above. As to words importing a warranty, see 5 Co. 18. N. B. It was a good custom, that feoffment by tenant in tail with warranty should not be a discontinuance; 1 Roll. Abr. 562 (I), pl. 2, cites 30 Ass. pl. 47.

(*o*) By the 1 & 2 Vict. c. 110, ("For abolishing Arrest on Mesne Process in Civil actions," see an extract from the Act in the Appendix,) s. 11, the sheriff is directed to deliver execution, upon an elegit issuing, of all the lands of the debtor, including lands of copyhold or customary tenure, and lands over which he has a disposing power for his own benefit, in like manner as the sheriff could previously to that act have delivered execution of a moiety of lands under a writ of elegit. But it is provided by the same section, that the party to whom copyhold or customary lands should be delivered in execution should render and perform the payments and services due to the lord, and be entitled to hold the lands until the amount of such payments, and the value of such services, as well as the amount of the judgment, should have been levied. And the 13th sect. of the act provides, that a judgment entered up as directed by

sheriff under an *elegit* (*p*), but should he have extended a moiety of both freehold and copyhold lands, the extent, although bad as against the copyhold, would have been good as against the freehold (*q*); and as no process could have issued to levy a debt upon copyholds, a judgment was no lien upon them (*r*); nor can copyholds be seized upon an outlawry (*s*), nor were they, previously to 3 & 4 Will. IV. c. 104 (*t*), assets for specialty debts, not even for debts of the crown (*u*); but copyholds may be sequestered (*v*). It should seem, however, that the sequestration cannot be revived against the customary heir, for if it could, the heir would possibly not take up the lands, and then the lord would be without a tenant (*x*). But the party sequestering has neither *jus ad rem vel in re*, the *legal* estate of the premises remaining in every respect as before (*y*).

In *Dunkley & Scribnor* (*z*), the defendant had been attached, and afterwards committed to the Fleet for a contempt of court, in not paying a sum of £138 : 8*s.* 4*d.* into the Bank, to the credit of the

the act shall operate as a charge on all lands and hereditaments, including those of copyhold or customary tenure. And see in the Appendix, 2 Vict. c. 11, "For the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy;" 2 & 3 Vict. c. 29, "For the better Protection of Parties dealing with persons liable to the Bankrupt Laws;" and 3 & 4 Vict. c 82, "For further amending the Act for abolishing Arrest on Mesne Process in Civil Actions."

(*p*) Drury *v.* Man, 1 Atk. 95; Rex *v.* Lord Lisle, Park. 195; Lex Cust. 19; Morris *v.* Jones, 3 Dow. & Ry. 603; S. C. 2 Barn. & Cress. 242; Manning's Ex. Pr. 42; but see 7 Mod. 38. Semble, that a lease with licence is extendible at law, post, tit. "Licence to demise, &c." Yet see contra Pictoe's case, 1 Roll. Abr. 888.

(*q*) Morris & Jones, sup.

(*r*) P. Harcourt, C. in Cannon *v.* Pack, 2 Eq. Abr. 226; 6 Vin. Cop. (O. e.) pl. 6; Sup. Co. Cop. s. 21, Tr. 215.

(*s*) Rex *v.* Budd, Park. 190; vide also Salherd & Evered's case, Ow. 37; but see S. C. (Saliard & Everat), 1 Leo. 99.

(*t*) See an extract from the act in Appendix.

(*u*) Brown's case, ubi sup.; Parker *v.* Dee, 2 Ch. Ca. 201; Robinson *v.* Tonge, 1 P. W. 680, n.; Aldrich *v.* Cooper et al., 8 Ves. 388, 394; post, tit. "Statutes."

Sed qu. whether a trust of copyholds is not assets in the hands of the heir? see Helley *v.* Helley, Trin. 7 Ann. 2 Eq. Ca. Abr. 509, pl. 4.

(*v*) Colston *v.* Gardner, 2 Ch. Ca. 46; 3 Swanst. 279, n.: Marquis of Carmarthen & Whitehead *v.* Hawson, 3 Swanst. 294, n.; Dunkley *v.* Scribnor, 2 Madd. 444; post, tit. "Aid of Courts of Equity."

A sequestration takes in the whole profits, an extent only a moiety.

(*x*) Whitehead & Harrison, 2 Eq. Ca. Abr. 713; 1 Barnard. Rep. B. R. 431; 6 Bac. Abr. 129; 19 Vin. 333, marg. 329, marg. 1 Vern. 166.

(*y*) 1 P. W. 307; 6 Bac. Abr. 131; Ib. 132; 2 Madd 444. That a sequestration is but a personal process appears by its falling and abating by the death of the party; 2 P. W. 622; 1 Ves. 182; 2 Ves. 464. But this is represented in some authorities to be otherwise when it issues, not on mesne process, but for non-performance of a decree; 3 Atk. 594; 1 Vern. 58. Sed qu., and see 4 East, 530, in Payne *v.* Drewe.

(*z*) Sup.

cause, pursuant to an order made for that purpose; and subsequently a commission of sequestration issued, by which the commissioners were directed to sequester the defendant's *personal* estate, and the *rents*, issues, and profits of his *real* estate, until payment of the above sum. The defendant, as the plaintiff deposed, continued in prison, and refused to sell or mortgage his house and land, and would do nothing but what the law obliged him to do. An order had been made for the commissioners to sell the personal property, including the crops of the land; and it was moved, that the commissioners under the sequestration might be at liberty to *let* an uninhabited *copyhold* messuage, with its appurtenances, and the said land, to *W. G.*, at a certain rent, and who was ready to sign an undertaking to give up the possession of the premises, when the defendant should have paid the above money into the Bank, or at such other time as the court should direct; and that the commissioners might pay the rents into the Bank in the usual way. The application was supported by an affidavit of two of the commissioners, and of *W. G.* the proposed tenant, stating, that the rent was as much as the house and lands were worth, and the latter undertaking to cultivate the land according to the usual course of husbandry, and to act as the court should direct. The clerk in court for the defendant was served with notice of the motion, and also the defendant in person. It was admitted that there was no case exactly in point. The Vice Chancellor made the order as prayed.

Copyholds are within the rule established in equity for marshalling assets; so that if *A.* has a mortgage of freehold and copyhold estates of *B.*, and *C.* has a mortgage of the freehold estates only, and is also a specialty creditor by bond of *B.*, *A.* would be thrown on the copyhold estate only, to which *C.* had no resort, or *C.* should stand in his place (*a*).

According to the case of *Robinson* v. *Tonge* (*b*), the copyhold

(*a*) Aldrich & Cooper, ubi sup.; Kidney v. Coussmaker, 12 Ves. 154; Duke's Char. Us. by Bridgm. 190, post, tit. "Election." It should seem that when a freehold estate was devised to the heir at law, although before the 3 & 4 Will. 4, c. 106, s. 3, he took by descent, yet, if the personalty was exhausted in payment of debts, the rule as to marshalling assets was not extended to legatees, so as to throw them on the freehold estate; Scott v. Scott, Ambl. 383, 2d ed. n. (2); and see Aldrich v. Cooper, sup.

The V. C. (Sir John Leach), in the case of Scott v. Beecher, 5 Madd. 96, held that the customary heir of the widow of a copyholder, who devised his copyholds and also his personalty to his wife, was not entitled to have a mortgage made of the copyhold property by the husband discharged out of his personalty; observing, that the widow might have elected to continue the mortgage as a charge on the realty, but that her personal representatives were not bound to make out any such fact of election, and that the money secured was not her debt.

(*b*) 1 P. W. 680, n.

would not be made to bear more than its relative proportion of the debt, for the purpose of opening the freehold more fully to the claims of the specialty creditors; but such a rule would by no means be a due application of the principle in equity, which provides against an election by one claimant to the prejudice of the claims of others, without subjecting any fund to a claim to which it was not before subject (*c*). And accordingly we find that the Court of Chancery overruled the decision in *Robinson & Tonge* in the case of *Aldrich & Cooper*, (sup.) Lord Eldon observing, "that the case of *Robinson & Tonge* was not reconcilable with the general classes of cases; and therefore, if it were necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he took it out of the freehold, those, who were thereby disappointed, must stand in his place as to the copyhold estate."

The above case of *Aldrich & Cooper* also decided, that if freeholds are conveyed in mortgage, with a covenant, for better securing the payment of the debt, to procure admission to and surrender copyhold estates, and in the meantime to stand seised of the copyholds in trust for the mortgagee, both freeholds and copyholds are *primarily* mortgaged, and the freeholds not first applicable.

It is a settled principle, that if a person seised of two different estates, say *A.* and *B.*, mortgage *A.*, and by his will charge all his real estates with the payment of his debts, and devise the estate *A.* to *C.*, and the estate *B.* to *D.*, *C.* may compel *D.* to contribute (*d*). So also if two estates comprised in a mortgage are devised to different persons, the devisees must contribute according to the value of the respective estates (*e*). The same would be the case as to freehold and copyhold estates included in the same mortgage, and descending to different heirs (*f*).

It has been lately decided, that creditors by specialty, entitled as volunteers only, cannot compete with creditors under the lowest class of security for valuable consideration; but that as against the devisees of the debtor, they have a right to stand in the place of mortgagees who have exhausted the fund provided by the testator for the payment of his debts (*g*).

The principle of *general* occupancy at common law, is not applicable to copyhold estates, since the freehold is never out of the lord;

(*c*) See Trimmer *v.* Bayne, 9 Ves. 209; Aldrich & Cooper, 8 Ves. 388, 391, 395.

(*d*) Carter & Barnardiston, 1 P. W. 506.

(*e*) Henningham *v.* Henningham, 2 Vern. 355; 1 Eq. Ca. Abr. 117; 2 Bro. C. C. 137, 138, in Tracy *v.* Hereford.

(*f*) Aldrich *v.* Cooper, 8 Ves. 390; 2 Coote, 506, 509.

(*g*) Lomas *v.* Wright, 2 Myl. & Keen, 769.

therefore, on a grant to *A.* for the lives of *B.*, *C.*, and *D.*, the lord would have had the land again on the death of *A* (*h*).

But there may be a *special* occupancy of copyholds, without any custom in favour of it (*i*). And we have seen that a special custom, extending the principle of general occupancy to copyholds, is good (*k*).

In a recent case of ejectment for the recovery of copyhold land in Somersetshire (*l*), a grant had been made to *A.* for the lives of *A.* and *B.*, and a grant also in reversion to *C.* for other lives. *A.* died, having devised to *B.*, who entered and kept possession till his death, when *C.* brought ejectment, and it was held, that as *C.'s* right of possession accrued on the death of *A.*, upwards of twenty years before the action was brought, it was barred by the statute of limitations, no special occupant being pointed out by the first grant, and as there can be no general occupant of copyholds, the estate granted by it determined on the death of *A.*

It may be proper to notice here, that although a rent is incapable of general occupancy (*m*), yet it has been decided, that the second branch of the statute of 29 Car. II. c. 3, is applicable to all estates *pur autre vie*, and therefore to rent charges; so that if the grantee of a rent charge die leaving *cestui que vie*, without devising the rent, the grantee's executors will be entitled to it (*n*).

(*h*) Ven *v.* Howell, 1 Roll. Abr. 511, (L.) pl. 3; Smartle *v.* Penhallow, ante p. 27, n. (*k*); Withers *v.* Withers, Amb. 152; Ib. in notis, 2d ed.; Zouch *d.* Forse *v.* Forse, 7 East, 186; Doe *&* Scott, infrà; and see Doe *&* Robinson, 2 Man. & Ry. 266, n.; post, tit. "Statutes;" 1 Vict. c. 26, s. 6, infra.

(*i*) Co. Lit. 41 b, n. 3; Co. Cop. s. 56, Tr. 128; Doe *d.* Lempriere *v.* Martin, 2 Sir W. Bl. 1148; and see Howe *v.* Howe, 1 Vern. 415; Rundle *v.* Rundle, 2 Vern. 264; Withers *v.* Withers, sup.

(*k*) Doe *&* Goddard, 1 Barn. & Cress. 522; ante, p. 24; and see Right *v.* Bawden, 3 East, 276, 277.

(*l*) Doe *d.* Foster *v.* Scott, 4 Barn. & Cress. 714; 7 Dow. & Ry. 190.

(*m*) Clearly there can be no entry on a rent; Hassell *v.* Gowthwaite, Willes, 505; nor can there be a general occupancy of anything which lies in grant; 2 Roll. Abr. 150 (C.); Co. Lit. 41 b, 388 a.

(*n*) Bearpark *v.* Hutchinson, 7 Bing. 178, confirming Rawlinson *v.* The Duchess of Montague, 3 P. W. 264, n.; and see Willes, 505.

The reason given for this is, that the statute was made, not only to prevent the inconvenience of scrambling for estates, and getting the first possession after the death of the grantee; but likewise for preserving and continuing the estate during the life of the *cestui que vie*, (3 P. W. 264, n.). The words "special occupant" used in the statute, are not, strictly speaking, applicable to things which lie in grant, Holden *v.* Smallbrooke, Vaugh. 198, 199; Crawley's case, Cro. Eliz. 721; Salter *v.* Butler, Ib. 901; Mo. 664; but in common parlance rents are the subject of special occupancy, the heir, when named in the grant, taking, not exactly as special occupant, but as special grantee, therefore quasi special occupant. Some have thought that executors and administrators, if named in the grant of a rent, might take, even before the stat. of frauds; Co. Lit. 41 b, n. 4, cites 3 Atk. 466; Dy. 328 b.

And by the late statute of 1 Vict. c. 26, "For the amendment of the laws with respect to wills," by which all copyhold property, including estates *pur autre vie*, is made devisable, it is enacted (*o*), that in case there shall be no special occupant of any estate *pur autre vie*, whether freehold, customary, or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and that if the same shall come to the executor or administrator, either by reason of a special occupancy, or by virtue of that act, it shall be assets in his hands, and be applied and distributed in the same manner as the personal estate of the testator or intestate.

It is a moot point whether the lord has any power over the lands of a lunatic, unless by custom. In *Cocks* v. *Darson* (*p*), where the lord had granted the custody of a lunatic's copyhold land, the court held, that an action touching the land was to be brought in the name of the lunatic, for that no interest was gained in the land by such a commitment; and Hobart said he did not agree that the lord had power over the lunatic's land, without a custom, for the limitation of the king's power over freeholds was not a consequence; and that although he took the statute [17 Ed. II.] to be but an affirmance of the common law, in the case of the king, yet the collateral incidents of estates, as dower, curtesy, wardship, and the like, were not without special custom.

But in *Beverley's* case (*q*) it is said, that the king shall not have the custody of the land, which an idiot holds by copy, for that is but an estate at will by the common law, and if the king should have the custody of it, it would be a great prejudice to the lord of the manor, "*but yet an alienation made by an idiot of his copyhold, after office "found, should be avoided;*" and for this is cited 13 Eliz. Dy. 302.

In the consideration of this question, it is not to be overlooked that according to a reported case in Dyer (*r*), an idiot could not be ordered in the Court of Wards for his copyhold, but in the court of the lord of the manor: and by a marginal note in Dyer (*s*), it appears that the rule of the Court of Wards was, that if an idiot had not any goods or chattels, or lands, except copyhold lands holden of a common person, the king should not have the custody, but the lord of

(*o*) Sect. 6; see the act in the Appendix.

(*p*) Hob. 215; S. C. Noy, 27; Poph. 141; and see 1 Coll. on Lun. 4; 2 Lutw. f. 1188.

(*q*) 4 Co. 126 b, cites Hard. 434; Sty. 21; and see 3 Bac. Abr. 532; Copyholds are not within 17 Ed. 2, st. 1, c. 9; (Wardship of Idiots as a fiscal prerogative); Co. Cop. s. 55; see also post, tit. "Statutes."

(*r*) 302 b, pl. 46; F. N. B. 232, A. (n.).

(*s*) 302 a, pl. 43, Pas. 13 Eliz.; John Rogers' case, C. W. fo. 74.

whom the copyhold was holden; but if he had any other, then the copyhold land also. And in *Eavers* v. *Skinner* (*t*) it was decided, that the lord should have the custody of one who was *mutus et surdus*, and no custom was laid; and the reason given for it was, that the lord would otherwise be prejudiced in his rents and services.

The case of *Cocks & Darson*, with other authorities (*u*), has clearly established, that the committee of a lunatic hath no interest whatever in the land, but a bare custody or authority (*x*); and it is to be recollected, that in the case of an infant, it is the infant by the guardian, and not the guardian who is to be admitted, so that no interest in the copyhold of an infant vests in the guardian (*y*).

It is only by special custom that the lord may appoint a guardian to an infant; but by custom he may do so, or give the custody to his bailiff (*z*).

In a case in 1 Leo. (*a*), it is stated that, by custom, the lord may assign one to take the profits of a copyhold descended to an infant during his non-age, to the use of the assignee, without rendering an account. Sir Edward Coke says, "Where, by the custom of the manor, the bailiff of the manor is to have the wardship of the copyhold heir, being under the age of fourteen, such a guardian shall neither be admitted, nor pay a fine, because he is but a partner [pernor] of the profits; and that not in his own right, but in the right of him to whom he is guardian" (*b*).

By 9 Geo. I. c. 29, the lord, after proclamation made in the manner therein directed, was empowered to appoint a guardian to an infant, for the purpose of admittance. That statute, however, was repealed by the act of 1 Wm. IV. c. 65, whereby the provisions of the act of 9 Geo. I. were simplified and consolidated (*c*).

(*t*) Cro. Jac. 105; and see Gilb. Ten. 308; Vin. Abr. Tit. "Lunatick," "Non Compos," "Idiot;" 3 Bac. Abr. 532.

(*u*) See Drury v. Fitch, Hut. 16, 17; Cole & Walles, 1 Leo. 328; 1 Vern. 262; Ca. temp. Talb. 153; 15 Vin. "Lunatick," (B.), 1b. (C.)

(*x*) But see 1 Ch. Ca. 19, 113, 153, 154. And note, certain powers over the estates of a lunatic are now vested in the committee, under the control of the Court of Chancery, by the acts of 43 Geo. 3, c. 75; the 59 Geo. 3, c. 80; and the 1 W. 4, c. 65, ss. 23, 24, 27, 28, et seq. Vide extracts in the Appendix; and see Ex parte Birch, re Addy, 3 Swanst. 98.

(*y*) Post, tit. "Admittance," "Guardianship."

(*z*) Clench v. Cudmore, Lutw. 1187; S. C. 3 Lev. 395; Cole & Walles, 1 Leo. 328; Kitch. 202; 6 Vin. Cop. (A. e. 3); Cocks & Darson, Drury & Fitch, ubi sup.; Sowper v. Goodbody, Dy. 302 b; The King v. The Inhab. of Wilby, 2 Mau. & Selw. 508, 509; Wade v. Baker & Cole, 1 Lord Raym. 131.

(*a*) P. 266, Ca. 357.

(*b*) Co. Cop. s. 56, Tr. 128.

(*c*) See the act of 1 W. 4, in the Appendix.

CUSTOM, it has been emphatically said, is the life and soul of copyhold tenure, and in illustration of that dictum, the author proposes now to treat more fully of some few qualities, inherent in frank tenure, either by the common or statute law, but which (as he has already shown) prevail only as to copyholds by the custom of particulars manors. And first, as to

ESTATES TAIL.

Whether or not copyhold lands can, strictly speaking, be intailed as freehold lands may be, has been the subject of much legal doubt and controversy.

The grant of feuds to a man and the heirs of his body, is admitted to have been very common, even before the statute *de donis*, 13 Ed. I. c. 1, which has been held not to extend to copyholds (*d*); and such a limitation in the case of copyhold land would, the author submits, both before and since that statute, create a fee simple conditional, unless by particular custom (*e*); that is, unless there was a custom in the manor allowing a remainder to be grafted on a limitation of the above nature, or empowering the copyholder to alienate before issue born (*f*).

In *Roe* d. *Crow* v. *Baldwere* (*g*), Ld. Kenyon, C. J., said, that copyhold estates were not the subject of intails, unless there was a custom in the manor to warrant it; and in *Moore* v. *Moore* (*h*), the Chancellor (Lord Hardwicke) ruled, that it was necessary to show a custom of creating an intail, and that it was not satisfactory to say, that because an estate might be surrendered in fee *vel aliter*, that it could be intailed under the statute of Westm. 2.; and that, to show merely that copyhold lands had been granted to men and the heirs

(*d*) Cary, 30; Sav. 67, in Heydon's case; Rowden *v.* Malster, or Royden & Moulster, Cro. Car. 42; S. C. 2 Roll. Rep. 383; S. C. Godb. 368, pl. 458; cites Pits *v.* Hockley, P. 35 Eliz. and Lane & Hills, 37 Eliz.; sed vide Mancel's case, Plow. Com., which is stated per Harvey, J., in the report of Rowden & Malster, in Godb. to be the only authority to the contrary; yet see 6 Vin. Cop. (F. e.) pl. 18.

(*e*) See particularly Godb. ut sup., and the late case of Doe *d.* Spencer *v.* Clarke, 5 Barn. & Ald. 458.

(*f*) Co. Lit. 60 b.

(*g*) 5 T. R. 104.

(*h*) 2 Ves. 601; S. C. Amb. 279; and see Heydon's case, 3 Co. 8; Margaret Podger's case, 9 Co. 105; Bulleyn & Graunt's case, 1 Leo. 175; (but see the report of S. C. Cro. Eliz. 149;) Warne *v.* Sawyer, 1 Roll. Rep. 48; Hill *v.* Morse, [or Upcheir or Upchurch,] Mo. 189, pl. 336; vide also Gravenor *v.* Brook & others, Poph. 33; S. C. (Gravenor *v.* Ted,) 4 Co. 23 a; S. C. (Gravenor *v.* Rake,) Cro. Eliz. 307; Lee *v.* Brown, Poph. 128; Rowden *v.* Malster, ubi sup.; Church *v.* Wyat, Mo. 637; Erish *v.* Rives, Cro. Eliz. 717; Hasting & Grey, cited ib.; Taylor *v.* Shaw, Cart. 22; 1 Sid. 268, 314; but see Adams *v.* Hincloe, 11 Mod. 199; 4 Leo. 64, ca. 157; Godb. 20; vide also Gurrey *v.* Sanderson, Cro. Eliz. 907.

of their bodies, did not prove that an intail might be created; but to do that, it must be shown that there have been surrenders in tail *with remainders over*, (for otherwise that estate might be a fee simple conditional,) or that the lands had gone in course of descent, according to the limitations, so long as to exclude the supposition of a fee simple conditional.

And in this case the Chancellor observed, that it was considered that before the statute *de donis* there might be a custom in manors to create estates tail; and, indeed, from the observations that have fallen from several distinguished judges in early cases, the author must presume that such a custom was frequently found to have existed before the statute. At all events, an immemorial existence of those privileges, which, under a limitation to a man and the heirs of his body, create a constructive estate tail, is very common, and has frequently availed in questions upon copyhold titles (*i*); so that where a remainder may be grafted on the limitation to the heirs of the body, which remainder is inconsistent with a fee conditional, for no remainder could be created of an estate not within the statute *de donis* (*k*); or where the tenant is permitted by the custom to alien even before issue born, in prejudice to the right of reverter, an estate limited to a man and the heirs of his body is in the nature of a fee tail at common law since the statute *de donis;* and where, from a more jealous preservation of the right of reverter, such remainders are not allowed, or the power of alienation originates with the birth of issue, the estate is in the nature of a fee conditional (*l*). And the reader is here reminded, that by having of issue, the condition (under a limitation creating a fee simple conditional at common law) is performed for three purposes, viz., to alien, to forfeit, and to

(*i*) Taylor *v.* Shaw, Cart. 22; Lex Cust. 170, 171.

(*k*) P. Lord Hardwicke, in Earl of Stafford *v.* Buckley, 2 Ves. 180; Co. Lit. 18 a; 3 Co. 3 b; 10 Co. 97 b; 1 Bro. C. C. 325. N.B.—In Doe *d.* John Simpson and another *v.* Thomas Simpson and others, 4 Bing. N. S. 333, 340, copyhold lands held of the manor of Knaresborough, in which manor there is no custom to intail, were devised to *J. S.* and his heirs, but if he should die without leaving any child, then to *M. B.* and her heirs; and the Court of C. B. held, that a fee simple conditional passed to *J. S.*, and that as the fee simple conditional had merged in the possibility of reverter which had descended to *J. S.*, as heir of the devisor, he had become seised of a fee simple absolute. And that decision has been very recently confirmed in the Exchequer Chamber in error, the court holding that the circumstance of the lands being copyhold, and incapable of being intailed, afforded no ground for considering the devise to the five natural children to be an executory devise, to take effect in the event of *J. S.* dying without any child *living at his decease*. Doe *d.* Hesard and others *v.* Simpson and others, 3 Scott, N. C. 715. And it is observable that there was no formedon in the remainder at common law; 2 Inst. 336. And see Preston on estates (in fee), p. 487; sed vide Vaugh. 269, in Gardner *v.* Sheldon.

(*l*) Cary, 30; Stanton *v.* Barnes, Cro. Eliz. 373; Pullen *v.* Middleton, 9 Mod. 483; post, p. 68; Doe *&* Clark, ubi sup.

charge, but that the course of descent is not thereby altered, for if the donee had issue and died, and the land had descended to his issue, yet if that issue had died (without any alienation made) without issue, his collateral heir should not have inherited (*m*).

The above conclusions are certainly in contravention to Lord Coke's position, that custom co-operating with the statute may make an intail (*n*); but that observation has been very frequently repudiated (*o*).

The statute *de donis*, it will be recollected, enacted that thenceforth the will of the donor should be observed, and that the tenant should have no power to alien so as to defeat either his issue or the donor; and the author must submit, though with great diffidence, after so much legal and very learned controversy, that the perpetuity which the statute aimed at was in itself a sufficient reason for considering that copyholds were not intended to be included in it, and, consequently, that although a custom to create a fee simple will warrant a grant to a person and the heirs of his body, yet that such a limitation will be a fee conditional (*p*), unless, as already observed, the privileges of an estate tail at common law have grown out of the custom of the manor, under an immemorial usage.

This protecting statute it is well known was relaxed, and its purposes defeated, in respect to freehold lands, by the opposition made to the very great evil and inconvenience of estates being rendered unalienable, and which gave rise to the practice of considering fines and recoveries as a bar to the issue of a person having an estate limited to him and the heirs of his body, and the latter as a bar also to those in remainder; and conformable to which practice in freehold cases, a recovery in the Customary Court Baron, and a forfeiture and regrant, of which the author will presently speak, and (as it has been said) other acts have been considered as bars in copyhold cases.

In some manors intails have been barred by surrender only, and in others both by surrender and common recovery; and it has been fully established that the one mode is not inconsistent with the existence of the other in the same manor (*q*).

(*m*) Co. Lit. 19 a. But it is otherwise when the gift is special to one and the heirs of his body by a particular person, for then, after issue had, the land is descendible to the issue of the donee's body *generally*; Ib. n. 2.

(*n*) Co. Lit. 60 a, b; 3 Co. 8 b; Lee *v.* Brown, Poph. 128; and see 1 Roll. Abr. 506 (B), pl. 1; Lex Cust. 165—7; Warne *v.* Sawyer, 1 Roll. Rep. 48; Hastings or Haselrick *v.* Grey, cited ib. 49; Cro. Eliz. 717.

(*o*) Heydon's case, 3 Co. 8; Adams *v.* Hincloe, 11 Mod. 199; Rowden & Malster, ubi sup.; Doe *d.* Wightwick *v.* Truby and others, 2 Sir W. Bl. 946.

(*p*) See Doe *d.* John Simpson and another *v.* Thomas Simpson and others, sup.

(*q*) Everall *v.* Smalley, 1 Wils. 26; S. C. 2 Stra. 1197; Doe *d.* Wightwick *v.*

And where the evidence was of a custom to bar estates tail, both by recovery and surrender, (there being forty-seven instances of barring by recovery, and seven only by surrender,) and the judge had left it to the jury to say whether the custom was to bar by recovery or surrender, without stating that the customs might be concurrent, the court granted a new trial (*r*).

In *Roe* d. *Bennett* v. *Jeffery* (*s*), a single instance of a surrender in fee by tenant in tail of a copyhold estate, was held to be good evidence to prove a custom to bar intails by surrender, although there was one instance of a recovery in the same manor of a much earlier date.

Even a surrender to the use of a will has been held to operate as a bar to an estate tail, the custom not requiring a recovery (*t*).

But when an intail may be barred by surrender only, the author apprehends that a remainder man in tail cannot effect a bar, before his estate falls into possession, except with the consent of the particular tenant (*u*).

Another method of barring estates tail in copyholds was, for the lord to seize on a pre-concerted forfeiture, and then to regrant according to the desire of the copyholder, who might have compelled such regrant, and avoided the mesne acts of the lord (*x*).

Truby and others, 2 Sir W. Bl. 946; and see Doe *d.* Dauncey *v.* Dauncey, 7 Taunt. 674; Oakeley *v.* Smith, 1 Eden, 261.

(*r*) Doe *d.* Whalhead *v.* Ossingbrooke, 2 Bing. 70; 9 Moore, 68.

(*s*) 2 Mau. & Selw. 92; see Doe & Mason, post.

(*t*) Moore *v.* Moore, 2 Ves. Sen. 601; S. C. Amb. 279; which was decided by Lord Hardwicke upon the authority of Carr *d.* Dagwel *v.* Singer, 2 Ves. 604. The reader is here referred to the extracts from 3 & 4 W. 4, c. 74, for the abolition of fines and recoveries, under the provisions of which act (see ss. 40 and 50) a disposition by a person seised of a *legal* estate tail in copyhold is to be effected by a surrender only.

If the tenant in tail be a feme covert, the concurrence of her husband is rendered necessary; s. 40.

Under the 34th sect. of the act, the consent of the person seised for an estate for life in possession (in the act denominated *the protector*) is requisite for the purpose of barring any estates in remainder of the estate tail, and the consent may be given either by the surrender of disposition, or by a distinct deed; ss. 42, 51, 52. But a disposition by the tenant in tail alone, as under a fine of freeholds previously to the statute, would create a base fee only.

By the 45th sect. a married woman, protector, may consent as a feme sole.

The act contains a power to enlarge a base fee, in accordance with the power, prior to the passing of the act, for a tenant in tail of freeholds to do so by suffering a recovery after having levied a fine; ss. 19, 34, 35, 39.

See as to equitable estates tail in copyholds, post.

(*u*) Highway & Banner, 1 Bro. C. C. 586, 588. This principle is adopted in the act of 3 & 4 W. 4, c. 74, s. 34.

(*x*) Grantham *v.* Copley et al., 2 Saund. 422; S. C. 2 Keb. 823; Pilkington *v.* Bagshaw, Sty. 450; Saunderson *v.* Stanhop, 2 Keb. 127; S. C. 1 Sid. 314; and see Taylor *v.* Shaw, Cart. 6, 22; Co. Cop. s. 48, Tr. 112.

The practice of effecting a bar to intails, whether by recovery, surrender, or forfeiture and regrant, has been alike attributed to the invention of our ancestors, in order to elude the statute *de donis;* but the author, still strongly inclined to maintain the opinion he has advanced, that customary estates in the nature of a fee tail were common even before that statute, would submit (and he hopes not to be thought too presumptuous in the inference) that when the intail was barrable by surrender, the custom may be presumed to have existed before the statute; and that a recovery, and forfeiture and regrant, were devices for avoiding its arbitrary provision, founded on feudal principles. This opinion must, at least, be considered to receive no inconsiderable sanction from the observation of Sir William Blackstone (*y*), that "about two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV., which were then openly declared by the judges to be a sufficient bar of an estate tail."

The *custom of barring* estates tail by forfeiture and regrant prevailed in several manors in Yorkshire, and was the only one known to have been practised in those manors (*z*).

The author has had occasion to consider the effect of a bar to an intail and remainders over, the tenant in tail being a feme covert, and having an equitable interest only in remainder. The mode proposed was, for the tenant for life and the feme covert to join in a lease for a short term, precisely on the plan adopted, when the tenant for life and person next immediately in remainder in tail were the tenants to the lord, and where no coverture or other disability existed; and as an equitable intail might have been barred, where a recovery was the customary mode, by the tenant for life and tenant in tail joining in a surrender to a tenant to the plaint, and pursuing the same forms, in all respects, as would have been used if they had the legal estate, it might have been urged, with some semblance of practical correctness, that a lease by tenant for life and tenant in tail in remainder, equitably intitled only, would have effected a bar to the intail where the custom of forfeiture and regrant prevailed; but unless it could have been shown that the recovery and lease for barring an intail of copyholds were declaratory acts only, and that the forms and principles which applied to a recovery of a freehold estate, or common law lease, were not essential or applicable in copyhold cases, the author is not prepared to admit that, under a title so circumstanced as that to which he is at present adverting, the intail and remainders would be considered to have been barred by the lease of the equitable tenant for life and feme covert equitable tenant in tail in remainder.

(*y*) 2d Vol. Com. p. 116. (*z*) Sup. n. (*x*).

The ground of his objection applied equally to a lease by a tenant for life and a feme covert tenant in tail in remainder, and to a lease by a feme covert tenant in tail in possession, and whether the estate tail was legal or equitable, a feme covert, the author conceives, having been incapable of granting a lease of copyholds, even by a fine at common law; so that some preconcerted act, tending to the disherision of the lord, would perhaps in the case of a feme covert have been the only mode of effecting a complete bar to the intail in those manors, where the act of forfeiture by the tenant, and a subsequent regrant by the lord, were the only forms prescribed by the custom. This difficulty was overgot in the above instance, by joining the trustees (the tenants to the lord) in the lease with the tenant for life and the feme covert and her husband, the wife being separately examined as to her consent to the lease, stating the intent of the forfeiture very fully upon the face of the lease; and in that case there appeared to be no possible objection to the trustees joining in barring the intail and the remainders over, as the only contingent limitation was to the issue of the tenant for life, whose estate was to be restored under the regrant from the lord, and the remainders were all in favour of the tenant for life and feme covert. But where there existed contingent trusts, it is possible that this mode might not have met with the assent of the trustees, and if they, in the exercise of their discretion, should not have thought it proper to join in giving effect to the wishes of the parties, the author conceives that a court of equity would not have compelled them to do so, although if they had concurred, it would have obliged a purchaser, it should seem, to accept the title.

This, the author submits, is deducible from the cases of *Moody* v. *Walters* (*a*), and *Biscoe* v. *Perkins* (*b*), in the latter of which cases Lord Eldon said, "The cases are uniform to this extent, that if trustees, before the first tenant in tail is of age, join in destroying the remainders, they are liable for a breach of trust, and so is every purchaser under them with notice; but when we come to the situation of trustees to preserve contingent remainders, who have joined in a recovery, after the first tenant in tail is of age, it is difficult to say more than that no judge in equity has gone the length of holding, that he would punish them as for a breach of trust, even in a case where they would not have been directed to join. The result is, that they seem to have laid down as the safest rule for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for trustees never to destroy the remainders, even if the tenant in tail, of age, concurs, without the direction of the court.

"The next consideration," added his Lordship, "is, in what cases

(*a*) 16 Ves. 283.

(*b*) 1 Ves. & Bea. 491; and see Biscoe *v.* Wilks, 3 Meriv. 456.

the court will direct them to join; and if I am to be governed by what my predecessors have done, and have refused to do, I cannot collect in what cases trustees would, and would not, be directed to join, as it requires more abilities than I possess, to reconcile the different cases with reference to that question. They all, however, agree that these trustees are honorary trustees; that they cannot be compelled to join; and all the judges protect themselves from saying that, if they had joined, they should be punished; always assuming that the tenant in tail must be twenty-one."

And the purchaser in that case, resisting the title, on the ground that trustees to preserve contingent remainders joining in a recovery with the first tenant in tail, who had attained twenty-one, were guilty of a breach of trust, was compelled to perform his contract.

Even a devise was held, in one particular case, to be a bar to an intail (*c*). In that case the equitable tenant in tail had requested the trustees to surrender the legal estate, and afterwards filed a bill in chancery to compel them so to do, and the lord refusing to accept a surrender from him because the legal estate was in the trustees, he made his will, and devised the estate to his wife for life, remainder to her children by a former husband; and the court decreed against the coheirs in tail of the testator.

It would appear to have been settled that, where the custom was silent as to the mode of barring intails, a surrender was the only proper act, a recovery, and forfeiture and regrant, requiring a custom in support thereof (*d*); consequently, where intails were barrable both by surrender and recovery in the same manor, the former was most advisable (*e*), unless, indeed, there should have been more frequent instances of barring by recovery, and those comparatively of a more ancient date (*f*), and then it would seem that a surrender would not have done (*g*).

In the above-mentioned case of *Roe* d. *Bennett* v. *Jeffery* (*h*), the question at the trial before Heath, J. at the assizes for Sussex was, whether there was a custom within the manor to bar intails by surrender; and the defendant had proved one instance only in support of the custom. On a motion for a new trial, Lord Ellenborough,

(*c*) Otway *v.* Hudson and others, 2 Vern. 583; and see 2 Atk. 526; Pullen & Middleton, 9 Mod. 483.

(*d*) White et ux. et al. *v.* Thornburgh et al. 2 Vern. 705; S. C. Gilb. Eq. Rep. 109; S. C. 2 Eq. Ca. Abr. 714; Pre. Ch. 425; Otway & Hudson, sup.; Snow *v.* Cutler, 1 Lev. 136; S. C. 1 Sid. 153; S. C. 1 Keb. 567, 752, 800, 851; S. C. Sir T. Raym. 164; Carr *d.* Dagwel *v.* Singer, 2 Ves. 604; Martin *d.* Weston *v.* Mowlin, 2 Burr. 979; Skin. 307; but see Lee *v.* Brown, Poph. 129.

(*e*) See Lofft, 398; Everall *v.* Smalley, 1 Wils. 26; S. C. 2 Stra. 1197.

(*f*) Doe & Truby, 2 Sir W. Bl. 947; but see Doe & Dauncey, 7 Taunt. 674.

(*g*) See the references to the provisions of 3 & 4 Will. 4, c. 74, ante, p. 57, n. (*t*); post, p. 61, n. (*o*).

(*h*) Ante, p. 57.

C. J. said, "The evidence unresisted is certainly evidence of a custom. It is true that one act undisturbed does not make a custom, but it will be evidence of a custom;" and Dampier, J. added, that it had been decided in the case of a customary descent, that a single instance was evidence to prove the custom (*i*); and that if frequent instances of barring by recovery had been proved, ***which was inconsistent with the mode by surrender***, there would have been weight in the argument that the single instance of a surrender did not support the custom contended for by the defendant.

This latter observation may, perhaps, be thought to imply that even a surrender required a custom (*k*), but the author submits that it was only intended to convey the opinion of the learned judge, that when intails had been barred both by surrender and recovery, in the same manor, the only proper mode was a recovery, if that had been frequent, and there should have been a single instance, or only a paucity of instances, of effecting a bar in any other way, and especially if a recovery were the more ancient practice.

In freehold cases, whilst the legal and equitable estates remained distinct, the *cestui que trust* could only have barred the intail and remainders by the same act as would have been good if the estate had been legal, namely, by a recovery; and evidence only of an intention to acquire and pass a fee simple, as by a deed of bargain and sale inrolled (*l*), or by a devise, which was formerly held to be sufficient (*m*), would not have done (*n*).

When the custom of the manor prescribed a particular mode of barring a *legal* estate tail in copyholds, the same form was to be adopted in barring an *equitable* intail (*o*). But as a common recovery

(*i*) Doe & Mason, 3 Wil. 63; ante, pp. 26, 29.

(*k*) And see Church *v.* Wyat, Mo. 638; 1 Roll. Abr. 506, (B.), pl 1; per Harcourt, C. Prec. Ch. 426; 6 Vin. Cop. (G. e.), pl. 21, p. 207, marg.

(*l*) See 3 Atk. 815, in Radford & Wilson.

(*m*) Woolnough *v.* Woolnough, Prec. Chan. 228.

(*n*) Kirkham *v.* Smith, Amb. 518; Roe *d.* Eberall et al. *v.* Lane et al. 1 H. Bl. 451; Boteler *v.* Allington, 1 Bro. C. C. 72; Legate *v.* Sewell, 1 P. W. 87; Salvin *v.* Thornton, cited in the last two cases.

(*o*) Now see 3 & 4 Will. 4, c. 74, referred to ante, p. 57, n. (*t*), and extracted in the Appendix, by which act power is given to *equitable* tenants in tail of copyholds, to dispose of their lands by surrender or deed, (ss. 50, 53); and a deed of disposition must be entered on the court rolls (s. 53), but is not required to be inrolled in the Court of Chancery (s. 54).

The author submits that a surrender is preferable to a deed, when the object is merely to convert the equitable estate tail into an equitable fee simple, and that for carrying into effect a contract for sale of copyholds, when the vendor is entitled to an equitable estate tail in possession, the proper form of conveyance is a bargain and sale, and a grant when he is entitled to an equitable estate tail in remainder. A tenant for life in possession (or protector) must give his consent by the same surrender or deed, or by a distinct deed, such deed also being required to be entered on the court rolls of the manor (ss. 50—53, and see s. 34, ante, p. 57, n. (*t*)). On an application to inrol a deed of disposi-

was not necessary to bar an estate tail in copyholds, except by special custom, it was clear that, in the absence of such a custom, an equitable estate tail in copyholds might, even before the late statute, have been barred by a surrender only (*p*).

And a person intitled to an equitable estate tail in copyhold lands might *alone* have suffered an equitable recovery, although he should have transferred his equitable interest to a mortgagee (*q*).

The case of *Grayme* v. *Grayme* & *Elton*, decided by Lord Chancellor Apsley in 1763, is cited by Mr. Watkins (*r*) as an authority for considering that if a tenant in tail of a trust of copyholds accepted a surrender of the legal estate, it would have barred the intail and remainders over; and this doctrine receives some sanction from the case of *Otway* & *Hudson* (*s*): but it must be recollected that, in the latter case, the intent to acquire a fee simple was not only evident, but that the tenant in tail did everything in his power to effect a bar, by the forms prescribed by the custom of the manor (*t*).

It is probable that when an intail might have been barred by surrender only, a court of equity would have deemed a surrender of the fee simple, from the trustee to the *cestui que trust*, a sufficient bar to the intail, as in the case of *Grayme* & *Grayme* (*u*); but where the custom of the manor required other forms to be pursued to bar an intail of the legal estate, the author apprehends that the court would not have considered the union of the legal fee with the equitable intail, or any other act operating as a declaration of intention only, to be a bar of an intail of copyholds, unless, indeed, under very peculiar circumstances, calling for the aid of the court, as in *Otway* & *Hudson* (*x*).

The author imagines, however, that a distinction was to be made between the case of an *executed* and of an *executory* trust, or in other words, between the case of an equitable *estate* and of a mere equitable *right*, and that, although in the former the equitable estate tail, and

tion under the 53rd section of the above act, an affidavit disclosing the contents, without annexing a copy of the deed, was held to be sufficient in Crosby *v.* Fortescue, 5 Dowl. 273.

Note, an inrolment of the deed of disposition relates back to the time of its execution, and when inrolled within the six months, enables a tenant in tail to make a good title, although the intail is not barred under the statute; Cattell *v.* Corrall, 4 You. & Coll. (Ex. Eq.), 228. As all the previous clauses of the act are by the 53d sect. made applicable to *equitable* tenants in tail of copyholds, as far as circumstances will admit, the observations made in p. 57, n. (*t*), with respect to married women, the acquisition of a base fee, and the enlargement of a base fee, equally apply to this note.

(*p*) Radford *v.* Wilson, sup.; 1 Ca. & Op. 201.

(*q*) See Nouaille *v* Greenwood, 1 Turn. 26.

(*r*) 1 vol. on Cop. p. 179.

(*s*) Ubi sup.

(*t*) And see Chaloner *v.* Murhall, 2 Ves. 524; Philips *v.* Brydges, 3 Ves. 128.

(*u*) Ubi sup.; and see Hale *v.* Lamb, 2 Eden, 292; 2 Watk. on Cop. 313, 4th ed.

(*x*) See the case of Pullen & Middleton, post.

the remainders over, could not have been barred, except by such formal act as would have been requisite if the estate tail and remainders had been of a *legal* character, yet that in the latter, any informal instrument, declaratory only of the design of the party to acquire the equitable fee simple, would have been sufficient, as in the case of *Hale & Lamb* (*y*). In that case, *W. H.*, by his marriage settlement, conveyed a freehold estate to the use of himself for life, with remainder to his first and other sons successively in tail, with remainder to his sons by any future marriage, in like manner, with a limitation over to collateral relations. *W. H.* also covenanted to surrender a copyhold estate to the use of himself for life, with remainder to the like uses as were created of the freehold estate. *W. H.* died without making any surrender, leaving two sons; the elder (*W. H.*) was admitted, and afterwards died without issue, and intestate; the second son (*P. H.*) was admitted, and afterwards suffered a recovery of the freehold estate, and subsequently, upon his marriage, conveyed the freehold estate to the use of himself and his issue in strict settlement, and covenanted to surrender the copyhold estate to the same uses as were limited of the freehold, but died without making any such surrender, and without issue: and thereupon, *A. B.*, claiming under the limitation in remainder to collateral relations in the settlement of *W. H.* the father, entered upon the copyholds, and was admitted thereto in fee (*z*), and filed a bill in the Court of Chancery for a specific performance of the covenant in the settlement of *W. H.* the father, which bill was dismissed under the following judgment of Lord Northington, confirming the title of those claiming under the second settlement, viz. "On the part of the defendant it has been insisted, that the court would not decree a specific performance of a covenant voluntary and without consideration. This has been answered, not so much by controverting the position, as by the fact, for the position is undoubtedly true, that a court of equity *will not decree a specific performance of a voluntary covenant, which is, in equity, no covenant at all*, and only a nominal one at law. If *William*, the settlor, had died without issue male, attaining twenty-one, I think the uncle would have been entitled to a specific execution of the covenant, because in such case it was consistent with the will and intent of the settlor. But as the preceding limitations of the tenan-

(*y*) 2 Eden, 292; see 1 Ca. & Op. 201, where Mr. Wilbraham, with reference to the rule that *where a recovery can be had, there a recovery ought to be suffered, to bar an intail*, inclined to think that the covenant in the marriage settlement of *P. H.*, the second son of *W. H.*, did not operate as a bar to the equitable intails, inasmuch as a regular bar might have been effected by *P. H.'s* surrendering to the uses of the first settlement, and afterwards suffering a recovery; but see Mr. Booth's opinion on the same case, ib. 202, et seq.

(*z*) See 2 Watk. on Cop. 309, n., 4th ed.

cies in tail conveyed an incidental dominion over the remainders, and *P. H.* actually suffered a recovery of the freehold, with which the copyholds are by the original settlement taken notice of to be intermixed, if *William* had executed the covenant, there cannot be a doubt but *P. H.* would have barred the remainder;—his own covenant in his marriage settlement bound him to do it. ***But as the covenant was only executory, and he was left in full legal dominion of the copyholds, he had nothing to do but to declare that he would take them discharged of any specific limitations, which, if actually made, he could and might have destroyed;*** and *that* he has manifestly done by his own repugnant covenant in his marriage settlement, and by his admission in fee. It is in my opinion absurd to say the descent of the executory covenant should put him into a worse condition than that covenant executed by a settlement, and that he could not loose *eodem modo quo ligatur*, by a declaration of a contrary will and contrary covenant."

And it is proper to remind the reader, that an estate tail cannot be merged, nor surrendered, nor extinguished, by accession of a greater estate(*a*); neither will the accession of the *legal* customary fee operate as a merger of an *equitable* estate tail in copyholds(*b*).

It is to be recollected that the bargain and sale, by commissioners of bankrupt, of a copyhold estate intailed on the bankrupt, was a bar to the issue in tail, and all remainders over, under the 12th section of 21 Jac. c. 19, *that* statute and the act of 1 Jac. c. 15, though not expressly mentioning copyholds, being held to extend to them (*c*); but by 6 Geo. IV. c. 16 (*d*), all prior statutes relating to bankrupts, and

(*a*) Wiscot's case, 2 Co. 61 a. But an estate tail may merge in the ultimate fee, by being changed into a determinable or base fee, or into an estate tail after possibility of issue extinct. See Preston on Merger, 222, 240.

(*b*) Merest *v.* James, 6 Madd. 118; ante, p. 61, n. (*o*).

(*c*) Post, title "Statutes."

(*d*) See extracts from this stat., and from 1 & 2 Will. 4, c. 56, in the Appendix. And note, the last mentioned act does not contain any provision as to any lands whereof a bankrupt is seised for an estate tail; but by the 26th section, the bankrupt's freehold property, by the act of 6 Geo. 4 directed to be conveyed by the commissioners to the assignees, is vested in the assignee without any conveyance. In the case of Doe *d.* Spencer *v.* Clark, 5 Barn. & Ald. 458, it was decided that the commissioners could convey a fee simple conditional at common law after the death of the bankrupt; but Holroyd, J., said (p. 464), "It is not necessary in the present case to determine what would be the effect of a bargain and sale executed by the commissioners after the death of the bankrupt, in a case where during his life he had been seised of an estate tail." And Bayley, J. (p. 462), said, "It is not necessary to determine in this case, whether an estate tail could be divested after the death of the bankrupt, by a bargain and sale executed by the commissioners; for this being a copyhold estate, and there being no custom stated to exist within the manor for intailing copyhold, the estate taken by the bankrupt was a fee simple conditional at common law."

It should seem by the case of Ex parte Somerville, re Loscombe, 1 Mont. & Ayr.

including the act of 21 Jac., were repealed; and by the 65th section of 6 Geo. IV., the commissioners were directed, by deed indented and inrolled in any of his Majesty's courts of record, to make sale, for the benefit of the creditors, of any *lands, tenements,* and *hereditaments*(*e*), situate in England or Ireland, whereof the bankrupt was seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder was in the crown, the gift or provision of the crown, and that every such deed should be good against the said bankrupt and the issue of his body, and against all persons claiming under him, after he became bankrupt, and against all persons whom the said bankrupt, by *fine, common recovery,* or any other means, might cut off or debar from any remainder, reversion, or other interest, in or out of any of the said lands, tenements, and hereditaments (*f*).

The act of 6 Geo. IV., as far as relates to the above power of sale in the commissioners, (with the exception of those cases where the commission or fiat, in pursuance of 6 Geo. IV. or any former act, should of itself be *primâ facie* evidence that the deed was produced, entered and indorsed as therein mentioned), was repealed by the 55th section of 3 & 4 Will. IV. c. 74. The 56th section of that act empowers any commissioner, in the execution of a fiat issued pursuant to 1 & 2 Will. IV. c. 56, to dispose by deed of lands of any tenure of which the bankrupt was tenant in tail for the benefit of the creditors, creating

408, that the common bargain and sale of the commissioners, equally with a bargain and sale to a purchaser, would divest an estate tail. In that case the usual bargain and sale to the assignees was not executed under the commission, and the bankrupt, tenant in tail, died. Afterwards a renewed commission was issued, and a common bargain and sale was made in 1827 to the assignees. The purchaser insisted on a special conveyance from the commissioners under the 65th section of 6 Geo. 4, c. 16, and the court held that the bargain and sale vested in the assignee all that the commissioners had power to convey, and intimated that the commissioners would be justified in executing a conveyance.

The act of 6 Geo. 4, c. 16, repealed the act of 1 Jac. c. 15, which provided that the death of the bankrupt should not prevent the commissioners from dealing with his estate (see sect. 17); but by sect. 26 of 6 Geo. 4, it was enacted, that if any bankrupt should die after adjudication, the commissioners might proceed in the commission as they might have done if he were living. Vide 3 & 4 Will. 4, c. 74, s. 65, which provides that in the cases therein mentioned, any disposition by the commissioners under a fiat of bankruptcy of the lands of a bankrupt, tenant in tail, shall, if the bankrupt be dead, be as valid and effectual as if he were alive.

(*e*) Although copyholds are not named in this section, it is clear that they would be held to be included in the power given to the commissioners; Cro. Car. 550; 5 Barn. & Ald. 460, 462, in Doe & Clark.

(*f*) As a bankrupt, seised for an estate tail in remainder, could have barred his issue *only* (by a fine), and not the estates in remainder of such estate tail, so the commissioners could only, in such a case, have conveyed a base fee, under the provisions of 6 Geo. 4; Jervis v. Tayleure, 3 Bar. & Ald. 557. And after the creation of a base fee, any person who would have become tenant in tail in possession, if the estate tail had not been barred, may dispose of the estate so as to enlarge the base fee into a fee simple absolute: see sect. 19 of 3 & 4 Will. 4, c. 74, ante, p. 57, n. (*t*).

as large an estate as the tenant in tail would have done, if he had not become bankrupt; and the 66th section enacts that such disposition shall have the same effect as a surrender, and give the same right to admission.

It is afterwards expressly provided by the act, that in the case of an estate tail in remainder, the consent of the protector shall be requisite, in order to create a larger estate than a base fee. (See the act in the Appendix; et vide ante, p. 64, n. (*d*); post, Appendix, "Rules to be Observed in holding a Customary Court Baron" (Instructions in particular Cases, &c.)

There is still one other mode by which an intail of copyholds, and the remainders over, may be barred, which is by an enfranchisement by the tenant in tail (*g*).

It would seem that length of possession, and a consistent deduction of title to the fee simple, will create a presumption of an intail having been barred (*h*).

The author has already shown that a recovery of copyholds did not alter the course of descent; but that, if the person suffering the recovery was intitled to part of the estate by descent from the maternal ancestor, and to other part by purchase, the former would go to the heir *ex parte maternâ*, and the latter to the heir *ex parte paternâ* (*i*).

And according to *Dell* v. *Higden* (*k*), the recovery in value could only have been of copyhold lands within the manor.

It is proper to notice here, that although a court of equity will correct any proceedings in the lord's court, when any thing should appear to be done therein against conscience (*l*), yet it has refused to rectify a mistake of names in a recovery suffered of a copyhold estate, after the lapse of a great length of time, and as against a purchaser (*m*); and has also refused to decree the lord of the manor to entertain a plaint, in the nature of a writ of error or false judgment, on a bill by a remainder man, after an intail spent for many years (*n*).

The reader is referred to the act of 1 Will. IV. c. 65 (*o*), by which it will be seen that a feme covert, as well as persons not being under

(*g*) Challoner *v.* Murhall, 2 Ves. jun. 524; Philips *v.* Brydges, 3 Ves. jun. 127-8; Parker *v.* Turner, 1 Vern. 393, 458; S. C. (called Barker *v.* Turner), 2 Cas. in Chan. 174; Dunn *v.* Green, 3 P. W. 10; Doe *d.* Reay *v.* Huntington and others, 4 East, 283; but see Bernard *v.* Simpson, Clayt. Rep. 138.

(*h*) Wadsworth's case, Clayt. Rep. 26; Scroggs, 95; Roe *d.* Lowe, 1 H. Bl. 459, 461.

(*i*) Ante, p. 44.

(*k*) Mo. 358, pl. 488.

(*l*) 1 P. W. 330; post, title, "Aid of Equity."

(*m*) Bell *v.* Cundall. Amb. 102.

(*n*) Ash *v.* Rogle and the Dean and Chapter of St. Paul's, 1 Vern. 367; S. C. 2 Ch. Rep. 387; Sho. Par. Ca. 67; 2 Bos. & Pul. 575.

(*o*) Sect. 11, repealing similar provisions by 47 Geo. 3, c. 8, and 59 Geo. 3, c. 80. The appointment of an attorney by husband and wife, for the purpose of surrendering the copyhold of the wife to a tenant to the plaint for suffering a reco-

coverture, might have suffered a recovery of land holden by copy of court roll, or in ancient demesne or otherwise, by attorney, to be constituted as is mentioned in that act.

And his attention is directed to the case of *Wymer* v. *Page* (*p*), which was an action for not accepting a conveyance on a title by the plaintiff alleged and by the defendant denied to be marketable. The only question was, whether a party could appoint an attorney for the purpose of suffering a recovery of copyhold lands, there being no express custom for it in the particular manor. It was contended, that in inferior courts it was not of course to appoint an attorney. Lord Ellenborough was of opinion that such an appointment might be made as of common right, unless there was an express custom to the contrary. The author apprehends, however, that even a custom for a feme covert to suffer a recovery by attorney, without any private examination as to her free consent, would have been bad (*q*).

Mr. Watkins, after maintaining that intails may be effected in all manors where a grant in fee simple is allowed, adds, "that it may be conceived frequently prudent to avoid the opposition of prejudice, or of a rigid adherence to what is deemed law, as consecrated by certain cases and precedents, (however numerous the cases and precedents which may be adduced to the contrary): and in order to effect this end, a *trust* may be created, whenever the custom of the manor will warrant a grant in fee. For whenever such grants in fee are allowed, the copyholds, which may be so granted, may be intailed in effect: if not by custom at law, they may be so in equity without it. For the custom only binds the tenancy, and has nothing to do with the trust. If a surrender be made to a person and his heirs, and a trust be declared of such estate to another and the heirs of his body, a court of equity will see it observed. The trustee and his heirs are tenants to the lord; and the lord has nothing further to do with it. The trust is between the tenant and the *cestuy que use*, and solely the subject of equity" (*r*).

very, was, prior to the statute of 47 Geo. 3, valid in law, as the act of the husband seised with his wife in her right. Doe *d.* Smith *v.* Bird, 5 Barn. & Ald. 695; S.C. 2 Nev. & Man. 679. But N.B. recoveries were abolished by 3 & 4 Will. 4, c. 74. Ante, p. 57, n. (*t*).

(*p*) 1 Stark. 9.

(*q*) Post, title "Surrender" (by baron and feme).

(*r*) 1 vol. on Cop. 159; and at the end of that chapter he gives the form of a deed by which such a trust may be created. The following note is added in the second edition: "It has been suggested to me, that equity cannot call in the *legal* estate, as the *legal* estate could not be transferred to one whom the custom does not notice. But quære whether, if the legal estate could *not* be transferred to the issue in tail, the court of equity would not in such case leave it in the trustee, and make him hold subject to the equity. If no one can take the trust who could not take the legal estate, according to the above suggestion, yet it must be proved that an estate to A. and the heirs of his body, is not included in the power to grant or limit in fee simple."

The expedient suggested by Mr. Watkins, in order to create an intail in *all* copyhold lands, has received the sanction of Mr. Gilbert Atherley, in his excellent treatise on Marriage Settlements (*s*); but the author feels it a duty to suggest, (though with every due respect for these authorities), that it ought not to be hastily adopted by any copyholder; for he is unwilling to believe that a court of equity would sanction a device, the effect of which would be little short of assuming a power over the very existence of all established customs; a power which no court of law would or could exercise: indeed, it would be virtually subjecting the customs of a manor, so far as they have for ages past regulated the descent and transmission of the copyhold property within it, to the caprice of every copyholder: the author must at least be allowed to doubt, whether any gentleman at the bar would feel himself justified in recommending a title so circumstanced; and he would ask, should the case ever occur, how the equitable intail is to be barred?

The reader's attention is particularly called to the case of *Pullen & Middleton* (*t*). There, a copyhold estate was limited *to trustees*, to the use of *A.* and the heirs of her body. By the custom of the manor, the lands were not capable of being intailed, so that no recovery could be suffered of them. *A.* married; and the husband and wife, by indenture of bargain and sale to lead the uses of a recovery, declared that the lands should be to the use of the husband and his heirs; and afterwards suffered a common recovery in the Court of Common Pleas. The question was, what effect the recovery had upon these copyhold lands. Lord Hardwicke, C., said, that "although by the custom of several manors copyhold estates could not be intailed, yet they were capable of such limitations as might make them fee simple conditional, and that it would make no difference that the wife was not seised of the legal estate, *as the trust estate of a copyhold could in no case be capable of an intail where the legal estate was not*, it being necessary that there should be the same rule concerning property in law and equity, though, as to the manner of conveying estates, some difference might be made; that a court of equity would in many cases dispense with the ordinary forms in passing estates, but never introduce any rules that might vary the nature of them at common law. The wife, therefore, being tenant of a fee simple conditional, had power to dispose of it by surrender, after the condition was performed, *i. e.* after issue." And after adverting to the case of *Otway & Hudson*, his lordship further observed, that "a recovery suffered in the Court of Common Pleas would not have barred such a trust estate tail as this, supposing it to be an estate tail, unless the trustees had refused to surrender, &c. But taking this estate to be a fee simple conditional at

(*s*) P. 564. (*t*) 9 Mod. 483.

common law, in trust for the wife, as it really was, after the condition performed, she might have devised it, had she been sole, by will, which would have operated as a good appointment of the trust. Being a feme covert, she had joined with her husband in executing a deed to make a tenant to the *præcipe*, and suffered a common recovery in the Common Pleas together with him, to the use of the husband and his heirs. That it was certain that a feme covert might by a common recovery convey her fee simple land, as well as bar an estate tail; for she being secretly examined before the recovery was suffered, she was as effectually barred as she would be in the case of a fine. But besides this deed and recovery, the husband and wife had gone further; they had brought their bill in the Court of Chancery against the trustees, to convey the legal estate, and a decree had been made for that purpose, which he was to suppose had been carried into execution; so that all had been done that could be done to transfer the estate to the husband. And he was of opinion that it was well transferred; and he did not see how the present case differed from the devise of a trust copyhold estate, which had always been held good."

The author is glad to find that his opinion, that the trust of a copyhold cannot be intailed, where an intail of the legal estate is not allowed, is sanctioned also by a very highly distinguished conveyancer of the present day (*u*), whose observations on this point conclude with the following interesting passages: "Lord Chief Justice Bridgman (*Taylor* v. *Shaw*, Carter 21.) [6, 22.] seems to have decided, that an estate tail in copyhold lands may be barred by a fine with proclamations, in the Court of Common Pleas. (*See also the observations of Lord Hardwicke in Pullen* v. *Middleton*, 9 Mod. 484.) On this determination it is to be remarked, that the lands are within the jurisdiction of that court (*x*), though they are more properly impleadable in the lord's court, and in this respect they are under a different predicament from the lands of the tenure of ancient demesne. This point is noticed, as a means of avoiding the rapacity of some lords of copyhold manors, who refuse to permit equitable owners to suffer a recovery, or pass a surrender in the lord's court, without being admitted, or at least paying fines as if they were admitted.

"It is, however, to be observed, that some gentlemen, whose opinion is intitled to the highest respect, are not satisfied that a fine of copyhold lands will bar the trust of a married woman in those lands; of course it is not safe to rely on a fine under these circumstances, though it is very proper that the point should be kept in mind, and whenever circumstances require it, pressed to a decision. Can a

(*u*) See Preston on Conveyancing, 1 vol. p. 153 to 160.

(*x*) But see Cru. on Fines, 211, 212.

* See also Cowley on Watkins 218

person claim any interest in copyhold lands in opposition to his own fine? Is he not estopped? That the decision will be in support of the validity of the fine, is a point on which little doubt is entertained by the writer of these observations. The same point applies to alienation by married women of equitable interests in copyhold lands. But it is not apprehended that a recovery in the Courts of Westminster Hall will have the same effect as a customary recovery, since a *customary recovery* is the prescribed mode of barring an intail. *Oliver* v. *Taylor*, 1 Atk. 474" (*y*).

It must, however, be recollected, that the statute of 4 Henry VII. was said to extend to copyholds only when a fine was levied by a disseisor, or by a feoffee of a copyholder (*z*); for which reason a fine, or plaint in nature thereof, in a customary court would not have barred an estate tail, except by special custom (*a*): and yet it has been said, that the interest of a copyholder might have been concluded by a fine levied in the lord's court (*b*).

After an attentive consideration of the question so very properly raised by Mr. Preston, on the effect of a fine of copyhold lands, when levied in the Court of Common Pleas, the author feels it incumbent upon him to state his opinion, that neither the legal nor the equitable interest in copyhold lands could have been bound by a fine so levied, but that in either case it would have been *coram non judice* (*c*). The contrary opinion does not appear to him to receive the least support from the argument, that the *freehold* interest of the lord, or his grantee, in the *copyhold* lands, is impleadable at common law; and the opinion he has formed, that there is no distinction in this respect between the legal and the equitable interest, in copyhold cases, is in no slight degree sanctioned by the clear principle, that a fine levied of a use at common law might have been avoided by the plea *quod partes finis nihil habuerunt* (*d*); and that it was only after the statute of uses, that the judges allowed a fine of the equitable interest in freehold

(*y*) According to the above case of Oliver & Taylor, a recovery might have been suffered in the Court of Common Pleas of customary freeholds, passing by surrender in a Borough Court, but not of copyhold lands.

(*z*) Post, tit. "Statutes;" and see Taylor *v.* Shaw, Carter, 6, 22.

(*a*) Cru. on Fines, 175, 193, 213; but see 4 Inst. 270. "Surrenders or plaints in nature of fines and recoveries may bar estates tail as well in the Court Baron as at the common law, if the custom have been such, which is the rule in these cases, 3 Feb. 1602, 45 Eliz.;" Cary's Rep. 30.

(*b*) See n. 1, to Harg. & Butl. Co. Litt. 121, a; Hunt *v.* Bourne, Comy. 93, 124; S. C. 1 Salk. 340; 1 Lutw. 301; vide also 2 Inst. 513; 2 Watk. on Cop. 39 to 42; but see Cru. on Fines, 211.

(*c*) See Scott & Kettlewell, 19 Ves. 335; Searle *v.* Kitner, in Chancery, 15 Apr. 1809, cited ib.; 1 Jac. & Walk. 553, n. b.

(*d*) Bro. Abr. tit. "Fine of Land," pl. 4, cites 27 H. 8, 20.

cases to have the same force as a fine of the legal estate (*e*); and if a fine in the Court of Common Pleas by a copyholder seised of the legal estate, would have been void, on account of his disability either to implead or be impleaded in that court, in respect of his copyhold lands, so the author apprehends a fine levied there by a *cestui que trust* of copyholds would have been alike inoperative.

The observations of Lord Hardwicke in *Pullen & Middleton* by no means favour the supposed power of a *cestui que trust* of copyholds to have levied a fine or suffered a recovery in the Court of Common Pleas, for it is to be recollected that the wife in that case was seised of a fee simple conditional, which she had power to dispose of by surrender, and that a bill had been filed in equity against the trustees, to compel a conveyance of the legal estate, and a decree obtained for that purpose; and, in short, (to use Lord Hardwicke's own words,) "all had been done that could be done to transfer the estate to the husband."

The better opinion would seem to be, that a fine or recovery of copyhold lands in the Court of Common Pleas would not have operated as a bar to an equitable estate tail, except where the party had an equitable *right* only, and not an equitable *estate* (*f*), so that any act declaratory of an intention or desire to hold, or to pass the copyhold land, according to the purport of the deed limiting the uses of the fine or recovery, would have been sufficient; or where, as in *Otway & Hudson*, the form of assurance prescribed by the custom of the manor for barring an intail of the *legal* customary estate, could not have been resorted to, by reason of impediments not within the control of the party levying the fine or suffering the recovery; or, where the ordinary method of barring an intail did not exist, as in the case of a union of an equitable estate tail, with the legal fee of the manor (*g*).

(*e*) 1 Ch. Ca. 49, 213, 268; Ca. temp. Talb. 41; 1 Cru. 210, 211; and see 2 P. W. 147; 3 Atk. 729.

(*f*) Ante, p. 62.

(*g*) Hale *v.* Lamb, ubi sup.; and see per Lord Ch. 2 Ves. J. 525, in Challoner *v.* Murhall, ante, p. 66.

OF CUSTOMARY DOWER OR FREEBENCH.

As the wife is not dowable, except by custom (*h*), the quantity and duration of her interest are of course regulated by the prevailing custom of each particular manor, where freebench is allowed: it is generally a third for her life, as at common law; but in other manors it is a fourth part only, and sometimes only a portion of the rent (*i*); but in many manors the wife takes the whole for her life (*k*); and in the manor of Taunton Deane in Somersetshire, the wife takes the inheritance (*l*). Frequently the customary right is *durante viduitate* (*m*); and in some manors it is confined to her *chaste* viduity (*n*). And in one case (*o*), the Court of B. R. held that it was not necessary to show instances of forfeiture for incontinence in support of the custom, and that the frequent use of the simple term *viduity*, might be explained by other entries to mean *chaste* viduity. But if the lord admit the widow after her incontinency, although without notice of the act, he is held to be bound by it (*p*).

In manors governed by the tenure of gavelkind, as at Canonbury and in other places in Middlesex, the wife takes a moiety for her widowhood; and by the custom of many manors, the widow of a copyholder for lives is intitled to freebench (*q*).

And in one case, a custom that a wife should not have her dower unless she claimed it within a year and a day, was held to be a good custom (*r*).

The wife has not an incipient title to freebench by the marriage, as in dower at common law, or at most it is a conditional inception, for she is intitled to freebench only in the event of the husband's *dying*

(*h*) Ante, p. 46.

(*i*) See 2 Col. Jurid. 382; Kitch. 201.

(*k*) Chantrell *v.* Randall, 1 Lev. 20; 1 Inst. 33 b; Kitch. 206, 242.

(*l*) Noy, 2; 1 Lev. 172; 1 Keb. 926; 2 Watk. on Cop. 87.

(*m*) Kitch. 206; 21 Ass. 11; Borneford *v.* Packington, 1 Leo. 1; Oland *v.* Burdwick, Cro. Eliz 460.

(*n*) Rob. Gav. b. 2, c. 2; 2 Watk. on Cop. 89; Wheeler's case, 4 Leo. 240; Leigh *v.* Williamson, 9 Wentw. 124.

(*o*) Doe *v.* Askew, 10 East, 520.

(*p*) Wheeler's case, 4 Leo. 240.

In the manors of East and West Emborne, and the manor of Chadleworth, in Berkshire, the widow, if found guilty of *incontinency*, loses her freebench, unless she comes into court, riding backwards upon a black ram, repeating certain ridiculous words. The same custom prevails in the manor of Torre, in Devonshire; see Cru. Dig. 327, citing Blount. Fragm; vide also 2 Watk. on Cop. 89.

(*q*) Hinton *v.* Hinton, Amb. 277; Noy, 2; Chantrell *v.* Randall, 1 Leo. 20; Newton *v.* Shafto, ib. 172; Rob. Gav. b. 2, c. 2; 2 Com. Dig. Cop. (K. 2); Right *v.* Bawden, 3 East, 260.

The custom of the manor of Whitchurch and Doddington is, that the first wife shall have her freebench in all the land the husband was ever seised of during the coverture, that the second wife shall have a moiety, and the third a third part so long as she keeps her husband above ground; 2 Eq. Ca. Ab. 101.

(*r*) 3 Leo. 227.

seised (*s*), though by the custom of some manors the right attaches to all the copyholds of which the husband is seised in possession during coverture (*t*).

If, therefore, the husband surrender his copyhold, and die, the subsequent admittance of the surrenderee, having relation to the time of the surrender, will defeat the widow's customary estate (*u*).

And so will the admittance of the husband's devisees in trust, if he surrender to the use of his will (*x*), but not otherwise (*y*); so that a devise, which by the special custom of some few manors was good without a surrender to will, even before the statute of 55 Geo. 3, c. 192, as in the manor of Barton upon Humber, in Lincolnshire, does not defeat the widow of her freebench, for in those instances the devisee takes, not by the surrender, but by the will, and, consequently, after the wife's right has attached.

It is also defeated by the admittance of a bargainee of commissioners of bankrupt under 13 Eliz. c. 5, (and see 6 Geo. IV. c. 16), which admittance has relation to the inrolment of the bargain and sale; nor will the admittance of the wife before the bargainee make any difference (*z*).

(*s*) Benson *v.* Scott, 4 Mod. 251; 12 Mod. 49; S. C. 3 Levin, 385; S. C. 1 Salk. 185; S. C. Holt, 160; S. C. Skin. 406; S. C. Carth. 275; S. C. Cumb. 234; Walter *&* Bartlett, 2 Roll. Rep. 179; Howard *v.* Bartlet, Hob. 181; Waldoe *v.* Bertlet, Cro. Jac. 573; Palm. 111; 1 Freeman, 516; Godwin *v.* Winsmore, 2 Atk. 526; Watk on Desc. 38, n. (t); and see The King *v.* The Inhabitants of Lopen, 2 T. R. 577, in which a pauper in possession under a bond given before marriage by the wife (dowable by the custom if the husband died seised) was held to gain a settlement. Where he is in a situation to enforce a conveyance of the legal estate, he is irremovable, and gains a settlement; so, therefore, a son who is emancipated before the admittance of his father, a devisee of copyhold; Rex *v.* The Inhabitants of Thruscross, 1 Adol. & Ellis, 126; and see Rex *v.* Ardleigh, 2 Nev. & Per. 240; vide also, as to a guardian's gaining a settlement by forty days' residence on a copyhold, post, tit. "Guardianship."

(*t*) See the cases of Riddell *v.* Jenner, and Doe *d.* Rose Riddell *v.* Gwinnell, post, p. 78.

(*u*) Benson *v.* Scott, sup.; Vaughan *d.* Atkins *v.* Atkins, 5 Burr. 2785—2787.

(*x*) Forder *v.* Wade and others, 4 Bro. C. C. 521.

(*y*) Hill *v.* Hill, Co. Ent. 123 a, 125 a. The author inclines to think that this distinction must have prevailed even after the statute of 55 Geo. 3, which, however, declared that the will, without a surrender, should be as effectual to all *intents and purposes* as if a surrender had been made. The statute for amending the laws with respect to wills, 1 Vict. c. 26, repealed the above statute of 55 Geo. 3, and authorized the disposition by will of copyhold property, though the testator should not have surrendered the same to the use of his will, nor been admitted thereto. But a surrender to will is still capable of being made, and may, it is apprehended, afford the same evidence of intention to bar a wife of freebench as it did previously to the statute dispensing with such surrender.

(*z*) Parker *v.* Bleeke, Cro. Car. 568; S. C. W. Jo. 451; and see 2 Vern. 194, 195, in Moyses *v.* Little.

And it will be defeated, in the case of a surrender by the husband by way of mortgage, by the admittance of the surrenderee after the husband's death (*a*).

And even by an agreement for sale for a valuable consideration; and there is no distinction in this respect between copyholds of inheritance, or for lives only, where the widow is dowable by the custom of the manor (*b*).

Freebench is also destroyed by the forfeiture of the husband (*c*), but not as against the heir of the lord in cases of forfeiture *at the election* of the lord, should the ancestor not have entered, or if he should have purged the forfeiture by accepting a surrender or otherwise (*d*).

It is not in the power of the widow of a copyholder, intitled by the custom to freebench, to avoid a lease with licence (*e*), except by special custom (*f*).

And according to the decision of the Court of B. R. in *Salisbury* d. *Cooke* v. *Hurd* (*g*), the widow of a copyholder would be defeated of freebench by a lease for years with licence, although the term should be made use of by way of mortgage only. And yet it is clear that the husband, in such a case, would die seised, the possession of his lessee being his own possession (*h*).

It has been doubted whether, in the case of a lease for years of a copyhold by licence, the feme should not be endowed of a proportion of the rent and reversion, corresponding with the extent of the customary freebench; but as customs are to be construed strictly, the better opinion is that the widow of a copyholder is only to be endowed of land (*i*); yet after the lease ended, she shall be endowed (*k*); and clearly by special custom the wife may be endowed of a third part of the rent (*l*).

Freebench is destroyed by unity of the freehold; but if a copyholder purchase the freehold in the name of a trustee, or if the lord enfeoff a stranger, and the feoffee convey to one for life, with

(*a*) Benson *v.* Scott, ubi sup.

(*b*) Hinton *v.* Hinton, 2 Ves. 631—638; S. C. Amb. 277; Brown *v.* Raindle, 3 Ves. jun. 256; but see Musgrave *v.* Dashwood, 2 Vern. 45, 63, which case, however, is not considered as an authority against the rule; see Hinton *v.* Hinton, sup.

(*c*) Allen *v.* Brach, Winch, 27; S. C. (Allen *v.* Booth), Lex Man. 107; Roe & Hicks, 2 Wils. 13; Borneford *v.* Packington, 1 Leo. 1.

(*d*) 1 Freem. 517.

(*e*) Fareley's case, Cro. Jac. 36; S. C. (Holder *v.* Farley), Mo. 758; Dugworth *v.* Radford, W. Jo. 462; and see 1 Freem. 516.

(*f*) Gilb. Ten. 321.

(*g*) Cowp. 481.

(*h*) Gilb. Ten. 321.

(*i*) Ib.; Hill *v.* Hill, Co. Ent. 123; Bac. Abr. Cop. 716, marg.

(*k*) Gilb. Ten. 321; Bac. Abr. Cop. 716, marg.

(*l*) Hill *v.* Hill, sup.; Kitch. 201; Coll. Jurid. 382; ante, p. 72.

remainder to the copyholder in fee, who grants away the remainder, the copyhold continues, and the widow will consequently be intitled to freebench (*m*).

If the lands escheat for want of a customary heir, still the wife shall have her freebench against the lord or his grantee, the law vesting the estate in her upon the death of the husband (*n*).

As there can be no proper disseisin of a copyhold, the entry of the disseisor will not prejudice the wife's title to freebench (*o*).

And as any act of the husband for a valuable consideration, defeats the wife's customary dower equally with a legal surrender (*p*), so, under an agreement to surrender a copyhold estate as an additional security, the wife is compellable in equity to surrender pursuant to the contract (*q*).

But the dying seised is not essential to dower in gavelkind lands (*r*).

A wife is not dowable of a trust either of copyholds or customary freeholds (*s*), though this was formerly doubted (*t*).

Nor is the wife of a trustee intitled to dower, any more than at common law (*u*); and though *Burgess* v. *Wheate* (*x*) is an authority in favour of the widow of the trustee, where the *cestuy que trust* dies without an heir, yet the author apprehends, (presuming the trusts to have been recorded on the court rolls,) that she would in a court of equity be considered a trustee for the lord.

As the admittance of a surrenderee defeats the estate of the widow of the surrenderor, so the widow of a purchaser who dies before admittance or presentment of the surrender is dowable, the law casting the freebench on the widow, just as it casts the descent on the

(*m*) Lashmer *v.* Avery, Cro. Jac. 126; Walter & Bartlett (or Howard & Bartlet, or Waldoe & Bertlet,) ante, p. 73, n. (*s*); and see Jenk. Cent. 318, ca. 15.

(*n*) Chantrell & Randall, Newton & Shafto, ubi sup.; Clarke *v.* Candle, 2 Sid. 165; Howard & Bartlet, Waldoe & Bertlet, ubi sup.; Jurden *v.* Stone, Hut. 18; 2 Watk. on Cop. 85.

(*o*) 2 Watk. on Cop. 77; post, tit. "Customary Plaints (*Disseisin.*)"

(*p*) Ante, p. 74.

(*q*) Brown *v.* Raindle, 3 Ves. jun. 256.

(*r*) See n. 164, Watk. Gilb. Ten.; Watk. on Desc. 38, n. (t); Rob. Gav. b. 2, c. 2, p. 221; Davies *v.* Selby, Cro. Eliz. 825.

(*s*) Forder *v.* Wade and others, 4 Bro. C. C. 521; Godwin *v.* Winsmore, 2 Atk. 526; Attorney-General *v.* Scott, Cas. Eq. temp. Talb. 138; Vernon's case, 4 Co. 1 b; Dixon *v.* Saville and others, 1 Bro. C. C. 326; Curtis *v.* Curtis, 2 ib. 629; Chaplin *v.* Chaplin, 3 P. W. 229. Note, the 3 & 4 Will. 4, c. 105, entitles a widow to dower of an equitable inheritance in *freeholds*, but the act does not extend to a widow who was married on or before the 1st January, 1834.

(*t*) Otway & Hudson, 2 Vern. 585; Banks *v.* Sutton, 2 P. W. 700; and see Newbery *v.* Wighorn, cited 2 Vern. 45, in Musgrave & Dashwood; and Forder & Wade, sup.

(*u*) Bevant *v.* Pope, 2 Freem. 71; vide also Noel *v.* Jevon, ib. 43.

(*x*) 1 Sir W. Bl. 123; S. C. 1 Eden, 177.

heir; and the admittance by relation makes the husband seised from the date of the surrender (*y*).

Although the heir dies before admittance, yet will his wife be dowable (*z*).

If the widow of the ancestor is endowed, the wife of the heir is to be endowed of the residue of the estate (*a*). And a wife is entitled to dower, though she be divorced *a mensâ et thoro* (*b*).

A jointure before marriage, in lieu of dower and thirds, out of any lands of freehold or *inheritance*, is a bar *in equity* of freebench (*c*).

An infant is bound by a legal jointure (*d*); but as copyholds are not within the statute of uses and jointures (*e*), an infant is not bound by a jointure of copyholds, or of any other property not within the provisions of the statute (*f*); and the supposition that an infant's right to waive a jointure is dependent upon the competency of the provision (*g*), was repudiated by Lord Thurlow in *Durnford & Lane* (*h*), which case appears to have met the approbation of Lord Eldon in *Milner* v. *Harewood* (*i*).

A devise in full of all *dower* or *thirds* has been held in equity to be a satisfaction of freebench, (which is a customary right *nomine dotis*) (*k*), so at least as to put the wife to her election (*l*).

But as there is no dower of the trust of a copyhold, the widow of a purchaser who neglects to take a surrender, or where the surrender is void for want of presentment, would not be intitled to freebench.

When a wife is dowable by custom, she has all the incidental qualities of dower at common law (*m*), and may recover damages by the

(*y*) Vaughan *d.* Atkins *v.* Atkins, 5 Burr. 2785.

(*z*) Fisher, 44; Watk. on Desc. 33 et seq.; Gilb. Ten. 288.

(*a*) Baker *v.* Berisford, Sir T. Raym. 58.

(*b*) Howard *v.* Bartlet, ubi sup.; Fisher, 44.

(*c*) Walker *v.* Walker, 1 Ves. 54.

(*d*) Drury *v.* Drury, 2 Eden, 39; 3 Bro. P. C. 492; 1 Bro. C. C. 106, n. 4; Ib. 505, n.; 3 Atk. 612; 1 Roper, 471. In Jordan *v.* Savage, 2 Eq. Ca. Abr. 101, pl. 8, the wife was held to be barred of her customary estate, though she was an infant at the date of the articles, and was not made a party to them; but this case is not reconcilable with the established rules either of law or equity.

(*e*) Post, p. 79, and tit. "Statutes."

(*f*) 1 Roper, 476.

(*g*) See 2 P. W. 244; 3 Atk. 612.

(*h*) 1 Bro. C. C. 116.

(*i*) 18 Ves. 275; 1 Roper, 479.

(*k*) Warde *v.* Warde, Amb. 299.

(*l*) Lacy *v.* Anderson, Choice Ch. Ca. 155; S. C. 1 Swanst. 445, 398, n.; Kidney *v.* Coussmaker, 12 Ves. 136; post, tit. "Election."

(*m*) Where the custom was that the widow should have freebench *durante viduitate*, and she sowed the land, and married before the corn was ripe, it was adjudged that the lord should have the crop, as she had determined her estate by her own act, but that if her lessee had sown the land, then he would have been entitled to the crop; Oland *v.* Burdwick, Cro. Eliz. 460; S. C. Mo. 394, pl. 512; S. C. Gouldsb. 189, pl. 136; S. C. (differently given) 5 Co. 116 a; but see 1 Roll. Abr. Emblem. A. 727, pl. 10; 2 Inst. 80, 81.

statute of Merton (*n*); yet it has been said, that the remedy for such damages is in the court of the manor, or in Chancery only, and that no action will lie for them at common law (*o*).

It has been held, that a woman may sit upon the homage either in a customary or common law Court Baron, but not to try issues, as it should seem (*p*).

The author will hereafter show more particularly, that the wife's estate is a continuation of the husband's, and that she therefore holds of the lord, and is not in need of admittance, except by special custom (*q*), or, at least, that it will be sufficient if she challenge her admittance (*r*). This principle was recognised by the decision in a case of ejectment (*s*) for copyhold lands held by the custom of freebench of the manor of Loders and Bothenhampton in Dorsetshire. A forfeiture was duly proved, but the counsel for the defendant proposed to give evidence that the legal estate in the manor was not vested in Sir E. Nepean at the time of the admittance of the defendant's husband, which the judge rejected. And the Court of B. R., on motion for a new trial, held that the defendant could not dispute the title of the lord, her husband having been admitted by him, and acknowledged himself to be his tenant.

But it would appear that the rule dispensing with the admittance of the widow, does not extend to gavelkind lands (*t*), nor to any instance where, by the custom, the widow takes only a portion of the land, for there her entry is necessary; nor can she enter without assignment by the heir (*u*): and if in such a case the heir should refuse to assign the widow freebench, she must resort to a plaint in

(*n*) 20 Hen. 3, c. 1; post, tit. "Statutes." But by 3 & 4 Will. 4, c. 27, s. 41, no arrears of dower, nor any damages on account of such arrears, are recoverable by action or suit for a longer period than six years.

(*o*) Co. Cop. s. 51, Tr. 119; see Shaw *v.* Thompson, 4 Co. 30 b, in which case a widow recovered dower of copyhold by plaint in the Lord's Court, and 40*l.* damages were assessed, S. C. 1 Roll. Abr. 600; but in the report of S. C. Mo. 411, it is said that at another day three justices held the action maintainable, "because the Court Baron cannot hold plea, nor award execution of 40*l.* damages, yet the damages were well assessed there." And see S. C. Cro. Eliz. 426.

(*p*) 2 Inst. 119, n. 10; and n. 168 to Watk. Gilb. Ten. p. 357, 475; post, tit. "Suit of Court."

(*q*) See Borneford *v.* Packington, 1 Leo. 1; 6 Vin. Cop. (K. e.) pl. 1; Forder *v.* Wade, 4 Bro. C. C. 524, 525; post, tit. "Admittance."

(*r*) Chapman *v.* Sharpe, 2 Show. 184; Jurden *v.* Stone, Hutt. 18; Howard *v.* Bartlet, Hob. 181; vide also Watk. on Desc. 81; post, tit. "Admittance."

(*s*) Doe *d.* Sir E. Nepean, Bart., *v.* Budden, 5 Barn. & Ald. 626; S. C. 1 Dow. & Ry. 243.

(*t*) Rob. Gav. b. 11, c. 2, p. 228, &c. 3d edition; for there the wife is to be endowed *by metes and bounds*, as on the recovery of dower at common law; Davies & Selby, Cro. Eliz. 825; 1 Keb. 583.

(*u*) Davies & Selby, sup.; post, tit. "Admittance."

nature of a writ of dower; and the homage to sever and set out the same (*x*). And it is to be recollected that a plaint for freebench or dower is excepted in the abolition clause of the late statute of limitation (*y*).

A wife, however, may be entitled by the custom to a portion of the copyhold of the husband, in nature of dower at common law, as in the manor of Cheltenham, under a local act of 1 Car. I. (*z*); and then an alienation by the husband alone will not deprive her, on his decease, of the right of admission to the customary portion, to be set out by the homage, with the remedy of an ejectment against the alienee (*a*).

Where the husband's dying seised is not essential to the wife's right to dower, as in gavelkind lands, and she has a provision by way

(*x*) Chapman *v.* Sharpe, 2 Show. 184. It seems that by agreement, the wife may be endowed by the heir, of a moiety of gavelkind lands, to hold in common with him; Rob. Gav. 227.

(*y*) 3 & 4 Will. 4, c. 27, s. 36.

(*z*) Riddell *v.* Jenner, 10 Bing. 29, which was confirmed by the case of Doe *d.* Gwinnell, infra.

(*a*) Doe *d.* Rose Riddell *v.* Gwinnell, 1 Adol. & Ell. N. S. 682. This was a special case reserved at the trial of the ejectment (at the spring assizes for the county of Gloucester in 1836, before Mr. Baron Alderson), for the opinion of the Court of Queen's Bench. Lord Denman, in delivering the judgment in favour of the plaintiff, stated the opinion of the court to be—that dower attaches on the husband's real property at the time of his death, according to its then actual value, without regard to the hands which brought it into that condition in which it is found, the law presuming that it will continue substantially the same up to the assignment;—that there was no foundation for the objection raised in argument, that the husband's death ought to be presented by the next homage, and dower then assigned by them, "but that the court must consider the homage as placed by the custom in the office of sheriff at the common law;" that in reference to the further objection to the mode of assigning dower, both by awarding a third part of the property of each separate owner, and by dividing the several houses into chambers, a third of which was allotted to the plaintiff as dower, the authority of Lord Coke, 35 a, was in the plaintiff's favour.

[N.B. In the above case of Doe *d.* Gwinnell, the lessor of the plaintiff was admitted at a court held in 1830, on the death of her husband, as tenant for life, to one-third of a piece of ground held and conveyed away by the husband in his lifetime; and at a court in 1834 she claimed to be admitted to a third of certain buildings which had been erected on part of the premises subsequently to such conveyance; and the homage not having assigned dower on this claim, a mandamus issued in 1835, commanding the lord and his steward to summon the homage, and commanding such tenants as should serve thereon, to assign to the lessor of the plaintiff for her dower, one equal third part of each and every the customary or copyhold messuages, lands, tenements, and hereditaments, within the said manor, of which the husband was seised during the coverture of the plaintiff. The homage at a subsequent court held in the same year, in obedience to the writ, set out third parts of several distinct parcels then held by different parties, and, among other parcels, a specific third part of a messuage called Buckingham-house. Specific third parts of other houses were similarly assigned.—No further admittance took place.]

of jointure charged upon other land, which is relied upon as a protection against freebench, care should be taken on the part of a purchaser, to ascertain that there is a good title to the lands so charged; this is more particularly essential in copyhold cases, because lands of that tenure are not within the statute of uses and jointures (*b*).

Some observations on the practice of joining the wife in the surrender of copyholds, will be found under the head of "Copyhold Assurances," and the reader is also referred to Chap. V. post, tit. "Election."

OF CURTESY (*c*).

We have already seen that curtesy is only a collateral quality in copyholds, and cannot exist but by custom; therefore, as in the case of freebench (*d*), the custom of each particular manor must be resorted to, to ascertain the quantity and extent of the interest of the husband in the lands of a feme copyholder (*e*): it is generally an estate for the life of the husband if there be issue, as at common law, but in gavelkind lands of a moiety only, so long as he continues unmarried, and even though there be not any issue.

It is said, that if the custom is for a man taking a *copyholder* to wife, and having issue, and outliving her, to be entitled to curtesy, he has no right, unless the wife is seised of the estate at the time of the marriage (*f*): this authority has been doubted (*g*), but, as it appears to the author, without any cause; for, if the wife's right accrued after the marriage, how could it be said that the husband married a copyholder? And it is to be recollected, that all customs of such nature are to be construed strictly.

Influenced by that rule, the author apprehends, that where the custom of the manor allows of curtesy, only on the wife's dying seised, the dying seised is essential, in analogy to the case of dower; but a special custom of that nature would not operate unfavourably to the husband, as it is equally out of the wife's power to make any

(*b*) Post, tit. "Statutes;" and see Vernon's case, 4 Co. 1 b.

(*c*) Formerly the estate of the husband in his wife's lands was termed his dower, equally with the estate of the widow in the lands of her husband; Rob. Gav. b. 2, c. 1, p. 136; see also Index to Fitzh. Abr.; 2 Watk. on Cop. 68.

(*d*) Ante, p. 46.

(*e*) Ever *v.* Aston, Mo. 271, 272; S. C. (Ewer *v.* Astwicke,) 1 And. 192; Rob. Gav. b. 2, c. 1.

(*f*) Sir J. Savage's case, 2 Leo. 109; S. C. cited in Beale & Langley, ib. 208; Gilb. Ten. 326; Fisher, 43.

(*g*) See Clements *v.* Scudamore, ante, p. 26.

disposition of her copyhold as of her freehold property, without the concurrence of her husband (*h*).

Mr. Watkins seems to have thought, that where the custom does not expressly require that there should be issue, the birth of issue is not essential to give the husband a title (*i*); but the author apprehends, that when curtesy is allowed, if the custom is silent with respect to there being issue, the rule of the common law would prevail.

But where curtesy is allowed by the custom of the manor, there is the same distinction between curtesy and freebench, in favour of the husband, as between curtesy and dower at common law; therefore, even of a trust of copyholds, the husband may be tenant by the curtesy (*k*).

It is, however, essential that the husband should have a seisin, either in law or equity, during the coverture; so that if the wife has a separate interest, not subject to the control of the husband, he will not be entitled by the curtesy; indeed such an interest would be directly adverse to the intention of the person creating the use or trust (*l*). See Cooper v. Macdonald 7th D 288

Though the law, as to freehold lands, vests the estate by curtesy in the husband without assignment, and even without entry, if the wife is already in possession, and prevents the heir from entering and acquiring seisin (*m*), yet, the author apprehends, if the husband takes only a portion of the wife's copyhold land, so that his interest cannot be considered as a continuation of her estate, an assignment and entry are equally as necessary as in the case of freebench (*n*).

Where the title of the wife is complete against all persons but the lord in respect of his fine, as where she takes by descent, the non-admittance of the wife will not affect the husband's right to the customary curtesy (*o*): and it is observable, that in Doe *&* Brightwen, the only evidence on the rolls, of the husband's right to curtesy, was three instances of the admission of husbands, whose wives had been previously admitted.

(*h*) A custom for her to do so would be bad, ante, p. 22.

(*i*) 2 vol. on Cop. 93; and see 1 vol. ib. 273, 274, cites Rob. Gav. b. 1, c. 1, p. 136, 150, [179, 196, 3d ed.]

(*k*) 2 Bl. Com. 337; Sweetapple *v.* Bindon, 2 Vern. 536; Cunningham *v.* Moody, 1 Ves. 176; 2 Watk. on Cop. 80, 95.

(*l*) Hearle *v.* Greenbank, 1 Ves. 307.

(*m*) Watk. on Desc. 82.

(*n*) Post, tit. "Admittance (Baron and Feme)."

(*o*) Doe *d.* Milner *v.* Brightwen, 10 East, 583; and see Ever *&* Aston, or Ewer *&* Astwicke, ubi sup.; 6 Vin. Cop. (H. e.) pl. 2; Calth. Read. 45; 12 Adol. & Ell. 574, in Doe *&* Clift.

OF PARTICULAR STATUTES AFFECTING, AND NOT AFFECTING, COPYHOLDS.

Before we quit the subject of the peculiar properties of copyhold tenure, contrasted with the incidental qualities of frank or freehold tenure, it appears desirable to consider the applicability of particular statutes to copyhold lands, when not expressly named in them, and in which we are essentially aided by the following exposition of Lord Coke, viz., that when an act of parliament altereth the service, tenure or interest of the land, or other thing, in prejudice of the lord or tenants of the manor, there the general words of such act extend not to copyholds (*p*); but that when an act is generally made for the good of the commonwealth, and no prejudice may accrue by reason of the alteration of any interest, service, tenure, or custom of the manor, there, usually, copyholds are within the general purview of such acts (*q*).

Conformable to this rule,

Copyholds are held to be within

The statute of Merton, 20 Hen. III. c. 1, giving damages on a recovery in a writ of dower (*r*).

The 3d and 4th chapters of West. 2, 13 Ed. I., giving a *cui in vita* upon a discontinuance by the baron; a *receit* upon the baron's refusal to defend the wife's title; and a *quod ei deforceat* to particular tenants; and also the 32 Hen. VIII. c. 28, which gave an entry in lieu of a *cui in vita* (*s*).

The 4th Hen. VII. c. 24, which made fines a bar on five years non-claim; but this was only where a fine was levied by a disseisor, or

(*p*) 3 Co. 8; Co. Cop. s. 53; 2 Brownl. 45, in Reyner *v.* Poell. It was on this principle that copyholds were held not to be within the act 12 Car. 2, of regicides. See Duke of York *v.* Marsham, Hard. 432; Lord Cornwallis's case, 2 Vent. 38, et vide 1 Show. 287; Carth. 205.

(*q*) Co. Cop. s. 53, Tr. 122; Heydon's case, 3 Co. 8, 9; Moore, 128; Sav. 66, 67; Rowden *v.* Malster, Cro. Car. 42; Glover *v.* Cope, Carth. 205; S. C. 3 Lev. 327; S. C. 4 Mod. 83—85; S. C. Holt, 159; S. C. Skin. 296, 305; S. C. 1 Salk. 185; Doe *d.* Watson *v.* Routledge, Cowp. 710; 1 Bac. Ab. 711.

(*r*) Shaw & Thompson, 4 Co. 30 b; S. C. Cro. Eliz. 426; S. C. Mo. 410; 1 Roll. Abr. 600; Co. Cop. s. 55, Tr. 126; and see 1 Inst. s. 36; 2 Inst. 80; Cro. Car. 43, in Rowden & Malster; ante, tit. "Freebench."

(*s*) Heydon's case, 3 Co. 9; Co. Cop. s. 55, Tr. 126; Rowden & Malster, Cro. Car. 43; Roswell's case, Dy. 264 a; Sav. 67; Gilb. Ten. 109; 2 Watk. on Cop. 36, 189, 190; sed quære, as to the 32 H. 8, c. 28; and see Kitch. 173; post, 87. It will be remembered that all actions, real or mixed, (except writs of dower, or a quare impedit, or an ejectment,) and all plaints, (except a plaint for freebench or dower,) were abolished by 3 & 4 W. 4, c. 27, s. 36.

by the feoffee of a copyholder, as a fine by a copyholder was void (*t*).

The 32 Hen. VIII. c. 2, 21 Jac. I. c. 16, of limitations of actions, &c. (*u*). But an action by the lord for a fine on admission to copyholds is not within the stat of 21 Jac. (*x*).

Ib. c. 9, against maintenance, champerty, and buying of titles (*y*).

Ib. c. 34, giving grantees of reversions a right of entry and of action against lessees (*z*). And assignees of the reversion of *part* of the demised premises are within this statute (*a*).

(*t*) Fermor's case, 3 Co. 77 a; Saffyn's case, 5 Co. 123 b; Margt. Podger's case, 9 Co. 105 a; Co. Cop. s. 55, Tr. 126; Howlet *v.* Carpenter, 3 Keb. 775; S. C. 1 Vent. 311; Saliard & Everat's case, 1 Leo. 99; Archbold *v.* Cook, Noy, 23, cites Mills *v.* Bradley, T. 2 Jac. C. B.; 2 Inst. 516; Freeman *v.* Barnes, 1 Sid. 458; 1 Preston on Conv. 260, 301; 2 Sanders on Uses and Trusts, 17; Shep. T. 21, 22; 6 Vin. Cop. (O. d.) pl. 13, 14; Doe *d.* Tarrant et al. *v.* Hellier et al., 3 T. R. 173; post, tit. "Forfeiture." Fines having been abolished by 3 & 4 W. 4, c. 74, a title by non-claim, under 4 H. 7, c. 24, was no longer capable of being acquired.

(*u*) 6 Ed. 6; Bro. Limitations, pl. 2; Kitch. 167; Lyford *v.* Coward, 2 Ch. Ca. 151; S. C. 1 Vern. 195; Knight & Adamson, 2 Freem. 106; Com. Dig. temps. (G. 1); Glover *v.* Cope, ante, p. 81; (but see more particularly the report in 3 Lev. and 4 Mod.); Shaw & Thompson, Mo. 411; Heydon's case, ib. 128; Doe & Hellier, 3 T. R. 172; Gilb. Ten. 178; 2 Watk. on Cop. 37; post, tit. "Ejectment" and "Customary Plaints." But the 4th s. of 32 H. 8, c. 2, as to avowry for rent, suit, or service, does not extend to casual services, as homage, fealty, and heriot; nor does it extend to reliefs; Bevil's case, 4 Co. 10 b, 11 a; 2 Inst. 96.

N.B.—Copyholds are also expressly within the late statute of limitations, 3 & 4 W. 4, c. 27, and customaryholds are embraced by the words, "or held according to any other tenure." Vide the act in the Appendix; post, tit. "Fealty, Suit, Rents, &c.;" tit. "Ejectment."

(*x*) 1 Lev. 273; 2 Saund. 64; 2 Keb. 536; post, tit. "Fine." But note the 3rd sect. of 3 & 4 W. 4, c. 42, (passed 14th August, 1833,) enacted, that an action of debt for a copyhold fine must be brought within three years after the end of the then present session, or within six years after the cause of action accrued.

(*y*) Co. Lit. 369 b: Kite & Queinton's case, 4 Co. 26 a; Co. Cop. s. 55, Tr. 126; Glover & Cope, sup.; (but see more particularly the report in 3 Lev. and 4 Mod.) Rowden & Malster, Cro Car. 43.

(*z*) Glover *v.* Cope, sup.; Baker *v.* Berisford, 1 Keb. 357; Webb *v.* Russell, 3 T. R. 398, 401; Whitton *v.* Peacock, 3 Myl. & Keen, 325; but this was formerly doubted, vide Co. Cop. s. 54, Tr. 125; Platt *v.* Plommer, Cro. Car. 24; Beal *v.* Brasier, Cro. Jac. 305; S. C. (Brasier *v.* Beale), Yelv. 222; S. C. 1 Brownl. & Goldsb. 149; Swinnerton *v.* Miller, Hob. 177, 178; Lex Cust. 253; and it is to be observed, that even before the stat. of 4 Ann. c. 16, it was held that an attornment to the surrenderee of a reversion of copyholds was unnecessary, the surrender and admittance being in the nature of an attornment, or at least supplying the want of it, vide Black *v.* Mole, Sir T. Raym. 18; S. C. 1 Lev. 40; S. C. 1 Keb. 93; Swinnerton *v.* Miller, sup.; 1 Leo. 297, ca. 408; 3 Leo. 197, ca. 247; 4 Leo. 230, ca. 352.

The above case of Whitton & Peacock decided, not only that the surrenderee of a copyhold is an assignee of a reversion within the stat. of 32 Hen. 8, c. 34, and that he may maintain an action of covenant upon a lease made by his surrenderor, but that the defendant in such action cannot protect himself by alleging the invalidity of the lease.

(*a*) Twynam *v.* Pickard, 2 Barn. & Ald. 105; Glover *v.* Cope, ubi sup.; (but see particularly the report in 3 Lev.)

The 27 Eliz. c. 4, of fraudulent conveyances (*b*).

The 1 Jac. c. 15, 21 Jac. c. 19, of bankrupts, and this by construction, copyholds being expressly mentioned in 13 Eliz. c. 7 (*c*). [But the three last mentioned acts were all repealed by the 6 Geo. IV. c. 16] (*d*).

The 65 sect. of 6 Geo. IV. c. 16, authorizing the commissioners to sell any lands, tenements, or hereditaments, whereof a bankrupt is seised in possession, reversion, or remainder; for copyholds are excepted in the previous section, where the same general words, "lands, &c." are used (*e*).

The 12 Car. II. c. 24, s. 8, enabling the father to appoint a guardian to his children, if the custom does not give the wardship to the lord; *contra*, if it does: this, at least, is the distinction made by Mr. Watkins, and, as the author submits, upon very just principles (*f*).

The 7 Anne, c. 19, authorizing infant trustees to convey (*g*). So

(*b*) Doe *d.* Watson *v.* Routledge, Cowp. 709; S. C. cited in Dougl. 716, (n. 1), and in Roberts' Fraud. Conv. 447; and see 2 Watk. on Cop. 191; 1 Evans' Stat. p. 392; yet see Bull. N. P. 108; Rob. Fraud. Conv. 447, n. (b); Atherl. Marr. Sett. 206. But copyholds were expressly held to be within the stat. in the case of Doe *d.* Tunstill *v.* Bothrell, 5 Barn. & Adol. 131; 2 Nev. & Mann. 64.

(*c*) Crisp *v.* Pratt, Cro. Car. 550; S. C. Mar. 34; S. C. W. Jones, 437; 1 Roll. Abr. 523, pl. 5; Gilb. Ten. 182; 6 Vin. Cop. (O. d.) pl. 35, 36; Parker & Bleeke, Cro. Car. 568; S. C. W. Jones, 451; Doe & Clark, 5 Barn. & Ald. 458.

[N.B.—No time was limited by the act of 13 Eliz. c. 7, for the inrolment of the bargain and sale of the commissioners, but the act of 21 Jac. c. 19, authorizing the commissioners to convey the intailed estates of a bankrupt, required that the bargain and sale should be inrolled within six lunar months.]

(*d*) The author apprehends that customary freeholds, passing by surrender and admittance, stand on the same footing as pure copyholds with regard to the bankrupt laws. In Doe *d.* Danson *v.* Parke, 4 Ad. & Ell. 818, it is erroneously stated arguendo, that "customaryhold" was first mentioned in the Bankrupt Act of 6 Geo. 4, c. 16, ss. 64, 68, &c.; but the term was used in the Bankrupt Act of 13 Eliz. c. 7, s. 2, which empowered the commissioners to make sale of the bankrupt's lands, tenements, and hereditaments, as well "copy or *customaryhold*" as freehold.

(*e*) By 1 & 2 W. 4, c. 56, s. 26, the real estates of a bankrupt, which by the act of 6 Geo. 4 were directed to be conveyed by the commissioners to the assignees (viz. the *freehold* estates), are vested in the assignees upon their appointment, without any conveyance; ante, p. 64, n. (*d*).

(*f*) 2 Watk. on Cop. 104, 195; Hutt. 17; but see 3 Salk. 177; Clench *v.* Cudmore, Lutw. 1190; S. C. 3 Lev. 395; and see 1 Lord Raym. 132, 133, in Wade *v.* Baker & Cole; Egleton's case, 2 Roll. Abr. 40, Garde P.; The King *v.* The Inhabitants of Wilby, 2 Mau. & Selw. 508; vide also Co. Cop. s. 23, Tr. 20.

(*g*) Doe & Morgan, 7 T. R. 104; and see Naylor & Strode, 2 Ch. R. 392. But Richards, C. B., doubted as to copyholds being within the statute of Anne, in Ex parte Janaway, 7 Pri. 689. In Ex parte Anderson, 5 Ves. 240, an infant trustee was ordered to convey an estate in Calcutta; and see several cases cited ib. 242, where the Court ordered infants to convey estates in the colonies, the act being general.

In Ex parte Johnson, 3 Atk. 559, Lord

therefore, within the act of 6 Geo. IV. c. 74, (repealing the last-mentioned act). And copyholds are expressly included in 11 Geo. IV.

Hardwicke made an order that an infant trustee, tenant in tail, should convey by a common recovery. See also Ex parte Bowes, ib. 164; Ex parte Smith, Amb. 624. In each of those cases a doubt was at first entertained by the Lord Chancellor, whether there ought not to be an application for a privy seal; and see 1 P. W. 538. But in Ex parte Johnson Lord Hardwicke made the order, on the ground of the act being general, that the infant *should convey lands as the Court by order should direct.* And in Ex parte Maire, 3 Atk. 479, a feme covert, the infant heir of a mortgagee in fee, was directed to convey by fine. And see Anon. Comy. 615.

The stat. of Anne extended to those cases only where the infant was a dry trustee, and not to cases where there was a trust to be executed; Blatch & Agnis *v.* Wilder and others, 1 Atk. 420; see also Dick. Ch. Ca. 400, in Riggs *v.* Sykes, ib. 392, in Chandler *v.* Beard, 2 Cox. Ch. Ca. 221, in Att. Gen. *v.* Pomfret, ib. 422; 17 Ves. 383; but see Ex parte Knight; Lady Teynham *v.* Head, 21 Jan. 1799, Chan. cited Sugden Vend. & P. 184, n., 8th ed. It was expressly held in Ex parte Chasteney, 1 Jac. 56, that an infant trustee for sale was not within the stat. of 7 Anne; and the M. R. expressed a doubt whether the fact that the *cestui que trusts* were competent to consent could make a difference. But it should seem that in practice, where the *cestui que trusts* were adult, and free from disabilities, the Court, on petition for a conveyance to their nominee, would have treated the infant as a trustee within the statute. See n. (a) to Ex parte Chasteney, sup. In the above case of Ex parte Janaway (7 Pri. 689,) the Court of Exchequer refused to compel the infant heir of a vendor, who had sold for a valuable consideration, and received the purchase money in his lifetime, to surrender to the purchaser under the statute of Anne; and see Sugd. Vend. and P. 182, 8th ed.; Fearne's Posth. 236; vide also, as to the heir of a vendor, ss. 16, 17 and 18, of 11 Geo. 4 & 1 Will. 4, c. 60.

Neither the 7 Anne, nor the 6 Geo. 4, applied to constructive trusts; Dew *v.* Clarke, 4 Russ. 511; King *v.* Turner, 2 Sim. 549; but the 6 Geo. 4, extended to cases where the trustee had some beneficial interest, or some duty to perform, *so as to enable conveyances to be made to vest trust estates in a new trustee or trustees duly appointed, alone or jointly with the continuing trustee or trustees;* see s. 10 And the 15 sect. of 11 Geo. 4 & 1 Will. 4, enacts, that persons shall be deemed trustees within the meaning of the act, notwithstanding they may have some beneficial interest, or some duty to perform; that in any such case, and in every case of a mortgagee, (not being a naked trustee,) the Court of Chancery *may* direct a bill to be filed, to establish the right of the party seeking the conveyance. By the 18 sect. the provisions of the act are extended to every case of a constructive trust, or trust arising or resulting by implication of law; except where the trustee has or claims a beneficial interest adversely to the party seeking a conveyance, and except as to cases upon partition, or arising out of the doctrine of election, or of vendors, otherwise than thereinbefore provided for. The 22d sect. has introduced an important alteration in practice, by the authority it gives to the Court of Chancery to direct a conveyance to be made to new trustees upon an application by petition under the provisions of the act, without a bill being filed for the purpose. Vide extract from the act in the Appendix.

The 4 & 5 Will. 4, c. 23, s. 2, (see the act in the Appendix) enacts, that when any trustee or *mortgagee*, either of freehold or copyhold estates, dies without an heir, the Court of Chancery may appoint a person to convey, in like manner as under the provisions of 11 Geo. 4 & 1 Will. 4. (Vide Reg. *v.* Pitt, 2 Per. & Dav. 385; post, tit. "Mandamus.")

and 1 Will. IV. c. 60, s. 6 and 13, (repealing the 6 Geo. IV.), under the rules of interpretation, s. 11. [*Note.* See similar act to 7 Anne, as to the duchy of Lancaster, and counties palatine of Chester, Lancaster, and Durham, and the principality of Wales, 4 Geo. II. c. 16, repealed and altered by 6 Geo. IV. c. 74. Vide also as to lands within the same duchy, counties palatine, and principality, the 7th sect. of the act of 11 Geo. IV. & 1 Will. IV.]

The 4 Geo. II. c. 28, s. 5, of distress for rent arrear (*h*).

The 9 Geo. II. c. 36, commonly (though improperly) called the statute of mortmain (*i*).

The 11 Geo. II. c. 19, s. 15, authorizing the executors of a tenant for life to recover a proportion of the rent from an under tenant, whose estate determines on the death of such tenant for life (*k*).

The 8th sect. of 17 Geo. III. c. 26, (for registering the grants of life annuities), mentioning certain cases to which the act should not extend (*l*).

Note.—In re Dearden, 3 Myl. & Keen, 508, Sir C. C. Pepys, M. R., held that the 8th sect. of 11 Geo. 4 & 1 Will. 4, c. 60, was confined to *positive* or *naked* trusts, and did not extend to the heir of a mortgagee out of the jurisdiction of the court, stating, as the grounds of his Honour's decision, that the 6th sect., which provides for the event of the infancy of persons seised, expressly includes *mortgagees* as well as trustees; and that the cases of constructive trustees were provided for by the 16th and 18th sections, which would have been useless if constructive trusts had been within the 8th sect.

But the present Master of the Rolls (Lord Langdale), in Ex parte Whitton, 1 Keen, 278, was of opinion that an unknown heir of a mortgagee was within the 8th sect. of 11 Geo. 4 & 1 Will. 4, explained by the subsequent act of 4 & 5 Will. 4, and made the usual order of reference.

(*h*) 2 Watk. on Cop. 181, 182, 191; and see n. 150 to Watk. Gilb. Ten. 468; Fisher, 138.

(*i*) Attorney-General *v.* Lord Weymouth, Amb. 20; Arnold *v.* Chapman, 1 Ves. 108; Attorney-General *v.* Andrews, ib. 225; Doe *d.* Howson *v.* Waterton, 3 Barn. & Ald. 149; 2 Watk. on Cop. 192; post, tit. "Surrender." But see 2 J. B. Moore, 619, in Brown & Ramsden. And see as to the proper Mortmain Acts, 15 Vin. 479, et seq. But copyholds are not within the 17th sect. of 59 Geo. 3, c. 12, "to amend the laws for the relief of the poor," post, p. 90.

(*k*) A tenant in tail who dies without issue, being in law considered as a tenant for life only, or at least as having only *an estate for life*, (and the preamble of the act speaks of persons having *estates for life*,) is within this statute; Paget *v.* Gee, Amb. 198; S. C. 9 Mod. 482, 5th ed.; S. C. 1 Burn, J. 633. So also is a rector, 8 Ves. 308.

N. B. This act was amended by 4 & 5 Will. 4, c. 22, and the principle of apportionment extended to annuities, dividends, &c.

(*l*) See 53 Geo. 3, c. 141, which repeals the act of 17 Geo. 3, but so as not to affect annuities previously granted. The 10th sect. of 53 Geo. 3, (by which certain cases are excepted out of the provisions of the act,) expressly mentions copyholds.

An annuity secured on lands in fee of equal annual value was not required to be registered under the act of 17 Geo. 3, although the annuity was also secured on leasehold property; Ex parte Michell, 2 East, 137. Nor was it necessary, in order to exempt the deed from registry, that the annual value should be above reprises;

Copyholds are also within 4 & 5 Vict. c. 38, (repealing 6 & 7 Will. IV. c. 70), authorizing the conveyance or enfranchisement of land, not exceeding an acre, as a site for a school, &c. They are also within the operation of ss. 4, 5 and 9, of the recent stat. of 7 & 8 Vict. c. 76, for simplifying the transfer of property.

Copyholds are held not to be within

The 20 Hen. III. c. 10, of *Merton*, authorizing suit by attorney (*m*).

Nor the 52 Hen. III. c. 9, of *Marlborough*, giving contribution for suit (*n*).

Nor 6 Ed. I. c. 12, of *Gloucester*, as to foreign warranty (*o*).

Nor the stat. of *Acton Burnel, de Mercatoribus*, 11 Ed. I. (*p*).

Nor the 13 Ed. I. c. 1, West. 2, *de donis* (*q*).

Nor the 13 Ed. I. c. 18, of *elegit* (*r*).

Nor the 17 Ed. II. c. 9, wardship of idiots (*s*).

Nor the 16 Rich. II. c. 5, as to the Pope's bulls (*t*).

Nor the 11 Hen. VII. c. 20, of discontinuance, and of alienation by wife of the lands of her deceased husband (*u*).

Nor the 27 Hen. VIII. c. 10, of uses and jointures (*x*).

Shrapnel *v.* Vernon, 2 Bro. C. C. 271. But under the exemption clause of 53 Geo. 3, it is required that the estates charged should be of equal or greater annual value than the annuity, *over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant.* See the act of 53 Geo. 3, in the Appendix.

(*m*) Sir John Braunche's case, 1 Leo. 104; 2 Inst. 100; 2 Watk. on Cop. 106, 189, 192.

(*n*) See 2 Inst. 117; F. N. B. 162; 2 Watk. on Cop. 179, 192.

(*o*) 2 Inst. 324.

(*p*) Heydon's case, Mo. 128; Sav. 67.

(*q*) Ante, tit. "Estates Tail."

(*r*) Heydon's case, sup.; Co. Cop. s. 53, Tr. 123; Cro. Car. 44; ante, p. 47; sed vide extract from 1 & 2 Vict. c. 110, and copy of 2 Vict. c. 11, in the Appendix; ante, p. 47, n. (*o*); post, p. 88, n. (*d*).

(*s*) Co. Cop. s. 55, Tr. 125; Supp. s. 21; Gilb. Ten. 186, 223; and see Beverley's case, 4 Co. 126; Tourson's case, 8 Co. 170; ante, p. 52.

(*t*) Co. Cop. s. 53, Tr. 123; Gilb. Ten. 186; 2 Watk. on Cop. 193; 5 East, 524.

(*u*) Harrington *v.* Smith, 2 Sid. 41, 73; Glover & Cope, ubi sup.; (and see particularly the report in 4 Mod.); 2 Ves. 358, n. But where the freehold had been conveyed to the husband and wife, joint copyholders in fee, and to the heirs of their bodies, the entry of the heir of the husband, under this statute, was held to be lawful, the copyhold interest being extinguished by such conveyance; Stockbridge's case, Cro. Eliz. 24; vide also 14 Vin. 549, n.

The 39 sect. of 3 & 4 Will. 4, c. 27, enacted, that no descent cast, discontinuance, or warranty, after 31st Dec. 1833, should toll or defeat any right of entry or action for the recovery of land.

(*x*) Kitch. 168, 170; see the report of Glover & Cope, in 4 Mod.; Walker *v.* Walker, 1 Ves. 54; Co. Cop. s. 54, Tr. 124, 125; Harrington *v.* Smith, 2 Sid. 41, 73; Rowden *v.* Malster, Cro. Car. 44; 2 Ves. 257, in Rigden *v.* Vallier; Leaper *v.* Booth, 1 Keb. 627; Gladstone *v.* Ripley, 2 Eden, 59, 60; 1 Swanst. 447, n. (a).

Nor the 31 Hen. VIII. c. 1, 32 Hen. VIII. c. 32, 8 & 9 Will. III. c. 31, 7 Anne, c. 18, of partition (*y*).

Nor 32 Hen. VIII. c. 28, as to leases by tenants in tail, or persons seised in right of their wives or churches (*z*).

Nor s. 6 of the same statute, relative to discontinuance by the husband of the wife's land (*a*).

Nor the 32 Hen. VIII. c. 37, empowering executors to distrain (*b*).

(*y*) Kitch. 167; Co. Cop. s. 54, Tr. 125; Gilb. Ten. 185; Rowden *v.* Malster, sup.; Co. Lit. 187 a, n. 2; Burrell *v.* Dodd, 3 Bos. & Pul. 378; and see Oakley *&* Smith, Amb. 369; S. C. 1 Eden, 260; Holloway *v.* Berkeley, 6 Barn & Cress. 11; post, at the end of tit. "Aid of the Courts of Equity." [N. B. Customary freeholds are not within these statutes, Amb. 268; 3 Bos. & Pull. 378; post, tit. "Customary Freeholds or Privileged Copyholds."]

Vide 3 & 4 Will. 4, c. 27, s. 36, abolishing the writ of partition.

It has been said that parceners of copyhold cannot make partition without the lord's licence; Lat. 201, n. 1; Co. Lit. 59 a, cites P. 41 Eliz. B. R.; Fuller *&* Terry, Hal. MSS.; et vide Calth. Read. 75, who says it was agreed in the Duchy Chamber, 12 Eliz. that if two joint [tenants,] copyholders in fee, make partition, it is good, and no forfeiture, nor alienation. A court of equity could not, previously to 4 & 5 Vict. c. 35, direct the partition of copyholds or customary freeholds, Jope *v.* Morshead, 6 Beav. 123; though if there had been both freeholds and copyholds, the court might have directed such a partition as to give the entire copyhold to one party, and the freehold or part of the freehold to the other; Dillon *v.* Coppin, cited 4 Beav. 217, n. The 85 sect. of the above act authorizes a court of equity to make the like decree in a suit for the partition of lands of copyhold or customary tenure, as might be made with respect to lands of freehold tenure. See the act in the Appendix.

(*z*) Co. Cop. s. 54, Tr. 125; Gilb. Ten. 179, 185; Sheere *&* Pentor, Litt. Rep. 304. But as a copyholder is only a tenant at will in contemplation of law, a grant by copy of court roll in fee, for life, or years, is a sufficient letting to farm within the statute to authorize a lease of the freehold interest; Dean and Chapter of Worcester's case, 6 Co. 37; S. C. called Baugh *v.* Haynes, Cro. Jac. 76, cites Sir James Marvin's case, 7 Eliz.; and see Banks *v.* Brown, Mo. 759; S. C. Noy, 110; Lord Norris's case, Noy, 106; Lex Cust. 251; Co. Litt. 44 b; vide also Ollery Monastery case, Sav. 66; 1 Leo. 4; 4 Leo. 117; Heyden's case, 3 Co. 7; S. C. Mo. 128; S. C. Sav. 66; et vide Threadneedle *&* Lynham, 1 Mod. 203; S. C. 2 Mod. 57; S. C. 3 Keb. 372.

Mr. Watkins thought that a lease by licence of the lord, or under a special custom, authorizing a copyholder to demise for twenty-one years, would be within the statute, and bind the issue, wife, or successor. See 2 vol. on Cop. 194, n. (g), 2d ed.; but the author cannot acquiesce in the grounds of this opinion.

(*a*) Bullock *v.* Dibley, Mo. 596; S. C. Poph. 38; Gilb. Ten. 178, 179; ante, p. 46. Vide 3 & 4 Will. 4, c. 27, s. 39; ante, p. 47, n. (*k*).

(*b*) Appleton *v.* Doily or Baily, Yelv. 135; S. C. 1 Brownl. 102; Sands *v.* Hempston, 2 Leo. 109; Bull. N. P. 57; Supp. Co. Cop. s. 21, Tr. 216; 2 Watk. on Cop. 182, 195; Toll. Exec. 452; Brad. Dist. 77; 2 Bac. Abr. 282, marg. But see per Eyre, J., Carth. 91; Gilb. Ten. 188; Appleton *&* Doily, sup. is an express authority that copyholds are not included in the act. And the point in the case in 2 Leo. was, whether the executor of a grantee of a rent charge, granted by the lord of a manor, could distrain on lands held by copy for life, and it was held that he could not, for the copyholder not only claimed by his grantor, but by custom

Nor the statute of wills, 32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5; 29 Car. II. c. 3 (*b*), though it was formerly thought that copyholds were within the 7th and 9th sections of 29 Car. II. as to declarations and assignments of trusts (*c*).

Nor 13 Eliz. c. 4; 25 Geo. III. c. 35, of crown debtors (*d*).

Nor 29 Eliz. c. 6, of recusancy (*e*).

Nor 31 Eliz. c. 7, of cottages (*f*).

Nor 21 Jac. c. 16, of limitations, so as to bar an action for a fine (*g*).

(paramount the title of the rent). Saffery *v.* Elgood, 1 Adol. & Ell. 194. So also Mo. 812. But Gilb. (Ten. 187), cites the same case contra, as reported in 2 Leo. 152, 3 Leo. 59, and considers that the report in 1 Leo. was upon the first hearing of the cause: he states that it was resolved by all the judges but Fenner, that the copyholds should be charged, the custom being no part of the title, but only appointing how the copyholder should hold; and refers to Dy. 270 b, and 1 Leo. 4. But it is quite clear that the law is as adjudged in the case 2 Leo. 109. See Swayne's case, 8 Co. 63 b; Sammer *&* Force, 2 Brownl. 208. Gilbert, however, as to the principal question, adds, that if the case (2 Leo.) were adjudged against the lands being charged in the copyholder's hands, yet that would not warrant the conclusion that the statute in no other part should extend to copyholds, "and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors should not have debt or distrain. The 37th sect. of 3 & 4 Will. 4, c. 42, authorizes the executors or administrators of any lessor or landlord to distrain for arrears of rent due to the testator or intestate in his lifetime. Vide extract from the act in the Appendix.

(*b*) Tuffnell *v.* Page, 2 Atk. 37; S. C. Barnard. 12; Attorney-General *v.* Barnes et ux., 2 Vern. 598; S. C. Gilb. Eq. Rep. 5; Skipwith's case, 3 Leo. 82, 83; S. C. Godb. 15; 4 Leo. 236; Roe *d.* Gilman *v.* Heyhoe, 2 Sir W. Black. 1114; Doe *d.* Cook *v.* Danvers, 7 East, 322; post, at the beginning of tit. "Devise;" Doe *v.* Harris, 8 Ad. & El. 1. But now see 1 Vict. c. 26, "for the amendment of the laws with respect to wills."

(*c*) Withers *v.* Withers, Amb. 151; 2 Watk. on Cop. 191; and see 2 P. W. 261.

(*d*) 1 Leo. 98, in Saliard *&* Everat's case; Gilb. Ten. 189; 2 Watk. on Cop. 195; ante, p. 48, n. (*u*). And see 2 Vict. c. 11, "for the better protection of purchasers against judgments, crown debts," &c. in the Appendix.

(*e*) Salherd *&* Evered's case, Ow. 37; but see S. C. (called Saliard *&* Everat), 1 Leo. 97, where it is reported differently, and as if the judges were of opinion that copyholds were within the equity of the statute.

N.B. By 35 Eliz. c. 2, s. 5, it was expressly provided, that if any person, having lands of copyhold or customary tenure, and being convicted of recusancy, repaired not home to his or her usual place of abode, not removing from thence above five miles distant, then the person so offending should forfeit such copyhold or customary land for the life of the offender (if his or her estate so long continued), to the lord of whom it was holden, unless such lord was a recusant convict, or seised or possessed in trust for such recusant copyhold or customary tenant, and in that case the forfeiture to be to the Queen.

(*f*) Brock *v.* Bear, 1 Bulst. 50; and see Smith's case, W. Jones, 272; 2 Inst. 737. [N.B. This act was passed to prevent lords of great wastes from converting the whole to building purposes, to the prejudice of agriculture.] See extracts from the act, post, 2d vol. pt. 3, "Articles inquirable in Court Leet [*cottages*]," and in the Appendix to Courts Leet.

(*g*) Gilb. Ten. 178; Hodgson *v.* Harris, 1 Lev. 273; S. C. 2 Keb. 536; 2 Watk. on Cop. 195; 1 ib. 321; 5 East, 524.

Nor 12 Car. II. c. 24, s. 8, authorizing a father to appoint a guardian to his children (*h*).

Nor the 29 Car. II. c. 3, s. 12; 14 Geo. II. c. 20, s. 9, of occupancy (*i*). [But the provisions of those statutes are made applicable to copyholds by the 6th sect. of 1 Vict. c. 26; see the Act in the Appendix; vide also ante, p. 52.]

Nor the 4 Geo. II. c. 10, authorizing trustees, being idiot, lunatic, or *non compos mentis*, or their committees, to convey (*k*); and consequently not within the 1 & 2 Geo. IV. c. 114, authorizing the Lord Chancellor, on petition, to order a conveyance to be made of lands, &c. vested in a lunatic trustee, or mortgagee, (not found so by inquisition:)—nor, as the author conceives, within the 6 Geo. IV. c. 74, for consolidating the laws as to conveyances of estates vested in lunatics, &c., although the word "surrender" was introduced in both those acts, and more pointedly in the latter; for *that* word was also used in the act of 4 Geo. II. [But see now 1 Will. IV. c. 60, ss. 2, 3, 5, 11, 12, 13, 20 and 22; and note that this act, like the act of 6 Geo. IV. as to infant trustees (ante, p. 84), extends the provisions to cases where the trustee may have some beneficial interest in the subject, or some duty to perform. Vide ss. 15, 16, 17, 18.]

Nor the 47 Geo. III. c. 74, "for more effectually securing the payment of the debts of traders," (and by which the real estates of a

But the 3d section of 3 & 4 Will. 4, c. 42 (passed 14th August, 1833), enacted, that an action of debt for a copyhold fine must be brought within three years after the end of the then present session, or within six years after the cause of action accrued; ante, p. 82. See extract from the above act in the Appendix.

(*h*) Gilb. Ten. (n. 172), pp. 476, 477; sed vide the authorities, ante, 83, n. (*f*).

(*i*) Smartle *v.* Penhallow, ante, p. 33, n. (*f*); Zouch *d.* Forse *v.* Forse, 7 East, 186.

(*k*) Ex parte Currie, 1 Jac. & Walk. 642. But it has been thought that copyholds were within the equity of the stat. See 1 Watk. on Cop. 63, 2d ed.; 1 Pow. Mortg. 205, 5th ed. In the above case of Ex parte Currie, *J. H.*, by settlement on the marriage of his daughter with the petitioner, covenanted to surrender copyholds to trustees in trust for himself for life, and after his death upon other trusts mentioned in the settlement. *J. H.* died without making any surrender, leaving the lunatic his only son and heir, having devised the premises to his daughter *E. C.* in fee, who was admitted, and continued in possession till her death, without calling for a surrender from the lunatic heir. The lunatic was also the heir of *E. C.* The petition prayed that his committee might be directed to surrender the copyhold to the uses of the settlement. Per Lord Chancellor, "It struck me at first that the lunatic was not a trustee within the old statute (4 Geo. 2, c. 10). The late statute (59 Geo. 3, c. 80), which has, I was going to say, extended the statute 43 Geo. 3, c. 75, to copyholds, but which has only removed some doubts whether that act applied to them, authorizes a sale, but then it is only for the debts and engagements of the lunatic. Therefore, if he is not a trustee within the old statute, I cannot make the order, and I cannot under that act execute a covenant against the lunatic." See Ex parte Birch, re Addy, 3 Swanst. 98.

trader, *which would be assets for payment of his specialty debts*, were made assets to be administered in equity for payment of all his debts, giving the specialty creditors a preference to simple contract creditors):—nor the 1 Will. IV. c. 47, whereby the last mentioned act was repealed, and the above stated provisions re-enacted in nearly similar language [see sect. 9]; and this, because copyhold lands were not assets for specialty debts (*l*).

Nor the 17th sect. of 59 Geo. III. c. 12, "to amend the Laws for the Relief of the Poor," and whereby all buildings, lands and hereditaments, purchased, hired or taken on lease by churchwardens and overseers for the purposes of that act, are to be conveyed demised and assured to the churchwardens and overseers, and their successors, in trust for the parish; and such churchwardens and overseers, and their successors, are thereby empowered to accept, take and hold the same buildings, lands and hereditaments, and all other buildings, lands and hereditaments belonging to such parish, in the nature of a body corporate, for and on behalf of the parish (*m*).

(*l*) Ante, p. 48. The provisions of 1 Will. 4, c. 47, were explained and extended by 2 & 3 Vict. c. 60. But qu. whether a trust of copyholds is not assets in the hands of the customary heir. Helley *v.* Helley, ante, p. 48, n. (*u*). And now see 3 & 4 Will. 4, c. 104, noticed ante, p. 48, and extracted in the Appendix.

(*m*) Att.-Gen. *v.* Lewin, 8 Sim. 366; 1 Coop. 51; Re Paddington Charities, 8 Sim. 620; ante, p. 85, n. (*i*).

CHAPTER III.

Of the Qualifications of the Lord of the Manor; and of his Grants, &c.

THE law does not regard either the quality of the person of the lord, or the quantity of his estate; for although he be not *sui juris*, or be seised of a limited interest only, yet may he make a voluntary grant in fee, or for such estate as is authorized by the custom of the manor, which grant would be good, notwithstanding the interest granted should continue longer than that of the lord; for instance, the infancy (*a*), idiotcy or lunacy of the lord of the manor,—or his being an outlaw (*b*), an excommunicate, a feoffee on condition, guardian in socage (*c*), tenant in tail, for life, or for years (*d*), or even at will (*e*); tenant by the curtsey, by statute or by elegit (*f*); or his being a bishop or other ecclesiastic seised in right of his bishopric or church (*g*),

(*a*) 3 Atk. 701; 1 Ves. 303, in Hearle *v.* Greenbank. But when the lord is an infant under fourteen, the courts should be held in the name of the socage guardian until the infant is out of ward. Appendix, tit. "Precedents of Court Rolls." Vide 3 & 4 W. 4, c. 106, by which a father is inheritable to his son, and qu. his right to socage guardianship?

(*b*) Even if the outlawry be for felony or murder, and the grant be made between the awarding of the exigent and the period of attainder; Co. Cop. s. 34, Tr. 71.

(*c*) If a feme guardian in socage should marry, yet the feme would continue guardian; Osborne *v.* Carden & Joye, Plow. Com. 293 b; 4 Vin. Abr. Baron & Feme, (E.) pl. 4; ib. (F.) pl. 3. But a guardian in socage has an interest joined with a trust. See 14 Vin. Ab. Guardian & Ward (Q.) pl. 10, marg.; and yet the husband shall not be guardian after her death; Willis *v.* Whitewood, Ow. 45. It should seem that the guardian may grant copies in his own name; post, tit. "Guardianship."

(*d*) The courts of the manor of Old Paris Garden, Christ Church, Surrey, are held under the title of a term of 2000 years, and the copyholders are the *cestuy que trusts* of the term.

(*e*) The author apprehends that a mortgagor *in possession* may hold courts, being *quasi* tenant at will to the mortgagee.

(*f*) Co. Lit. 58 b; Co. Cop. s. 34; Reeve *v.* Martin & Cooper, Noy, 41; Delavel *v.* Clare, ib. 85; Shoplane or Shopland *v.* Roydler, Cro. Jac. 55, 98; S.C. Ow. 115; S.C. (Sapland & Ridler), Godb. 143; 4 Leo. 238; Bedell *v.* Constable, Vaugh. 182; Wade *v.* Baker & Cole, 1 Lord Raym. 131; Lord Norris's case, Noy, 106; Neale *v.* Jackson, 4 Co. 26, 27; S. C. Cro. Eliz. 394; Clarke *v.* Pennifather, 4 Co. 23 b; 11 Co. 18 a; Kitch. 166, 167; 6 Vin. Cop. (G.); Com. Dig. Cop. (C. 3); 2 Roll. Abr. 41, pl. 3; 2 P. W. 122; Gilb. Ten. 189. It has however been doubted whether a mere tenant at will of a manor could hold a court and grant copyholds; but see Br. tenant by copy, pl. 27, 28, 29.

(*g*) 4 Co. 21 b, in Brown's case, cites 4 H. 6, 11; 21 H. 6, 37; ib. 23 b, in Clarke *v.* Pennifather; 1 Watk. on Cop. 26, cites 15 H. 7, pl. 13, fol. 10 a; Gilb. Ten. 197. But see Long *v.* Baker, 1 Roll. Rep. 202. Vide the case of Doe *d.* Burgess & Harrison *v.* Thompson, 5 Adol. & Ell. 532; post, 97.

will not disable him from making a voluntary grant; and in the latter case the grant would be good even against the king, on the vacancy of the see (*h*). So a grant by a dowress (*i*), or by the husband seised in right of his wife (*k*), is equally good to bind the inheritance or other estate authorized by the custom; but in the latter instance the wife's joining is essential (*l*); and this, because it is not the husband alone, but both husband and wife that are seised in right of the wife (*m*).

In *Blewit's* case (*n*) it was held that the committee of a lunatic could not grant a copyhold, as they had no estate, but that the lunatic by his steward (who was appointed by him by deed before he became lunatic) might grant according to the custom of the manor; and although it was in that case ordered that the steward should not grant without the privity of the committee and the sanction of the court, yet it would seem that such grants would be good in law.

The above rules apply as well to such estates as are surrendered by the copyholder, through the medium of the lord, as also to any copyholds which may escheat (*o*); and though by relation the manor is forfeited from a period prior to the grant, yet the grant will not be impeachable; as if the lord commit treason or felony, and afterwards, and before he is attainted, grant a copyhold estate held of the manor, such grant shall stand good (*p*).

So also if a manor be granted to *A. for life* on condition, and *A.* before, or even after the condition broken, but previous to entry for breach of the condition, grants out copyholds, such copies will be good, as the livery of seisin necessary to perfect the grant could only be avoided by entry or claim (*q*). It should seem, however, that the holding of a court, or any act of ownership by the lessor, after condition broken, will be equivalent to an entry (*r*).

(*h*) 4 Co. 22 a; Gilb. Ten. 198.

(*i*) Bragg *v.* Brooke, Godb. 135, pl. 156, in which it was held, that the widow suing for her dower, per nomen 100 messuages, &c., had no manor and could not grant. And see S. C. Gouldsb. 37, pl. 11; Ow. 4.

(*k*) 4 Co. 23 b; 8 Co. 63 b.

(*l*) Shoplane *v.* Roydler, Cro. Jac. 99; Co. Cop. s. 34, Tr. 68.

For the manner of holding a court, and of proceeding for the recovery of heriots, when the husband is seised in right of his wife, vide 1 Ca. & Op. 216.

(*m*) Dougl. 329; Tidd's Pr. 445; 2 Chit. on Plead. 243.

(*n*) Ley, 47, 48; and see Knipe *v.* Palmer, 2 Wils. 131; 6 Vin. Cop. (G.) pl. 15; ante, p. 52.

(*o*) Vide Covert's case, Cro. Eliz. 754, which was a grant of escheated copyholds during the time the temporalities were in the queen's hands by the vacancy of a see.

(*p*) Co. Cop. s. 34, Tr. 70, 71; 1 Watk. on Cop. 27, 28.

(*q*) Earl of Arundel's case, Dy. 342 b; S. C. Jenk. Cent. 242, ca. 26; S. C. Bendl. & Dal. 290; S. C. 4 Co. 24 a; Co. Cop. s. 34, Tr. 70, 74, 75.

A grant by the feoffee of an infant could not have been defeated by the subsequent entry of the infant; Co. Cop. s. 34, Tr. 75.

(*r*) Culth. Read. 38.

And again, if a man marry a feme seignioress under the age of consent, and afterwards she should disagree, though the marriage be void *ab initio*, yet grants made of copyholds before disagreement are good (*s*).

It is quite clear that upon a regrant of copyholds, the lord cannot diminish the ancient rent and services (*t*). Yet in *Smith* v. *Reynard* (*u*), it was said by *Ley*, C. J., that when copyhold lands come into the hands of the lord by escheat or forfeiture, he may regrant by copy, rendering a *greater* rent: and Kitch. (*v*), after stating that a lessee for years of a manor may grant copyholds for lives, adds, "but "such a termor of a manor cannot let a copyhold, reserving less rent "than the ancient rent, but ought to reserve the ancient rent, *or* "*more*, 4 M. 1." (*x*).

But we read in the commentaries of Mr. J. Blackstone (*y*), "in "admittances, even upon a *voluntary grant* from the lord, when "copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep "the lands in his own hands, or to dispose of them at his pleasure, "by granting an absolute fee simple, a freehold, or a chattel interest "therein, and quite to change their nature from copyhold to socage "tenure, so that he may well be reputed their absolute owner and "lord, yet if he will still continue to dispose of them as copyhold, he "is bound to observe the ancient custom precisely in every point, and "can neither in tenure nor estate introduce any kind of alteration (*z*); "for that were to create a new copyhold: wherefore in this respect

(*s*) Co. Cop. s. 34, Tr. 70, 71.

(*t*) Harris *v.* Jay, 4 Co. 30 a; S. C. Cro. Eliz. 699, 700; Clarke *v.* Pennifather, 4 Co. 23 b; Paston *v.* Manne, Het. 6; and see Kitch. 167.

(*u*) 2 Rol. Rep. 236.

(*v*) Page 167.

(*x*) And it is clear that if upon a surrender, with the reservation of a rent, the lord reserveth a greater rent, then is the reservation void only for the surplusage, and the admittance so far good as it accords with the surrender; Co. Cop. s. 41, Tr. 93.

(*y*) 2 vol. p. 370.

(*z*) And see also for this, Co. Cop. s. 41, Tr. 90. Coke in the same section says, "If the lord fail in reserving *verum et antiquum redditum*, as if he reserveth 10*s*. where the usual rent customably reserved is 20*s*., this may be a means to avoid the admittance. And the law is very strict in this point of reservation; for though the ancient accustomable rent be reserved according to the quantity, yet if the quality of the rent be altered, the heir may avoid this grant. For if the ancient rent from time to time hath been 20*s*. in gold, and the lord reserveth it in silver, this variance of the quality of the rent is in force to destroy the grant. So if the ancient rent hath been accustomably paid at four feasts in the year, and the lord reserveth it at two feasts."

In accordance with the above doctrine, where the lord of a manor, of which copyholds were held for lives, granted a garden for three lives (which garden had been formerly part of a copyhold tenement, but had been excepted out of some prior grants), reserving, not the ancient rent for the whole tenement, nor any apportioned part of such rent, but an entirely new rent of 2*s*., and the circumstances stated in the case were not such as to warrant the court in finding a special custom in support of

" the law accounts him custom's instrument. For if a copyhold for " life falls into the lord's hands by the tenant's death, though the " lord may destroy the tenure and enfranchise the land, yet if he " grants it out again by copy, *he can neither add to nor diminish the* " *ancient rent*, nor make any the minutest variation in other respects."

It has been doubted whether the lord may regrant out copyholds which come to his hands by escheat or forfeiture, or by purchase, in separate parcels, at apportioned rents (*a*); but the author is apprehensive that this disability can only apply to a lord having a limited interest in the manor, in analogy to cases of reservation of rent in leases by ecclesiastical bodies and tenants in tail; and even as to a lord *pro tempore*, his regrant at an apportioned rent would be binding on him, the author conceives, and avoidable only by the remainderman (*b*). When the lord is seised in fee, it should seem that he is as capable of apportioning the rent on a regrant of copyholds, as in the case of freehold lands held by an ancient quit rent, the effect of such apportionment being a release and extinguishment of the residue of the rent as to the particular lands regranted (*c*); and this conclusion is favoured by the rule, that coparceners, because they take by act of law, may regrant copyholds that escheat, at an apportioned rent (*d*); and by the settled doctrine that a rent service shall not be extinct by the lord's purchase of part of the tenancy, but shall be apportioned (*e*).

If lands grantable in fee escheat, the lord may grant them out again by copy for life only, and may regrant them after the death of the copyholder for life; or he may grant the reversion by copy to another (*f*).

It has been said that a lord who has a limited interest in the manor cannot grant a copyhold in reversion without a special custom (*g*); this

the grant, it was held to be void against the succeeding lord; Doe *d.* Rayer *v.* Strickland, 2 Q. B. Rep. 792.

(*a*) Co. Cop. s. 41, Tr. 91, where he says, " So if two copyholds escheat to the lord, the one of which hath been usually demised for 20*s.* rent, the other for 10*s.* rent, and he granteth them both by one copy for one rent of 30*s.*, this is not good; and so if a copyhold of three acres escheats, which hath ever been granted for 3*s.* rent, and the lord granteth one acre, and reserveth *pro rata* 1*s.* rent, *verus et antiquus redditus* is not reserved. But if a copyhold of six acres, which hath ever been demised for 6*s.* rent, escheated to two copartners, and one granteth three acres, reserving 3*s. pro rata*, this is a perfect reserving." And see Gilb. Ten. 200; Lord Mountjoy's case, 5 Co. 3 b; 2 Bl. Com. 370; 1 Watk. on Cop. 282.

(*b*) See Gilb. Ten. 200.

(*c*) See Kitch. 170, who says, that a rent of a copyholder may be apportioned as well as another rent; Doe *&* Huntington, 4 East, 271, 289.

(*d*) See 5 Co. 5 a, & b.

(*e*) Co. Litt. s. 222, 223.

(*f*) Kempe *&* Carter's case, 1 Leo. 56.

(*g*) March's Rep. 6, pl. 13; and see Gilb. Ten. 204, 205; Lord Oxford's case, Mo. 95, pl. 236; Co. Cop. s. 34, Tr. 74; Plimpton *v.* Dobynet, Gouldsb. 102, pl. 8; 1 Leo. 158; 3 Leo. 226, pl. 303; Godb. 140; 6 Vin. Cop. p. 3, pl. 1, and marg.

dictum is controverted by Mr. Watkins, who nevertheless thinks a custom to restrain a tenant for life or years from so granting might be good (*h*), of which the author apprehends there can be no doubt; but, even when there is no such custom, he agrees with Mr. Watkins, that the tenant of a limited interest in a manor may grant in reversion, so as not to exceed, with the existing copyhold interest, the quantity of estate authorized by the custom (*i*), and that such grant will be good, although the estate created by it does not fall into possession before the determination of the interest of the grantor; for it is only a grant of a portion of a greater interest, which the custom authorizes to be granted by the lord *pro tempore*, of whatever nature his estate may be (*k*): but see *Gay* v. *Kay* (*l*), in which the custom seems to have influenced the court in deciding that a dowress might grant for lives in reversion. In that case it was said by Popham, that the tenant of a particular estate cannot grant a copyhold by parcels, nor demise part and retain the residue; and, therefore, that if a feme be endowed of several copyhold tenements, she cannot grant part of them by copy in possession or reversion (*m*).

It is supposed that if there be two joint tenants of a manor, and a copyhold escheats, one of them may grant the entirety of this copyhold, each being seised *per mie et per tout* (*n*); yet this power has been doubted (*o*).

But whatever estate the lord may have in the manor, he must be *legitimus dominus pro tempore*, and be seised in possession, or at least must derive his power from a person who is the lord *pro tempore*: therefore a grant of copyholds, or a feoffment of the manor, to a stranger, by a disseisor or his heir, will not bind the disseisee, but

(*h*) 1 vol. on Cop. 40, cites Gllb. Ten. 322; Com. Dig. Cop. (C. 12.) Vide also Carew's case, Mo. 147, pl. 292; 6 Vin. Cop. G. pl. 9, and note; Dyer, 343.

(*i*) See Sapland & Ridler, infra.

(*k*) Vide Shoplane v. Roydler (or Shopland v. Rider) Cro. Jac. 99; Ow. 115; S. C. (Sapland & Ridler), Godb. 143; 2 Roll. Abr. 41 (Q), pl. 3; 2 P. W. 122, in the case of Lord C. J. Eyre v. The Countess of Shaftesbury. And in Davies v. Fortescue, Hetl. 54, it was said, that if a man be seised of a manor whereof there are divers copyholders admittable for life or for years, and he leaseth the manor to another for term of life, the lessor [lessee] may make a demise by copy in reversion to commence after the death of the first copyholders, and that is good enough, but the custom of some manors is to the contrary, and that is allowed. The principle that grants made by a lord, though having a limited interest only in the manor, will be good if in conformity with the custom, though the estate created may endure beyond the grantor's life, was recognized in the recent case of Doe *d.* Rayer v. Strickland, 2 Q. B. Rep. 792.

(*l*) Cro. Eliz. 661.

(*m*) Mr. Watkins, in noticing this dictum, adds a quære, 1 Watk. 25, n. (*n*); see ib. 47, n. (*c*), where the quære is not repeated.

(*n*) Co. Cop. s. 34, Tr. 76. And see 1 Watk. on Cop. 26.

(*o*) Lancaster v. Lucas, 1 Leo. 234; 2 Bl. Com. 183.

Tenants in common must join in convening a court; Hurlestone's case, Dyer, 377 a, marg.

may be avoided by him upon his recovery or entry (*p*). And grants of copyholds by a tenant in tail after discontinuance, and by the feoffee of a man seised in right of his wife, might, after the death of the grantor, have been avoided by the heir recovering in a formedon in the descender, and by the feme upon her entry, or recovery in a *cui in vitâ* (*q*). And so again is the law upon grants, made by the heir after death of the ancestor, of lands whereof the widow is endowed, which may be avoided by her (*r*); and also upon grants by copy made by an abator or intruder (*s*); or by a tenant at sufferance (*t*), as by a grantee *pur auter vie* continuing after the death of the *cestuy que vie*, or by the lessee for years of a tenant for life, who dies, or by the lessee *for years* of a manor, after breach of a condition annexed to his estate, and before entry of the lessor (*u*); and also upon grants made after an alienation in mortmain, and before the lord paramount has entered for a forfeiture; or by a parson (a manor being parcel of his glebe) made after institution and before induction; for, as to the temporailties, he is not complete parson before induction, though it is otherwise as to the spiritualities (*x*).

And if the lord of a manor, seised in fee simple, by his will direct that his executors shall grant copyhold estates according to the custom of the manor for the payment of his debts, &c., and they make voluntary grants accordingly, these grants are good, although they have no interest whatever in the manor (*y*); but such grants, the author apprehends, would not be good as against the dower of the wife of the lord (*z*).

Under a grant of copyholds in possession, the grantee may enter immediately, without any formal admittance, although his estate, strictly speaking, is not derived out of the lord's interest (*a*); and a grantee for life in reversion may also enter upon the determination of the prior estate, and bring an ejectment without admittance (*b*).

The admittance to a copyhold estate pursuant to a surrender is distinguishable from a voluntary grant; and as no interest whatever passes to the lord by the surrender, so the surrenderee has no legal

(*p*) Kitch. 167; Co. Cop. s. 34, Tr. 72, 73; Co. Lit. 58 b; Dillon *v.* Fraine, Poph. 71.

(*q*) Chudleigh's case, 1 Co. 140 b; French's case, 4 Co. 31; Co. Cop. s. 34, Tr. 73, 74; Co. Lit. 58 b; Kitch. 167, 173; Dillon *v.* Fraine, sup.

(*r*) Note 6 to Co. Lit. 58 b; Co. Cop. s. 34, Tr. 71.

(*s*) Co. Lit. 58 b.

(*t*) Rous & Artois, 2 Leo. 45; S. C. Ow. 28; S. C. Mo. 236; S. C. 4 Co. 24 a; Co. Cop. s. 34, Tr. 74.

(*u*) Co. Cop. s. 34, Tr. 74; contra, upon grants by the lessee *for life* of a manor, ante, p. 92.

(*x*) Co. Cop. s. 34, Tr. 74, 75.

(*y*) Co. Lit. 58 b; Co. Cop. s. 34, Tr. 72, 73.

(*z*) Dyer, 251 a; supra, n. (*r*).

(*a*) Swayne's case, 8 Co. 63 b; Co. Cop. s. 34, Tr. 69.

(*b*) Roe *v.* Loveless, 2 Barn. & Ald. 453.

title until the lord's acceptance of him is signified by admittance (*c*); and as an admittance is purely a ministerial act, so admittances made by disseisors, abators, intruders, tenants at sufferance, a devisee whose estate is afterwards avoided, or others having defeasible titles, are good (*d*).

So also as to an admittance by the heir before assignment of dower (*e*), or by a newly appointed bishop during the vacancy of the see (*f*).

And if the lord, having a particular or defeasible interest in the manor, die after taking the surrender, the lord in remainder shall be compelled to admit the surrenderee (*g*).

The disregard which the law has to the extent of the lord's estate, being confined to such acts as are done by him *secundum consuetudinem manerii*, and which do not arise out of his interest in the manor, it follows, that if a tenant for life of a manor grant a licence to a copyholder to alien or demise, and die, the licence will cease; for it only operates as a waiver of the right of the lord, who cannot grant a dispensation for a longer term in the tenancy than he has in the seigniory (*h*): and, *à fortiori*, a contract or agreement for a licence, made by a person having a life estate only, or other particular interest in the manor, will not bind the lord in remainder (*i*).

The lord of a manor is chancellor in his own court (*k*). In a case in 6 Eliz. (*l*), where the question was, whether a judgment on default upon a plaint in the nature of a writ of entry in the post, given in a court held at night, was good, Dyer, Welch and Benlowe held the judgment good, Dyer saying, that "if it were erroneous he could have no remedy by writ of false judgment, nor otherwise, but only

(*c*) Co. Lit. 60 a.

(*d*) Kitch. 167; Chudleigh's case, 1 Co. 140 b; S. C. (called Dillon & Fraine), Poph. 71; 4 Co. 24 a; Moore & Pitt, 1 Vent. 359; Rous & Artois, Owen, 28; S. C. 2 Leo. 46, 47, cites Stowley's case, Mo. 236, 237.

(*e*) Rous & Artois, Mo. 237.

(*f*) Ante, pp. 91, 92. In Doe *d.* Burgess and Harrison *v.* Thompson, 5 Adol. & El. 532, S. C. 1 Nev. & P. 215, it was decided that an admittance at a court held during the vacancy of the see, before any grant of the temporalties to the new bishop, and before he had been confirmed, but in his name, was good.

(*g*) Co. Lit. 59 b, cites Earl of Arundel's case, 17 Eliz.

(*h*) Munifas *v.* Baker, 1 Keb. 25, 26; Petty *v.* Evans or Pettis & Debbans, 2 Brownl. 40; 1 Rol. Abr. 511 (K.); 6 Vin. Cop. (I. d.); Gilb. Ten. 203, 299.

(*i*) See Awbry *v.* Keen, 1 Vern. 472.

(*k*) Co. Cop. s. 44, Tr. 100. This undoubted maxim strengthens the more general opinion that the lord may hold his own customary courts; post, p. 119. And the author submits, that the 86th section of the Commutation and Enfranchisement Act (4 & 5 Vict. c. 35), authorizing *the lord* (or steward) to hold customary courts without the presence of homagers, is declaratory of that rule of law.

(*l*) Mo. 69; Ca. 185; S. C. Ow. 63; And see Kitch. 162; 14 H. 4, 34; Winter & Jeringham, Dy. 251 b, pl. 92. Vide also 6 Vin. Court (G), pl. 10; Brown's case, 4 Co. 21 b; Shaw & Thompson, ib. 30 b.

by way of petition to the lord; and he ought in such a case to do right to the parties according to conscience, for he hath power as a chancellor within his own court."

And where a copyholder surrendered to the use of *A.* upon trust to levy certain monies, and afterwards to surrender to the use of *B.*, and the monies were levied, and *A.* refused to surrender; *B.* had exhibited a bill in the lord's court against *A.*, who was decreed to surrender, which he still refused; and the Court of King's Bench held, that the lord might seize, and admit *B.* (*m*).

If a copyhold escheat, or be forfeited, or become extinguished by unity with the manor, (for it is not material whether the copyhold comes to the lord, or the manor to the copyholder), and the lord make a lease, or a feoffment in fee, (though on condition, and he afterwards enter for the condition broken), or any other common law assurance; or if the land be actually extended upon a statute or recognizance acknowledged by the lord, or be assigned to his wife in a writ of dower, the custom (as the author has already shown (*n*)), is destroyed, and the land cannot afterwards be granted by copy, because during such estate it was not demised or demisable by copy of court roll; but if the lord keep the land in hand, or let it at will, he, or his heirs or alienee, may regrant at pleasure (*o*); and the grantee will hold discharged of the dower of the wife of the lord, and of any statute or recognizance executed by him (*p*).

But a lease by the king of an escheated copyhold is an exception to the rule that a common law assurance prevents a regrant (*q*).

And the act of the tenant for life or years of the manor will not affect the copyhold interest so as to prejudice the person in remainder; therefore, when in such a case the particular tenant creates a common law interest or a charge to affect the land, such interest or charge is not good against the estate of the remainder-man (*r*).

(*m*) 1 Leo. 2, pl. 2.

(*n*) Ante, pp. 14, 32.

(*o*) Ante, p. 15; post, tit. "Forfeiture," "Extinguishment"

(*p*) Swayne's case, 8 Co. 63 b; S. C. Mo. 811, 812; 4 Co. 24 a; Co. Cop. s. 34, Tr. 71; Podger's case, 9 Co. 107; Sammer & Force, 2 Browl. 208; Cham & Dover, 1 Leo. 16; Earl of Westmoreland's case, 3 Leo. 59; Sands & Hempston, 2 Leo. 109. And see Sneyd *v.* Sneyd, 1 Atk. 442. Sed vide Walton's case, Dy. 270 b; Mo. 94, pl. 233; 1 Leo. 4. In the above case of Sammer & Force, Coke, C. J. said, "that if a copyholder be of twenty acres, and the lord grants rent out of those twenty acres, in the tenure and occupation of the copyholder, (and name him), there if this copyhold escheat, and be granted again, the copyholder shall hold it charged, for this is now charged by express words."

(*q*) Ante, p. 15, n. (*k*). And the rule, that an exception of the Court Baron in a grant of the manor is void, does not apply to a grant by the king. Ante, p. 12.

Exception of courts and perquisites is good as to the perquisites, though bad as to the courts; Brown *v.* Goldsmith, Mo. 870; S. C. 1 Brownl. 175; Wheeler *v.* Twogood, 1 Leo. 118.

(*r*) Ante, p. 15; post, title "Extinguishment."

If the lord grant by copy, to hold for the lives of others and the longest liver of them *successively*, it will not give any estate to the *cestuy que vies* (*s*), unless there be a special custom in favour of such a construction (*t*); not even if the grant contain words of admittance of the *cestuy que vies* (*u*).

A grant by the lord to the father and son, there being but one son, is good; but if more than one son, it is void for uncertainty (*x*).

It is sufficient to create an estate, if the person intended to take is named in the *habendum* of a copy, though not in the grant, for in many manors it is customary to insert the words of grant and limitation in the *habendum* only (*y*).

As the greater estate includes the less, where the custom warrants a grant in fee simple, the lord may grant to one and the heirs of his body for life, for years, or any other estate (*z*): and under a custom to grant for three lives, a grant for the lives of two, or for the life of one only, will be good (*a*).

By the same rule, under a custom to grant to three persons, *habendum* to them successively *sicut nominantur* and not *aliter*, the lord may grant to *A.* and his assigns for his own life and the lives of two others (*b*): so under a custom to grant for life, he may grant *durante viduitate* (*c*); but not *e converso*, as an estate for life is greater than an estate during widowhood; and a grant for a greater estate than is prescribed by the custom would be void (*d*).

A custom to grant in fee, or for life *solummodo*, will authorize a grant to *A.* for life, with remainder to *B.* and the heirs of his body (*e*).

Again, the words *sequels in right*, *sibi et suis*, or *sibi et assignatis* (*f*), or *him* and *his*, for a term of [300] years *or more* (*g*), may by custom create an inheritance. And so also, by custom, the words *him* and *his* may create an estate for life only (*h*).

In the manor of Inkberrow in Worcestershire, the grant is to "*him and his*," which by the custom creates an estate for the term of the life

(*s*) Right *d.* Dean and Chapter of Wells *v.* Bawden et al., 3 East, 260.

(*t*) Doe *&* Goddard, 1 Barn. & Cress. 523; ante, pp. 24, 51.

(*u*) Right *&* Bawden, supra.

(*x*) Cob *v.* Betterson, Cro. Jac. 374.

(*y*) Brooks *v.* Brooks *&* Wright, Cro. Jac. 434; S. C. Poph. 125; and see Roe *v.* Loveless, 2 Barn. & Ald. 454.

(*z*) Co. Lit. 52 b; Co. Cop. s. 33, Tr. 65; Gravenor *&* Ted, 4 Co. 23 a; Stanton *v.* Barnes, Cro. Eliz. 373; Kempe *&* Carter, 1 Leo. 56; and see Doyle *&* Wood, Cro. Eliz. 431; S.C. Mo. 359.

(*a*) 2 Lord Raym. 995, 999; Ven *&* Howell, 1 Roll. Abr. 511.

(*b*) Smartle *v.* Penhallow, 1 Salk. 188; S. C. 3 Salk. 181; S. C. 2 Lord Raym. 999; S. C. 6 Mod. 66.

(*c*) Down *v.* Hopkins, 4 Co. 29 b; S. C. Cro. Eliz. 323; Smartle *v.* Penhallow, sup.; Co. Cop. s. 33, Tr. 65.

(*d*) Co. Cop. s. 41, Tr. 90; ib. s. 33, Tr. 65.

(*e*) Stanton *v.* Barnes, sup.

(*f*) Bunting *v.* Lepingwell, 4 Co. 29 b; 1 Watk. on Cop. 109.

(*g*) This custom exists in Warwickshire and other parts of England.

(*h*) Hide *v.* Welsh, Choice Ch. Ca. 165; 1 Watk. Cop. 109, n.

of the grantee, and the life of any wife he may leave at his death, and the life of his eldest son; and for want of a son, his eldest daughter living at the decease of the survivor of the grantee and his wife, and twelve calendar months after the death of such eldest son or daughter, usually denominated the dead man's year. And in that manor there are also copyholds for lives.

There are in many manors both copyholds of inheritance and for lives (*i*), and such a custom is good; but a grant of the latter for lives, with a remainder in fee, would be void as to the remainder (*k*).

It may here be proper to take some notice of the doctrine of escheat. The case of *Burgess & Wheate* (*l*), if well decided (*m*), is an authority, that if a man has got the legal estate, a court of equity will not take it from him, except for some person who claims an interest in the land by descent, devise, or purchase (*n*); and therefore it should seem that equity will not interpose between the lord and a trustee, when the *cestuy que trust* of copyholds dies without heirs, unless, perhaps, where the lord partakes of the trusts by having recorded them upon the manor rolls (*o*).

And in a case where the *cestuy que trust* died without heirs, equity refused to assist the heir of the trustee, who desired to perfect his legal estate by admission (*p*); but the Court of *B. R.*, under the same title, granted a mandamus to compel the lord to admit the heir, in order to enable him to try his right (*q*).

It is quite certain that if lands escheat, the lord shall have them discharged of any trusts to which he is not privy (*r*); and, equally so, that the lord will be bound by any condition or trust which he may consent to record, and therefore that a *cestuy que trust* would, in a case where the trusts had been entered upon the court rolls, be relieved in equity against the lord, claiming by escheat on the death of the trustee without heirs.

In no case, indeed, can the lord claim against his own voluntary grant, or his admittance under a surrender or any other existing title (*s*): so, in *The King* v. *The Inhabitants of Haddenham* (*t*), which

(*i*) Kitch. 170; Kempe & Carter, 1 Leo. 56.

(*k*) Kitch. 170.

(*l*) 1 Sir W. Bl. 167; S. C. 1 Eden, 177.

(*m*) In the case of Middleton *v.* Spicer, 1 Bro. C. C. 204, Lord Thurlow, C., said that Burgess & Wheate was determined upon divided opinions, and opinions which continued to be divided, of very learned men; and see the notes to the report in 1 Eden; vide also Walker *v.* Denne, 2 Ves. jun. 170, 277; Belt's Supp. to Ves. sen. 348, 349.

(*n*) 3 Ves. 757.

(*o*) Post, tit. "Trust Estates."

(*p*) Williams *v.* Lord Lonsdale, 3 Ves. 752, 754.

(*q*) Rex *v.* Coggan, 6 East, 431; S. C. 2 Smith, 418.

(*r*) Burgess & Wheate, ubi sup.; post, tit. "Trust Estates," "Forfeiture."

(*s*) Anon. 4 Leo. 88; Ca. 186; Wheeler's case, ib. 240; Marke *v.* Sulyard, Toth. 107.

(*t*) 15 East, 463.

was the case of a settlement by purchase, the pauper being an attainted person, but having been discharged by warrant under the sign manual, Lord Ellenborough, C. J., asked how the lord could impeach the title against his own admittance, upon the ground of an antecedent incapacity; and whether he must not proceed in all cases as for a subsequent forfeiture (*u*).

But an admittance upon a misconceived right will not be binding upon the lord as a new substantive grant; therefore, in *Right & Bawden* (*x*), it was held that the admittance of the *cestuy que vies* did not extend the grant, and, consequently, that the widow of the *cestuy que vie* first in succession could not hold (under a custom intitling the widow of a person dying seised to freebench) against the legal title of the lord of the manor.

Considerable doubts have been entertained whether even the lord of a manor could grant or admit to copyholds out of the manor, or, indeed, out of court; but both authorities and principle were decidedly in favour of the lord's right to grant or admit, even out of the manor, neither a voluntary grant, which affects the lord's interest only, nor the mere ministerial act of admission upon a surrender, requiring the presence and sanction of the tenants of the manor (*y*).

Lord Coke (*z*) says, "the lord of a manor may make admittances out of court, and out of the manor also, as at large appeareth in my reports."

And one of the resolutions in *Melwich's case* (*a*) was, that the lord himself might make a grant or admittance of a copyhold out of the manor at what place he pleased.

And again we read in Coke's Copyholder (*b*), "In this customary power of admittance the lord doth somewhat outstrip the steward; for the lord may make either admittances upon voluntary grants, admittances upon surrenders, admittances upon descents, in any place where he pleaseth out of the manor, but so cannot the steward (*c*).

Scroggs, in treating of the authority of the lord and steward (*d*), says, "In this customary power [admitting to copyholds], the lord doth somewhat exceed the steward; for the lord may make admittances either upon voluntary grants, or upon surrenders, or upon descents,

(*u*) See the case of Pay *v.* Guybon & Brown, Cro. Eliz. 582, and quære, if the lord grant a copyhold to *A.* on certain conditions, which are only in part performed, and *A.*, after breach of one of the conditions, surrender to *B.*, whom the lord admits, whether the lord can enter for a subsequent breach of the other conditions?

(*x*) 3 East, 260.

(*y*) See 1 Leo. 289, in Lord Dacre's case.

(*z*) Co. Lit. 61 b, s. 78.

(*a*) 4 Co. 26 b.

(*b*) S. 44, Tr. 101.

(*c*) But see ib. s. 46, Tr. 107; post, "Office of Steward."

(*d*) P. 87; and see Doe & Whitaker, 5 Barn. & Adol. 435; post, pp. 103, 112.

in any place out of the manor; whereas the steward can only make such admittances within the manor."

And C. B. Gilbert (*e*) says, the passage 1 Inst. 58 a, (that a Court Baron cannot be held off the manor,) "plainly shows that a lord cannot make admittances or grants at a court held off the manor, no more than the steward. For Coke says, that if the Court Baron be held off the manor, it is void; and he there speaks of a Court Baron as including the copyholder's court, where the steward is judge: but, as hath been said before, a lord may make admittances or grants out of the manor at what place he pleases, which are Coke's words, and must be understood, not at a court, but at some other time, or else he contradicts himself" (*f*).

The case of *Clifton* & *Molineux* (*g*) appeared to the author to be an authority, that if the court itself was void, all the grants and admittances which took place therein, though made by the lord himself, were void also.

(*e*) Ten. p. 250; and see 1 Watk. on Cop. 253; 6 Vin. Cop. n. (b).

(*f*) The following important provisions in the late Commutation and Enfranchisement Act, (4 & 5 Vict. c. 35,) referred to ante, p. 6, &c., and which will be found in the Appendix, merit particular notice in the present chapter.

The 86 sect. enacts, that after 31 December, 1841, the lord, or the steward, or his deputy, may hold a customary court, although there shall not at the time be any person holding of the manor by copy of court roll, or being such tenants, none or only one of them shall be present; but that no proclamation made at the court shall bind the title or interest of any person, unless served with notice thereof within one month after the meeting [court].

[N.B. The act does not dispense with any of the accustomed forms and usages of convening and holding a customary Court Baron, except only the presence of homagers.]

By the 87 sect. it is enacted, that after 31 December, 1841, the lord, or the steward, or his deputy, may, either within or out of the manor, and without holding a court, grant any lands, parcel of the manor, to be held by copy of court roll, or according to the custom, which the lord shall be authorized so to grant out.

The 88 sect. enacts, that after 31 December, 1841, the lord, or the steward, or his deputy, may, either within or out of the manor, and without holding a court, admit any person entitled to be admitted tenant to any lands, parcel of the manor, to be held by copy of court roll, or according to the custom.

By the 89 sect. it is enacted, that after 31 December, 1841, every surrender and deed of surrender which shall be accepted by the lord, and every will and codicil, a copy whereof shall be delivered to the lord, or to the steward, or his deputy, either at any such court to be holden without the presence of homagers, or out of court, and every grant and admission by the lord, or the steward, or his deputy, pursuant to the act, shall be forthwith entered on the court rolls of the manor; and that every such entry shall for all purposes be deemed and taken to be an entry made in pursuance of a presentment at a court by the homage assembled thereat.

And the 90 sect. enacts, that after 31 December, 1841, the presentment of a surrender, will, or other instrument or fact, shall not be essential to the validity of any admission; see post, title "Steward's Fees."

(*g*) 4 Co. 27 a; and see Melwich & Luter, 4 Co. 26 b.

The case of the Duke of *Suffolk* (*h*) was also an authority against the validity of any grant or admittance by the lord at a court not legally holden. So also was the case of *Marke* & *Sulyard* (*i*), in which the party was compelled to seek relief in equity against the lord by whom the grant was made.

The author was also much inclined to think that it was necessary that a grant or admittance made even by the lord himself out of court should be entered on the rolls of the manor before it could be deemed to have had any legal effect; for how could the grantee or party admitted be said to hold by copy of court roll, or, in other words, to be a *copy*-holder, until such entry had been made (*k*)?

Kitch. (*l*) says, "The admittance makes a copyholder, and the entry of that in court makes him tenant by copy of court roll; for copyholder is he which holdeth by copy of court roll."

And Calthrop in his readings (*m*) observes, "If the lord in open court doth grant a copyhold land, and the steward maketh no entry thereof in the court rolls, this is not good, though it be never so publicly done; nor no collateral proof can make it good."

But in the case of *Doe* d. *Leach and others* v. *Whitaker* (*n*), the grant, although made at a court holden out of the manor, and therefore void, was deemed to be valid, "it being one of many acts which might be done by the lord without the form and machinery of a court."

(*h*) Cited Cro. Eliz. 814, in Sands *v.* Drury. It was adjudged in that case "that where one had two manors, and granted a copyhold of the one manor at the court of the other manor, it was a void grant; for it cannot be a copyhold according to the custom of a manor whereof it is not parcel."

(*i*) Toth. 107, ed. 1671, [p. 45 in ed. of 1649.] The report is thus given: "A copyhold granted at a court kept out of the manor, confirmed against the lord which made it; Marke *contra* Sulyard, 25 Eliz."

(*k*) Lit. s. 75; Kite *v.* Queinton, 4 Co. 25 b.

(*l*) P. 165; and see ib. p. 162.

(*m*) P. 37.

(*n*) 5 Bar. & Ad. 409; ante, p. 101; post, p. 112. According to that decision, the grantee would acquire the legal customary interest by the mere entry of the grant on the rolls out of court, and although no court had been subsequently holden. Sed quære de hoc?—Note. In the above case of Doe & Whitaker, it was urged on the part of the defendant, in support of the rule for entering a nonsuit, that even if the grant could be sustained as an act done out of court, yet that the plaintiff had no *legal* title for want of the production at the trial of an instrument of grant, and evidence of the presentment and inrolment of such a grant at a court legally holden, so as to constitute the grantee tenant by copy of court roll; and the defendant's counsel repeatedly adverted to the fact, that no court had been held subsequently to that which was deemed to be a void court, it not having been held within the precincts of the manor. Vide the 89 sect. of 4 & 5 Vict. c. 35, referred to ante, p. 102, note (*f*).

What things are demisable by Copy.

It should seem that even a manor may be demisable by copy (*o*); but it has been said that the lord of the customary manor could not keep Courts Baron to have forfeiture, or hold pleas in a writ of right (*p*).

A mill may be granted by copy (*q*). Tithes are also demisable by copy (*r*). And so is common appendant (*s*), and also common of pasture without land, as it may be parcel of a manor (*t*). A rent charge or a rent seck may be parcel of a manor, and may therefore be granted by copy (*u*). So also underwood, without the soil (*x*), herbage or vesture of land, forecrop or *prima tonsura* (*y*), or other profit which lies in tenure (*z*), or which is appendant to that which lies in tenure, as an advowson, fair, market, piscary, or the like (*a*); though the offices of stewardship or bailiwick of a manor (*b*), or other like profit, not lying in tenure (*c*), are not grantable by copy.

It is laid down in some books of authority that *advowsons in gross*, and even rents, commons in gross, and the like incorporeal hereditaments (*d*), cannot be held by any manner of service, and therefore are not grantable by copy; although it is admitted by the same authors, that "what things soever are parcel of the manor and are of perpetuity" (*e*) may be granted by copy; and Sir Edward Coke fur-

(*o*) Rex *v.* Stanton, Cro. Jac. 259; S. C. (called Rex *v.* Staverton,) Yelv. 190; Moor *v.* Woodgame, ib. 327; S. C. (called Sir H. Nevil's case,) 11 Co. 17 a; Supp. Co. Cop. s. 17, Tr. 200; Co. Lit. 58 b; See Jenk. Cent. 274, ca. 95; 6 Vin. Cop. (E.) pl. 5; Com. Dig. Cop. C. 1. [Aylesham in Norfolk is said to be held by copy, vide Compl. Eng. Cop. p. 50.] But see 1 Watk. on Cop. 32, 33; Scroggs, 94.

(*p*) Rex *v.* Stanton or Staverton, sup.

(*q*) Green & Harris, cited 4 Leo. 241, in Ward's case; Godb. 127.

(*r*) 1 Roll. Abr. 498, A. pl. 1, Cro. Eliz. 413, cites Sir John Bourn's case as so adjudged; see also Musgrave *v.* Cave, Willes, 324; cont. Sands *v.* Drury, as reported Cro. Eliz. 814; but see S. C. N. 9, to Co. Lit. 58 b, citing Hal. MSS.; vide also Supp. Co. Cop. s. 17, Tr. 200; Com. Dig. tit. Cop. (C. 1); 6 Vin. Cop. E. pl. 1.

(*s*) Cro. Eliz. 814, in Sands *v.* Drury; Co. Cop. s. 42, Tr. 97; Calth. 41.

(*t*) Musgrave *v.* Cave, sup.

(*u*) Com. Dig. Cop. (C. 1); 2 Roll. Abr. 120 (B); Musgrave *v.* Cave, sup.; Gilb. Ten. 331.

(*x*) Hoe & Taylor, 4 Co. 30 b, 31 a; S. C. Cro. Eliz. 413; S. C. Mo. 355; Co. Lit. 58 b; Co. Cop. s. 42, Tr. 97.

(*y*) Co. Lit. 58 b; Co. Cop. s. 42, Tr. 97; Hoe & Taylor, sup.; Cro. Eliz. 814, in Sands & Drury; Jenk. Cent. 274, ca. 95; 6 Vin. Cop. (E.) pl. 2, 3, 4; 1 Roll. Abr. 498 (A.), pl. 2; Stammers *v.* Dixon, 7 East, 200.

(*z*) Hoe & Taylor, sup.; Co. Cop. s. 42, Tr. 97; Jenk. Cent. 274, ca. 95.

(*a*) Hoe & Taylor, sup.; Com. Dig. Cop. (C. 1); 6 Vin. Cop. (E); Co. Lit. 58 b.

(*b*) Calth. 41; Co. Cop. s. 42, Tr. 97.

(*c*) Co. Cop. s. 42, Tr. 97.

(*d*) Co. Cop. s. 42, Tr. 97; Calth. 41; Gilb. Ten. 331, 332.

(*e*) Co. Cop. s. 42, Tr. 97; Gilb. Ten. 332.

ther says that a grant may be made by copy of twenty loads of wood, to be taken by the grantee (*f*).

The above case of *Musgrave & Cave* furnishes useful and interesting comments as to the demisable quality of common in gross, rent charges, &c., and which appear to be well deserving of notice in this place. It was an action of trespass in the Court of Common Pleas, and the question, whether a right of common insisted on by the defendants in their plea was well pleaded or not, came before the court on demurrer; the objection being, that it did not sufficiently appear what sort of right of common it was; the court, however, decided that it was common appurtenant, and so there was no weight in that objection. But Willes, C. J., in delivering the judgment of the court, stated that there was another objection made at the bar which staggered the court a good deal more, but which, upon consideration, they thought was capable of a plain answer; and in his concluding observations on that point, the chief justice thus stated the opinion of the court:—

"The objection is, that this common cannot be parcel of the manor, and yet be demised and demisable by copy of court roll; because as soon as it is once severed by such demise and granted by itself without any land with it, it ceases to be part of the manor, and so can never afterwards be granted again by copy; because nothing can be granted by copy but what is parcel of the manor. This is the strength of the objection.

"To this it was answered, that not only common, but several other things merely incorporeal, may be granted by copy of court roll; and several cases were cited to this purpose. In Co. Lit. 58 b, it is said that the herbage or vesture of land, underwoods, and whatever concerneth lands and tenements, may be granted by copy of court roll. And he goes further, and says that a fair or market appendant to a manor may be granted by copy. In 1 Roll. Abr. 498, A. pl. 1, it is expressly said that tithes may be granted by copy of court roll (*g*); and though the contrary seems to have been determined in the case of *Sands* v. *Drury*, Cro. Eliz. 814, yet that case, when considered, is a case of no great authority as to this point; first, because the judges there were divided in their opinion as to this; for though they all agreed in the judgment, some of them went upon another reason, because it was not found in the special verdict that the tithes were demised by copy time out of mind; and Popham, J., who held that tithes were not demisable by copy, went upon this reason, that they could not be parcel of a manor, which I shall show by and by to be a mistake, and that they may be parcel of a manor; and if so, his

(*f*) Cop. s. 42, Tr. 98; and see Gilb. Ten. 332.

(*g*) Vide Harg. Co. Lit. 58 b, n. 9.

reason fails: and they all in that case agreed that common and *prima vestura prati* might be granted by copy. In the case of *Hoe* v. *Taylor*, Moor, 335, it is held that underwood, tithes, a market or piscary, may be granted by copy of court roll, if the custom will warrant it; and it is said there that the market of Crockham or Crockenham, in the county of Somerset, has always been granted by copy. And the same is said in the same case, as reported in 4 Co. 30 b, 31 a.

"I own that when these cases were first cited, I thought that they only meant that when copyhold land, to which common or any other profit is appurtenant, was granted by copy, the common or other thing appurtenant will pass with the land; and taking them in this sense, the cases cited would not at all help the present case, because here no land is granted, but only a bare right of common. But upon looking into the cases and considering them, I find that they go farther, and that the meaning of them all is, that common, tithes and other things, may pass by copy of court roll by themselves, without any lands.

"What my brother Draper said the last time plainly shows how this may be, and has removed all the doubts that we had in relation to this matter. For, as we are upon a demurrer, if this right of common, as pleaded, can be good upon any supposition whatsoever, we must take it to be so. Now, supposing it to be as my brother Draper suggested, that Old Field was formerly part of the manor, and that the lord, time before memory, granted away Old Field, reserving common of pasturage therein for 360 sheep, this right, so reserved, will certainly remain parcel of the manor; as if the lord grant away his demesnes, reserving a rent, this rent is undoubtedly parcel of the manor, as is held in 2 Rol. Abr. pl. 4, who cites for this an old case in 22 Ass. 53. Nay, that book goes still further; for in the same page, pl. 2 and 3, it is expressly held that seck rent may be parcel of a manor; as if the lord, by his deed, whereby he reserves the rent, or by a deed subsequent, release all the services to the tenants, in which case the rent will undoubtedly become rent seck, yet it is parcel of the manor; for which also he cites the same book of Assize, and also 31 Ass. 23, which case is much stronger than the present.

"Taking it therefore that this common may be parcel of the manor, there is but one difficulty remaining, how it can be demisable by copy after it has been once so demised, because such demise severs it from the manor, and turns it into a common in gross, and so it ceases to be parcel of the manor; and if it ceases to be parcel of the manor, it can never be demisable again by copy. But there is a plain answer to this when the nature of the case is thoroughly considered. For if the lord, by a common law grant, had demised this common for years, though it had been holden as common in gross during the term, after

the end of the term it would be common appurtenant, and parcel of the manor again. And every copyhold, though of inheritance, is in the eye of the law considered as a tenancy at will, and consequently a much less estate than that of a term of years. Though, therefore, it should be taken to be in gross during the estate of the copyholder, as soon as it comes again into the hands of the lord, it is common appurtenant again, and parcel of the manor as before.

"This answer, if there were no other, would be sufficient to remove the objection. But I think that the matter may be carried still further, and that it is common appurtenant even whilst it is enjoyed by the copyholder, for the same reason as copyhold lands are always considered in point of law as part of and as the demesnes of the manor, even whilst they are enjoyed by copyholders of inheritance.

"The case may be put in the same manner of tithes. Suppose a spiritual person lord of a manor, and possessed of lands parcel of his manor, which were tithe free in the hands of the lord, and that from time beyond memory he had granted away these lands, reserving the tithes, the tithes in this case would remain parcel of the manor; and if the manor came to the crown on the dissolution of the monasteries, and was afterwards granted by the crown to a subject, these tithes still remain parcel of the manor, and if the custom will warrant it, may for the same reason be granted by copy of court roll. So a fair or a market appendant may be granted by copy, because a grant by copy to hold at the will of the lord, according to the custom of the manor, does not destroy the appendancy; but they remain still parcel of or appendant to the manor, notwithstanding such grant (*h*).

"We think therefore that all the objections to this plea have received an answer."

Of Persons incapacitated to take as Grantees.

A feme covert may be a copyholder, but the wife of the lord of a manor is incapable of taking under an immediate grant from her husband. So where on the death of the last tenant the lord demised by copy to his wife, to hold to her and two others for their lives, and the life of the iongest liver of them successively, the court held that it was a void grant (*i*).

It has been frequently said, that the same persons as are capable of a grant at common law, are capable of a grant by copy, and that *he* shall be a person sufficient to be a copyholder, who is able of him-

(*h*) See Doe *d.* Gibbons, Bart. *v.* Pott, Dougl. 709; and Roe *d.* Hale *v.* Wegg, 6 D. & E. 708.

(*i*) Firebrass *d.* Symes *v.* Pennant, 2 Wils. 254.

self, or by another, to do the service of a copyholder; but the latter position, taken in a limited sense, is controvertible; for though, under both positions, an infant or a feme covert may be a copyholder, as the guardian of the infant, and the husband of the feme copyholder may do the services, yet the latter position would exclude a person *non sanæ memoriæ*, an idiot, a lunatic, an outlaw, or an excommunicate, from receiving a grant of a copyhold estate; and still we find it laid down that persons under those disabilities, as well as an infant and a feme covert, may be grantees of copyholds (*k*), and that the purchase by the wife shall stand in force until her husband disagrees.

The king cannot be a copyholder either in his corporate or natural capacity (*l*); but if a person who holds a copyhold estate becomes king, the copyhold is suspended, for it would be beneath the dignity of a king to perform such services as those to which copyholds are subject: yet after his decease, the next person entitled (not being king) shall hold by copy, and the tenure be revived (*m*).

It is generally supposed that a corporation, either aggregate or sole, cannot hold lands by copy of court roll, for the effect would be to deprive the lord as well of suit and service as of his fines (*n*). But Sir Edward Coke (*o*) says, "If a copyhold be granted to a *Dean and Chapter*, or to a *Mayor and Commonalty*, without any express estate, a perfect estate in fee passeth." And again, "If a copyhold be granted to an *Abbot* and to *his heirs*, an estate for life only passeth."

And supposing a surrender to be made to *A.*, to the use of a charity, it is clear that the lord would be compellable to admit *A.*,

(*k*) Co. Cop. s. 35, Tr. 79; Shepp. Ct. Keep. 115; 6 Vin. Cop. (L.) pl. 6, cites Calth. Read, 51, 52, p. 40, 2d ed.

(*l*) Hard. 434, in Duke of York *v.* Sir John Marsham; ib. 436, citing the King *v.* Holland; (but see the King *&* Holland in Sty. 41); Field *v.* Boothsby, 2 Sid. 82; 1 Mod. 17.

(*m*) 1 Watk. on Cop. 31, cites Co. Litt. 1 b; Dy. 2 b, pl. 8, marg.; ib. 154 b, pl. 18; and adds, yet there are many instances of kings holding lands of a subject in ancient days; see 1 Rob. Scotl. 8, and N. Stuart Diss. Antiq. Engl. Constit. p. 3, s. 3, p. 160, n. (6).

(*n*) Duke's Ch. U. by Bridg. 135. Mr. Booth inclined to the opinion that a corporation *aggregate* or *sole* could not be a copyholder; see 1 Ca. & Opin. 186. Mr. Watkins was of the same opinion, 1 vol. on Cop. 31, 242. So also was Mr. Hargrave, 1 Watk. on Cop. 242 (n.).

See as to the use of the word "successors," in a conveyance to a corporation sole, ib.; and also Co. Lit. 94 b.

"A dean and chapter, and other bodies politic, cannot do homage, for that shall be done in person, and a corporation cannot appear in person, but only by attorney," &c., Bro. Fealty, 15; Co. Lit. 66 b; 2 Lord Raym. 864.

It has been decided that where a corporation sole or aggregate becomes possessed of lands, which, in the hands of a tenant, are liable to seignorial rights, as fines and forfeitures on conviction of crimes, &c. the corporation is liable to indemnify the lord in respect of such loss; Thornton *v.* Robin, 1 Moore, P. C. 438, affirming the judgment of the Court of Jersey.

(*o*) Cop. s. 49, Tr. 113, 114.

because he would receive no prejudice thereby, as he would have his tenant in the person of *A.* (*p*).

It has been said that an alien may be a copyholder, and that neither the king, nor the lord of the manor, could seize the copyhold lands (*q*). But Mr. Watkins was of opinion that an alien could not hold by copy (*r*). And the better opinion would seem to be, not only that an alien could not compel the lord to admit him to copyhold land, but that the lord and not the king shall have the advantage of any purchase of copyholds made by an alien (*s*); and this chiefly because the king cannot be tenant to the lord of a manor (*t*).

But there are grounds for contending, that upon a grant of copyholds in trust for an alien, the king could claim *the profits* by virtue of his prerogative (*u*). p. 465

And the author apprehends that if the lord will grant to or admit an alien, or any incapacitated person whatever, the lord's interest will be thereby concluded (*x*).

Of the Office and Power of the Steward, &c. (*y*).

Lord Coke, in his discourse on the antiquity and nature of manors and copyholds, very justly observes, that from the measure of authority and confidence committed to the steward of a manor, the lord would do well to be very careful in making his choice; for, if he be defective in any one of these three qualities, knowledge, trust, or

(*p*) Ranshaw *v.* Robotham, 43 Eliz. in Canc.; Duke's Ch. U. by Bridg. 135.

(*q*) Calth. Read. 40; 6 Vin. Cop. (L.) pl. 7.

(*r*) 1 vol. on Cop. 31; and see 6 Vin. Cop. (L. e. 2), pl. 2, 3; Eaton's case, Lit. Rep. 23; post, at the end of tit. "Forfeiture."

(*s*) Per Harrison, Lecturer Lin. Inn, 1632; Dy. 2 b, marg., 302 b, marg.; post, at the end of tit. "Forfeiture."

(*t*) 1 Mod. 17, in Smith *v.* Wheeler; 1 Pow. Mortg. 106 n. (A.)

(*u*) Post, at the end of tit. "Forfeiture."

(*x*) Ante, p. 100. Vide also as to incapacities of grantees, Sugd. Vend. & P. 569 et seq. 8th ed.

The 7 & 8 Vict. c. 66, for amending the laws relating to aliens, enables every person born out of her majesty's dominions, of a mother being a natural born subject, to take any real or personal estate: the fourth sect. of the act authorizes every alien, being the subject of a friendly state, to take and hold every species of personal property, except chattels real: and the 5th sect. authorizes every alien, residing in any part of the United Kingdom, and being the subject of a friendly state, to hold lands, houses or other tenements, for the purpose of occupation or trade, for any term not exceeding twenty-one years.

(*y*) See as to powers given by the late *commutation* and *enfranchisement* act (4 & 5 Vict. c. 35,) to stewards, as well as lords, to hold courts without the attendance of homagers, and to make grants and admittances either in or out of the manor, and without holding a court, ante, title "Qualification and Powers of the Lord of the Manor," p. 102, note (*f*); vide also post, title "Steward's Fees."

diligence, the lord may be much prejudiced; and he quotes the counsel given to the lord by Fleta:—"Provideat sibi dominus de senescallo circumspecto et fideli, qui in legibus consuetudinibusque provinciæ, et officio senescalciæ, se cognoscat, et jura domini sui in omnibus tueri affectet, quique ballivos domini in suis erroribus et ambiguis sciat instruere et docere, quique egenis parcere, et nec prece, vel precio, velit à tramite justitiæ deviare, et perversè judicare" (*z*).

In the king's manors a steward must be appointed by patent (*a*). And in the case of *Harris & Jays* (*b*), a grant made in full court by the queen's auditor and surveyor was held to be void, such officer not having power to retain a steward, and the grant, though made in court, being voluntary, and distinguishable therefore from an act of necessity.

By the act of 10 Geo. IV. c. 50, s. 14, the commissioners for the time being of his majesty's woods, forests and land revenues from time to time are authorized to appoint such persons as they shall think fit to be the stewards of any hundreds, honours, manors or lordships, being part of the possessions and land revenues of the crown, to which the act relates, with power and authority to hold and keep all and singular Hundred Courts, Courts Leet, views of Frankpledge, Courts Baron, and Customary and other Courts within the limits and precincts of such hundreds, honours, manors, or lordships respectively, and to perform and execute all things belonging or incident to such offices (*c*).

The appointment of a steward by a corporation must also be by deed (*d*); but in all other cases a steward may be appointed by parol (*e*), though not, the author apprehends, for life (*f*).

It is, however, usual and proper in every case to constitute the chief steward of a manor by deed; and a proper form of appointment will be found in the Appendix.

(*z*) Co. Cop. s. 45, Tr. 103; and see Co. Lit. 61 b; 9 Co. 48 b, in Earl of Shrewsbury's case.

(*a*) Co. Cop. s. 45, Tr. 104.

(*b*) Cro. Eliz. 699; S. C. 4 Co. 30 a; see this case post, p. 115.

(*c*) No seisin is acquired by the commissioners under that act, but the king or queen is still lord or lady of the manor. See the case of The Queen *v.* The Steward of the Manor of Richmond, post, title "Mandamus."

(*d*) Co. Cop. s. 45, Tr. 105; Owen *v.* Saunders, 1 Lord Raym. 160, 161; see also Kitch. 164; Nels. Lex Man. App. pl. 34.

(*e*) Co. Cop. s. 45, Tr. 104; Co. Litt. 61 b; Harris & Jays, ubi sup.; Lady Holcroft's case, 4 Co. 30 b; Smithson *v.* Cage, Cro. Jac. 526; Blagrave & Wood's case, 1 Leo. 227, 228, cites 21 Hen. 7, 36, 37; S. C. Godb. 142; Down *v.* Hopkins, 4 Co. 30 a; Dy. 248, pl. 79; 19 Vin. Abr. "Steward," (F.); Com. Dig. Cop. (R. 5); ib. "Leet," (M. 1); Scroggs, 88.

(*f*) Blagrave & Wood's case, sup.; Dy. 248; Owen *v.* Saunders, 1 Lord Raym. 159.

A steward, whether *de jure* or *de facto*, may execute any ministerial act in court, because the tenants are not compellable to enquire into the lawfulness of his authority (*g*). So Kitch. (*h*) says, "And if one holds but one court by appointment of the lord, where another hath a patent to be steward, and is absent, surrender taken and entered in this court is good, and also is admittance." But even a steward *de jure* cannot grant in opposition to the express commands of his principal (*i*); neither would a grant by him diminishing the ancient rent and services be good (*k*).

The law is as little inclined to examine the imperfections of the steward's person, as the unlawfulness of his authority:—So if the steward of a manor is under any disability, as being an idiot, *non compos mentis*, an outlaw, or excommunicate, yet it is said, that such acts as he shall do as incident to his office, and therefore as judge, or, at least, as custom's instrument, cannot be avoided (*l*); and the author is apprehensive, that although an infant cannot sit as judge in a Court Leet, yet he may preside not only in a Court Baron, where the suitors are the judges, but also in a Customary Court, and do all acts of a ministerial nature, provided he be of years of discretion (*m*), especially if the office is granted so as to be exercisable by a deputy (*n*).

Mr. Watkins urges (*o*), on the authority of *Melwich's* case (*p*), and *Dudfeild & Andrews* (*q*), that a steward might have *admitted* not only out of court, but, as a consequence, out of the manor; and he enforces his argument in favour of the steward's power to admit *out of court*, by adverting to the principle, that copyholders had not originally a negative voice upon the admittance of a new tenant, and, therefore,

(*g*) Mo. 112, in Knowles *v.* Luce; Co. Cop. s. 45; Harris *v.* Jays, ubi sup.; Hippsly *v.* Tucke, 2 Lev. 184; Parker & Kett, 1 Lord Raym. 658; Selk. 95; Comy. 84; 12 Mod. 467.

(*h*) P. 162, cites 2 Ed. 6, tit. 26.

(*i*) Harris & Jays, sup.; Scroggs, 91.

(*k*) Cro. Eliz. 699; Gilb. Ten. 222, 315.

(*l*) Co. Cop. s. 45, Tr. 104, 105; Gilb. Ten. 316.

(*m*) Scambler & Waters, Cro. Eliz. 637; S. C. cited Co. Lit. 3 b, n. 4; 1 Roll. Abr. 731; 2 ib. 153; Mar. 41; and see Scroggs, 89; vide also Yonge *v.* Stowell, Cro. Car. 279; S. C. Sir W. Jones, 311; Gilb. Ten. 315 to 318. But see Co. Lit. 3 b, where Lord Coke says an infant or minor is not capable of an office of stewardship of the court of a manor either in possession or reversion, and he refers to Scambler's case, but notices the above case of Yonge & Stowell, and Young & Fowler, as contra; vide also n. 4, ib. referring to Scambler's case in 1 Roll. Abr. 731 (I.), and Cro. Eliz. 636, as acc., and also to that case as contra, in Mar., where also Mr. J. Jones affirmed that Scambler's case was also contra.

(*n*) See n. 4 to Co. Lit. 3 b; Gilb. Ten. 316; Com. Dig. Cop. (R. 5). And note, an infant may make a deputy for his advantage; see W. Jones, 311, in Yonge *v.* Stowell.

(*o*) 1 vol. on Cop. 253.

(*p*) 4 Co. 26 b.

(*q*) 1 Salk. 184.

that their presence on an admission is not necessary (*r*); but it is to be recollected that the decision in *Dudfeild & Andrews* was, *not* that a steward might admit, but that he might *take surrenders* out of the manor; and that in the subsequent case of *Tukely & Hawkins* (*s*), there was an express resolution of the Court of C. B., upon motion for a new trial in ejectment, that a steward of a manor might take a *surrender* of a copyhold out of the manor, but could not *admit* out of the manor. And *Melwich's* case is an authority that a steward of the court of a manor could not, at any court held out of the manor, have made grants or admittances.

There are authorities however, (as the author is about to show), which favoured the more general opinion that an admittance by the chief steward of a manor out of court, upon a surrender, was good, provided an entry thereof was afterwards made upon the court rolls, and, if out of court, it is difficult to discover a good reason for denying him the power to have admitted out of the manor (*t*); and it is clear that he might have done so by special custom, for instance, where, by immemorial usage, a court was held within one manor for several distinct manors (*u*). But it was decided, that the steward could not, in his mere character of steward, admit out of the manor (*x*).

Coke, in his Copyholder (s. 46), in suggesting that in one point the power of a steward exceeds the power of an under-steward, says, "The steward can make an admittance out of court, and it shall "stand good *if entry be made in the court roll that he that is admitted* "*hath paid his fine and hath done fealty*, but the under-steward, "though he may take a surrender out of the court, yet he cannot "make any admittance out of court, without special authority or "particular custom." And again (s. 45), he states that a "steward "by parol may take surrenders out of court, or make voluntary ad- "mittances or [do] any other act incident to the office."

And according to *Kitch.* (*y*), if an under-steward take a surrender and admit one out of court, without authority of the lord or the chief steward, it is not good; and *Kitch.* adds, "notwithstanding a lawful "steward, as it seems, may take a surrender out of the court, and "admittance made out of the court is good, *if it be entered in the* "*court roll that he is admitted, and hath paid his fine, and hath done*

(*r*) Vide also Lord Dacre's case, 1 Leo. 289.

(*s*) 1 Lord Raym. 76.

(*t*) But see cont. Tukely & Hawkins, ubi sup.; Scroggs, 87. Vide also 2 D'Anvers, 179, 189; Doe & Whitaker, infra.

(*u*) Cro. Car. 367; Cro. Eliz. 614; ante, p. 6.

(*x*) Doe & Whitaker, 5 Barn. & Adol. 435; ante, pp. 101, 102, 103. But now see 4 & 5 Vict. c. 35, s. 88, ante, p. 102, n. (*f*).

(*y*) Page 162. And see Bro. "Court Baron," pl. 22; ib. "Tenant per Copy," pl. 26.

"*fealty.*" But in p. 165, *Kitch.* says, "And also the high steward "may admit out of the court, *by special usage and custom within the "manor used*" (*z*).

It is right, however, to notice, that it has even been doubted whether a steward can, under an appointment in writing framed in general terms, or under a parol appointment, accept a surrender, and examine a feme covert as to her voluntary consent out of court (*a*).

In the case of *Howsego* v. *Wild* (*b*), the Court of B. R. decided that the steward of a manor may take a surrender of a copyhold out of the manor.

And it was held by the Court of C. B. in *Dudfeild & Andrews* (*c*), that the steward may take a surrender as well out of the manor as out of court, since it might be a convenience (*d*), but could not be prejudicial to any one. And in the above-mentioned case of *Tukeley & Hawkins*, a second resolution was, "that a custom that the steward shall not take surrenders out of the manor is a void custom (*e*)."

Lord Coke (*f*) says, "This is the general custom of the realm, that every copyholder may surrender in court, and need not to allege any custom therefore. So if out of court he surrender to the lord himself, he need not allege in pleading any custom. But if he surrender out of court into the hands of the lord by the hands of two or three, &c. copyholders, or by the hands of the bailiff or reeve, &c., or out of court by the hand of any other, these customs are particular, and therefore he must plead them."

(*z*) In 1 Roll. Abr. 505, (V. pl 4), it is said that the steward of a manor may admit upon a surrender out of court as well as in court; and for which Froswell & Welch's case is cited. But see that case in 3 Bulst. 214; Cro. Jac. 403; 1 Roll. Rep. 415; Godb. 268; Bridgm. 49. And note that according to those reports of the case, the question was whether the admittance of the surrenderee by the lord out of court would make him a good copyholder.

(*a*) See Cro. Eliz. 443, in Bright & Forth, where it was held by Anderson & Beaumond that surrenders were by custom, and ought to be in the court of the manor, and that a surrender to the lord himself in his house or out of court was not good. It was urged in Blagrave & Wood, 1 Leo. 227, that a surrender taken out of court by a person retained as steward of the manor is good, but that a steward retained to keep courts has no authority except in court.

(*b*) 1 Roll. Abr. 500; 6 Vin. Cop. (X.), pl. 3; 2 D'Anv. 181 (F.), pl. 1.

(*c*) 1 Salk. 184; 1 W. & M.

(*d*) The delay in convening a court might operate very prejudicially to a copyholder desirous of making a surrender of his estate.

(*e*) The Court of B. R., in referring to this resolution in Doe & Whitaker, said, "That is perhaps going a good way, for in Dudfeild v. Andrews, it is only by reasoning and queries that it is thought proper the steward should have such a power;" 5 Barn. & Adol. 435. And see Bright & Forth, Cro. Eliz. 443, in which Anderson said, "Surrenders are by custom, and therefore they ought to be in the court of the manor; and a surrender to the lord himself in his house or out of court is not good." And the report adds, "*Quod Beamond concessit.*"

(*f*) Co. Lit. 59 a.

Probably Lord Coke did not mean that a surrender into the hands of a *steward* out of court required a custom. At all events it is clear that a surrender into the hands of the steward *out of court* (*g*), or even out of the manor (*h*), is good, without pleading a custom for it; and whether the steward is appointed by deed or by parol (*i*); and although the surrender be to the steward's own use (*k*): and that the steward may upon such a surrender made by husband and wife take the examination of the wife as to her voluntary consent, in analogy to the power the commissioners under a *dedimus potestatem* formerly had in the case of a fine of freeholds (*l*).

The distinction between acts of necessity, arising out of the ordinary duties of the office of steward of a manor, and exercisable therefore even without a special authority, and acts in their nature voluntary, and therefore requiring a special mandate, is very clearly exemplified by Sir Edward Coke in his Copyholder (*m*), where, in alluding to licences sometimes granted to copyholders to alien by deed (*n*), he says, "And in this point of licence, the lord's authority doth exceed the steward's authority. For though some are of opinion that it is both usual and warrantable for the steward of a manor, in the absence of his lord, to license a copyholder in full court to alien by deed for so many years as he shall think good, because he

(*g*) Baker & Denham, M. 24 Car. B. R. Hal. MSS.; S. C. Sty. 146; Heggor *v.* Felston, 4 Leo. 111; Co. Litt. 58 a, n. (4), 59 a, n. (6).

(*h*) Howsego & Wild, Dudfeild & Andrews, infra.

(*i*) Lady Holcroft's case, 4 Co. 30 b; Co. Lit. 59 a, n. (6); Co. Cop. s. 45, Tr. 104. But in Owen *v.* Saunders, 1 Lord Raym. 159, Powell, J. said, that a steward retained for years *by parol* was not properly a steward, "*for he cannot take surrenders out of court;*" for this, however, he cited Blagrave & Wood's case, 1 Leo. 227; Godb. 142; and Dy. 248, neither of which authorities support the dictum. Note, the appointment in Blagrave & Wood appears to have been for the keeping of the courts only, and not generally as steward of the manor. See the report in 1 Leo. ante, p. 113, n. (*a*); Gilb. Ten. 277.

(*k*) Erish *v.* Rives, Cro. Eliz. 717.

(*l*) Smithson *v.* Cage, Cro. Jac. 526.

(*m*) S. 46, Tr. 101.

(*n*) The 92d section of the 4 & 5 Vict. c. 35, already referred to (and see the act in the appendix), recites, that by the custom of certain manors, the lords are restrained from granting licences to their tenants to alien their ancient tenements otherwise than *by entireties*, and enacts, that it shall be lawful for any such tenant, with the licence of the lord or the steward (which licence the lord is thereby authorized to give, or to empower the steward to give, by any writing under his hand, to be afterwards entered upon the rolls of the manor), to dispose of his ancient tenement, or any part thereof, by devise, sale, exchange or mortgage, *in such parcel or parcels* as he shall think proper, but subject to the payment of such portion or portions of the yearly customary lord's rent as shall be set and apportioned by the lord or the steward, or his deputy; and that such parcel or parcels (except so far as the tenure or descent may be affected by the act) shall be held and be conveyed as the original tenement has by custom been held and conveyed.

is judge in the court, and besides the entry of it in the court roll is in this manner, *Ad hanc curiam J.S. petit licentiam domini dimittendi, &c., cui dominus licentiam dat, &c.*, and therefore this licence being granted in the lord's name in full court, the lord shall never enter for a forfeiture, but shall ever be estopped to say the contrary, but that he did give licence; yet (under reformation be it spoken) I much mistrust the truth of this opinion; for this power of licensing copyholders to alien by deed *is not customary, for then it were as proper to the steward as to the lord;* but it is a power of *interest* annexed to the person of the lord in respect of his estate in the manor, and not in any other collateral respect: and therefore the steward having a bare authority to execute what the custom of the manor doth warrant, without doubt he cannot *virtute officii* grant any unwarrantable licence to alien by deed, no more than to commit waste; for the one act as well as the other tendeth to the breach of custom, and both of them, without a sufficient allowance, amount to the forfeiture of a copyhold: but by express words in the steward's patent, or by special authority given him by the lord, or by some particular custom warranting the same, the steward may in court lawfully license copyholders to alien as well as the lord may."

And we have a further exemplification of this distinction in the case of *Harris & Jays*, where, as we have already seen (*o*), the steward was appointed by the queen's auditor and surveyor *pro illâ vice*, who granted in full court copyhold land which had escheated for felony, and the grant was deemed to be void merely because it was a voluntary act, and that such officer had no power to appoint a steward, *Popham* observing, that "acts done by one who keeps court as steward without authority, if they come in by presentment from the jury, or of necessity, are good;—as an admittance of the heir upon a presentment, or admittance by a surrender to an use:" —but that "acts voluntary, as the grant of a copyhold, are not good (*p*)."

It is certain that an office of trust annexed to the person, and concerning the administration of justice, cannot be granted for a term of years, for then it would devolve upon executors or administrators, which might be very inconvenient (*q*). And it should seem that even under a grant of the stewardship of a court baron, where the suitors

(*o*) Ante, p. 110; 19 Vin. 597.

(*p*) It is however not unusual for the steward to be specially authorized to make voluntary grants of copyholds reverting to the lord by escheat or forfeiture, or by the determination of copies granted for lives only, and either in or out of court; and the power is sometimes extended to a deputy steward. And now see the Commutation and Enfranchisement Act, 4 & 5 Vict. c. 35, s. 87, ante, pp. 102, note (*f*), 109, note (*y*).

(*q*) Sir George Reynel's case, 9 Co. 96 b. And see 2 Show. 24, in Howard *v.* Wood.

are the judges (*r*), to two persons for a term of years, the appointment would determine with the lives of the grantees (*s*).

Under an appointment of two joint stewards, the author apprehends that courts may be held by one of them (*t*); and that one of two joint stewards may perform all acts of a ministerial nature (*u*) as well out of court as in court.

An office which is partly ministerial and partly judicial cannot be granted in reversion, not even by the king (*x*); *à fortiori* a grant in reversion of an office wholly judicial, as, for instance, the stewardship of a Court Leet, would be void (*y*).

But the law distinguishes between an entire office comprehending two parts, one judicial and the other ministerial, as, for instance, the ancient office of auditor of the court of wards (*z*), and two offices distinct in themselves, but comprehended under one name, as steward of a manor, embracing the offices of steward of a Court Leet, and of a Court Baron (*a*).

The law also makes a distinction between the office of judge of a court of record (*b*), and a judicial office exercisable by deputy; therefore the author apprehends that the office of steward of a customary Court Baron, although of a judicial character, being exercisable by deputy, may be granted in reversion (*c*), and even *in futuro*, as it varies from the case of land (*d*).

It is at all events certain that the king may grant an estate in an office in reversion (*e*), or to commence *in futuro*, or upon a contingency (*f*); and that a custom may make an office grantable in reversion in the case of a common person (*g*).

Doubts were formerly entertained whether a grant by a subject (*h*) of the stewardship of a manor for life was good, except by custom or

(*r*) Ante, p. 4.

(*s*) Howard *v.* Wood, Sir. T. Jones, 127.

(*t*) Knowles *v.* Luce, Mo. 112; 1 Comy. 84; ante, p. 111. But see Anon. Gouldsb. 2, pl. 4; Jenk. Cent. 246, ca. 35.

(*u*) Vin. Abr. tit. "Authority," p. 419.

(*x*) Curle's case, 11 Co. 4 a; Co. Lit. 3 b.

(*y*) Howard *v.* Wood, sup.; S. C. 1 Freem. 473; S. C. 2 Lev. 245; S. C. 2 Sho. 21; Veale *&* Priour, Hard. 357.

(*z*) Curle's case, sup.

(*a*) Howard *&* Wood, sup.

(*b*) See T. Jones, 127, and 2 Sho. 25, in Howard *&* Wood.

(*c*) Ib. And see 16 Vin. Offices (F.); Walton's case, Dy. 270 b; Young *v.* Stoell, Cro. Car. 279; S. C. W. Jones, 310. See cont. Sir John Savage's case, Dy. 259 a. But note, there the second grant was by the name of a reversion.

(*d*) Ferrer *v.* Johnson, Cro. Eliz. 336; The King *v.* Kemp, Carth. 352; S. C. 4 Mod. 275.

(*e*) Sir John Savage's case, sup.

(*f*) The King *v.* Kemp, sup.

(*g*) Mar. 43, in Young *v.* Fowler, cites 1 H. 7, Croft's case. Vide also Co. Lit. 3 b, n. (5); Hard. 357, in Veale *&* Priour; 2 Vent. 188, in Woodward *&* Fox.

(*h*) N.B. In the Earl of Shrewsbury's case, 9 Co. 42, the grant of the stewardship for life was by the crown.

act of parliament (*i*); but in a recent case of an action of assumpsit in B. R., the court held that a grant for life *by deed* of the stewardship of a manor, and of the courts thereto belonging, was good (*k*). Abbott, C. J., in delivering the judgment of the court, adverted to the case mentioned by Lit. sect. 378, of a grant by deed by a subject of the office of a parkership for the life of the grantee, and to Lord Coke's commentary upon that sect. (1 Inst. 233 b), where he states that "if a man doth grant to another the office of the stewardship of his courts of his manors, with a certain fee, the grantor cannot discharge him of his service and attendance, because he hath the profits and fees belonging to his office, which he should lose if he were discharged of his office." The court also adverted to the case of *Harvey* v. *Newlyn* (*l*), which was an action on the case for disturbing the plaintiff in the office of bailiff of a manor, granted to him for life, and observed, that the decision against the plaintiff in that case appeared to have been because it was not alleged by him that there was any profit belonging to the office.

The appointment of a steward is generally, however, during the lord's pleasure only, and, even when made for years, or for life, the office may be forfeited by misuser, nonuser or refuser (*m*): but in a

(*i*) See Owen *v.* Saunders, 1 Lord Raym. 158.

(*k*) Bartlett *v.* Downes, 3 Barn. & Cress. 616; S. C. 5 Dow. & Ry. 526; S. C. 1 Car. & Pay. 522. The plaintiff was appointed to the stewardship by *R. R.* (who was seised in fee of the manor), by deed under seal, which granted to him the office of steward of the manor, and the holding and keeping of all courts of what kind soever to the said manor belonging, receiving the fees and profits, &c. during his life. *R. R.* devised the manor to *C. D.*, and *E. D.* held a court, and received certain fees, to recover which the action was brought.

In a recent case the defendant, in consideration of being permitted to hold the office of steward of a manor at the will of the grantor, promised out of the fees to pay an annuity to the former steward, so long as he should hold the office, and the lord afterwards appointed the defendant steward for life; and it was decided that it was not competent for the defendant to contend that he did not hold at the will of the lord, and avoid payment of the annuity; Mattock *v.* Kinglake, 1 Perr. & Dav. 46.

The existence of grants for life of the stewardship of manors is recognized in the late Commutation and Enfranchisement Act, ante, p. 141, n. (*p*); post, tit. "Steward's Fees."

(*l*) Cro. Eliz. 859. See the pleadings in an action of debt by a steward appointed for life, to recover the arrears of an annuity, Nevill *v.* Rede, Nels. Lex Man. App. pl. 33. And note, that a steward appointed by deed or patent may recover his salary by writ of annuity; Dy. 248 a, pl. 79.

Vide also Nevil's case, 7 Co. 33 b, where it is said, that the office of steward, receiver or bailiff of a manor, may be intailed within the stat. *de donis*, because it is exercisable within lands, cites 5 E. 4. See Cro. Car. 557.

(*m*) See 9 Co. 50 a, in the Earl of Shrewsbury's case. Vide also Co. Cop. s. 45, Tr. 106, 107, where these causes of forfeiture are thus stated: viz. "1. By *Abuser*. As if the steward burn the court rolls, or if he taketh a bribe to wink at any

stewardship for *life* the appointment would not be revoked by a subsequent sale, and of course therefore not by a devise (*n*) of the manor, and this, because of the casual profits incident to the office (*o*), which could not be determined but with the existence of the manor (*p*).

Should the steward be disturbed in his office, his remedy is by an action on the case (*q*), which has been substituted for an assise (*r*); and it was laid down in *Webb's case* (*s*) that an assise lay for the office of steward, bailiff or receiver of a manor. It also appears that the Court of King's Bench would grant a *mandamus* to restore a person to the office of steward of a customary Court Baron (*t*).

offence, or use partiality in any cause depending before him. 2. By *Non-user*. As if the steward by his patent being tied to keep court at certain times of the year, without request to be made by the lord, faileth, and by his failure the lord receive any prejudice, this is a forfeiture. But if the lord be not damnified, then this non-user is no forfeiture. 3. By *Refuser*. As if the steward tied by his patent to keep court upon a demand or request to be made by the lord, if the lord demandeth or requesteth him to keep a court, and he faileth, this is a forfeiture, though the lord be thereby nothing damnified." [N.B. Non-user of itself, without some special damage, is no forfeiture of private offices; Co. Lit. 233 a.]

In the case of an attorney, whose stewardship is determined, the court of law of which he is admitted will exercise a summary jurisdiction to compel him to deliver up the court rolls of his employer; Ex parte Corpus Christi College, 6 Taunt. 105. And see Sir Richard Hughes *v.* Mayre, 3 T. R. 275; Marshall's case, 2 Sir W. Bl. 912; Ex parte Grubb, 5 Taunt. 206. The custody of court rolls belongs to the lord, and the steward is considered, with regard to the rolls, as the lord's agent only, and in Rawes *v.* Rawes, 7 Sim. 625, was ordered to deliver them over to the receiver in the cause.

(*n*) Bartlett *v.* Downes, ubi sup.

(*o*) Co. Lit. 233 b; Harvy *v.* Newlyn, ubi sup. And see Vin. Abr. "Officer" (O. 4), pl. 5 & 6; Br. Graunts, pl. 93, 134.

(*p*) Sir Charles Howard's case, Cro. Car. 60. "Two joint tenants [of a manor] grant the stewardship thereof to one, and 20*l.* per annum for the exercise of it; if the one discharge him, it is a good discharge as to the service, but yet he shall have his fee. If the lord of a manor grant the stewardship thereof to another, taking 10*l.* per annum of the issues and profits of his court there for his fee, and afterwards the lord dischargeth the steward, the same is void; for it is a disadvantage to the steward, for he cannot have his fee if no courts be holden; but if the fee be limited to issue out of lands, there such discharge is good; for there the steward shall have his fee, although that no courts be holden there; see 18 E. 4, 8, to that purpose." By Tanfield, arg. in Goore and others *v.* Dawbeny, 2 Leo. 76.

(*q*) Ferrer & Johnson, Cro. Eliz. 335; Harvy & Newlyn, sup. And see the pleadings in an action for disturbing a deputy steward, where the chief steward was appointed by a corporation, Anon. Nels. Lex Man. App. pl. 34.

(*r*) See Boyter *v.* Dodsworth, 6 T. R. 683, in which Lord Kenyon said, "If there had been certain fees annexed to the discharge of certain duties belonging to this office [belfry and church sexton], and the defendant had received them, an assise would have lain; and the action for money had and received to recover fees has always been considered as being substituted in the place of an assise. But there is no pretence to say that an assise will lie for a gratuity."

(*s*) 8 Co. 47 b.

(*t*) Ile's case, 1 Vent. 153.

It has been thought that the office of steward is absolutely essential (*u*), but the author has not been able to find any authority denying the lord of a manor the privilege of holding his own courts; on the contrary, it is laid down in various books, that the *lord* or his steward is the judge in the customary court (*x*), which seems fully to establish the right of the lord to preside in person, if he pleases. It may, however, admit of a question, whether in such a case the lord would be entitled to the fees usually charged by the steward upon surrenders and admittances, &c., unless by special custom or convention, though there can be no doubt that the lord could recover the amount of stamp duties and other disbursements.

Deputy (and Sub-deputy) Steward.

The author apprehends that the steward of a manor may appoint a deputy or under-steward to hold courts, or perform ministerial acts out of court (*y*), and either in writing or by parol (*z*), although the patent of the chief steward should not contain an express authority for that purpose (*a*); and that all such powers as a steward of a manor may exercise as of common right are exercisable by a deputy steward (*b*), unless controlled by custom, or unless a limited authority is expressed in his deputation, in which case the special purpose or turn only for which he is deputed will, of course, be the extent of his power (*c*). But Sir Edward Coke suggests (*d*) that an under-steward cannot be made, without special words in the steward's patent, autho-

(*u*) Supp. Co. Cop. s. 3, Tr. 149; Fisher on Copyholds, 58, cites Withers *v.* Iseham, Dy. 70, pl. 37; and see Cholmely *v.* Morton, 2 Sho. 180.

(*x*) Kitch. 163, 164; Co. Lit. 58 a; 4 Co. 26 b. Sir Edward Coke considered the steward merely as the representative or deputy of the lord *in his absence;* Co. Cop. s. 45, Tr. 102. And see 2 Watk. on Cop. 25 et seq.; ante, p. 97, n. (*k*).

(*y*) Lord Dacre's case, 1 Leo. 288; Burgesse & Foster, ib. 289; Burdet's case, Cro. Eliz. 48; Parker & Kett, infrà. But there was a special custom shown in the first case, and an express power in the steward's patent in the last three cases. Vide also 19 Vin. "Steward of Courts" (I.). In the case of Heggor & Felston, 4 Leo. 111, it was noticed that a copyholder being in Ireland, the steward deputed a person to take the surrender there, and that the surrender was held to be good. But in Walron *v.* Corham, Toth. 277, 11 Jac., it was held that "*a steward of a court* cannot make a letter of attorney to a man to take a surrender." See Blagrave & Wood, ante, p. 113, as to a possible distinction between the steward of a manor, and the steward of a court.

(*z*) But the author apprehends that a deputation for any special purpose or turn only must be by deed.

(*a*) See Parker & Kett, post, pp. 120, 121; Gilb. Ten. N. cxi.; Young *v.* Fowler, Cro. Car. 556.

(*b*) 12 Mod. 468; 1 Ld. Raym. 661. Sed vide Kitch. 162; Earl of Shrewsbury's case, 9 Co. 48 a, b; 1 Comy. 84. But see ante, p. 137.

(*c*) Gilb. Ten. 447, 448; 19 Vin. "Steward of Courts" (I.); 1 Salk. 96.

(*d*) Co. Cop. s. 46, Tr. 107. And see 4 Leo. 244.

rizing him to make a deputy, unless in cases of necessity (*e*), since," he adds, "it is an office of knowledge, trust and discretion (*f*)." And it is clear that an under-steward cannot make voluntary grants, unless expressly authorized so to do by the chief steward by virtue of a special power contained in his patent.

And according to the case of *Young & Fowler* (*g*), the lord of the manor is to approve of the deputy's sufficiency, and his misdemeaning himself, or being unskilful, would be a forfeiture, and at the steward's peril.

A deputy steward may hold a court either in his own name, as deputy, or in the name of the chief steward (*h*), but it is more regular to act in the name of the principal (*i*).

It is generally conceived that a deputy cannot make a deputy, or, in other words, cannot transfer his authority to another (*k*); but that as grants in court (not being of a voluntary character) by any steward who has colour of title are good (*l*); so if a deputy steward depute another, *who holds courts* and makes grants, the acts of the sub-deputy would be valid. Of this there can be no doubt, (the grants made by the sub-deputy being of a ministerial and not of a voluntary character), as he would be a steward *de facto*, having colour of legal authority (*m*). And according to the cases of *Lord Dacre* (*n*) and *Parker & Kett* (*o*), which appear to the author to merit the notice he is about to take of them, a deputy steward may depute another *as his servant* to perform any *specific* ministerial act which he should by his own appointment be authorized to execute *even out of court*, such limited authority not being inconsistent with the rule that *delegatus non potest delegare*.

Lord *Dacre's* case (*p*) was this: Lord *D.* seised of the manor of *E.*, granted the stewardship to the Marquess of Winchester, who appointed *C.* to be his deputy, to keep a court and *ad tradendum*

(*e*) "As if an office of stewardship descend unto an infant, he may make a deputy, because the law presumeth he is himself incapable to execute it;" ante, p. 111. "So if it be granted to an earl, in respect of the exility of the office in a base court, and of the dignity of the person;" ib. And see as to an implied necessity from the dignity of the person, Earl of Shrewsbury's case, 9 Co. 49 a.

(*f*) But see Lord Dacre's case, infrà.

(*g*) Cro. Car. 556.

(*h*) Parker *v.* Kett, 1 Ld. Raym. 659, 660; S. C. 12 Mod. 469, 470.

(*i*) 12 Mod. 690; Combe's case, 9 Co. 76 b; 19 Vin. Abr. "Steward of Courts," (I.), pl. 6.

(*k*) 39 H. 6, 33, 34; 14 E. 4, 1; Earl of Rutland & Spencer's case, 4 Leo. 244; S. C. 2 Brownl. 337; Scroggs, 88; 12 Mod. 470; 1 Comy. 84; Com. Dig. Cop. (C. 5.)

(*l*) Ante, pp. 111, 114.

(*m*) 12 Mod. 470, 471; 1 Ld. Raym. 660, 661; and see Cro. Eliz. 534; Mo. 112.

(*n*) In ejectment, B. R. Tr. 26 Eliz., 1 Leo. 288.

(*o*) 1 Ld. Raym. 658; S. C. Salk. 95; S. C. 12 Mod. 467; S. C. Comy. 84.

(*p*) Sup.

certain land to *W.* by copy, for life. *C.* commanded *H.* his servant to keep the said court, and grant the land *ut supra*, which was done, and the copy was entered, and Lord Dacre subsigned it. *H.* had many times kept the said court both before and after, and the custom was that the steward, or his deputy, might take surrenders, and grant estates by copy: and the question was, whether the estate granted by *H.*, the servant of the deputy, was good or not, the custom found not extending further than the deputy. It was argued that a deputy cannot transfer his authority (*q*); and that the assent and subsignment of the copy by the lord did not give any strength to the copy, which was void at the beginning. Against which it was urged, that to take a surrender and to grant an estate by copy was not a judicial act, and that no trust was transferred to *H.*, a trust being only reposed in *him* who may deceive, and in that case there was an express command which *H.* could not transgress, nothing being left to his discretion. The whole court were of opinion that the grant for the manner of it was good, "especially because the Lord Dacre agreed to it (*r*)."

Parker & Kett was a special case reserved for the opinion of the Court of King's Bench in an action of ejectment, and involved two points: 1st, Whether a sub-deputy steward had a good original authority to take the surrender of Charles Kett, a copyholder of the manor of Reswick in Norfolk, to the use of his will; and supposing he had not, whether the defect was cured by the intention of the law, or by subsequent acts. Mr. Samuel Keck, the Master in Chancery, was constituted the steward of the manor by patent, to exercise the office by himself or his sufficient deputy; by virtue of which power he made Clerke his deputy steward, who had executed the office many years. Clerke appointed Thacker and Ballaston to be his deputies jointly and severally, to take the surrender of Kett out of court to the use of his will. Ballaston took the surrender accordingly, which was presented at the next court before Clerke, who admitted Elizabeth Kett, the defendant, under the will of the said Charles Kett, her husband. The case was argued several times, and Holt, Ch. J., in delivering the opinion of the court in favour of the surrender, said as to the first point, "that Ballaston deriving his authority from a writing under the hand and seal of the deputy steward, had a good original authority. For where an officer has power to make a deputy, such deputy (when he is created such) may do any act that

(*q*) Ante, p. 120.

(*r*) Holt, C. J., in delivering the judgment of the court in Parker & Kett (see Ld. Raym. 661), said, "the undersigning of the copy in the said case by the Lord Dacre signified nothing, being after the grant, and could amount to no more than a declaration of his *consent*, or at most to a confirmation, but could not amount to a grant."

his principal might do, and less power he cannot have." And he cited the case of an under-sheriff, *Norton* v. *Sims*, Hob. 12. The court, in answer to an objection that a deputy cannot make a deputy, and that a deputy cannot be made to do a single act, said, it appeared sufficiently what Clerke meant, viz. that Thacker and Ballaston should be his servants, adding, "and the case in Cro. Eliz. 533 rules it; for the reason there was, because he was a servant, and the deputy of a ministerial officer may appoint a servant."

On the 2nd point the court held, that, admitting that the authority originally was defective, yet they were sufficient stewards *de facto*, and the surrender for that reason good; that a steward *de facto* may take a surrender, and is no other than *he* who has the reputation of being steward, and yet is not a good steward in point of law; adding, "Now here Clerke was a good deputy. Now suppose that he had made Thacker and Ballaston deputies absolutely, *which would have been void*, yet it would have given Thacker and Ballaston the reputation of being good stewards; and a surrender to them, and a presentment afterwards in court, and admittance made accordingly, would be good." And the court held that *Knowles* & *Luce* (*s*) was a case strong in point; and further observed, that if the grant by the steward's servant (the case of Lord *Dacre*) (*t*) in court was good, the surrender in the principal case, taken out of court, and afterwards presented in court, and admittance made in pursuance of it, would be good also.

Bailiff or Reeve.

The office of the bailiff or reeve of a manor is clothed with much less important trust and discretion (*u*), and the author is not aware that any doubt is entertained of the power of the lord, or chief steward, to appoint a bailiff by parol (*x*), or of the appointment being good when made by the steward without any special authority for that purpose, or of the bailiff's power to act by deputy as regards his duties, either in or out of court, a bailiff being a ministerial and not a judicial officer (*y*).

For the derivation of the words "bailiff" and "reeve," and "what belongeth of duty and right to either of them," the reader is referred to Fleta, lib. 2, cap. 67, 69; Co. Lit. s. 79, 379.

(*s*) The case of a court held by one of two joint stewards, Mo. 111, 112; ante, p. 116.

(*t*) Ante, p. 120.

(*u*) 3 Edw. 2, tit. Avowry; 2 Edw. 4, 4; 12 H. 7, 14; 21 H. 7; Keilw. 158 b; Gybson v. Searl, Cro. Jac. 84, 176; Harvy v. Newlyn, ubi sup. But it should seem that if the lord of a manor was beyond the sea, the writ of right was to be directed to the bailiff of the manor; 1 Leo. 228, in Blagrave & Wood's case.

(*x*) Blagrave & Wood, ubi sup. cites 12 H. 7, 25, 26, 27.

(*y*) See Vane's case, Sid. 335, pl. 5; 5 Vin. 432; 7 Vin. 556.

CHAP. IV.

OF SURRENDER.

[*Reserving the subject of Surrender to Will for distinct consideration.*]

THERE can be no substitution of a person into the tenancy but by a *surrender* (*a*), nor is such substitution complete until admittance (*b*).

If therefore two copyholders are desirous of exchanging their copyhold lands, it can only be effected by surrendering to the use of each other, and each being admitted under such respective surrenders (*c*). So where joint-tenants of copyhold, without the consent of the lord, made partition by parol, and afterwards occupied in severalty, and one of them surrendered in general words, it was held by the Court of King's Bench that the surrenderee was not entitled to be admitted to the parcels holden in severalty by his surrenderor (*d*).

The word "surrender" is said by C. J. Coke to be *vocabulum artis*, and to admit of no qualified term (*e*), but this rule does not extend to the lord, for between a tenant and him, the conveyance need not be according to the custom, but may be made by bargain and sale, or other less formal act (*f*); and in *Blemmerhasset* v. *Humber-*

(*a*) Knight *v.* Cooke, 2 Ch. Ca. 43.

(*b*) But note, it was decided in Goodtitle *d.* Fowler *v.* Welford, 1 Dougl. 139, that a devisee in remainder of copyhold, who had surrendered to the customary heir, might be examined as a witness, although the heir would not assent to the surrender.

(*c*) Kitch. 171; Co. Cop. s. 36, Tr. 83; Earl of Carlisle *v.* Armstrong, 1 Burr. 333. But a different mode of transferring the copyhold interest is sometimes pointed out by act of parliament, as in the case of a sale formerly of copyhold property belonging to a bankrupt or an insolvent debtor: but now see the recent statutes referred to, post, title "Admittance," "Commissioners and Assignees of Bankrupt," "Assignees of Insolvent Debtors."

N.B. By 4 & 5 Will. 4, c. 30, "to facilitate the exchange of lands lying in common fields," persons seised of or entitled to copyholds, though for life only, are authorized to convey in exchange by the form of deed in the schedule of the act any lands *held by copy of court roll*, lying intermixed and dispersed in common fields, meadows, or pastures, for other pieces of land, either lying therein or being part of the inclosed lands in the same or any adjoining parish, such deed of exchange to be produced to the lord of the manor or his steward, who is required to cause the same to be entered on the court rolls; and the act provides that the fees and charges of such entry shall not exceed sixpence for every law folio of seventy-two words. See extract from the act in the Appendix.

(*d*) Rex *v.* Southwood, 5 Man. & Ry. 414.

(*e*) Co. Cop. s. 39, Tr. 86; and see 6 Vin. Cop. (U.), pl. 2.

(*f*) Blemmerhasset *v.* Humberstone, Hut. 65; S. C. Sir W. Jones, 41; Hasset *v.* Hanson, Win. 66, 67; Wakeford's case, 1 Leo. 102; Gilb. Ten. 252, 253; ib. 300, 301; ib. 311, 312; ib. Watk. N. 115.

stone (*g*), Lord Hobart thought that a copyholder declaring himself weary of his copyhold, and *requesting the lord to take it*, was equal to a surrender.

Mr. Watkins contends, that the rule does not extend even to a return of the copyhold into the lord's hands, for the purpose of being conveyed to a stranger (*h*), unless the rights of a third person are prejudiced, as was the case in *Zinzan & Talmadge* or *Talmash* (*i*), where the first *cestui que vie* was allowed by the custom to destroy the whole estate by surrendering into the lord's hands, and it was held that his joining with the lord in levying a fine of the lands did not operate as a surrender within the custom. When the act is such as amounts to an absolute relinquishment of the estate to the lord, it would certainly seem that the above rule is not applicable, although the lord subsequently grant the estate out again to the nominee of the copyholder; but when the lord is merely the conduit pipe of assurance to a third party, it may be doubtful whether the word "*surrender*" is not essential to conclude the interest of the customary heir (*k*).

The case of *Belfield & Adams*, 3 Bulst. 80, cited in Gilb. Ten. 253, 254, and quoted by Mr. Watkins (*l*) to prove that a copyhold may be surrendered by implication, is clearly opposed to the dictum of Sir Edward Coke, that the word "surrender" is *vocabulum artis;* but this case is by no means to be relied on as an authority in favour of Mr. Watkins's proposition. Chief Baron Gilbert, in noticing the case, thus expresses himself: "Copyholder in fee comes into court, and there accepts a copy to himself for life, remainder to his wife for life, remainder to his son for life; this is tantamount to a surrender to the use of himself, &c., but he hath his old reversion in him; for there is no ground to make a surrender of that by construction, because he has made no disposition of it. But as this case is in Rolls (*m*), it is said that it was no surrender, for that a copyhold cannot be surrendered by a surrender in law, but only by actual surrender; yet as it is in other places in Rolls, it is, as in Bulstrode, held to be a surrender, but that the reversion was still in the copyholder."

(*g*) Hut. 65; and see 6 Vin. Cop. (Z.), pl. 17; Coleman *v.* Bedill, 1 And. 199; S. C. called Coleman *v.* Portman, 1 Leo. 191, ca. 273; sed vide 1 Roll. Abr. 502, (L.).

(*h*) 1 Cop. 55.

(*i*) Pollexf. 564; S. C. Sir T. Raym. 402; S. C. 2 Show. 130; S. C. T. Jones, 142; S. C. 1 Freem. 263.

(*k*) Calth. Read. 43 et seq.; 6 Vin. Cop. (Z.), pl. 8, 10, 15; ib. Cop. (L. a.), pl. 1; Kitch. 169, 170, 171.

(*l*) 1 Cop. 58; and see S. C. Southcot & Adams, 1 Roll. Rep. 256; 2 D'Anv. 183 (L.), pl. 1.

(*m*) 1 Roll. Abr. 501 (L.), Shephard & Adams; but see M. 13 Jac. B. R. cited ib.

The rule, however, is applicable to the *legal* customary interest only, the equitable or beneficial interest in copyholds being transferable by deed, so that a joint tenancy in the trust of copyholds may be severed by a common law assurance (*n*).

And in strictness copyholds for lives are not the subject of surrender, other than as a mode of extinguishing the copyholder's interest, except by special custom, for it should seem that a copyholder for life cannot of common right surrender to the use of another for the remainder of his own life; and all the authorities agree that under the ordinary surrender by a copyholder for life, and the regrant by the lord to the purchaser or his nominee, the grantee is *in* by the lord, and not by the surrenderor.

So a special custom was requisite to enable a copyholder *pur auter vie* to devise his interest (*o*); and hence also when a bill is brought for the surrender of a copyhold for lives, the lord must be made a party (*p*).

How Surrenders are to be made, and into whose Hands.

Surrenders are made in various forms,—in some manors by a rod, in others by a straw, in others by a glove; which symbol is delivered over by the surrenderor to the steward or other person taking the surrender in the name of seisin.

A surrender must be taken by the lord or his steward, or the deputy steward (*q*), though, by special custom, it may be into the hands of two tenants of the manor, or of one tenant, or into the hands of the bailiff in the presence of two tenants, or into the hands of a tenant in the presence of other persons (*r*); the custom, however, must be pleaded (*s*).

(*n*) Trodd *v.* Downs, 2 Atk. 304. A joint-tenant of the *legal* customary fee may *release* to his companion; Wase *v.* Pretty, Win. 3.

(*o*) See Wellman *v.* Bowring, 1 Sim. & Stu. 24. Copyholds and customary holds *pur autre vie* were made devisable by 1 Vict. c. 26, s. 3.

(*p*) 6 Vin. Cop. (X. e.), 239.

(*q*) Dudfeild & Andrews; Tukely & Hawkins; Lord Dacre's case; Parker & Kett, ubi sup.; ante, pp. 114, 119. And a surrender may be made into the hands of a steward to his own use, ante, p. 114; 1 New Abr. 473; Gilb. Ten. 277.

(*r*) Co. Lit. 59 a; Kitch. 201; Page *v.* Smith, 3 Salk. 100; Beany *v.* Turner, 1 Lev. 293; S. C. (called Turner & Benny,) 1 Mod. 61; S. C. (called Turnor *v.* Benson,) 2 Keb. 666; and see 1 Watk. on Cop. 78, n. 2d ed., where he notices a custom to surrender, &c. in the presence of "sufficient witnesses," though not tenants.

(*s*) Freeborn *v.* Purchase, Sty. 107; All. 68, 69; Co. Lit. 59 a; but see Beany & Turner, or Turner & Benny, sup.

But a tenant is not liable, where such a custom prevails, to an action for refusing to take a surrender (*u*).

Where a person filling the office of clerk of the castle of F. stated it to be usual for him, as well as the steward, to take surrenders, the Court of B. R. held the custom to be valid, and the practice sufficient evidence of its existence for a jury (*x*).

The heir is a copyholder to many purposes before admittance, and, as it would seem, may take a surrender (*y*).

It has been said that an attainder is an absolute determination of the estate of a copyholder for life, and that he cannot afterwards be of the homage, nor take a surrender out of court, even though he should have been pardoned (*z*); but the author apprehends that this notion is correct only so far as it applies to the case of a copyholder for life, with remainder over upon his decease, or in case of forfeiture or other determination of his life estate; and to the case of an attainted copyholder, where the lord had entered for the forfeiture; for it should seem that the competency of a copyholder who commits felony is restored by a pardon under the great seal, or under the provisions of the 6 Geo. IV. c. 25, and that the legal seisin will remain in him, if not divested by the entry of the lord (*a*).

Whether a Surrender can be made by Attorney.

A doubt has existed in practice whether a copyholder could surrender by power of attorney; and this doubt has received some sanction by a case in which two judges are reported to have held, against the opinion of a third judge, that a surrender by attorney was not good, and that if the copyholder could not attend in person, the lord should appoint a special steward to take the surrender (*b*).

But the author apprehends that there can be no good reason assigned for this distinction between freehold and copyhold assurances, and that in all cases such acts as a copyholder can do himself, he may authorize another to do for him either in or out of court, and without

(*u*) Forde *v.* Hoskins, 1 Roll. Rep. 126.

(*x*) Doe *v.* Mellersh, 5 Adol. & Ell. 541; 1 Nev. & Per. 30; ante, p. 26. By the custom of the manor of Kettering, a surrender may be taken out of court by one of two persons styled deciners, and it is presented by the deciners at the following court, inrolled and left with the steward; vide Doe *v.* Mee, 4 Barn. & Adol. 617; S. C. (Hawthorn *v.* Mee,) 3 Nev. & Man. 424.

(*y*) Munifas *v.* Baker, 1 Keb. 25; 4 Co. 22 b; post, tit. "Admittance;" tit. "Forfeiture."

(*z*) Benison *v.* Strode, T. Jones, 189, 190; S. C. Skin. 8.

(*a*) Doe *d.* Evans *v.* Evans, 5 Barn. & Cress. 587; and see 3 Co. 10 b, 11 a; Plow. 486; Doe *d.* Griffith *v.* Pritchard, 5 Barn. & Adol. 775.

(*b*) See 1 Leo. 36, ca. 45.

any special custom for it (*c*); for as a surrender out of court by the hands of the steward is good without custom (*d*), so it may well be made according to the rule of common law by attorney (*e*).

And yet it should seem that a surrender which is warranted only by special custom, must be made in person, as if there be a custom that an infant may surrender at the age of discretion (*f*), or that a copyholder out of court may surrender into the hands of the lord by the hands of two customary tenants (*g*).

It is certainly the constant practice to admit of surrenders by power of attorney, and in such cases it is usual, and very proper, for the steward to inrol the power, which should be copied *verbatim* at the end of the court roll of the particular day. The reader will find that in *Hardy* v. *Reeves* (*h*) the heir of the mortgagee gave a power of attorney to be admitted, and afterwards to *surrender* to a person who purchased subject to the equity of redemption: and that in the *Attorney-General* v. *Vigor and others* (*i*) no question was made on the validity of a power of attorney to be admitted, and afterwards to *surrender* to the use of the will of the copyholder.

And even a custom for a copyholder to make letter of attorney to two copyholders to surrender after his death has been held to be good (*k*).

It was, however, decided by Lord Hardwicke, in a case where a custom was alleged that all surrenders must be made in person, except in special cases of disability, that the purchaser was not compellable to accept of a surrender by attorney, nor was the custom contrary to law (*l*); but even without any special custom the vendor is compellable to surrender in person, if it can be conveniently done (*m*).

A covenant to surrender copyholds would not be broken by a re-

(*c*) Combes's case, 9 Co. 75; Parker & Keck, 1 Comy. 85; Warner *v.* Hargrave, 2 Roll. Rep. 393; 1 D'Anv. 665, Authority (A.) marg.; 2 D'Anv. 181 (G.); 1 New Abr. 462 (D.); Godb. 389; and see 1 Watk. on Cop. 67, n. (p); 2 Ves. 679, in Mitchel *v.* Neale; Doe *d.* Smith *v.* Bird, 5 Barn. & Ad. 695; S. C. 2 Nev. & Man. 679. In that case it was held that a power of attorney by husband and wife (prior to the stat. of 47 Geo. 3, sess. 2, c. 8, enabling a feme covert to suffer a recovery of copyholds by attorney,) authorizing a person to surrender the wife's copyhold to a tenant to the plaint, for the purpose of a recovery in the manor court to bar an intail, was valid *as the act of the husband*, ante, p. 66, note (*o*).

(*d*) Co. Lit. 59 a, n. (b); ante, p. 114.

(*e*) See 9 Co. 76 b, in Combes's case.

(*f*) Co. Cop. s. 34, Tr. 78; Perk. s. 12, 13.

(*g*) Co. Cop. s. 34, Tr. 78; Co. Lit. 59 a; Combes's case, 9 Co. 76, cites Chapman's case, 1 Roll. Abr. 500.

(*h*) 4 Ves. jun. 466.

(*i*) 8 Ves. jun. 265.

(*k*) Roby & Twelves, Sty. 423; and see Wallis *v.* Bucknal, ib. 291, 311.

(*l*) Mitchel *v.* Neale, 2 Ves. 679.

(*m*) Noel *v.* Weston, 6 Madd. 50; and see per Lord Hardwicke, 2 Ves. 681, in the above case of Mitchel & Neale.

fusal to execute a power of attorney for that purpose, as it is also clear that a copyholder is not compellable to surrender by attorney (*n*).

In *Mitchel & Neale* the Chancellor said, "a surrender by attorney cannot be out of court, for that would be for an attorney to make an attorney, which, unless there is a special power in the letter of attorney for that purpose, an attorney cannot do:" but this, the author conceives, must mean where the surrender is into the hands of the lord by the hands of customary tenants, or of the bailiff or reeve, pursuant to a special custom (*o*).

A person who has a bare authority, as an executor empowered to sell land, cannot surrender by attorney (*p*).

Nor can an authority by special custom, though joined with an interest, be executed by attorney (*q*).

An attorney may surrender either in the name of his principal or in his own name (*r*), but in the latter case the power should be referred to; and an attorney may act although his principal is present (*s*).

According to the authority of Lord Coke (*t*), an infant or feme covert, and almost every other person, under whatever disability, may be an attorney to surrender for another, the act being merely ministerial; but a power of attorney cannot be given by a person under disability, unless authorized by act of parliament, as under the acts of 9 Geo. I. c. 29, and 47 Geo. III. sess. 2, c. 8, [but now see 1 Will. IV. c. 65 (*u*)].

An attorney must pursue his authority strictly, according to his appointment, (which must be by deed,) and consistent with the custom of the manor (*x*); but if he exceed his authority, the excess only will be void (*y*).

Of the Surrenderor and Surrenderee, and first of

BARON and FEME.—A surrender by a feme copyholder is suspended by marriage (*z*); and a devise by a feme copyholder, pursuant to a

(*n*) Symms *v.* Smith, Cro. Car. 299; S. C. Godb. 445.

(*o*) Ante, pp. 126, 127.

(*p*) Combes's case, and Warner & Hargrave, ubi sup.; Co. Cop. s. 34, Tr. 78. And this rule, the author conceives, extends to persons who derive a power over the fee of copyholds under an act of parliament.

(*q*) As if there be a special custom, that a copyholder *for life* may make estate for twenty years, to continue after his death; Co. Cop. s. 34, Tr. 78.

(*r*) Combes's case, ubi sup.; Parker & Kett, 1 Salk. 96; S. C. 1 Ld. Raym. 659; S. C. 1 Comy. 83; S. C. 12 Mod. 468; but see contr. 2 Ld. Raym. 1419, which, however, is not considered an authority.

(*s*) Mitchel & Neale, ubi sup.

(*t*) Co. Lit. 52 a; and see Harg. and Butl. ib. n. (2).

(*u*) See this act in the Appendix.

(*x*) Combes's case, ubi sup.; Co. Lit. 52 a.

(*y*) Co. Cop. s. 41, Tr. 93.

(*z*) George *d.* Thornbury *v.* Jew, Amb. 627; 1 Ves. 229.

surrender to the use of her will, is revoked by her marriage, for it is a power arising out of an interest, and not a mere naked power (*a*).

But a mere naked power, or a power of nomination, *given* to a feme copyholder who afterwards marries, may be exercised by her during her coverture (*b*).

And it should seem that a feme covert may exercise even a power appendant, or in gross, given to her whilst sole, and consequently that such a power given by the husband to his wife, or by a stranger to husband and wife, may be executed by her after her second marriage (*c*).

In the case of *Bayley & Warburton* (*d*), it was said, "a power given to a single woman, if she marry, may be executed by her husband and her;" the author apprehends, however, that the husband's joining could not be essential.

(*a*) Marquess of Antrim *v.* Duke of Buckingham, 1 Ch. Ca. 18; S. C. 3 Salk. 276; S. C. 2 Freem. 168; S. C. cited 2 Comy. 496, in Bayley *v.* Warburton; Doe *&* Staple, 2 T. R. 695, 697; 1 Ca. & Op. 158; 2 Bro. C. C. 544; 2 Roper, 69; Lewis *v.* Bulkeley, 2 Sir Geo. Lee's Cases, 513; Amb. 721, n. (2d ed.) But it was formerly doubted whether, if the wife survived, her will made before marriage would not revive; 4 Co. 60; 2 Bro. C. C. 537; 2 Roper, 70. As to powers which may or may not be released and extinguished, vide post, "Of Surrenders on Condition, &c." And note, that a feme covert may release or extinguish a mere *right* or a *power* in regard to copyhold lands by *deed*, see 3 & 4 Will. 4, c. 74, s. 77, such deed being acknowledged as directed by the 79th section, and the husband concurring in it. Semble, that a feme covert, with her husband's consent, may convey an *equitable* estate in copyholds *in fee* or *for life* either by surrender, with private examination (s. 90), or by deed, acknowledged under the 79th sect.; and she may convey an *equitable* estate tail in copyholds by surrender or deed (ss. 50, 53), ante, p. 61, n. (*o*).

(*b*) Gibbons *v.* Moulton, Fin. 346; Marquess of Antrim *v.* Duke of Buckingham, ubi sup.; Rich *&* Beaumont, 6 Bro. P. C. 152; S. C. cited 1 Ves. 305; 2 Ves. 64, 191; 3 Atk. 711; Travel *v.* Travel, cited 2 Ves. 191; 3 Atk. 711; Downes *v.* Timperon, 4 Russ. 334; Sugd. on Pow. 160 (5th ed.). See also Co. Lit. 112 a, (n. 6), where it is stated that a wife alone may execute a naked authority, whether given before or after coverture; and that the rule is the same where both an *interest* and an *authority* pass to the wife, if the authority is *collateral* to and doth not flow from the interest.

(*c*) Harris *v.* Graham, 1 Roll. Abr. 329, pl. 12; 3 Vin. 419; S. C. cited in Bayley *&* Warburton, 2 Comy. 496; Daniel *v.* Upton, Noy, 80; S. C. (Daniel *v.* Ubley,) Sir W. Jones, 137; and see 1 P. W. 155, in Tomlinson *v.* Dighton, 1 Ves. 157; in Burnet v. Mann, Lat. 39, 134; Sugd. on Powers, 133, &c. Powell, in his Treatise on Powers (p. 33), says, "And if a power be appendant or in gross, and the donee thereof be a feme sole, the better opinion seems to be that she will not, by her subsequent marriage, render herself incapable of executing the power, she being, as to her interest therein, considered in equity as a feme sole."

In Bagot *v.* Oughton, Fort. 332, the power to lease reserved to the feme on her first marriage was held not to be well executed by her and her second husband, but it was on the ground that the lands were in demesne, and not before in lease, and the power extended only to lands which were let before, as the yearly rents to be reserved were to be "such or more as the same were then *let* at." And see this case cited 3 Salk. 276; 1 Sid. 107.

(*d*) Ubi sup.

But a power created by settlement previous to the marriage of *A.* with *B.* to be executed by *B. during her coverture,* would be confined to the joint lives of *A.* and *B.*, and could not be exercised by *B.* after the death of *A.* during her widowhood or second marriage (*e*).

Where a power over copyholds was given to the wife "*notwithstanding her coverture,*" it was held that the words in italics were intended to enable her to make a will whilst married, but did not disable her from doing so after she became sole (*f*).

A surrender of copyholds by a feme covert is void, unless she signify her free will and consent under a private examination by the lord or by the steward, or his deputy (*g*); and by special custom, but clearly not without a custom, a wife may be privately examined as to her consent before two tenants (*h*).

In the town of Denbigh, in Wales, there is a custom that a feme covert, with her husband, may alien her land by surrender and examination in court, and that it shall bind as a fine would have done (*i*).

And it would seem now to be settled, that the private examination by the lord or steward of a manor of a feme covert seised of a copyhold estate, or entitled to freebench as the wife of a copyholder, where gavelkind custom prevails, and having therefore an inchoate title, analogous to the case of dower (*k*), stands on the same footing as the private examination of a wife under a fine of freehold property (*l*) did, even without any special custom for it. The case of *Smithson* v. *Cage* (*m*) is a direct authority for this principle; and it is well known that by an immemorial custom prevailing in particular places, a bargain and sale, &c. by the husband and wife, *when she is examined according to such custom,* will bind her and those claiming under her, and be equivalent to a fine (*n*); and such conveyances are also protected by an act of parliament passed in the thirty-fourth year of the reign of King Henry VIII (*o*).

It should seem that a surrender by husband and wife of the wife's

(*e*) See Horseman *v.* Abbey, 1 Jac. & Walk. 381.

(*f*) Doe *&* Bird, 2 Nev. & Mann. 679; S. C. 5 Barn. & Adol. 695.

(*g*) Smithson *&* Cage, Cro. Jac. 526; Burdet's case, Cro. Eliz. 48; Burgess *&* Foster, 1 Leo. 289.

(*h*) Erish *v.* Rives, Cro. Eliz. 717; Rich *v.* Erth, Toth. 108; Driver *d.* Berry *v.* Thompson and another, 4 Taunt. 294.

(*i*) Dy. 363 b.

(*k*) Ante, p. 75. So where the wife has an incipient title to freebench by special custom, ante, p. 72.

(*l*) See Mary Portington's case, 10 Co. 42 b. In Wood *v.* Lambirth, 1 Tur. & Phil. 8, a surrender by a wife with the consent of her husband (she having been separately examined), to the use of a purchaser, was held to bar her right to freebench out of all copyhold lands of which the husband might be seised during the coverture, supposing the custom to have given her such right, although the purchaser had not been admitted.

(*m*) Cro. Jac. 526.

(*n*) 2 Inst. 673.

(*o*) C. 22; 1 Roper, Husb. and Wife, 139.

X not followed and explained Johnson v Clark 1908 1. Ch. p. 310

copyhold land, she being privately examined, is good by custom, even if the wife be an infant (*p*).

We have seen that in one case a custom for a wife to dispose of her copyhold estate without a private examination was held to be bad (*q*); so in another case, a custom for her to do so without the assent of her husband (*r*); but it seemed to be the opinion of Lord Hardwicke in *Taylor* v. *Philips* (*s*), that a custom for the wife to surrender her copyholds in the presence of the husband, but without his joining, would be good. See contra Coventry's Cases 6 Watkins 289.

And *Skipwith's* case (*t*) is an authority that a custom for a wife to dispose of her copyhold land, with the assent of her husband, *though not privately examined*, would be good; and it should seem that the husband's assent would, under many circumstances, be presumed.

In the case of *Scamon* v. *Maw* (*u*), the Court of C. B. held that, even in the absence of any special custom, a surrender by a feme covert *alone* of her copyhold land to the use of her husband, *she having been privately examined*, and the husband's assent being evidenced by his being present, and his immediate admittance under it, was a valid surrender.

Where the custom required that the husband's consent should be expressed in the surrender and admission, the Court of B. R. would not presume his consent against a person not claiming under the surrender, even though the husband had no personal interest in the property (*x*).

The case of *Compton* v. *Collinson* (*y*) has been thought to be an

(*p*) Litt. Rep. 274; 2 H. Bl. 345. As to powers which can be exercised by an infant, vide post, p. 137.

(*q*) George *d.* Thornbury *v.* Jew, Amb. 629; ante, p. 22.

(*r*) Stevens *d.* Wise *v.* Tyrell, 2 Wils. 1; Hill *v.* Bunning, 1 Sid. 17; ante, p. 22; and see Compton *v.* Collinson, 2 Bro. C. C. 384, n. 39, where it is said that the case of Stevens & Tyrell seems much shaken, if not overruled, by the decision of the principal case; but the author does not concur in that observation. Vide Doe & Shelton, infra.

(*s*) 1 Ves. 229.

(*t*) Mo. 123, ca. 268; S. C. Godb. 14, 143; 3 Leo. 81. This case is noticed in 2 Danv. Ab. 430, pl. 10, as an authority that a custom for a feme covert to devise her copyhold land with *or without* the consent of her husband would be good; but it is not rightly abridged, as is shown by the report in Moore; and see 2 Wils. 1, 2, in Stevens & Tyrell; ante, p. 22.

(*u*) 3 Bing. 378; S. C. 11 Moore, 243.

(*x*) Doe *d.* Shelton *v.* Shelton, 3 Adol. & Ell. 265. The court there said that they were far from acquiescing in the proposition that a custom requiring the expression of consent on the face of the surrender would be void in law (p. 281); and they held a surrender, said to be made by *B. S.* by persons calling themselves "his assignees duly appointed," and which made no mention of a bankruptcy, did not bind *B. S.* as the act of his attorney, not only on account of a custom in the manor for stating in the surrender the due appointment of such attorney, but for want of all proof of authority from him.

(*y*) 1 H. Bl. 343; S. C. 2 Bro. C. C. 385.

authority that the surrender of the wife alone, without the husband's consent, either expressed or implied, when the husband has bound himself by an agreement before marriage, or under a deed of separation, would be good even to pass the *legal* customary interest; but this conclusion is opposed by several authorities applicable to the disposition of freehold property, which clearly show that, even under such an agreement made previously to marriage, the conveyance by the wife, without a fine, would operate only as the exercise of an *equitable* power, and have no effect as far as regards the legal estate (*z*), although a court of equity would compel the heir to give effect to such a disposition by the wife.

In the case of *Bramhall* v. *Hall* (*a*) articles were entered into on the marriage of George Bramhall and Anne his wife, then a widow and seised of an estate in fee, by which Bramhall covenanted that his intended wife should have power by deed or will to dispose of her estate after her decease to any person whomsoever. After the marriage, the wife, by *lease* and *release* reciting the articles, conveyed the estate to the use of her natural son for life, with remainders over; and afterwards the husband and wife levied a fine of the premises, and declared the uses different from those in the release; and Lord Northington, C. held that the wife, having the legal interest in her, the lease and release were not good to pass her estate, either as a conveyance or as an execution of a power; and that the estate passed by the fine.

But a devise by the wife would be a good execution of a power reserved by marriage articles, as in the last-mentioned case, the legal estate being in trustees (*b*).

In the above-mentioned case of *Compton & Collinson* the husband, Michael Collinson, by articles of separation covenanted that his wife, Jane Collinson, should enjoy to her own use all such estates, both real and personal, as should come to her during the coverture, or that he should become entitled to in her right, and that he would join in the necessary assurances to limit such property as she should appoint; and afterwards the wife became entitled to copyhold estates by descent, and was admitted thereto, and surrendered the same to the use of her will. By a writing purporting to be her will she devised the copyholds to John Willis and his heirs. Subsequently, viz. in July, 1772, the said Jane Collinson made absolute surrenders of the said

(*z*) See Rippon v. Dawding, Amb. 565; George & Jew, ubi sup.; Wright v. Lord Cadogan, 1 Bro. P. C. 486; Power v. Bailey, 1 Ball & Bea. 49; 2 T. R. 695. But the wife cannot defeat the right of the heir by any agreement after marriage, Dillon v. Grace, Sch. & Lef. 463; Amb. 566 (2d ed. n. 3).

(*a*) Amb. 467; S. C. 2 Eden, 220; 10 Serjt. Hill's MSS. 39; see 3 Adol. & Ell. 278, in Doe & Shelton; ante, p. 131, n. (*x*).

(*b*) Wright v. Englefield, Amb. 468.

copyhold estates to the said John Willis, who was admitted accordingly. Michael Collinson did not join or concur in any of the surrenders made by his wife, who afterwards died leaving her husband surviving, and C. S. Collinson her customary heir: and the question submitted by the Court of Chancery to the Court of C. B. was, whether John Willis took any and what estate under the surrenders and will of Jane Collinson. The Court of C. B. certified that they were of opinion that John Willis took an estate to him and his heirs according to the custom of the manors, under the surrenders and admissions of July, 1772.

It is material to observe, that the surrenders made by Jane Collinson were, on the face of them, surrenders by her *as a feme sole*. Lord Loughborough noticed this circumstance in a very early part of the judgment of the court; so that by analogy to the case of a fine by a married woman, acting as a feme sole (*c*), the surrender might very consistently be held to conclude the wife and her heirs, and to be avoidable only by the husband (*d*).

In the case of *Doe* d. *Nethercote* v. *Bartle* (*e*), it was decided in the Court of B. R. that the act of 55 Geo. III. c. 192, (for dispensing with surrenders to will in ordinary cases), had not supplied a surrender in favour of the will of a feme covert, on account of the essential concomitant act of a private examination as to her free and uncontrolled assent.

This may perhaps be the most proper place to remind the reader, however, that, under some special circumstances, a wife may make a will, and in every thing act as a feme sole, and as if the husband were dead, as in the case of *The Countess of Portland* v. *Prodgers* (*f*), where the will of Lady Sandys was established, her husband being banished for life by act of parliament, which is a civil death (*g*); and it would

(*c*) M. 7 H. 4, 23; 17 Ass. 17; 2 Roll. Abr. 20 (T.) pl. 1; Bro. Fines, pl. 75; Perk. s. 20; Moreau's case, 2 Sir W. Bl. 1205; Shep. T. 7; but Roll refers also to M. 17 E. 3, 52 b, 79, with a dubitatur.

If the surrenders had disclosed the coverture, the author apprehends that they might have been avoided even by the wife or her heirs, as a fine in such case might have been for error apparent on the record; 1 Sid. 122; 1 Taunt. 38.

(*d*) See 3 Adol. & Ell. 275, 278, in Doe *d.* Shelton *v.* Shelton; ante, p. 131, n. (*x*).

(*e*) 5 Barn. & Ald. 492.

(*f*) 2 Vern. 104; Com. Dig. Baron and Feme (A. 3); Bro. Abr. Baron and Feme, pl. 66, 81; ibid. Coverture, 76; Fitz. Abr. *cui in vita*, pl. 31; and see 2 Bos. & Pul. 227; 3 P. W. 38; Compton & Collinson, ubi sup.

(*g*) See sect. 91 of 3 & 4 Will. 4, c. 74, which empowers the Court of Common Pleas to dispense with the concurrence of a husband incapable of executing a deed or making a surrender, in consequence of being a lunatic, &c. (and, in the case of a lunatic, whether found such by inquisition or not), or of his residence not being known, or being in prison, or being separated from his wife, or being transported, or other cause; vide Ex parte Ann Shirley, 5 Bing. N. S. 226; 7 Dowl. (P. C.), 258, where the husband had resided abroad for more than twenty years with another

appear that, although an abjuration is not, strictly speaking, a civil death, yet the effect is, from the necessity of the case, the same as to the wife (*h*).

It is very common, on the sale of copyhold estates, where the wife is dowable by the custom of the manor, to join her in the surrender to the purchaser; but this is totally unnecessary, as the dower attaches only on lands of which the husband dies seised, and it being a settled principle, that the freebench of the wife is defeated by the alienation of the husband, or even his contract for sale; unless, indeed, as to copyhold estates within manors where gavelkind tenure prevails, and there it is essential that the wife should join in the surrender, and be privately examined as to her uncontrolled assent, the same as on a surrender of her own customary estate. The practice of joining the wife in the surrender when unnecessary is very objectionable, and should be discountenanced by stewards of manors, as it is putting upon the face of the court rolls constructive evidence of a custom, which, in point of fact, does not exist, and must sooner or later lead to litigation; indeed it has, to the author's knowledge, already done so (*i*).

The interest of a feme covert in copyhold property will not be changed nor affected by the mere reservation in a conditional surrender of the equity of redemption to the husband, but only by some express declaration of intention, distinct from the mortgage transaction (*k*).

Though copyholds are not within the statute of uses, they may be surrendered by a husband to the use of his wife, the conveyance being not immediately to her, but mediately by the lord into whose hands the surrender is made (*l*). And the case of *Driver* d. *Berry* v. *Thompson* (*m*) has decided, that a copyhold estate may be limited by the husband and wife to such uses as shall be appointed by the will of the wife, and that her appointment by will in the husband's lifetime is good.

The reader is here reminded that a surrender by the husband of copyhold lands belonging to his wife did not work a discontinuance,

woman. The application to the Court must be supported by the affidavit of the wife herself; Re Bruce, 3 Scott, N. C. 592.

(*h*) Co. Litt. s. 200; 4 Vin. Baron and Feme (L. a.); but see a special act to enable the Duchess of Exeter to act as a single woman during the life of her husband, who was attainted of treason; Hal. MSS. Ro. Parl. v. 5, p. 548, noticed Co. Litt. 133, b. n. 4.

(*i*) See, in connection with this suggestion, the case of Riddell & Jenner, as to customary dower in the manor of Cheltenham, 10 Bing. 29; Doe *d.* Rose Riddell *v.* Gwinnell, 1 Adol. & Ell. N. S. p. 682; ante, p. 78.

(*k*) Reeve *v.* Hicks, 2 Sim. & Stu. 403; 1 Roper, Husb. & W. 151.

(*l*) Bunting *v.* Lepingwel, 4 Co. 29 b; Co. Cop. s. 35, Tr. 79; Gilb. Ten. 220.

(*m*) 4 Taunt. 294; and see Peacock *v.* Monck, 2 Ves. 191; Belt's Supp. 323-4.

even prior to the 3 & 4 Will. IV. c. 27, stat. 39, so as to put the wife to a customary plaint (*n*).

When a husband is desirous of securing to his wife a life interest in copyholds, care should be taken to avoid any limitation of a contingent nature, as, until lately, there were no means of conveying a contingent right in lands of copyhold tenure, and the doctrine of estoppel does not apply to copyholds (*o*).

Should copyhold lands be limited, as is more usually done, to the use of the husband for life, and after his decease to the use of the wife for life, the life estate of the wife in remainder might be conveyed by a surrender, with the customary private examination as to her voluntary consent. But it is by no means unfrequent, even when the husband intends to keep a power of disposition over copyhold property with the concurrence of his wife, to frame the surrender to the use of the husband and wife for their lives, and the life of the survivor [or longer liver] of them, and after the decease of the survivor [or longer liver] of them, to the use of the heirs of the survivor.

Under a surrender so worded, the limitation to the heirs of the survivor of the husband and wife is clearly a *contingent* interest, and, under the previous limitation, the husband and wife as clearly take by *entireties*, and therefore without any power of severance in either of them alone (*p*). And in the case of *Doe* d. *Dormer* v. *Wilson* (*q*), the Court of B. R. decided, that such previous limitation created *vested* interests in the husband and wife, not only for their joint lives, but for *the life of the survivor of them*, so that a surrender by the husband and wife in favour of a purchaser in fee (and which could only pass such interests as were of a vested nature), was good for the joint lives of the husband and wife, and *the life of the survivor;* and a verdict in ejectment obtained by the customary heir of the wife (who survived her husband), and which ejectment was brought within twenty years from the decease of the wife, was therefore established.

The author submits, however, that it might be contended, in a case similar to that of *Doe & Wilson*, that, although a limitation to *A.* and his wife for the lives of two strangers, and the life of the survivor of them (where the joint interest and possession of *A.* and his wife might continue during the whole period of the estate limited by the surrender, that is, the husband and wife might outlive both the *cestuy que vies*), would obviously create a vested estate in *A.* and his wife, not only during the joint lives, but also during the life of the survivor

(*n*) Ante, pp. 46, 47; 5 Barn. & Adol. 712; in Doe & Bird.

(*o*) Taylor v. Phillips, 1 Ves. 230; post, pp. 137, 138, n. (*b*).

(*p*) See Co. Litt. 187 b, 299 b; Purefoy v. Rogers, 2 Lev. 39; Back v. Andrews, 2 Vern. 120; Green *d.* Crew v. King, 2 Sir W. Bl. 1212; 5 T. R. 654, per Lord Kenyon, in Doe & Parratt.

(*q*) 4 Barn. & Ald. 303.

of the *cestuy que vies;* yet that under a surrender to *A.* and his wife *for their own lives,* and *the life of the longer liver* [*or survivor*] *of them, and after the decease of the survivor, to the heirs of such survivor,* where the *joint interest* or possession could not by any possibility continue during the whole period of the estate limited by the surrender (the husband and wife being themselves the *cestuy que vies*), the true legitimate construction of the surrender must be a limitation to *A.* and his wife for their joint lives, remainder to the survivor for his or her life, remainder to the heirs of the survivor, and then the life interest limited to the survivor, uniting to and being equally *contingent* with the ultimate limitation to the heirs of the survivor, the surrender would create a *vested* interest in the husband and wife during their joint lives *only,* with a contingent remainder in fee to the survivor.

And in support of this construction, it might, the author thinks, be urged that, under a surrender to *A.* and his wife for their lives, and the life of the longer liver [or survivor], and after the decease of the survivor of them, to the right heirs of such survivor, there would be less inconsistency in construing the words, "*and the life of the longer liver*" as substantive words of limitation, to be read "*and to the longer liver for life,*" than in considering the superadded words "*and after the decease of the survivor of them*" to have reference to the quantum of interest designed to be given to the husband and wife, and not to the limitation of the estate upon which the remainder over in fee was engrafted (*r*).

(*r*) The author understands that, in the above case of Doe & Wilson, the defendant was in possession of evidence to prove that a mortgage in fee was contemplated, on the execution of the surrender pursuant to Mr. Mordaunt's contract for the purchase, and was, in fact, made some short time afterwards, which necessarily strengthens the presumption that Mr. Mordaunt intended to keep a power of disposition (in conjunction with his wife) over the *fee simple* of the estate, and that they could not have understood the effect of the surrender made to them. These circumstances at least militate against any supposition of a design in the parties to extend the *vested* estate under the surrender, to the life of the survivor of Mr. and Mrs. Mordaunt, *and to that period only.*

The author is also informed that the surrender to Mr. and Mrs. Mordaunt was made by the assignee of a bankrupt, who had previously charged the estate equitably with a sum borrowed on bond, and that in a deed of release of right and covenants for the title, accompanying the surrender (by which it appeared that the purchase money was insufficient for the discharge of the mortgage-debt), it was recited that the estate had been surrendered by the assignee, at the request of the equitable mortgagee, to the use of Mr. Mordaunt and his wife *and the survivor of them,* and the heirs of the survivor, and that the release of right by the equitable mortgagee (in which the assignee of the bankrupt joined) was framed conformably to that recital, and not made to Mr. and Mrs. Mordaunt for their lives and *the life of the longer liver;* and had the surrender been worded as recited in the above-mentioned deed, it is quite clear that all the estate limited by the surrender beyond the *joint lives* of the husband and wife, would have

An infant is not bound by a surrender (*s*), except by special custom (*t*); consequently he may enter at full age, and was not put to his plaint in nature of a *dum fuit infra ætatem* (*u*), even though the surrenderee has been admitted (*v*); yet a surrender by an infant, if it be for his benefit, or (if not prejudicial to the infant) for the benefit of others (*x*), is voidable only, and not *ipso facto* void (*y*); therefore an infant may surrender a copyhold held for lives, for the purpose of effecting a renewal, subject to his right of avoiding the transaction when of age; it should however appear on the face of the surrender, that such renewal is beneficial to the infant (*z*). But a power over copyholds cannot be executed by an infant, when it is coupled with an interest, any more than in freehold cases (*a*).

The Effect of a Surrender, with relation to Contingent and Reversionary Interests; and as to the Mode of conveying distinct Estates and distinct undivided Interests, and also the Copyholds of Bankrupts and Insolvent Debtors, &c. &c.

A person who is not in the customary seisin, as a contingent remainder-man, or the heir in the lifetime of his ancestor, even al-

been *contingent*, and then the ejectment by the customary heir of the wife would have failed, from being out of time, as the husband died much more than twenty years before the action was brought. The late case of Elston *v.* Wood, 2 Myl. & Keen, 678, shows that the Court of Chancery would have reformed the surrender in the above case conformably to the actual agreement between the parties, and is important on the question, "when and how court rolls may be amended." See that title, post.

(*s*) Hughs *v.* Carpenter, Toth. 278.

(*t*) Ante, p. 130. By the custom of the manor of Panington an infant of twelve years may surrender; Lyde *v.* Somister, Trin. 15 Car. Toth. 173. And in Nayler *v.* Strode, 2 Ch. Rep. 392, a surrender of a copyhold by an infant of four or five years of age was allowed.

(*u*) Note, the plaint abolished by 3 & 4 Will. 4, c. 27, s. 36.

(*v*) Gilb. Ten. 277; Knight & Footman, 1 Leo. 95; S. C. (Knight & Fortipan), Cro. Eliz. 90; Bullock *v.* Dibley, Mo. 596; Poph. 39; Gooles *v.* Grane, Mo. 597.

(*x*) 3 Burr. 1801.

(*y*) Zouch & Parsons, 3 Burr. 1794, 1804; Co. Lit. 51 b, (n. 3); Ashfield *v.* Ashfield, W. Jones, 157; 17 Ves. 384. And Perkins, s. 12, says, "All gifts, grants or deeds made by an infant, which do not take effect by delivery of his hand, are void; but gifts, grants or deeds made by an infant, by matter in deed or in writing, which take effect by delivery of his own hand, are voidable by himself and his heirs, and by those which shall have his estate." And again, s. 13, "And therefore if an infant make a deed of feoffment, and a letter of attorney unto a stranger to make livery of seisin, and he make livery of seisin by force thereof, he shall be taken for a disseisor," &c.

(*z*) Zouch & Parsons, sup. And an infant trustee was compellable to surrender copyholds under the stat. 7 Ann. c. 19, and 6 Geo. 4, c. 74. And now see 1 W. 4, c. 60, ante, p. 85.

(*a*) Hearle *v.* Greenbank, 1 Ves. 299; 3 Atk. 695.

As to powers which an infant may exercise over real or personal estate, see Pow. on Powers, 43; Sugd. on Powers, 162 et seq. (5th. edit.)

though the ancestor should die before him, cannot surrender; for a surrender, which passes only what the surrenderor has at the time, does not operate by way of estoppel; therefore, where a copyhold was devised to *A.* for life, remainder to *B.* for life, and after his decease to such of the testator's nieces (daughters of *A.*) as should be then living, as tenants in common in fee, and the six nieces were admitted in reversion, each to an undivided sixth part, and sold and surrendered their shares to *B.*, (four only surviving *B.*, of whom three afterwards died), the surviving niece, and the heirs of the other three who survived *B.*, recovered in ejectment against the devisee of the purchaser of *B.* (*b*).

But the reversioner and vested remainder-man are in the customary legal seisin, as contradistinguished from an actual seisin by taking of esplees (which latter is the seisin contemplated by the statutes of limitation (*c*)), and may surrender (*d*); and although a copyholder who has leased by licence of the lord, is not strictly speaking a reversioner, yet his copyhold interest may pass in a surrender by the name of a reversion (*e*).

(*b*) Doe *d.* Blacksell and others *v.* Tomkins et ux., 11 East, 185. And see Goodtitle *d.* Faulkner and others *v.* Morse, 3 T. R. 365 (which case affords much information on the doctrine of estoppel as applicable to freehold tenure, and on the diversity between a release, a feoffment and a warranty.) Vide also Doe *&* Prestwidge, 4 Mau. & Sel. 178; Doe *d.* Ibbott *v.* Cowling et ux., 6 T. R. 63; Taylor *v.* Philips, 1 Ves. 229, 230.

In Bensley *v.* Burdon, 2 Sim. & Stu. 519, the V. C. said that an estoppel was as well worked by an indenture of release as any other indenture; and that the text writers upon that subject stated that estoppel was wrought by any deed indented, making no exception as to the indenture of release.

See Mr. Fearne's suggestion of the mode of conveyance best calculated to bind a future executory interest in copyholds, in his Posth. W., p. 108, 109.

N.B.—Contingent, executory or other future interests in any real or personal estate, are expressly made devisable by 1 Vict. c. 26, (s. 3). See the Act in the Appendix. And the 5th sect. of 7 & 8 Vict. c. 76, for simplifying the transfer of property, authorizes the conveyance assignment, or charge by any deed, of any *contingent* or *executory interest, right of entry for condition broken*, or *other future estate or interest* a person may have in any copyhold land.

The above section, taken in connection with the stat. 3 & 4 Will. 4, c. 74, s. 77, will, it should seem, enable a married woman, with the consent of her husband, to assign or charge her contingent interest in copyhold property.

(*c*) Widdowson *v.* Earl of Harrington, 1 Jac. & Walk. 558, 559.

(*d*) Butler *&* Lightfoot, 3 Leo. 239; 4 Leo. 9; Heggor *&* Felston, 4 Leo. 111; Gyppyn *v.* Bunney, Cro. Eliz. 504; S. C. (Tiping *v.* Bunning), Mo. 465; Colchin *v.* Colchin, Cro. Eliz. 662; Auncelme *v.* Auncelme, Cro. Jac. 31; Bullen *&* Grant, Cro. Eliz. 148; S. C. 1 Leo. 175; Church *v.* Munday, 12 Ves. 426, 431; Co. Lit. 266 b, n. (1).

So a reversioner or vested remainderman could not have devised the copyhold previously to the stat. of 55 Geo. 3, c. 192, without surrendering to the use of his will. Post, tit. "Surrender to Will."

(*e*) Swinnerton *v.* Miller, Hob. 177; S. C. Brownl. 178. But see Selby *v.* Becke, Litt. Rep. 17; Saffyn's case, 5 Co. 124 b; Cro. Eliz. 585.

A remainder-man entering upon the tenant for life does not thereby acquire any customary estate whereof to make a surrender; but the person ousted is in all cases the tenant, and he or his heir may surrender, and not the person who has obtained wrongful possession (*f*); but the author apprehends that the person ousted, or his heir, must enter previously to his making any surrender (*g*); and as such disseisor has no copyhold interest before admittance, he is not capable of a release from the rightful tenant, especially as such release would be prejudicial to the lord (*h*).

One joint tenant may release (*i*) or surrender to another, which will operate as a severance of the joint tenancy, and on a release from one of three or more joint tenants to his companions, they will be *in* by the releasor (*k*); and the joint tenancy will be destroyed even by a surrender to will (*l*); or to a stranger on condition to perform the will of the surrenderor (*m*), though such surrender is dormant and revocable.

A question has frequently arisen whether a copyholder can insist upon having distinct copyhold tenements, i.e. estates held originally by distinct titles, included in one surrender or copy, and the author is not aware of any clear authority upon the point; but he inclines to think that the lord or steward would be compelled, upon an application to the Court of B. R. for a mandamus, to accept a surrender by which a tenant should desire to pass two or more distinct copyholds (*n*).

(*f*) Bird & Kirke, 1 Mod. 199; S. C. Carter, 237; S. C. (called Keen *v.* Kirby), 2 Mod. 32; 1 Watk. on Cop. 61; 2 Watk. on Cop. 146.

(*g*) Joynder *v.* Lambert, Cro. Jac. 36; Norrice *v.* Norrice, March, 23; Selby & Becke, Litt. Rep. 17; Pit *v.* Moore, T. Jones, 154; 1 Burr. 108. And see Nalson *v.* Remington, Clayt. 1, in which a copyholder of the king, who was put out of possession during the ouster, made a surrender to *I. S.*, who was lessor of the plaintiff, and it was held that nothing passed by the surrender, though there was no disseisin, the freehold being in the king, who could not be disseised; but that by the entry of the copyholder his estate was regained. And see Anderson *v.* Haywood, 3 Leo. 221; 4 Leo. 30.

[N.B.—The right of entry was not tolled by a descent of copyholds, ante, p. 46. Neither is it necessary for a disseisee of copyholds to be admitted on entry, as he continues tenant; Co. Cop. s. 56, Tr. 129.]

(*h*) Wakeford's case, 1 Leo. 102; n. (2) to Co. Lit. 59 a; 4 Co. 25 b; Mortimore's case, Hetl. 150; Co. Cop. s. 36, Tr. 83.

(*i*) Wase *v.* Pretty, Win. 3; Mortimore's case, sup.

(*k*) Kitch. 168; Co. Lit. 59 b; Co. Cop. s. 35, Tr. 79; Mortimore's case, Wase & Pretty, ubi sup.; 4 Mod. 254; 2 D'Anv. 205; 1 New. Abr. 470. And see Baddeley *v.* Leppingwell, 3 Burr. 1543; post, tit. "Admittance (*Joint-tenant*)." But qu. contra, when the release is from one of two joint tenants to his companion; Wase & Pretty, sup.

(*l*) Post, tit. "Surrender to Will." — *k 211*

(*m*) Gale *v.* Gale, 2 Cox. Ch. Ca. 136.

(*n*) Note, distinct copyholds might have been included in one plaint; 8 Co. 47 b, 48 a, in Webb's case, cited post, tit. "Steward's Fees." And see the Stamp Act of 44 Geo. 3, c. 98, repealing provisions in former acts as to the multiplication of stamps upon surrenders and admittances.

He apprehends also that coparceners (*o*) and tenants in common (*p*) may elect to pass their separate interests to a purchaser or mortgagee, by one surrender.

A surrenderee of copyholds cannot surrender before admittance, even though the surrender to him is presented, nor will his admittance subsequent to his surrender make such surrender valid by relation (*q*); for though any act of law will operate upon the estate, as in *Benson & Scott* (*r*) and other cases, where the admission has been held to have relation to the surrender, so as to make the estate pass in the same course of descent, and to give the same right to dower and curtesy as if the admittance and surrender had been contemporaneous acts; yet it cannot be affected by any act of the party, according to the distinction in *Butler & Baker's* case (*s*).

And as a surrenderee has no interest before admittance of which a court of law can take notice (*t*), he is not capable of forfeiting the copyhold by committing felony or other act (*u*); but it is otherwise as to an heir, who is, to many purposes at least, tenant before admittance (*x*).

The above case of *Doe & Tofield* has decided (contrary to a prevailing notion (*y*)), that the steward's acceptance of a surrender from the first surrenderee is not an admittance of him: and Lord *Ellenborough* there observed, that the authorities on that point in Co. Cop. s. 39, Yelv. 144, and Pop. 127, were not impeached by the passage in Roll. Abr. 505, X. Pl. 1, or the note in Co. Litt. 60 a; for it appeared from Cro. Eliz. 504 and 662, that in *Keeping & Bunning* (called in Cro. *Gyppin & Bunney*), the first surrenderee was a remainder-man, and that the tenant for life had been admitted, and that *Colchin* v. *Colchin* was the case of an heir.

(*o*) In a case of an application to the Court of B. R. for a mandamus to compel the lord to admit coparceners as one heir, and on payment of one set of fees, C. J. Abbott said, "I entertain considerable doubts whether the steward, after admitting them as one heir, can insist upon taking their surrender separately; but on that I pronounce no decided opinion;" Rex *v.* The Lord of the Manor of Bonsall and his Steward, 3 Barn. & Cress. 176; S. C. 4 Dow. & Ry. 825.

(*p*) See Co. Cop. s. 56, Tr. 130.

(*q*) Co. Cop. s. 39, Tr. 87; Supp. s. 4; Sty. 146, in Barker *v.* Denham, 2 Bl. Com. 368; Rawlinson *v.* Green, Poph. 127; S. C. 3 Bulst. 237, 240; Wilson *v.* Weddell, Yelv. 144; S. C. 1 Brownl. 143; Co. Lit. 60 a, n. (2); Doe *d.* Tofield *v.* Tofield, 11 East, 246; and see Robinson *v.* Greves, Bridgm. Rep. 81; Ford *v.* Hoskins, Cro. Jac. 368; S. C. 2 Bulst. 336.

(*r*) Ubi sup.

(*s*) 3 Co. 29 à.

(*t*) Doe *d.* Bennington *v.* Hall, 16 East, 211. He has neither *jus in re* nor *ad rem*; 5 Burr. 2771.

(*u*) Roe *d.* Jefferies et al. *v.* Hicks et al. 2 Wils. 13. And see Co. Cop, s. 59, Tr. 137.

(*x*) Roe *d.* Hicks, sup.; Borneford *v.* Packington, 1 Leo. 1; ante, p. 126; vide 12 Ad. & El. 572, in Doe *v.* Clift.

(*y*) Elkin *v.* Wastall, 3 Bulst. 232; 6 Vin. Cop. (E. b); 1 Watk. on Cop. 60, 61; ib. 101; Co. Lit. 60 a, n. (2); Gilb. Ten. 283.

The author proposes to take particular notice of the acts of parliament relating to the conveyance of the copyhold property of bankrupts and insolvent debtors, in treating of the admittance of surrenderees; but the reader is to bear in mind that an important change as to the mode of transferring the copyhold estate of a bankrupt was introduced by the stat. of 6 Geo. IV. c. 16 (*z*), and of the copyhold estate of an insolvent debtor by the act of 7 Geo. IV. c. 57 (*a*).

When a copyholder surrenders for a valuable consideration, the land is bound both at law and in equity (*b*), and he is prevented from surrendering to any other person (*c*); but the whole legal estate remains in him (*d*), and he has a right to retain the possession subject to his accounting for the mesne profits, if the surrenderee is afterwards admitted (*e*); and if the surrenderor die, the estate devolves upon his

(*z*) Sects. 64, 68. And see 1 & 2 Will. 4, c. 56; but note, the 26th sect. of that act, vesting the real estate of a bankrupt in the assignees, did not include copyholds; ante, pp. 64, n. (*d*); 83, n. (*e*).

With respect to powers vested in a bankrupt, see Sugd. on Powers, 190 (5th edit). Note also, that it was decided in Thorpe *v.* Goodall, 17 Ves. 388, 460, that a bankrupt was not compellable by decree in equity to execute a power for the benefit of his creditors. But by 6 Geo. 4, c. 16, s. 77, the assignees may execute any powers vested in the bankrupt.

By the General Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 22, the assignees appointed by the court may execute any powers which the insolvent might have executed for his own benefit; post, tit. "Admittance." See extracts from the above acts in the Appendix.

(*a*) Sect. 20. And see 1 Will. 4, c. 38, ss. 5, 6, 7, in the Appendix.

N.B.—The provisions and schedules of 7 Geo. 4 and 1 Will. 4, as to the conveyance of an insolvent's interest in copyhold or customary property, were virtually repealed by the 47th section of 1 & 2 Vict. c. 110; post, tit. "Fine."

(*b*) Payne *v.* Barker, Sir Orl. Bridg. 24. And the admittance, as we shall see hereafter, is merely as between the lord and tenant: on these grounds it has been decided that the admittance of the surrenderee need not be memorialized on a surrender of copyholds for securing an annuity; Doe *d.* Naylor *v.* Stephens, 1 Pri. 38.

(*c*) Kitch. 161; Co. Cop. s. 39. Tr. 87, 88; Roe *d.* Noden *v.* Griffiths, 4 Burr. 1961; Vaughan *d.* Atkins *v.* Atkins, 5 Burr. 2785, 2787; Holdfast *d.* Woolams *v.* Clapham, 1 T. R. 601; Benson *&* Scott, 1 Salk. 185; S. C. 3 Lev. 385; S. C. Skin. 406; S. C. Holt, 160; S. C. Comb. 233; S. C. 4 Mod. 251; S. C. 12 Mod. 49; Cro. Car. 284.

(*d*) Kitch. 161; Burgoyne *v.* Spurling, Cro. Car. 273, 283; S. C. W. Jones, 306; Baddeley *v.* Leppingwell, 3 Burr. 1543; Fisher *&* Wigg, 1 P. W. 17; Doe *d.* Shewen *v.* Wroot and others, 5 East, 132; S. C. 1 Smith's Rep. 363; Doe *&* Tofield, 11 East, 250.

This rule was recognised some years ago in a case of arson, where it was held that a tenant in possession of a copyhold messuage was not guilty of arson by burning it, although it had been surrendered to the use of a mortgagee, who had not been admitted, for it was not the house of *another*; Rex *v.* Spalding, 1 Leach, C. L. 218. See now as to the offence of a person setting fire to a house, whether in his own possession or in the possession of another, 7 & 8 Geo. 4, c. 30, s. 2.

(*e*) 2 Bl. Com. 368; Co. Cop. s. 39, Tr. 87; Gilb. Ten. 263; Roe *d.* Jefferey et al. *v.* Hicks et al., 2 Wils. 13; Burgoyne *v.* Spurling, sup.; Berry *v.* Greene, Cro. Eliz. 349; Frosel *or* Rose-

customary heir (*f*); but he is a trustee for the surrenderee, and cannot set up an objection against his recovering in ejectment on a demise laid between the time of the surrender and the admittance, even if the action is brought before admittance, for that relates back to the period of the surrender (*g*); but an action of trespass would be maintainable by the surrenderor and not by the surrenderee (*h*); and yet if the lord accept a surrender, and the surrenderee enter and afterwards, before admission, the lord disseise him, an action would lie against the lord, because he ought not to take advantage of his own wrong (*i*).

A surrender is not affected by the death of the surrenderor (*k*), or of the person by whose hands the surrender is made, but presentment and admittance afterwards will be good; nor does the death of the surrenderee before presentment of the surrender affect the right of the heir to be admitted (*l*).

So much of the copyholder's interest as is not expressed in the surrender, or in the limitations by his will, pursuant to a surrender to the uses thereof, will remain in him of his old estate, and be considered as his reversion (*m*): therefore after a surrender by a copyholder to the uses of his will, he may surrender to any person he pleases (*n*); and on a surrender to such uses as the lord shall appoint, if the lord appoints the use to *I. S.* for life, the fee (subject to the life interest of *I. S.*) will result to the surrenderor (*o*).

well *v.* Welsh, Cro. Jac. 403; S. C. 3 Bulst. 214; S. C. 1 Roll. Rep. 411; S. C. Godb. 268; Arnold *v.* George, Yelv. 16.

(*f*) Burgoyne & Spurling, Frosel & Welsh, Doe & Wroot, ubi sup.; Doe *d.* Vernon *v.* Vernon et al., 7 East, 8.

(*g*) See Benson & Scott, Holdfast & Clapham, and Vaughan & Atkins, ubi sup.; Doe *d.* Bennington *v.* Hall, 16 East, 208.

(*h*) Berry *v.* Greene, Cro. Eliz. 349; Payne *v.* Barker, Sir Orl. Bridg. 21. Semble, that even a power to sell, and a covenant for quiet enjoyment in a deed of trust of even date with the surrender, would not justify an entry before admission; Watson *v.* Waltham and others, 2 Adol. & Ell. 485.

(*i*) Roe *v.* Hicks, 2 Wils. 15.

(*k*) But a custom requiring the surrenderee to be admitted in the lifetime of the surrenderor would be good; Fenn *d.* Richards *v.* Marriott, Willes, 430; ante, p. 24.

(*l*) Bunting *v.* Lepingwel, 4 Co. 29 b; Kite & Queinton, 4 Co. 25 a; Co. Cop. s. 40, Tr. 89; Vaughan & Atkins, Frosel & Welsh, sup. As to presentment and admittance, now see 4 & 5 Vict. c. 35, ss. 88, 89, 90.

(*m*) Bunting *v.* Lepingwel, sup.; Bullen & Grant, Cro. Eliz. 148; S. C. 1 Leo. 174; Podger's case, 9 Co. 107 a; Fitch *v.* Hockley, Cro. Eliz. 441; S. C. 4 Co. 23 a; Brown *v.* Dyer, Holt, 165; S. C. 11 Mod. 98; Thrustout *d.* Gower *v.* Cunningham, 2 Sir W. Bl. 1046; Roe *d.* Noden *v.* Griffits et al., 4 Burr. 1952; Bicknall *v.* Tucker, Brownl. 181; Vin. Abr. Cop. (S. a), pl. 16; Shepherd *v.* Adams, or Belfield & Adams, or Southcot & Adams, ante, p. 124. But see reference to the 3d sect. of 3 & 4 Will. 4, c. 106, post, 143, n. (*y*).

(*n*) Fitch & Hockley, Thrustout & Cunningham, sup.; post, tit. "Surrender to Will."

(*o*) Wrot's case, Litt. Rep. 26.

The heir, as the author has before shown (*p*), would, until lately, have taken by descent and not by purchase, when the two estates met in him (*q*); and the ultimate limitation to the right heirs of the copyholder, under a surrender to uses, was within this rule, whether or not the copyholder took a particular estate by the surrender (*r*); though it has been thought, that if the surrenderor did not take a particular estate, the fee would not have resulted to him, but that his heir would have been *in* by purchase (*s*). Indeed a distinction of that nature once existed with respect to freehold estates (*t*), but it was afterwards abolished, and both in freehold and copyhold cases, the ultimate limitation to the right heirs of the grantor, or surrenderor, was considered as part of his old estate, and vested in him as a reversionary interest (*u*); the rule having been that a man could not limit an estate to his right heirs as purchasers (*x*). It followed that under a surrender to uses, with the ultimate limitation to the right heirs of the surrenderor, the descendible quality of the estate was not altered (*y*).

Where a surrender is perfect in the beginning, a memorandum which would make the whole void will be rejected, as if the memorandum be, that the surrender is not to be in force till after the death of the surrenderor (*z*): this is precisely the principle of the decision in *Carter & Madgwick* (*a*), that when in a freehold case the habendum is repugnant to an express estate limited by the premises, the habendum shall be void.

(*p*) Ante, p. 43.

(*q*) But this is altered by 3 & 4 Will. 4, c. 106, infra, n. (*y*).

(*r*) Roe & Griffits, sup.; Smith *v.* Trigg, 1 Stra. 487; Godbold *v.* Freestone, 3 Lev. 406; Abbot *v.* Burton, 1 Salk. 590; Harris *v.* Bishop of Lincoln, 2 P. W. 138; Gilb. Ten. 272; Fearne, Cont. Rem. 86 to 95. And to defeat the title of the customary heir, it must be distinctly shown that the ultimate remainder passed out of the surrenderor; Roe & Griffits, sup.

(*s*) Allen & Palmer, 1 Leo. 101; and see Roe *d.* Nightingale et ux. *v.* Quartley, 1 T. R. 634; Counden *v.* Clerke, Hob. 31; Dy. 134 a, pl. 7.

(*t*) Dy. 134 a; Hob. 31; 1 Watk. on Cop. 97, 98.

(*u*) Harris *v.* Bishop of Lincoln, 2 P. W. 138; and see Godbold & Freestone, Abbot & Burton, sup.; see also Fenwick *v.* Mitforth, Mo. 284; Fearne, Cont. Rem. 66, 67.

(*x*) 32 H. 8; Br. Garde, 93; Co. Lit. 22 b.

(*y*) But now by the 3d sect. of 3 & 4 Will. 4, c. 106, "for the amendment of the law of inheritance," the heir takes as devisee, and not by descent, if a copyhold estate be devised to him: and a limitation by any assurance to the person conveying, or his heirs, will create an estate by purchase. And by the 6th sect., a lineal ancestor takes as heir, in preference to collateral persons, therefore a father is preferred to a brother or sister: but the act does not extend to any descent before 1 Jan. 1834; ante, pp. 43, 44, n. (*f*) and (*g*)

(*z*) Seagood *v.* Hone et ux., Cro. Car. 367; S. C. Sir W. Jones, 342; 5 Mod. 267, in Leigh *v.* Brace; post, tit. "Surrender in futuro."

(*a*) 3 Lev. 339.

And a limitation that is good in its nature will be supported, although others are void (*b*).

Where the limitation of the use of a copyhold of inheritance is void, the surrender to the lord will be deemed void also (*c*).

But it would seem that if a surrender is made generally into the lord's hands, even of a copyhold of inheritance, without any circumstances explanatory of a contrary intention, the surrender will operate as an extinguishment of the copyholder's interest (*d*).

Yet we shall presently see that this maxim admits of an exception, as an estate may be implied from the admittance, when the surrender is made to the lord in such unqualified terms.

If, however, any estate is limited by the surrender, the admittance, in whatever manner it may be made, will not vary or qualify the uses of the surrender; this, indeed, is a necessary consequence of the rule, that a surrenderee of a copyhold of inheritance is *in* by the surrenderor, and not by the lord (*e*).

Suppose, therefore, a surrender to be made to *A.* without any condition, and the lord to admit *A.* upon a condition, the condition would be void; or if it be to *A.* for life, either expressly or for want of any words of limitation, and the lord admit in fee, a life interest only would be acquired by *A.* under such surrender and admittance (*f*).

So any variance in the person, as well as in the estate, between the admittance and the surrender, is equally within the same rule; if therefore the surrender should be to *I. S.*, and the lord should admit *I. S.* and *I. N.*, no estate would be acquired by *I. N.* under this admittance, but the whole would vest in *I. S.* (*g*).

And an admittance by the lord wholly at variance with the surrender would be void; as if the surrender be to *I. S.*, and the lord admit *I. N.*; and in such a case *I. S.* might afterwards be admitted according to the effect of the surrender. Again, if the surrender be

(*b*) Webster *v.* Allen, Mo. 677, ca. 922.

(*c*) Simpson's case, Godb. 265, pl. 364; Bambridge *v.* Whitton, Mar. 177, cited Supp. Co. Cop. s. 1, Tr. 144; but see Mo. 352, in Portman & Willis.

(*d*) Co. Cop. s. 35, Tr. 80; Gilb. Ten. 254; ib. (n. 117); Fisher *v.* Wigg, 1 P. W. 17; S. C. 1 Ld. Raym. 627; S. C. 12 Mod. 296; 1 Watk. on Cop. 92, 109; but see 1 Roll. Rep. 253; Com. Dig. Cop. (F. 8).

(*e*) Co. Cop. s. 41, Tr. 91; Taverner & Cromwell, 4 Co. 27 b; Westwick *v.* Wyer, 4 Co. 28 b; Bunting *v.* Lepingwel, 4 Co. 29 b; Bullock & Dibler, Poph. 39; 3 Burr. 1543; 4 Burr. 1961; 5 Burr. 2786; 3 Leo. 210, ca. 274; Paulter *v.* Cornhill, Cro. Eliz. 361; Fitch *v.* Hockley, Cro. Eliz. 442; S. C. 4 Co. 23 a; Lane *v.* Pannel, 1 Roll. Rep. 238, 317, 438; Hether & Bowman, Sty. 462; Co. Lit. 59 b.

(*f*) Kitch. 171; Co. Cop. s. 41, Tr. 93; Bunting *v.* Lepingwel, 4 Co. 29 b.

(*g*) Co. Cop. s. 41, Tr. 92; Westwick *v.* Wyer, 4 Co. 28 b; and see 3 Leo. 210, ca. 274.

to *A.* with the reservation of a rent, and the lord admit *A.* without any reservation of rent, or upon the reservation of a less rent than is mentioned in the surrender, the admittance would be wholly void (*h*).

It has been said that a surrenderee, when admitted, is *in* by grant from the lord (*i*). This, however, is clearly erroneous as to a surrender by a copyholder of inheritance (*k*).

The author apprehends that, by special custom, a copyholder for life may surrender to the use of another for the life of the surrenderor, and then that the surrenderee will be *in* by the surrenderor, as in the case of a copyhold of inheritance, and not by the lord; but that, in the absence of any such special custom, where a copyholder for life surrenders to the lord, whether absolutely to do therewith his will and pleasure, or to the use of another, to whom the lord grants the copyhold, the estate vests in the lord, and the grantee is *in* by him, and not by the surrenderor (*l*). So that if *A.*, a copyholder for life, were to surrender to *B.* for his life, there would be no reversion in *A.* (*m*). In *Grantham* v. *Peebles & Copley* (*n*), the court said, that even if a surrender be made to the lord "to the intent *quod inde faciat voluntatem*, yet, *by custom*, the surrenderor by petition, *or declaration*, may direct it to any person whatever, and the lord must pursue it, *and there is no estate in the lord* [Dy. 264, pl. 38], but it remains in the tenant's hands till admittance of such party, and the purchaser might come in at any time."

It may be right to observe, in conclusion of our considerations of the effect of a copyhold surrender, that a conveyance of copyholds for a consideration, however inadequate, is not fraudulent as against cre-

(*h*) Co. Cop. s. 41, Tr. 93; 3 Burr. 1543; Allen & Nash, 1 Brownl. 127; Hether & Bowman, Sty. 462. It was said by Glyn, C. J., in Blunt & Clark, 2 Sid. 61, that if a surrender be to the use of I. S., and I. N. is admitted, *and afterwards I. S. consent*, this is a good admittance. Sed qu. and see 6 Vin. Cop. (F. b), pl. 16.

(*i*) 2 Ves. 257; 1 Roll. Abr. 627; Dis. I. pl. 9, in Moore's case; and see Yelv. 223, in Brasier v. Beale; S. C. 1 Brownl. 149; 1 P. W. 17, in Fisher & Wigg.

(*k*) Ante, p. 144; and see King v. Lorde, Cro. Car. 204; Kerby's *alias* Kirk's case, 1 Freem. 192; S. C. (Bird & Kirke) 1 Mod. 200; More v. Pitt, 1 Freem. 246. If a surrender be made to the lord for life, with remainder over, the remainder would be good, and the remainder-man would be in by the surrenderor, and not by the lord; Wade v. Bache, 1 Sid. 360.

(*l*) See the cases in the last note. ["Where a bill is brought for surrender of a copyhold estate *held for lives*, the lord must be made a party, because when the surrender is made, *the estate is in the lord*, and he is under no obligation to new grant it; contra in cases of copyholds of inheritance, for there the lord need not be a party; Mich. Vac. 1720 in Canc." See 6 Vin. Cop. (X e.), pl. 5.]

(*m*) King v. Lorde, sup.

(*n*) 2 Keb. 823; S. C. 2 Saund. 422.

ditors under the stat. of 13 Eliz. c. 5 (*o*), and that copyholds were not, until a recent period, subject to debts (*p*).

Of the Construction of Copyhold Surrenders.

Surrenders of copyholds, it has been often, and, as the author conceives, correctly observed, are governed by the same rules as common law assurances (*q*); and conformably to this maxim, upon a limitation to the ancestor for life, and a further limitation in the same surrender to his right heirs, the two estates will unite, as in *Shelley's* case (*r*).

It must, however, be recollected, that when an estate for life is limited to the father or mother *only*, and the subsequent limitation is to the heirs of *both their bodies*, the latter limitation is a contingent remainder to the heirs as well in copyhold as in freehold cases (*s*).

Again, a surrender to the use of *A. B.* in general terms, without words of limitation, or of *A. B.* in fee simple, or of *A. B.* for ever, would create a life interest only (*t*), as an estate cannot arise by implication in a surrender any more than in a deed at common law (*u*),

(*o*) Ex parte Cockshott, 3 Bro. C. C. 504; Mathews *v.* Feaver, 1 Cox Ch. Ca. 278; Hassells and another *v.* Simpson, Doug. 89, n.; Cooke's Bpt. L. 99, 149; 1 Mont. Bpt. L. 36.

(*p*) Ante, p. 48. See the reference to 3 & 4 Will. 4, c. 104, ib. n. (*t*).

(*q*) Fisher *v.* Nicholls, 3 Salk. 100; S. C. Holt, 163; Idle *v.* Coke, 2 Salk. 620; S. C. 2 Lord Raym. 1144; S. C. 1 P. W. 70; S. C. 11 Mod. 57; S. C. Holt, 164; Fisher *v.* Wigg, 1 Ld. Ray. 630; S. C. 1 Salk. 391; 3 Salk. 206; S. C. Comy. 88; S. C. Holt, 369; S. C. 1 P. W. 14; S. C. 12 Mod. 296; Sutton *v.* Stone and others, 2 Atk. 101; Lovell *v.* Lovell, 3 Atk. 11; Allen *v.* Patshall, Godb. 137; Seagood *v.* Hone, Cro. Car. 366; S. C. W. Jones, 342; 1 Saund. 151, in Wade *v.* Bache; Bawsy *v.* Lowdall, Sty. 250; Wright *d.* Burrill *v.* Kemp, 3 T. R. 473; Gilb. Ten. 268 et seq.; Lilly's Pr. Reg. 2nd part, 389; see per M. R. in Widdowson *v.* The Earl of Harrington, 1 Jac. & Walk. 545; post, "Uses in Futuro," and "Fee upon a Fee."

(*r*) 1 Co. 93 b.; and see Allen *v.* Palmer, 1 Leo. 101; Sharp *v.* Musgrave (or Scarpe *v.* Goderd), Sir O. Bridg. 56, and n. (*m*); Bawsy & Lowdall, sup.; Fearne Cont. Rem. 283; 1 N. R. 325, in Bromfield *v.* Crowder; Gilb. Ten. 272; 1 T. R. 634, in Roe *v.* Quartley; Roe *v.* Griffiths, 4 Burr. 1960; Thrustout *v.* Cunningham, 2 Sir W. Bl. 1046. And the above rule is not affected by the enactments of 3 & 4 Will. 4, c. 106, ante, p. 43, n. (*f*); 143, n. (*y*). But see 7 & 8 Vict. c. 76, s. 8, which enacted that after the time at which the act came into operation, no estate in land should be created by way of contingent remainder.

(*s*) Lane *v.* Pannel, 1 Roll. Rep. 238, 317, 438; Frogmorton *d.* Robinson *v.* Wharrey, 3 Wils. 125, 144; S. C. 2 Sir W. Bl. 728; 3 Leo. 4, ca. 10; Fearne, Cont. Rem. 85, 86, 458.

(*t*) Co. Cop. s. 49; ib. 41, Tr. 93. Secus if the estate be surrendered to the use of the will of the surrenderor, and he by his will devise the land to *A.* for ever; Allen *v.* Patshall, Godb. 137; 1 Hughes Abr. 455.

(*u*) Allen & Nash, 1 Brownl. 127; Seagood *v.* Hone et ux., Cro. Car. 367; S. C. W. Jones, 342; Gilb. Ten. 259; 1 Watk. on Cop. 115. But an estate may arise by implication in a conveyance to uses as well as in a will; Pibus & Mitford, 1 Vent. 372; 1 Cru. Dig. 442.

with, perhaps, this exception, namely, that when the surrender is made generally into the lord's hands, without expressing any use, the estate intended to be created may be implied from the admittance (*x*), a surrender of copyholds allowing of an averment in cases of uncertainty, when not opposed by any settled principle of law, and the admittance being sufficient to rebut the presumption of an intention to extinguish the copyhold interest; and clearly also with this qualification, viz. that by custom a surrender, in whatever form, may create a fee, or any less estate (*y*).

But we have seen that Mr. Watkins's opinion was adverse to the above proposition, that an estate cannot arise by implication in a surrender (*z*); the authority relied upon by Mr. Watkins being the case of *Belfield & Adams*, as reported by Bulstrode, viz. that a copyholder in fee accepting a copy to himself for life, remainder over, is tantamount to a surrender to the use of himself for life, &c., leaving the old reversion in him; but we have also seen that, according to the report of the same case in Rolle, such acceptation of a new copy was held not to amount to a surrender.

Having shown that the strict rules which regulate the construction of limitations in deeds of conveyance of freehold property, are applicable to copyholds, the author proposes, (previously to a discussion of the question whether surrenders of copyholds are, as a general principle, governed by the same rules as common law assurances), to enter upon a brief consideration of the instances of exception to which he has just adverted; and—

First, as to an averment in cases of uncertainty in the description of the surrenderee.

A surrender, it is said, will be good although the surrenderee is not accurately described, and an uncertainty in a surrender may be helped by averment, but when it is so very general and uncertain as not to disclose the intention, it will necessarily be deemed void (*a*). Lord Coke tells us (*b*), that "it is not necessary upon surrenders of copyholds, that the name of the party to whose use the surrender is made be precisely set down; but if by any manner of circumstance the grantee may be certainly known, it is sufficient: and therefore a sur-

(*x*) Kitch. 169; Brown *v.* Foster, Cro. Eliz. 392; Brooks *v.* Brooks and Wright, Cro. Jac. 434; S. C. Poph. 125; 2 Roll. Abr. 67; Grants (K), pl. 18; 1 Watk. on Cop. 109, 113; Gilb. Ten. 254, 255.

(*y*) Kitch. 201; Thettenwell *v.* Bunney, cited in Warne & Sawyer, 1 Roll. Rep. 48; and see Brown *v.* Foster, Cro. Eliz. 392; Peake *v.* Peake, Choice Ch. Ca. 116.

(*z*) Ante, p. 124.

(*a*) 5 Co. 68 b.; Cob *v.* Betterson, Cro. Jac. 374; 6 Vin. Cop. (K. a), pl. 5, marg.; Gilb. Ten. 263; Calth. Read. 31; 1 Watk. on Cop. 107, 108; ante, pp. 143, 144.

(*b*) Co. Cop. s. 35, Tr. 80.

render made to the lord archbishop of Canterbury, or the lord mayor of London, or the high sheriff of Norfolk, without mentioning either their christian name or surname, is good enough, and certain enough, because they are certainly known by this name, without farther addition." "So," he adds (*c*), "if I surrender to the use of the next of my blood, to the use of my wife, to the use of my brother or sister, having but one brother or sister, these surrenders are good without any additions, because the grantee may certainly be known by these words:" again, "if I surrender to the use of my son *W.* having more sons than one of that name, yet by an averment this incertainty may be helped (*d*). But if I surrender to the use of my cousin, or my friend, this is so general, and so incertain, that no subsequent manifestation of my intention can any way strengthen it. So if three surrender to the use of three or four of St. Dunstan's parish, not naming the parishioners, this surrender is utterly void: and so if I surrender in the disjunctive, to the use of *J. L.* or *J. N.* this is insufficient, for the incertainty (*e*)."

It may here also be proper to notice the case of *Roe* d. *Hucknall & others* v. *Foster* (*f*), which was a surrender by *I. L.* of a copyhold in his own occupation, to the use of *J. L.* and *I. L.* his son, for their lives, and the life of the survivor, remainder to the heirs of the body of the said *I. L.* son of *J. L.*, remainder to the right heirs of *the said I. L.*; and the court held that it vested the remainder in fee by construction in the heirs of *I. L.* the surrenderor, and not in *I. L.* the son of *J. L.*

And secondly, with regard to the influence of particular customs over copyhold surrenders. The author has already shown (*g*) that the words "*sibi* et *suis*," or "*sibi* et *assignatis*," or "*sequels* in *right*," or the like, may by custom create an inheritance; and that in the manor of Inkberrow, the words "*him and his*," create an estate for the term of the life of the grantee, and the life of any wife he may leave at his death, and the life of his eldest son; and, for want of a son, his eldest daughter living at the decease of the survivor of the grantee and his wife, and twelve calendar months after the death of such eldest son or daughter.

(*c*) Ib.; and see Cob *v.* Betterson, sup.; Kitch. 161.

(*d*) See contra, Winkmore's case, 29 Eliz. cited in Cob & Betterson, sup.; but in some cases (*i. e.* where the ambiguity is raised by extrinsic circumstances,) parol evidence will be received to explain not only a will, 4 Dow. Dom. Proc. 93, in Doe *d.* Oxenden *v.* Chichester, post, 313, n. (*d*), but even a deed, Harding *v.* Suffolk, 1 Ch. Rep. 138; 3 Wils. 276; 1 T. R. 301; 4 Cru. Dig. 305 et. seq.; post, tit. "Evidence."

(*e*) Co. Cop. s. 35, Tr. 81.

(*f*) 9 East, 405.

(*g*) Bunting *v.* Lepingwel, 4 Co 29 b; ante, p. 99.

There are also many manors in which the grant is made to several; and by the custom, the first person named takes the whole for his life, and so every one in succession (*h*).

In noticing the exceptions to the rule that copyhold surrenders are to be construed in the same manner as conveyances at common law, it will be proper to mention that a surrender of copyholds is not allowed to work a wrong (*i*), but shall pass only such estate as the surrenderor may lawfully convey; therefore should *A.* a copyholder for his life, with remainder over to another, surrender to *B.* for the life of *B.*, it will operate as a surrender only for the life of *A.*, even if a custom can be shown in favour of such a surrender (*k*); and if the lord were to admit *B.* for his own life, it could only be good as a fresh grant (*l*); but it has been decided that if a person is admitted upon a mistaken claim, no new title being in contemplation of the parties, such admission shall not operate as a new and substantive grant from the lord (*m*).

The author will now proceed to a discussion of the position, that surrenders of copyholds are governed by the same principles as common law assurances; and in the first place, no little respect is due to the abundant *dicta* in affirmance of the rule, even supposing that any one or more cases, where a limitation of estate was alone the subject of consideration, and no special custom existed, had created an exception to it.

The case of *Fisher & Wigg* (*n*) has been supposed to have fully established this exception, if not to have wholly denied the existence of the rule in question: the case was as follows: a copyholder in fee had issue four sons and two daughters, and surrendered his copyhold to the use of his wife for life, and after her death to the use of his three younger sons and two daughters, *equally to be divided*, and their *respective* heirs and assigns for ever: the question was, whether the sons and daughters took as tenants in common or as joint tenants.

(*h*) Fisher & Wigg, 1 Ld. Raym. 627; 1 P. W. 17; and see 2 Vern. 264; but the *cestui que vies* in a grant of copyholds do not take beneficially without a special custom, ante, p. 99.

(*i*) Ante, p. 138; Dy. 264 a, Roswell's case.

(*k*) Mo. 8, ca. 27; Gilb. Ten. 257; 451, 453, n.; and see Co. Cop. s. 34, Tr. 76; vide also Anon. 2 Freem. 118; Portman *v.* Willis, Cro. Eliz. 386; S. C. Mo. 352; 1 Watk. on Cop. 98, 99; and see ante, p. 145.

(*l*) Gilb. Ten. 452, 453, n. 120.

(*m*) Zouch & Forse, 7 East, 186; and see Right *d.* Dean and Ch. of Wells *v.* Bawden and others, 3 East, 260; post, at the end of tit. "Admittance."

(*n*) 1 P. W. 14; 1 Lord Raym. 622; 1 Salk. 391; 3 Salk. 206; Holt, 369; 1 Comy. 88; 12 Mod. 296; 1 Eq. Ca. Abr. 291; 2 Atk. 305.

Gould, J., was in favour of a tenancy in common: he observed, that in the construction of deeds this rule was to be attended to, viz. to make all parts of them take effect according to the intent of the parties, so as it be not contrary to the rules of law, and that it would not be inconsistent with any rule of law to construe this a tenancy in common; the words upon which the court were to judge, being *not words of limitation or creation of an estate, but of qualification and correction:* that no precise words were requisite to make a tenancy in common, and that the words "equally to be divided" applied to the quality of the estate, and not to the limitation of it: that the intention of the surrenderor was to make a provision for his younger children and their heirs; which would not take effect if it were a joint estate: that surrenders of copyhold land to uses ought to have the same favourable construction as wills, and were not to be tied up to the strict rules of common law, but should be expounded according to the intention of the party: that as to the intention of the party, the words in a deed were capable of the same construction as in a will: that the words "equally to be divided," made a tenancy in common in a will beyond dispute; and that the present was the case of an use, which had the like construction as a will: that in *Smith* v. *Johnson* (*o*), a feoffment was made to two and their heirs, equally to be divided, and there Scroggs and Dolben were of opinion that the feoffees were tenants in common, and not joint tenants, but Jones differed.

In the present case Turton, J., agreed with Mr. J. Gould; but Holt, C. J., contra, observed, that copyhold lands did not differ in construction of law from freehold lands, and that surrenders of copyholds were governed by the same rules as conveyances at common law: that the opinion in Poph. 126, which his brothers relied on, viz. that a surrender was to be construed as a will, was of no authority; for it was amongst the additional cases, and not reported by Popham; and that there was no mention made of it in the report of the same case in Cro. Jac. 434: that by the surrender the sons and daughters were joint-tenants, for the words "equally to be divided" signified no more than the law would have implied without them, therefore they could have no operation; 1 Inst. 186 a: that the word *equally* did not alter the manner of taking the profits, there being no difference in that respect between joint-tenants and tenants in common: that there was a difference between wills and conveyances at law, and that words in the one should have a different construction from what they would have in the other: that it was after some time and debate, that the words "equally to be divided" obtained to make a tenancy

(*o*) Pasch. 32 Car. 2, B. R.

in common; and that the doubt proceeded from those words *not making a tenancy in common at common law*, for if they had, there could then have been no doubt upon a will: that it had been the constant opinion both at the bar and on the bench, *that those words would not make a tenancy in common in a deed:* that nobody was satisfied with the judgment in the case of *Smith & Johnson*, and afterwards the rule for judgment was discharged, and an "*ulterius concil.*" awarded, and then the party died; so that no judgment was given.

The court, however, in the principal case decided in favour of a tenancy in common (*p*).

The above case of *Fisher & Wigg* must certainly be considered as a settled authority for construing the words "equally to be divided" as a tenancy in common in a surrender of copyholds, equally as in a will; and it is as clearly settled that the same words will make a tenancy in common, in a conveyance deriving its effect from the statute of uses (*q*).

The author is not aware of any case in which the effect of those words in a common law deed has been judicially considered, since the courts have ceased to favour the construction of a joint-tenancy, except the above case of *Smith & Johnson*, in which the point was not fully decided; but should it be held at any future period that those words are not to have the same operation in a common law conveyance as in a conveyance to uses, (a distinction which certainly appears to have prevailed formerly, see Sty. 211, in *Hurd & Lenthall;* 1 P. W. 20; Cro. Eliz. 695, in *Lewen* v. *Cox*; 1 Salk. 390, in *Ward* v. *Everard*,) then indeed, but not till then, he will be ready to admit, either that the case of *Fisher & Wigg* was wrongly decided, or that it has impugned the rule we are now discussing.

It does, however, appear to the author, that the case of *Fisher & Wigg* was rightly decided, though some of the observations of the judges who decided it are at variance with the principle upon which his opinion is founded, namely, that there is no distinction between a conveyance at common law, and a conveyance under the statute of uses; nor between a conveyance of the one description or the other,

(*p*) Note, in Pibus & Mitford, 1 Vent. 376, Twisden, J., said, "A deed differs greatly from a will, for if a man surrenders copyhold land to two, equally to be divided, they are joint-tenants; but such a devise would have made them tenants in common." Note also, it has been said that the decision in Fisher & Wigg was afterwards reversed. See Stringer v. Philipps, M. 1730; 1 Eq. Ca. Abr. 291; but this would seem to be an error, vide 1 P. W. 97, (n. 1); 1 Wils. 341; post, 152.

(*q*) Anon. 2 Vent. 365; 1 Ld. Raym. 626; Goodtitle *d.* Hood v. Stokes, 1 Wils. 341; S. C. Say. 67; and see Denn *d.* Gaskin v. Gaskin, Cowp. 660; Rigden v. Valier, 2 Ves. 252; Stratton v. Best, 2 Bro. C. C. 237, 239. As to words which will create a joint-tenancy, and those which will create a tenancy in common, see 2 Bl. Com. 187, 193, 18th ed.

and a surrender of copyholds, either as to strict words of limitation, or in giving effect to an evident intention, but that the same latitude of construction is admissible in either form of assurance; and as the words "equally to be divided" are not words of limitation, but of modification or qualification only, and are held in a will to show an intention of creating a tenancy in common, so they are to have that effect in every description of conveyance, whether of freehold or copyhold property.

Since the case of *Rigden & Valier* (*r*), all idea of a different rule of construction between a surrender of copyholds and a conveyance to uses, or deed of covenant to stand seised, has been completely abolished.—That case was as follows: *G. E.* by deed-poll, in consideration of natural love and affection to his wife and children, did give, grant, and confirm to his two daughters, all the rents and profits of two messuages and certain lands during the life of his wife, equally to be divided between them, paying 5*l.* per annum to his wife; and after the decease of his wife, his two daughters to have the same messuages and lands to them and their heirs for ever, equally to be divided between them. The wife survived the husband, and afterwards died; then one of the daughters died, leaving children, who filed this bill as co-heirs of their mother, tenant in common with her sister under the above settlement and disposition, for an account of the rents and profits of a moiety of the estate, for a partition, and to have certain deeds and writings produced and secured. The question was whether the two daughters of *G. E.* took as joint-tenants, or as tenants in common. Lord Hardwicke, in deciding in favour of a tenancy in common, observed, that there was no solemn determination that the words "equally to be divided" would not make a tenancy in common in a deed, though it had been said over and over again that those words were sufficient in a will, but not in a deed: that the case of *Fisher & Wigg* (*s*), which was relied on as a judgment of B. R. that those words in a surrender of copyholds would make a tenancy in common, had been objected to as a doubtful authority, and was said to have been reversed: that on search he (Lord Hardwicke) could not find it to be so, or that a writ of error was brought (*t*): that another case was cited, which passed as an authority by the judges in that case, viz. 2 Vent. 365, which, if rightly reported, was in point: that he had caused the register's books to be searched, and could not find any decree entered to warrant the report; but that it was cited by Gould, J. and it was taken that there was such a case; and that it might be so, though not entered, for the parties frequently

(*r*) 2 Ves. 252; Belt's Supp. 335; S.C. 3 Atk. 731; and see 2 Keb. 341, in Wade v. Balch (or Bache); ante, p. 151, n (*q*).

(*s*) Ante, p. 149 et seq.

(*t*) Ante, p. 151, n. (*p*).

acquiesced, and there was often ground to proceed no farther: that there was another authority (such as it was) of *Smith & Johnson*, which, if rightly stated, was on feoffment, and was not disputed by Holt: that no one had more reverence for the opinion of Holt, Ch. J., than he had, yet he thought the arguments of the other judges more founded on the nature and reason of the thing, and that Gould's argument had great weight, and was not to him (Lord Hardwicke) satisfactorily answered: that the case was indeed on a surrender of copyhold lands in the *lord's court*; and the judges who argued to make it a tenancy in common held that such a surrender was not to be construed in the strictness of the thing, but like a will: that Holt contended it was to be construed as a deed, and that in one thing he was certainly right, viz. that a surrender of copyhold lands to uses was not to be considered on the foot of a use or trust, for they were not within the statute of uses; therefore such surrender was only a direction to the lord whom to admit, and when admitted, the surrenderee was *in* by grant of the lord, not of the surrenderor (*u*); so that it was of a particular nature, not as a use or trust on the statute: but that the arguments of the judges, if of weight in that case, held full as strong in a covenant to stand seised, as that (though he was not quite sure whether it was meant as a deed or a will) would be construed; the use till the event happened remaining in the grantor, being sufficient to support the uses declared in the deed: that it was objected, that there was no warrant to construe a deed to uses, as to the limitations and words of it, in a greater latitude than a conveyance by way of feoffment, or other conveyance at common law, and if construed in a different manner would cause great confusion; which his lordship held to be true in general, for the statute joining the estate and the use together, it became one entire conveyance by force of the statute, and the words were to be construed the same way, but that this was to be taken with some restriction: that as to the words of limitation in a deed, they were to be sure to be construed in that manner, viz. in the same sense; but that where they were words of regulation or modification of the estate, as the words *equally to be divided* were, and not words of limitation, he (Lord Hardwicke) thought there was no harm in giving them greater latitude in deeds on the statute of uses, which were trusts at common law, than on feoffments, which were strict conveyances at common law. His lordship's opinion therefore was, that the plaintiffs were entitled to have a decree for the division of the estate, and a decree was made accordingly.

In the case of *Denn* d. *Gaskin* v. *Gaskin* (*x*), which arose out of a devise of a freehold messuage to three persons *equally*, and in which

(*u*) But see ante, p. 145. (*x*) Cowp. 660.

the court of B. R. held that the devisees took an estate for life *as tenants in common*, Lord Mansfield said that the word *equally* as well as the words *equally to be divided* implied a division, whereas if the devisees were to take as joint tenants, there would be no division: that he remembered arguing a case before Lord Hardwicke in support of the opinion of Mr. Justice Gould in P. W. 14, and against the opinion of Lord Holt; and there Lord Hardwicke thought with Mr. Justice Gould, that it was certainly the better opinion, more liberal, and better founded in law. And Mr. Justice Aston, following Lord Mansfield, observed, that the words "equally to be divided" had been determined to be a tenancy in common in a *deed*. The court, in this last case, did not even hint at any distinction between a conveyance to uses, and a feoffment at common law in the effect of the words "equally to be divided."

And in *Tapner* d. *Peckham and others* v. *Merlott and Prior* (*y*), the Court of Common Pleas held most distinctly that there were no good grounds for construing a conveyance to uses in a different manner from other conveyances. In that case, upon a trial in ejectment for the manor of Keynor, in Sussex, one of the questions reserved for the opinion of the Court was, what estate *J. F.* took under a settlement whereby the premises were limited by Sir *T. M.* on the marriage of his daughter *E. M.* with *J. F.* to the use of himself and his heirs until the marriage, afterwards to the use of *J. F.* and his assigns *for* 99 *years*, if he should so long live, sans waste, then to trustees during his life to preserve contingent remainders, and after his death to the use of *E. M.* for her life for her jointure, remainder to the first and every other son of the marriage [successively] in tail general, remainder to every after-born son [successively] in tail general, remainder to the first and every other daughter of the marriage [successively] in tail general, remainder to every after-born daughter [successively in tail general], and for default of such issue, to the use and behoof of the *heirs and assigns of the said J. F. for ever.*

The marriage took effect, and *J. F.* entered and was in possession during his life, and died without issue born in his lifetime or after his death. His wife afterwards entered and died seised. *J. F.* by his will devised his estates generally to his uncle *I. M.* in fee, who sur-

(*y*) Willes, 177; and see 3 T. R. 765, in Doe & Morgan, where Lord Kenyon said, that soon after the statute of uses an attempt was made to introduce a different construction on deeds to uses from that which was put on common law conveyances, but that the attempt failed of success, and that the same rule of construction applied to both. Vide also 2 Barn. & Ald. 130, in Doe *d.* Littledale *v.* Smeddle et al., and 2 Lord Raym. 1151, in Idle *v.* Cooke. But see 1 Ves. 167, (n. f.), in Stones *v.* Heurtly; 1 P. W. 14, (n. 1), in Fisher & Wigg; and 2 Bro. C. C. 237, 238, in Stratton & Best.

vived *J. F.*, and devised to his son and heir *J. M.* the defendant, in fee, his reversionary estate called Keynor Farm. *I. M.* died before *E. M.*, and upon her death *J. M.* entered and levied a fine. The lessors of the plaintiff were the heirs at law of *J. F.* No evidence was given at the trial of an actual entry to avoid the fine. Lord C. J. Willes, after stating that the court were all clearly against the plaintiff on this latter point, observed, as to the principal question, that *J. F.* had only an estate for 99 years in him at the time of the devise to *I. M.* (Co. Lit. 319): that if *J. F.* had had a life estate he would have taken a fee-simple because of the ultimate remainder limited to his heirs: that this general rule seemed to be agreed on all sides, but two answers were endeavoured to be given to it; 1st, that the word *assigns* plainly showed that it was intended that the inheritance should vest in *J. F.*; 2dly, that this being a conveyance made by way of use, must be construed in a different manner from a conveyance of a legal estate, and that, as in a will, the words must be construed according to the intent of the parties. And after expressing an inclination of opinion that the word *assigns*, though it did not alter the estate of *J. F.*, yet it might give him a power of disposing of the premises by will, Lord C. J. Willes thus concludes: " as to what was insisted upon that a conveyance to uses is to be construed as a will and in a different manner from other conveyances, we are all clearly of a contrary opinion: for since the statute of uses an use is turned into a legal estate to all intents and purposes; it must be conveyed exactly in the same manner and by the same words; and if it were otherwise, as most conveyances are now made by the way of use, endless confusion would ensue. A case indeed was cited, and much relied on, to establish this doctrine: that was the case of *Leigh* v. *Brace*, reported Carthew, 343, and 5 Mod. 266, (a); in the first book said to have been adjudged in B. R. Hil. 6 W. and in the last M. 8 W.: the words of that deed were thus; an estate was vested in trustees in fee to the use of the grantor for life, then to the use of Thomas Brace his son, and his heirs, and for default of issue of the body of the said Thomas Brace, then to the use of the heirs of the grantor: the special verdict is set forth in 5 Mod., and I have compared it with a copy of the record which has been brought to me; and in that case the court did certainly determine that Thomas Brace the son took only an estate tail; but in 5 Mod. where the case is more largely and more particularly reported than in Carthew, there is not one word said of any difference between a conveyance by way of use and any other conveyance: but the resolution (appearing there) is founded upon other determinations in respect to legal conveyances; as the case in Co. Lit. 21 a, where it is held that if a man make a feoffment to another and his heirs, habendum to him and the heirs of his body, he

shall have an estate tail; and a case out of the 37 Lib. Ass. 15, long before the statute of uses, was cited for that purpose. Another case was cited from 19 Hen. VI, 74, that if a feoffment be made to a man and his heirs, and if he die without heirs of his body, remainder over, this is an estate tail. They considered therefore the words in this deed as one sentence, and the latter as explanatory of the former. And they cited likewise *Beck's* case, reported in Litt. 344, where a feoffment was made to the first son and his heirs, and for default of such issue remainder over. But the court, as appears by the report in 5 Mod., said not one word about the statute of uses, but said they would consider it just in the same manner as if a gift were made to a man and his heirs, viz. to the heirs of his body. It is indeed said in Carthew, where the case is very shortly reported, that the court laid a great stress upon its being a conveyance by way of use, which conveyances they said had been always construed as wills, and that they were not tied up to the strict forms of conveyances at common law, and that it was so adjudged on the same deed in B. C. on a special verdict. I own that Carthew is in general a very good and a very faithful reporter; but I fancy he was mistaken here, because I cannot think that the court would give so absurd a reason for their judgment, especially since there is not a word said of it in 5 Mod., where the case and the arguments upon it are very particularly reported. However if this had been as Carthew reports, yet it is a single case, it is contrary to reason and common experience, and such a determination would make such a confusion in all the property of the people of this kingdom, that I own I should have no regard to it, but think that the contrary ought to be declared to be the law."

Indeed it is quite clear that the intention will prevail in all cases, as well in deeds and surrenders as in wills, unless the limitation be contrary to any settled rule of law; so the word "or" may be read "and" in order to give effect to an evident intention; *Wright* d. *Burrell* v. *Kemp* (*z*). In that case a surrender was made by *A.* to himself for life, remainder to his wife for her widowhood, and upon her marriage after his death, to her son *W.* for life; and after the decease of *W.* to the issue of his body, provided that if *W.* should die in the lifetime of the surrenderor, *or* without issue, the estate should go to the right heirs of the surrenderor: *A.* the surrenderor survived his wife, and *W.* also died in the lifetime of *A.* leaving issue; and the court held that the issue were well intitled to the estate, but avoided

(*z*) 3 T. R. 470; vide also Sowell *v.* Garret, Mo. 422; Price & Hunt, Pollexf. 645; Barker *v.* Suretees, 2 Str. 1175; Framlingham *v.* Brand, 3 Atk. 390; Doe & Smeddle, 2 Barn. & Ald. 126; Doe & Selby, 2 Barn. & Cres. 926; 1 Pow. Dev. 379 et seq.; Lock *v.* Southwood, 1 Myl. & Keen, 411; Bush *v.* Locke, 9 Bli. N. S. 1.

giving any opinion as to the extent of their interest under the above limitation. Lord Kenyon there observed, that there was no doubt but that a surrender was considered as a common law conveyance, and was not intitled to the same favourable construction as a will (*a*); and that in deeds certain legal phrases must be used, in order to create certain estates, as heirs to create a fee, and heirs of the body to create an estate tail; but beyond that he would say with Lord Hardwicke that there was no magic in particular words further than as they show the intention of the parties: that in order to give effect to the intention of the surrenderor, the court must say that when he used the word *or*, he meant *and*; and that there was no case in which any difference had been made as to the point in question between a will and a deed, when the court were considering how the intention of the parties could be effected (*b*).

It is a general rule of construction, both in freehold and copyhold cases, that where there is a sufficient certainty before, by way of description of the thing granted or surrendered, as by giving to a close a particular name, &c. there a subsequent mistake, as in the tenant's name, or in the number of acres or rent, shall not injure the grant or surrender; but that where a *particular* description is added to a *general* one, it shall restrain the general words (*c*). So where a copyholder surrendered "all his copyhold cottage, *with a croft adjoining*, &c. *all which premises were then in his own possession*," to the

(*a*) In Smithson *v.* Cage, Cro. Jac. 526, the court of B. R. held that lands appertaining to a messuage did not pass by a surrender of the messuage *cum pertinentiis*, but only the house with the curtilages, and that there was no distinction in this respect between a copyhold and freehold. And see Archer *&* Bennett, 1 Lev. 131; Fisher on Cop. 153. Sed vide the distinction in the case of a devise, Doe *d.* Lempriere *v.* Martin, 2 Sir W. Bl. 1148; vide also Blackhall *v.* Thursby, Het. 2; 6 Vin. Cop. (S. a.), pl 21.

(*b*) And see Windham's case, 5 Co. 7; 2 Bro. C. C. 237; Idle *v.* Cooke, ubi sup.; 2 Comy. 540. The following note the author found in the margin [s. 50, p. 143,] of a valuable interleaved copy of Lord Coke's Copyholder, published in 1650; which book appears to have been in the possession of Mr. Mauritius Johnson, of the Inner Temple, in 1713, by whom, probably, the note was made. "It was agreed by the court in the case of Holmes *&* Meynel (Mich. 33 Car. 2, B. R. then a trial at bar) obiter, that if a copyhold be surrendered to the use of two sons in tail, and that if one die without issue, the other shall be his heir, and if both die without issue, then to the use of another in fee, and afterwards one of them dies without issue, the survivor shall have the entirety. N. B. Justice Dolbin showed a case, styled Johnson *&* Smart's case, in a very fair MS. being a surrender of copyhold lands in the manor of Lourington, much to this purpose. And whereas Rolle in his Abr. (2 Abr. fo. 416,) tit. "Remainder," hath such a case under such names, as on a devise by will; the court agreed that the case in Rolles Abr. was erroneously taken, and that the true case was according to Dolbin's MS."

(*c*) Plowd. 191; Shepp. T. 99; Doe *&* Greathed, 8 East, 103.

uses of his will, and devised to his wife "all his copyhold *cottage and premises then in his own possession*" for her life, and the surrenderor, at the date of the surrender and of his will only in fact occupied the cottage and garden behind it, it was held that the croft passed; the description of all the premises as in the possession of the copyholder being a mere mistake, and the words both in the surrender and will being sufficient to comprise the croft (*d*).

And in *Roe* d. *Conolly* v. *Vernon* & *Vyse* (*e*), where *A.*, seised of customary tenements, some held at fines certain and others at fines arbitrary, or, as they are termed in the manor, customary tenements *compounded* and *uncompounded*, surrendered out of court "all his messuages, &c., which he held by copy of court roll, being of the yearly rent to the lord of 4*l.* 10*s.* 8½*d. and compounded for*," (which rent exceeded the amount payable for the compounded tenements;) and by his will devised his copyhold messuages in Middlesex, and all his *freehold* manors, messuages, &c. in Great Britain, to uses under which the lessor of the plaintiff claimed, and by a residuary clause devised all other his manors, &c. either freehold or copyhold, on an event which happened, to his three daughters and their heirs, equally as tenants in common; the question reserved for the opinion of the court was, whether the *uncompounded* tenements passed to the lessor of the plaintiff by the devise of all *freehold* manors, &c. or by implication from the whole of the will; or whether they passed to the daughters by the residuary devise; and the court held that the words "*and compounded for*" operated by way of restriction, and confined the surrender to that description of copyholds; and that the words "*yearly value, &c.*" did not qualify the restriction. It was also adjudged that the testator used the word "*freehold*" as referrible only to what were, according to common understanding, freehold lands, and that the lands in question, which were generally reputed copyholds, passed to the daughters by the residuary devise.

And a general description both in the surrender and admission may be qualified by the established usage of the manor. So in *Stammers* v. *Dixon* (*f*) it was held, that although the terms of the surrenders and admissions were sufficiently comprehensive to pass the *soil*, yet that by received usage the grants might be restrained to and only pass the *fore crop*.

(*d*) Goodright *d.* Lamb *v.* Pears, 11 East, 58; and see Goodtitle *d.* Paul *v.* Paul, 2 Burr. 1089, (and the cases cited, ib. 1093); S. C. 1 Sir W. Bl. 255; vide also 15 East, 309; 5 Taunt. 321.

(*e*) 5 East, 51; and see Gascoigne and others *v.* Barker, 3 Atk. 9; Wilson *v.* Mount, 3 Ves. 193.

(*f*) 7 East, 200. And one person may have the *prima tonsura* as copyhold, and another may have the soil and every other beneficial enjoyment as freehold, ib.; see also ante, p. 104.

We are now to consider whether an estate to commence *in futuro*, or a *fee upon a fee*, can be limited in a *surrender* of copyholds, as in a conveyance to uses since the statute of 27 Hen. VIII., or as in a will, or as in the case of trust estates; and if the opinion of those gentlemen who have advocated the affirmative of the position (*g*) be correct, then indeed we should have to acknowledge a still further exception to the rule, that a surrender of copyholds is to receive the same construction as a conveyance at common law; or rather the author would be disposed to consider the concession as an unqualified denial of the rule altogether: but it does appear to him that the contrary opinion, and which he believes to be the more general one (*h*), is supported both by principle and authority.

FIRST *of an Estate to commence* IN FUTURO.

An examination of the cases bearing on the point under consideration, and as nearly as possible in chronological order, may best serve to lead us to a right conclusion.

Clampe's case, in replevin, as reported by Croke (*i*), was this: The defendant avowed for damage feasant in the land, being copyhold and parcel of the manor of *C.* and of the nature of Borough English, and demised to *J. B.* and *Margaret* his wife, and their heirs, by copy of court rolls, by the name of a *Mese*, containing twelve acres of land, and that *J. B.* died, and said *Margaret* married *J. Clampe*, and they had issue the plaintiff, their eldest son, and the avowant their youngest son; that afterwards *Margaret* died seised, and the land descended to the avowant, as youngest son and heir by the custom, who entered and took the cattle damage feasant. The plaintiff by replication confessed the above premises, but said that *J. Clampe* and *Margaret* surrendered said land *per nomen* of the reversion after the death of said *J. C.* and *M.* to the use of the plaintiff and his heirs, who was admitted accordingly; and that *M.* died and

(*g*) The opinion of the late Mr. Fearne was somewhat favourable to limitations of this nature in surrenders of copyholds. See his Treatise on Cont. Rem. p. 416, 417; and the late Mr. Sanders expressed a very decided opinion in favour of such limitations in a tract entitled, "Surrenders of Copyhold Property considered with reference to future and springing uses." Vide also Darcy *v.* Blake, 2 Sch. & Lef. 388; 5 Cru. Dig. 590. And likewise an opinion of Mr. Hump. Davenport given between the years 1610 and 1625, noticed by Mr. Sanders in the above-mentioned tract, p. 42, n.

(*h*) Mr. Watkins concurred in the opinion entertained by the author. See 1 Watk. on Cop. p. 197 et seq.

(*i*) Cro. Eliz. 29. This case is thus shortly reported in 4 Leo. 8: "A copyholder in possession surrendered the reversion of his land *post mortem suam* to the lord to an use, &c. It was adjudged, that thereby nothing passed."

J. C. did survive; that afterwards *J. C.* died, and the plaintiff entered *absque hoc*, that the said land did descend to the defendant, as *puisne* son, &c. And upon this replication, it was demurred in law. Coke for the avowant prayed judgment. First, for the matter in law, the plaintiff's plea was not sufficient; for he pleaded a surrender of the land by the name of *a reversion* (*k*), after the death of the baron and feme; and by that pretence there would be a particular estate left in the feme and also in the baron; whereas the baron had nothing before, which could not be, for the surrender was void. *For when one is seised in fee, he cannot by any matter in fact give away the inheritance after his death, and so leave a particular estate in himself;* but peradventure it might be done by matter of record, and of that opinion was the court, 38 H. VI.; 8 H. VII. And it was absurd that by a mere grant the baron thould have an estate for life, who had nothing before. Secondly, he said there was an apparent fault in the pleading, for the avowant pleaded that *Margaret* died seised, and the land descended to him, and the plaintiff in his replication traversed the descent, and not the dying seised, 14 H. VIII. 23. At the end of the term the avowant had judgment. The reporter adds a note, that it was moved that the twelve acres could not pass by the name of a *mese*, but that the court gave no regard to it.

The case of *Allen & Nash* (*l*) is thus reported by Brownl. Special verdict in ejectment upon surrender of copyhold land to the use of the second son for life, after the death of the tenant and his heirs, and it was adjudged not to be good in a surrender; for though it be good in a will, yet implication is not good in a surrender, and in copyhold cases a surrender *to the use, &c.* this is no use, but an explanation how the land shall go.

But the report of *Allen & Nash* in Noy (*m*) is as follows: In

(*k*) See Drewell's case, cited per Harvey, J., in Selby & Beck, Litt. Rep. 18, which he states to be this: A feme copyholder in fee came to the court and offered to surrender to *J. S.* and his heirs, but she desired to retain an estate for life to herself; and the steward entered, that she surrendered the *reversion of her copyhold* to *J. S.* after her death; and it was adjudged a bad grant, because there was not any reversion.

[N.B. By the grant of a reversion, land in possession does not pass; but a grant by a reversioner of the land for life passes the reversion; Lofield's case, 10 Co. 107, 108; Milborne *v.* Dashburne, Cro. Eliz. 323. A grant by a remainder-man for the life of the tenant for life is void, because it can never take effect in possession, nor can the grantee have any benefit of the services; Cholmley's case, 2 Co. 51.]

(*l*) Hil. 5 Jac. C. B. Brownl. 127.

(*m*) P. 152; and see Bentley *v.* Delamor, 1 Freem. 268, where it is said, "A surrender in futuro is good, *and the mischief* for the freehold remains in the lord." Mr. Sanders in his tract on Surrenders says, "Some words are here omitted. The meaning manifestly is, that the mischief of future limitations, in common law conveyances, does not apply to copyholds, the freehold in the latter case remaining in the lord." Post, pp. 164, n. (*x*), 168.

ejectment it was resolved, that if a copyholder surrenders according to the custom to the use of *N.* after the death of the surrenderor, that is good, notwithstanding that one cannot preserve the same estate to himself, *for the estate is in the lord;* and the surrenderor during his life shall take the profits, and afterwards the lord ought to admit *B.* [*N.*], according to the direction of the said surrender..

In *Dunnal* v. *Giles* (*n*), which was the case of a devise of a term of years to one for life, with remainder over to another, and which was held to be a good devise, it is said, " If a man hath a rent *in esse,* you cannot grant that in reversion after your death; but if I surrender to the use of one after my decease, [this] is not good, by his [the] opinion of *Warburton & Daniel.*"

The case of *Simpson & Sothern,* or *Southwood,* B. R. 13 Jac. as reported by Godbolt (*o*), was this: *R. S.* a copyholder in fee, *jacens in extremis,* made a surrender of his copyhold, habendum [à tempore mortis of the surrenderor] to his child in ventre sa mere, and his heirs, and if such child died before his full age or marriage, then to *J. S.* and his heirs. The child was born and died within two months, upon which *J. S.* was admitted; and a woman, as heir general to the devisor and to the infant, was also admitted, and entered into the land, against whom *J. S.* brought trespass; and it was adjudged against the plaintiff. Two points were resolved in this case: 1st, *that a surrender cannot begin at a day to come,* no more than a livery, as it was adjudged 23 Eliz. in that court in *Clark's* [qu. *Clampe's*] case: 2dly, that the remainder to *J. S.* could not be good, because it was to commence upon a condition precedent, which was never performed: and therefore the surrender into the hands of the lord was void, for the lord doth not take but as an instrument to convey the same to another: and it was therefore said, that if a copyholder in fee doth surrender unto the use of himself and his heirs, because that the limitation of the use is void to him who had it before, the surrender to the lord is void (*p*).

According to the report of this case in Cro. Jac. (*q*), the resolutions

(*n*) Brownl. 41.

(*o*) P. 264, and there called Simpson's case.

(*p*) Ante, p. 144.

(*q*) P. 376, and there called Sympson & Sothern; and see S. C. (called Simpson & Southwood), 1 Roll. Rep. 109, 137, 253; 2 Roll. Abr. 791, 794, 795; see also S. C. 2 Bulst. 272, where the judgment of the court is stated to have been thus expressed: " Here in this principal case the surrender is not good; it is like unto an attornment: if the one or the other dies before attornment, it will not then be good, for there ought to be a perfection of the thing in the life of the parties; here in this case, the very foundation of all is bad; here it is to an infant in ventre sa mere; this is not good by an immediate surrender."

The above case of Simpson & Sothern is cited from 2 Bulst. 274, in Lex Cust. p. 128, where it is added, " this case falls upon a rule in law, that one cannot pass a

of the court were as follows: 1st, that a surrender habendum after death to the use of another and his heirs, is merely void, for a copyholder in fee cannot surrender habendum after his death, no more than a tenant in fee can convey his lands habendum after his death, for then he should leave a particular estate in himself, which is against the rules of law: and there is not any difference betwixt a copyhold and freehold as to that purpose. Coke cited *Clamp's* case, that such a surrender was void: 2dly, that the surrender to the use of *J. S.* and his heirs, if it happens that his child in ventre sa mere die within age, is merely void; for he cannot make such a conditional surrender to operate in future; judgment for the defendant.

Hollsworth's case is thus reported by Clayton (*r*). A copyholder had made a surrender in fee of his copyhold in possession, after his death, and it was holden good by custom of the manor, which was Wakefield; *otherwise it is by the common law.*

In *Seagood & Hone* (*s*), a copyholder surrendered to the use of *F. R.* and *J.* his son, and the longest liver of them, and for want of issue of *J. R.* the lands to remain to the younger son of *Mary Seagood; the surrender not to stand and be in full force until after the death of the surrenderor.* The first question was upon this latter clause, viz. whether the surrender were good, and that clause void. It was resolved that the surrender was good, and that clause (being repugnant to the premises) should be rejected as void and idle. The second question was, whether *J. R.* took an estate for life only, or an estate to him and the heirs of his body; and it was resolved that he had but an estate for life, and no higher estate by implication, for although it might be enlarged by implication in a devise, yet it should not be so in a surrender or conveyance.

The case of *Barker & Taylor*, B. R. 10 Car. in ejectment (*t*), was as follows: two coparceners, copyholders in possession, the one sur-

copyhold estate to begin from a day to come, nor yet upon a contingency, no more than a freehold at common law." And see Mr. Watkins's observations on this case, 1 vol. on Cop. 203 et seq.; vide also Belt's Supp. to Ves. Sen. p. 119, in Taylor *v.* Philips.

Lord Chief Baron Gilbert (Ten. 260), observes, "If a surrender be to the use of *J. S. habendum* after the death of the surrenderor for life, this is a void surrender, being but one entire limitation; but if the surrender were to him generally, *habend.* after the death of *J. R.*, quære, if the *habend.* be void or not?" the meaning of which clearly is, that where an estate is expressed in the *habendum*, and no estate is limited by the premises, then if the limitation by the *habendum* is void, the whole is void; but when an estate is well limited by the premises, the *habendum*, if repugnant, is void, but the previous limitation remains good. Ante, p. 143; and see Hogg & Cross, Cro. Eliz. 254; post, tit. "*Fee upon a Fee.*"

(*r*) P. 21.

(*s*) Cro. Car. 367; S. C. W. Jones, 342; ante, p. 143.

(*t*) Godb. 451.

rendered his *reversion* in the moiety after his death; Cur. the surrender is void, and the same is all one, as well in the case of copyhold as of freehold: so was it adjudged 26 Eliz. in *Plat's* case; and so also was it adjudged in this court, 3 Car. in *Simpson's* case.

Bambridge v. *Whitton and Wife*, Hil. 17 Car. B. R. in ejectment, is thus reported by March (*u*). Upon *not guilty* pleaded a special verdict was found, and the case was this: a copyhold tenant in fee doth surrender into the hands of two tenants, unto the use of *J. W.* immediately after his death; and whether it be a good surrender or no, was the question. Harris: that the surrender is void. Estates of copyholds ought to be directed by the rule of law, as is said in 4 Rep. 22 b, 9 Rep. 79, and 4 Rep. 30. And as in a grant a grant to one in *ventre sa mere* is void, so also in a will or devise, and as it is resolved in Dyer, 303, p. 50. So it hath been adjudged that the surrender to the use of an infant in ventre sa mere is void: and as at common law a freehold cannot begin *in futuro*, so neither a copyhold, for so the surrenderor should have a particular estate in him without a donor or lessor, which by the rule of law cannot be: and he took a difference betwixt a devise by will, and a grant executed; in a devise it may be good, but not in a grant executed: and here he took a difference where the grant is by one entire clause or sentence, and where it is by several clauses, 32 E. I.; Taile, 21; Dyer, 272, p. 30; Com. 520 b; 3 Rep. 10, *Dowtie's* case; 2 Rep. *Doddington's* case. For instance, he would put only the case in Dyer and the comment. A termor grants his term *habendum* after his death, there the *habendum* only is void, and the grant good; but if he grant his term after his death, there the whole grant is void, because it is but one sentence: so he said in this case, because it is but one clause, the whole grant is void. Another difference (he added) is, where the distinct clause is repugnant and where not; where it is repugnant there it is void, and the grant good, *quia utile per inutile non vitiatur*. But in this case it is one entire sentence; M. 13, or 23 Jac. in this court; Rot. 679, *Sympson & Southwell's* case, the very case with the principal one. There was a surrender of a copy-tenant to the use of an infant in *ventre sa mere* after the death of the surrenderor, and there it was resolved by all the judges except Dodderidge, that the surrender was void; first, because it was to the use of an infant in *ventre sa mere;* and secondly, *because it was to begin in futuro*, which is contrary to the rule in law: and copy-tenants, as it was there said, ought to be guided by the rules of law; but Dodderidge doubted of it, and he agreed [with] the case at common law, that a freehold could not commence *in futuro*, but he doubted of a copyhold; and he put

(*u*) P. 177, ca. 236.

the case of surrender to the use of a will: but he said that judgment was afterwards given by Coke, Chief Justice, in the name of all the other judges, that the surrender was void, and therefore *quod querens nihil capiat per billam*, wherefore he concluded that the surrender was void, and prayed the judgment of the court.

It is scarcely necessary, the author submits, to do more than to state the above authorities, in order to satisfy the reader that there is every reason to suppose, that, whenever the point now under our consideration shall call for a decision, it will be ruled, that an estate *in futuro* cannot be created in a surrender of copyholds, any more than in a conveyance of freeholds at common law.

It may, however, be proper to remark, as far as the report by Noy of the case of *Allen & Nash* is unfavourable to this conclusion, that no importance can be attached to an authority so very loosely worded as that is, particularly when the very same case is differently reported in another book, and evidently in a way much more to be relied upon. The supposed decision in Noy is also rendered very questionable by the reason given for it, namely, that *the estate is in the lord* (*x*). The freehold interest certainly is in the lord, but we have already seen that no estate passes to him by a surrender in which any use is declared (*y*); and though the freehold interest in the lord was capable of supporting a contingent remainder in copyholds, as we shall see hereafter, yet that peculiar quality of the lord's reversionary estate cannot be urged as a reasonable ground for any distinction between freeholds and copyholds in the effect of a limitation *in futuro*.

It is true that so much of the copyholder's interest as is not disposed of by a surrender remains in him of his old estate (*z*), and therefore the reason greatly relied upon in support of the maxim, that an estate *in futuro* cannot be limited of a freehold at common law, namely, that if allowed a vacancy would be created in the tenure, certainly does not apply to copyholds; but it is to be recollected, that the admittance of a surrenderee has relation to the date of the surrender, and it would therefore be very inconsistent, even on a principle of tenure, to sanction a limitation which must of necessity

(*x*) Vide also the case of Bentley & Delamor, 1 Freem. 268, ante, p. 160, n. (*m*), in which the same maxim is stated as favourable to a limitation in futuro, but in so vague a way as to be of little or no authority. And see Lex Cust. p. 117, where in citing Bambridge & Whitton, ubi sup., that a copyholder cannot surrender an estate to another, and leave a particular estate in himself, it is added, "therefore Noy, p. 152, is not law."

(*y*) Ante, p. 145.

(*z*) Ante, p. 142; but see the reference p. 143, n. (*y*), to the provisions of 3 & 4 Will. 4, c. 106, "For the Amendment of the Law of Inheritance."

presuppose a continuing estate in the surrenderor; and, with reference to the original nature of a copyholder's interest, it would be equally inconsistent to invest him with the power of creating an estate, which could not be limited by a person possessing a freehold interest; and even allowing all possible weight to the above distinction in principle between freehold and copyhold assurances, still as there ought to be some fixed standard for the guidance of the courts, in the construction of limitations in copyhold surrenders, and as there is no perfect accordance between a surrender of copyholds and a conveyance of freeholds, either before or since the statute of uses, it surely is not reasonable to urge the absence of the probable grounds of a decision in a freehold case, as the necessary inducement of a contrary decision in a copyhold case, and in contravention of the very general, if not uniform, practice of adhering, in the construction of limitations in surrenders of copyhold property, to the rules applicable to common law assurances, especially as such practice is not attended with the least inconvenience; for it is observable, that all such springing and executory limitations and powers, as are frequently introduced into settlements of freehold property, may be created of copyholds through the medium of trusts, and which, should it be required, might be enforced in a court of equity.

The author is aware that Lord Coke has said that "in customary grants upon surrenders the law is not so strict as in grants at the common law, for in grants at the common law, if the grantee be not in *rerum naturâ*, and able to take by virtue of the grant presently upon the grant made, it is merely void: but in customary grants upon surrenders the law is otherwise: for though at the time of the surrender the grantee is not *in esse*, or not capable of a surrender; yet if he be *in esse* and capable at the time of the admittance, that is sufficient: and therefore if I surrender *to the use of him that shall be heir to J. S.*, or to the use of *J. S.'s* next child, or to the use of *J. S.'s* next wife; though at the time of the surrender *J. S.* had no heir, child or wife, yet if afterwards he hath a child or taketh a wife, his heir, his child, or his wife, may come into the court and compel the lord to admit according to the surrender. So if I surrender to the use of him that shall come next into St. Paul's after such an hour, whose fortune soever it is to come first, the lord must admit him, and I shall never avoid it. The same law is, if I surrender to the use of him that *J. S.* shall nominate, or that I myself shall nominate to the lord at the next meeting. The reason of the law is this: a surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee before the lord hath admitted him according to the surrender; and therefore if at the time of the admittance the grantee be in *rerum naturâ* and able to take,

that will serve. Besides, in customary grants the intent of the grantor is more respected than it should be by the strict rules of the law; which appeareth by this, that if a surrender be made of a copyhold to the use of a last will, and the surrenderor deviseth it unto two, the one is admitted according to the purport of the will, this shall inure to both (*a*)."

Some of the above positions of Lord Coke are perfectly reconcilable with settled principles and authorities, as we shall see hereafter in discussing the subject of springing uses and powers; and it is clear that a devise of copyholds, though operating as an appointment of the use pursuant to the surrender, is not more fettered by the strict rules of limitation applicable to conveyances both of freehold and copyhold property than a devise of freeholds, but the same latitude of construction is allowable in both instances.

It does not appear to the author, however, that Lord Coke meant to contend, at least as a general rule, that a use *in futuro* could be created in an immediate surrender of copyholds; the direct contrary opinion indeed is manifested by the following conclusion of the section of his Copyholder, from which the above passages are cited, viz. " but though the surrender be a thing executory and the intent of the grantor so much favoured, yet if a copyholder will surrender to the use of the right heirs of *J. S.* he being alive, this is void, because it cannot take effect according to the intent of the grantor; for he would have the grant to be executed presently, which cannot be, in regard that *J. S.* can have no heir till after his death (*b*)."

Secondly, *of a* Fee *upon a* Fee.

The author now proposes to examine the authorities for and against the position that a *fee* may be limited on a *fee* in a *surrender* of copyholds, and he thinks it right to pursue the same plan as in discussing the previous and nearly allied question, of a limitation commencing *in futuro*.

As the cases of *Brian & Cawsen* (*c*), and *Wellock & Hamond* (*d*), were both cases of devise, it would have appeared to the author quite unnecessary to have taken any notice of them in this place, had they not been urged as authorities in favour of a limitation of a fee upon a fee in a surrender of copyholds.

The former case was a devise of distinct property to three brothers,

(*a*) Co. Cop. s. 35, Tr. 81, 82.

(*b*) See further as to limitations in futuro, post, tit. " Fee upon a Fee."

(*c*) 3 Leo. 115.

(*d*) Cro. Eliz. 204; S. C. (called Wellcoke *v.* Hammond), cited 3 Co. 20 b.

and if they lived till they were of age and should have issue, then the property was devised to them respectively and their respective heirs; and the will contained a devise over to the other brothers or brother in like manner, if either or any of them should die without issue.

The brothers were admitted according to the intent of the will, and one of them died under age and without issue, whereupon the two surviving brothers were admitted to his part; one of those two came of age and had issue, and surrendered all his interest to the third brother and his heirs, who was admitted accordingly and attained twenty-one, and afterwards died without issue; and it was resolved that no estate tail was created by the will, but that the fee simple vested in the devisees when they came of age and had issue, *so as the residue of the devise was void.*

In *Wellock & Hamond, T. W.* a copyholder in fee of land, of the nature of Borough English, having issue four sons and one daughter, (or, according to Lord Coke's statement of the case, three sons and one daughter,) surrendered to the use of his will, and devised to his wife for life, with remainder to *J.* his eldest son, *paying* 40*s.* to each of his brothers and to his sister within two years after the wife's death. The wife entered and died, and then *J.* entered, and omitted to pay the legacies within the two years, but paid them within five. The youngest son died without issue. *J.* surrendered to will and devised to his wife, who on his death entered and married the defendant. Then *R.* as youngest brother and *heir* entered; the defendant ousted him, and he brought trespass. The question was if the entry of *R.* were lawful. The court held that the word "*paying*" was a limitation and not a condition, for if it were a condition it was extinguished in the heir, and there was no remedy for the money, but being a limitation the law would construe it, that upon the non-payment of the money his estate should cease, and then the law should carry it to the heir by the custom, without any limitation over. The court added, "*and in a devise it may well be that an estate in fee shall cease in one and shall be transferred to another.*" Judgment for the plaintiff.

The case of *Paulter* v. *Cornhill and others* is thus reported in Cro. Eliz. (*e*) "It was moved whereas the surrender was to the use of one in fee, upon condition to pay 100*l.* to a stranger, and that if he failed, it should be to the use of a stranger in fee; whether that were a good limitation to the stranger, so as there should be a fee dependent upon a fee. The court spake not much hereto, but willed to have it specially found; yet Beamond conceived it to be good enough, for it should be as an use limited upon a feoffment, and these uses should rise out of the first surrender."

(*e*) P. 361.

Kitchen says (*f*) "Use may be of copyholds as well as of freehold, but the statute of 27 H. VIII. for uniting the possession to the use doth not extend to such tenures."

In the *Lex Custumaria* (*g*) it is said that a fee may be limited upon a fee, upon a collateral contingent in copyhold estates: "as if a man surrender a copyhold in fee to the use of *J. S.* and his heirs, who is an infant, and if *J. S.* dies before the age of twenty-one years or marriage, then he surrenders this to the use of *J. D.* in fee: this is a good remainder to *D.* upon the contingent."

The authority given for this is the case of *Simpson* & *Southwood*, 2 Roll. Abr. 791; M. 13 Jac. B. R.; (but Rolle gives it with a dubitatur; and see S. C. very differently reported, 2 Roll. Abr. 794, pl. 8, ante, p. 161).

The case of *Bentley* v. *Delamor* is reported by Freeman (*h*) thus: "Copyholder surrenders to the lord, to the intent that the lord shall admit *A.* whom he intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and *A.* in tail. The question was whether the limitation of the estate upon the limitation of the fee precedent be good or not? The cases cited were Rolle, 263; 1 Leo. 288; 2 Cro. 376; Godb. 274. Per tot. Cur. It is good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds. A surrender in futuro is good, and the mischief (*i*) for the freehold remains in the lord."

The case of *Edwards* v. *Hammond*, C. B. 35 Car. II. is thus reported by Levinz (*k*): "A copyholder of land, Borough English, surrendered to the use of himself for life, and after [to] the use of his eldest son and his heirs, if he live to the age of twenty-one years; provided and upon condition that if he die before twenty-one, that then it shall remain to the surrenderor and his heirs. The surrenderor died, the youngest son entered, and the eldest son being seventeen brought an ejectment; and the sole question was whether the devise to the eldest son be upon condition *precedent*, or if the condition be *subsequent?* scil. that the estate in fee shall vest immediately upon the death of the father, to be divested if he die before twenty-one." The court held "that though by the first words this may seem to be a condition *precedent*, yet taking all the words together, this was not a condition precedent, but a present devise to the eldest son, subject

(*f*) P. 170.

(*g*) P. 120; but see ib. 128.

(*h*) C. B. 1 Freem. 267, 268; vide also Roe *d.* Noden *v.* Griffits and others, 4 Burr. 1952, where a copyholder surrendered to the use of himself, his heirs and assigns, till solemnization of his intended marriage, and then to the use of himself for life, &c. And see 2 W. Bl. Rep. 1046, in Thrustout & Cunningham.

(*i*) Ante, p. 160, n. (*m*).

(*k*) 3 Lev. 132.

to and defeasible by this condition *subsequent*, scil. his not attaining the age of twenty-one: and they resembled this to the case of *Spring & Cæsar*, reported by Jones Just. and abridged by Roll. 1 Abr. 415, *nu.* 12. A fine to the use of *B.* and his heirs, if *C.* pay him not 20*s.* upon Sept. 10, and if *C.* does pay to the use of *B.* for life, remainder to *C.* and his heirs, where the word *Si* does not create a condition precedent, but the estate in fee vests presently in *B.*, to be divested by payment afterwards; so here."

Stocker and Wife v. *Edwards*, reported by Shower (*l*), appears to be the same case as *Edwards & Hammond* (*m*), but it is thus differently stated. A surrender of a copyhold tenement was made to the use of himself [the surrenderor] for life, and after to the use of John his youngest son, *and the heirs of his body*, if he attain to the age of eighteen years, and if he die before he attain to that age without issue male, then to his [the surrenderor's] right heirs. The question was whether this was a *contingent remainder*, or whether it should attach immediately upon the death of tenant for life? And it was held that it attached immediately, because of the intention of the party; and held to be the same with Sir *Julius Cæsar's* case in Jones, 389.

The above authorities, the author would submit, are far from favouring an opinion that the doctrine of springing, shifting, and executory uses, applies to a surrender of copyholds.

(*l*) 2 Sho. 398, ca. 365.

(*m*) The reader is also referred to the case of Bromfield *v.* Crowder, 1 N. R. 324, in which the following note is given of Edwards & Hammond, viz. "The record of the case of Edwards *v.* Hammond was searched for and produced by desire of the court, from which it appeared that the premises in question were customary lands held of the manor of South Burstead, in Essex, in which there was a custom that the youngest son should inherit, and that the widow of the tenant in fee should have her freebench; that John Hammond the elder surrendered the reversion of the premises in question, dependant on his mother's freebench, to the use of himself for life, and after his decease, to the use of John Hammond the younger, (his eldest son,) 'and his heirs and assigns for ever, if it shall happen that the aforesaid John Hammond the younger shall live until the aforesaid John Hammond attain the age of twenty and one years; provided always and under the condition nevertheless, that if it shall happen that the aforesaid John Hammond the younger shall die before he attain the age of twenty and one years,' then to remain to the use of John Hammoud the elder and his heirs; that the mother died in the lifetime of the surrenderor; that the surrenderor died leaving issue the said John the younger, his eldest son, and Thomas his youngest son; that John Hammond the younger was admitted according to the surrender; that the defendant Ann Hammond was the widow of the youngest son, who entered on the death of his father, and that John Hammond the younger (the eldest son) being then fifteen, brought an ejectment against Ann Hammond, his brother's widow; that judgment was given for him upon special verdict in the Common Pleas, and afterwards a writ of error brought."

The case of *Brian & Cawsen* was wholly a question of devise, and furnishes no argument whatever in support of an analogy between limitations in a surrender of copyholds and in a conveyance of freeholds since the statute of 27 Hen. VIII. And the case of *Wellock & Hamond*, as far as it may be thought to bear on the present question, is an authority that a fee upon a fee can be limited of copyhold property by way of devise *only*.

In *Paulter & Cornhill* the court, with the exception of Beamond, J., carefully abstained from giving any opinion on the present point, and it does not appear that it was further urged, from which it may be concluded that the parties were well satisfied that the decision would have been against the analogy contended for.

With respect to the position in the Lex Custumaria, that a fee may be limited upon a fee on a collateral contingency in copyhold estates, the author will only observe, that as far as the position is intelligible, it is supported only by a single authority, and which, as already noticed (*n*), is abridged by Rolle with a *dubitatur*, 2 vol. 791; and see ib. 794, 795, where it is said to have been adjudged that the ulterior fee did not arise, the contingency not happening in the lifetime of the surrenderor.

It is quite impossible to draw any certain conclusion on the point under discussion, from a case so vaguely reported as that of *Bentley & Delamor* (*o*); it appears to the author indeed to prove little, if any thing, more than that the court were agreed that copyholds might be surrendered on condition, and as to which the author believes no doubt has ever been entertained. It is to be recollected that the reason why one fee could not be limited in destruction of another pre-existing fee by a feoffment at common law is, that a freehold could only be defeated by entry of the feoffor or his heirs for a condition broken; and as copyholds may be surrendered on condition, it may be urged by analogy, that the doctrine of springing uses does not apply to copyhold surrenders; but that any limitation superadded to the estate of the surrenderee would be a trust only in equity, equally as in the case of a superadded use in a feoffment before the statute of Hen. VIII.

It may be thought that the observation in *Bentley & Delamor* as to the freehold interest remaining in the lord is favourable to a limitation *in futuro;* and so far, certainly, this case would be an authority for the position, that a fee may be limited on a fee in copyhold surrenders; but the author will presently endeavour to show, that

(*n*) Ante, p. 168.

(*o*) Ante, p. 168. And see Roe & Griffits, and Thrustout & Cunningham, there referred to.

the freehold interest in the lord is not capable of being urged as a ground for supporting a limitation of copyholds, for an estate *in futuro*.

The case of *Edwards & Hammond*, or *Stocker & Edwards*, admitting it to be the case of an immediate surrender and not of a devise (*p*), and that the limitation to the son was in fee simple and not in fee tail, seems to the author to have no influence over the present question, but merely to be an authority that copyholds may be surrendered on a condition *subsequent*, of which the surrenderor or his heirs are to have the advantage.

But here the author feels it to be his duty to apprise the reader that Mr. Sanders, who in the early part of his consideration on copyhold surrenders (to which the author has before alluded), dissents from the generally received opinion that such surrenders are to be construed in the same manner as common law conveyances, seems to think that the observations of Lord Hardwicke in *Sutton & Stone* (*q*), and *Lovell* v. *Lovell* (*r*), and of Sir John Holt, C. J. in *Fisher & Wigg* (*s*) in affirmance of that rule, were not intended to be used "*in the general and unrestrained sense*" attributed to them, but that the tendency of them was "to assimilate the operation of a surrender and a deed, in opposition to a will, and to refer to limitations deriving their effect under the statute of uses, in conveyances at the common law, and not to the operation of the feoffment before the origin of uses;" and in support of this reasoning Mr. Sanders urges the dissimilarity of uses limited in surrenders of copyhold estates, and limitations in feoffments before the statute of 27 Hen. VIII., and, as particular instances of such dissimilitude, notices the necessity of there being in every common law conveyance both a grantor and grantee; and the rule, that in feoffments and grants, a party not named in the premises shall not take by the habendum; and also the notion, that the words "*equally to be divided*" would not create a tenancy in common in a common law deed. Mr. Sanders then contends that uses limited on a surrender of copyholds are more to be assimilated to uses arising out of the seisin of a feoffee, under a feoffment since the statute of Hen. VIII., and, indeed, that there is no substantial distinction between them. He further urges, that the legal estate is not vested in the copyholder, but in the lord; and that the copyholder is tenant at will to the lord, with a *beneficial* interest co-extensive with the fee by custom only, and that the legal fee so vested in the lord will support and give effect to future and springing uses of the copyhold interest. Another point

(*p*) See Sanders on Surrenders, p. 53; ante, p. 168.
(*q*) 2 Atk. 101.
(*r*) 3 Atk. 11.
(*s*) 1 P. W. 14.

enforced by Mr. Sanders is, that powers of revocation and appointment of new uses are applicable to settlements of copyhold estates (*t*): and from these premises that learned gentleman has drawn a conclusion that future springing and executory uses may be limited upon a surrender of copyholds, equally as in feoffments deriving their effect from the statute of uses.

The author has already endeavoured to show that the greater weight of authority is in favour of a surrender being construed as a common law assurance, as far as there is any similarity between a surrender of copyholds and a conveyance of freeholds, either before or since the statute of uses, subject however to the rule, that the limitations in a surrender may, in some cases, be explained by the admittance, and to the further maxim, that words of limitation may be supplied by the custom of the manor. And this position, he submits, is far from being impugned by the argument, that in every common law deed there must be both a grantor and grantee; for it is quite clear that a surrender does not create a seisin in the lord, to supply the uses declared; and although it is equally clear that nothing vests in the lord by the surrender, and that the surrenderee is not *in* by him, but by the surrenderor, yet, in comtemplation of law, a surrenderee after admittance is *in* upon a new grant from the lord (*u*); and it may therefore be urged, that in every surrender of copyholds, there is ideally both a grantor and grantee, in exact similitude to a common law conveyance.

It is true that in a feoffment and grant at common law, a party not named in the premises could not take by the habendum; and it is generally supposed that in a surrender of copyholds, a party not named in the premises may take under the habendum; but this distinction between a deed and a surrender does not exist in a general and unqualified sense. The surrender itself merely points out the person whom the lord is to admit, and the estate intended to be transferred to him by the surrenderor; the lord then grants seisin to the surrenderee, without any words of limitation, to hold to the surrenderee *and his heirs*, or for such other interest as is expressed in the surrender; and if the surrender does not distinctly describe either the person of the surrenderee, or the estate intended to be transferred to him, this, as we have before seen, may be explained by the act of admittance or grant, and which was the ground of the decision in *Brooks's case* (*x*).

And even in a conveyance at common law, a person might take by way of remainder, though not named in the premises (*y*).

(*t*) See the case of Boddington & Abernethy, post.

(*u*) See Roe & Loveless, 2 Barn. & Ald. 456, 457; ante, p. 96; post, tit. "Pleading," &c.

(*x*) See Sanders on Surrenders, p. 14; ante, p. 147.

(*y*) Greenwood *v.* Tyler, Cro. Jac. 563.

It is also observable that there is no real distinction between a feoffment or grant of freeholds at common law, and a *voluntary* grant of copyholds, when such grant is not controlled by any particular custom (*a*); but that under a voluntary grant of copyholds to *A.*, habendum to *A.* and *B.*, nothing will vest in *B.* (*b*).

The author, in his observations on the case of *Fisher & Wigg*, has suggested, that the words "equally to be divided" would probably be held to create a tenancy in common, even in a common law conveyance, and if so, the supposed distinction, in the operation of such words, between a deed of that nature, and a conveyance deriving its effect under the statute of uses, does not assist the argument that future and springing uses are applicable to an immediate surrender of copyholds.

With reference to Mr. Sanders's position that the legal estate is not vested in the copyholder, but in the lord, and that such estate in the lord will support future and springing uses of the copyhold interest, it is proper to remind the reader that the legal *customary* fee is clearly in the copyholder, and that he may maintain ejectment (*c*), and have trespass against the lord himself, should he presume to disturb his possession (*d*); and even indict him (*e*).

(*a*) See 1 Lord Raym. 627; Downs *v.* Hopkins, Cro. Eliz. 323; ante, p. 148.

(*b*) 2 Roll. Abr. 67, (K.), pl. 19 to 23; Windsmore *v.* Hobart, Hob. 313; Greenwood *v.* Tyler, Cro. Jac. 563; 1 Watk. on Cop. 113, 114.

(*c*) Post, tit. "Admittance" and "Action of Ejectment."

(*d*) Gilb. Ten. 157, 329; 1 Watk. on Cop. 45; st. 21 Jac. c. 15; 1 Hawk. P. C. ch. 64, s. 15, 16, 17.

(*e*) "Tenant by the custome is as well inheritour to have his land according to the custome, as he which hath a freehold at the common law." Per Danby, C. J., C. B. M. 7 E. 4, 19. "If tenant by custom paying his services be ejected by the lord, he shall have an action of trespass against him." Per Brian, C. J., C. B., H. 21 E. 4, 80; Co. Litt. 60 b.; Co. Cop. s. 9; Gilb. Ten. 157, 329; 1 Watk. on Cop. 45. But this is only since copyholders ceased to be mere tenants at will.

The estate of a copyholder, prior to the period of its assuming that permanent quality, which time and custom have established, has been, and not inaptly, compared to a use of a freehold at common law. Bacon, in his reading on the Statute of Uses, p. 18, says, "For the inception and progression of uses, I have for a precedent in them searched other laws, because states and commonwealths have common accidents; and I find in the civil law that that which cometh nearest in name to the use, is nothing like in matter, which is *usus fructus*: for *usus fructus et dominium* is with them, as with us, particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio*, and therefore you shall find in Justinian, lib. 2, that they had a form in testaments, to give inheritance to one to the use of another, *Hæredem constituo Caium; rogo autem te, Caie, ut hæreditatem restituas Scio.* And the text of the civilians saith, that for a great time if the heir did not as he was required, *cestui que use* had no remedy at all, until about the time of Augustus Cæsar there grew in custom a flattering form of trust, for they penned it thus: *Rogo te per salutem Augusti*, or *per fortunam Augusti*, &c. Where upon Augustus took the breach of trust to

It is also clear that the reversionary freehold interest in copyhold lands is vested in the lord distinct from the customary interest (*f*), and that such reversionary freehold intitles the lord to enter in case of any forfeiture by the particular copyhold tenant (*g*); and this is the true reason why the lord's interest would have supported a contingent remainder, under a surrender of copyholds; but it does not by any means follow that such freehold interest in the lord should operate as a seisin (analogous to the seisin of a feoffee to uses) to give effect either to a springing use, or to a limitation in futuro of the copyhold interest, when no prior use is created; for neither in the instance of a fee limited upon a fee, nor of a limitation of the fee in futuro, could the lord

sound in derogation of himself, and made a rescript to the *prætor* to give remedy in such cases; whereupon, within the space of a hundred years, these trusts did spring and speed so fast, as they were forced to have a particular chancellor only for uses, who was called *prætor fidei commissarius*; and not long after, the inconvenience of them being found, they resorted unto a remedy much like unto this statute, for by two decrees of senate, called *senatus-consultum Trebellianum et Pegasianum*, they made *cestui que use* to be heir in substance. I have sought likewise, whether there be any thing which maketh with them in our law, and I find that Periam, Chief Baron, in the argument of *Chudleigh's* case, compareth them to copyholders, and aptly for many respects.

"First, because as an use seemeth to be an hereditament in the Court of Chancery, so the copyhold seemeth to be an hereditament in the lord's court.

"Secondly, this conceit of limitation hath been troublesome in copyholders as well as in uses; for it hath been of late days questioned whether there should be dowers, tenancies by the curtesy, intails, discontinuances and recoveries of copyholds, in the nature of inheritances, at the common law; and still the judgments have weighed, that you must have particular customs in copyholds, as well as particular reasons of conscience in use, and the limitation rejected.

"And thirdly, because they both grew to strength and credit by degrees; for the copyholder first had no remedy at all against the lord, and were as tenancy at will. Afterwards it grew to have remedy in chancery, and afterwards against their lords by trespass at the common law; and now, lastly, the law is taken by some, that they have remedy by *ejectione firmæ*, with a special custom of leasing. So, no doubt, in uses: at the first the chancery made question to give remedy, until uses grew more general, and the chancery more eminent; and then they grew to have remedy in conscience: but they could never obtain any manner of remedy at the common law, neither against the feoffee, nor against strangers; but the remedy against the feoffee was left to the *subpœna*, and the remedy against strangers to the feoffee."

But as a use in a freehold case is by the statute of 27 Hen. VIII. turned into a legal estate, so the use in a surrender of copyholds, since the estate of a copyholder became alienable and descendeth uncontrolled by the lord, is turned into a customary legal estate, under which a demise by a copyholder, though void against the lord, is good to maintain the declaration in ejectment.

(*f*) But they are not distinct interests as to all purposes, for the possession of the copyholder is regarded as the lord's possession, and will cause a *possessio fratris* in him. Watk. on Desc. c. 1, s. 1, p. 51.

(*g*) But it is to be recollected that the lord could only retain possession during the continuance of the particular estate, and that such forfeiture would not affect the interest of the persons entitled in remainder.

enter, without being considered as a trespasser, except, indeed, for a forfeiture of the whole copyhold interest, which, so far from supporting the springing or future use, would of necessity defeat it altogether.

The author cannot himself see any analogy between a conveyance to uses of freehold property, and a surrender of copyholds, with reference to the general doctrine of powers, so far at least as involves the question whether springing or secondary uses in destruction of prior vested estates may be created by means of a power of appointment deriving its effect from the operation of the statute of uses. It certainly is not to be denied that a power of appointment or nomination, to be executed either by deed or will, may be created by a copyhold surrender (*h*), and that such a power may be given to a wife, and to be exercised in the lifetime of the husband (*i*), or even to a stranger (*k*). Indeed the legality of a power of appointment over copyholds, *even where the fee is limited in default of any exercise of the power*, has been recognized by the courts both of law and equity (*l*).

In *Doe* d. *Harman* v. *Morgan* (*m*), which was an ejectment tried before Mr. Justice Heath at the assizes for Monmouth, a verdict was found for the plaintiff, subject to the opinion of the Court of B. R. on the following case. *H. L.*, being seised in fee of the copyhold estate in question as heir ex parte maternâ, surrendered the same to the use of himself and his assigns for life, with remainder to the use of such persons and for such estates as he should by *deed* or will,

(*h*) See Beal & Shepherd, Cro. Jac. 199; Holder & Preston, 2 Wils. 400.

(*i*) Cotter *v.* Layer, 2 P. W. 623; Driver & Thompson, 4 Taunt. 294; and see Peacock *v.* Monk, 2 Ves. 191; Belt's Supp. 323, 324.

(*k*) Wrot's case, Litt. Rep. 26; Co. Cop. s. 35, Tr. 82.

(*l*) See Rex *v.* The Lord of the Manor of Oundle, 1 Adol. & Ell. 283, which arose upon the return to a writ of mandamus, issued at the instance of John Pruday, to compel his admission to certain copyhold hereditaments. The writ set forth that Richard Ragsdale was seised in fee, and surrendered the copyholds to such uses as Thomas Dawson should *by deed* direct and appoint, and in default of and until such direction and appointment, to the use of Dawson in fee, who afterwards did by deed direct and appoint that the premises should remain to the use of Pruday in fee. The return stated that T. Dawson had never been admitted, nor had he or Ragsdale ever surrendered to Pruday. The lord contended that, as Dawson took not only a power, but an interest, he ought to have paid his fine before he could appoint by deed. The court held that Ragsdale remained tenant to the lord until some person should be admitted under his surrender: that Dawson could not have surrendered his interest without being first admitted; but as he had chosen to execute a deed of appointment under the power, his appointee took nothing of him, but became the surrenderee of Ragsdale, and that he (Pruday) was therefore intitled to be admitted; and a peremptory mandamus issued accordingly. But the author apprehends that the lord is not compellable to accept a surrender creating a power of appointment, to be executed by *deed*.

(*m*) 7 T. R. 103.

signed in the presence of three witnesses, direct, with remainder over, in default of appointment or devise, to his heirs and assigns according to the custom of the manor. *H. L.* subsequently, at a Court Baron of the manor, surrendered the premises to the use of *J. B.*, his customary heirs and assigns. At the foot of the surrender a memorandum was written that such surrender was made for securing the repayment of 1000*l.* and interest due from *H. L.* to *J. B.*, and that after payment thereof, the premises were to revert to and follow the uses of the first above mentioned surrender; and *J. B.* was thereupon admitted tenant. Afterwards *J. B.* died, and the premises descended to his infant son and customary heir *J. B.* The mortgage money was paid by *H. L.* to the executor of *J. B.* the father. *J. B.* the infant appeared personally before the lord of the manor out of court, and was admitted tenant, and immediately afterwards, by virtue of an order of the Court of Chancery, surrendered to the use of the said *H. L.*, his heirs and assigns, according to the custom of the manor, who at a subsequent court was admitted accordingly, and afterwards died intestate. *S. H.*, one of the plaintiffs, was the paternal heir of *H. L.*, and the defendant was his maternal heir. The question was, whether on the death of *H. L.* the premises descended to his maternal or paternal heir. The counsel for the defendant observed, that the only ground on which he could rest the defendant's title was, that the legal estate remained in *H. L.*, notwithstanding the surrender to *J. B.* the mortgagee, who had an equitable interest only; for at the time of such surrender *H. L.* had only an estate for life, with a power of appointment by deed or will, attested by three witnesses; and no such appointment having been made, the legal estate was not divested from him by the surrender in fee to *J. B.* the father, unless it could operate upon the reversion in fee in default of appointment: the defendant, therefore, as heir ex parte maternâ, was entitled, according to the case of *Abbot* v. *Burton*, Salk. 590. Lord Kenyon, C. J. "If it were material to decide that point in this case, I should think that an appointment by *H. L.* by deed would have been good, though not executed in the presence of three witnesses, and that that number of witnesses only applied to an appointment by will. But it is immaterial to consider that point here. The surrender in favour of *J. B.*, the mortgagee, was not merely of an equitable, but of the legal estate; *J. B.* was admitted in fee under it, and his heir at law surrendered to *H. L.* in fee. This then is like a feoffment and refeoffment (*n*), which, it has been long settled, breaks the line of descent; and consequently the lessor of the plaintiff, who is the heir ex parte paternâ, is entitled to recover."

(*n*) Ante, p. 44.

It is clear therefore that had *H. L.* made an appointment of the customary fee simple of the estate in question to a stranger pursuant to the above power, such appointment would, in the opinion of Lord Kenyon, have displaced the fee limited, in default of appointment, to the heirs of *H. L.*

The case of *Roe* d. *Buxton and Wife* v. *Dunt* (*o*) has been considered as an authority not only in favour of a power of appointment in a surrender of copyholds, and a limitation over in fee for want of any exercise of the power, but also of a limitation of one fee upon another on a contingency. It was an ejectment for copyhold lands in H. in Norfolk, and the following case was reserved for the opinion of the Court of C. B.:—*S. S.* widow, a copyholder in fee, surrendered in court to the use of her son *J. S.* and *Elizabeth* his wife during their lives, and the life of the longer liver of them, and after the decease of the survivor of them, to their child or children, male or female, in such proportion, &c. and for such estate, &c. as the parents or the survivor should by any *surrender* or *surrenders* thereof, and according to the custom of the manor, or by his or her last will and testament direct, declare, limit or appoint, and for want of such direction, &c. then to all and every the child and children of the said *J. S.* and *Elizabeth* his wife, *and their heirs*, equally to be divided between them as tenants in common, and not as joint tenants; *and for want of such issue*, then to the right heirs of the said *J. S.* for ever. *J. S.* and *Elizabeth* his wife were at the same court admitted tenants, to hold according to the uses aforesaid, and *J. S.* immediately afterwards surrendered the premises to the uses of his will.

Elizabeth S. died, and *J. S.* her husband, who survived her, by his will devised to his daughter *S. S.* and her heirs for ever, when she attained the age of twenty-one years, all his messuages, lands, tenements and hereditaments, in *H.* aforesaid, and if she died before she should attain twenty-one, then he devised the said hereditaments unto his sister Ann Dunt, the wife of Thomas Dunt, of *H.* aforesaid, and her heirs for ever, subject to the following condition, viz., in case her said sister Ann should at any time when she was possessed of the said messuages and lands make sale thereof to any person or persons, then his will was that the said Ann his sister did pay to his brother the sum of 50*l.* out of the money arising by such sale. *J. S.* died and left only one child, his daughter *S. S.*, by his said wife Elizabeth, who on her father's death took possession of the premises, and died seised in 1765, an infant. Mary, the wife of Thomas Buxton, (the lessor of the plaintiff), was the cousin and heir of *S. S.* the infant, and Thomas Dunt the defendant was husband of Ann Dunt, the

(*o*) 2 Wils. 336.

sister and devisee of the testator *J. S.* The question for the opinion of the court was, whether the plaintiff, as lessee of Thomas Buxton and Mary his wife, in right of the said Mary, the heir of *S. S.* the infant, was entitled to recover in the ejectment: and the whole court were clearly of opinion that *J. S.* the testator had no power or authority to make the will and surrender as above, but that there being only one child of the testator by his late wife, *that* child was entitled to the whole of the premises in fee; and Mary Buxton being her heir at law, the plaintiff had judgment.

It is true that the court in the last case did not express any suspicion of the legality of the power of appointment, but it is worthy of remark that this case was determined on the circumstance of there being only one object of the power, and that the validity of it or of the limitation over in default of any exercise of the power was not brought into question, the child being clearly entitled to the fee.

In the case of *Lord Kensington* v. *Mansell* (*p*), the lord of the manor sought by his bill in equity to discover the exact purport of an instrument of appointment, and to have the benefit of it upon a trial of an action in ejectment for the satisfaction of his fine under 9 Geo. I. c. 29. The facts disclosed by the case were these: upon the marriage of *W. B.* a copyholder in fee, in 1768, some deed or deeds or writings were executed by him, whereby he covenanted to surrender the copyhold estate in question to the use of himself for life, with remainder to trustees to preserve contingent remainders, remainder to his intended wife for life, remainder to trustees to preserve contingent remainders, remainder to the use of any one, two or more child or children of the marriage, in such shares and for such estates, and with such limitations and provisions as the said *W. B.* should by deed or will appoint, and in default of such appointment, to the use of all and every the child and children in tail general, and in default of issue of the marriage to *W. B.* and his heirs.

On the 11th April, 1768, *W. B.* made a surrender of the copyhold premises, and was again admitted to the uses of the settlement, and he did not on such re-admission pay any fine, as he had paid his fine on his former admission. In 1799 *W. B.* in pursuance of the power of appointment vested in him by the settlement, and in contemplation of a marriage between Elizabeth his only daughter and *M. D. M.*, executed some deed or deeds, appointing all the copyhold premises to or for the benefit of his said daughter or her intended husband and her issue, whereby (according to the statement in the bill) the daughter became entitled to an estate for life, or some larger estate expectant on the determination of the estate for life of *W. B.* It further

(*p*) 13 Ves. 240.

appeared by the bill that the marriage took place, and that *W. B.* died in 1803, whereupon *M. D. M.* and his wife, or he in her right entered; and at a court held the 20th July, 1803, the homage presented the death of *W. B.*, of which presentment *M. D. M.* and his wife had notice; and on the 21st October, 1803, *Elizabeth M.* was admitted by attorney, pursuant to the act of 9 Geo. I. c. 29, and a fine was accordingly assessed by the lord for such admission, which *M. D. M.* and his wife refused to pay. In Hilary term 1804 the lord brought an ejectment, and at the trial Lord Ellenborough ruled that it was necessary for the plaintiff to produce in evidence the deed of appointment under which *Elizabeth M.* became entitled to be tenant; and the plaintiff not being able to produce the deed to show that *Elizabeth M.* was entitled to the estate according to the terms of the admission, was nonsuited.

The defendants put in a general demurrer to the above bill of discovery. Upon the hearing Lord Eldon, C., after noticing that the act of 9 Geo. I. seemed only to go to the case where the wife came in by descent or surrender to will, observed, that he should have thought under the act that it was better not to produce the deed of appointment: that the opinion of the court might have been taken upon what appeared, whether Mrs. *M.* was such a feme-covert as took under the scope of the act; and whether, the lord having admitted her, the fine which should have been paid by the tenant for life, became payable by those in remainder: that the lord admitting had a right previously to call upon the person claiming to be admitted to state the uses of the settlement, and then had no occasion to look at the deed: that even an appointee would be nothing more than a person in remainder under the settlement: that if it appeared upon the court roll that *W. B.* was admitted under the settlement, his lordship could not imagine how the instrument in question at *Nisi Prius* was not evidence for the defendant, instead of for the plaintiff: that he should have held that there was not an appointment until an appointment was proved; and that it was upon those who were to disappoint the lord of his fine to produce that settlement, not upon the plaintiff: that the fact of such a settlement as in the bill stated and an admission to the uses of that settlement was admitted.

Lord Eldon, after hearing the arguments in support of the demurrer, and of the counsel for the plaintiff, asked if the case must not go upon this; that the party taking under the deed, if there was an admission of the tenant for life, there was no occasion for a farther admission? might it not therefore be studiously omitted? His lordship further observed, that his difficulty was, that the estate of the feme-covert ought to have been taken by the court upon the ejectment to be an estate vested in default of appointment, until it was

shown that there was an appointment: that he was much struck with this difficulty, taking it to be the case of a feme-covert within the act, and that the appointment would take her case out of the act: that if the lord had admitted her either heir general, or according to any other estate capable of being defeated only by an appointment made, the plaintiff should have recovered in the ejectment, unless an appointment was shown; for it could not be said to exist until its existence was proved, and that it was for the defendant to prove it: that if it were shown that she was not admitted according to the act, then the nonsuit was right: but how was it incumbent upon the plaintiff to prove that appointment? that when the tenant for life came on behalf of himself, and all in remainder and reversion, if the lord did not take the fine, he could not afterwards insist upon the fine from those in remainder: that the lord might apportion the fine among the different parcels of the inheritance; but it was not possible to say the tenant for life should pay nothing, and those in remainder should pay the whole: that the appointee, when once become such, was the same as if originally named in the first instrument, the appointment being only an instrument enabling him to succeed under the first instrument. Lord Eldon afterwards stated, that he had not been able to get information from the quarter he expected as to what passed at the trial, but he had received information sufficient to ascertain that the bill did not accurately state the transactions in the case. The order was that the demurrer should be allowed: the plaintiff to be at liberty to amend the bill. This was accordingly done by introducing at length the surrender made by *W. B.*, stating specifically the uses of the settlement, and a subsequent presentment, stating the deed of appointment by which *W. B.* appointed the premises to Mrs. *M.*, his daughter and only surviving child, her heirs and assigns for ever, subject to his estate for life. A general demurrer was also put in to the amended bill, which was argued before Lord Erskine, C., who allowed it on the ground that the act of 9 Geo. I. c. 29, providing for the admission of infants and femes-covert, was confined to the title by descent or surrender to the use of a will. Nothing of importance fell from his lordship on the principal point, beyond the expression of a clear opinion, that an appointee of the copyhold under the power, would be on the footing of a person in remainder (*q*).

The only observation the author thinks it necessary to make on the last case is, that no question was raised as to the validity of the power of appointment, and that the limitation over in default of appointment to *W. B.* and his heirs was inoperative, the estate continuing in him, (subject to the uses of the surrender for the benefit of the wife and children,) as part of his old reversion.

(*q*) See further as to this case, post, tit. "Fine."

And the author must here again remind the reader, that a surrender neither vests an immediate estate in the surrenderee, nor creates a seisin in the lord to supply a use, and this material distinction between a conveyance of freeholds since the stat. of Hen. VIII. and a surrender of copyholds, may serve to show that a power of appointment over copyholds may exist consistently with the position, that such a power cannot be made the medium of springing and secondary limitations, in imitation of the practice in freehold cases. On the admission of the surrenderee of copyhold land, he becomes seised of the estate limited to him by the surrender rather as the nominee than as the assignee of the interest of the surrenderor, a surrender being in its nature an authority or direction only to the lord, to admit this or that particular person (*r*); and whether it authorises the admission of *A.*, or of such person as *A.* shall name to fill the tenancy intended to be vacated by the surrender, can be of no importance.

It must however be conceded, that this right of nomination when given to a stranger, or when reserved to the copyholder himself to be exercised by deed, the fee being limited over to a stranger in default of any appointment, somewhat militates against the position that a fee is not capable of being limited upon a fee in an immediate surrender of copyholds; and it may perhaps afford a case of exception to that rule; but it by no means would seem to follow that a power of appointment of copyholds is, as a general legal maxim, to be assimilated to a power of appointment of freeholds under the operation of the statute of uses, so that such springing and shifting uses and powers as are allowable in freehold cases, and which derive their legal effect out of the seisin of the feoffee or releasee of the inheritance, may be created in a surrender of copyholds, where the statute has no operation (*s*): and even with respect to the power of appointment or nomination in copyhold cases, it may be very doubtful whether, after the tenancy is filled by an admission to the whole customary fee-simple under a surrender of copyholds, such estate in fee could be displaced by the exercise of an *antecedent* power of appointment created by the same surrender (*t*); and although it should be thought that from the peculiar nature of a surrender, this mode of limiting a fee upon a fee in copyhold cases is allowable, yet the author submits that it would be far from establishing that one fee may be substituted for another by an immediate surrender, through the medium of a

(*r*) Ante, p. 153.

(*s*) See Atherley on Marr. Sett. p. 570.

(*t*) See the case of The King *v.* The Lord of the Manor of Oundle, 1 Adol. & Ell. 283, ante, p. 175, n. (*l*); but note, the court did not express any opinion as to the effect which would have been produced by the admission of the donee of the power, under the limitation to him in fee in default of and until an exercise of the power of appointment.

limitation in the nature of a power of revocation and new appointment of uses unknown to the common law, but which has been introduced into settlements of freehold property since the stat. of 27 Hen. VIII.

The reader's attention is here called to the case of *Boddington & Abernethy*, sent by the M. R. for the opinion of the Court of King's Bench (*u*), which is thought to be an authority, that shifting and springing limitations are allowable in surrenders of copyholds through the medium of a power of appointment, on the ground that no rule of law is thereby contravened, inasmuch as a surrender does not operate as a conveyance by transmutation of possession.

The case of *Boddington & Abernethy* was in effect this: *A. F.*, spinster, was seised in fee simple of a freehold estate, and was also seised in *fee tail* of a copyhold estate held of the manor of Enfield; and on her marriage with *W. R.* conveyed the freehold property to *T. F.* and *J. R.* their heirs and assigns, to the use of *W. R.* for life, with remainders over, and with a proviso and declaration that it should be lawful for *T. F.* and *J. R.* or the survivor of them, or the heirs of the survivor, at any time or times thereafter, at the request and with the consent and approbation of *W. R.* and *A. F.*, or the survivor, during their lives and the life of the survivor (testified, &c.), to dispose of and convey, either by way of sale for a valuable consideration in money, or in exchange for or in lieu of other manors, &c. of equal value, all or any of the manors, &c. unto any person or persons whomsoever, and that for the purpose of effecting such disposals and conveyances, but not for any other purpose, it should be lawful, *if it should be thought necessary or requisite*, for *T. F.* and *J. R.*, and the survivor of them, or for the heirs or assigns of such survivor, upon such request and with such consent and approbation as aforesaid, by any deed or instrument in writing to be sealed and delivered, &c. to revoke, determine and make void all and every the uses, &c. in the indenture of release limited, &c. of the hereditaments so to be sold or exchanged, and by the same or any other deed or instrument in writing, to be so sealed, &c. and with such consent and approbation as aforesaid, to limit and appoint the hereditaments whereof the uses should be so revoked, either unto the purchaser or purchasers, or to the person or persons making such exchange or exchanges, and to his, her and their respective heirs and assigns, or otherwise to limit, &c. such new or other use or uses, &c. of and concerning the same hereditaments as should be necessary or requisite for effecting such sale or exchange. And by the same indenture *A. F.* covenanted to make such surrender and suffer such recovery in the copyhold court

(*u*) See 5 Barn. & Cress. 776; 8 Dow. & Ry. 626.

as were necessary to extinguish her estate tail, and bar all remainders expectant thereon, and for surrendering, &c. the same according to the custom of the manor, *to the same uses* and *subject to the same powers* as were before limited as to the freehold estates. After the marriage a surrender was made, and a recovery duly suffered of the copyhold estate pursuant to the above-mentioned covenant. The demandant was admitted in the usual form, and immediately surrendered *to the uses* and *subject to the powers* contained in the indenture of release, and thereupon *W. R. was admitted tenant for life* of the said copyhold estate. By deed of release and appointment of 16th July, 1805, between *T. F.* and *J. R.* of the first part, *W. R.* and *A.* his wife, of the second part, *S. B.* of the third part, *J. W.* of the fourth part, the Rev. *J. R.* of the fifth part, and *A. W.* of the sixth part, *T. F.* and *J. R.* in consideration of 1320*l.*, being a reasonable price in that behalf, to them paid by *S. B.* with the consent and approbation and at the request of *W. R.* and *A.* his wife, testified, &c. and by virtue of the powers by the first mentioned indenture given, sold the said copyhold premises to *S. B.* in fee: and in pursuance of the powers to them given by the same indenture and the surrender, revoked the uses, &c. to which the said copyhold premises had been surrendered, and did thereby limit and appoint that all the said copyhold premises should immediately after the sealing and delivery of the said indenture of release and appointment, be and remain to the use of *S. B.*, his heirs and assigns; and *W. R.* for himself and *A.* his wife did covenant with *S. B.* to surrender or cause to be surrendered the said copyhold hereditaments to the use of *S. B.* his heirs and assigns. On 22d August, 1805, *W. R.* surrendered the copyhold premises to the use of *T. F.* and *J. R.* their heirs and assigns, *upon the trusts* of the settlement, and at a court held on the 28th of the same month, *T. F.* and *J. R. were admitted tenants* thereof accordingly, and at the same court *S. B.* was admitted in fee on the surrender of the trustees *T. F.* and *J. R.* (*x*). In June, 1822, the defendant *John Abernethy* entered into a contract with the plaintiff *S. B.* to purchase the copyhold estate, and a bill was filed to compel a specific performance of the contract. The question raised for the opinion of the Court of B. R. was, whether the plaintiff had an estate in fee simple at the will of the lord, according to the custom of the manor, in the said copyhold hereditaments. For the plaintiff it was argued that the authorities were in favour of the proposition, that copyholds may be surrendered to uses to take effect *in futuro*, and so as to give an estate in fee to a stranger in destruction of a previous fee, copyholds not

(*x*) Post, p. 184.

passing by transmutation of possession, and the freehold remaining in the lord; and that as the reasons for the rules of the common law were in many instances inapplicable to a conveyance of copyholds, so the rules themselves ought not to be applied to those estates, although it might be perfectly true that surrenders ought to be construed as conveyances at common law. For the defendant it was contended that the power reserved by the settlement was at variance with the principles of the law relating to copyholds, and would be bad in a common law conveyance of freeholds, and that the same construction must take place on a surrender of copyholds as in a conveyance at common law; and that even if a surrender to uses to arise *in futuro* might be good, still that a power to revoke *vested* estates, and limit new ones, could not be reserved in a surrender of copyholds. The judges (Mr. Justice Littledale declining to sign the certificate, not having heard the whole of the argument) certified their opinion, that the plaintiff had an estate in fee simple at the will of the lord, according to the custom of the manor.

It is right to observe that in conformity with the usual practice in such cases, no explanation was given by the Court of B. R. of the ground of their opinion, a circumstance which is particularly to be regretted in the present case; for although it is highly probable, with reference to the argument adduced on the part both of the plaintiff and the defendant in the suit in equity, that the decision of the court was formed upon the broad principle, that a power of revocation and substitution of new uses is valid in a surrender of copyholds to uses by way of strict settlement, so as to displace the former uses and entitle the appointee to admittance; yet it is observable that in the principal case, after the exercise of the power of appointment in favour of *S. B.* (the purchaser), *W. R.* (who had been admitted to the copyholds *for life* upon the surrender of the demandant under the customary recovery, to the uses of the deed of settlement), surrendered the said copyholds to the use of the trustees of the settlement, *their heirs and assigns*, and that they were admitted thereto accordingly, and subsequently surrendered to *S. B.* the purchaser, and that *S. B.* took admittance in fee under the last-mentioned surrender; so that supposing the legal fee to have been acquired by the trustees of the settlement under the surrender made by *W. R.*, the case now under consideration has no bearing on the question, whether a power of revocation and appointment over copyholds is capable of being exercised so as to displace prior vested *legal* customary estates (*y*); and no doubt ever existed as to the effect of such a power upon the equitable

(*y*) See The King *v.* The Lord of the Manor of Oundle, ante, pp. 175, n. (*l*); 181, n. (*t*).

fee, the legal customary fee being acquired by the purchaser under the power, through the medium of the trustees of the settlement, or other person being at that period the lord's admitted tenant (*z*).

The author has not overlooked another circumstance mentioned by Mr. Sanders as favorable to the limitation of a fee upon a fee, and powers of revocation, &c. in an immediate surrender of copyholds, viz. that forms of settlements containing such limitations are to be found in ancient books of precedents. In the book called the English Copyholder, published in 1735, (page 403,) there certainly is the form of a surrender by *J. B.* into the hands of the lord by the acceptance of two tenants, to the use of himself, his heirs and assigns, until the solemnization of a marriage then intended between *W. B.* his son, and *C. L.*, and after such marriage to the use of *W. B.* and *C.* his intended wife, for the term of their natural life and the life of the longest liver of them, and from and after their decease to the use of such child and children as should be begotten by *W. B.* on the body of *C.*, share and share alike, and to the heirs and assigns of such child or children for ever, according to the custom of the manor; and in default of such issue, then to the use of the said *J. B.*, his heirs and assigns for ever (*a*).

But with respect to the form copied in part by Mr. Sanders from the same book, p. 385, so far from being favourable to the practice it is cited in support of, it would appear to have been worded with the impression that springing and secondary uses, and powers of revocation, &c. could not be introduced in settlements of copyhold property, except by vesting the legal fee in trustees; for it is observable that the whole *legal* customary fee was so limited as to be capable of

(*z*) The case of Boddington & Abernethy will probably be considered as having gone the full length of deciding that shifting, springing, and future uses, are capable of being limited in a surrender of copyholds.

With respect to what is said in the text on that case, as to the effect of the surrender from the tenant for life to the trustees, and their admission thereunder, and their subsequent surrender to the purchaser, and his admission under that surrender, it is to be observed, that inasmuch as the trustees by the surrender to them would only acquire an estate for the life of the tenant for life, they by their surrender to the purchaser would only pass the same and no greater estate to him, so that it appears the purchaser could not have acquired the customary fee, except by force of the appointment executed by the trustees.

In the above case it is conceived that the estate of the tenant for life would have been defeated by the power of revocation executed by the trustees, though there had been no surrender of that estate to them, and that no surrender could have been required by the lord.—[Editor's note.]

(*a*) And see 2d vol. Horseman's Preced. 472, 475; 3d vol. 440, 441; Jacob's Court Keeper, 7th ed. p. 226; Calth. Read. 31, 32, qu. p. 25, 2d ed. cited by Mr. Sanders in his Treatise on Surrenders, p. 54; and see Roe & Griffits, 4 Burr. 1952; Thrustout *v.* Cunningham, 2 Sir W. Bl. 1046; ante, p. 168.

being transferred to a purchaser, in case the power of sale had been exercised before the contingent estates vested, or during the minority of the persons beneficially entitled under such contingent limitations. The estate was surrendered by *G. C.* the elder to such uses as should be declared by a deed intended to bear even date with the surrender: and by a deed purporting to be a *post nuptial* settlement of copyhold property belonging to the said *G. C.* the elder, reciting a marriage had between *G. C.* the younger, and *J. C.* then his wife, and that in consideration thereof, and of the portion paid by Sir *W. J.* (father of the said *J. C.*) the said *G. C.* the elder did covenant to make, and had accordingly on the day of the date of the same deed made the aforesaid surrender; it was witnessed, that in consideration of the said marriage and portion and for the settling, &c. the said *G. C.* the elder did limit, declare and appoint, and it was by all the parties thereto limited, declared and appointed, that the said surrender should enure to the uses, &c. after mentioned, viz. to the use and behoof of the said *G. C.* the younger for his natural life, and after his decease to the use of the said *J.* his wife for her natural life, in part of her jointure, and after the decease of the longer liver of them the said *G. C.* the younger and *J.*, to the use and behoof of the said Sir *W. J.* and *F. J.*, *A. B.*, Sir *J. P.* and Sir *R. P.*, their, &c. [executors and administrators], for the term of 200 years, upon the trusts after expressed, and subject thereto to the use and behoof of the said Sir *W. J.*, his, &c. [heirs and assigns], upon trust and confidence to permit and suffer the first and other son and sons of the said *G. C.* the younger by the said *J.* his wife, successively and according to seniority, and the heirs male of their respective bodies, to receive the rents and profits thereof, and for default of such issue, upon the like trust for the benefit of an after-born son or sons of the said *G. C.* the younger by the said *J.*, and the heirs male of his and their body and bodies successively, and for default of such issue, upon further trust and confidence, that the said Sir *W. J. his heirs and assigns, should surrender* the premises to the use and behoof of the said *F. J.*, *A. B.*, Sir *J. P.* and Sir *R. P.*, their, &c. [executors and administrators] for the term of 300 years, upon the trusts after expressed, and subject thereto upon further trust and confidence that the said Sir *W. J.*, *his heirs and assigns, should surrender* the premises to the use and behoof of the said *G. C.* the elder, his heirs and assigns for ever. And after declaring the trusts of the aforesaid respective terms of 200 years and 300 years, the following provisos were inserted in the said settlement, viz. "Provided always, and it is covenanted, declared and agreed, by and between all the said parties to these presents, and it is the true intent and meaning of them and every of them, and of these presents, and it is hereby declared, limited and appointed, that

it shall and may be lawful to and for the said *G. C.* the younger, and the said *G. C.* the younger shall have full power and authority by any deed or deeds, writing or writings, to be by him sealed and subscribed in the presence of three or more credible witnesses, to declare, limit or appoint the said copyhold messuages, &c. and every or any part or parcel thereof, to any woman or women that he the said *G. C.* the younger shall happen to marry, for the term of the life and lives only of such woman or women, for her and their respective jointure or jointures, or livelihood, and in lieu of her dower and thirds at the common law; and it is hereby declared, limited and appointed, that the said surrender hereinbefore recited as to the said messuages and other the last-mentioned premises, from and after such declaration, limitation and appointment of the said *G. C.* the younger, shall be and enure to the use of the said woman or women from the time as he shall happen to marry, for and during her or their natural life or lives for their respective jointure or jointures or livelihood as aforesaid, anything herein to the contrary in anywise notwithstanding.

"Provided always, and it is further covenanted, declared and agreed by and between all the said parties to these presents, and the true intent and meaning of them and of these presents, and of the said surrender, was and is, that if the said *G. C.* the younger, and *J.* his wife, or the survivor of them, by and with the advice and consent of the said Sir *W. J.* and *G. C.* the elder, during their joint lives, and if it shall happen that the said Sir *W. J.* shall die first, then after the decease of the said Sir *W. J.* by and with the advice and consent of the said *G. C.* the elder with *F. J.* and *A. B.* or either of them, and if it shall happen that the said *G. C.* the elder shall die before the said Sir *W. J.*, then after the decease of the said *G. C.* the elder, by and with the advice and consent of the said Sir *W. J.* with the said Sir *J. P.* and Sir *R. P.* or either of them, shall be minded to sell and dispose of the said premises in S. aforesaid, or any part thereof, *that then and in such case it shall and may be lawful to and for the said* G. C. *the younger, and* J. *his wife, and the survivor of them, and the said Sir* W. J. *to surrender the said premises, all or any part thereof as shall be agreed to as aforesaid, into the hands of the lord of the said manor of, &c. to such person and persons, and for such estate and estates, and to such uses, intents and purposes, as by the said* G. C. *the younger, and* J. *his wife, or the survivor of them, by and with the consent aforesaid, shall be limited and declared, and that such surrender or surrenders of the said premises, or any part thereof, by the said* G. C. *the younger, and* J. *his wife, or the survivor of them, and the said Sir* W. J., *and the estate and estates, uses, intents and purposes, limited and declared thereupon, shall be good and effectual in law to*

all intents and purposes, anything hereinbefore to the contrary in anywise notwithstanding."

[Then follows the usual direction for the investment of the monies arising from sale in the purchase of other estates; and that the respective limitations by virtue of the several powers should take effect according to priority of time in the creation thereof, without regard to the order of such powers; with covenants from *G. C.* the elder for the uninterrupted possession and further assurance of the premises surrendered as aforesaid.]

The author would submit that the present question is far from being assisted, either by the forms of settlement above particularly noticed, or by the precedents of copyhold assurances to be found in Horseman and other similar publications, wherein those precedents are chiefly confined to deeds of covenant or agreements on the part of the copyholder to surrender his copyhold lands to particular uses; and although the uses are stated in those instruments precisely on the plan of a freehold settlement, where the operation of the stat. of Hen. VIII. is in the contemplation of the parties, yet it is possible that such covenants or agreements might have been carried into effect at that period, as they clearly would be now according to the general practice of the profession, by vesting the legal customary interest in trustees, (so far at least as relates to the contingent and other estates limited upon and subsequently to the first and immediate life interest, or the life interest of both the parents, in the case of a strict family settlement,) upon such trusts as would best and nearest correspond with the uses expressed in the deed of settlement; and (as the author has before suggested) (*b*) this plan, at the same time as it is calculated to meet the supposed distinction between freehold and copyhold assurances, in the limitation of springing and secondary estates, and powers of revocation, &c., would occasion no particular inconvenience or extra expense to the parties beneficially interested in the settled property.

It is scarcely necessary to cite authorities in favour of a perfect similitude between freeholds and copyholds in the effect of limitations of the equitable interest; but as the principle was recognised in a recent case (*c*), involving an interesting question of construction, the author will conclude the present subject with a short statement of the facts disclosed by Mr. Maddock's report of that case, and of the Vice-Chancellor's judgment in it.

John Abbs Gorton, the brother of the plaintiff, for a nominal con-

(*b*) Ante, p. 165; and see Atherley on Marr. Sett. p. 570.

(*c*) Hampson *v.* Brandwood and others, 1 Madd. 381; see Co. Lit. 271 b, n. 1, s. iii. 2.

sideration, on the 13th of February, 1778, surrendered certain copyhold hereditaments *to the use of J. E. and J. B. and their heirs*, and the survivor of them, and the heirs of such survivor for ever, according to the custom of the manor, to such uses, intents and purposes, and subject to such powers, provisos, limitations and appointments as were mentioned, expressed and declared by an indenture bearing even date therewith, and made between the said *J. A. G.* on the one part, and the said *J. E.* and *J. B.* on the other part; and at a court held the 14th of May, 1778, the said *J. E.* and *J. B.* were admitted accordingly. By the indenture referred to in the said surrender, it was witnessed, that in consideration of 5*s.* the said *J. A. G.* pursuant to the surrender, did grant, bargain, &c. all and singular the said copyhold hereditaments, with their appurtenances, unto and to the use of the said *J. E.* and *J. B.* and their heirs, and the survivor of them and his heirs for ever, in trust nevertheless to permit and suffer *E. G.* mother of the said *J. A. G.* (and of the plaintiff) to receive the rents for her life, and after her decease to permit and suffer the said *J. A. G.* and his assigns to receive the rents for his natural life, if he survived his mother, and after his decease to the use of the first male issue lawfully begotten by the said *J. A. G.*, which should attain to the age of twenty-one years, and to the heirs and assigns of such male issue for ever, charged as therein mentioned, and for default of such male issue, to the use of all and every the daughter and daughters of the said *J. A. G.* begotten, and to their several heirs and assigns for ever as tenants in common, discharged of any further or other limitation whatsoever: provided, and it was thereby declared, that if the said *J. A. G.* at the time of his decease should leave one or more male issue to inherit as aforesaid, then and in such case it should and might be lawful, and should be construed, and the trust therein reposed, and the execution of the said indenture was and were thereby declared to be upon this condition that the said *J. A. G.* did thereby reserve a power to himself, whereby he should have liberty and be fully empowered in and by his last will and testament duly executed, or by any other his act and deed in writing duly executed, to charge and make chargeable the said surrendered premises, with any and what sum and sums of money, to the use of all or any of his other children lawfully begotten, which he should in and by such will or such other his act and deed in writing duly executed, direct, limit and appoint; and for default or want of such issue, to the use of the plaintiff (then *L. G.*), during the term of her natural life, if she should be then living; and from and after her decease, (the said *J. A. G.* being dead without issue as aforesaid,) to the use of all and every the children of the plaintiff lawfully begotten, their heirs and assigns for ever, as tenants in common, share and share alike; and

for default of such issue, to the right heirs of the said *J. A. G.* for ever.

J. A. G. died the 10th of January, 1811, having only had three daughters, who all died in his lifetime unmarried. In 1803, and subsequent to the death of his three daughters, *J. A. G.* being advised that he had an absolute power of disposition over the premises, in the event of his dying without leaving any issue surviving him, subject to the life estate therein of the plaintiff, and subject also to such other uses of the said settlement, if any should take effect after her decease, surrendered the premises to the use of his will; and by his will dated 10th August, 1809, and a codicil dated 9th January, 1811, devised the said estate in favour of the defendants (*James Brandwood* excepted). The plaintiff upon the death of the survivor of the three daughters of the said *J. A. G.* was the heir at law of such three daughters, and heir according to the custom of the manor of which the said premises were held; and by her bill insisted that upon the death of *J. A. G.* she became entitled to the surrendered premises in fee-simple in possession, as heir to her said three nieces, and prayed that the defendant *James Brandwood*, the surviving trustee, might be decreed forthwith to surrender the premises to her or as she should direct. The defendant *James Brandwood* by his answer insisted that the defendants the devisees of *J. A. G.* were entitled, but submitted to act as the court should direct. The other defendants (the devisees) claimed to be entitled to the interests devised to them by *J. A. G.*; and insisted that by virtue of the limitation of the indenture of 13th February, 1778, and in consequence of the events which took place, the ultimate reversion in fee of the copyhold premises was vested in *J. A. G.*; and that, subject to such estates and interests as were given by that deed, he had a right to dispose thereof, and had effectually disposed of the same by his will; and that the plaintiff as heir at law, or customary heir of the daughters of *J. A. G.*, or otherwise, was not entitled to the premises. Per the V. C. "The question is, what is now the right of the plaintiff *Love Hampson?* that depends upon the words of the deed of 13th February, 1778. Being a deed to declare uses, it ought to receive a liberal interpretation according to the intention of the settlor consistently with the words he has used. After some recitals the deed proceeds to the limitation, the construction of which is now in question. The defendant the trustee by his answer insists, that the limitation of the copyhold estates to the daughters of *John Abbs Gorton* was not a vested but a contingent limitation; and that the fee-simple was not vested in the plaintiff as heir at law of the daughters, but continued in *John Abbs Gorton*; and that he had an absolute power of disposition over the premises in the event of his dying without having any issue surviving him, subject

to the life estate therein of the plaintiff, and subject also to such other uses of the settlement as, if any, should take effect after her decease. It was certainly a contingent limitation in fee-simple to the daughters; but on their coming into existence and dying, the contingent limitation of the inheritance to them descended on their heirs (*d*); it being a rule that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, except where the existence of the devisee of the contingent interest, at some particular time, may by implication enter and make a part of the contingency itself upon which such interest is intended to take effect (*e*). Here the daughters to whom the contingent limitation of the estate was made came into existence, and therefore on their deaths it descended on their heirs. It was a double limitation, first to the sons in fee, and for want of sons there is a substantial limitation to the daughters in fee. Whether the estate thus vested in the daughters on their birth, would have opened again in favour of an after-born son, it is not necessary to decide. It has been argued that the first limitation to the sons was too remote and therefore bad, and that consequently the subsequent limitations were bad; that the words 'first male issue lawfully begotten by the said *John Abbs Gorton* which should attain twenty-one years, and to the heirs and assigns of such male issue,' mean male descendants; and that as the first son might have lived till twenty and died leaving a son who might also have died under twenty leaving a son, and so on, the estate might have been rendered unalienable beyond the period allowed by law, and *Davenport* v. *Hanbury* (*f*), *Freeman* v. *Parsley* (*g*), and *Leigh* v. *Norbury* (*h*), have been cited to show that the word *issue* is construed to mean *descendants*. It is true that primâ facie the meaning of the word *issue* is *descendants*; but wherever in a deed or a will the intention appears to be that the word *issue* should not mean *descendants* but *children*, the courts give it such a construction, as in *Sibley* v. *Perry* (*i*), where the word *issue* was construed *children*. In the present case, to interpret the word *issue* to mean *descendants*, would be to render the deed a mere nullity. A deed, if possible, must be interpreted so as to be effectual—*ut res magis valeat*. If in this case the words *male issue* are construed *sons*, the deed is good and effectual, because it must be known at his death whether or not he has sons. If *issue* here means *descendants*, we must reject the words 'begotten

(*d*) Vick *v.* Edwards, 3 P. Wms. 371; Weale *v.* Lower, Pollexf. 54.

(*e*) Fearne on Contingent Remainders, 364, Butler's ed.

(*f*) 3 Ves. 257.

(*g*) Ib. 421.

(*h*) 13 Ves. 340.

(*i*) 7 Ves. 522.

by the said *John Abbs Gorton.*' No case has been found where issue 'begotten by' by the settlor has been held to mean other than children. The word *issue* in this deed is used synonymously with *children*, and not *descendants*. It was used in the same way in his father's will, which he might have had in his recollection. The provision in the deed, that if male issue were born, the father should have a power of providing for his other children, strongly shows that by male issue was meant sons. Where he speaks of issue generally he means children. He first gives to his male issue, and in default to his daughters; thereby contrasting them with his sons, whom he denominated under the term *male issue*. He discovers no intention to provide for remote descendants except through their parents. There are difficulties, I admit, in construing the words 'male issue' to mean 'sons;' for according to this deed if he had two sons, and his eldest son died in his lifetime leaving a son, such son would not take, but the second son on attaining twenty-one during the minority of his nephew would take, in exclusion of the son of the eldest son. But if the words 'male issue' are to be construed '*descendants*,' difficulties would equally occur; for if having only daughters, say seven, and one had a son, that son on attaining twenty-one would take in exclusion of his mother and of all the other daughters. In default of male issue the estate is given to the daughters 'discharged of any further or other limitation whatever;' in these latter expressions, following probably the words used in his father's will, and meaning that they should take without being subject to the power reserved in case there should be male issue which took, and without the necessity of arriving at twenty-one before they could take, as in the limitation to the male issue. The power reserved in case there was male issue was natural, that younger sons and daughters might be provided for; but if there were only daughters the estate was to go to them equally, and the reservation of such a power was unnecessary. It is said the words after the limitation to the daughters 'for and in default of such male or female issue, to the use of *Love Gorton*,' cut down the fee which would pass by the words previously used in the limitation to the daughters to an estate tail. It is not said 'in default of *issue of the body*,' &c.; and if by issue he meant children, as I have endeavoured to show, it only means that if he has no children then the estate is to go to *Love Gorton*, the next object of his bounty. To construe the words as giving an estate tail, would be contrary to the plain meaning of the language used in the limitation to the daughters, which gave a fee 'without any further or other limitation;' but taking issue to mean children, every part of the instrument is capable of taking effect. It was urged that in

Lee & Brace (*k*), reported in Lord Raymond (*l*), the words '*for want of issue,*' were held to cut down a previous fee which had been given to an estate tail; but that case appears to have been misreported in Raymond, and that the words were 'for want of issue *of the body,* &c.' as appears by the report of the same case in Modern Reports (*m*), and in Carthew (*n*); that was a strong expression, indicating a clear intention. The case which approaches nearest to the present is *Doe* v. *Perryn* (*o*). "In the first place then," says Lord Kenyon, "do these words confer an estate tail, or a fee in *Dorothy's* children? The words are, 'to all and every the children of *Dorothy,* begotten or to be begotten on her body by *James Comberbach,* and *their heirs for ever;* and *for default of such issue,* &c. then over.' Now words more emphatical cannot be used to create a fee than to '*A.* and his heirs for ever.' Undoubtedly these words may be controlled by subsequent ones, and were properly so in *Ives* v. *Legg,* cited by the defendant's counsel; because there the limitation was to his daughter, and the children of her body begotten and their heirs, and afterwards to a person who might by possibility have been heir to those children. That sufficiently explained the intention of the devisor, because there could not be a failure of heirs general while the remainder-man or any of his descendants were living. But that case differs from the present, because there the limitation over was 'in default *thereof,*' namely *heirs;* and here 'in default of *issue,*' which is referrible to *children.* It has been argued that this testator contemplated that he might have no children, or that they might die in his lifetime, and that under that idea, and for default and want of issue, he limited over the estate to the plaintiff for life and to her children in fee, and for default of such issue to his own right heirs; and that the words 'for default and want of issue,' mean 'in default of issue living at my death;' but the words 'in default of issue' are not construed to mean 'in default of issue living at my death,' unless in cases of *personal* estate, as was stated by Mr. Justice Buller in *Doe* v. *Perryn* (*p*). I do not find any words in this settlement expressive of an intent that if the settlor had daughters in his lifetime who should die, that the estate should go over; but he appears to have meant

(*k*) See C. J. Willes's observations on the case of Leigh & Brace, ante, pp. 155, 156.

(*l*) 1 Ld. Raym. 101.

(*m*) 5 Mod. 266.

(*n*) Carth. 343. The same case is reported in Holt, 668, where the words are "for want of issue of him."

(*o*) 3 T. R. 484.

(*p*) 3 T. R. 494. Lord Kenyon appears to have been of a different opinion in Porter v. Bradley, 3 T. R. 143; but Lord Eldon, in Cooke v. De Vandes, 9 Ves. 197, 203, concurred in the opinion of Mr. J. Buller.

first that his male issue his sons should take a fee, and if there were none, then that his daughters should take a fee. The plaintiff therefore must have a decree according to the prayer of her bill."

Of Surrenders on Condition, and Release of Right, &c.

COPYHOLDS may be surrendered on condition (*q*), and if the condition be performed according to the terms of the surrender, the surrenderor (even though the surrenderee has been admitted) may re-enter without new admittance (*r*), for he will be *in* of his old estate; but if the condition be broken, for instance when upon a mortgage of copyholds the surrenderee is admitted, and the money is not paid at the appointed time, so that there is an equity of redemption only remaining in the surrenderor, there his re-admittance is necessary (*s*); which admission, as the author has already shown, will break the line of descent of an estate taken from the maternal ancestor (*t*).

As the law of conditions is applicable to copyholds, it follows that a copyholder may surrender to the use of another, reserving rent, with condition of re-entry for non-payment, and may accordingly re-enter in case of any default (*u*); but a power of re-entry cannot be reserved to a stranger (*x*).

If the condition of a surrender be strictly performed, or when, in the case of a mortgage, the money is repaid before the admittance of the surrenderee, the steward's entry of such performance or payment in the margin of the court rolls will alone be sufficient; and if the surrender has not been presented conformably to the custom of the manor, no notice need be taken of it on the rolls (*y*).

Although it is very usual to discharge a conditional surrender of copyholds by way of mortgage by an entry of the above nature, *at any time* before admittance, yet there is an evident irregularity in so doing after the condition is forfeited (*z*).

(*q*) Wade's case, 5 Co. 114; Rose *v.* Tillier, 2 Ch. Rep. 214; S. C. 2 Ch. Ca. 94; ante, p. 171.

(*r*) Gilb. Ten. 276; Simonds *v.* Lawnd, Cro. Eliz. 239.

(*s*) Fawcet *v.* Lowther, 2 Ves. 300; Gilb. Ten. 276.

(*t*) Ante, p. 44.

(*u*) Lex Cust. 127, cites 4 H. 6, 11; 21 H. 6, 37; but see Mo. 352, in Portman & Willis.

(*x*) Gooche's case, Lane, 99.

(*y*) Fawcet *v.* Lowther, 2 Ves. 302.

(*z*) But the author apprehends that if the steward, according to the usual practice, enter on the court rolls a minute of a warrant of satisfaction from the mortgagee, or his legal personal representatives, (which is generally so entered in the margin of the entry of the conditional surrender,) he would not be justified in afterwards admitting the mortgagee or his heir; and that should he grant such admission, he would be compellable in a court of equity to pay all the costs of revesting the *legal* customary estate in the mortgagor, his devisees, heirs or assigns.

Where a conditional surrender was forfeited, and it was desired that the old surrender should be taken up and a new one made, but the lord insisted that the mortgagee should be admitted and pay a fine, and caused proclamations to be made for that purpose, the Court of Chancery refused to interfere, except to direct an issue to try the question whether the lord was bound by the custom to accept the second surrender, and the matter was compromised (*z*).

It was formerly the practice in cases of conditional surrenders, where the custom allowed of surrenders by the hands of customary tenants, (and where probably the lord could compel the surrenderee to be admitted,) not to present the surrender at the succeeding court, such non-presentment being at law a forfeiture, but subsequently to such court to make a new surrender, and so to renew the conditional surrender from time to time, in order to avoid the fine to the lord on admission. The practice however received a check from Lord Keeper North, who, upon a bill exhibited in Chancery to be relieved against such a forfeiture, denied the aid of the court, and left the party to the common law (*a*).

When the surrender is conditional for securing payment to the surrenderee of a sum of money, tender of the money by the surrenderor will save the condition (*b*).

A condition, or an equity of redemption, may be released by deed to the surrenderee, if he has been admitted, even should the condition not have been forfeited (*c*); and indeed, after admittance of the surrenderee, the equity of redemption cannot properly be extinguished by a surrender, although such surrender might possibly be held to operate as a release.

A release of right to a person in actual possession, who has been wrongfully admitted, is an effectual extinguishment of such right (*d*); and a surrender by a feme covert and her husband to the tenant in possession by a wrongful title, the right being in the wife, who was secretly examined as to her consent before the steward, was held, in the case of *Stone* v. *Exton* (*e*), to be a good release of the right, without any particular custom for it; but with the exception of a feme covert, who cannot release a copyhold interest by deed, it

(*z*) Tredway *v.* Fotherley, 2 Vern. 367.

(*a*) Skin. 142, pl. 13.

(*b*) Wade's case, 5 Co. 114 b; Gilb. Ten. 276; Co. Lit. 209 a, et seq.; and see Paulter *v.* Cornhill, Cro. Eliz. 361.

(*c*) Kite *&* Queinton, 4 Co. 25; Hull *v.* Sharbrook, Cro. Jac. 36; Co. Lit. 59 a; ib. n. 2.

(*d*) Kite *&* Queinton, 4 Co. 25; Blemmerhasset *v.* Humberstone, Hut. 65; Co. Lit. 59 a, n. 2; Co. Cop. s. 36, Tr. 83, 84; and see Whitton *v.* Williams, Cro. Jac. 101; 10 East, 595, in Doe *&* Brightwen; 6 Vin. Cop. Z. a, pl. 2, 7, 11.

(*e*) 2 Sho. 83; and see 1 Ca. & Op. 158.

should seem that a mere right is not properly the subject of a surrender (*f*).

Although possibilities not coupled with an interest, and contingent estates in copyholds, cannot be conveyed by a surrender (*g*), yet it should seem that a power over copyholds coupled with an interest may, in an ordinary case, be extinguished by a deed of release, and, in the case of a feme covert, by a surrender, with private examination (*h*).

A release which would operate to the prejudice of the lord could not be supported (*i*); therefore, should there be a custom in a manor enabling the lord to compel a surrenderee to come in and be admitted (*k*), the author apprehends that the right of any person to whom a surrender should be made could not be extinguished by a deed of release; and it is to be recollected that an unadmitted disseisor is not capable of a release (*l*).

A release of right would at a very distant period be presumed in favour of a person who had procured admission; but in the case of *Doe* d. *Milner* v. *Brightwen* (*m*), it was held that a release of right could not be presumed during the existence of a legal interest, which would preclude the assertion of the right, nor within twenty years after it had terminated.

Of Surrenders to Charitable Uses: and herein of Mortmain.

Copyholds may be conveyed to a charitable use as well as freeholds (*n*); and when, prior to the statute of 9 Geo. II. c. 36, a copyholder was desirous of settling his estate for the benefit of a charity, it was the usual practice to surrender to some friend to the use of [or rather in trust for] the particular charity; and as such surrender did not operate to the prejudice of the lord with respect to his services (the surrenderee becoming the tenant of the land, and the use [or

(*f*) Kite & Queinton, Hull & Sharbrook, sup.; and see Mortimore's case, Hetl. 150; 6 Vin. Cop. Z. a, pl. 8; 1 Watk. on Cop. 61; Spindlar & Wilford, 2 Vern. 16.

(*g*) Ante, pp. 137, 138. See 7 & 8 Vict. c. 76, the fifth section of which empowers any person to convey, assign or charge, by *deed*, any such contingent or executory interest, right of entry for condition broken, or other future estate or interest he may have in any freehold, copyhold or leasehold land, or personal property; and see ante, p. 138, n. (*b*).

(*h*) Fearne's P. W. 108; see ante, p. 138, n. (*b*).

(*i*) Ante, p. 195, n. (*c*); 6 Vin. Cop. Z. a.

(*k*) Post, tit. "Admittance."

(*l*) Mortimore's case, Kite & Queinton, ubi sup.; Wakeford's case, 1 Leo. 102; Gilb. Ten. 118, 193; 6 Vin. Cop. Z. a, pl. 3, 7, 11 marg., 12.

(*m*) 10 East, 590, 596.

(*n*) Kenson's case, 1599, in Canc. Duke's Char. Uses. 80; same by Bridgman, p. 361; Attorney-General *v.* Foyster, 1 Anst. 116; ante, p. 85.

trust] only vesting in the charity), the lord was compellable to admit the surrenderee; but it should seem that a charitable use could not at any period have been created of a copyhold interest, to the prejudice of the services due to the lord (*o*).

It was also a common practice, prior to the above statute, for a copyholder, by his will, to empower his executors, or some sole or aggregate corporation, to sell his copyhold lands, the produce to be applied to charitable uses; and the courts of equity would compel the heir to give effect to this intention (*p*), and, if necessary, supply the want of a surrender to the use of the will, as we shall presently see (*q*).

But as copyholds are clearly within the operation of the stat. of 9 Geo. II. c. 36 (*r*), the only mode now of disposing of a copyhold estate for a charitable purpose, is to make a surrender of the legal interest to some proper person, either in the nature of a voluntary conveyance (should the lord object to any reference to a trust deed), or expressly upon the trusts of a deed of even date with the surrender; and then by deed referring to the surrender, to declare the charitable purposes desired to be created, which deed must be "indented, sealed and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor (including the days of the execution and death), and be inrolled in the High Court of Chancery within six calendar months next after the execution thereof;" and such settlement must be made to take effect in possession for the charitable use intended, and be without any power of revocation, trust or condition, for the benefit of the donor, or any person claiming under him (*s*).

In the report of the case of *Doe* d. *Howson* v. *Waterton* (*t*), which was an ejectment tried at the summer assizes 1819 for the county of York, before Wood, B., the following facts are stated to have appeared: Robert Yoward, being seised of the premises, which were copyhold of the maner of Rothwell, surrendered them by writing dated 19th July, 1743, into the hands of the lord of the manor, *to the*

(*o*) Ranshaw & Robottom in Canc. 43 Eliz., cited in Duke's Char. U. by Bridg. 135. This case shows that the lord is not compellable to admit a corporation; ante, p. 108. And see Duke's Char. U. by Bridg. pp. 137, 162, 356; Bro. "Fealtie & Homage," pl. 15; Co. Lit. 66 b; 2 Ld. Raym. 864.

(*p*) Guiddy's case, 4 Jac. in Canc. Duke's Ch. U. by Bridg. 135.

(*q*) Post, tit. "Surrender to Will;" 43 Eliz. c. 4; Duke's Ch. U. by Bridg. 391, n.

(*r*) Arnold *v.* Chapman (Foundling Hospital Case), 1 Ves. 108; S. C. Duke's Ch. U. by Bridg. 420; Doe *d.* Howson *v.* Waterton, 3 Barn. & Ald. 149; but see the case of Brown & Ramsden, 2 Moore, 612.

(*s*) See the act of 9 Geo. 2, in the Appendix; vide also 52 Geo. 3, c. 102, Appendix, for registering Charitable Donations in the Office of the Clerk of the Peace.

(*t*) Sup.

use of certain persons therein named, their heirs and assigns for ever, *in trust* nevertheless to and for the use, benefit and habitation of the poor of the town of Rothwell for ever. The trustees were duly admitted at a court holden October 12th, 1743. The lessor of the plaintiff was the eldest son of the last surviving trustee, who died in 1786, and he was duly admitted tenant the 20th October, 1813, on inquisition of the homage, upon the like trusts. No evidence was given to show when Robert Yoward died. At the trial it was objected by the counsel for the defendants that this surrender was void by the stat. of 9 Geo. II. c. 36, none of its provisions having been complied with, and the case of *Arnold & Chapman* (*u*) was cited to show that copyholds were within that act. The learned judge being of that opinion directed a nonsuit: and upon a motion for a new trial, it was contended, that though a devise of copyhold was held to be within the 9 Geo. II. c. 36, in the case of *Arnold & Chapman*, yet a conveyance of copyhold, as here, in the lifetime of the party, was not within that statute; and that a copyhold could not pass by a bargain and sale enrolled, which was the form directed by the act; that it was not within the mischief intended to be remedied by the statute, a copyhold not passing by a private conveyance, but by surrender only, which was a public act done openly in the lord's court; that the statute did not make void the legal estate, and therefore, as the plaintiff had been admitted, he might recover at law (*x*). Supposing, however, that a bargain and sale and an enrolment were necessary, that they might, after so long an enjoyment, be presumed to have existed (*y*): and as to the objection that it did not appear that the surrenderor survived for a year after the surrender, it was sufficient to say, that as it appeared he was alive when the surrender took place, the court would also presume that he continued alive for a twelvemonth afterwards. Abbott, C. J. observed, that the case cited of *Arnold & Chapman* was a distinct authority to show that copyhold as well as freehold lands were within the operation of the 9 Geo. II. c. 36: and if it were perfectly clear that it was impossible for the mode of conveyance pointed out by the statute to be adopted in the case of copyhold, the only consequence that would follow would be that the statute would absolutely prohibit any conveyance of copyhold to charitable uses; but it would by no means be a legitimate consequence that copyhold lands could lawfully be conveyed without the formalities required by that act; that the act was passed for the sake of public policy, and to prevent persons from conveying their lands to charitable uses in a secret manner at or near to the time of their death: it therefore had

(*u*) 1 Ves. 108; ante, p. 198, n. (*r*).

(*x*) Doe *d.* Toone *v.* Copestake, 6 East, 331.

(*y*) Mayor of Kingston *v.* Horner, Cowp. 102; Rex *v.* Long Buckby, 7 East, 45.

directed the execution in the presence of two witnesses, and the enrolment in chancery, and made it necessary that the party should survive for a year: that it was said, in the principal case, that the court might presume, if necessary, that a bargain and sale and enrolment had been made; but that the cases cited were very distinguishable from the principal one, and no instance could be found where the court had presumed that an enrolment had been made (*z*). His lordship was therefore of opinion that no such presumption ought to be made, and that there were no sufficient grounds for granting the rule. Bayley, J. was of the same opinion. The statute, he observed, meant to provide that a party, who conveyed his lands to charitable uses, should, at the time of such conveyance, be of full understanding, and that the conveyance should possess the greatest possible notoriety; that it was said, that by a surrender of copyhold openly in the lord's court, this would be effected; but that was not so; for, though the surrender itself be notorious, yet the uses to which the lands were surrendered need not appear on the rolls of the court (*a*). Admitting, he said, that there could not be an operative bargain and sale in that case, still the parties might, at least, have attained the object of notoriety, by executing a deed declaring the uses of the surrender, in the mode required by the statute, and having it enrolled in chancery; but that had not been done: that as to presuming an enrolment, if it had appeared that the rolls of chancery had been searched, and a chasm had been discovered about the period of this surrender, it might have been different; that at present there was no evidence upon which such presumption could be founded. Holroyd, J. said that it appeared to him that copyhold lands were within the mischief intended to be remedied by the statute 9 Geo. II. c. 36; and, if so, that they fell within the rule of law, which says, that cases within the mischief of a statute shall be held to be included in the general words of it: and although a copyhold must pass by surrender, and not by bargain and sale, yet it was clear that the uses of the surrender might be declared by deed indented and enrolled; that, however, he added, had not been done in the present case. Best, J. concurred; and the rule was refused.

It is generally supposed that copyholds are within the mortmain acts (*b*), properly so called (*c*), and that as those acts extend to a trust

(*z*) See Wright *v.* Smythies, 10 East, 412.

(*a*) In the case of Car *v.* Ellison, 3 Atk. 74, Lord Hardwicke held that an indorsement of the uses on the surrender, by the steward, was sufficient, without specifying them on the court rolls of the manor.

(*b*) 9 Hen. 3, c. 36; 7 Edw. 1, st. 2, c. 1; 13 Edw. 1, st. 1, c. 32 & c. 33; 34 Edw. 1, st. 3; 18 Edw. 3, st. 3, c. 3; 15 Rich. 2, c. 5; 23 Hen. 8, c. 10. See these statutes collected by Mr. Evans in his first volume, p. 2, class 5. Vide also 15 Vin. Abr. tit. "Mortmain" (A. 2.)

(*c*) Sir R. P. Arden, M. R. in Corbyn *v.* French, 4 Ves. 427, said, that the stat.

estate, a licence of the king (*d*) is necessary, when a surrender is made of copyhold lands to a trustee for a corporate body, not previously enabled by statute or licence to hold lands (*e*): but as the king is a sharer in the forfeiture created by the mortmain acts, it may at least admit of a question, whether they would be held to extend to a surrender of copyholds, either immediately to a corporation, or to a trustee for their benefit. And it is to be recollected that copyholds are held not to be comprehended in the general words of the statute of 16 Rich. II. c. 5, of Pope's Bulls, or of 2 Hen. V. c. 7, of Heretics, or of 12 Car. II. of Regicides, &c.; and principally because of the prejudice that would accrue to the lord, by the king's being a sharer in the forfeiture created by those statutes (*f*).

There are few uses, however, for the benefit of a corporate body, either sole or aggregate, that would not be deemed of a charitable nature, and be protected by the statute of 43 Eliz. c. 4 (*g*); but it is to be kept in mind that a conveyance, whether of freehold or copyhold property, which would have been aided formerly by the statute of 43 Eliz., must now be framed with a due regard to the provisions of the act of 9 Geo. II. c. 36.

It is observable that the second section of that act provided that nothing thereinbefore mentioned, relating to the sealing and delivery of any deed twelve calendar months at least before the death of the grantor, should extend to any purchase made *bonâ fide* and for a full and valuable consideration, and that this provision has been explained by a recent act to have been intended only to prevent such purchases from being avoided by reason of the death of the grantor within twelve calendar months after the sealing and delivery of the deed relating thereto, and not wholly to exempt such purchases from the operation of the act (*h*).

The author thinks it right to notice that it is now fully established that a bequest of money to be applied simply in the melioration of lands already in mortmain, or for building upon them, is valid (*i*);

9 Geo. 2, c. 36, was commonly called the statute of mortmain, but very improperly, for it did not prevent the alienation of land in mortmain, nor was that the object of the act; it had nothing to do with that; the object was to prevent devises of land, or any interest in land, or bequests of money to be laid out in any such interest, for any *charitable* use whatsoever.

(*d*) See 7 & 8 Will. 3, c. 37.

(*e*) See 1 Watk. on Cop. 242.

(*f*) Co. Cop. s. 53, Tr. 123, 124; 2 Sid. 43, in Harrington *v.* Smith; ante, pp. 81, 86.

(*g*) The endowment of a vicarage, for the increase of the minister's maintenance, would seem to be a use of this nature; 1 Edw. 6, c. 14; Duke's Ch. U. by Bridg. 354.

(*h*) 9 Geo. 4, c. 85. See this act in the Appendix. N. B. It establishes all prior deeds relating to purchases of land for charitable purposes, executed under the erroneous notion of such an exemption.

(*i*) Vaughan *v.* Farrer, 2 Ves. 185; Att. Gen. *v.* Bowles, ib. 547; Att. Gen. *v.* Foyster, 1 Anst. 119; Pelham *v.* An-

but in order to give validity to a bequest of money to be laid out in erecting a chapel, school, &c., the testator must point out some land already in mortmain, upon which the building is to be erected, or at least show an expectation that the land will be purchased, or legally provided for the purpose by other persons (*k*).

It is also a rule that if a legacy is inseparably connected with a primary devise of copyhold land void by the statute, the legacy must also fail, even, as it should seem, though the devise should be revoked by a subsequent surrender of the copyhold (*l*); but when the fund is applicable at discretion to several purposes, some of which are void, and the others not, the legacy will be restrained to the latter, and established (*m*).

Where copyhold lands were devised to *W. H.* in fee, charged with a sum of money to be paid to the testator's executors for charitable purposes, and the testator died without leaving either a customary heir or any next of kin, it was decided by the Master of the Rolls that the devisee took the land subject to the legacy, and that the crown was entitled to the amount of the legacy by its prerogative; if real estate, because there was no customary heir; and if personal estate, because there were no next of kin (*n*). But on an appeal Lord Lyndhurst, C., expressed his doubts as to the correctness of that decision; and Lord Brougham, C., subsequently held that the money which was a void bequest under the mortmain act, was to be considered as real estate undisposed of, and that the devisee, and not the crown, was entitled to it (*o*).

The reader is here apprised that, by the act of 55 Geo. III. c. 147 (*p*), every parson, vicar, &c., is enabled to exchange his parsonage house and glebe lands, with the consent of the patron and bishop, for other

derson, 2 Eden, 296; S. C. 1 Bro. C. C. 444, in notis; Att. Gen. *v.* Tyndall, Amb. 614 (reversing the decree at the Rolls); Harris *v.* Barnes, ib. 651; Att. Gen. *v.* Hyde, ib. 751; Att. General *v.* Bishop of Chester, 1 Bro. C. C. 444; Brodie *v.* Duke of Chandos, Att. Gen. *v.* Hutchinson, ib. in notis; Att. Gen. *v.* Nash, 3 Bro. C. C. 588; Foy *v.* Foy, 1 Cox, C. C. 163; Blandford *v.* Thackerell, 2 Ves. jun. 238; Corbyn *v.* French, ib. 428; Chapman *v.* Brown, 6 Ves. 404; Att. Gen. *v.* Parsons, 8 Ves. 186; Att. Gen. *v.* Davies, 9 Ves. 535; Att. Gen. *v.* Munby, 1 Mer. 345; and see n. (1) to Glubb *v.* Att. Gen. Amb. 373, 2d ed.

(*k*) Henshaw *v.* Atkinson, 3 Madd. 313. A gift of residuary personalty to intreat the lord of a manor to grant waste land for a building for charitable purposes held to be void, as an inducement to draw land into mortmain; Mather *v.* Scott, 2 Keen, 172.

(*l*) Att. Gen. *v.* Hinxman, 2 Jac. & Walk. 270, 277.

(*m*) Att. Gen. *v.* Parsons, 8 Ves. 186, 189.

(*n*) Henchman *v.* Att. Gen. 2 Sim. & Stu. 498.

(*o*) i. e. that the devisee took the land discharged of the legacy bequeathed for charitable purposes; 3 Myl. & Keen, 488, 492.

(*p*) See this act in the Appendix; see also 6 Geo. 4, c. 8.

houses and lands of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor belonging to the same benefice, such copyholds, after the annexation to the benefice, to be of freehold tenure; and also to annex to the benefice any lands held by copy of court roll for life or lives, or for years determinable on a life or lives, of any manor being parcel of such benefice; and likewise (where the existing glebe does not exceed five acres) to purchase lands not exceeding twenty acres, of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor belonging to the benefice, such copyholds upon the annexation to become freehold tenure. And it may be useful to notice that, by the act of 59 Geo. III. c. 12, s. 17, churchwardens and overseers are authorized to purchase and hold freeholds and leaseholds in the nature of a body corporate; but it has been decided that copyholds are not within the provisions of the act (*q*).

Of the revocable nature of a Surrender.

We have already seen that the lands of a copyholder are bound by the surrender, and it follows that a surrender is not revocable when supported by a valuable or other obligatory consideration; but a voluntary surrender made out of court may be revoked before or even after it has been presented (*r*); and, according to Kitchen (*s*), at any time before admittance; this, indeed, assuming that copyholds are within the statute of 27 Eliz. c. 4 (*t*), would seem to be a necessary consequence of the rule, now so fully established in freehold cases, that a voluntary conveyance as against a purchaser, even with notice (*u*), is deemed to be fraudulent under that statute (*x*); so that there can be no doubt that a purchaser from the donor would have a good title to copyhold land against the donee, even after his admittance.

(*q*) Att. Gen. *v.* Lewin, 8 Sim. 366; 1 Coop. 51; Re Paddington Charities, 8 Sim. 620; ante, p. 90.

(*r*) Co. Cop. s. 39, Tr. 87, 88; Kitch. 161; Gooche's case, Lane, 99; Doe *&* Routledge, Cowp. 705; Burgoyne *&* Spurling, Cro. Car. 273, 283; 6 Vin. Cop. (Y.); ib. (T. a.); 1 Roll. Abr. 499, 500, (E.); 2 D'Anv. 180, pl. 2; but see per Holt, in Stint *v.* Blount, cited Com. Dig. Cop. (F. 12.)

(*s*) 1 Watk. 87; even by parol, Com. Dig. Cop. (F. 1.)

(*t*) See Doe *&* Routledge, sup.; ante, tit. "Statutes," p. 101. Note.—Copyholds were held to be within the statute of 27 Eliz. in Doe *d.* Tunstill *v.* Bottriell, 5 Barn. & Adol. 131; 2 Nev. & Man. 64; and see Currie *v.* Nind, 1 Myl. & Craig, 17.

(*u*) Tonkins *v.* Ennis, 1 Eq. Ca. Abr. 334; Evelyn *v.* Templar, 2 Bro. C. C. 148, Belt's ed.; Doe *d.* Otley *v.* Manning, 9 East, 59.

(*x*) Doe *&* Routledge, ubi sup.; Doe *d.* Otley *v.* Manning, sup.; and see the cases there referred to. Vide also Pulvertoft *v.* Pulvertoft, 18 Ves. 84; Buckle *v.* Mitchell, ib. 100; Cornick *v.* Trapaud, 6 Dow's P. C. 60.

But a purchaser from a volunteer is protected by the saving clause in the stat. of 27 Eliz. (*y*).

And a voluntary settlement is clearly good as between the parties to it (*z*).

It is also to be recollected that the inducement to a marriage is a sufficient consideration to support a voluntary settlement (*a*); and that covenants in marriage articles in favour of collateral relations have been executed by the courts of equity (*b*). Yet it should seem that the marriage consideration does not run through the whole of a settlement, so as to induce a court of equity to give effect to a covenant in favour of a perfect stranger (*c*). And it has been decided that a limitation to a collateral relation is not protected and rendered valuable merely by its being found in a marriage settlement (*d*). But a limitation to persons not immediately within the consideration of the settlement cannot be defeated by a purchaser, when it is so interposed as to be essential to the support of limitations valuable in their nature; as, for instance, where a limitation in favour of the issue of a second marriage by the settlor is interposed between the limitations to the sons of the first marriage and the daughters of that marriage (*e*).

When and how Court Rolls may be amended.

A surrender will not be avoided by an inadvertence of the steward, but on clear proof of the error, the rolls, it is said, shall be amended (*f*); and this would seem to be allowable, as far as respects any variance between a surrender and the entry of it on the court rolls of the

(*y*) Wilson *&* Wormal, Godb. 161; Prodger *v.* Langham, 1 Sid. 133; Andrew Newport's case, Skin. 423; Doe *&* Martyr, 1 N. R. 334; George *v.* Milbanke, 9 Ves. 195.

(*z*) 18 Ves. 92; Allen *v.* Arme, 1 Vern. 365; Smith *v.* Garland, 2 Meriv. 123.

(*a*) 1 Atk. 190; Cro. Jac. 158, in Colvile *v.* Parker, 1 Ch. Ca. 99; Heisier *&* Clarke, 2 Eq. Ca. Abr. 46, pl. 13.

(*b*) Vernon *v.* Vernon, 2 P. W. 594; Osgood *v.* Strode, ib. 254; Sutton *v.* Chetwynd, 3 Meriv. 255; Pulvertoft *v.* Pulvertoft, 18 Ves. 92.

(*c*) Sutton *v.* Chetwynd, 3 Meriv. 255.

(*d*) Johnson *v.* Legard, cited 3 Meriv. 254, and since reported 3 Madd. 283. In this case the Court of B. R. certified their opinion that the limitations to collaterals were void against purchasers; and the Vice-Chancellor confirmed the certificate. See also Lane's Rep. 22. The settlement being made by a tenant in tail does not alter the case; Cormick *&* Trapaud, 6 Dow, P. C. 86.

(*e*) Clayton *v.* Lord Wilton, 3 Madd. 302, n.

(*f*) 1 Watk. on Cop. 89; 2 ib. 45; Kite *&* Queinton, 4 Co. 25. The language of that case is as follows: "if the truth of the case was that the surrender conditional was presented, and the steward in entering thereof omitted the condition, yet upon good proof thereof the surrender should not be avoided, but the roll should be mended, for the roll should not include in such case the party either to plead or give in evidence the truth of the matter." Vide also 1 Rol. Abr. 501; Co. Cop. s. 40, Tr. 89; post, tit. "Presentment of Surrender."

manor, and either as to the lands or uses (*g*); but when the legal estate has been drawn out of the copyholder by an actual surrender, not according with his design, and even contrary to written instructions, the author must suppose that the estate of the surrenderee is incapable of being defeated at law by any amendment of the court rolls, though a court of equity would, of course, interfere in any case of fraud.

In *Brend* v. *Brend* (*h*) a surrender, made in pursuance of a deed of covenant to settle copyhold lands on the heirs male, was entered on the rolls to the heirs general, and the surrender was decreed to be vacated, and a new surrender directed to be made according to the covenant.

The Court of B. R., in *Burgess & Foster's case* (*i*), held that the mis-entry of the date of the court should not prejudice the party, such entry not being a matter of record, but an escroll only; and that on issue joined of the time of the surrender, or of the time of the court, it should not be tried by the rolls of the manor, but by the country.

In *Hill & Wiggett* (*k*) an entry in the steward's book, and parol proof by the foreman of the jury, were admitted as good evidence that a feme covert had surrendered her whole estate, though the surrender on the roll and the admission were only of a moiety.

And in a late case (*l*), where a surrender and the presentment thereof by the homage were allowed to be proved by a draft of an entry from the muniments of the manor, and the parol testimony of the foreman of the homage who made the presentment, Lord Tenterden, C. J., in delivering the judgment of the Court of B. R., observed, that there had been cases decided in courts of law, showing that the entry on the roll was not conclusive upon the parties, but that a mistake in the entry might be shown by averment in pleading, or by evidence before a jury, and cited the above cases of *Burgess & Foster*, and *Kite & Queinton*.

In a recent case (*m*) the Court of Chancery decreed an entry upon the court rolls to be reformed conformably to the actual agreement between the parties, as evidenced by an entry in the steward's minute book; but it appearing that the lord was not a party to the suit, the Master of the Rolls required that counsel should be instructed to appear for the lord, and consent to the order to be made by the court (*n*).

(*g*) Towers *v.* Moor, 2 Vern. 98.

(*h*) Fin. Rep. 254. It is probable in this case that the entry on the rolls corresponded with the surrender.

(*i*) 1 Leo. 289; S. C. 4 Leo. 215.

(*k*) 2 Vern. 547; and see Towers *v.* Moor, ib. 98; Walker *v.* Walker, Barnard. 214.

(*l*) Doe *d.* Priestley & Wife *v.* Calloway, 6 Barn. & Cress. 484; S. C. 9 Dow. & Ry. 518.

(*m*) Elston *v.* Wood, 2 Myl. & Keen, 678.

(*n*) It does not appear by the report whether an application had been previously made to the lord of the manor to

The case of *Winter & Jeringham* (*p*) is one of considerable interest, and was as follows: *B.* covenanted to convey all his lands and tenements holden of the manor of Hackney, and afterwards surrendered divers lands by their proper names, &c.; the surrender was enrolled with this addition to the parcels, viz., "*by the name of all the lands, tenements and hereditaments, which he had and held of the aforesaid manor on the day of this surrender, &c.;*" and the question was, whether more lands than were specified in the surrender should pass, which, says the reporter, "was much in debate for twenty-four years in several courts." The report of this case concludes thus: "and by the opinion of Dyer no more than was particularly expressed in the surrender shall pass; and according thereto a decree was made by Lord Wentworth, Lord and Chancellor of his manor aforesaid, whereof he afterwards repented; yet many others agreed with the above opinion as law."

Of the mode of enforcing an Agreement to Surrender, or a void Surrender: and of the proper method of conveying an Equitable Interest in Copyholds.

A CONTRACT or agreement to surrender (*q*), or a surrender which is void for want of presentment in due time, will be enforced in equity in favour of a purchaser or mortgagee against the heir or widow, or the person next in succession, where the first life in a copy has a power to dispose of the estate (*r*); and against a devisee (though a child of the testator), or a volunteer (*s*), or the assignees under a

exercise his undoubted right of affording relief to the party aggrieved, "as chancellor of his own court;" ante, p. 97.

(*p*) Dy. 251 b. As to the admissibility of an averment, and of oral testimony, in the construction of copyhold assurances, see ante, p. 147; Beversham's case, 2 Vent. 345; S. C. Taylor *v.* Beversham, 2 Ch. Ca. 194.

(*q*) A conveyance of copyholds as of freeholds is evidence of a contract, to be enforced in equity against the customary heir; Spencer *v.* Boyes, 4 Ves. 370. We have seen that a rent-charge, as parcel of a manor, is grantable by copy, ante, p. 104; but a rent reserved by a surrender of copyholds is not the subject of surrender and admittance; yet those acts are evidence of an agreement for sale, and are good in equity; Spindlar *v.* Wilford and another, 2 Vern. 16; and see Austin *v.* Smith, 1 Leo. 315.

(*r*) Davie or Davies *v.* Beardsham or Beversham, et ux., 1 Ch. Ca. 39; S. C. 3 Ch. Rep. 4; S. C. Nels. Ch. Rep. 76; S. C. 2 Freem. 157; 9 Mod. 75; Barker *v.* Hill, 2 Ch. Rep. 218; Bradley *v.* Bradley, 2 Vern. 165; Oxwith *v.* Plummer, Gilb. Eq. Rep. 13; S. C. 2 Vern. 636; Patteson *v.* Thompson, Fin. 272; 6 Vin. (O. e.) pl. 2; Keen *v.* Sparrow. ib. marg.; Fin. 331; Hinton *v.* Hinton, 2 Ves. 631, 638; S. C. Amb. 277; Brown *v.* Raindle, 3 Ves. 257; 2 Freem. 65; Greenwood *v.* Hare, 1 Ch. Rep. 272; ante, tit. "Freebench." As to presentment not being essential to the validity of admission, vide 4 & 5 Vict. c. 35, s. 90.

(*s*) Martin *v.* Seamore, 1 Ch. Ca. 170.

commission of bankrupt (*t*), or a surviving joint-tenant (*u*); and as a consequence against a purchaser with notice in favour of a mortgagee (*x*), and also against a person having no interest at the time of the contract, but afterwards becoming entitled by right (*y*); though it seems doubtful whether the court would in the latter instance enforce the contract against the heir (*z*).

It has been decided that there is no distinction between title deeds of freehold property and copies of court rolls, when deposited by way of security, but that an equitable lien on the estate is alike created (*a*); nor is there any distinction between freeholds (*b*) and copyholds in regard to the lien which a vendor has for his purchase-money: so that where a bond was given for payment of part of the purchase-money for a copyhold estate within twelve months after the death of the vendor, and interest in the mean time, the surrender expressing that the whole purchase-money had been paid, the vendor was held to have a lien on the estate for the amount of the bond (*c*).

The author thinks it proper to remind the reader, that if a person contract for the purchase of the entirety of an estate, and the title should prove to be bad, say as to one seventh share, the purchaser will not be compelled to take a conveyance of the other six sevenths (*d*).

But that a person purchasing two lots, where a good title is shown only to one, may or may not be compellable to perform his contract as to both according to circumstances. In the case of *Lewin* v. *Guest* (*e*) he was compelled to complete as to both lots; but in *Poole*

(*t*) Taylor *v.* Wheeler, 2 Vern. 564; S. C. 2 Salk. 449; 10 Mod. 492; 2 Ves. 633; and see 1 Atk. 162, 191; 2 Atk. 562; 1 Stra. 242, 243; 3 Br. C. C. 596; vide also 1 ib. 269.

Assignees in bankruptcy, after the commission is superseded, cannot enforce a contract for sale previously abandoned on an objection to the validity of the commission, although the same persons are chosen assignees under a new commission; Bartlett *v.* Tuchin, 6 Taunt. 259.

(*u*) Hinton *v.* Hinton, ubi sup.; Brown *v.* Raindle, ubi sup., overruling Musgrave & Dashwood, 2 Vern. 45, 63.

(*x*) Jennings *v.* Moore, 2 Vern. 609; Blenkarne & Jennens, 2 Bro. Par. Ca. 278.

(*y*) Morse *v.* Faulkner and others, 1 Anst. 11; and see Clayton *v.* The Duke of Newcastle, 2 Ch. Ca. 112; Wiseman *v.* Roper, 1 Ch. Rep. 158; Goodtitle *d.* Faulkner and others *v.* Morse, 3 T. R. 365.

(*z*) Morse and Faulkner, sup.; Alison's case, 9 Mod. 62.

(*a*) Ex parte Warner, 1 Rose's Bpt. Ca. 286; 19 Ves. 202; Winter *v.* Lord Anson, 3 Russ. 492; Whitbread *v.* Jordan, 1 You. (Ex. Eq.) 303.

(*b*) See as to freeholds, 1 Bro. C. C. 269; 9 Ves. 115; 11 Ves. 401; 13 Ves. 114; 14 Ves. 606; 1 Rose Bpt. Ca. 286, (n.); 1 Meriv. 9.

(*c*) Winter *v.* Lord Anson, sup.

(*d*) Dalby *v.* Pullen, 3 Sim. 29; and see Roffey *v.* Shallcross, 4 Madd. 227; 2 Bro. C. C. 118, n. (1).

(*e*) 1 Russ. 325.

v. *Shergold* (*f*) there were two of the lots to which no title could be made, and Lord Kenyon said he was clearly of opinion that a case might be made, where, if it turned out that the seller could not make a good title to a part, it might be a sufficient reason to put an end to the whole contract.

A voluntary agreement will not be enforced by a court of equity, not at least if it be purely voluntary (*g*). But a covenant in a marriage settlement to surrender copyholds (*h*), though of a voluntary nature, will be carried into effect against the heir, where it has influenced the general provisions of the settlement so as to create an equity in favour of the persons interested under the limitations contained in it (*i*).

It may be of use to mention here, that in *Prebble* v. *Boghurst* (*k*) Lord Eldon inclined to the opinion that a bond by *A.* to settle messuages or lands "if he should become *seised* in possession," would embrace copyholds as well as freeholds.

And that when a marriage settlement contains a covenant with a trustee to surrender copyholds *to him* to the uses of the settlement, the trustee must be made a party to the suit, as the effect of the surrender, if decreed, would be to give him the legal estate (*l*).

A parol agreement for sale of copyhold lands stands precisely on the same footing as a parol agreement for sale of freehold property, and may be avoided by a plea of the statute of frauds (*m*); and proof of part performance of the contract equally takes the case out of the statute. So, where there was clear evidence that no fraud had been practised, and that the defendant had done several acts of ownership, as ordering in bricks, fishing in ponds, &c., a specific performance of the contract was decreed against him by the Court of Exchequer (*n*).

(*f*) 1 Cox Ch. Ca. 274; S. C. 2 Bro. C. C. 118.

(*g*) Wycherley *v.* Wycherley, 2 Eden, 177; Bellingham *v.* Lowther and others, 1 Ch. Ca. 243; Neeve *v.* Keck, 9 Mod. 106; Jefferys *v.* Jefferys, 1 Cr. & Phil. 138; and see post, tit. "Evidence."

(*h*) It would seem that a surrender of copyholds will not satisfy a general covenant in marriage articles to purchase and settle lands; Att. Gen. *v.* Whorwood, 1 Ves. 540, 541; Belt's Supp. 240; and see Pinnell *v.* Hallett, Amb. 106; S. C. 2 Ves. 276; Belt's Supp. 344.

(*i*) Neeve et al. *v.* Keck, sup.; Marlow *v.* Maxie et al. Fin. 388; 1 Vern. 240; and see ante, p. 203.

(*k*) 1 Swanst. 581; but the Lord Chancellor is reported to have entertained a different opinion on the hearing of the cause, see 1 Swanst. 319. Note, a copyholder for life or any greater estate, may in pleading allege that he is *seised* in his demesne as of freehold; post, tit. "Pleading, &c."

(*l*) Cope *v.* Parry, 2 Jac. & Walk. 538; 2 Vern. 36.

(*m*) 29 Car. 2, c. 3, s. 4.

(*n*) Borrett *v.* Gomeserra, Bunb. 94; and see Sugden's Vend. and Purch. 107 et seq., 8th ed.; 1 Fonbl. on Eq. c. 3, s. 8; Evans' Coll. of Stat. 1 vol. pt. 2, cl. 1, No. 17.

Under a bill for a specific performance of a contract to sell, the plaintiff is not entitled in an ordinary case to restrain the owner from dealing with the estate: but in one case, after delivery of possession and receipt of part of the purchase-money, the vendor of copyholds was restrained in equity from surrendering the property to trustees under a general conveyance and assignment of all the vendor's estate and effects (*o*).

Where there is a natural obligation or a moral duty to be fulfilled, equity will enforce an agreement to surrender, or would have supplied a surrender which was void for want of presentment, equally as for a purchaser or mortgagee; but this aid is confined to a wife, children, and creditors, and is subject to the same rules in favour of the customary heir when unprovided for, and the same distinctions between a lineal and collateral heir, as prevailed in cases of devise, where the copyholder, prior to the act of 55 Geo. III. (now repealed), neglected to surrender to the use of his will.

In *Rodgers* v. *Marshall* (*p*), the counsel for the defendant disputed the consideration of the deed stated in the bill, and contended that the equity of supplying a surrender was confined to a will, and could not prevail against a grandchild having no other provision; and the Master of the Rolls is reported to have said, "upon the evidence I cannot take this to be a conveyance for a valuable consideration. The question then is, whether the defect is to be supplied, as this is a conveyance for a younger son upon the consideration of love and affection; and there certainly are cases of supplying the want of a surrender upon a deed as well as a will for a younger child; but upon the same principle as in the case of a will or the execution of a power, that is for and against the same persons. It is said this is the case of a disinherited heir; and it has been sometimes laid down that the court will not supply the defect against a disinherited heir, or, as the phrase has been latterly, against an heir unprovided for, that is without any provision. Here they have attended only to the former circumstance. The answer states that he inherits nothing, unless he is entitled to this estate; but does not say whether he is or not provided for in any other way. Some inquiry is necessary upon that point

(*o*) Spiller *v.* Spiller and others, 3 Swanst. 556.

(*p*) 17 Ves. 294; and see Nandike *v.* Wilkes, Gilb. Eq. Rep. 114; 1 Eq. Ca. Abr. 393, c. 5, (in this case a specific execution of a bond given by the husband before marriage was decreed, but so as to secure the issue, by making them purchasers); see also Randal *v.* Randal, 2 P. W. 464. An agreement to surrender entered into by the wife before marriage will be enforced, though the husband die before it is done; Baker *v.* Child, 2 Vern. 61; Cotter *v.* Layer, 2 P. W. 625; vide also Fursaker *v.* Robinson, Gilb. Eq. Rep. 139; 1 Eq. Ca. Abr. 123, c. 9; Pre. Ch. 475, (in which the aid was refused to a natural child); and post, tit. "Surrender to Will."

whether he has any other provision; if not, I incline to think that, against a grandchild, the want of surrender ought not to be supplied. The question has never been determined as to him; though as against a collateral heir it has been held that it shall be supplied." And an inquiry was directed whether the defendant had a provision, and as to the nature and extent of it.

In *Parks* v. *Wilson* (*q*), *A.* was seised of a copyhold estate which he wished to devise to his nephew *B.*, and finding that a surrender was not then practicable, prevailed on his sister and heir presumptive (the mother of *B.*) to enter into a bond to surrender to her son upon payment of two hundred pounds. *A.* died. *B.* received the rents during his mother's life, but no surrender was made by her. *B.* died, when his mother got herself admitted to the copyhold, and took out administration to her son, and devised the copyhold to one of her daughters. The other daughter brought a bill, praying for a conveyance of the moiety of the land, which was decreed on payment of the two hundred pounds, with interest from the death of the uncle.

And where a settlement of freehold estates (which was upon the husband and wife for life, with remainder to the first and other sons of the marriage in tail, with remainder to trustees for a term of years for raising portions for daughters,) contained a covenant on the part of the husband to settle copyhold lands upon the same uses and trusts, *as far as the custom of the manor would allow;* and a surrender was made, but no term limited for securing the portions; it was decreed that the copyhold estate should stand charged with the portions according to the prayer of the bill, which stated that there was no issue male of the marriage, and that the freehold estate was not sufficient to raise the portions for the daughters (*r*).

In another case (*s*), *A.* by marriage articles covenanted that within a month after marriage he would surrender a copyhold to the wife for life, with remainders over; and if he should neglect or refuse to do so, then he would leave the wife five hundred pounds at his death. No surrender was made. The husband died after the month without assets: and Parker, C., decreed that the heir should surrender, it not being a case of election, but a charge in equity.

But in *Vane* v. *Fletcher* (*t*), the Court of Chancery refused to compel the heir to give effect to a voluntary settlement on remote relations, where the copyholder had given a letter of attorney to another to surrender, which surrender the steward refused to accept, because it was objected to deliver up to him the letter of attorney;

(*q*) 10 Mod. 515.

(*r*) Shouldham v. Shouldham, 2 Vern. 321.

(*s*) Wood v. Pesey, 5 Vin. Cop. Contract (O.), pl. 36; S. C. 2 Eq. Ca. Abr. 55, pl. 3.

(*t*) 1 P. W. 352.

the Chancellor observing, that this was a lucky accident in favour of the heir, which equity ought not to deprive him of, any more than if the copyholder and the lord had disagreed about a fine which had prevented a surrender; and that this being a voluntary conveyance, was not to be assisted in equity, like the case of a conveyance to a wife or child.

In all cases of necessity, as when from any particular circumstances no court can be held to give effect to such disposition as the copyholder may be desirous of making of his estate, equity will supply the want of a surrender (*u*).

And where a writ of *aiel* was brought in the Manor Court to avoid an estate, "for that no surrender had been made;" it appearing that the rolls were lost, and that the defendant had been in possession for forty-five years, the Court of Chancery granted a perpetual injunction, on the ground that a surrender ought to be presumed (*x*).

And although even a long period of enjoyment would not induce the presumption of the inrolment of a bargain and sale (the inrolment being an essential part of the title), except it appeared that the rolls of Chancery had been searched, and a chasm had been discovered about the period of such conveyance (*y*); yet it is clear that if a copyhold estate should have been enjoyed without interruption for a great length of time, a surrender would be presumed, for the same reason as Lord Kenyon, in *England & Slade* (*z*), held that a conveyance ought to be presumed to have been made to the *cestui que trust* in strict execution of the trusts, although a very short period of time had then elapsed, and that a jury might be directed to presume a surrender in much less time than twenty years; and also that livery of seisin will be presumed in the case of a lease, after a long possession under it (*a*).

An EQUITABLE INTEREST in copyhold lands is not the subject of surrender (*b*), except in the instance of a surrender for the purpose of barring an estate tail (*c*), but it is *assignable;* and the assignee of an equitable estate, on taking a surrender from the person in whom

(*u*) Murrel & Smith, 4 Co. 25 a; S. C. Cro. Eliz. 252; 1 New Abr. 472, pl. 6; and see 1 P. W. 354, 355; 2 Vern. 584, 585.

(*x*) Knight v. Adamson, 2 Freem. 106; Lyford v. Coward, 2 Ch. Ca. 150; S. C. 1 Vern. 195; Roe & Lowe, 1 H. Bl. 457, 459; Cookes v. Hellier, 1 Ves. 235; Wilson v. Allen, 1 Jac. & Walk. 619, 620.

(*y*) Doe & Waterton, 3 Barn. & Ald. 152; and see Wright v. Smythies, 10 East, 409.

(*z*) 4 T. R. 682.

(*a*) Isack v. Clarke, 1 Rol. Rep. 132; Biden v. Loveday, cited 1 Vern. 196; S. C. Toth. 116; 13 Vin. 206, pl. 5.

(*b*) But a surrender is the only mode of passing a legal interest in copyholds, *whether it be in possession or of a reversionary nature*, ante, p. 123.

(*c*) Ante, p. 61.

the legal copyhold interest is vested, may compel an admission upon payment of a single fine.

In the case of *The King* v. *The Lord of the Manor of Hendon and his Steward* (*d*), *A.* had covenanted to assign and surrender to *B.*, and the covenant was presented by the homage. *B.* assigned to *C.* who took a surrender from *A.*, and an application of *C.* to be admitted was resisted by the lord, on the supposition of his being intitled to a fine from *B.*; but upon a motion for a mandamus to compel the lord or his steward to admit *C.*, the Court of B. R. held that *C.* was intitled to admission, and that any private agreement between *A.* and *B.*, not followed up by a surrender, could not give the lord any right to a fine, notwithstanding the presentment of such agreement.

Of Surrender to Will.

THIS branch of the law of copyhold tenure was materially altered by the lately repealed act of parliament of 55 Geo. III. c. 192 (*e*): but the author thinks it will be useful to go into the subject now proposed for consideration as much at large as if the act had never existed.

The operation of the act was not, as the author submits, to make copyholds devisable, but virtually to create an ideal surrender, leaving the will to operate as a declaration of uses or appointment, as before the passing of the act, and, unfortunately, without giving the protection which was afforded in freehold cases by the statute of frauds; neither did the act supply surrenders which were matters of substance, but those only which were mere matters of form; so that in *Doe* d. *Nethercote* v. *Bartle* (*f*) it was decided by the Court of B. R. that a feme covert was incapable of devising her copyhold land, except through the medium of a surrender to will, under the sanction and protection of the private examination by the lord or steward as to her uncontrolled assent.

It is already shown that the legal estate in copyholds can pass only by surrender, unless, indeed, under some legislative enactment, or

(*d*) 2 T. R. 484, 485; vide also Cooke's Bpt. L. c. 8, s. 2.

(*e*) Note, that lands held by copy of court roll according to the custom of the manor, *though not at the will of the lord*, are within the provisions of that stat.; Doe *d.* Edmunds *v.* Llewellin, 2 Cr. Mee. & Ros. 503.

Note also, that the act of 55 Geo. 3, was repealed by 1 Vict. c. 26, "For the amendment of the Laws with respect to Wills:" vide both the acts in the Appendix, and post, tit. "Devise."

(*f*) 5 Barn. & Ald. 492; 1 Dow. & Ry. 81; but by the above act of 1 Vict. c. 26, copyholds and customaryholds are expressly made devisable.

upon a relinquishment of the copyhold to the lord; and it would seem to follow, as the author has already suggested, that the will of a copyholder was to be considered as merely directory or declaratory of the uses of the surrender; but the general terms of a surrender might be restrained by the will (*g*).

It is clear that copyholds might, by special custom, have been devised without a surrender to will, even before the statute of 55 Geo. III. (*h*).

And it would seem that a custom denying a copyholder the privilege of surrendering to the uses of his will could not have been supported (*i*); such a custom might well, indeed, have been thought incapable of support, being in restraint of a right which existed only by custom (*k*); but as the lord was at liberty to impose such conditions as interest or caprice might dictate, on the original grant of the copyhold estates within his manor, it would have been difficult to maintain the right of a testamentary disposition of copyhold lands of inheritance against a *prescriptive* mode of assurance, which excluded the power of devising through the medium of a surrender (*l*).

(*g*) 3 Leo. 18, ca. 43, Anon.

(*h*) Wrot's case, P. 35 Eliz. C. B., cited Litt. Rep. 26; Bac. Ab. Cop. (G.), p. 724, marg.; Hills *v.* Hills, Co. Ent. 124 b; Smith *v.* Paynton, Carter, 71, 86; and see Devenish & Baines, 2 Eq. Ca. Abr. 43. Copyholds are clearly not within the statutes of wills, ante, p. 107. But now see 1 Vict. c. 26, s. 3, in the Appendix; post, title, "Devise."

(*i*) Per Lord Thurlow in Pike *v.* White, 3 Bro. C. C. 28. But see the judgment of the Court of Exchequer, in Doe *d.* Edmunds *v.* Llewellin, infra.

(*k*) Wardell *v.* Wardell, 3 Bro. C. C. 116; 4 East, 271; 7 East, 307.

(*l*) Mr. Belt, in his useful edition of Brown's Chancery Cases, vol. iii. p. 286, has expressed an inclination of opinion similar to that entertained by the author on this point, but has shown, by a very interesting note, that it is at least doubtful whether Lord Thurlow laid down any such general proposition as that attributed to him in Pike & White. Mr. Evans, in his Collection of the Statutes, vol. i. Pt. 2, Class XI. No. 1, in adverting to that dictum says, "This opinion is certainly very conducive to public convenience, with regard to its effects; but it seems very difficult to support it upon the principle of mere legal reasoning; or to discover upon what correct principles a custom according with the general common law, and not affected by any legislative provision, could be controuled or superseded by mere judicial authority."

In Church *v.* Mundy, see 12 Ves. 426, 15 ib. 396, on the question whether the reversion or vested remainder of a copyhold expectant on an estate tail could be surrendered to the use of a will, Lord Eldon, C., stated Lord Thurlow's opinion above cited, and said the court would hold that there might be a surrender to the use of the will, though no instance could be found upon the records of the manor; or if there could be no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds, the want of which (in the case of creditors, &c.) the court would supply. But it is observable that the point of a prescriptive right in the lord, unfavourable to a testamentary disposition of the copyhold lands, does not appear to have been raised in the latter case.

In the late case of Doe *d.* Edmunds *v.* Llewellin, 2 Cr. Mee. & Ros. 503, ante, p. 262, note (*e*), Lord Abinger, C. B., in

By a special custom prevailing in the manor of Barton-upon-Humber, the copyhold tenements are devisable for fourscore years, and not otherwise, without any surrender being made to the uses of the will.

Stewards of manors, those at least who were well acquainted with their duty, were careful, in all cases, so to frame the surrender to will, as to embrace any previous general devise which the copyholder should have made; this being essential in order to give effect to the testator's intention, if by his will he had contemplated the disposition, not only of the copyhold property he then possessed, but of any he should have subsequently acquired; for if the words of the surrender were *future*, that is, if the surrender was to such uses as he should appoint, copyholds purchased by or descended to the testator after the date of

delivering the judgment of the court, said, "The special verdict finds that the estates in question, with all other copyholds of the like nature, passed by surrender and admittance, and it does not state any negative of a custom to pass by will; therefore the question arises, which has been very ingeniously and fully discussed, whether or not we must take the special verdict to be that this copyhold estate, within a manor of this description, did not pass by will. Now if it had been necessary to find affirmatively or negatively, in distinct terms, whether a custom existed to pass copyholds by will in this manor, the special verdict would be imperfect for not having found distinctly the negative or affirmative of that proposition, and the result would have been that the court must have awarded a writ of venire de novo; but on a full consideration, we are of opinion that there is sufficient on this special verdict to warrant our judgment, although it does not contain any negative finding against the right claimed by the devisee. It may be oberved that the authority of Lord Thurlow, in the case of Pike *v.* White, 3 Bro. C. C. 286, if taken to the full extent, would be a warrant to say that in all cases a negative custom of that sort would be bad; but the court is not prepared to go that length; at the same time it must be observed, that the authority of Lord Thurlow in that case, though referred to by other judges, has never been questioned, nor has his dictum been overruled; but Lord Thurlow's proposition contains two points in respect of the case then before him. The case neither found that there was or was not a custom; and Lord Thurlow laid it down that it was impossible to say that a copyhold surrendered to the use of a will should not pass thereby, though there were no special custom prevailing in the manor to devise lands; but then he added, if a negative custom had been found that lands should not be surrendered to the use of a will, it would have been bad. Now the question which has been made on Lord Thurlow's judgment by two or three gentlemen who have devoted much time to the nature of copyhold tenures, has never gone beyond this proposition, namely, whether, where the custom has been found in the negative to exist in a manor that copyholds should not pass by will, Lord Thurlow would have been right in saying that that custom would be unlawful; but nobody has ever questioned the first part of the proposition, that where it did not appear in the negative form, the estate did pass by surrender and admittance to the use of a will. It appears to us on principle, and upon the authority of this case, and so far nobody has questioned Lord Thurlow's dictum, that if the fact is affirmatively found, as it is here, that copyhold estates do pass by surrender and admittance, there is enough found to justify us in inferring that they must pass by will, the contrary custom not being found. Judgment for the defendant."

his will, even if the devise was in the very general terms of "all his real estates," would not have passed; but it would seem that any copyhold estates, which the testator possessed at the time of making his will, would have passed by such a devise, when the surrender was subsequent to it, although the words of surrender were future (*m*).

It must also be recollected that a codicil to a will operates as a republication, so as to bring the will to the date of the codicil, and, consequently, to give effect to a surrender of an estate acquired after the date of the will (*n*).

And it had long been settled that after-purchased lands would have passed by a will containing a description applicable to them, when surrendered to uses *already declared*, or to be declared, by the will of the copyholder (*o*); for the surrender was, in effect, a republication of the will (*p*).

As the lord is only the medium of surrender, a surrender to will does not pass any interest to him, but the lands remain vested in the surrenderor, and may be afterwards surrendered by him to a purchaser or otherwise (*q*).

(*m*) Warde *v.* Warde, Amb. 299. And see n. (1) & (3), ib. 2d ed.; 3 Atk. 178, in Carte *v.* Carte; Spring *d.* Titcher *v.* Biles *&* another, 1 T. R. 435, n. (*f*). And see 8 Ves. 285, citing S. C., and Sadlier *&* Crespin, before C. J. Eyre. Vide also Doe *v.* Dilnot, 2 N. R. 403.

(*n*) Acherley *v.* Vernon, 9 Mod. 68; S. C. 10 Mod. 518; S. C. Comy. 381; 3 Bro. P. C. 85; Doe *d.* Pate *v.* Davy, Cowp. 158; Doe *d.* Gibbons *v.* Pott, Dougl. 716. And see Potter *v.* Potter, 1 Ves. 437; S. C. 3 Atk. 719; Gibson *v.* Lord Montfort, 1 Ves. 489; Belt's Supp. 191; Jackson *v.* Hurlock, Amb. 487; Barnes *v.* Crow, 4 Bro. C. C. 2; S. C. 1 Ves. jun. 486; Pigott *v.* Waller, 7 Ves. 98; Holmes *v.* Coghill. ib. 505; 12 Ves. 206; De Bathe *v.* Lord Fingal, 16 Ves. 167; Hulme *v.* Heygate, 1 Meriv. 285; Goodtitle *d.* Woodhouse *&* others *v.* Meredith, 2 Mau. & Selw. 13; Duffield *v.* Duffield, 3 Bli. Dom. Proc. N. S. 345, 346. These cases have fully settled that a codicil is *primâ facie* a republication of a will, so as to pass after-purchased lands, and that it requires a manifest contrary intention to repel that effect, as in Strathmore *v.* Bowes, 7 T. R. 482; Bowes *v.* Bowes, 2 Bos. & Pul. 500. A codicil is also a republication of a will, so as to make a newly purchased estate devised by the codicil subject to a charge of debts contained in the will; Rowley *v.* Eyton, 2 Meriv. 128. But the old cases were unfavourable to the constructive republication of a will, see 7 Ves. 117 et seq.; 1 Meriv. 293.

And it has been decided that a codicil will not, by the mere effect of republishing a will, be an execution of a power executed by the will, but afterwards discharged by the creation of a new power; Holmes *v.* Coghill, 7 Ves. 499; 12 Ves. 206. And see Lane *v.* Wilkins, 10 East, 241.

(*o*) Heylyn *v.* Heylyn, Cowp. 130; Lofft, 604; Att. Gen. *v.* Vigor *&* others, 8 Ves. 286; Denn *d.* Harris *v.* Cutler, cited Cowp. 131; 1 T. R. 438; 8 Ves. 285. And see Sugden's Vend. and Purch. 173, 8th ed.

(*p*) 1 T. R. 437, n.

(*q*) Fitch *v.* Hockley, Cro. Eliz. 441, 442; 4 Co. 23 a; Thrustout *d.* Gower *v.* Cunningham, 2 Sir W. Bl. 1046; and see Burgoine *v.* Spurling, Cro. Car. 283, 284; S. C. W. Jones, 396.

The surrender of a feme copyholder being suspended by marriage, she cannot after coverture devise her copyholds pursuant to a surrender made when sole (*r*).

And as the surrender of a joint tenant operates as a severance (*s*), it followed that a surrender by him to the use of his will, and a devise in pursuance of such surrender would have been good, even though the surrender was not presented till after his death, for the joint tenancy was severed from the time of the surrender (*t*).

A surrender to will only operates on the interest which the copyholder has at the time, and will not therefore pass lands subsequently taken by him in exchange (*u*), nor a reversion in fee afterwards descending to and devised by a tenant *pur autre vie* (*x*); but an existing surrender to will has been held to support a devise, so as to include the ultimate remainder or reversion in fee limited by a subsequent surrender to uses, on the principle that when a copyholder surrenders to uses the estates created are new estates only, in so far as such uses differ from the estate which existed in the surrenderor at the time of the surrender (*y*).

An equity of redemption until the admission of the mortgagee, is as much the subject of surrender to will as the land was before the mortgage (*z*); but a surrender to will was not necessary (even before the stat. of 55 Geo. III.), in the devise of a trust or equitable estate (*a*),

(*r*) George *d.* Thornbury *v.* Jew, Amb. 627, 473, marg.; ante, p. 128.

(*s*) Ante, p. 139.

(*t*) Constable's case, cited Co. Lit. 59 b; Porter *v.* Porter, Cro. Jac. 100; Allen *v.* Nash, 1 Brownl. 127; S. C. Noy, 152; Benson *v.* Scott, 4 Mod. 254; S. C. 3 Lev. 385; Lex Cust. 127; Gale *v.* Gale, 2 Cox, Ch. Ca. 156; 2 Ves. 609.

(*u*) Frank *v.* Standish, in Scac. cited 1 Bro. C. C. 588, and 15 Ves. 391.

(*x*) Doe *d.* Ibbott *v.* Cowling et ux. 6 T. R. 63; and see Goodtitle *d.* Faulkner and others *v.* Morse, 3 T. R. 365; Morse *v.* Faulkner, 1 Anst. 11; and Doe *d.* Blacksell and others *v.* Tomkins et ux. 11 East, 185; vide also n. (d), 1 Watk. on Cop. 126, 127.

(*y*) Thrustout *d.* Gower *v.* Cunningham, ubi sup.; Fearne's Cont. Rem. 90; Vawser *&* Jeffery, 16 Ves. 527; 3 Barn. & Ald. 462; 3 Russ. 479; and see Roe *&* Griffits, 4 Burr. 1956.

(*z*) Doe *d.* Shewen *v.* Wroot and others, 5 East, 138, 139, n.; Kenebel *v.* Scrafton, 8 Ves. 30; and see 2 East, 530; Perry *v.* Whitehead, 6 Ves. 544; Floyd *v.* Aldridge *&* Willis, cited 5 East, 137; Wainewright *v.* Elwell, 1 Mad. Rep. V. C. Court, 627; but see Fearne's P. W. 100.

(*a*) Post, tit. "Devise;" Davie *v.* Beardsham et ux., 1 Ch. Ca. 39; S. C. 3 Ch. Rep. 4; S. C. Nels. Rep. 76; S. C. 2 Freem. 157; 9 Mod. 75; 1 T. R. 601, 602; Ardesoife *v.* Bennet, 2 Dick. 465; Greenhill *v.* Greenhill, 2 Vern. 680; S. C. Gilb. Eq. Rep. 77; S. C. Pre. Ch. 322; Hawkins *v.* Leigh and others, 1 Atk. 387; Macey *v.* Shurmer, ib. 389; Tuffnell *v.* Page, 2 Atk. 37; S. C. Barn. 9; Car *v.* Ellison, 3 Atk. 75; Allen *v.* Poulton, 1 Ves. 121; Att. Gen. *v.* Andrews, 1 Ves. 225; Gibson *v.* Lord Montfort, 1 Ves. 489; see also Wainewright *v.* Elwell, sup. in which it was decided by the then Vice Chancellor, that an unadmitted devisee has no title to devise even in equity. And see

and therefore not in the devise of an equity of redemption, after the admittance of the mortgagee (*b*).

We will now proceed to a consideration of those cases in which a court of equity, with a due regard to the inviolability of certain moral duties, and in analogy to the aid it affords to a defective execution of a power (*c*), supplied the want of a surrender to the uses of a will, and thereby gave effect to a manifest or constructive intention (*d*); and which practice, it has been said, originated upon charities under commissions of charitable uses, after the statute of 43 Eliz. c. 4 (*e*); a devise to a charity being considered as a direction to the heir to make a surrender, and therefore good as an appointment under that statute (*f*).

This aid has been refused to legatees (*g*), and was confined to a *wife, children,* and *creditors.* In *Palmer* v. *Palmer* (*h*), upon a bill filed to compel payment of a legacy, and to have a copyhold estate, which had been devised in aid of the personalty, surrendered by the heir to the uses of the will, the heir was, upon certain terms, ordered to surrender accordingly.

As to the Wife, the reader is referred to *Strode* v. *Falkland,* 3 Ch. Rep. 187, 188; *Biscoe* v. *Cartwright,* Gilb. Eq. Rep. 121;

King *v.* Turner, 2 Sim. 545; Right *d.* Taylor *v.* Banks, 3 Barn. & Adol. 664; and see 1 Myl. & Keen, 456, on appeal; Phillips *v.* Phillips, 1 Myl. & Keen, 649.

(*b*) Macnamara *v.* Jones, 1 Bro. C. C. 481; King *v.* King, 3 P. W. 360; Strudwicke *v.* Strudwicke, cited by Mr. Cox, n. (1), ib.; Brent *v.* Best, 1 Vern. 69; Higate *v.* Higate, Toth. 142; see also Martin *v.* Mowlin, 2 Burr. 979; but see Andrews *v.* Tuckwell, Mos. 95; and qu. whether or not the mortgagee had been admitted?

(*c*) Chapman *v.* Gibson, 3 Bro. C. C. 230.

(*d*) A constructive intention was raised in favour of creditors, but in the case of a wife or of children, the intention must have been perfectly manifest; Sampson *v.* Sampson, 2 Ves. & Beam. 337; Byas *v.* Byas, 2 Ves. 164; Belt's Sup. 315.

(*e*) 3 Ves. 69. A devise to a charity prior to the act of 9 Geo. 2, the testator dying after it, was held to be good in Ashburnham *v.* Bradshaw, 2 Atk. 36; Att. Gen. *v.* Lloyd, 1 Ves. 33; S. C. 3 Atk. 551; Att. Gen. *v.* Andrews, 1 Ves. 225; and see Att. Gen. *v.* Heartwell, Amb. 451.

(*f*) Portreeve and Burgesses of Chard and others *v.* Opie, Fin. 75; Rivett's case, Mo. 890; Duke's Ch. Us. by Bridgm. 366; Att. Gen. *v.* Andrews, 1 Ves. 225; Att. Gen. *v.* Sawtell, 2 Atk. 497; Harrison *v.* Grosvener, 2 Keb. 837; and see Att. Gen. *v.* Downing and others, Amb. 573; S. C. 1 Dick. 414, wherein the court would not supply the surrender for a charity, as there were prior limitations in strict settlement, even though such limitations had failed. But now as to charitable dispositions of copyhold property, see 9 Geo. 2, c. 36; ante, p. 196.

(*g*) Rafter *v.* Stock, 1 Eq. Ca. Abr. 123, pl. 12; Supp. Vin. Abr. Cop. (M. a), s. 3, pl. 3.

(*h*) 2 Dick. 534, in which case however it does not appear by whom the bill was filed.

Tollet v. *Tollet*, 2 P. W. 489; *Hawkins* v. *Leigh and others*, 1 Atk. 388; *Smith* v. *Baker*, ib. 385; *Taylor* v. *Taylor*, ib. 386; 3 Bro. C. C. 231; *Roome* v. *Roome*, 3 Atk. 181; *Goodwyn* v. *Goodwyn*, 1 Ves. 228; *Byas* v. *Byas*, 2 Ves. 164; *Tudor* v. *Anson*, ib. 582; *Marston* v. *Gowan*, 3 Bro. C. C. 170; *Chapman* v. *Gibson*, ib. 229; n. (1), to *Watts* v. *Bullas*, 1 P. W. 60; *Rumbold* v. *Rumbold*, 3 Ves. 65; *Hills* v. *Downton*, 5 Ves. 557; *Church* v. *Mundy*, 12 Ves. 426; *Fielding* v. *Winwood*, 16 Ves. 90.

As to Children:

Vide *Smith* v. *Ashton*, 1 Ch. Ca. 263, 264; *Hardham* v. *Roberts*, 1 Vern. 132; 2 ib. 164; *Kettle* v. *Townsend*, 1 Salk. 187; *Bradley* v. *Bradley et al.* 2 Vern. 163; *Croft* v. *Lyster*, cited ib. 164; *Montague & Bath's* case, 3 Ch. Ca. 106; 2 Ch. Rep. 417; *Baker* v. *Jennings*, 2 Freem. 234; *Pope et al.* v. *Garland*, 3 Salk. 84; *Strode* v. *Falkland*, 3 Ch. Rep. 187, 188; *Watts* v. *Bullas*, 1 P. W. 60, and n. (1) ib.; *Bullock* v. *Bullock*, 6 Vin. Cop. (M. a,) pl. 19; *Burton* v. *Lloyd* or *Floyd*, ib. pl. 20; 3 P. W. 285, (n. A.); 2 Br. Par. Ca. 281, (*Lloyd* Appell. *Burton* Resp.); *Weeks* v. *Gore*, 6 Vin. Cop. (M. a.), pl. 24; *Earl of Suffolk* v. *Howard*, 2 P. W. 178; *Tollet* v. *Tollet*, 2 P. W. 489; *Carter* v. *Carter*, Mos. 370; *Andrews* v. *Waller*, 6 Vin. Cop. (W. e.), pl. 12; *Hicken et al.* v. *Hicken*, 6 Vin. Cop. (M. a.), pl. 30; *Cook* v. *Arnham*, 3 P. W. 283; S. C. Ca. Temp. Talb. 35; *Hawkins* v. *Leigh and others*, 1 Atk. 388; *Macey and others* v. *Shurmer*, ib. 389; *Roome* v. *Roome*, 3 Atk. 181; *Goring* v. *Nash and others*, 3 Atk. 191; *Banks* v. *Denshaw and others*, ib. 585; *Goodwyn* v. *Goodwyn*, 1 Ves. 228; *Byas* v. *Byas*, 2 Ves. 164; *Tudor* v. *Anson*, 2 Ves. 582; *Lindopp* v. *Eborall*, 3 Bro. C. C. 188; *Chapman* v. *Gibson*, ib. 229; *Pike* v. *White*, ib. 286; *Rumbold* v. *Rumbold*, 3 Ves. 65; *Hills* v. *Downton*, 5 Ves. 563; *Blunt* v. *Clitherow*, 10 Ves. 589; *Garn* v. *Garn*, 16 Ves. 268; *Pennington* v. *Pennington*, 1 Ves. & Beam. 406; *Sampson* v. *Sampson*, 2 Ves. & Beam. 337; *Braddick* v. *Mattock*, 6 Madd. 361.

As to Creditors:

Vide Carey's Rep. 9, 10; *Pope et al.* v. *Garland*, 3 Salk. 84; *Challis* v. *Casborn*, Gilb. Eq. Rep. 96; S. C. 1 Eq. Ca. Abr. 124; S. C. Pre. Ch. 407; *Strode* v. *Falkland*, 3 Ch. Rep. 187, 188; *Drake* v. *Robinson*, 1 P. W. 443; *Harris* v. *Ingledew*, 3 P. W. 98; ib. n. (2); *Haslewood* v. *Pope*, 3 P. W. 322; *Mallabar* v. *Mallabar*, Ca. Temp. Talb. 78; *Attorney General* v. *Mott*, 2 Eq. Ca. Abr. 234, pl. 23; *Car* v. *Ellison*, 3 Atk. 73; *Roome* v. *Roome*, 3 Atk. 181; *Ithell* v. *Beane*, 1 Ves. 215; S. C. 1 Dick. 132; *Byas* v. *Byas*, 2 Ves. 164; *Tudor* v. *Anson*, ib. 582; *Coombes* v. *Gibson*, 1 Br. C. C. 273; *Bixby*

v. *Eley*, 2 ib. 325; S. C. 2 Dick. 698; *Lindopp* v. *Eborall*, 3 Bro. C. C. 188; *Chapman* v. *Gibson*, ib. 229; n. (1), to *Watts* v. *Bullas*, 1 P. W. 60; *Kentish* v. *Kentish*, 3 Br. C. C. 257; *Growcock* v. *Smith*, 2 Cox Ch. Ca. 397; *Hills* v. *Downton*, 5 Ves. 563; *Kidney* v. *Coussmaker*, 12 Ves. 136; *Pennington* v. *Pennington*, 1 Ves. & Beam. 406.

And the author will show, in treating of devises of copyholds, that a court of equity would have supplied the want of a surrender for creditors, even where there were freeholds, if the freeholds were insufficient for payment of the debts, though not when the freeholds were adequate. But in the case of creditors the aid was confined to the amount of the debts, for the heir had equal equity at the least with the devisee, and where the equity was equal, the law prevailed (*i*).

And as the court did not interpose when the equity was equally balanced, so a surrender would not have been supplied against the customary heir, being a child of the testator, unless such heir was provided for; but a provision made for him, either by the parent or *aliunde*, brought him within the rule, without regard to the amount of such provision (*k*).

This at least was considered to be the established practice of the Court of Chancery, until the case of *Hills* v. *Downton* (*l*), in which Lord Rosslyn (Chancellor) observed, that the distinction as to the consideration of the state of the family had been for the last twenty years completely laid out of the question, and that if attention were to be paid to the situation at all, it must be whether there was a provision by the will: but that he could not conceive a rule that set you to seek into the circumstances of the heir at law. It is thought, however, that Lord Rosslyn did not adhere to the opinion which he seemed to entertain at the hearing of that cause.

The inconvenience of the exception to the above rule in favour of

(*i*) Compton v. Collinson, 2 Bro. C. C. 386; 3 ib. 171, (n. Belt's ed.); 1 Watk. on Cop. 141; Supp. Vin. Abr. Cop. (M. a), s. 3, pl. 3.

(*k*) Kettle v. Townsend, 1 Salk. 187; 1 Eq. Ca. Abr. 123; 3 Bro. C. C. 231; Biscoe v. Cartwright, Gilb. Eq. Rep. 121; Andrews v. Waller, 6 Vin. Cop. (W. e.), pl. 12; Hicken et al. v. Hicken, ib. (M. a.), pl. 30; Strode v. Falkland, 3 Ch. Rep. 188; Cook v. Arnham, 3 P. W. 283; S. C. Ca. Temp. Talbot, 35; Smith v. Baker, 1 Atk. 386; Hawkins v. Leigh and others, ib. 388; Macey and others v. Shurmer, ib. 390; Chapman v. Gibson, 3 Bro. C. C. 229; Pike v. White, ib. 288; Cooper v. Cooper, 2 Vern. 265. Where the elder brother had been in possession twenty years, by consent of the plaintiff, (a younger brother who was well provided for,) the bill to have a surrender supplied was dismissed with costs; James v. James, 6 Vin. Cop. (M. a.), pl. 12; 1 Eq. Ca. Abr. 123.

(*l*) 5 Ves. 557.

the heir, if a child of the testator, evidently appears to have been felt by Lord Alvanley in the above case of *Chapman & Gibson*; but in his observations on the case of *Hills & Downton*, which will be found in the appendix to Sir Edward Sugden's Treatise on Powers, he declared that if the case of a son wholly unprovided for were to come before him, he should hesitate, notwithstanding the great authority of the Lord Chancellor, to make a decree against him.

The author is not aware of any authority expressly deciding the point upon which we have seen there was a difference of opinion between Lord Rosslyn and Lord Alvanley, except that of *Rodgers* v. *Marshall* (*m*), wherein the Master of the Rolls (Sir William Grant) adopted the opinion of Lord Alvanley, holding, that even as against a grandchild, the want of a surrender ought not to be supplied, unless he had a provision in some other way. The author has before shown that this was the case of an informal conveyance of a copyhold for a younger son, and that an inquiry was directed whether the defendant had a provision, and as to the nature and extent of it (*n*).

All the authorities seem however to have agreed, that it was of no consequence whether the provision came from the parent or not, and that if the son had a provision, it was immaterial how ample or scanty it might be, the parent being the best judge as to the *quantum* of the provision (*o*); yet the author apprehends it must not have been merely illusory (*p*).

But a distant heir was within the rule that a surrender was to be supplied, though totally unprovided for; the same natural or moral obligation, as between a parent and child, not applying in those cases: therefore in the above case of *Chapman & Gibson*, a surrender was supplied in favour of a wife against the customary heirs, a nephew and niece, without regard to any provision made for such heirs (*q*).

And in *Fielding* v. *Winwood* (*r*), the equity of the wife prevailed against the collateral heir, without any consideration as to the latter having a provision or not.

Equity, in aiding a devise in favour of a wife or children, where

(*m*) 17 Ves. 294; and see Fielding *v.* Winwood, 16 Ves. 90; Garn *v.* Garn, ib. 268; 3 Bro. C. C. 229, (n. 2, Belt's ed.)

(*n*) Ante, p. 209.

(*o*) Goring *v.* Nash, 3 Atk. 191; 3 Bro. C. C. 230; Kettle *v.* Townsend, 1 Salk. 187; Cook *v.* Arnham, 3 P. W. 284; Braddick *v.* Mattock, 6 Madd. 363.

(*p*) Hicken et al. *v.* Hicken, 6 Vin. Cop. (M. a.), pl. 30; Andrews *v.* Waller, ib. (W. e.), pl. 12; Boss *v.* Boss, ib.; S. C. (called Ross *v.* Ross), 1 Eq. Ca. Abr. 124; Braddick *v.* Mattock, sup. Mr. Watkins was of opinion that what the heir had acquired or was acquiring by his own industry, could not be considered as a provision; see 1 vol. on Cop. 135, (n. h), 2d ed.

(*q*) See 3 Bro. C. C. 229, n. (2 and 3), Belt's ed.

(*r*) 16 Ves. 90; vide also Smith *v.* Baker, 1 Atk. 385; Taylor *v.* Taylor, ib. 386; 3 Bro. C. C. 231, n. (1) to Watts & Bullas, 1 P. W. 60.

there was clear evidence of an intention to pass copyholds, did not regard the circumstance of the wife or children being otherwise provided for (*s*).

Nor was it of any importance that the custom allowed of a devise of the beneficial interest *only*, by requiring that the copyhold should be surrendered to a trustee for purposes to be declared by a will (*t*); nor was there any distinction in the case of a devise in favour of children, merely because the wife was entitled to freebench, or as heir to the husband by the custom of the manor; nor because the only provision for her should have been an annuity issuing out of the copyhold itself (*u*).

The want of a surrender would have been supplied for a wife or child having a limited interest, although the persons in remainder were not within the rule. So, in *Marston* v. *Gowan* (*x*), where there was a devise to trustees to sell, and the interest of the produce of sale to be paid to the wife for life, and after her decease the principal to be paid to the children of the testator's sisters; the Lord Chancellor ordered the copyholds to be sold, the wife to have the interest of the purchase money for her life, and then the money to result to the customary heirs. This case shows that the interposition of trustees for a wife or child did not vary the rule.

Although the devise to a wife or child was in remainder, after an estate limited to a person not coming within the above rule, yet would the surrender have been supplied (*y*). So also although the devise was of an estate to which the testator was entitled in remainder only (*z*).

The above rule, founded on the best principles of equity and justice, was equally applicable to lands of gavelkind and borough-English tenure (*a*).

(*s*) Kettle & Townsend, 1 Salk. 187; Carter *v.* Carter, Mosel. 365; Baker *v.* Jennings, 2 Freem. 234; Burton *v.* Lloyd or Floyd. ubi sup.; Weeks *v.* Gore, 6 Vin. Cop. (M. a.), pl. 24; Andrews *v.* Waller, ib. (W. e.), pl. 12; Cook *v.* Arnham, Ca. Temp. Talb. 37; Tudor *v.* Anson, 2 Ves. 582; Smith *v.* Baker, sup.; Goring *v.* Nash, 3 Atk. 191; but see Biscoe *v.* Cartwright, Gilb. Eq. Rep. 121.

(*t*) Braddick *v.* Mattock, 6 Madd 361.

(*u*) Ibid.

(*x*) 3 Bro. C. C. 170; see also Macey *v.* Shurmer, 1 Atk. 389.

(*y*) Cook *v.* Arnham, 3 P. W. 285, 286; S. C. Ca. Temp. Talb. 35; and see Goring *v.* Nash, 3 Atk. 191, 192.

(*z*) Cook *v.* Arnham, sup. The necessity of resorting to equity to supply a surrender to will in favour of a wife or child, when the devise was of a remainder, would seem to prove that a remainder-man and a reversioner could not have devised without a surrender to will, prior to the 55 Geo. 3, c. 192; ante, p. 138.

(*a*) Bradley *v.* Bradley et al. 2 Vern. 165, in which Lord Commissioner Hutchins said, "there ought not to be one sort of equity for an eldest, and another for a younger son." And see Cooper *v.* Cooper, 2 Vern. 265; Byas *v.* Byas, 2 Ves. 164.

In the case of *Kettle & Townsend* (*b*), Lord Somers decided that a surrender ought to be supplied in favour of a grandchild, but his decree was afterwards reversed in the House of Lords; yet we find that in *Watts* v. *Bullas* (*c*), the Master of the Rolls thought that the surrender ought to be supplied for a grandchild, and that it would be so ruled if the question were again to come before the House of Lords; and both Lord Harcourt (*d*) and Lord Cowper (*e*) disapproved of the decision in the Lords.

In *Hills & Downton* (*f*) Lord Rosslyn also expressed his dissatisfaction with the determination of the House of Lords, which reversed Lord Somers's decree, that a surrender might be supplied for a grandchild, and doubted the authority of the note in Salkeld, and, as he said, the only other authority, a decree of the lords commissioners.

But the question between a grandchild and the heir was again agitated (not long after the decision of *Hills & Downton*) in the case of *Perry* v. *Whitehead* (*g*). The bill was filed by five grand-daughters, devisees, stating that the copyhold premises having been surrendered by the testatrix upon mortgage, no surrender was necessary to the use of her will (but it is to be observed that the mortgagee was not admitted, and consequently a surrender was requisite), and that if it were necessary, the want of it ought to be supplied in equity. The counsel for the plaintiff relied on the above cases of *Hills & Downton*, *Chapman & Gibson*, *Watts & Bullas*, and *Fursaker & Robinson*, and Anon. 2 Freeman, 197; but Lord Eldon, C. (stopping the counsel for the defendant, and in opposition to the argument urged that there was a moral obligation from a grandfather towards his grandchild) observed, that where a legacy is given to a grandchild, in order to carry interest, there must be something more than merely giving the legacy, something showing that the testator put himself *in loco parentis* (*h*);

(*b*) 1 Salk. 187; 1 Eq. Ca. Abr. 123; 10 Mod. 471; 2 Vern. 625.

(*c*) 1 P. W. 61.

(*d*) Freestone & Rant, 1 P. W. 61, (n. †).

(*e*) Fursaker *v.* Robinson, Gilb. Eq. Rep. 140; S. C. Pre. Ch. 475; 1 Eq. Ca. Abr. 123, pl. 9.

(*f*) 5 Ves. 563. And see Anon. 2 Freem. 197; Chapman & Gibson, 3 Bro. C. C. 231; 3 Ves. 12; vide also Allen *v.* Poulton, 1 Ves. 121, where it was objected that the defect of a surrender should not be supplied for a grandchild; but the Master of the Rolls held that the copyhold was well devised to a grandson, on the ground that a person claiming under the will must admit the whole; post, tit. "Election."

(*g*) 6 Ves. 544; and see Elton *v.* Elton, 3 Atk. 508; S. C. 1 Wils. 161; Goodwyn *v.* Goodwyn, 1 Ves. 228; Tudor *v.* Anson, 2 Ves. 582; 2 Fonbl. on Eq. 123; 12 Ves. 210; ante, p. 208.

(*h*) In this case the Lord Chancellor further observed, "The case of a grandchild, where the father is alive, and abundantly providing for it, is very different from the case where the father is dead. As to the statute of Elizabeth, if the father is living, the grandfather is under no legal obligation." And see Abrand *v.* Dancer, 2 Ch. Ca. 26.

and held, that the rule laid down by the House of Lords could not be reversed in a court of equity, but must remain till altered by the house: he therefore dismissed the bill, but said it was impossible to give costs where the plaintiffs had so much encouragement from *dicta*.

It had been long established that the surrender to will should not have been supplied in favour of natural children (*i*), or of a brother or sister, or any collaterals (*k*), or of strangers or volunteers, as a legatee or devisee, not being a wife or child (*l*).

It appears that by the customs of the manor of Taunton and Taunton Deane in Somersetshire, the wife inherits the copyhold lands as heir to her husband (*m*), and that a surrender to the use of a will is inoperative, if the devisor live more than seven years after such surrender, so that the widow is then to have the estate (*n*). The reasonableness of the latter custom is open to considerable doubt; but at all events the author must suppose that a court of equity would have relieved a devisee, where, prior to the act of 55 Geo. III. c. 192, the testator had neglected to comply with the custom.

The reader is here reminded that length of possession will create the presumption of a surrender having been made, especially where the court rolls are lost (*o*).

Of Presentment of Surrenders (*p*).

When a surrender was taken out of court, the presentment, by the

(*i*) Tudor *v.* Anson, 2 Ves. 582; Crickett *v.* Dolby, 3 Ves. 12; and see Fursaker *v.* Robinson, ubi sup.; 12 Ves. 209, in Holmes & Coghill; Fearne's P. W. 328; Bramhall *v.* Hall, Amb. 468, 2d ed.; 2 Eden, 219.

(*k*) Goodwyn *v.* Goodwyn, 1 Ves. 228; Strode *v.* Falkland et al. 3 Ch. Rep. 169; S. C. 2 Vern. 625; Marston *v.* Gowan, 3 Bro. C. C. 169; and see Rogers *v.* Downs, 9 Mod. 292; Judd *v.* Pratt, 13 Ves. 168; 15 Ves. 390.

(*l*) Strode *v.* Falkland, sup.; Floyd *v.* Aldridge & Willis, cited 5 East, 137; and see 1 Madd. Rep. V. C. Court, 631, 632, 633, in Wainewright *v.* Elwell; ante, p. 208.

(*m*) 2 Watk. on Cop. Append. No. XII.

(*n*) Portman *v.* Seymour, 9 Mod. 280.

(*o*) Ante, p. 210.

(*p*) The author thinks it better to refer thus early in the consideration of the law and practice as to presentment of surrenders, to the 89th section of the Commutation and Enfranchisement Act (4 & 5 Vict. c. 35). By that section it is enacted, that every surrender and deed of surrender to be accepted by the lord, and every will and codicil, a copy whereof shall be delivered to the lord, or to the steward or his deputy, either at a court to be holden without the presence of homagers (under the 86th section), or out of court, and every grant and admission by the lord, or the steward or his deputy (under the 87th and 88th sections), shall be forthwith entered on the court rolls of the manor; and that every such entry shall for all purposes be deemed and taken to be an entry made in pursuance of a presentment at a court by the homage assembled thereat; and the 90th section enacts, that a presentment shall not be essential to the validity of any admission. Vide also ante, title "Qualifications of the Lord of the Manor," &c., p. 102, note (*f*); post, title "Steward's Fees."

general custom of manors, was to be made at the succeeding general court (*q*); or if there was a special custom for it, at the second or third court day (*r*); or within a year (*s*); or alternatively at the next court, or within a year, or at the next court after the year (*t*). And the author apprehends that it was only by special custom that a surrender, taken out of court by tenants of the manor, or the bailiff or reeve, would have been good, when omitted to be presented at the court held next immediately after the date of such surrender (*u*).

But it would seem that a surrender *to will* might, without a special custom, have been presented at the next court after the death of the surrenderor (*x*); even in the case of a surrender by a joint tenant in fee (*y*).

It has been said that by special custom a surrender might have been presented at *any* subsequent court (*z*), and the Vice-Chancellor, in the

(*q*) Co. Cop. s. 40, Tr. 88; Co. Lit. sect. 79; Gilb. Ten. 220, 280; Fawcet *v.* Lowther, 2 Ves. 302; Moore *v.* Moore, ib. 602; Mitchel *v.* Neale, ib. 680; Burton *v.* Lloyd, 3 P. W. 285, (n. A.); see Burgoyne *v.* Spurling, Cro. Car. 273, 283, 284; S. C. Sir W. Jo. 306, in which case *A.* had surrendered into the hands of customary tenants to the use of *B.* in fee, on condition to be void if *A.* paid *B.* a certain sum on the 1st of July following, and afterwards, before payment of the money, *A.* surrendered by the hands of customary tenants to *C.* in fee, and then paid the money according to the condition, and surrendered in like manner to *D.* in fee, and the surrender to *D.* was presented at the next court, and subsequently, *at the same court*, the surrender to *C.* was presented, but the conditional surrender to *B.* was not presented; and it was adjudged that *C.* should have the land.

(*r*) Co. Cop. s. 40, Tr. 88; Fawcet *v.* Lowther, sup. And see Gilb. Ten. 280, where it is said "the reason of this seems to be to prevent disputes; for if an old surrender might be trumped up at any time, it would defeat any after charges made by him that surrendered; which charges would appear to be good enough since he is tertenant and continues possession, and the surrender could not be known. But now let the purchaser stay a court or two, and then he may be sure to know whether there is any incumbrance; for if the surrender is presented, then it appears and he need not meddle; if it be not presented, he knows it is void, and so may proceed."

(*s*) Roswell *v.* Welsh, 3 Bulst. 215. The custom there appears to have been that the surrender ought to be presented within a year. But see Forsell *v.* Walshe, Bridgm. 50. (And qu. S. C.), where the jury found that the surrender by the custom ought to be presented at the next court, otherwise the surrender to be void; S. C. (Frosel *v.* Welsh), Cro. Jac. 403; S. C. 1 Roll. Rep. 415; S. C. Godb. 268; Com Dig. Cop. F. 10; Taylor *v.* Wheeler, 2 Vern. 565; S. C. 2 Salk. 449.

(*t*) Parman *v.* Bowyer, Cro. Eliz. 668; and see S. C. (Perryman's case), 5 Co. 84; S. C. (Pereman & Bower), 2 And. 125; S. C. cited Carter, 73; see also Supp. Co. Cop. s. 19, Tr. 209; Com. Dig. Cop. F. 10. And this custom extends in some manors to a testamentary paper; Com. Dig. Cop. F. 9; and in others to conveyances of freehold lands. See Perryman's case, sup.; Co. Lit. 59 b.

(*u*) Gilb. Ten. Note xcv. p. 220; Burton & Lloyd, 3 P. W. 285, (n. A.); and see Skin. 142, pl. 13.

(*x*) Carpender & Ilton, Stint & Blount, cited Com. Dig. Cop. (F. 10); Co. Lit. 62 a.

(*y*) Ante, p. 215.

(*z*) See Com. Dig. Cop. (F. 10); 2 Bl. Com. 369. And note, that Lord Hard-

case of *Horlock* v. *Priestly & Wife* (*a*), expressed an opinion that, in the absence of any special custom, a surrenderee had an inchoate legal title, capable of being made complete whenever it might suit his convenience to have the surrender presented; but on the argument of a case reserved for the opinion of the Court of B. R. at the trial of an action of ejectment directed by the Court of Chancery in the above cause of *Horlock & Priestley*, and in which the question was whether there was any sufficient proof of a presentment of the surrender (*b*), and not whether the presentment (which appeared to have been made full two years after the date of it) was good, and where the presentment and inrolment could only have been good by a custom to present a surrender at *any* subsequent court, Lord Tenterden said, " It is not necessary in this case to give an opinion, whether such a custom is good in point of law, but I must say that I should have great difficulty in holding that such a custom is valid."

The surrender, and, indeed, every other document connected with the copyholder's title, on being presented in court, should have been indorsed with these words, " presented and inrolled at a court held for the manor of —— the —— day of ——:" and this indorsement should have been undersigned by at least two of the homage.

If the surrender was taken out of court by the lord or steward, it was brought into court with the rolls of the manor, as a matter of course; but when it was taken by a tenant or tenants, or the bailiff or reeve of the manor, under a special custom, it should have been brought into court by the persons or person who took it (*c*); yet we have seen that the death of the persons who took the surrender, or of the surrenderor or surrenderee, or both of them, would not have vitiated it (*d*); and as the surrender was produced, the author conceives, for the purpose only of being presented by the homage of the particular court, it does not seem to have been absolutely essential that the persons taking it should have attended, though

wicke, in the case of Moore & Moore, 2 Ves. 602, said, " By the general custom of copyholds a surrender ought to be presented at the next court, as appears from Lord Coke; but by the special custom of a manor it may be presented at any subsequent court; what is the custom here does not appear; that is not a ground for me to determine that the surrender is void."

See further as to presentment of surrenders, as well by the general usage of manors, as by special custom, 6 Vin. Cop. (U. a.), (W. a.), (X. a.), (Y. a.); Com. Dig. Cop. (F. 10.)

(*a*) 2 Sim. 78. See the case of Doe *d.* Wheeler *v.* Gibbons, 7 Car. & Pa. 161, where a mortgagee was admitted several years after the date of the conditional surrender, which admission was held to relate back to the surrender, so as to defeat the title of an intermediate purchaser; but the report does not show the period of the presentment of the conditional surrender.

(*b*) Doe & Calloway, 6 Barn. & Cress. 492; S. C. 9 Dow. & Ry. 518.

(*c*) Co. Cop. s. 40, Tr. 88, 89.

(*d*) Ante, p. 142.

living (*e*), if the court be satisfied that the surrender was made (*f*), and the lord or steward will dispense with such attendance, and admit the surrenderee.

The presentment should, in all material points, correspond with the surrender, as any variance would certainly be fatal, if the surrender were not taken by the lord or steward, and the lord had no knowledge of the true surrender previous to the admittance; and would create a question upon the title, although the precise terms of the surrender, when taken by tenants, or the bailiff or reeve of the manor, were known to the lord at the time of admission, nay, even if the surrender were taken by the lord himself or his steward.

But the author is about to show that doubts were entertained of the necessity of a presentment of the surrender of copyhold lands when such surrender was taken by the lord or steward, and, consequently, whether the admittance in such cases would not have been good, although the presentment did not correspond with the terms of the surrender.

Lord Coke says (*g*), "If a copyholder will surrender in court to the use of a stranger, besides the surrender, the admittance is requisite; and, if the surrender be made out of court, into the hands of *the lord himself*, which the general custom will warrant, or into the hands of the bailiff, or two tenants of the manor, which by special custom only is warrantable, besides a surrender, two other ceremonies are requisite; the one, a true presentment of the surrender in court by the same persons into whose hands the surrender was made; the other is an admittance of the lord according to the effect and tenor both of the surrender and presentment."

We have here, therefore, an authority, not only that a surrender, even when taken by the lord himself, must have been presented in court (*h*), but that it must have been truly presented.

Lord Coke adds (*i*), "If the surrender be conditional, and the presentment be absolute, both the surrender, presentment and admittance thereupon are wholly void; but if the conditional surrender be presented, and the steward, in entering of it, omitteth the condition, yet, upon sufficient proof made in court, the surrender shall not be avoided, but the roll amended; and this shall be no conclusion to the party to plead or give in evidence the truth of the matter."

And again he says (*k*), "If the *steward*, the bailiff, or the tenants, into whose hands the surrender is made, *refuse to present*, upon a petition or a bill exhibited in the lord's court, the party grieved shall find

(*e*) Except by special custom; 3 Bulst. 218.

(*f*) Co. Cop. s. 40, Tr. 89.

(*g*) Co. Cop. s. 38, Tr. 85, 86.

(*h*) But see post, p. 232, per Baron Carter, in Chance *v.* Dod.

(*i*) Co. Cop. s. 40, Tr. 88, 89.

(*k*) Ib.

remedy. But if the lord will not do him right, he may both sue the lord and them that took the surrender in the chancery, and shall there find relief." So that we have here a further authority, the author conceives, that the surrender should have been presented, though taken by the lord or steward.

Chief Baron Gilbert considered the presentment of a surrender as of no other importance than to inform the lord of the manor of the contents of it. He says (*l*), " It seems that the presentment of a surrender in court is only by way of instruction, to let the lord know of the surrender, and, accordingly, he may admit; for it is apparent that a presentment is not of necessity, because the lord may admit out of court (*m*); and any act of the lord's consenting to the surrender will amount to an admittance, which plainly shows that a presentment is only to show there was such a surrender; for if it were of necessity, then there could be no admittance out of court, nor [and] no act implying the lord's consent would be *tantamount* to an admittance; and then, if we go to the reason of the thing, since the estate is only to be surrendered to the lord, and by him transferred to the surrenderee, if he accept the surrender, and grant an admittance, which is all that can be done, what need is there of a presentment, and of what use can it be for the homage to present a surrender in order for the lord's admittance, when the lord may take notice that there was such a surrender, accept it, and admit accordingly? The estate, as it was derived from the lord, so it must be surrendered to him, *and the presentment makes no part either of the surrender or admittance.* In itself it is nothing but a notification that there was such a surrender, which if the lord takes notice of without a presentment, it frustrates the end of a presentment, and the presentment is in no ways of use. Therefore it seems that if a surrender be made, and then a wrong presentment be made of this surrender, and then admittance is made according to the surrender, that is good; for only the presentment can be void, and then there is an admittance upon a surrender without any presentment, which, for the reasons above, seems to be very good. It is said in Lex Cust. 137, that a surrender must be presented by the same persons that took it: so says Coke; but that this is not literally true, will appear from what he says in another place, that if he that took the surrender die, yet if presentment be made of it, it is sufficient; and it is said in Lex Cust. to have been held by Wadham Windham, that if a surrender be made to one tenant, and presented to have been made to another, yet that is nothing to vitiate the surrender; if the surrender be presented by any body, and admittance thereupon made, it seems to be well enough, for it is known that there

(*l*) Ten. p. 278, 279. (*m*) Ante, pp. 101, 102.

was a surrender; and if the presentment should be void, yet the admittance is good enough without it."

And in another place (*n*) the learned chief baron thus expresses himself:

"My Lord Coke says, that presentments of surrenders ought, in all material points, to ensue and agree with the surrenders themselves (Co. Cop. s. 40), else the surrender, presentment, and admittance thereupon will be void, which seems reasonable; for if the presentment in matter differs from the surrender, the lord hath no sufficient notice of the surrender; and then the admittance upon it must in reason be bad, and not help out the presentment; for if the lord knew the true surrender, perhaps he would never consent to such a surrender; and the true surrender ought to be known, that the lord might know his tenant, and from whom to take his services. The admittance cannot help out, for that was grounded upon the presentment; but if the lord had notice of the true surrender, though the presentment did differ, yet it seems reasonable the admittance should enure according to the surrender, because he had notice of the true surrender; and when a man is admitted, he is *in* by the surrender. Sed quære, where it is said that if the presentment differ in points material from the surrender, that there the admittance, presentment and surrender are all void: it seems this must be understood, if the time for presenting the surrender be past, for if there should be a presentment and admittance made contrary to the surrender, sure this will not make the surrender void, before the utmost time allowed by law for the surrender's being presented; for it is no reason to say that because the presentment is void, that therefore the surrender is void; for the surrender depends, not on the presentment, though it may be void because not presented, but not because ill presented. So that if, after such ill presentment and admittance, there should be a good presentment and admittance, it seems the surrender and all the other acts will stand good."

Mr. Justice Blackstone adopts the opinion of Lord Coke, and says (*o*), the surrender is to be brought into court by the same persons that took it, and then to be presented *by the homage;* and, in all points material, must correspond with the true tenor of the surrender itself. The learned judge adds, "And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment and admittance thereupon are wholly void (Co. Cop. 40): *the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such untrue presentment.*"

(*n*) Ten. p. 336. (*o*) 2 Bl. Com. 369.

Mr. Watkins, on the question of the necessity of a presentment of the surrender in all cases, observes (*p*):

"When a surrender is made out of court into the hands of any who cannot thereupon make an admittance, or if no admittance be immediately made by a person enabled to admit, such surrender should be regularly presented.

"From the general terms in which the necessity of a presentment of a surrender made out of court is asserted in many of our books, it seems to have been too often inferred that such presentment is equally requisite, into whose hands soever the surrender is made.

"It is said in Calthrope, that if the lord, having copyhold lands surrendered into his hands, will, in the presence of his tenants out of court, grant the same to another, and the steward enter the same into the court book, and make thereof a copy to the grantee, and the lord die before the next court, it will be no good copy to hold the land.

"But," continues Mr. Watkins, "it must be evident, from the reason of the thing, as well from the weightier testimony of other writers, that the presentment is only for the information of the lord, to apprise him that such surrender has been made.

"To what purpose can it be to make known to the lord that such surrender was made, when the lord knows it already? Why declare to him that it was taken, when he must be conscious that he had taken it himself? Besides, who is to present a surrender taken by the lord? The lord may take a surrender without the presence of a tenant. Is the lord to present it himself? But to whom is he to present it? Whom is he to inform of the event? He cannot present it to himself; and he is not obliged to say any thing about the matter to his tenants. When the lord, therefore, takes a surrender out of court, he may admit without any presentment.

"The same reasoning holds equally good as to the steward, in cases where the surrender is only the mean of conveyance. He may accept such surrender and immediately admit the *cestui que use*. It is clear that many of the books, when speaking of the necessity of a presentment, in case of a surrender being made *to the lord* out of court, mean only a surrender made out of court to the lord *by the hands of tenants*, or those of the bailiff or reeve."

It must be apparent to the reader that the above authorities opened a large field for doubt, as to the importance to be attached to the presentment of a surrender as an integral part of the copyhold assurance, when it was taken by the lord or steward: but as the lord might have been compelled to admit the surrenderee, and as the presentment and inrolment of the surrender served as evidence of the

(*p*) On Cop. vol. i. p. 79.

copyholder's title, it might have been urged that the presentment of a surrender was not so much for the information of the lord, as a part of the requisite adjudication of facts by the homage, leading to the inrolment of the surrender upon the court rolls of the manor, by a copy whereof the tenant holds his estate.

It is well known to every practical man that not only surrenders made out of court, but also surrenders and every other act done in court, were included in the presentment or verdict of the homage, and would (with the exception of any licences or grants by the lord in virtue of his freehold interest) seem to have received their effect by being put upon the rolls, under the sanction of such presentment or verdict; and it was, at least, contrary to all practice for the lord or steward to inrol any act which was done by them ministerially only out of court, before such act had been presented in court by the homage; and if the practice was founded in necessity, then the copyholder's title was incomplete *in all cases*, until the surrender had been presented and inrolled at a court held for the manor.

And a copyholder, it must be recollected, holds not only at the will of the lord, *secundum consuetudinem manerii*, but also *by copy of court roll;* must not his title, therefore, have been incomplete, until he could have been put into possession of a copy from the court rolls of the surrender, and of the admittance thereupon, as recorded at some court held for the manor, under the verdict or presentment of the homage (*q*)?

The necessity for presentment and inrolment of a surrender, in order to create a perfect legal title in the surrenderee, was somewhat sanctioned by Mr. Watkins himself, who says (*r*), "But if the surrender be taken out of court by the lord or the steward personally, and no immediate admission be made (*s*), the memorandum of the taking of such surrender, signed by the tenant who surrenders, and the lord or the steward taking it, *should be certified and produced,* on admittance being requested at a future time from the lord, if the steward had taken it, or from the steward, if taken by the lord."

And he adds, "If admittance be immediately made by the lord or steward taking such surrender, yet such admittance should be regularly notified at the next court day, *for the information of the tenants.* This too was more immediately necessary in ancient days, as, in case the tenants should have known any objections to the person so admitted, of which the lord might have been ignorant, they might have

(*q*) Ante, p. 103.

(*r*) On Cop. vol. i. p. 81.

(*s*) Semble, that the steward, prior to 4 & 5 Vict. c. 35, could not have admitted out of court; ante, pp. 102, 111, et seq.

informed him of them; from which he might have been induced to resume the estate, as having conferred it on a person who was unworthy of the grant. Add to this, *that it must be regularly inserted on the court rolls of the manor, by a copy of which he is to hold.*"

The case of *Kite* & *Queinton* (*t*) has clearly established the proposition of Mr. Justice Blackstone that an admittance was void, when founded on an untrue presentment of a surrender, if such surrender had been taken by the tenants or bailiff of the manor; for there the surrender (which was taken by copyhold tenants) was on certain conditions, and at the next court the surrender was presented; but in the presentment, the conditions were omitted, and he, to whose use the surrender was made, being dead, the lord, by the steward, admitted his daughters and heirs, who entered; the surrenderor released to the daughters, being in possession, and afterwards entered upon them; and the court held that the right was in the surrenderor, even after the admittance of the daughters, which right was extinguished by the release.

If, indeed, as it has been said (*u*), the presentment of a surrender was only for the information of the lord, then, when the lord or his steward had positive notice of the exact terms of the surrender (which must have been the case when such lord or steward took the surrender himself), or, when notice of the precise terms of such surrender previous to admission could have been proved upon the admitting lord or steward, the presentment of the surrender, in whatever form or words, might perhaps have been considered as a presentment of it in the very terms of the instrument; or, at least, it might have been thought that the variance in the presentment was an error in form, capable of correction, and which ought not to operate to the prejudice of the surrenderee.

Whatever might have been adjudged to be the effect of the want of presentment, or of an ill presentment of the surrender, with reference to the question of title, when such surrender was taken by the lord or steward, or when the terms of the surrender were known to the lord or his steward before he admitted the surrenderee, it is clear that the presentment and proclamation on death are not merely for the information of the lord, but also to give notice to those who have a right to be admitted, that the tenancy has become vacant (*x*).

If a copyholder contract to surrender his copyhold land, and should afterwards surrender by the hands of two tenants, pursuant to a custom of that nature, it would be a good performance of the con-

(*t*) 4 Co. 25 a.

(*u*) See East & Harding, Cro. Eliz. 499.

(*x*) Doe *d.* Whitbread *v.* Jenney, 5 East, 522, 532.

tract (*y*). But it was decided in the case of *Shann & Shann* (*z*), that a surrender into the hands of a tenant of the manor pursuant to a custom, did not satisfy a contract to surrender, so as to ground an action for recovery of the consideration money, the court holding that the surrender was not effectual until presented at the court.

When the surrender was to the lord's own use, the copyhold interest vested in him without presentment, although he was tenant for life only (*a*); but it is to be recollected that this operated as a relinquishment of the copyhold, and that any other assurance would equally answer the purpose.

Wherever a court of equity would supply the want of a surrender, it would of course have relieved against an ill presentment, or the want of a timely presentment of the surrender (*b*).

When the custom of the manor was general, that *all* surrenders were void if not presented within a definite period, it is probable that a surrender taken by the lord or steward, and omitted to be presented within the period prescribed by the custom, would have been deemed void at law, equally with a surrender taken by tenants or the bailiff or reeve of the manor, and left in their or his hands (*c*); and that it would not have been saved by the lord's neglect to convene a court, as the surrenderor might have procured a court to be held (*d*). But when no such special custom prevailed, it is supposed that the presentment of a surrender at the succeeding court, when taken by the

(*y*) Page & Smith, Holt, 161; 3 Salk. 100; Hard. 293; Beany *v.* Turner, 1 Lev. 293; S. C. 1 Mod. 62; S. C. 2 Keb. 666.

(*z*) Sty. 256; and see Shann *v.* Bilby, ib. 280. In the case of Vaughan & Atkins, 5 Burr. 2785, Lord Mansfield said, "the surrender is a complete execution of the contract as between the vendor and vendee;" and see Page & Smith, Beany & Turner, sup.

(*a*) See St. Paul *v.* Viscount Dudley and Ward, 15 Ves. 167, ante, pp. 35, 36.

(*b*) Portman *v.* Seymour, 9 Mod. 280; ante, p. 222; Jennings *v.* Moore and others, 2 Vern. 609; Blenkarne & Jennens, 2 Bro. Par. Ca. 278; Burton *v.* Lloyd or Floyd, 6 Vin. Cop. (M. a.) pl. 20; 2 Bro. Par. Ca. 281; 3 P. W. 285, n. (a); Taylor *v.* Wheeler, 2 Vern. 564; S. C. 2 Salk. 449; 2 Ves. 633; 10 Mod. 492; Martin *v.* Seamore, 1 Ch. Ca. 170; ante, pp. 208, 216, 222, et seq.

Vide also Co. Cop. s. 40, Tr. 89, where Lord Coke says, "If those into whose hands the surrender is made die before presentment, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly, and if the *steward*, the bailiff, or the tenants, into whose hands the surrender is made, refuse to present, upon a petition or bill exhibited in the lord's court, the party grieved shall find remedy. But if the lord will not do him right, he may both sue the lord and show that he took the surrender in the Chancery, and shall there find relief."

(*c*) Co. Cop. s. 38, Tr. 85, 86; Burton *v.* Lloyd, 3 P. W. 285, n. (a). By the custom of the manors of Stepney and Hackney, all surrenders taken out of court by the steward or his deputy were void, if not *published* and *notified* to the homage at the next general court.

(*d*) Smith *v.* Paynton, Cart. 73, 75, 86; and see Cro. Jac. 403, in Forsel & Welsh

lord himself, was not essential to its validity, as the surrender was then in the lord's custody (*e*), and formed part of the muniments of the manor (*f*). As the steward was made responsible for the proper entry of the surrender on the court-rolls, it was the practice, when the surrender was taken by him, to leave it, or a duplicate of it, in his hands. And when only one part was made, it was generally delivered over to the surrenderee upon his admittance, after having been presented in court and enrolled.

Should a court have been attended by two copyholders only (*g*), one of whom had previously surrendered all or part of his copyholds to the use of a purchaser or mortgagee (who wished to be admitted,) such surrender having been taken by tenants or the bailiff or reeve of the manor, pursuant to an established custom, and therefore, without doubt, requiring to be presented, a question would have arisen whether the presentment of the surrender by such two homagers would have been good: there is not, the author believes, any authority on this point, but the better opinion of the profession would seem to have been, that a copyholder was not precluded from acting as a homager in giving effect to a transfer of his own estate.

It may be useful to mention in conclusion of the present chapter, that in order to postpone a party who obtains the legal customary interest in copyholds, it must be shown that he had notice of the intermediate incumbrance (*h*); or there must be either fraud, concealment, or such gross negligence as may be presumed to have originated in a fraudulent intention (*i*); and that the mere circumstance of his not obtaining possession of the title deeds is not sufficient (*k*); but nevertheless that a court of equity will not assist a first mortgagee in obtaining possession of title deeds from a second mortgagee, unless he will pay him his money (*l*).

(*e*) Vide per Mr. Baron Carter in Chance *v.* Dod, at Thetford Assizes, 2 Barn. Rep. 406; 12 Vin. 214; but see Co. Cop. s. 38, Tr. 85, 86; ante, p. 225.

(*f*) Sed que. as to a surrender taken by the steward; see 2 Ves. 302, 596, 602.

(*g*) Ante, p. 5.

(*h*) Greswold *v.* Marsham, 2 Ch. Ca. 170; Mocatta *v.* Murgatroyd, 1 P. W. 394; Toulmin *v.* Steere, 3 Meriv. 224; Peter *v.* Russell, 2 Vern. 726; S. C. 1 Eq. Ca. Abr. 321.

(*i*) Tourle *v.* Rand, 2 Bro. C. C. 650; and ib n. (1) and (2); Plumb *v* Fuitt, 2 Anst. 436, 437; Evans *v.* Bicknell, 6 Ves. 174; 2 Sim. 77, in Horlock *&* Priestley.

(*k*) Tourle *v.* Rand, sup.; n. (5) to Beckett *v.* Cordley, 1 Bro. C. C. 357. These cases show that Mr. J. Buller's position in Goodtitle *&* Morgan, 1 T. R. 762, is wrong.

(*l*) Head *v.* Egerton, 3 P. W. 280; Kensington, ex parte, 2 Ves. & Beam. 83.

CHAPTER V.

Of Devise (*a*).

A WILL of copyholds was only in the nature of an appointment or declaration of the uses, pursuant to the power created by the surrender (*b*), and was as inoperative as a substantive conveyance of copyhold property, as a will defectively executed was for the conveyance of freehold property (*c*): it followed, therefore, that a will of copyholds did not require attestation pursuant to the fifth section of the statute of frauds (*d*), which was confined to such estates as passed by the statute of wills (*e*); but if a copyholder, by his surrender to will, imposed upon himself any certain mode of attestation, the copyholds would not have passed unless the formalities required had been

(*a*) Vide 1 Vict. c. 26, "For the Amendment of the Laws with respect to Wills," in the Appendix (ss. 3, 4, 5, 9 and 26); but note, the act does not extend to any will made before 1st January, 1838, although the testator died subsequently to the passing of the act.

Note also, that sect. 7 enacts, that no will by a person under the age of twenty-one shall be valid; and sect. 8, that no will of a married woman shall be valid, except such as might have been made before the act passed.

(*b*) Ante, p. 211; but see the above act of 1 Vict.

(*c*) Brodie *v.* Barry, 2 Ves. & Beam. 133, in which case the Master of the Rolls drew an analogy between a devise of copyholds in England, and a will of land in Scotland; observing, that a will of copyholds operated as a declaration of the uses of the surrender, and that if in Scotland there be a conveyance previously executed according to the proper feudal forms, the party might by will declare the use and trust to which it should enure.

(*d*) 29 Car. 2, c. 3.

(*e*) 34 & 35 Hen. 8, c. 5; 3 Lev. 79; 2 Keb. 128; Semaine *v.* ———, 1 Bulst. 200; Att. Gen. *v.* Barnes et ux., 2 Vern. 598; Tuffnell *v.* Page, 2 Atk. 37; S. C. Barn. 9; Att. Gen. *v.* Sawtell, 2 Atk. 497; Att. Gen. *v.* Andrews, 1 Ves. 225; Wagstaff *v.* Wagstaff, 2 P. W. 258; Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 77; Roe *d.* Gilman *v.* Heyhoe, 2 Sir W. Bl. 1114; Carey *v.* Askew, 2 Bro. C. C. 58, Belt's ed.; S. C. 1 Cox, Ch. Ca. 241; Habergham *v.* Vincent, 2 Ves. jun. 229; S. C. 4 Bro. C. C. 353; Harg. & But. Co. Lit. 111 b, N. (1) and (3); 2 Wils. 16; Doe *d.* Cook *v.* Danvers, 7 East, 322; 2 Esp. N. P. 467; Appleyard *v.* Wood, Sel. Ca. temp. King, 42. N.B. By the second sect. of the above act of 1 Vict. c. 26, the statutes of wills, and so much of the statute of frauds as relates to devises of land, are repealed; and by the third section customary freeholds and copyholds, including estates pur autre vie, are made devisable; the fourth section regulates the fines and fees to be paid by devisees; the fifth section directs that an extract of the will shall be entered on the court rolls; and by the ninth section every will must be in writing, and signed by the testator in the presence of two witnesses at one time, and be attested by them in the testator's presence.

complied with in the execution of the will (*f*): yet, under particular circumstances, a court of equity would have aided a defective execution of the power, as in freehold cases (*g*); and in favour of particular objects, would have given effect to a devise of copyholds by a feme covert, in nature of an appointment, pursuant to a contract before marriage (*h*).

Where a copyholder had made his will, which was attested by three witnesses, and afterwards caused such will to be altered, by striking out several devises, and a memorandum to be written that he had examined, perused and approved of the will so altered, but did not republish it in the presence of three witnesses, but directed it to be written out fairly, and became delirious before it was returned, it was held to be a good will, and a surrender was decreed accordingly (*i*).

In *Roe* d. *Gilman* v. *Heyhoe* (*k*), a will in the testator's own handwriting, without seal or witnesses, was adjudged to be sufficient to pass a copyhold estate previously surrendered to the uses of his will.

And in *Carey* v. *Askew* (*l*), the Master of the Rolls said, it had been held that any will received by the ecclesiastical court was sufficient to govern the surrender of a copyhold; and therefore he adjudged that the copyholds passed by the will, which was only a fair copy of a draft prepared by the attorney, and altered by him pursuant to the testator's directions, and not even seen by the testator.

In *Noel* v. *Hoy* (*m*), a devise of all the testator's property to his wife by a will without date, signature or witnesses, but which had been proved in the ecclesiastical court, was held to pass a copyhold estate belonging to the testator, and which he had surrendered to the use of his will.

And as a will unattested was sufficient to pass copyholds, so if a charge upon freehold and copyhold land by will had been revoked by a codicil not properly attested to pass freeholds, the charge would have been revoked as far as concerned the copyhold land, though it would have remained a subsisting charge upon the freeholds (*n*).

(*f*) Godwin v. Kilsha, Amb. 684; and see 2 Ves. jun. 216. Note, the tenth section of the act of 1 Vict. (c. 26), provides, that no appointment by will in exercise of any power shall be valid, unless the same be executed as thereinbefore required; and that every will so executed shall, as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding the imposition of some additional or other form of execution or solemnity.

(*g*) Tollet v. Tollet, 2 P. W. 489; Cotter v. Layer, ib. 623; Mountague & Bath, Sel. Ca. Ch. 55; 2 Ch. Rep. 417; Hervey v. Hervey, 1 Atk. 563.

(*h*) Rippon v. Dawding, Amb. 565, 2d ed.; ante, p. 132.

(*i*) Burkitt v. Burkitt, 2 Vern. 498.

(*k*) 2 Sir W. Bl. 1114.

(*l*) 2 Bro. C. C. 59.

(*m*) 5 Mad. 38; and see Jervoise v. Duke of Northumberland, 1 Jac. & Walk. 570; 1 Russ. 482, in Henderson v. Farbridge.

(*n*) Mortimer v. West, 2 Sim. 274.

An instrument in any form, whether deed-poll or indenture, if the obvious purpose was not to take place till after the death of the person making it, operated as a sufficient declaration of the uses of a surrender to will, even if it had been wholly confined to copyholds, and not therefore within the cognizance of the ecclesiastical courts (*o*)

In *Habergham* v. *Vincent* (*p*), freehold and copyhold estates were devised to trustees, upon trust to convey to certain uses, remainder to such uses as the testator should by any deed or instrument in writing, executed by him and attested by two or more credible witnesses, direct or appoint; and, by an instrument on the following day under his hand and seal, attested by two witnesses, stamped, and concluding like a deed, he exercised the power in the following manner: "*Now know ye*, that by this my *deed-poll* I do direct and appoint, &c.;" and this instrument was proved as a will. Buller, J. (who with Mr. Justice Wilson assisted the Chancellor at his request), in considering whether the last instrument was testamentary or not, said that it did not affect the personal estate, and therefore the ecclesiastical court acted without jurisdiction; but he considered it as a future direction, and not a deed of appointment to take effect *instanter*, in which case it would have been void; and the Chancellor decided that the second instrument was a testamentary paper, and a good disposition of the copyhold.

It was not essential that the will should have referred to the surrender (*q*); indeed it should seem that as copyholds were not within the statutes of wills, a will by parol only would have been sufficient to pass them (*r*); and that for the same reason, a will of copyholds might have been revoked by parol (*s*), as a will of freeholds might have been previous to the statute of frauds (*t*).

Mr. Watkins says (*u*), "A will by *parol* was good as to lands *devisable* by custom before the statute of frauds (Co. Litt. 111 a), and in the old writ of *ex gravi querela* the custom was alleged generally to devise by last will. It does not seem probable that a will in writing

By the same rule a will sufficient to pass copyhold and personal estate, but not executed according to the statute of frauds, would not have been a good revocation of a former will, as far as related to any freehold estate. See Hyde *v.* Hyde, 3 Ch. Rep. 155; Limbery *v.* Mason & Hyde, 2 Comy. 451; Grantley *v.* Garthwaite, 2 Russ. 90; 1 P. W. 344, 345, n.; and see 1 Vict. c. 26, s. 20, in the Appendix.

(*o*) Doe & Smith, Peake's Ev. 458.

(*p*) Ubi sup.; and see Greene *v.* Proude, 1 Mod. 117.

(*q*) Manwood's case, Cary, 36.

(*r*) But now see sect. 9 of the above mentioned act of 1 Vict. c. 26.

(*s*) 3 Barn. & Ald. 468, in Vawser *v.* Jeffery. But this is altered by 1 Vict. c. 26, s. 20.

(*t*) 1 Roll. Abr. 614 (O.), pl. 1, 4; Ford's case, 1 Sid. 73; Burton *v.* Gowell, Cro. Eliz. 306; Brooks *v.* Ward, Dy. 310 b; Coke *v.* Bullock, Cro. Jac. 49.

(*u*) 1 Cop. 130, but he makes a query, whether the 19th sect. of the 29th Car. 2, c. 3, relative to nuncupative wills, did not extend to copyholds, it being general. And see 1 Pow. on Dev. 62, n. 4, 6th ed.

should be required of a burgess or villein, who were not permitted even to have their children taught to read without a licence from the lord (Paroch. Antiq. 401), till they were enabled by statute (7 H. IV. c. 17, A. D. 1405.")

And it is clear that by special custom a will of copyholds, even by parol (*x*), was good, without any surrender, and without the aid of the statute of 55 Geo. III. c. 192 (*y*).

Copyholds did not pass by a general devise of all *real estates*, unless there were other words or circumstances in the will showing an *evident*, or creating a *constructive*, intention on the part of the testator to include them in the devise (*z*).

This, the author submits, was deducible not only from the cases cited, and others to which he is about to refer the reader, but also from the settled principle that a court would not raise the presumption of an intention to include copyholds under a general devise for payment of debts, where there were freeholds, unless the copyholds had been surrendered to will, or the freeholds were insufficient.

In *Chapman* v. *Hart* (*a*), Lord Hardwicke, Chancellor, said, "Suppose a case (which though I do not know to be determined, I should not doubt to determine so) of a person seised of freehold and copyhold in *D.*, who surrenders to the use of his will, and devises all his lands and tenements in *D.* to a child, there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds; but if no surrender to the use of the will, only the freehold would pass, to which *lands* and *tenements* generally mentioned shall be applied, there being no surrender to the use of the will to show a different intent. Suppose that will executed in the presence of two witnesses, or of one only, those general words used, and no surrender, though this were to a child or wife, the court would not supply the defect of surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will not duly executed, when if duly executed, the court would not have supplied that defect; for such variation of the construction would be very dangerous, and might make terms and perhaps terms attendant on the inheritance to pass."

(*x*) Devenish *v.* Baines, 2 Eq. Ca. Abr. 43; Pre. Ch. 3.

(*y*) Note, this statute was repealed by the above act of 1 Vict. c. 26, ante, p. 211, n.

(*z*) Goodwyn *v.* Goodwyn, 1 Ves. 226; Harwood & Child's case, Ca. Temp. Talb. 179; Milbourn *v.* Milbourn, 2 Bro. C. C. 64; S. C. 1 Cox, Ch. Ca. 247; and see Watkins *v.* Lea, 6 Ves. 640. But this also is altered by the 26th section of the above mentioned statute of 1 Vict. c. 26, which expressly provides that a general devise shall be held to include customary, copyhold and leasehold estates.

(*a*) 1 Ves. 273.

The case of *Byas* v. *Byas* (*b*) is also important on the present point. In that case *A.* seised of freehold and also of copyhold (of the nature of Borough English, descendible not only to the younger son, but to the younger daughter), the copyhold not having been surrendered to will, in the introductory part of his will desired that his debts should be paid, and then made a provision for his wife and daughters; and gave all the rest and residue of his estate, *real* and personal of what nature soever the same might consist at the time of his death, to his wife, her heirs, executors, &c. For the plaintiff, the wife, it was insisted that the words made use of by the testator would take in all sorts of estates he might be seised of at his death, and that the court would supply the want of surrender. For the defendant, the youngest daughter, it was urged that, supposing the court would supply the want of surrender for the wife, yet on the face of the will an intent should appear that the copyhold should pass; but that there was no mention of it, nor any thing to induce the court to think that the testator intended it for her. The Master of the Rolls (Sir John Strange) said that there was no case where there was freehold as well as copyhold, and no notice taken of the copyhold in the will, that the court had supplied the want of surrender: that if the testator had none but copyhold, "*all my real estate*" would have been sufficient to pass the copyhold, though no surrender had been made to the use of the will: but that the general heir at law, or heir by particular custom, had been always so favoured as not to be disinherited by implication or inference from the particular wording of the will. And he referred to the case of *Bethlehem Hospital*, 10 June, 1735, that "*all my lands*" would not pass copyhold lands not surrendered, if there were other lands to satisfy those words, unless the intent were explained by a surrender to will (*c*), or the mention of copyholds.

And although in *Church* v. *Mundy* (*d*), under a general devise of all the testator's worldly estate and effects, whether real or personal, a bill to supply the want of a surrender of a reversionary copyhold interest in favour of a wife was dismissed with costs by the Master of the Rolls, who expressed an opinion that the general words of the devise could not be held to pass the reversionary interest, whether there was or was not any freehold estate to which they could apply; yet, on an appeal from that decree, the Lord Chancellor held, that if the testator had no *freehold* property, the words "real estate" were capable of application to the reversion of the copyhold; and observing that *Chapman* & *Hart*, decided by Lord Hardwicke, was an authority of great weight, he directed a reference to the master to ascer-

(*b*) 2 Ves. 164, 165.
(*c*) See 1 Ves. 227.
(*d*) 12 Ves. 426.

tain whether the testator had any and what freehold estates at the time of making his will (*d*).

It was decreed by the Master of the Rolls in *Judd* v. *Pratt* (*e*), that general words, as "all the residue of my real estate," would not pass unsurrendered copyholds there being freeholds, unless an intention to include the copyholds appeared by other circumstances in the will; and that decree was affirmed on appeal to the Chancellor (*f*), who gave his sanction to the authority of *Byas & Byas*, and *Lindopp & Eborall*.

The same rule governed the decision in *Sampson* v. *Sampson* (*g*), though it was contended that as the will had no operation on the freehold estate, there being but two witnesses, the copyhold should pass *ut res magis valeat*.

In *Ithell* v. *Beane* (*h*), Lord Hardwicke supplied the want of a surrender under a general devise in favour of creditors, there being no freehold lands; yet he thought it should be otherwise if there had been freehold property; this distinction in the case of creditors was however overruled by several subsequent authorities. *Drake* v. *Robinson* (*i*) was a devise of all real estates to trustees for the payment of debts, the testator having both freeholds and copyholds, the latter unsurrendered; and it was adjudged that if there was not sufficient to pay the creditors without the copyholds, those ought to pass.

The same principle prevailed in *Challis* v. *Casborn* (*k*), and *Kidney* v. *Coussmaker* (*l*), and also in *Holmes* v. *Coghill* (*m*); and in the above case of *Judd & Pratt* (*n*), the Lord Chancellor thus distin-

(*d*) 15 Ves. 396; and see Bullock *v.* Bullock, 6 Vin. Cop. (M. a.), pl. 19; Smith *v.* Baker, 1 Atk. 385, 386; Tudor *&* Anson, 2 Ves. 582; Lindopp *v.* Eborall, 3 Bro. C. C. 188; Pennington *v.* Pennington, 1 Ves. & Beam. 406; Wentworth *v.* Cox, 6 Madd. 363; Jones *v.* Tucker, 2 Meriv. 537.

(*e*) 13 Ves. 173.

(*f*) See 15 Ves. 390.

(*g*) 2 Ves. & Beam. 339; see also Brooke *v.* Gurney, cited 5 Ves. 559, in Hills *&* Downton.

(*h*) 1 Ves. 215; S. C. 1 Dick. 132.

(*i*) 1 P. W. 442.

(*k*) Gilb. Eq. Rep. 96; S. C. Pre. Ch. 407.

(*l*) 12 Ves. 136, 158, 159. It was held in this case that the court would not only supply the want of a surrender, but direct an account of rents and profits; and that laches were not to be imputed to creditors under a devise for payment of debts, as to a specific devisee, to prevent or limit such account even against an infant heir.

(*m*) 12 Ves. 216.

(*n*) See 15 Ves. 394; vide also Growcock *v.* Smith, 2 Cox, Ch. Ca. 397; Harris *v.* Ingledew, 3 P. W. 96; Haslewood *v.* Pope, ib. 322; Mallabar *v.* Mallabar, Ca. Temp. Talb. 78; Hellier *v.* Tarrant, ib. 3d ed., 288, n., and the cases there cited of Welch *v* Cook (1745 or 1746), and Backbridge *v.* Slater, at the Rolls, 1766; Supp. Vin. Abr. Cop. (M. a), s. 1, pl. 6; ib. s. 3, pl. 3; Tudor *v.* Anson, 2 Ves. 582; Coombes *v.* Gibson, 1 Bro.

guished between the presumption raised in favour of creditors and a wife or children, namely, that where the parent, intending to make a provision for his child, appropriated a freehold estate, the extent of the provision being undefined, there was no reason for increasing it by the addition of a copyhold estate; but that where the testator showed an intention that his debts should be paid (*o*), the amount of the debts must govern the construction of intention, and therefore if the freehold estate was not sufficient, the court drew the inference that the testator meant to provide a sufficient fund, and would decree the copyholds to be charged in aid.

An intention to include copyholds in a general devise of real estates would have been implied, not only from the circumstance of the testator's not being seised of freehold property, but also from his having surrendered his copyholds to the use of his will, even if he had been entitled to freehold estates (*p*); and likewise from merely stating in his will that the copyholds had been surrendered by him to the uses thereof, *Banks & Denshaw* (*q*).

This last case was distinguished by Lord Hardwicke from the case of *Barker* v. *Barker* (the King's Head Inn, Turnham Green) (*r*), which house was copyhold, three parts of it being in one manor, and the other fourth part in another manor, and the testator devised all his copyhold estate *which* he had surrendered to the use of his will, having surrendered the three parts only, and the court would not supply a surrender as to the one-fourth part lying in a different manor: it was,

C. C. 273; Kentish *v.* Kentish, 3 ib. 257; Pennington *v.* Pennington, 1 Ves. & Beam. 408, 409.

In the above case of Coombes & Gibson, a general charge of debts was held to extend to *unsurrendered* copyhold as well as to freehold lands: but Ashhurst, J., said, that if the freehold had been devised to one person, and the copyhold to another, the freehold might have been first applied.

If, however, the real estates were charged generally, and the testator had surrendered the copyhold parts to the uses of his will, the amount of the debts must have been raised out of the freehold and copyhold *rateably* according to their value; Growcock *v.* Smith, sup.; see also 3 P.W. 98.

Real estates are sometimes made to bear the burthen of *mortgages* and *legacies* in exoneration of personalty; Lawson *v.* Hudson, 1 Bro. C. C. 57, Belt's ed.

(*o*) This intention was inferred from the prefatory words, "I direct that all my just debts shall be first paid and satisfied;" Godolphin *v.* Penneck, 2 Ves. 271; Ellison *v.* Airey, ib. 568; Tudor *v.* Anson, 2 Ves. 582.

(*p*) Chapman & Hart, ubi sup.; Tendril *v.* Smith, 2 Atk. 85; Goodwyn *v.* Goodwyn, 1 Ves. 227; Andrews & Waller, Bullock & Bullock, Byas & Byas, Hawkins & Leigh, Wentworth & Cox, ubi sup.; Haslewood *v.* Pope, 3 P. W. 322; Noel *v.* Hoy, 5 Madd. 38; and see Hope *v.* Taylor, 1 Burr. 268.

(*q*) 3 Atk. 585; S. C. (Banks & Denshire), 1 Ves. 63.

(*r*) 1 Ves. 63, 121; and see Gascoigne and others *v.* Barker, 3 Atk. 8.

however, the relative pronoun "*which*" that alone induced the restrictive construction in the latter case (*s*).

But the frequent addition in a will of the words "*the copyhold part thereof having been previously surrendered to the use of my will*" (*t*), or "*having surrendered the copyhold part thereof to the use of this my will*" (*u*), has been considered in a devise of freeholds and copyholds by general words as a mistaken description, where no such surrender had in point of fact been made; yet in *Wilson* v. *Mount* (*x*), where the testator having surrendered part only of his copyholds to the use of his will, devised all his freehold and copyhold estates to trustees in trust to sell, and used these words, ("*the copyhold part whereof I have surrendered to the use of my will*);" the Master of the Rolls thought that he meant only to devise such copyholds as were surrendered, and that the clause in the parenthesis was (in favour of the heir) to be taken as restrictive.

In the case of *Strutt* v. *Finch* (*y*), *W. W.* empowered the three trustees to whom he had devised his freehold property, to sell all and every his copyhold or customary messuage, &c., (adding "*and which I have surrendered to the use of this my will*") to any person, &c., and to cause and procure the purchaser or purchasers to be admitted thereto under or by virtue of his will, "or the surrender to the use thereof as aforesaid." The testator died in 1811 seised of freehold estates and of two copyhold estates, one held of the manor of Muckinghall in Essex, and the other of the manor of South Church, in the same county, and the former *only* had been surrendered by him to the use of his will: and the Vice Chancellor held that the words "and which I have surrendered to the use of this my will" were intended as an affirmation of a fact, in which he appeared to have been mistaken, and were not exceptive, and that the copulative "and" distinguished the principal case from that of *Wilson* & *Mount*.

And in the case of *Oxenforth* v. *Cawkwell* (*z*), where a testator seised of copyhold estates, having surrendered part thereof only to the use of his will, devised all his freehold, copyhold and leasehold messuages, lands, tenements and hereditaments whatsoever and wheresoever situate, not thereinbefore given, devised or bequeathed, "*the copyhold parts thereof having been duly surrendered to the uses of this my will*," unto his nephews *W. C.* and *E. O.* their heirs, &c., in equal shares; and the question was whether the unsurrendered copyholds passed: the Vice Chancellor considered the above words

(*s*) 1 Ves. 64; ib. 121, 122.

(*t*) Rumbold *v.* Rumbold, 3 Ves. 65; Oxenforth *v.* Cawkwell, post.

(*u*) Banks *v.* Denshaw, sup.

(*x*) 3 Ves. 191; vide also Gascoigne & Barker, sup.

(*y*) 2 Sim. & Stu. 229.

(*z*) Ib. 558.

in italics as simply affirming that the testator had surrendered to the use of his will all his copyhold lands, &c., not thereinbefore devised, observing, " and because he happened to be in one particular mistaken in the fact affirmed by him, I cannot therefore assume that he had an intention which is neither warranted by the particular expression relied upon, nor reconcilable to the other parts of the will. I agree that there is a great resemblance between this case and the case of *Wilson* v. *Mount;* but there is a difference in the language, and the expression here used is less susceptible of a restrictive sense. Lord Alvanley had great difficulty in coming to his conclusion in *Wilson & Mount,* but considered himself as yielding to authority, and has not given universal satisfaction."

And a general devise of all freehold and *copyhold* lands created a presumption of an intention to pass copyholds not surrendered to the uses of the will, although the testator should have been possessed of other copyholds which he had so surrendered (*a*).

The rule which called for a clear manifestation of intention, in order that copyholds should pass by a general residuary devise of real property, received no inconsiderable sanction from the circumstance of copyholds not being within the statutes of wills, and therefore, strictly speaking, not being in their nature of a testamentary disposition.

And so long ago as the 7 Car. I. in the case of *Rose & Bartlett* (*b*), it was established as a rule of construction, that if a man had lands in fee-simple, and lands for a term of years, and devised all his *lands* and *tenements,* the fee-simple lands *only* would pass, but that by such a devise a term would pass if the testator had no lands in fee; which distinction showed that unless there were special circumstances clearly indicating a contrary intention, a general gift of land by will *primâ facie* passed such estate only as the nature of the instrument was calculated to pass (*c*), namely, land of freehold tenure.

(*a*) Blunt v. Clitherow, 10 Ves. 589; Andrews v. Waller, ubi sup.

(*b*) Cro. Car. 293; see also Knotsford v. Gardiner, 2 Atk. 450; Pistol v. Riccardson, B. R. Hil. 1784, cited 2 P. W. 459, n.; 6 T. R. 350; Lane v. Earl Stanhope, 6 T. R. 345; Thompson v. Lawley, 2 Bos. & Pul. 303; Dixon v. Dawson, (Slawin v. Farside), 2 Sim. & Stu. 337; but see Addis v. Clement, 2 P. W. 459.

The rule in Rose & Bartlett, excluding leaseholds where there were freeholds, did not apply to leases for lives, except, perhaps, where the limitations were of a nature to raise a presumption of an intention to confine the devise to freeholds of inheritance; Sheffield v. Lord Mulgrave, 5 T. R. 571; 2 Ves. jun. 526; 2 Pow. on Dev. 138, 3d ed. See also Fitzroy v. Howard, 3 Russ. 225; Weigall v Brome, 6 Sim. 109. And leasehold property will pass under the description of "*real estate,*" where the intention is clear; Goodman v. Edwards, 2 Myl. & Keen, 759; and now see 1 Vict. c. 26, s. 26, ante, p. 236, n. (*z*).

(*c*) See per Lord C. Talbot, in Haslewood & Pope; per M. R. in Milbourne & Milbourne; and per V. C. in Wentworth & Cox; post, p. 243.

But according to a decision in the Court of Common Pleas (*d*), a general testamentary disposition of real estates after the lately repealed act of 55 Geo. III. (*e*), which superseded in a great measure the practice of surrendering copyholds to the use of a will, by declaring that a testamentary disposition of copyhold property, although no such surrender had been made, should be as valid as the same would have been if a surrender to will had been made, ought to receive the same construction as if the testator (being possessed of both freehold and copyhold lands), had surrendered the copyholds to the use of his will (*f*).

It was difficult, however, to imagine how the powers of the act of 55 Geo. III. could have been deemed to have affected the long established rule of construction, which required some clear demonstration of intention, in order that copyholds should pass by a general devise of real estates, where the testator had freehold property, especially as the author apprehends that, even after the above mentioned act, a devisee of copyholds must have been held to have taken by way of appointment under a surrender supplied by the statute, and not by way of devise (*g*): and if so, the argument that after the act of 55 Geo. III. copyholds would have passed by a general devise, even when the testator was seised of freehold property, was also opposed by the rule that where a person having an interest in particular lands, and a power over other lands of freehold tenure, made a general devise of all his lands, the devise would have passed his interest, but would not have been an execution of the power (*h*).

And although greatly mistrusting his own judgment whenever it is opposed to a judicial decision, the author must confess his inability also to reconcile the case of *Doe* & *Ludlam* with the *dicta* to which he is now about to refer.

(*d*) Doe *d.* Clark *v.* Ludlam, 7 Bing. 282; S. C. 5 Mo. & Pa. 46. The decision in Doe *v.* Ludlam was confirmed by the V. C. in Weigall *v.* Brome, 6 Sim. 109; and see Doe & Bird, 5 Barn. & Adol. 695; S. C. 2 Nev. & Man. 679; Doe *d.* Edmunds *v.* Llewellin, 2 Cr. Mee. & Ros. 503; but in the last case the will did not contain a specific devise of the testator's freehold property, and was attested by two witnesses only.

(*e*) C. 192; ante, p. 211.

(*f*) And see 2 Pow. on Dev. 122, 3d ed.; but see Rob. on Wills, 393.

(*g*) In the consideration of this question, it is not to be overlooked that the act of 55 Geo. 3, contained a provision that no person should be entitled to admission under a testamentary disposition, except on payment of such sums of money as would have been payable in respect of the surrender to will, and the enrolment thereof, had the testator made a surrender to the uses of his will.

(*h*) See post, p. 251. Note, this is altered by the 27 sect. of 1 Vict. c. 26, which enacts that a general devise of real estates shall operate as an execution of any power of appointment of the testator over estates to which the description may extend, unless a contrary intention shall appear by the will.

In the case of *Haslewood* v. *Pope* (*i*), Lord Chancellor Talbot said, "If a man devises all his lands, tenements and hereditaments in Dale, in trust to pay his debts and legacies, and the testator has some freehold and some copyhold lands there, only the freehold lands shall pass; for his will must be intended of such lands and tenements *as are devisable in their nature.*"

The Master of the Rolls in *Milbourne* v. *Milbourne* (*k*), in noticing the then settled rule that where there were freehold lands to satisfy the words of the will, the copyhold would not pass, observed, "To the same effect is *Haslewood* v. *Pope*, (3 Wms. 322,) *copyholds not being in their nature objects of testamentary disposition*, shall not be supposed within the intention of the testator, unless he has shown such intention by surrendering them to the use of his will, or in case the words of the will cannot be satisfied otherwise."

Lord Erskine, C., in *Holmes & Coghill* (*l*), establishing that although equity will in certain cases aid a defective execution of a power, yet that the want of execution cannot be supplied even for creditors, said, "This court supplies the surrender, but not the will for creditors. There must be the will: then the court informed of the intention by that will, completes it as in the other case, supplying the surrender."

In *Church* v. *Mundy* (*m*) the Master of the Rolls observed, "the surrender shows an intention to pass the estate; *but no inference can arise from doing nothing, where it is not necessary to do any thing. If there is no surrender, intention is out of the question.*"

Again, in *Wentworth* v. *Cox* (*n*) the Vice-Chancellor said, "A general gift of all my estate *primâ facie* passes such estate only *as the nature of the instrument is calculated to pass.*"

In the case of *White* v. *Vitty* (*o*), the testator, after devising a freehold house to his wife in fee, devised the residue of his *freehold* estates in four specified parishes, or elsewhere in the county of Cambridge, unto *R. V.* and *P. W.*, or the survivor of them, their heirs and assigns, upon trust that they or the survivor of them or his heirs, should within twelve calendar months after his decease (*p*) sell and dispose of all his *copyhold* estates in the several parishes aforesaid, and, after paying the expenses attending such sales, should pay the

(*i*) 3 P. W. 322; see also Harris *v.* Ingledew, ib. 96; Hawkins *v.* Leigh, 1 Atk. 388; Challis *v.* Casborn, Gilb. Eq. Rep. 96, 97.

(*k*) 1 Cox, Ch. Ca. 248.

(*l*) 12 Ves. 216.

(*m*) Ib. 430.

(*n*) 6 Madd. 364.

(*o*) 2 Russ. 484.

(*p*) In the argument it was stated that the following line was accidentally omitted in the will, immediately preceding the words "sell and dispose," viz. "sell and dispose of all the freehold estates so devised to them as aforesaid, and."

surplus monies to his executor, to be applied in discharge of certain legacies: and then the testator devised the residue of his real estate to *M. P. W.*, and died seised of *freehold* property not in the county of C., and of *copyhold* property *not* situate in the above four parishes; and he had surrendered all his copyhold estates to the use of his will.

The residuary devisee appealed against a decree made in the cause by the V. C., and upon the hearing of the appeal, Lord Eldon, C., after adverting to some of the questions which arose upon the construction of the will, and the difficulties in which they were involved, said that one of the questions was, "Whether the copyholds would pass under the residuary clause; and that would depend, in a great measure, on the effect of the cases in which copyholds had been held to pass under a general devise of real estate, taken in connexion with the 55 Geo. III. c. 192. This testator died after the passing of that act; and as the act makes a surrender unnecessary for a devise of copyholds, it may be a question *whether the surrender can now be considered as any evidence of an intention that copyholds should pass by the devise*, since, under a will containing sufficient words to pass them, they would pass equally (as the law now exists) whether they were or were not surrendered" (*q*).

This observation, it is to be recollected, was made by Lord Eldon, not with reference to the question whether a general residuary devise of real estates ought, after the act of parliament, to have been held to have passed unsurrendered copyholds, although the testator died seised of freeholds, but to express the doubt entertained by his lordship, whether, as that case arose subsequently to the act, the intention of the testator to include his copyholds in the general residuary devise, as well as his freeholds, could be inferred from the circumstance of his having surrendered *all* his copyholds to the uses of his will, whereas they would have passed by the will without any surrender, if it contained words sufficiently descriptive of copyhold property.

The case was again argued before Lord Chancellor Eldon, assisted by the chief justices of the Courts of King's Bench and Common Pleas, and the two chief justices expressed an opinion (*r*) that the beneficial interest in all the freeholds of the testator, whether in the county of Cambridge or elsewhere, passed to the residuary devisee; that the legacies were a charge only on the copyholds situate in the four parishes; that no estate in those copyholds passed to the trustees, *but only a power to sell;* that any surplus monies arising from sale, after satisfying the legacies, passed by the residuary clause; and that the copyholds *not* situate within the four parishes passed to the residuary

(*q*) 2 Russ. 488, 489. (*r*) 2 Russ. 490, 497; 4 ib. 585.

devisee. In delivering their opinions, each of the chief justices alluded particularly to the fact of a surrender having been made by the testator of *all* his copyholds to the uses of his will.

Best, C. J. (*s*) said, "Another point arises with respect to the testator's copyholds not situate in the four parishes, and which, therefore, connot, on any construction of the will, be considered as devised to the trustees. It is stated as a fact that these copyholds were surrendered to the use of the testator's will. *If they had not been surrendered, it would have been difficult probably, whatever might have been the intent of the testator, to have said that the words of the residuary clause were sufficient to pass them. But the circumstance of their being surrendered clearly shows an intent on the part of the testator that they should pass;* and it hardly requires authorities to show, that when we are to decide on the intention, the words here used will pass copyholds *which have been so surrendered.* For what purpose were they surrendered to the use of the will, unless the testator intended that they should pass by the will?"

No judgment was pronounced in this case by Lord Eldon during the time he held the great seal; but his lordship, after his resignation of it, transmitted to the parties a written judgment to the following effect:—That legal construction would not admit of considering the word *copyhold* as introduced by mistake instead of *freehold,* and therefore that the will must be construed as if the testator had directed the word *copyhold* to be inserted where it is found; that, in accordance with the opinions of the chief justices, the freehold estates (as to the beneficial interests) in the four parishes or elsewhere in Cambridgeshire passed to the residuary devisee; that any other freeholds, which the testator had not devised to *V.* and *W.*, would pass under the residuary devise, and concluding thus: "And *as I understand all the testator's copyhold estates were surrendered to the use of the will, whether in the four parishes or out of them,* I think that, as to the copyholds in the four parishes, the legacies must be paid out of the produce of them made by sale, if that produce is sufficient to pay them, and if there is a surplus, I think that surplus belongs to the residuary devisee. I also think that if that produce is insufficient to pay the legacies, there is no other fund created by this will out of which the deficiency can be paid. *I think the copyhold not in the four parishes goes under this will to the residuary devisee.*"

The case of *Cuthbert* v. *Lempriere* (*t*) might at first sight appear to be an authority that copyholds would have passed by a general devise of real estates even if the testator had been seised of freehold property, and although the will should not have taken notice of the

(*s*) 2 Russ. 493. (*t*) 3 Mau. & Selw. 158.

copyhold property, but an attentive perusal of that case will show that the testator's intention to include his copyhold at Crondall was clearly manifested. The testator had been admitted to several copyholds in Crondall, Hants, holden of the manor of Crondall, subject to certain quit rents, to the use of himself for life, and of such person as he should limit or appoint, and in default of appointment to the use of himself in fee; and he was seised of other real property in Great Britain and in Ireland, and possessed of an estate at Blansby held under two leases, and by his will devised his *whole real estate in lands* in Great Britain or Ireland to his wife for life, and after her decease to be divided between his two nephews and their respective issue, and failing such issue, then among the surviving younger children of his four nieces; and by a codicil revoked the latter clause of his will, and before that division should be made, he devised his *whole real estate* to his nephew John Lord Berkeley, and his heirs male, with remainders over; and also thereby devised his two leases, *with the quit rents of his lands in Crondall* and in Blansby to the said John Lord Berkeley, after his wife's decease. The Court of B. R., upon a case sent from the Court of Chancery, certified their opinion that John Lord Berkeley took an estate in fee simple in the copyholds at Crondall, under the codicil of the said testator.

It might have been a question whether, under a general devise of lands, copyholds of inheritance and leaseholds for years would have passed (*u*). The only case bearing on this point is, the author believes, *Roe* d. *Pye* v. *Bird* (*x*), where *J. G.*, who had been admitted in fee to copyhold lands in *B.*, and had surrendered the same to the use of his will, and who had a long term of years in other lands in *B.*, devised all his messuages, lands, tenements and hereditaments in *L. W.* and *B.* to his wife for life, and after her decease, "all that his *estate* in *B.* to his niece *M. B. and her heirs*," and bequeathed all his goods, &c., and all other his personal estate to his wife. The rule in *Rose* & *Bartlett* was urged as favourable to the claim of the wife; but De Grey, C. J., was of opinion that the true construction of the will was to give the leasehold to the niece, observing that the words of the will were "all his messuages, lands, tenements and hereditaments," and that by the strict rule of law, as the testator had no estates but copyhold and leasehold, none of them could pass by those words, but that by recurring to the intention of the testator, they were all capable of passing, if all were intended to pass, and that the same rule must apply to both. Blackstone, J., acceded, and observed that the words were sufficient to carry the premises, either as land or money,

(*u*) But now see 1 Vict. c. 26, s. 26, ante, p. 236, n. (*z*).

(*x*) 2 W. Bl. 1301.

according to the intent of the testator, "all my estate" being sufficient to comprise leasehold; that the testator certainly considered both the copyhold and leasehold at *B.* as one consolidated estate; that they had been occupied together (*y*) for at least twenty-three years; and that he purchased them together, and either meant both to go to his wife or neither, which latter would not be contended for.

It may be proper to mention that it was not decided whether, after the act of 55 Geo. III., a power of sale given by a copyholder to his executors or others was valid, although the testator had not made a surrender to the uses of his will, or, in other words, whether the act of parliament had supplied a surrender in favour of a power of sale; the words of the act having been, in effect, that where by the custom of any manor, any copyhold tenant might by will *dispose of* or *appoint* his copyhold tenements, the same having been surrendered to the uses of his will, every *disposition* or charge to be made by the will of any person dying after the passing of the act, of any copyholds, *or of any right, title or interest* in or to the same, should be as valid and effectual to all intents and purposes, although no such surrender to will had been made, as the same would have been if a surrender had been made (*z*). In order to obviate the doubt, it was the practice to obtain a release of right from the customary heir to the purchaser, after he had been admitted under a bargain and sale from the executor or other person to whom the power of sale was given (*a*).

In construing wills of copyhold lands, the courts are not governed by any express legal terms, any more than in a devise of freeholds; and copyholds will therefore pass by the words "all the residue of my property *and effects*," [or "property, *goods and chattels*"] (*b*); or

(*y*) See Lane *v.* Earl Stanhope, 6 T. R. 345; Doe *d.* Lucan, 9 East, 448; Hobson *v.* Blackburn, 1 Myl. & Keen, 571; Goodman *v.* Edwards, 2 Myl. & Keen, 759.

(*z*) Whether or not the act of parliament supplied a surrender so as to defeat a widow's customary freebench, see ante, p. 73, n. (*y*).

(*a*) Note.—As copyholds are made devisable by the third section of 1 Vict. c. 26, and as the 55 Geo. 3 was repealed by the 2d sect. of that act, the author apprehends that there is no longer any distinction between freeholds and copyholds as to the effect of a power of sale in a will, when copyholders adopt the testamentary power of disposition created by the act, but that they may surrender as heretofore to the uses of their wills (see ss. 3 and 4), and then the author conceives that a power of sale of copyholds may be given to executors or others, the exercise whereof by a bargain and sale, according to the practice prior to 55 Geo. 3 (and the partial practice even prior to the act of 1 Vict.), would operate as an appointment and declaration of uses, and enable a purchaser to claim admittance under it.

(*b*) Doe *d.* Andrew *&* others *v.* Lainchbury *&* others, 11 East, 290; Doe *d.* Wall *v.* Langlands, 14 East, 370; Patton *v.* Randall, 1 Jac. & Walk. 189; Doe *&* Morgan, 6 Barn. & Cress. 512; Edwards *v.* Barnes, 2 Bing. N. C. 252; Doe *d.* Pole *v.* Watson, 6 Car. & Pa. 301. Contra,

the words " all the property of whatever description or sort that I may die possessed of (*c*);" or under the description of " personal estate [or property] (*d*)," where there is a manifest intention on the face of the will to devise real estates. And the words " real property," or the word " estate" or " estates," will pass all the interest of the testator, as well as the land (*e*). And a devise of " the whole remainder

if the word " property" be followed up by an enumeration of articles of personalty; Roe & Yeud, 2 N. R. 214; and see Doe & Rout, 7 Taunt. 79. The words "goods, chattels, estate and effects," were held to pass the fee to executors upon trust to sell, in King *v.* Shrives, 5 Sim. 461; 10 Bing. 238; but the context influenced the construction.

It has been decided that copyholds will pass by the words " all that my copyhold ground rent;" Walker *v.* Shore, 19 Ves. 391. As to the construction of the words " ground rent" in printed particulars of sale, see Stewart *v.* Alliston, 1 Meriv. 26.

(*c*) Noel *v.* Hoy, 5 Mad. 38.

(*d*) Doe *d.* Tofield *v.* Tofield, 11 East, 246.

(*e*) Nicholls *v.* Butcher, 18 Ves. 193; Jongsma *v.* Jongsma, 1 Cox, Ch. Ca. 362; Carter *v.* Horner, 4 Mod. 89; S. C. 1 Show. 348; Scott *v.* Alberry, 1 Comy. 337; Wilson *v.* Robinson, 2 Lev. 91; S. C. 1 Mod. 100; S. C. 3 Keb. 180, 245; Macaree *v.* Tall, Amb. 181; Tuffnell *v.* Page, 2 Atk. 38; S. C. Barn. 14; Doe *d.* Burkitt and others *v.* Chapman, 1 H. Bl. 223; Doe *d.* Child and wife *v.* Wright and others, 8 T. R. 64; Doe *d.* Wright *v.* Child and wife, 1 N. R. 335; Reid *v.* Shergold, 10 Ves. 378; Randall *v.* Tuchin, 6 Taunt. 410; but see Goodwyn *v.* Goodwyn, 1 Ves. 227; Pettiward *v.* Prescott, 7 Ves. 541; Sharp *v.* Sharp, 6 Bing. 630. The reader is also referred on this subject to the following authorities; Reeves *v.* Winnington, 3 Mod. 45; Cole *v.* Rawlinson, 1 Salk. 234; Countess of Bridgwater *v.* Duke of Bolton, ib. 237; S. C. 6 Mod. 106; Hopewell *v.* Ackland, 1 Salk. 239; S. C. Comy. 164, post, p. 249; Beachcroft *v.* Beachcroft, 2 Vern. 690; Shaw *v.* Bull, 12 Mod. 594; Cliffe et al. *v.* Gibbons et al. 2 Ld. Raym. 1324; Barry *v.* Edgworth, 2 P. W. 524; Burdet *v.* Burdet, 1 Inst. 345; Ibbetson *v.* Beckwith, Ca. temp. Talb. 157; Tanner *v.* Morse, ib. 284; S. C. (Tanner *v.* Wise), 3 P. W. 295; Timewell *v.* Perkins, 2 Atk. 102; Ridout *v.* Pain, 1 Ves. 10; S. C. 3 Atk. 486; Bailis *v.* Gale, 2 Ves. 48; Doe & Underdown, Willes, 296; Stiles *d.* Rayment & Wise *v.* Walford, 2 Sir W. Bl. 938; Hogan *d* Wallis and others *v.* Jackson, Cowp. 299; Loveacres *d.* Mudge *v.* Blight et ux. ib. 352; Denn *d.* Gaskin *v.* Gaskin, ib. 657; Right *d.* Mitchell et ux. *v.* Sidebotham and another, 2 Doug. 763; Huxtep *v.* Brooman, 1 Bro. C. C. 437, post, p. 249; Holdfast *d.* Cowper *v.* Marten and others, 1 T. R. 411; Fletcher *v.* Smiton, 2 T. R. 656; Doe *d.* Palmer and others *v.* Richards, 3 T. R. 356; Doe *d.* Beezley *v.* Woodhouse and others, 4 T. R. 89; Goodright *d.* Baker *v.* Stocker, 5 T. R. 13; Andrew *v.* Southouse, ib. 292; 1 Bos. & Pul. 247, 248; Trent and others *v.* Hanning and others, 1 N. R. 116; S. C. 7 East, 97; Roe *d.* Child et ux. *v.* Wright, 7 East, 259; Roe *d.* Shell *v.* Pattison, 16 East, 221; Sir Arthur Chichester *v.* Oxenden, 4 Taunt. 176; Chorlton *v.* Taylor, 3 Ves. & Bea. 160; Hick *v.* Dring, 2 Mau. & Selw. 448; Uthwatt *v.* Bryant, 6 Taunt. 317; Denn & Hood, 7 Taunt. 35; Roe & Bacon, 4 Mau. & Selw. 366; Harding *v.* Gardner, 1 Brod. & Bing. 72; Wilkinson *v.* Chapman, 3 Russ. 145; but see Frogmorton *d.* Wright *v.* Wright and another, 3 Wils. 414; S. C. 2 Sir W. Bl. 889.

The words " my share of the *B.* and other estates" held to pass the fee of an undivided part; Paris *v.* Miller, 5 Mau. & Selw. 408. And the Court of B. R. expressly decided this case on the effect

of all those lands, &c.," after a previous devise for life, has been held to be the same in effect as " all my estate, &c.," and to pass a fee (*f*).

General introductory words in a will, as, for instance, " *As touching my worldly estate* (*g*)," or " *As to my temporal estate* (*h*)," or " *As to my worldly substance* (*i*)," favour the construction of a fee, especially if the subsequent words of devise are not merely local, or the devise is not wholly disjoined from the introductory clause; but such words are not sufficient in themselves to carry a fee (*k*).

It has been doubted whether a fee would not pass to a devisee by the use of the term " *hereditaments* (*l*);" but in *Doe & Allen* (*m*) Lord Kenyon considered the word as descriptive, and expressed his astonishment that any doubt should ever have been entertained about it; and it is clear, the author submits, that the word " hereditament" would not *per se* create an estate in fee, although it may be explained by other parts of the will to mean the inheritance (*n*).

The words " *all I am worth* (*o*)," and also the words " *whatever else I have in the world* (*p*)," include real estate, in their ordinary signification: and even the words " *all I may die possessed of*" will pass real estate if the intention be manifested by other parts of the will (*q*), but not otherwise (*r*); and words of the above or the like import may

of the word " share" alone, Lord Ellenborough saying, " This is not the devise of a portion which the devisor has carved out of the entirety; it existed in her as it is devised; the words ' my share,' as it seems to me, were used as denoting the interest."

N.B. The 28th sect. of 1 Vict. c. 26, enacts, that a devise without words of limitation shall pass the fee, or other the whole estate or interest of the testator, unless a contrary intention shall appear by the will.

(*f*) Norton *v.* Ladd, 1 Lutw. 755.

(*g*) Ibbetson *v.* Beckwith, Ca. temp. Talb. 157; Smith *v.* Coffin, 2 H. Bl. 441; Frogmorton *v.* Holyday, 3 Burr. 1625; S. C. 1 Sir W. Bl. 535; Loveacres *v.* Blight, Cowp. 352; Hope *v.* Taylor, 1 Burr. 268.

(*h*) Grayson *v.* Atkinson, 1 Wils. 333.

(*i*) Hogan *v.* Jackson, Cowp. 299.

(*k*) Frogmorton *v.* Wright, 3 Wils. 414; S. C. 2 Sir W. Bl. 889; Denn *v.* Gaskin, Cowp. 657; Goodright *v.* Stocker, 5 T. R. 13; Doe *v.* Buckner, 6 T. R. 610; Doe & Allen, 8 T. R. 503; Goodright *v.* Barron, 11 East, 220.

(*l*) 1 Salk. 239, in Hopewell & Ackland; 3 T. R. 360, in Doe & Richards.

(*m*) Sup. Holt, C. J., would seem to have been of opinion that the word " hereditament" implied a fee. See Holt, 236. Sed vide the case of Hopewell & Ackland, in Comy. 167, where the difference is suggested between the words *hæreditas* and *hæreditamentum*, the former importing the estate or interest in the land, and the latter the land itself.

(*n*) See Mos. 240, in Canning *v.* Canning; 3 Wils. 418; Denn *d.* Moor *v.* Mellor, 5 T. R. 558; Doe *d.* Mellor *v.* Moor, 6 T. R. 175; Denn & Moor, in error, 1 Bos. & Pul. 559 et seq.

(*o*) Huxtep *v.* Brooman, 1 Bro. C. C. 437.

(*p*) Hopewell & Ackland, 1 Comy. 164; Ca. temp. Talb. 386; Goodtitle & Maddern, 4 East, 496.

(*q*) 8 Ves. 607.

(*r*) Monk *v.* Mawdsley, 1 Sim. 289.

also be explained by the context of the will to mean the interest of the testator, as well as the land, and to pass the fee.

A charge upon the estate of an annual payment, which may by possibility continue beyond the life of the devisee, will induce the construction of a fee in a limitation, that would otherwise only create a life interest (*s*): so also a charge of a sum in gross, or of all debts and legacies (*t*).

The effect of the word "estate" or "property" in a devise may, however, be restrained by the intention collected from the general words of the will (*u*), and by terms of locality, if the whole of the words are merely descriptive (*x*); but it was held by Lord Hardwicke in *Bailis* v. *Gale* (*y*), that the words "*all that estate I bought of Mead*" passed both the interest and land, and were not descriptive only; and in *Roe* d. *Child & wife* v. *Wright* (*z*), the words "*all my estate, lands, &c. known and called by the name of the Coal Yard, in the parish of St. Giles, London,*" were held not to be a local description only, but to pass the fee (*a*).

(*s*) Collier's case, 6 Co. 16 a; Ansley & Chapman, Cro. Car. 157; Baddeley v. Leppingwell, 3 Burr. 1533; and see Frogmorton d. Bramstone v. Holyday et al. ib. 1618; Loveacres & Blight, Cowp. 352; Goodright d. Baker v. Stocker, 5 T. R. 13; Andrew v. Southouse, ib. 292; Doe & Clayton, 8 East, 141.

(*t*) See the several authorities in the last note; vide also Doe & Richards, 3 T. R. 356; Denn & Mellor, 5 T. R. 558; Doe & Holmes, 8 T. R. 1; Goodtitle & Maddern, 4 East, 496; Doe & Snelling, 5 East, 92; Dolton v. Hewen, 6 Madd. 9. But this is only where the devisee is charged, and not when the charge is upon the land simply. Vide the authorities in the last note, and sup.; see also Dickins v. Marshal, Cro. Eliz. 330; Fairfax v. Heron, 2 Eq. Ca. Abr. 307; Canning v. Canning, Mos. 240; 2 Atk. 341; Roe & Blackett, Cowp. 239; Doe & Clarke, 2 N. R. 349; Doe & Clayton, 8 East, 141; Pow. on Dev. 394, 3d ed.; Henvell v. Whitaker, 3 Russ. 343; Dover v. Gregory, 10 Sim. 393.

(*u*) Wilkinson v. Merryland, Cro. Car. 447, 449; Marhant v. Twisden, Gilb. Eq. Rep. 30; Chester v. Painter, 2 P. W. 335; Bailis v. Gale, 2 Ves. 51; Doe d. Spearing v. Buckner, 6 T. R. 610; Hilton v. Kenworthy, 3 East, 553; Roe d. Helling v. Yeud, 2 N. R. 214; Woollam v. Kenworthy, 9 Ves. 137; Doe d. Bunny v. Rout, 7 Taunt. 79.

(*x*) Doe & Clayton, 8 East, 141; Doe & Lawes, 2 Nev. & Per. 195; 7 Ad. & El. 195.

(*y*) 2 Ves. 48; and see Sharp v. Sharp, 6 Bing. 630.

(*z*) 7 East, 259; and see Tuffnell v. Page, Barry v. Edgworth, Goodwyn v. Goodwyn, Chichester v. Oxendon, Chorlton v. Taylor, Randall v. Tuchin, Denn v. Hood, ubi sup.

(*a*) The words "my estate *of A.*," and "my estate *at A.*," are words of the same import; see Doe d. Oxenden v. Chichester, 4 Dow's P. C. 92, which case has decided that, except where there is a latent ambiguity, parol or extrinsic evidence is not admissible to explain a will; Newton v. Lucas, 6 Sim. 57; post, tit. "Evidence;" and see ante, 148, n. (*d*); Harris v. Bishop of Lincoln, 2 P. W. 137; Beaumont v. Fell, ib. 141; Amb. 175, n. (1); Thomas v. Thomas, 6 T. R. 676; Careless v. Careless, 1 Meriv. 384; Doe & Huthwaite, 3 Barn. & Ald. 632; Doe & Westlake, 4 ib. 57.

And again in *Harding* v. *Gardner* (*b*), a devise of the testator's real estates, consisting of thirty acres, &c. was held to pass a fee, the words of locality not qualifying the technical operation of the word estate.

In *Roe* v. *Bacon* (*c*), where the testator devised all his freehold lands, messuages and tenements, at &c., to his wife for her life, and after her decease, *all the said estates* to be divided among his four sons and his son-in-law *C. T.*, share and share alike, the court of B. R. held that the sons took a *fee* in remainder after the death of the wife.

An estate in fee in a prior devisee may also be implied from the subsequent limitations in the will; for instance, if an estate is limited by will to the child of a prior devisee for life, without words of inheritance, with remainder over *in fee* should such child die before a certain age, the child will take an absolute fee on attaining the particular age (*d*): nor, as it should seem, is this rule restricted to a devise to the child of the prior devisee for life (*e*).

And it has been decided (*f*), that a reversion in fee of copyhold estates passes by a residuary devise to a previous devisee for life, unless a contrary intention is to be collected from the whole of the will; and that a charge of an annuity on the residuary estate is not a sufficient indication of such an intention.

It was a rule in copyhold as well as in freehold cases, that general words of devise would not have operated as an execution of a power, if the testator had any devisable interest to which the words would apply (*g*).

(*b*) 1 Brod. & Bing. 72.

(*c*) 4 Mau. & Selw. 366; and see Uthwatt *v.* Bryant, 6 Taunt. 317.

(*d*) Purefoy *&* Rogers, 2 Saund. 380; Wright *v.* Bond, 2 N. R. 125; Marshall *&* Hill, 2 Mau. & Selw. 608; Doe *d.* Elsmore and others *v.* Coleman and others, 6 Pri. 179; and see Robinson *v.* Grey, 9 East, 1; Doe *&* Cundall, ib. 400; but see Fowler *v.* Blackwell, 1 Comy. 353; Roe *&* Blackett, Cowp. 235. And an exception out of a general devise carries the same quantity of estate as that from which it is excepted; and therefore a fee would pass by an exception out of land devised in fee; Doe *v.* Lawton, 4 Bing. N. S. 455.

(*e*) Wright *&* Bond, Doe *&* Cundall, sup.; 2 Pow. on Dev. 395 et seq., 3d ed.

(*f*) Doe *d.* Moreton and Wife *v.* Fossick, 1 Barn. & Adol. 186; and see Goodright *v.* Marquis of Downshire et ux., 2 Bos. & Pul. 600.

(*g*) Sir Edward Clere's case, 6 Co. 17; Parker *&* Kett, 12 Mod. 469; Earl of Leicester's case, 1 Vent. 278; Colt *v.* Bishop of Coventry, Hob. 159; Campbell *v.* Leach, Amb. 747; Standen *v.* Standen, 2 Ves. jun. 589; Dillon *v.* Dillon, 1 Ball & Beatty, 93; Langley *v.* Sneyd, 3 Brod. & Bing. 254; Lewis *v.* Lewellyn, 1 Turn. 104; Farmer *v.* Bradford, 3 Russ. 354; Napier *v.* Napier, 1 Sim. 28; Lovell *v.* Knight, 3 Sim. 275; Walker *v.* Mackie, 4 Russ. 76; Grant *v.* Lynam, ib. 292; Wallop *v.* Lord Portsmouth, Sugd. on Pow. Append. p. 762, 5th ed.; Lownds *v.* Lownds, 1 You. & Jerv. 445; Doe *&* Roake, 2 Bing. 497; S. C. (Denn *v.*

So where a testator having a mere power of appointment over freehold and copyhold estates, and being seised in fee of other freehold estates, made a general devise of all his freehold and copyhold estates, without any reference to his power of appointment, it was decided by Best, J., and two of the Masters in Chancery, sitting for the Master of the Rolls, that the will was an execution of the power over the copyhold, but not of the power over the freehold estates (*h*).

And where a person had both a power and an interest in copyholds, a general devise would have passed the interest, although the will should have been a defective execution of the power; and it was decided that such a devise was aided by the now repealed statute of 55 Geo. III. c. 192 (*i*).

A testamentary power over copyhold estates might, however, have been executed without taking any notice of it (*k*); but if the testator had any other real estates, it was essential that he should have shown that he had the particular property in view by some reference to it (*l*); therefore where a testator, having a power to appoint a copyhold estate by deed or will, made a general devise of all the residue of his effects, real and personal (*m*), Lord Hardwicke adjudged that the copyhold did not pass, noticing that the testator had other lands on which the devise might be satisfied (*n*); and that there was nothing that was at all descriptive of the copyhold but what was applicable to the estates of which the testator was *seised*.

The rules adopted in freehold cases as to words of recommendation in a will, and exclusive dispositions under powers, apply equally to

Roake) in error, 5 Barn. & Cress. 720; S. C. Dom. Proc. (Roakes plt., Denn deft.), 1 Dow, N. S. 437; 4 Bli. N. S. 1; 6 Bing. 475; Hougham *v.* Sandys, 2 Sim. 95; Davies *v.* Williams, 1 Adol. & Ell. 588; vide also Anson *v.* Lee, before the V. C. March, 1831, MS.

(*h*) Lewis *v.* Lewellyn, 1 Turn. 104.

(*i*) Doe *d.* Hickman *v.* Hickman, 4 Barn. & Adol. 56; ante, p. 236, n. (*z*). And note, by s. 27 of 1 Vict. c. 26, a general devise of real estates will include estates which the testator may have a power to appoint; ante, p. 242, n. (*h*).

(*k*) Manwood's case, Cary, 36; Andrews *v.* Emmot, 2 Bro. C. C. 303; Lane *v.* Wilkins, 10 East, 242; Doe *&* Bird, 2 Nev. & Man. 679; S. C. 5 Barn. & Adol. 695. It has been decided by the House of Lords that a power of revocation reserved to *A. by any writing* under his hand and seal attested by two or more credible witnesses, and of appointing new uses *by the same or any other deed*, may be exercised by *the will of A.*, without noticing the power; Countess of Roscommon *&* Fowke, 6 Bro. P. C. 158; see also Sug. on Powers, 227, 5th ed.; Doe *&* Holloway, 1 Stark. 431; ante, p. 235.

(*l*) Sugd. on Powers, 289, 5th ed.

(*m*) Ex parte Caswall, 1 Atk. 559; ante, p. 236 et seq. We have seen that a power when coupled with an interest cannot be executed by an infant, ante, p. 137.

(*n*) Equity will direct an enquiry, whether there be any thing but copyhold to answer the devise. Secus in the case of a power to appoint personalty; Jones *v.* Tucker, 2 Meriv. 537; Jones *v.* Curry, 1 Swanst. 71.

copyholds. So in *Macey and others* v. *Shurmer* (*o*), which was a devise by *N. S.* to his wife, her heirs and assigns for ever, being well assured that she would at her decease dispose of the lands amongst all or such of his children as she in her discretion should think most proper, and as they by their conduct should deserve; it was held that the word "*such*" gave the wife the power to make an exclusive disposition to any one child (*p*).

The courts have inclined to construe a devise of copyhold as of freehold, so as to annex the legal estate to the equitable, by making the estate of the trustees commensurate with the purposes of the trust; therefore under a devise to *A.* and *B.* and their heirs, in trust to permit *C.* or her assigns to occupy the same, or to pay to or permit her or her assigns to receive the rents for her natural life for her separate use, and subject to such estate and interest of *C.* to such uses as *C.* should by her will appoint, and in default of appointment to her right heirs; it was held that the estate was vested in *A.* and *B.* and their heirs for the life *only* of *C.*, and that the legal estate, after *C.'s* death, vested in the appointee under her will, who recovered in ejectment against the assignee of the person to whom the trustees had surrendered (*q*).

But in deciding whether trustees took the fee or not, the courts were influenced by the purposes of the trust; and the intermixture of copyholds with other property in which the trustees must be held to have the whole interest, would have induced the court to decide that the legal fee of the copyholds vested in the trustees (*r*).

Under a devise of freehold and copyhold to trustees in trust for an infant son, and to be *transferred* to him as soon as he should attain twenty-one, but in case he should die before he attained twenty-one, then a devise over to *V. P.* and his heirs, it was held that the trustees took only an estate for years, determinable upon the son's attaining twenty-one (*s*).

(*o*) 1 Atk. 389.

(*p*) Where the power is not exclusive, it is no longer necessary to give a substantial share to each of the objects; 1 W. 4, c. 46.

(*q*) Doe *d.* Woodcock *v.* Barthrop, 5 Taunt. 382; vide also Lord Say and Seal *&* Lady Jones, 3 Bro. P. C. 113; Doe *&* Simpson, 5 East, 162; Hawker *v.* Hawker, 3 Barn. & Ald. 537; Morrant *v.* Gough, 7 Barn. & Cress. 206; 1 Man. & Ry. 41; and see Stanley *v.* Stanley, 16 Ves. 491.

(*r*) See Houston *v.* Hughes, 6 Barn. & Cress. 403; 5 Russ. 116; and see Doe *&* Willan, 2 Bar. & Ald. 88; Doe *&* Martyn, 8 Barn. & Cress. 497; Doe *&* Edlin, 4 Adol. & Ell. 589; Heardson *v.* Williamson, 1 Keen, 33.

By s. 30 of 1 Vict. c. 26, a devise to a trustee or executor passes the fee or whole estate of the testator, unless a definite term or estate of freehold be given expressly or impliedly. And by s. 31, devisees in trust take a fee, when the trusts may continue beyond the life of a person to whom a beneficial interest is given.

(*s*) Doe *d.* Player *v.* Nicholls, 1 Barn. & Cress. 336; S. C. 2 Dow. & Ry. 480; Edwards *v.* Symons, post.

And in a modern case (*t*), the Court of Common Pleas held that a direction in a codicil to the will of the testator, that his copyhold property *should be transferred to his wife*, was not equivalent to a devise of the copyhold, and consequently that the legal estate did not become vested in the trustees named in the will.

As the cited case of *Chapman & Prickett* involves several points of considerable interest, the author proposes to give an extract from the report of it in Bingham, first briefly noticing the facts of the case, and the result of a bill filed in the Court of Chancery in connexion with it.

The testator Thomas Lambe by his will dated 21st June, 1804, devised freehold messuages, stock in the funds, money and debts, and all shares or property which he might be possessed of or intitled to, unto *J. H.* and *Jos. B.* their executors and administrators, upon trusts for the benefit of his wife for life, and of his children attaining twenty-one. By a codicil the testator directed that his copyhold estate in *I.* should be *transferred* to his wife until the expiration of the leases, and after that time as soon as convenient, or within one year, to be sold by public auction, the money to be placed in the Three per cent. Bank of England Stock, for the benefit of his children "and their heirs, *as directed in the will.*" And if it should please God to call her before that time of the expiration of the leases, the copyhold to be sold by public auction soon as convenient, and the money placed as above directed. N. B. If there should not be money sufficient in the testator's possession at the time of his decease to pay the fine of the copyhold, proving the will and funeral expenses, his executors to sell out of the Three per cent. Consols 600*l.* or a small sum as might be required. The testator died in May, 1806, leaving his wife and three lawful children by her, viz. one son (his customary heir), and two daughters. The will and codicil were proved by the widow and the said *J. H.* and *Jos. B.* on 23d May, 1806. On 11th July, 1806, the said *J. H.* and *Jos. B.* were admitted tenants of the premises in question, to hold to them and their heirs upon the trusts of the above will and codicil. The widow of the testator, on the 12th Aug. 1807, intermarried with John Burton, and she died 23d Nov. 1823, without having had issue by him. The three legitimate children of the testator all died in the lifetime of their mother, under twenty-one *and unmarried.* Letters of administration of the effects as well of such children as of their mother were afterwards granted to the said John Burton. The said *Jos. B.*, one of the trustees named in the said will, died 5th Feb. 1825, leaving *J. H.* his co-trustee surviving.

(*t*) Chapman *v.* Prickett, 6 Bing. 602, (which was a special case arising out of an action of replevin).

A bill was afterwards filed in the Court of Chancery by the said John Burton against *J. H.* (the surviving trustee), praying that it might be declared that, under the above-mentioned circumstances, the plaintiff had become entitled to the monies to arise by the sale of the copyhold estate, and that the estate might be surrendered to him (*u*). *J. H.* in his answer alleged, that the plaintiff, as administrator of his wife and her children, was not entitled to any interest in the copyhold estate, but that the same belonged to the customary heir of the testator, if any such heir, and, if not, then that *J. H.* was entitled to the estate for his own use; and that he had always understood that the testator was illegitimate; and that, his children being all dead, there was no heir of the testator in existence. For the plaintiff it was contended, that by the codicil the copyhold was converted out and out into personalty, for that there was no event in which it was not to be sold. For the defendant it was urged, that in the events which had happened there was no trust affecting the copyhold estate, as the children all died before the lease expired, so that the period of sale did not arrive until all the purposes of sale had failed, and therefore, that as the legal interest remained in the defendant, he was entitled to hold the estate for his own benefit. The V. C. (Sir Anthony Hart) did not deliver any judgment in this case, but sent to the parties minutes from which the following decree was drawn up, dated the 29th October, 1827. "This court doth declare, that the said defendant ought not to be permitted, in equity, to avail himself of the contingencies which have happened in the testator's family, to retain the estate for his own benefit; and it appearing, by the Master's said report, that no person hath been found to sustain a claim to the said estate, as a resulting trust of real estate for the benefit of the customary heir, against the personal representatives of the next of kin claiming the same as converted by the codicil into the nature of equitable personal estate, this court doth declare that the said defendant *J. H.* is bound to surrender the said copyhold estate to the plaintiff, as being the legal personal representative of the children of the testator, as if the said estate had been sold, and the money held by him for the purpose of distribution according to the trusts of the said codicil; and therefore this court doth order and decree that the said defendant do, at the expense of the plaintiff, surrender the said copyhold estate to the plaintiff and his heirs, as being the legal personal representative of the testator's children. But this court doth declare that the surrender of the said copyhold estate, so to be made to the plaintiff, is to be without prejudice to any question which a customary heir of the testator, or of the children of the said

(*u*) Burton *v.* Hodsoll, 2 Sim. 24.

testator, may raise, whether the money which would have arisen from the sale of the said copyhold estate, if the same had been sold by the defendant pursuant to the trusts of the codicil, would have vested in such children in the nature of real or personal estate."

A distress was made of the goods of Chapman by Prickett (the defendant in the action of replevin) under the authority of John Burton. The defendant by his pleas made cognizance as bailiff of *J. H.* for rent due 25th March, 1828, and as bailiff of John Burton for the same rent. It was pleaded in bar, first, that the plaintiff did not hold as tenant to *J. H.* or to John Burton; and secondly, that no rent was in arrear. Upon the trial a verdict was taken for the plaintiff for 4*l.* 4*s.*, with liberty to enter a verdict for the defendant for 126*l.*, the rent distrained for, subject to the opinion of the court on a case to be stated. The case mentioned that the lease of the above copyhold expired in the lifetime of the testator's widow, viz. the 25th December, 1821; and that the plaintiff was let into possession by her in October, 1823, to hold from Michaelmas preceding at the yearly rent of 42*l.*, and that the plaintiff remained in possession up to the time of the distress.

In delivering the judgment of the court, upon the argument of the special case, Tindal, C. J., observed, "that they were of opinion that the testator did not intend by his will to pass any interest in the copyhold estate in question to the trustees named therein, and that it did not pass to the trustees by the codicil, for they were not named in it either expressly or by any necessary implication; so that there appeared no estate in the trustees out of which the relation between landlord and tenant could be created, and therefore the cognizances in the name of the surviving trustee altogether failed: that the second cognizance depended on the nature of the interest which the wife took under the codicil, and that the court thought that it was the manifest intention of the testator that her interest should be coextensive with the lease, unless in the event of her death before the determination of the lease, in which case her interest was to determine with her life; and that as the case proved that the lease of the copyhold expired the 25th December, 1821, it followed that the rent distrained for accrued since the time when the wife's interest under the codicil expired, and consequently that there was no holding by the plaintiff under John Burton, her personal representative. Judgment for the plaintiff (*x*).

(*x*) It appears that after the judgment in this case was delivered, viz. on the 6th of December, 1830, *J. H.* (the surviving trustee) (acting in pursuance of the direction for that purpose contained in the above-mentioned decretal order of the 29th of October, 1827), out of court, surrendered the said copyhold estate to the use of the said John Burton, his heirs and assigns for ever, "subject nevertheless and

If a copyholder who had made a surrender to the uses of his will, by his will devised that his copyholds should be sold, but without saying by whom, a court of equity would compel the customary heir to give effect to the power of sale (*y*). But the heir is not a necessary party in such a case, when the power is given to executors (*z*) or to a particular person (*a*); or when by implication the power is exercisable by the executors *virtute officii* (*b*).

In *Bateman* v. *Bateman* (*c*) the will contained a proviso that if the testator's personal estate, and his house and lands at *W.* should not pay his debts, then his executors were to *raise* the same out of his copyholds, and it was held that the executors were entitled to *sell* the copyholds.

When the testator shows an intention to give all from the heir, and to turn the land into personalty, his design is not to be disappointed

without prejudice to any such question as might thereafter be raised by the customary heir of the testator, Thomas Lambe, or of his children, as in the said order mentioned." And at a court held the 23d of December, 1830, John Burton was admitted pursuant to the last-mentioned surrender, to hold to him, his heirs and assigns, subject to any such question as in the same surrender is mentioned.

An action of ejectment was brought by J. Burton in the Court of Common Pleas against Chapman (the plaintiff in the action of replevin), to recover possession of the above-mentioned copyhold property, which was tried before C. J. Tindal in the sittings after Michaelmas Term, 1832;—when the plaintiff relied on his title under the surrender of the 6th of December, 1830, and gave evidence to establish the illegitimacy of the testator, Thomas Lambe; and a verdict was taken for the plaintiff, subject however to a special case for the opinion of the Court of Common Pleas, upon the effect of the surrender by the trustees of the will to the plaintiff, and his admission as aforesaid, without any proclamations in court on the death of Thomas Lambe, or seizure by the bailiff, upon a precept from the lord or steward.

[The author was informed that the special case was not proceeded with.]

(*y*) Blatch & Agnis *v.* Wilder and others, 1 Atk. 420; 1 Ch. C. 180; Pits *v.* Pelham, 1 Lev. 304.

(*z*) Warneford *v.* Thompson, 3 Ves. jun. 513; White *v.* Vitty, 2 Russ. 496. But see ante, p. 247, as to such a power when no surrender has been made to the use of the will, especially since the act of 1 Vict. c. 26.

(*a*) Bright *v.* Hubbard, Cro. Eliz. 68. In the case of Brent *or* Beal *v.* Sheppard, Cro. Jac. 199, a copyholder in fee surrendered to the use of his will, and devised his copyhold land to his wife, and if she had any issue by him, then to such issue at the age of twenty-one, and if the issue died before that age or before his wife, or if she had no issue, *then she to choose two attornies, and to make a bill of sale of the lands to the best advantage;* and the court held that she had the lands for life, and not having issue, had not any interest to dispose of, but had authority by will to nominate two who should sell, and that the vendee should be *in* by the first will, and that no new surrender would be necessary.

(*b*) For several authorities on powers of sale expressly given to executors, or arising by implication from the tenor of the will, see 8 Vin. Devise (M. e. to S. e.) The power is not to be implied because the devisees are minors; Patton *v.* Randall, 1 Jac. & Walk. 196.

(*c*) 1 Atk. 421.

by any subsequent event; for instance, should the money arising from the sale be directed to be laid out in the purchase of an annuity, the heir will be decreed to join in a sale, although the annuitant should die immediately after the testator (*d*). But if the conversion be for any partial purpose which fails, then the heir will be entitled by way of resulting trust (*e*).

The rule in freehold cases that an estate may arise by implication in favour of the wife, when the devise is to the heir, but not when it is made to a stranger, is equally applicable to copyholds (*f*).

But few cases, if any, can arise under a will, where the intention will not prevail, if discoverable by the court, (whether of law or equity); and the courts are influenced by the context, even if it be opposed to a general rule of construction (*g*); and will sometimes substitute the plural for the singular number, and *vice versâ*. It must, however, frequently happen that the designs of a testator are defeated by the obscurity, not only of the language of the particular devise, but even of the context of the will (*h*). Devises of copyholds were more particularly favoured in this respect, as the courts raised the presumption of and gave effect to the copyholder's intention to pass lands acquired after the date of the will, if there were words in it sufficiently comprehensive to include them, and the lands had been surrendered to the uses of the will (*i*): this point was first discussed in *Heylyn* v. *Heylyn* (*j*); and though the authority of that case has been doubted (*k*), the case of *The Attorney-General* v. *Vigor* (*l*) *and several others* (*m*) put the question at rest.

And where the previous devise is clear, the property ascertained by

(*d*) Yates *v.* Compton, 2 P. W. 309. As in such a case the heir will be entitled to the intermediate rents at law, it is usual to insert a clause in the will devising the same to the executors or to trustees.

(*e*) Post, tit. "Trust Estates."

(*f*) Fawlkner *v.* Fawlkner, 1 Vern. 22. And see Higham *v.* Baker, Cro. Eliz. 16; Horton *v.* Horton, Cro. Jac. 75; Bro. "Devise," pl. 52; Vaug. 264; Smartel *v.* Scholler, 1 Vent. 323; S. C. 2 Lev. 207; S. C. T. Jones, 98; 1 Meriv. 414.

(*g*) Houston *v.* Hughes, 5 Russ. 116.

(*h*) See Woodhouse *v.* Meredith, 1 Meriv. 450; Houston & Hughes, sup.

In cases of great obscurity the title of the heir is favoured. So under a devise and bequest of freehold, leasehold and *copyhold*, and 1000*l.* stock to *A.*, *B.* and *C.*, tenendum the said last-mentioned freehold and leasehold messuages, tenements, estates and premises and the 1000*l.*, upon trust for *A.*; it was held by the M.R. that *A.* was not interested in the copyholds, which descended to the heir; Stubbs *v.* Sargon, 2 Keen, 225; and the decision was affirmed by the Lord Chancellor, 3 Myl. & Cr. 507.

A copyhold brewhouse and malthouse, *let on lease with plant and utensils*, were devised by the description of copyhold messuages; the plant held to pass; Wood & Gaynon, Amb. 395.

(*i*) Ante, p. 214. And now by 24th section of 1 Vict. c. 26, a will speaks from the death of the testator.

(*j*) Cowp. 130; Lofft, 604.

(*k*) See 1 Watk. on Cop. 127.

(*l*) 8 Ves. 286.

(*m*) Ante, p. 214, n. (*o*).

it will pass, though there be a subsequent misdescription (*n*); but where the testator, who was seised of freehold and copyhold estates in *I.* which were under mortgage, and of other freehold land in *I.* not included in the mortgage, recited in his will that he was seised of divers freehold and copyhold hereditaments in *I.* (which copyholds he had surrendered to the use of his will), and *all which freehold and copyhold messuages, &c. were subject to a mortgage thereof* made, &c., and then gave and devised *all* and every *his said freehold and copyhold* messuages, &c. unto *P.* and *A.* and their heirs upon certain trusts, and gave all the residue of his freehold and copyhold estates unto his son *S. P.*, his heirs, &c., the Court of Common Pleas held that the land in *I.*, which was not comprised in the mortgage, did not pass to the trustees, but vested in *S. P.* the son, under the residuary devise (*o*).

If a testator be entitled to two species of property, the one precisely answering the description, the other not so exactly and technically answering it, the latter will not be held to pass. So where a testator devised all his copyhold estates situate at *G. which he became entitled to on the decease of his father;* and the fact was, that on the death of his father the testator had taken possession of two copyholds at *G.*, one which his father had in his lifetime surrendered to him in fee, but of which the father retained possession until his death, and another which descended to him as his heir:—it was held that the latter estate being sufficient to satisfy the words, the former did not pass (*p*). The decision in this case was influenced by the long established rule, that an heir is not to be disinherited except by express words or necessary inference (*q*).

In *Doe* d. *Belasyse and wife* v. *Earl and Countess of Lucan* (*r*), the Court of B. R. held that a general devise of the testator's *manor* of *S.*, and all his messuages, *farms*, &c. within the *precincts* and *territories of S.*, passed copyholds of the testator within the *township of S.*, which were within the local ambit of the manor, but held of another manor, and which the testator had surrendered to the use of his will (*s*); and that the general words messuages, *farms*, &c., particularly the word "farms," were sufficient to carry copyhold, if the intent appeared upon the whole will; and that the intention was

(*n*) Roe *d.* Conolly *v.* Vernon & Vyse, 5 East, 78; Doe & Bower, 3 Barn. & Adol. 459.

(*o*) Pullin *v.* Pullin, 3 Bing. 47.

(*p*) Roe *d.* Ryall *v.* Bell, 8 T. R. 579; 2 Pow. on Dev. 106, 3d edit.

(*q*) As to this rule, see Boutell *v.* Mohun, Pre. Ch. 384; Sympson *v.* Hornsby, ib.; Gascoyne *v.* Barker, Byas *v.* Byas, ubi sup.; Upton & Lord Ferrers, 5 Ves. 801.

(*r*) 9 East, 448.

(*s*) It appears by the report of this case that the surrender to will did not influence the decision.

shown by the word "farms," the testator having a farm composed of both freehold and copyhold, and let as one entire property (*t*).

And a general devise of all the testator's *unsettled* lands (there being both freehold and customary lands, part of the former settled, and the latter not having been surrendered to will), was in the case of *Hawkins* v. *Leigh and others* (*u*) held to pass the *unsettled* freehold lands only, notwithstanding there were the prefatory words "as for my worldly estate, &c.," the court conceiving that by the word "*unsettled*" the testator must have meant lands of the same kind as those settled.

But prefatory words, similar to the above, are generally held to influence all the subsequent clauses of the will (*x*).

When a testator suspends the possession of the devisees until a particular event, as, for instance, until a younger child attains twenty-one, the courts incline to refer the words "survivors and survivor" to the period of the testator's death, so as to create vested interests in the persons then living and answering the description in the devise; and the law favours the vesting of estates (*y*). So in *Edwards* v. *Symons* (*z*), the testator devised freehold and copyhold lands, in trust to receive and apply the rents for the maintenance, education and advancement of his five sons and daughter Elizabeth, and immediately on Elizabeth attaining twenty-one, then the testator devised the said lands to his said six children, and to the *survivors and survivor* of them, their heirs and assigns for ever, as tenants in common; and it was held that such of the children as survived the testator took on his decease a vested fee as tenants in common.

And in the case of *Doe* d. *Pilkington* v. *Spratt* (*a*), *W. S.* devised copyhold lands unto his son *D. S.* and his wife, and *J. H.* and his wife, or the survivor of them for their lives, and after the decease of all of them, *to the male heir at law of the testator, his heirs and assigns for ever.* The testator bequeathed trifling legacies to three other sons, and died leaving two sons and one daughter by his first

(*t*) See Lane & Stanhope, and Thompson & Lawley, ante, pp. 241, 246; Hobson *v.* Blackburn, 1 Myl. & Keen, 571; Goodman *v.* Edwards, 2 Myl. & Keen, 759.

(*u*) 1 Atk. 388.

(*x*) Tudor & Anson, 2 Ves. 582; Coombes & Gibson, 1 Bro. C. C. 274; Godolphin *v.* Penneck, 2 Ves. 271; Ellison *v.* Airey, 2 Ves. 568; Belt's Supp. 341, 417; ante, p. 249.

(*y*) See Doe *d.* Cholmondeley *v.* Maxey, 12 East, 589; Cholmondeley *v.* Clinton, 2 Mer. 171; 2 Bar. & Ald. 625; 2 Jac. & Walk. 113.

(*z*) 6 Taunt. 213.

(*a*) 5 Barn. & Adol. 736, 739; and see Doe *d.* Eustace *v.* Easley, 1 Cr. Mee. & Ros. (Ex.) 823, where, upon a devise of copyhold, after limitations to the testator's wife, and a nephew and his child, in the following words, viz. "to revert to my next male heirs for ever," the court held that upon the death of the testator without issue, and determination of the life estates, the customary heir was entitled.

wife, and the said *D. S.* and two other sons by his second wife; and the Court of King's Bench held that the fee vested at the testator's death in the person who was then his male heir at law, and was not contingent until the determination of the life estates; and noticed that in the cases cited against such a construction (*b*), an intent contrary to the general rule was shown.

Taylor v. *Taylor* (*c*) was another case of construction in which the intention prevailed:—there *A.* gave his copyhold to the child or children with which his wife was then enceint, and to the heirs of such child or children for ever; and if such child or children should not be born alive, or being born alive, should die without leaving lawful issue, or before he or she had disposed of the same, then he gave it to his wife: the wife was not with child, and Lord Hardwicke was of opinion that it was well devised so as to have a surrender supplied, and that it ought to be construed as if the testator had said "*and if no child be born alive.*"

In a recent case (*d*) a testator devised his freehold duchy or copyhold and leasehold estates to his widow and his youngest son, upon trust to permit his widow to receive the rents and profits for life, should she remain unmarried; and after her decease or future marriage, then as to all his freehold and duchy or copyhold and leasehold estates, to the use of his three sons, to be equally divided between them as tenants in common for ever; and the testator declared his further will to be, that if at any time within three years next after the decease or future marriage of his widow, his eldest son Hugh should be desirous to have the whole of the estates before devised unto and among him and his brothers, upon his paying 1000*l.* to each of them within that period, for such their shares and interest therein, the same should become the sole and exclusive property of

(*b*) Doe *&* Frost, 3 Barn. & Ald. 546; Phillips *v.* Deakin, 1 Mau. & Selw. 744.

(*c*) 1 Atk. 386. In a late case a devise was made of leasehold and *copyhold* for life, and afterwards to be sold, and the purchase money divided into four parts, one to be paid to each of the testator's four sons living at the decease of the tenant for life, *and in case of either of their deaths, his share to be paid to his issue, and in case either should die without issue, his share to be divided amongst his surviving children.* One of the sons died in the testator's lifetime leaving a child, who was held to be entitled to such share as the parent would have been entitled to if he had survived the tenant for life; Le Jeune *v.* Le Jeune, 2 Keen, 701; see reference to s. 33 of 1 Vict. c. 26, post, p. 265, n. (*z*).

(*d*) Ley *v.* Ley, 2 Mann. & Gr. 780. Note. The estate described in the will as "duchy" or "copyhold," was of conventionary or customary hereditary leasehold tenure, existing in the assessionable manors of the duchy of Cornwall; see n. (a) to the above case of Ley *v.* Ley, in Manning and Granger's Reports; vide also the reference to that case, and the case of Rowe *v.* Brenton, post, title "Mines."

such eldest son: and after giving certain legacies to his (the testator's) daughters, which, with debts, were charged upon his freehold property, in the event of the personalty being insufficient, the will proceeded:—" I further direct that should my eldest son die without issue, then I give and devise unto my second son John Morgan, all those my freehold and duchy or copyhold estates aforesaid; and in case he should have no issue, then to my youngest son Edwin and his issue, his heirs and assigns for ever."

The eldest son died intestate and without issue, leaving his mother still unmarried, and his two brothers him surviving, and without having exercised the option of purchase given him by the will: and it was held that the eldest son died seised of the remainder in fee of one-third part of the freehold and duchy or copyhold lands devised by the testator's will, expectant on the death or second marriage of his mother; and that he died possessed of the absolute estate in remainder in one third part of the leasehold estates devised by the said will, expectant on the death or second marriage of his mother.

It was decided in the case of *Driver* d. *Frank* v. *Frank* (*e*), that a devise to *A.* for life, and after his death to the second, third, and all other the sons of *A.* (the eldest son excepted), successively in tail, gave a vested interest to the second son of *A.* as soon as he had two sons *in esse*, not capable of being divested by the death of the eldest son.

And a devise to an unborn person for life is good; but any limitation over to the issue of such unborn person, with the view of engrafting a succession on that life estate, would be too remote (*f*).

Under a devise of copyholds to *R.* for life, and after his decease to the heir of his body (in the singular number) for ever, it was held that *R.* took an estate in fee simple (*g*).

So in *Sharp* v. *Musgrave* (*h*), a copyholder who had surrendered to the use of his will, devised to Robert for life, and after his decease to the *heir* of his body for ever upon a condition, and it was agreed that Robert had an estate of inheritance.

If, however, there are superadded words of limitation, the word " heir" (in the singular number) is a word of purchase (*i*). But it is

(*e*) 3 Mau. & Selw. 25; 6 Price, 41.

(*f*) See Beard *v.* Westcott, 5 Taunt. 393; 5 Barn. & Ald. 801; Lord Deerhurst *v.* Duke of St. Alban's, 5 Madd. 232; Hayes *v.* Hayes, 4 Russ. 311, 316, 317; Fearne, 402, 403.

(*g*) Bawsy (or Pawsey) *v.* Lowdall, Banc. sup. 165; Sty. 249, 273; 1 Fearne, 279.

(*h*) C. B. 165, cited Orl. Bridg. 56, in Petty & Goddard; but see ib. n. (m), where it is stated in reference to a MS. report, No. 42, Harg. MSS. pl. 308, that the case is properly called Scarpe *v.* Goderd, and that it is supposed not to have been decided.

(*i*) Archer's case, 1 Co. 66 b; Fearne, 150, 178.

otherwise when strict technical words of limitation are engrafted on the word "heirs" (*k*): and also when, in the former case, the construction of an estate of inheritance in the particular devisee is required by other clauses in the will, expressing the general intention of the testator (*l*). And the courts incline to construe even the words "heirs of the body," with the superadded words "*whether sons or daughters,* [or] *male as well as female, and to take as tenants in common,*" as words of limitation, so as to create an estate tail (*m*). When however the engrafted words clearly and distinctly show that by "heirs of the body" the testator meant *children* (*n*), (and especially if the will contain words of devise importing an estate in fee simple in such issue) (*o*), the intention will prevail against the above strict rule of construction, and the words "heirs of the body" be held to operate as words of purchase.

But since the decision of the House of Lords in the cited case of *Jesson & Wright*, it is clear that words of qualification, such, for instance, as "females as well as males, to take as tenants in common," would be held not to turn the words "heirs of the body" into words of purchase.

And it is established that a devise to the heirs general of the heirs of the body, with a limitation over on failure of issue of the particular devisee, will not prevent the construction of an estate tail (*p*).

(*k*) Shelley's case, 1 Co. 93; Fearne, 181.

(*l*) Petty *v.* Goddard, Orl. Bridg. 35.

(*m*) Pierson *v.* Vickers, 5 East, 548; Candler & Smith, 7 T. R. 531; Doe *d.* Bonsall *v.* Harvey, 4 Barn. & Cress. 610; Jesson and others *v.* Wright and others, Dom. Proc. 2 Bli. 2, (in which the devise was to *W.* for life, and after his decease to the heirs of his body, in such shares and proportions as he should by deed or will appoint, and for want of appointment, to the heirs of the body of *W.*, share and share alike as tenants in common, and if but *one child*, the whole to such only *child*, and for want of *such* issue, to the heirs of the devisor,) and which case overruled that of Doe & Goff, 11 East, 668, (in which the devise was to the testator's daughter Mary, and to the heirs of her body begotten or to be begotten, as tenants in common, but if such issue should die before he, she or they attained twenty-one, then to the testator's son Joseph in fee; and the daughter was held to take an estate for life only, with remainder to her children as purchasers). And see Crump *v.* Norwood, 7 Taunt. 362, which closely resembles Doe & Goff, but does not appear to have been noticed in Jesson & Wright.

(*n*) Law *v.* Davys, Fitzg. 112; S. C. 2 Str. 849; S. C. Lord Raym. 1561; S. C. cited Amb. 11, (in which case the devise was to *B.*, the testator's second son, and the heirs male of his body, viz. to the first son of *B.* and the heirs male of his body, and so on in like manner to the second and other sons of *B.* successively, and it was held to be an estate for life only in *B.*) Vide also Lisle *v.* Gray, 2 Lev. 223; Goodtitle *v.* Herring, 1 East, 264; North *v.* Martin, 6 Sim. 266.

(*o*) Doe & Laming, 2 Burr. 1100, in which case the devise was to *A.* and the heirs of his body, as well females as males, *and to their heirs and assigns for ever.*

(*p*) Pierson *v.* Vickers, 5 East, 548; Measure *v.* Gee, 5 Barn. & Ald. 910; Kinch & Ward, 2 Sim. & Stu. 409; and

It would however be dangerous to rely on a title depending upon a devise to a person and the heirs of his body, with superadded words somewhat similar to those in *Jesson & Wright*, but not altogether so favourable to the construction of an estate tail (*q*).

And even words of purchase, in their ordinary signification, will sometimes be construed as words of limitation; so the word "son," when used as denoting, not an individual, but a class, will operate as a word of limitation. Therefore a devise of freehold and copyhold to the son of *T. G.*, and to his eldest son if he had one, but if he had no son, then to the next eldest regular male heir of the *G.* family, as long as there was one of them in being, was held to give the son of *T. G.* an estate tail (*r*).

It has long been settled that if a devise be made with a single intent to create a succession of life estates to persons *in esse*, and to others not *in esse*, and so not warranted by law, the persons *in esse* will take a life interest only (*s*). But if after a devise to one for life, and to his heirs or issue for ever, or for their lives, there be a devise over on failure of issue of the previous devisee for life, he will take an estate tail (*t*), the same as under a devise to *A.* for life, and in case of his death without issue, then to *B.* (*u*).

Although it was formerly thought that under a devise to *A. and his heirs*, and if he should die without issue, (that is, upon a general failure of issue of *A.*, to whom an estate *in fee* was before limited,) the remainder over would be void, as being too remote (*x*); yet it is

see Goodright *v.* Pullyn, 2 Lord Raym. 1437; S. C. 2 Str. 7129; Wright *v.* Pearson, Amb. 358; Denn *&* Shenton, Cowp. 410; Alpass *&* Watkins, 8 T. R. 516.

(*q*) See Willcox *v.* Bellaers, 1823, 2 Pow. on Dev. 485, n.; in which the devise was to the testator's son *H. T. W.* for life, and after his decease to such of his said son's children, and in such shares as the son should by will appoint, *and to their heirs*, and failing such appointment, then to the heirs of the body of the said *H. T. W. their heirs and assigns for ever*, and in case his said son should happen to die without issue, then from and immediately after his decease over to another child for life, &c., and Sir Thomas Plumer, M. R., would not compel the purchaser to take the title under a recovery suffered by *H. T. W.*, as there was so much doubt whether the limitation created an estate tail.

(*r*) Doe *d.* Garrod *v.* Garrod, 2 Barn. & Adol. 87; see Doe *d.* Eustace *v.* Easley, 1 Cr. Mee. & Ros. (Ex.), 823; ante, p. 260; Trash *v.* Wood, infra.

(*s*) Goodtitle *v.* Wodhull, Willes, 592; Seaward *v.* Willock, 5 East, 198.

(*t*) Reece *v.* Steel, 2 Sim. 233; Mortimer *v.* West, ib. 274; and see Trash *v.* Wood, 4 Myl. & Cr. 324.

(*u*) Robinson *v.* Robinson, 1 Burr. 38; 2 Brownl. 271; Vent. 230; 1 Comy. 296; Willes, 3; 4 Mau. & Selw. 62; 17 Ves. 484, in Barlow & Salter; Ward *v.* Bevil, 1 You. & Jerv. 513; and see Simmons *v.* Simmons, 8 Sim. 22; Machell *v.* Weeding, ib. 4. But even this rule will be relaxed, in order to give effect to an intention to be gathered from the context; Houston *v.* Hughes, ubi sup.

(*x*) See Forth *v.* Chapman, 1 P. W. 663; Fearne, 476, 477; Beauclerk *v.* Dormer, 1 Atk. 308; Barlow *v.* Salter, 17 Ves. 479; Campbell *v.* Harding, 2 Russ. & Myl. 401.

now a settled rule that, under such a limitation, *A.* would take an estate tail, the limitation over being explanatory of the word "heirs," and showing that the testator thereby meant "heirs of the body" (*y*).

And a devise over in case of death *without issue*, and in case of death *without leaving issue*, were, prior to the stat. of 1 Vict. c. 26, held equally to import a general failure of issue, and the words were not, in either case, restrained to issue living at the time of the decease of the first devisee (*z*).

The author thinks it right to notice in this place that, under a devise (even of a remainder) to the wife for her life, and after her decease to the heirs of her body by the testator, the wife, if she survived the testator, would be tenant in tail after possibility, although there never was any issue of the marriage, for there would be a possibility of issue for many months after the testator's decease; and to constitute a tenancy in tail, the possibility of issue is to be looked to, and not the event (*a*).

It has been adjudged that a devise on condition to pay a certain sum, is a limitation, and not a condition, if the devise be to the customary heir, but a condition, according to the words, if it be to any other person; and that the condition is not broken unless the sum is demanded (*b*).

And in *Clerke* v. *Howe* (*c*), it was ruled by Holt, C. J., that if copy-

(*y*) 1 Roll. Abr. 835, 836, "Estate," (P.); Tuttesham *v.* Roberts, Cro. Jac. 22; Browne *v.* Jerves, ib. 290; Gilbert *v.* Witty, ib. 655; Brice *v.* Smith, 2 Comy. 539; S. C. Willes, 1; and see Nottingham *v.* Jennings, 1 Comy. 82; Helier *v.* Jennings, 1 Freem. 510; Litt. Rep. 345; 1 Lord Raym. 506; Doe *&* Ellis, 9 East, 382; 4 Mau. & Selw. 62; 1 P. W. 57, n.

(*z*) Beauclerk *v.* Dormer, ubi sup.; Franklin *v.* Lay, 6 Madd. 258; Ward *&* Bevil, ubi sup. But by the 29th section of the last mentioned act (see the Append.), those words, or any other words, importing either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, are to be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, "by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided that the act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

By the 32d section it is enacted, that a devise for an estate tail shall not lapse by the death of the devisee, leaving issue inheritable living at the testator's decease.

And the 33d section enacts, that a devise or bequest to a child, or other issue of the testator, shall not lapse by the death of such devisee or legatee, leaving issue living at the testator's decease, but take effect as if such death had happened immediately after the death of the testator. Vide Johnson *v.* Johnson, 3 Hare, 157.

(*a*) See Platt et ux. *v.* Powles, 2 Mau. & Selw. 65.

(*b*) Curteis *v.* Wolverston, Cro. Jac. 56; ane see Wellock *&* Hamond, Cro. Eliz. 204; 3 Co. 20 b; ante, p. 167; Marston *v.* Marston, Nel. Ch. Rep. 24.

(*c*) 1 Lord Raym. 726.

hold land was surrendered to the use of a will, and afterwards be devised to *B.* and his heirs, upon condition that he paid 100*l.* within six months after the death of the devisor to *J. S.*, if the money was not paid, *J. S.* ought to be admitted, and then he must make an actual entry before he can surrender: therefore a surrender made in that case by *J. S.* before actual entry was adjudged ill.

In fixing the intention under an ambiguous devise, the Court of Chancery has inclined to a construction in favour of creditors: so in *Noel* v. *Weston* (*d*), the will contained an introductory clause, that "the testator's just debts, &c. should be paid and satisfied," and then bequeathed the personal estate to *S. W.*, subject to the payment of the debts, &c.; but in case the personal estate was insufficient, the testator charged his *freehold* estates with the payment thereof, and *subject thereto*, he devised all his freehold and *copyhold* estates (which he had surrendered or intended to surrender to the use of his will) to the said *S. W.* for life, with remainder over; the Vice-Chancellor, relying on the effect of the words "*subject thereto*," held that the copyhold estates were applicable to the debts as well as the freehold.

In another case (*e*), the testator expressed his intention to dispose of the whole of his estate and effects, and directed that *all his debts and funeral expenses should be first paid*, and then, subject thereto, he devised particular parts of his estate to different persons; and the question was, whether certain customary lands mentioned in the will, and which had been surrendered by the testator to the uses of his will, were subject to the debts; and Lord Hardwicke held that they were, the prefatory words "*all his debts, &c.*" running over all the subsequent clauses of the will (*f*).

It was a settled rule prior to the now repealed act of 55 Geo. III. c. 192, that a customary heir, having more than an equity, was incapable of devising before admittance, or, at least, without surrendering to the uses of his will (*g*); but the author had frequently ventured to advise that the above act embraced the case of an unadmitted customary heir, and consequently that he might have devised before admittance. The Vice-Chancellor was of a contrary opinion in

(*d*) 2 Ves. & Beam. 269.

(*e*) Godolphin v. Penneck, 2 Ves. 271; and see Coombes & Gibson, 1 Bro. C. C. 274; Ellison v. Airey, ib. 568; Tudor v. Anson, ib. 582; Beachcroft v. Beachcroft, 2 Vern. 690; Trott v. Vernon, ib. 708; Williams v. Chitty, 3 Ves. 545; King v. Denison, 1 Ves. & Beam. 274; Clifford v. Lewis, 6 Madd. 33; Ronalds v. Feltham, 1 Turn. & Russ. 418; and see Cole v. Turner, 4 Russ. 376.

(*f*) Ante, p. 260.

(*g*) Smith v. Triggs, 1 Stra. 487; Hawkins v. Leigh, 1 Atk. 388; 1 Watk. on Cop. 102. See the act 55 Geo. 3, c. 192, in the App.; ante, p. 211.

By the third section of 1 Vict. c. 26, customary freehold and copyhold estates may be devised by a person entitled to admission as *heir*, *devisee*, or otherwise, although he shall not have been previously admitted thereto; post, 268, in note.

the case of *King* v. *Turner* (*h*); but his honor's decision was overruled by Lord Chancellor Brougham on appeal (*i*), who concurred in opinion with the Court of King's Bench in *Right* d. *Taylor* v. *Banks and others*.

A feme covert, we have seen, could not have devised copyhold lands pursuant to a surrender made when sole to the use of her will (*k*); yet if the husband, previous to the marriage, covenants that she may settle or devise the same during coverture, the devisee of the wife will have a good title in equity (*l*); but if the will in such a case were executed previous to the marriage, it would be revoked by the marriage (*m*).

The interest of a *cestui que trust* in copyhold property was devisable without surrender to will, an equitable estate, as is already shown, not being the subject of surrender (*n*); and a will attested by two witnesses only, or even an unattested will, was sufficient to pass a trust of copyholds (*o*) as well as the land itself; but the intention to

(*h*) 2 Sim. 548; and see per Sir T. Plumer, V. C., in Wainwright & Elwell, 1 Madd. 632.

(*i*) 1 Myl. & Keen, 456.

(*k*) Ante, pp. 128, 215.

(*l*) Rippon v. Dawding, Amb. 565; George d. Thornbury v. Jew, ib. 627; ib. 473, marg.; vide also Baker v. Child, 2 Vern. 61; 1 Eq. Ca. Abr. 62.

(*m*) Hodsden v. Lloyd, 2 Bro. C. C. 534; 4 Co. 61; 2 P. W. 624. As to powers which, if given to a feme sole, may be exercised by her after her marriage, and which, if given to a feme covert, may be exercised by her after her second marriage, see ante, p. 129. And note, that an express estate for life, with a general power of disposition, does not pass the inheritance in realty, nor the absolute interest in personalty, but implies a power of appointment only; Liefe v. Saltingstone, 1 Mod. 189; 1 Leo. 283; 3 Leo. 71; 1 Inst. 9 b; 8 Vin. 206, pl. 7; Reid v. Shergold, 10 Ves. 370; Bradly v. Westcott, 13 Ves. 463. A gift to *A.*, to dispose of at his will and pleasure, without any express estate being limited to him, passes the fee, or absolute interest; 1 Leo. 283; 3 Leo. 71; Elton v. Sheppard, 1 Bro. C. C. 531; 3 Ves. 299, 470; Bradly v. Westcott, sup.; but see Irwin v. Farrer, 19 Ves. 86. In Maskelyne v. Maskelyne, Amb. 750, a bequest of a sum to *A.* to dispose of *by will*, was held to be an absolute interest. So where the devise was to the wife and her heirs, with the expression of an intention that she should enjoy the property for her life, and by will dispose of the same as she thought proper, she was held to take the fee; Doe d. Herbert v. Thomas, 4 Nev. & Man. 696. Where an express estate to another intervenes between the devise for life and a general power of appointment, the estate for life is enlarged; Goodtitle d. Pearson v. Otway, 2 Wils. 6; Preston on Estates, tit. "Wills," pt. 3, p. 83.

(*n*) Ante, p. 215; 1 Bro. C. C. 482; 1 H. Bl. 461; Phillips v. Phillips, sup.

(*o*) Appleyard v. Wood, Select Cases, temp. King, 42; Tuffnell v. Page, 2 Atk. 37; Barn. R. 12; 1 Ves. 225; Jervoise v. Duke of Northumberland, 1 Jac. & Walk. 570; Gibson v. Rogers, Amb. 94; Henderson v. Farbridge, 1 Russ. 482; but it was formerly thought otherwise; see Wagstaff v. Wagstaff, 2 P. W. 258; Anon. Rolls Court, Hil. Vac. 1727; 2 P. W. 261; Andrews v. Tuckwell, Mos. 95; vide also Godwin v. Kilsha, Amb. 684, which the Lord Chancellor is reported to have decided on the authority of Cotter v. Layer, 2 P. W. 623; but note that in Cotter & Layer the testatrix had only a

devise such equitable interest must have been evident (*p*), and then a general devise by the words "all other my real estate," would have included the trust of copyholds (*q*), even if the testator had the legal interest in other copyholds, some surrendered and others not surrendered to the uses of his will (*r*).

In the above case of *Car & Ellison*, the testator had freehold land to which the general words "all other my real estate" might have applied; but Lord Hardwicke decided that case on the manifest indication of the testator's intention to include his equitable interest in the particular copyholds, observing "the material circumstance here is the intention of the testator to restore the estates to the wife, from whom they originally came, and therefore he could not mean to dismember and sever the copyhold estate from the freehold."

It followed from the above-mentioned rule that an equity of redemption, where the mortgagee had been admitted, was devisable without surrender to will (*s*): and that a purchaser, whether he had

power of appointment, and not the equitable fee; and this circumstance is noticed in Mr. Hargrave's copy of Ambler in the British Museum. See n. 2 to Godwin & Kilsha, Amb. 2d ed. by Mr. Blunt, p. 685. And note also that in Godwin & Kilsha, the surrender to will required that the will should be published in the presence of three or more witnesses, and the will was unattested.

But a devise of a trust of customary freeholds, where there was no custom to surrender the legal interest to the use of a will, or where the customary interest was not devisable, must have been attested according to the statute of frauds; Hussey & Grills, Amb. 299; Willan & Lancaster, 3 Russ. 108; post, tit. "Customary Freehold."

When by the custom of the manor copyholds (prior to 55 Geo. 3, c. 192) might have been devised without a surrender to will, the author apprehends that the will required to be attested according to the statute of frauds. Such was the practice in the manor of Newcastle-under-Lyne.

N.B. The third section of 1 Vict. c. 26, enacts, that every person may devise and bequeath by his will, executed as thereinafter required, all real and personal estate which he shall be entitled to at law or in equity at the time of his death, and which, if not so disposed of, would devolve upon his heir, or the heir of his ancestor, or upon his executor or administrator, and that the power shall extend to *customary* and *copyhold* estates, notwithstanding that, being entitled as heir, devisee or *otherwise*, to be admitted thereto, he shall not have been admitted, or that the same, in consequence of the want of a custom to devise or surrender to will, or otherwise, could not at law have been disposed of by will, if the act had not been made; ante, p. 266, n. (*g*).

(*p*) Allen *v.* Poulton, 1 Ves. 121; Gibson *v.* Lord Montfort, ib. 489; Henderson *v.* Farbridge, 1 Russ. 481.

(*q*) Car *v.* Ellison, 3 Atk. 73; Greenhill *v.* Greenhill, 2 Vern. 679; Gilb. Eq. Rep. 77; S. C. cited in Acherly *v.* Vernon, 9 Mod. 75 (called Woodier *v.* Greenhill); and see 1 Ves. 122, in Allen *v.* Poulton; ib. 489, in Gibson *v.* Lord Montfort; but note, in the above case of Greenhill (or Woodier) & Greenhill, the intention might have been inferred from the copyhold being included in the same contract with the freehold.

(*r*) Allen *v.* Poulton, sup.

(*s*) Ante, p. 216.

taken a surrender or not, might have devised before admittance, having a title in equity (*t*).

But it was decided by Sir Thomas Plumer, V. C., that a devisee who had not been admitted had not such an equitable interest as was devisable, establishing therefore that it was not every one who had an incomplete legal title that had an equitable title; or, in other words, that it was not every surrenderee that had a devisable interest (*u*).

When a copyholder surrenders to particular uses, limiting the reversion in fee to himself, he is *in* of his former estate (*x*); and if he afterwards surrendered to will and devised the estate, and was subsequently admitted according to the surrender to uses, such admittance would not have been a revocation of his will (*y*); and by the same rule, if a copyholder in fee surrendered to will, and afterwards made a surrender to particular uses on his marriage, with the reversion to himself in fee, and then devised the estate, the devise would have been supported by the surrender to the u e of the will (*z*).

If, however, a copyholder, after devising his estate, conveyed it *entirely* away, though he took it back again the same day, such conveyance would have been a revocation of the devise (*a*); and in *Vawser* v. *Jeffery* (*b*), it was held by the Master of the Rolls that a devise

(*t*) Davie *v.* Beardsham (or Beversham), 1 Ch. Ca. 39; 3 Ch. Rep. 4; Nels. Rep. 76; 2 Freem. 157; ante, p. 215.

(*u*) Wainewright *v.* Elwell, 1 Madd. Rep. 627; and see Doe *&* Vernon, 7 East, 8; 1 Myl. & Keen, 463, in King *v.* Turner; ib. 664, in Phillips *v.* Phillips; Doe *v.* Lawes, 2 Nev. & Per. 195; 7 Ad. & Ell. 195. But the author apprehends that the rule was founded in the unconscientious design of the devisee to keep the lord out of his fine, and that it would not have been held to apply to a devisee in fee in remainder, who died in the lifetime of the unadmitted tenant for life; nor to the devisee of such remainder-man, who also died before the tenant for life, not even if there were a special custom compelling remainder-men to be admitted and fine, as a remainder-man need not pay a fine due by reason of a special custom, until his estate falls into possession; 1 Bac. Abr. 735; vide also 1 Vent. 260, in Batmore *&* Graves; 1 Burr. 212; Gilb. Ten. 163; post, tit. "Fine;" but a devise by an unadmitted remainder-man (that is, a remainder-man compellable by special custom to be admitted and fine), so consequently by his devisee, could only pass an equitable interest. And note, by 1 Vict. c. 26 (sect. 3, see the Appendix), *equitable* as well as legal interests in copyholds are devisable; ante, p. 268, in note.

(*x*) But this is altered by 3 & 4 Will. 4, c. 106, s. 3, ante, pp. 43, note, 143, note.

(*y*) Roe *d.* Noden *v.* Griffits and others, 4 Burr. 1952.

(*z*) Thrustout *d.* Gower *v.* Cunningham, 2 Sir W. Bl. 1046.

(*a*) Roe *d.* Noden *v.* Griffits and others, sup.; 1 Wils. 308; 2 Swanst. 273, in Vawser *&* Jeffery. But by the 23d section of the above mentioned statute (1 Vict. c. 26), it is enacted, that no subsequent conveyance or other act by the testator, except an express formal revocation under the 20th section, shall prevent the operation of the will with respect to his interest in the real or personal estate at the time of his death.

(*b*) 16 Ves. 526.

of copyholds was revoked in equity by a covenant to surrender the estates to the same uses as were created by the marriage settlement of the devisor of certain freehold lands, the object of the settlement being to secure a jointure annuity to the wife: the decree appears to have been made on the ground that an agreement to convey revoked a devise as well as an actual conveyance (*c*); and from an impression that if a surrender had been made to the uses of the settlement, the will would have been revoked at law. From this decree the devisees appealed; and on the argument of the appeal (*d*), Lord Eldon, C. was of opinion that the devise of the freeholds was revoked by the subsequent conveyance; and directed a case to the Court of B. R. on the question, whether the devise of the copyholds was revoked by a surrender being made thereof to the uses of the settlement, the order expressly directing that the case should state the settlement, and that an actual surrender had been made *pursuant to the covenant by G. C.* (*e*) of the copyhold estates to the uses of the said settlement.

The judges of the Court of King's Bench certified (*f*) that the surrender made by *G. C.* to the uses of the settlement, did not revoke the surrender to the use of his will and the devise of the copyholds. The case was again argued before Lord Eldon on the equity reserved, but no judgment had been pronounced whilst his lordship held the seals. It was afterwards re-argued before Lord Lyndhurst, C. (*g*), who reversed the decree of the Master of the Rolls as far as it declared that the testator's will was, as to the copyholds, revoked in equity by the covenant in the settlement to surrender the copyholds to the uses of that settlement.—His lordship relied on the established rule (*h*), that whatever estate a copyholder takes back under a surrender to uses, vests in him as part of his old estate, and observed that in the present case the estate of *G. C.* did not undergo any change, and consequently that what was done did not constitute a revocation with respect to the copyhold property beyond the partial interest, the *new* estate, which was created by the surrender: and that the answer which the Court of B. R. gave to the argument, that the testator intended that the freeholds and copyholds should go together, and therefore that as there was a revocation with respect to the freeholds, he must have intended to revoke the will as to the copyholds (and which was a decisive one) was, " that the will was

(*c*) See Rider *v.* Wager et al. 2 P. W. 332; Cotter *v.* Layer, ib. 624; Knollys *v.* Alcock, 5 Ves. 653.

(*d*) See 2 Swanst. 268.

(*e*) It is to be observed that the settlement did not contain an express covenant to surrender the copyholds; but they were included in the grant and release, and in the covenant for further assurance.

(*f*) See 3 Barn. & Ald. 462.

(*g*) 3 Russ. 481.

(*h*) See Roe *&* Griffits, 4 Burr. 1952; Thrustout *&* Cunningham, 2 Blackst. 1046; Fearne, 68, 70.

revoked as to the freeholds, not by any manifestation of intention on the part of the testator, but by the change that had taken place in his estate; and therefore that the revocation of the will as to the freeholds, did not afford any ground for inferring that there was an intention to revoke the devise of the copyholds."

In the case of *Reid* v. *Shergold* (*i*), *H. M. S.*, cestui que trust for life of copyholds, with a power to dispose thereof by will, after acquiring the legal customary estate of inheritance, and surrendering to the uses of her will, devised the copyholds pursuant to the power, and then sold and surrendered to a purchaser; and the Chancellor (Lord Eldon) held that the surrender could not be considered in equity an attempt towards the execution of the power, and adjudged that such surrender was nevertheless a revocation of the will. The observation of Lord Eldon in that case, on the effect of a refusal by one of several devisees in trust to act, induces the author to state the substance of the devise. It was to *S. B.* and *W. H.* and to the survivor of them, and to the executors or administrators of such survivor, in trust for the sole and separate use of *H. M. S.* (the wife of *H. S.*) for life, and when *M. G. S.* daughter of *H. M. S.*, should attain twenty-one, or after the death of her mother, to transfer the copyhold premises to her the said *M. G. S.*; but if she died before twenty-one, the testator devised the same to such persons as *H. M. S.* should by will give and dispose thereof. The testator gave full power to the trustees with the consent of *H. M. S.* to sell and surrender the copyholds, and gave the residue of his estate, real and personal, to *W. G.* *M. G. S.* survived the testator and died under twenty-one, in the lifetime of her mother. *W. H.* was admitted tenant, and *S. B.* attended the court and declined to act (*k*). *W. H.* afterwards by the direction of *H. M. S.* surrendered to her in fee, and she was admitted, and then surrendered to will; and it was observed by Lord Eldon, that "the effect of such refusal of *S. B.* to act in the trust, and the admission of *W. H.* was, that he was owner of the entire legal interest (*l*), in trust for the niece for life, for her daughter surviving her if she attained twenty-one, and if she died under twenty-one, for the residuary devisee; and that by the surrender to *H. M. S.* she became entitled to the legal estate upon the same trusts."

(*i*) 10 Ves. 370.

(*k*) It is clear that a devisee need not disclaim in a court of record, nor even by deed; vide Townson *v.* Tickell, 3 Barn. & Ald. 36; vide also 2 Vent. 201 et seq.; Begbie *v.* Crook, 2 Bing. N. C. 70. But the act must be unequivocal, and not a mere refusal to take any benefit under the will; as, for instance, saying he was heir at law, and would not take under the will; Doe *d.* Smyth *v.* Smyth, Bart., 6 Bar. & Cr. 112. And see as to the effect of a release with intent to disclaim, Nicloson *v.* Wordsworth, 2 Swanst. 372.

A deed of disclaimer is the best evidence of the renunciation of a trust; Stacey *v.* Elph, 1 Myl. & Keen, 195.

(*l*) Sec 4 Ves. 98.

The rule in freehold cases, that where a man had an equitable interest in fee, and devised the land, and afterwards the legal fee descended to him, or he took a conveyance of the legal estate to himself in fee, or to a trustee, such descent or conveyance was no revocation of the devise, was equally applicable to copyhold estates (*m*).

The courts leant to the construction of a partial revocation only, where the words used were so very general as to render it at least doubtful whether the testator contemplated a destruction of the whole of a previous disposition made by his will. The case of *Hicks & Doe* (*n*) is an authority for this proposition. By a special case arising out of a verdict in ejectment, it appeared that *J. H.* devised copyhold property to trustees, in trust for his wife during her life or widowhood, or so long as she should reside upon the premises, and in either of those events, in trust to follow the disposition of his residuary real estates. The testator then devised to the same trustees a certain freehold estate in trust as therein mentioned, and subject thereto to follow the disposition of his residuary real estates, and devised certain other freeholds, and all the residue of his real estates charged as therein mentioned to his son (who died in his lifetime) for life, remainder to his issue in tail male, and failing such issue, to testator's grandson *J. G.* for life, remainder to his sons in tail male, with remainders over: and he bequeathed to the trustees the personal property upon the copyhold premises, in trust for his wife during the time she should be entitled to those premises, and after the determination of her interest therein, in trust for the devisee of the residuary real estate. By a codicil *J. H.* made variations in the disposition by his will of his freehold property, bequeathed certain annuities, and revoked the bequest of his personal property about his copyhold premises, and gave the same and the residue of his per-

(*m*) Greenhill *v.* Greenhill, 2 Vern. 679; Marwood *v.* Turner, 3 P. W. 163; Swift *d.* Neale *v.* Roberts, 3 Burr. 1490; Parsons *v.* Freeman, 3 Atk. 741, 749; S. C. 1 Wils. 308; Sparrow *v.* Hardcastle, ib. 803, 804; Doe *d.* Gibbons *v.* Pott and others, 2 Dougl. 717; Watts and others *v.* Fullarton, cited ib. 718; 1 Watk. on Cop. 124, 125; and see Rawlins *v.* Burgis, 2 Ves. & Beam. 385; Ward *&* Moore, 4 Madd. 368.

And this rule applied equally to the case of a feme covert having the whole beneficial interest in personalty, with a power to appoint by will, and a feme covert who exercised the power, and after her husband's death took an assignment from the trustees of the personal estate to herself; Clough *v.* Clough, 3 Myl. & Keen, 296. But where a feme covert having a power of appointment only over real estate exercised it by will, and afterwards becoming discovert, she took a conveyance from the trustees to herself in fee, Lord Thurlow decided that the conveyance operated as a revocation of the will; Lawrence *v.* Wallis, 2 Bro. C. C. 319.

(*n*) Hicks *v.* Doe *d.* Hearle and others, 1 You. & Jerv. 470; and see Duffield *v.* Elwes, 3 Barn. & Cress. 705; S. C. 5 Dow. & Ry. 764.

sonalty to his wife. By a second codicil *J. H.* appointed his wife sole executrix and residuary legatee of his personal estate. By a third codicil he made a specific disposition of certain shares in a fire office: and by a fourth codicil, revoking and making void *several* of the dispositions made by his will and former codicils of all his freehold, *copyhold* and personal estate, instead and in the place of such devise, disposition and bequest, he gave, devised and bequeathed all his freehold, *copyhold* and personal estate to his daughter for life, remainder to his grandson *J. G.* and his issue in strict intail, and on failure of such issue, his estate to go as directed by his will; and he ratified the several annuities and donations bequeathed by his will and former codicils, and gave to his wife a further annuity; and in all other respects confirmed his will and former codicils. The Court of Exchequer held that the latter codicils revoked the devise in the will to the widow of the copyhold property: but the case having been turned into a special verdict, a writ of error was brought in the Exchequer Chamber, in which the counsel for the plaintiff in error contended that the fourth codicil merely interposed a life estate to the daughter of the testator before that to his grandson, leaving the devise of the copyhold to the widow untouched; and that had it been the intention of the testator to revoke the will as applicable to his wife, he would have used the words "the several dispositions," and not "several of the dispositions," which affected the will partially only, so that the judgment of the Court of Exchequer ought to be reversed. It was reversed accordingly, and the judgment of the Exchequer Chamber was afterwards confirmed by the House of Lords (*o*).

It had been decided that marriage and the birth of a child were such an entire change in the circumstances of a person, as to be an implied revocation of a will (*p*); but that either of those events

(*o*) 8 Bing. 475; 6 Bli. N. S. 37. In a recent case of a devise of copyholds, it appeared that the testator, being irritated against the devisee, threw the will upon the fire, whence it was rescued by the devisee, at which the testator, when informed of it, expressed his displeasure;—the envelope only was partially burned;—and the Court of Queen's Bench held that in a case to which the statute of frauds did not apply, the testator's power of revocation was not limited by a necessity for an *express declaration* to revoke, and that the jury was warranted in finding from the evidence that the facts amounted to a revocation, and that the mere knowledge of the continuance in specie of the will, unaccompanied with any wish to restore its efficacy, but on the contrary displeasure at its rescue from the flames, did not constitute such acquiescence in its continuance as would amount to a revocation of the previous revocation; Doe *v.* Harris, 8 Adol. & Ell. 1; ante, p. 88, n. (*b*).

(*p*) Lugg *v.* Lugg, 2 Salk. 593; Doe *d.* Lancashire, 5 T. R. 49; Shepherd *v.* Shepherd, ib. 51, (n.); Eyre *v.* Eyre, cited in Cook *v.* Oakley, 1 P. W. 304; Wellington *v.* Wellington, 4 Burr. 2167,

singly was not sufficient to work a revocation (*q*), except in the case of a *feme* copyholder, whose will made when sole was revoked by marriage (*r*).

And as the assignees of a bankrupt are trustees for him after payment of the debts, a devise of real estate is not revoked by bankruptcy (*s*).

The will of a copyholder is ambulatory until his death, equally with a will executing a power of appointment in freehold cases; therefore a devisee of copyholds dying in the lifetime of the testator will take no benefit under it (*t*); nor in such a case will the heir be entitled under a devise to *A.* for life, and after his decease to the heirs of his body (*u*).

We have already seen that so much of the copyholder's interest as is not devised away from the customary heir, the heir will take by

2171; Christopher *v.* Christopher, ib. 2182; Gibbons *v.* Caunt, 4 Ves. 848; and see Holloway *v.* Clarke, 1 Phill. 339; and the cases cited in Brady *v.* Cubitt, 1 Dougl. 35; vide also Israell *v.* Rodon, 2 Moore (Jud. P. C.), 51.

Vide also the authorities referred to in the judgments of Sir George Lee in several cases in the ecclesiastical courts, published in 1833, by Dr. Phillimore, from the MSS. of that distinguished judge, and well meriting a place in every law library, 2d vol. p. 208 et seq.

(*q*) Doe *d.* White *v.* Barford and another, 4 Mau. & Selw. 10; Wilkinson *v.* Adam, 1 Ves. & Beam. 465; and see Jackson *c.* Hurlock, Amb. 487; Parsons *v.* Lanoe, ib. 561; Thompson and Wife *v.* Sheppard, cited ib. 490, 561; Gray *v.* Altham, cited ib. 490; Brady *v.* Cubitt, sup.; which latter case decided that an implied revocation by marriage and the birth of a child might be rebutted by parol evidence. Vide also Emerson *v.* Boville, 1 Phill. 343; Johnson *v.* Wells, 2 Hagg. 561; Ex parte the Earl of Ilchester, 7 Ves. 348; Sheath *v.* York, 1 Ves. & Beam. 390; Wilkinson *v.* Adam, sup.; but see 4 Ves. 840, in Gibbons *&* Caunt, where Lord Alvanley expressed his disapprobation of the practice of receiving evidence against the presumption raised by marriage and the birth of a child. See further as to implied revocations, Kenebel *v.* Scrafton, 2 East, 530; Reid *v.* Shergold, 10 Ves. 370.

(*r*) Ante, pp. 128, 129. And see Gouldsb. 109, ca. 16; 1 Anders. 181, ca. 217.

But note,—by the 18 sect. of 1 Vict. c. 26, the will of a man or woman is revoked by marriage alone, except when made in exercise of a power of appointment, when the real or personal estate would not, in default of appointment, have passed to his or her heir, executor, or administrator.

But the 19 sect. enacts, that no will shall be revoked by any presumption of intention, on the ground of an alteration in circumstances.

And by the 20 sect., a will can only be revoked by a subsequent will executed as required by the 9 sect., or by intentional destruction.

By the 21 sect. any alteration in a will, and by the 22 sect. any revival of a will before revoked, partially or wholly, must be executed according to the 9 sect.

(*s*) Charman *v.* Charman, 14 Ves. 580.

(*t*) Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 65, 77; Belt's Supp. to Ves. sen. 279; but see 1 Vict. c. 26, ss. 32, 33; ante, p. 265, n. (*z*).

(*u*) Busby *&* Greenslate, 1 Stra. 445; 1 Fearne, 80; Shelley's case, 1 Co. 104.

descent (*x*); and the cases on this point go upon the supposition that the heir has no election. But this is only when particular estates are carved out in favour of strangers; for under a devise to the heir for a limited estate, with remainder over in fee, or a devise to the eldest son in tail (*y*), or a devise to the eldest son and a stranger as *joint-tenants* (*z*), the heir will take by purchase, as in either of those cases the devise to the heir would not be of the same estate as that which would have descended to him (*a*).

And the above rule extends equally to a devise *to* the heir in fee, with an executory devise over on some future event (as, for instance, in case of the death of the heir under twenty-one, without leaving issue), and to a devise *from* the heir in a like event, when there is no devise to him until the contingency happens (*b*); though it was formerly thought, on the authority of *Scott & Scott* (*c*), that the heir would take by purchase, and not by descent, under a devise to him in fee, with an executory devise over (*d*).

(*x*) Ante, pp. 43, 143. And see Wills *v.* Palmer, 2 Sir W. Bl. 687; S. C. 5 Burr. 2615. But now see 3 & 4 Will. 4, c. 106; ante, p. 43.

(*y*) Watk. on Desc. 176, 167; Bro. Devise, pl. 4, 41; and see Wills & Palmer, sup.

(*z*) Contra, under a devise to the son and a stranger, *as tenants in common;* Watk. on Desc. 178; Fearne Posth. W. 130, 132.

(*a*) Preston & Holmes, 1 Roll. Abr. 626, Disc. I. (pl. 2); and see S. C. and other authorities, ante p. 43.

(*b*) Doe *d.* Pratt and others *v.* Timins and another, 1 Barn. & Ald. 530; and see Hainsworth (or Hamsworth) *v.* Pretty, Cro. Eliz. 833, 919; S. C. Mo. 644; Wood *v.* Skelton, 6 Sim. 176.

(*c*) Amb. 383; S. C. 1 Eden, 458. The case is thus reported in Ambler: "Scott devised to Henry, his eldest son, and only son by a former wife, and to his heirs and assigns, all other his real estate not before devised; nevertheless, in case he should die without issue, not having attained twenty-one, then, from and immediately after his death under age and without issue, unto the testator's son William, and the heirs male of his body, with remainders over. The eldest son attained twenty-one. The specialty creditors (not having a lien on the real estate) having exhausted the personal estate in satisfaction of their demands, the legatees contended to stand in their place, and come upon the real estate. Q. whether the eldest son took by devise or descent? In the latter case, the legatees would be entitled; in the former, not. Henley, Lord Keeper, after having taken time to this day, gave his opinion that the eldest son took by devise, as having under the will a different estate than would have descended to him, the one being pure and absolute, the other not."

(*d*) A note of the late Mr. Serjeant Hill's in the author's possession, which was read in the above case of Doe & Timins, is well calculated to show the grounds of the erroneous inference that has been drawn from the determination in Scott & Scott. The note is written in the margin of Ambler's Reports, and is in his verbis: "The determination in this case is right, but the reason given for it is wrong; that the reason is wrong appears from Cro. Eliz. above referred to," (Cro. Eliz. 833, 919,) "and many other cases; but though a devise of a fee-simple to the testator's heir is void in all cases, notwithstanding the land is devised subject to a charge, as appears by the cases referred to by Ambler

Even a devise of copyholds to the heir, charged with debts or incumbrances, would not have affected the customary descent (*e*). But if a devise had been made of copyholds to the customary heir, and he entered *as heir*, he could not have compelled a purchaser to take the title without production of the will or sufficient evidence of its contents (*f*).

The reader is here apprised that when under an executory devise of copyhold land, the rents and profits arising between the death of the testator and the period of an estate vesting are not disposed of by the will (*g*), they belong to the customary heir (*h*). But that a general residuary disposition of all the testator's real and personal estate would pass the intermediate rents of an estate so devised on contingency, and which would otherwise have gone to the heir (*i*).

in the margin, by Str. 1270, Lord Raym. 728, 2 Burr. 879, 882, 1 Vent. 372, S. P. admitted Hob. 30, and many other authorities, all contrary to Gilpin's case, Cro. Car. 161, which has sometimes been cited, and expressly overruled, as in Comy. 72; and so a devise to the testator's heir in fee, subject to a contingency, as in Cro. El. ubi sup. and in the case here before Lord Northington is void, for it amounts to the same as if there had been no devise to him, but only a devise from him upon a contingency; and, therefore, if the contingency on which the devise from him is to take effect never happens, the heir takes by descent, and not by purchase. Yet [Though] a devise to the testator's heirs, if not restrained to a less estate than a fee-simple, is void as to passing the estate, yet the devise to the heir will in many instances influence the construction of the will, as was holden by Lord Holt, 1 Wms. 24, 25, and accordingly adjudged in the case there; and so was the opinion of Lord Harcourt with respect to the point on which the decision here reported by Ambler must have been founded; for, according to the case in Salk., though if lands descend to a heir (which from the context must be understood where they are not mentioned in the will to be devised to him), if the personal estate be exhausted in payment of bonds, the legatees may stand in their place, and be paid out of the real estate, as is clear they may, and he seemed to admit the same; yet Lord Cowper in that case held, that since the testator had devised the lands, that they 'ought to be exempted, for it was as much the testator's intention that the devisee should have this land, as the others should have the legacies, and a specific legacy is never broke into in order to make good a pecuniary one.'"

In the above case of Doe & Timins, Bayley, J., observed, "I can see no reason therefore why the heir at law here should not take by descent, and there are strong reasons why he should. *The case of Scott* v. *Scott has received a sufficient answer in argument at the bar.*" See 6 Sim. 183, 185, in Wood *v.* Skelton.

(*e*) Ante, p. 44; and see Hainsworth (or Hamsworth) *v.* Pretty, Cro. Eliz. 833, 919; Mo. 644; Noy, 51; Chaplin *v.* Leroux, 5 Mau. & Selw. 14. But now see 3 & 4 Will. 4, c. 106; ante, p. 43.

(*f*) Stevens *v.* Guppy, 2 Sim. & Stu. 439.

(*g*) Ante, p. 258, n. (*d*).

(*h*) Hopkins *v.* Hopkins, 1 Ves. Sen. 268; Stanley *v.* Stanley, 16 Ves. Jun. 511.

(*i*) 1 Ves. 491, in Gibson *v.* Lord Montfort; and see Duffield *v.* Elwes, 3 Barn. & Cress. 705; S. C. 5 Dow. & Ry. 764.

On the Practice in Equity of putting a Party to Election.

It may be well, in conclusion of the present chapter, to show that the doctrine of election extends to copyholds, and the author will on this subject first refer the reader to the case of *Frank* v. *Standish* (*k*), in which the testatrix, having surrendered to the use of her will, afterwards exchanged part of her copyholds for others which had not been surrendered, and then devised all her freehold and copyhold estates; two of her co-heiresses took beneficially under the devise, and one of them and also the third co-heiress were pecuniary legatees; and the Court of Exchequer decreed that the defendant, one of the co-heiresses, having made her election to take under the will by accepting her legacy, she and the other co-heiresses should surrender to the uses of the will; in which decree the court appears to have been influenced by the authority of *Noys* v. *Mordaunt* (*l*).

In *Cookes* v. *Hellier* (*m*), *T. C.* the copyholder, devised to his heir-at-law *T. S.* for life, with remainders over, making him also executor and residuary legatee of a large personal estate; the copyhold did not appear to have been surrendered to the use of the will, but the court rolls were burned. *T. S.* took an enfranchisement of the estate, in which he was recited to be executor and devisee of *T. C.*, and afterwards made a conveyance creating a term of years to raise money for payment of his debts after his death, the residue of the trust to be for the benefit of the remainder-man in the will of *T. C.* The remainder-man, after the death of *T. S.*, filed this bill in Chancery against his devisee to have a conveyance of the enfranchised estate, insisting that there was sufficient ground to presume a surrender, and that it was lost when the court rolls were burned, and that no one can dispute the will under which he has benefit. Lord Hardwicke (Chancellor) held that the plaintiff was entitled to the estate, observing that the surrender to will could not be presumed in equity upon a *casual* destruction of the court rolls any more than at law; but that a person enjoying a benefit under a will must abide by it *in toto*, and that in this case the devisee of *T. S.* was bound by his acquiescence. His lordship considered the description of *T. S.* in the deed of enfranchisement, and the circumstance of the term of years being made attendant on the inheritance, after the performance of the

(*k*) Cited in Highway and others *v.* Banner and others, 1 Bro. C. C. 588; and in Judd *v.* Pratt, 15 Ves. 391; and see Macnamara *v.* Jones, 1 Bro. C. C. 481, Belt's ed. The reader is also referred to an interesting note on the nature and origin of the doctrine of election in 1 Swanst. 394; and see per M. R. ib. 420 et seq. in Gretton & Haward.

(*l*) 2 Vern. 581.

(*m*) 1 Ves. 234.

trust for the benefit of the remainder-man, as evidence of *T. S.'s* intention to take under the will, and not as heir.

And where a person seised of freehold and copyhold estates devised all his real and personal estates to trustees for the benefit of his wife for her life, and after her death (subject to a few legacies), to convey and transfer the same to his heir, and died *without surrendering the copyhold to the use of his will;* on a bill filed by the heir against the widow (the administratrix) for an account of the personal estate, and to have the trusts performed, and a cross bill by the widow to compel the heir to make his election, either to take under the will or as heir, and if he elected to take as heir, to have a compensation out of his interest in the estates devised to him, equal to the interest in the copyhold which the testator intended to give her by the will; Lord Henley, Chancellor, was of opinion that this was a case of election, and that the heir would disappoint the manifest intention of the testator by claiming the copyhold; and held that his election to take under the will would be determined by an agreement he was said to have entered into with the widow about buying her interest in the personal estate (*n*).

It is observable that in the last case there were peculiar expressions in the will, showing the testator's intention to include his copyhold estates in the devise to his wife for her life; but in the case of *Judd* v. *Pratt* (*o*), it was decided that in the absence of any such evidence of intention, a general residuary devise of real estates would not raise a case of election as to copyholds not surrendered by the testator to the use of his will, there being freeholds to satisfy the general words of devise (*p*). And the same case showed that where, prior to the act of 55 Geo. III. c. 192 (*q*), the intention was not sufficiently manifest for the purpose of supplying a surrender to will, it was deemed not to be so for the purpose of raising a case of election; and that circumstances *dehors* the will might be evidence as to the property, but ought not to be admitted to show the intention (*r*).

(*n*) Unett *v.* Wilkes, Amb. 430; S. C. 2 Eden, 187; and see Att. Gen. *&* Parkin, 1 Dick. 422; Amb. 566, in which the heir, to whom the testator devised a small freehold estate for life, was decreed to give effect to a devise to Pembroke Hall, Cambridge, of a copyhold estate which had not been surrendered by the testator to the use of his will.

(*o*) 13 Ves. 168; 15 Ves. 390.

(*p*) Whether or not, subsequently to the act of 55 Geo. 3, c. 192, the intention to include copyholds in a general residuary devise, where the testator died seised of freeholds, would have been implied in a similar case to that of Judd *&* Pratt, see Doe *&* Ludlam, and the author's comments upon that decision, ante, p. 242 et seq.; and see ante, p. 294, n. (*e*).

(*q*) Ante, p. 236.

(*r*) Lord Hardwicke in Car *&* Ellison, 3 Atk. 73, inferred the intention from circumstances *dehors* the will, but that was

And it has long been settled that loose and ambiguous expressions will not be a sufficient indication of intention to raise a case of election. So where the testator devised his freehold and copyhold estates at *R.*, *T.*, *E.* and *W.*, (which copyholds he had surrendered to the use of his will), and all other his freehold and copyhold estates in trust for his wife for her life; and the testator was seised in fee of a copyhold estate at *W.*, and of a moiety of an estate at *T.*, to the other moiety of which his wife was entitled in her own right; and she was also seised in fee of two copyholds in *R.* and *E.*, but in those places the testator had no property whatever, nor had he any other real estates than as before mentioned, the Lord Chancellor held that it did not sufficiently appear that the testator intended to devise the moiety of his wife, the words of devise being "his estate which he had surrendered." And the wife was not put to her election (*s*).

But the author apprehends that a general devise of all the freehold and *copyhold* estates which the testator should die possessed of, would have created a case of election against the heir, as to any copyhold lands purchased by the testator after the date of his will (*t*).

In *Wardell* v. *Wardell* (*u*), the testator having limited several copyhold estates upon certain trusts, after noticing that for want of surrenders to will or other customary forms they would descend to his son John as his heir contrary to his intention, directed that his son should do all acts necessary for establishing the estates limited by the will, and that in case of his refusal, an estate devised to him in tail should cease, and the remainders thereupon expectant take effect in possession, as if his son were dead without issue, and that in the mean time and until such refusal, the copyholds should be enjoyed according to his will. The customary estates not being devisable, it was insisted that the court could not decree a surrender; but Lord Thurlow, Chancellor, held, that though they were not devisable, yet as the testator might dispose of them, *and had marked his intention so to do*, that brought the case within the principle upon

the case of a trust of copyholds, ante, p. 268; and the doctrine was reprobated as very dangerous by Lord Thurlow, in Stratton *v.* Best, 1 Ves. jun. 285; and see 13 Ves. 174.

(*s*) Read *v.* Crop, 1 Bro. C. C. 492; and see Rancliffe, Lord, Appel. & Parkyns, Resp. 6 Dow. P. C. 179, per Lord Eldon, C.

(*t*) See Thellusson *v.* Woodford, 13 Ves. 209; Rendlesham, Appel., Woodford, Resp., 1 Dow. P. C. 249; Churchman *v.* Ireland, 1 Russ. & Myl. 250; but see Johnson *v.* Telford, ib. 244; Back *v.* Kett, Jac. 534. And note, that in Churchman & Ireland, the Lord C. would not give costs, as the case bore so near a resemblance to that of Back & Kett, in which the heir was not put to his election.

(*u*) 3 Bro. C. C. 116.

which the court supplied surrenders for payment of debts, or for younger children, and decreed the surrenders prayed by the bill (*x*).

And where a copyholder had surrendered part only of his copyholds to the use of his will, and it appeared from the wording of the will that he meant to devise such copyholds only as he had so surrendered, and which included certain entailed lands, the Master of the Rolls held that the heirs could not take both under the will and the estate that was entailed, but must be put to their election, on the principle that no one claiming under a will can contravene it (*y*).

In another and more recent case (*z*), the testator was entitled both *legally* and *beneficially* to certain copyhold property, and was *legally* seised of the customary fee of other copyholds holden of the same manor as the former, but was only *equitably* entitled *for life* to the latter, with remainder to his son in tail, with remainder to himself in fee; and having surrendered to the use of his will all his copyholds held of the said manor, he devised all his copyhold estates in general terms to trustees, in trust for his son for life, with remainders over; and the Court of Chancery held that the *beneficial* as well as the legal interest of the testator in the settled estate passed by his will, and that the son was bound to elect whether he would abide by and give full effect to the general devise.

But this doctrine does not apply to creditors; and those persons who come within the rule are not bound by an election made under a mistaken impression.

In *Rumbold* v. *Rumbold* (*a*), under a devise of unsurrendered copyhold lands for the benefit of the wife and children, and the only provision for the eldest son and heir being an annuity to be purchased with the monies arising from the sale of the estates, the heir was put to his election; but was held not to be bound by having received half a year's payment of the annuity. In that case the testator had apparently contemplated, not an *equitable* disposition of the copyhold

(*x*) Ante, pp. 216, 236, et seq.

(*y*) Wilson *v.* Mount, 3 Ves. 191, over-ruling Cull *v.* Showell, Amb. 728; and see 1 Swanst. 407; see also as to this principle 1 Ves. 122, in Allen & Poulton; 13 Ves. 220, 221, in Thellusson *v.* Woodford; Broome *v.* Monck, 10 Ves. 609; Welby *v.* Welby, 2 Ves. & Beam. 187.

(*z*) Abdy *v.* Gordon, 3 Russ. 278. When a will is totally void as to freehold property, the heir is not put to his election by accepting a legacy; Hearle *v.* Greenbank, 1 Ves. 299; S. C. 3 Atk. 695; Carey *v.* Askew, 2 Bro. C. C. 58, 59, Belt's ed.; S. C. 1 Cox, Ch. Ca. 241; Sheddon *v.* Goodrich, 8 Ves. 496; Thellusson *v.* Woodford, ubi sup. But it should seem that if a condition is annexed to a legacy given to the heir not to dispute the will, he must then elect between the inheritance and the legacy; Boughton *v.* Boughton, 2 Ves. 12; and see 1 Swanst. 405, 406; 2 Ves. & Beam. 130, in Brodie *v.* Barry.

(*a*) 3 Ves. 65; and see Kidney & Coussmaker, post, p. 281; vide also Strutt *v.* Finch, 2 Sim. & Stu. 229.

property, but a disposition to have a *legal* effect, devising all his estates, as well copyhold as freehold, and using the words "the copyhold part thereof having been previously surrendered to the use of my will," although it appeared at the hearing not only that he had not surrendered the property to the use of his will, but that in point of fact he had never been admitted thereto.

We have seen that a jointure of copyhold lands is no bar of dower at common law (*b*), but it was long since held that a devise of copyholds in lieu of dower might raise a case of election.

Where the bill was to stay a suit at law in a writ of dower, for that the wife had certain copyhold lands devised to her in lieu of her thirds at law, which she accepted of and enjoyed twenty years, and yet sought to recover dower of the freehold lands, and demurred to the bill because copyhold lands could be no bar of dower, the court held that she could not in conscience have both, and therefore must answer (*c*).

Another case applicable to this rule and of considerable interest, is *Kidney* v. *Coussmaker* (*d*); there *A.* devised certain freeholds and copyholds by the general terms of messuages, lands, &c. in trust to be sold, and the produce, after discharging mortgages, to be considered as part of the residue of his personalty; and after confirming a post nuptial settlement on his wife, he directed that if the messuages therein devised to her for life did not produce 400*l.* per annum, the deficiency should be made up to her out of the produce of his personal estate, and declared that the provision should be in bar of dower and free-bench: the testator gave the remainder in the freehold messuages his wife had for life, and all other his freehold and copyhold lands, &c. not before devised, to his two daughters, as tenants in common in tail, with cross remainders, with remainder to his own right heirs; and he further directed that until sale of the first mentioned estates, the surplus rents, after payment of the interest of mortgages, should go in the same manner as the interest of his residuary

(*b*) Ante, pp. 76, 79; and see Gladstone v. Ripley, 2 Eden, 59, 60; 1 Swanst. 447, n. a.

(*c*) Lacy et ux. v. Anderson et ux. 24 Eliz., Choice Cases in Ch. 155, 156; S. C. cited 1 Swanst. 398, n.; ib. 430, n.; ib. 445, A.

(*d*) 12 Ves. 136; and see Ardesoife v. Bennet, 2 Dick. 463; S. C. (called Wilson v. Andesoif,) cited 15 Ves. 392; Graves v. Forman, cited 3 Ves. 67; Pettiward v. Prescot, 7 Ves. 541; Blunt v. Clitherow, 10 Ves. 589; Streatfield v. Streatfield, Ca. temp. Talb. 176; Herne v. Herne, 2 Vern. 555; Stratton v. Best, 1 Ves. jun. 285; Whistler v. Webster, 2 Ves. jun. 367; Sheddon v. Goodrich, 8 Ves. 481; Brodie v. Barry, 2 Ves. & Beam. 130, 133; Halford v. Dillon, 2 Brod. & Bing. 12; Dillon & Parker, 1 Swanst 370, 400, where most of the cases on the doctrine of election are collected; vide also Gretton v. Haward, ib. 409. N. B. The judgment in the above case of Dillon & Parker was affirmed in the House of Lords, see 7 Bli. N. S. 325.

personal estate; and the Master of the Rolls held that the widow was entitled to her election, and that an enquiry must be made of what estates she was dowable, and that she should not be bound by the election, which it appeared she had made under a mistaken impression (*e*); but that an objection taken that the creditors could not defeat the provision for the wife was not to be supported, the doctrine of election not applying to creditors. In this case the Master of the Rolls also held that not only creditors by specialty are permitted, but that creditors by simple contract are, by marshalling, permitted to follow devised estates, if there are no estates descended, or if the descended estates have been applied (*f*).

(*e*) See also 1 Swanst. 407; Amb. 728, in Cull *v.* Showell.

(*f*) It is to be borne in mind that the principle of election is compensation, not forfeiture. Vide 13 Ves. 171, (n.), in Judd *&* Pratt; 1 Swanst. 381, in Dillon *&* Parker.

As to the doctrine of election and satisfaction, see a treatise on those subjects by Mr. Stalman, of Lincoln's Inn.

CHAPTER VI.

Of Admittance.

THE act of admittance to copyholds is to be distinguished from the mere voluntary grant of the lord (*a*), and where the right of alienation is established by the custom of the manor, the admittance is more of form than of essence, and the surrender is deemed to be the substantial part of the conveyance (*b*).

But the licence of the lord of a manor to an alienation of customary freehold lands, according to the practice prevailing in several manors in Cumberland (*c*), stands on quite a different footing to an admission pursuant to a surrender; and in the former instance the estates pass by the customary bargain and sale, although the new tenants, on death or alienation, are bound to appear and have their names entered on a roll, paying a shilling or other small sum to the steward of the manor, and which inrolment the lord may enforce by seizure *quousque*. And in the case of *Doe* d. *Earl of Carlisle and others* v. *Towns* (*d*), it was held by the Court of King's Bench that such an inrolment was not an admittance within the stamp act of 55 Geo. III. c. 104, imposing a duty on *customary* estates passing by surrender and admittance or by admittance only, and not by deed.

And when admission merely signifies the assent of a public body, that the person in whose favour a surrender may have been made shall become a member of the society, as in the case of *Doe* d. *Warry and others* v. *Miller* (*e*), where a surrender was made of

(*a*) It was therefore held in a late case, that where the admission was in pursuance of a surrender, or of what by statute was equivalent thereto, and not of a voluntary grant by the lord, the lord's title was immaterial; Doe *d.* Burgess and Harrison *v.* Thompson, 5 Adol. & Ell. 532; S. C. 1 Nev. & Per. 215; ante, p. 97, n. (*f*); post, title "Forfeiture."

(*b*) Benson *v.* Scott, 4 Mod. 251; 3 Lev. 385; Salk. 185; Comb. 233; Skin. 406; Carth. 275; 12 Mod. 49; Holt, 160; and see 3 Burr. 1543; 4 ib. 1961, 1962; 5 ib. 2785; Gilb. Ten. 438, n. 94.

(*c*) See reference, ante, p. 114, n. (*n*), to the 92 sect. of 4 & 5 Vict. c. 35, empowering tenants (where by the custom the lords are restrained from granting licences to alien ancient tenements otherwise than by entireties), with the licence of the lord or steward under his hand, to be afterwards entered on the court rolls, to dispose of their ancient tenements, or any part thereof, by devise, sale, exchange, or mortgage, *in parcels*, at apportioned rents.

(*d*) 2 Barn. & Adolp. 585; post, title "Customary Freeholds," Ch. IX.

(*e*) 1 T. R. 393.

chambers in New Inn to the treasurer and antients of the society, to the intent that they might grant to a purchaser, it is the surrender which passes the whole legal interest, and the persons to whom it is made become trustees for the purchaser, and there is no analogy between such a case and the surrender of and admission to copyholds of inheritance (*f*).

As a surrenderee of copyholds has no legal title until admission, it was usual in the case of an absolute surrender to apply to be admitted at the court at which the surrender is made; and if made out of court, then at the next general court; and where the purchaser, from a desire to surrender the estate by way of mortgage or otherwise, would have been inconvenienced by the delay of his admittance, he was allowed by the general custom of manors to call a special court (*g*).

Should a purchaser who has taken a surrender die before admittance, his heir might claim to be admitted *as by descent* (*h*); but he would be compellable to give effect to any devise or other disposition made by the ancestor of the equitable estate (*i*).

The power of the lord, or the chief steward of the manor, or his deputy, to admit a person into the tenancy has already been discussed (*k*); and with respect therefore to the mere form of admission, considered as a compulsory act, it may only be necessary to observe that the lord is not bound to admit incapacitated persons, as aliens, outlaws, &c., or persons not able to perform the usual services of fealty, suit of court, &c., as corporate bodies (*l*); nor to admit a tenant according to the express terms of a surrender, when it is contrary to the legal forms, or prejudicial to the lord's interest (*m*); for instance,

(*f*) A surrender of the above nature is to be assimilated to a surrender of copyholds for lives to the lord, to the intent that he may regrant to a purchaser for his own life, or for a life or lives to be named by him, which surrender vests the copyhold estate in the lord, upon an implied trust to regrant the same to the purchaser.

(*g*) The inconvenience and expense of calling a special court was obviated by the 88 sect of 4 & 5 Vict. c. 35; ante, p. 102, n. (*f*).

(*h*) Blunt *v.* Clark, 2 Sid. 61; Gilb. Ten. 220, 288; Rob. Gav. b. 1, p. 128, 3d ed.; Cont. Moore's case, 1 Roll. Abr. Disc. (I.), pl. 9. But on this question see Vaughan *&* Atkins, 5 Burr. 2786. We have seen that by the custom of some manors the grantee of a customary estate passing by deed or surrender, must be admitted in the lifetime of the grantor; ante, p. 24.

(*i*) This is clearly so in the case of a purchaser, but it was not every equitable interest that was devisable; Wainewright *v.* Elwell, 1 Madd. Rep. 627.

(*k*) Ante, pp. 96, 100, et seq.

(*l*) Co. Litt. 66 b; 2 Lord Raym. 864, in Tonkin *v.* Croker; 1 Watk. on Cop. 242; ante, p. 108.

(*m*) Car *v.* Ellison, 3 Atk. 75; post, tit. "Contingent Remainders." Nor is the lord bound to admit a person until the stamp duties and steward's fees are paid. See 48 Geo. 3, c. 149, s. 34, in the Appendix.

if the surrender be to *A.* for his life, *without impeachment of waste,* the lord need only admit *A.* for his life, omitting the words making him dispunishable for waste.

The customary form of admittance should be strictly pursued, as any deviation would probably be fatal at law, though open to relief in equity, if there were a sufficient consideration to induce the court to interpose (*n*).

A symbolical investiture was adopted at a very early period, and was not unusual even in grants of freehold property. The more ordinary symbol of possession is a rod, wand or verge, and hence copyholders are frequently denominated " tenants by the verge (*o*)."

At the first general court, after the death of a copyholder is known to the homage, it should be presented, and if personal notice has not been served on the customary heir by the steward, calling upon him to take admission, which should be done if possible (*p*), and if the heir or his place of abode be unknown, so that such notice could not be served immediately after the court, the first proclamation should be made for the heir, or other person claiming title to the land whereof such copyholder died seised, to come in and be admitted; and if no person should attend and make out a claim to admission, the proclamation must conclude with a direction for a second proclamation to be made at the next general court; at which court the second proclamation is to be made accordingly, and in case no right to admission is then shown, it should direct a third proclamation to be made at the succeeding general court; and at such court a third proclamation is to be made, and if no claim is then established, a precept should be issued by the lord or steward to the bailiff of the manor, to seize the lands into the lord's hands for want of a tenant (*q*). Proclamations

(*n*) Aspye *v.* ———, Cro. Car. 597; 1 Watk. on Cop. 262.

(*o*) Co. Lit. 61 a. Sometimes a straw is used as the symbol of possession; Co. Cop. s. 39, Tr. 87. Mr. Watkins, 1 vol. on Cop. p. 261, says, " the symbol was generally arbitrary, and often of the most extravagant nature: a sword, a lance, a knife, a glove, the key of a church, and even a drinking cup, or a lock of the grantor's hair, was adopted as the symbol of possession. The rod, staff or verge, however, was the most common; and which most probably was no other than that borne by the officer of the court, and consequently always at hand: though its origin indeed had been deduced from a more ancient and sacred source. (See Stuart's view of Soc. in Eur. b. 1, c. 2, s. 4, p. 289, 4to. ed.")

(*p*) See as to the effect of personal notice, 1 Barn. & Adol. 747, in Doe *&* Trueman, post; and see as to presentment, infra, p. 287, n. (*a*).

(*q*) See the forms of Presentment, Proclamations and Precept, in the Appendix. Note,—proclamations may be made at a customary court held without the presence of homagers, under the 86th section of the 4 & 5 Vict. c. 35; but they would not bind the title of any person, unless served with notice thereof within one month after the court; ante, p. 102, n. (*f*).

of this nature are in imitation of the feudal law, by which the feud was lost, unless the heir appeared within a year (*r*).

The presentment and proclamation may be general, and need not mention the name of the person to be admitted, though known, nor specify the particular estate of which the tenant died seised; nor is it necessary, in order to seise *quousque*, to prove the proclamations *vivâ voce* (*s*).

In the case of *Doe & Jenney* (*t*) Lord Ellenborough said, "And though as the object of the presentment is for the information and instruction of the lord, it would, in respect of him, be better to mention the person who ought to come and be admitted, when known; yet, in respect of the heir or remainder-man, this is not the purpose of the presentment, nor are the proclamations intended to inform persons of their titles, but to give notice to those who have a right to be admitted that the tenancy is vacant, and that the lord requires of those who are entitled to take upon them the tenancy.

When the heir or devisee appears in court to be admitted, either personally or by attorney, the formalities of proclamation are said to be unessential (*u*); but it is customary and very proper to proclaim the vacancy at the door of the court in all cases, in order that any person disputing the right of admission may come forward and state the grounds of his claim to fill the vacant tenancy.

In the case of *Doe* d. *Bover* v. *Trueman* (*x*) the Court of B. R. adjudged that if notice to attend at a court and be admitted be not served personally on the heir of a deceased copyholder, or left at his usual place of abode, and which would be sufficient to entitle the lord to seize without any proclamation, there is no distinction, as to the course to be pursued by the lord for obtaining possession of the estate, between an absolute seizure for a forfeiture under a special custom, and a seizure *quousque* where no such custom prevails; but that there must be three proclamations in either case, and that they must be made at consecutive courts. It was, however, considered by Mr. Justice Bayley in the above case of *Doe & Trueman*, that the seizure *quousque* is rather in the nature of process at the instance of the lord, by way of *cape* or *distringas*, to compel an appearance by the heir, than a forfeiture, so that there appeared to be no objection to the succeeding lord (*y*) going on to complete the proceedings which had been begun in the time of the preceding lord to compel an appearance.

(*r*) Wright's Ten. 198; Gilb. Ten. 442, n. 100; 1 Watk. on Cop. 230, 231, 232.

(*s*) Doe & Hellier, 3 T. R. 164, n. (*a*); but see Scroggs, 98.

(*t*) 5 East, 532.

(*u*) 1 Watk. on Cop. 239.

(*x*) 1 Barn. & Adol. 736.

(*y*) He was a devisee of the manor. See this case, post, tit. "Forfeiture."

And Lord Tenterden, C. J., in the judgment given by him upon the second argument of that case, observed, "The proclamations at the lord's court are substituted for the notice which ought to be given to the heir, if known, that the tenancy is vacant. The proceeding bears some analogy to proceedings in outlawry, to compel a party to appear in court to answer the complaint of another. In such a proceeding the sheriff is commanded by the *exigi facias* to cause the defendant to be required from county court to county court, or from husting to husting, if in London; and it has been held that proclamations should be made at five successive county courts or hustings, for that a time commenced ought to be continued without intermission. So in proceedings against bail, where there are two writs of *scire facias*, and two returns of *nihil*, the second *scire facias* must be tested on the return-day, or, if by original, on the *quarto die post* of the first. It seems to us to be reasonable that a similar rule should apply to copyholds. It may be that the party to be admitted may watch, after proclamation made at one court, to see if any thing further takes place at the next, and if not, he may think the proceedings are abandoned;" and his lordship added, "there appears no sound distinction between proclamations in cases of seizure for a forfeiture, and proclamations for seizing a copyhold *quousque*."

And the author inclines to think that, in reference to the ulterior proceedings, there is no distinction between a seizure for a forfeiture by special custom, by the non-appearance of the heir after proclamations or personal notice, and a seizure *quousque*, having only for its object the recovery of a descent-fine, but that an ejectment for obtaining possession of the estate founded on the seizure must in either case be brought within twenty years of the period when the lord's right to issue a precept of seizure accrued (*z*).

As the heir, even if of full age, was not bound to take admittance until his ancestor's death had been presented, and proclamations had been made (*a*), or at least until he had been personally served with notice to appear in court (*b*), it followed that the lord might frequently have been kept out of his fine for a very long period; but, on the other hand, the lord was not compellable to account for the rents of the

(*z*) Vide 21 Jac. c. 16; 3 & 4 Will. 4, c. 27, s. 2; post, p. 289. But the lord's neglect to seize quousque within twenty years would not alter the tenure, and consequently the only loss sustained by the lord would be the descent-fine.

(*a*) Kitch. 246; Rumney & Eve, 1 Leo. 100; Anderson & Hayward, 3 ib. 221; S. C. 4 ib. 30; Sir Richard Lechford's case, 8 Co. 99 b; S. C. (Underhill & Kelsey), Cro. Jac. 226. Since the act of 4 & 5 Vict. c. 35 (ss. 86, 89), it is sufficient that the death of a tenant is recorded by the lord or steward at a court held without the presence of homagers, and consequently without any presentment of the fact.

(*b*) Doe & Trueman, ubi sup.

estate received by him during his possession, upon a seizure made *quousque* (*c*).

It has been decided that if the heir be beyond sea at the time of the descent and of the proclamations, he is not bound by a custom that the land should be forfeited for not coming after three proclamations (*d*); but if the heir leave the kingdom after the first proclamation, or perhaps at any time after the descent, unless it be evident that he had not notice of the vacancy, he is bound, as it would seem, by such a custom (*e*).

Neither the presentment of the forfeiture nor the entry or seizure of the lord need be proved (*f*), so that a written precept to seize does not appear to be necessary in any case (*g*).

A custom to seize, as forfeited, if not claimed after three proclamations, or within a year and a day (and which has been said to be a good custom (*h*)), would not be binding on a person under disability, as an infant or feme covert, any more than on the heir beyond sea (*i*).

It is very essential to observe, that in the case of co-heiresses, the lord can only seize the particular share in respect of which no claim to admission shall be made (*k*), and that, as the neglect of coming in to be admitted is not a cause of forfeiture without a special custom, the lord can enter and retain possession only *quousque* the heir demands admission (*l*).

In these instances great care should be taken by the steward to avoid a *general* and *unqualified* seizure, which would vitiate the whole proceedings, they being, as in outlawry, *strictissimi juris*; therefore, where the entirety was seized *absolutely* by the lord, one of the co-heiresses being a feme covert, and protected from forfeiture by the statute of 9 Geo. I. c. 29 (*m*), the customary heirs recovered in eject-

(*c*) Underhill *v.* Kelsey, sup.; King *v.* Dilliston, Carth. 45; Gilb. Ten. 231; ib. n. 161.

(*d*) Underhill & Kelsey, sup.; King *v.* Dilliston or Dillington, Carth. 42; 1 Freem. 494; Kitch. 246. And see the other authorities, ante, p. 24, n. (*i*).

(*e*) Sir Richard Lechford's case, 8 Co. 100 b; Whitton & Williams, Cro. Jac. 101; 1 Watk. on Cop. 236; Watk. Gilb. Ten. 230, 231; ib. n. 101.

(*f*) Bull. N. P. 107, cites Peter ex dem. Episc. Winton *v.* Mills et al. per Tracy, Surry, 1707; and see Benson *v.* Strode, 2 Sho. 152; but see 1 Keb. 287, Lord Salisbury's case.

(*g*) Trotter *v.* Blake, 2 Mod. 229.

(*h*) See Stowel *v.* Lord Zouch, Plowd. 372; Gilb. Ten. 230.

(*i*) Kitch. 246; Gilb. Ten. 230, 231; and see King *v.* Dilliston, and other cases, ante, p. 24, n. (*i*), sup. n. (*d*); but, according to the opinion of Gilbert, C. B., such a custom would bind a feme covert; Ten. 231.

(*k*) Doe *d.* Tarrant and others *v.* Hellier and others, 3 T. R. 171, 172.

(*l*) Earl of Salisbury's case, 1 Lev. 63; S. C. (Pateson *v.* Danges), 1 Keb. 287; Titus *v.* Perkins, Skin. 250, &c.; King *v.* Dilliston, sup.; Roe *d.* Ashton *v.* Hutton and others, 2 Wils. 162; Doe & Hellier, sup.

(*m*) Repealed by 1 Will. 4, c. 65, and its provisions re-enacted with amendments; see Appendix.

ment against the grantee of the lord; which verdict was confirmed by the Court of King's Bench, upon a case reserved at the trial: the court, however, expressed an opinion that the intention to seize *quousque* might have been explained by other acts, but that the subsequent grant of the lord clearly showed that he meant to seize absolutely (*n*).

In the above case of *Doe & Hellier* the deceased copyholder had levied a fine which, from the description of the estates, comprehended his copyhold as well as freehold property, and, on the part of the defendant (the grantee of the lord), it was contended, that by levying the fine an absolute and incurable forfeiture was incurred; but the court inclined to the opinion that the statute of limitations (21 Jac. c. 16) made it necessary that the lord of a manor should have entered for a forfeiture within twenty years (*o*).

The bailiff, on executing the precept, should require the occupier to attorn tenant to the lord, but he would not be justified in using force to obtain possession of the estate (*p*); and if resistance be made to the execution of the precept, the lord may maintain ejectment (*q*).

If the heir or other person entitled to admission be an infant, or feme covert, or lunatic, the provisions of the act of 11 Geo. IV. & 1 Will. IV. c. 65, should be pursued (*r*); but the act is not imperative on the lord, when admission is not required by virtue of the third section on the part of the guardian, attorney or committee of the party under disability (*s*).

The observations of Lord Eldon, in the above case of *Lord Kensington & Mansell*, claim the particular attention of every court-keeper,

(*n*) Doe & Hellier, ubi sup.

Where *J. S.*, being seized of copyhold property, conveyed the same to a canal company, and died, whereupon three proclamations were made for the heir to come in and be admitted, and on his not coming in, the property was seized into the hands of the lord, and the heir was a minor at the time of seizure, it was held that the lord was bound to pursue the course pointed out by statutes 9 Geo. 1, c. 29, 11 Geo. 4 & 1 Will. 4, c. 65, in the case of an infant heir, and that they applied to a seizure quousque; Dimes *v.* Grand Junction Canal Company, reported 8 Jurist, 847.

(*o*) See confirmation of this opinion by Sir J. Leach, M. R., in Whitton *v.* Peacock, 3 Myl. & Keen, 335; ante, p. 387.

(*p*) 3 Leo. 99, ca. 142.

(*q*) Pateson *v.* Danges (Lord Salisbury's case), 1 Keb. 287; Lex Cust. 17; Doe *d.* Smyth *v.* Smyth, Bart., 6 Bar. & Cr. 114; and see 5 Bing. 411.

(*r*) See extract from the act in the Appendix; vide also in the Precedents of Court Rolls a form of admittance of an infant heir by attorney appointed by the steward, in which the lord's entry for the recovery of the fine imposed at the court, and to be demanded under the sixth section, is contemplated.

(*s*) Lord Kensington *v.* Mansell, 13 Ves. 240. See this case fully stated, ante, p. 178 et seq.; Doe & Hellier, sup.

The act of 9 Geo. 1 was confined to infants and femes covert, claiming by descent or surrender to will; but the 11 Geo. 4 & 1 Will. 4 is general as to infants, femes covert and *lunatics*, entitled by descent or surrender to will, *or otherwise*.

and suggest the propriety, whenever a power of appointment is created under a surrender of copyholds, of his assuming that the power has not been exercised, until an appointment is proved to exist.

When an admission is required in the case of an infant, whether claiming by descent or surrender to will or otherwise, it is the infant by his guardian, and not the guardian himself, that is to be admitted tenant to the lord (*t*).

The customary heir of a copyholder, being a complete tenant before admittance against all persons but the lord, may enter and take the profits, and maintain trespass, and bring ejectment, without having been admitted (*u*), and even surrender on payment of the lord's fine (*x*), and after his admittance he may bring trespass against the lord (*y*); but before his admission the heir is not entitled to be sworn on the homage, nor could he have maintained a plaint in the nature of an assise (*z*); and these incapacities before admittance influenced the decision of the Court of King's Bench, in the application for a *mandamus* to compel the lord to admit the customary heir, in the case of *The King* v. *The Master, &c. of the Brewers' Company* (*a*).

It would seem that a customary heir who is refused admittance,

(*t*) Co. Cop. s. 56, Tr. 128; 1 Watk. on Cop. 272; stat. 1 Will. 4, c. 65; post, tit. "Guardianship."

(*u*) Brown's case, 4 Co. 22 b; Clarke v. Pennifather, 4 Co. 23 b; Co. Cop. s. 41, Tr. 94; Kitch. 119, 120; Brown v. Dyer, 11 Mod. 73, 99; Knight v. Fortipan, Cro. Eliz. 90; Bullock v. Dibler, Mo. 596; Poph. 39; Frosel v. Welsh, Cro. Jac. 403; S. C. 1 Roll. Rep. 411; S. C. Godb. 268; S. C. 3 Bulst. 214; Stephens v. Baily, Nel. Ch. Rep. 107; York & Allein, Lane, 20; Rumney & Eve's case, 1 Leo. 100; Dancer v. Evett, 1 Vern. 392; Simson v. Gillion, Noy, 172; 3 Lev. 327; 1 Comy. 241; 1 Mod. 120; The King v. Rennett, 2 T. R. 198; Doe & Hellier, 3 T. R. 169; Cowp. 741; Bull. N. P. 108; Ballantine's ed. of Runnington on Eject. 390; Doe v. Crisp, 1 Per. & Dav. 37; 2 Bar. & Ald. 459, in Roe & Loveless.

(*x*) Brown's case, sup.; Co. Cop. s. 41, Tr. 94; Kitch. 162; Brown v. Dyer, sup.; Joyner v. Lambert, Cro. Jac. 36; Colchin v. Colchin, Cro. Eliz. 662; Wilson v. Weddell, Yelv. 145; S. C. Brownl. 143; 3 Lev. 327; 1 Comy. 241; Morse v. Faulkner, 1 Anst. 13; 1 Watk. on Cop. 245, cites also Dalrymple, F. P. ch. 6, s. 3, pp. 252, 253; ante, pp. 126, 140, 266, 267.

(*y*) Co. Lit. 60 b; 1 Watk. on Cop. 45; and see Scott v. Kettlewell, 19 Ves. 335, n.; ante, p. 173.

(*z*) Co. Cop. s. 41, Tr. 94; Kitch. 118, 119; 5 East, 532. And see Gilb. Ten. 287, who adds, "but it seems he may have assise of mort d'ancestor upon his ancestor's admittance." This, however, would appear to be an erroneous deduction from the rule that the heir before admittance might take the profits, and have his action at the common law upon the *possession* of his ancestor; Kitch. 119. And the author must suppose that if a plaint were received, the want of admittance would not avail the tenant.

Note,—All plaints of right, except a plaint of freebench, were abolished by 3 & 4 Will. 4, c. 27; post, tit. "Customary Plaints."

(*a*) 3 Barn. & Cress. 172; S. C. 4 Dow. & Ry. 492; and see Mason v. Day, Gilb. Eq. Ca. 77; 12 Adol. & El. 572 et seq.; post, tit. "Mandamus."

will be ter-tenant against the lord, though the lord lose his fine (*b*). So also will the widow of a copyholder, where admittance to free-bench is requisite by the custom, and she has challenged her right to admittance (*c*).

And in *Doe* d. *Burrell* v. *Bellamy and another* (*d*), Bellamy, the lord of the manor, having seized after the usual proclamations for the heir to come in and be admitted, and afterwards demised the land to the other defendant, the heir applied to the steward to admit him, and upon his refusal to do so in the absence of the lord, the heir brought his ejectment, and had a verdict; and on a motion in the Court of King's Bench to set the verdict aside, on the ground that the lessor of the plaintiff should have tendered himself at one of the lord's courts, the rule was refused, Dampier, J. observing, that what had been said by the steward was a dispensation with the plaintiff's attendance at the lord's court.

The admittance is merely as between the lord and tenant (*e*); if, therefore, the customary heir should die before admission, his heir might enter (*f*), and such death will not prevent the widow from being endowed (*g*), nor the husband from being tenant by the curtesy (*h*); and we have seen that if the heir die after having entered, there shall be a *possessio fratris*, even before admittance (*i*).

A disseisee of copyholds must enter before he can surrender; but as he continues the lord's tenant, notwithstanding the disseisin, his re-admittance on entry is unnecessary (*k*).

It is only by special custom, the author conceives, that the lord can compel a surrenderee to come in and be admitted, as the tenancy continues full by the surrenderor (*l*), the surrenderee until admittance having neither *jus in re* nor *jus ad rem* (*m*), though by custom (*n*) the lord may seize after three proclamations, if the surrenderee should not appear, in the same manner as in the case of an heir; but the neglect of the tenant for life or years will not prejudice those in remainder (*o*);

(*b*) 1 Comy. 245.

(*c*) Jurden & Stone, Hutt. 18; ante, p. 77.

(*d*) 2 Mau. & Selw. 87.

(*e*) Knight v. Bate, Cowp. 741; Roe v. Hicks, 2 Wils. 15; ante, pp. 126, 140, 290; post, tit. "Admittance by Implication."

(*f*) Clarke & Pennifather, 4 Co. 23 b.

(*g*) Ante, p. 76.

(*h*) Ante, p. 80.

(*i*) Ante, pp. 44, 45. And see Watk. on Desc. 69.

(*k*) Ante, p. 139.

(*l*) Ante, pp. 141, 142; 1 Watk. on Cop. 234, n., 237, 241; but see ib. 291; 1 Dougl. 141, per Willes, J., in Goodtitle v. Welford, ante, p. 123, n. (*b*).

(*m*) 1 Show. 87; 3 Mod. 226; Payne v. Barker, Orl. Bridg. 23; ante, p. 140.

(*n*) As to the effect of a release of right from the surrenderee to the surrenderor, when such a custom exists, vide ante, p. 196.

(*o*) Baspool v. Long, Yelv. 1; S. C. Noy, 42; S. C. Cro. Eliz. 879; 1 Roll. Abr. 568, Cop. G. pl. 5; 6 Vin. Abr. Cop. (S. c.), pl. 8; Sir T. Raym. 404; Rastal v. Turner, Cro. Eliz. 598; and see 6 Vin. Abr. Cop. (E. d.), pl. 11.

nor will such a custom bind an infant, a feme covert, or an heir beyond sea (*p*).

No notice whatever can be taken by the lord of a mere covenant to surrender, though he is bound to admit the assignee of a covenantee under a surrender made to such assignee by the covenantor (*q*): but the assignee of a surrenderee, the author conceives, cannot compel admission, without satisfying the lord such fine as he would have been entitled to by the admission of the surrenderee, especially where there is a custom in the manor by which the lord might compel the surrenderee to come in and be admitted (*r*).

Every person capable of a grant by copy may take by attorney (*s*). And in accordance with this principle, Lord Ellenborough, in the case of *Wymer* v. *Page* (*t*), held that a party might have appointed an attorney for the purpose of suffering a recovery as of common right, unless there was an express custom to the contrary.

But the lord is not compellable to admit by attorney (*u*), except in the case of a feme covert, infant, or lunatic (*x*); and this is the natural consequence of the rule that fealty cannot be done by attorney (*y*); but it is usual to admit the heir or surrenderee or devisee by attorney, and not to put the party to the expence of appointing one by deed (*z*), if admittance be the only object, as the court may name any person present to act for him, and to receive seizin on his behalf (*a*); but his assent must be shown by payment of the fine assessed by the lord or other act. So where the heir was abroad and a neighbour came and was admitted in his name, and the heir returned and consented to the admittance by bringing an action against another, it was held to be a good admittance (*b*).

We have seen that before admittance a surrenderee cannot surrender, even if the surrender to him has been presented, and that his subsequent admittance will not make a surrender by him valid by rela-

(*p*) King *v.* Dilliston, 1 Sho. 83; S.C. 3 Mod. 221; ante, p. 288.

(*q*) The King *v.* The Lord of the Manor of Hendon and his Steward, 2 T. R, 484; 1 Watk. on Cop. 57; ante, p. 211.

(*r*) Ante, p. 195.

(*s*) Co. Cop. s. 35, Tr. 80.

(*t*) 1 Stark. 9.

(*u*) Co. Cop. s. 35, Tr. 80; Co. Lit. 66 b, 68 a; ib. n. 5; Combe's case, 9 Co. 76 a; Floyer *v.* Hedgingham, 2 Ch. Rep. 56. It was held in the case of Hildyard *v.* S. S. Company and Keate, 2 P. W. 77, that an admittance upon a surrender made by virtue of a forged letter of attorney would be void.

(*x*) Ante, p. 289.

(*y*) Post, Chap. VIII.; Co. Cop. s. 35, Tr. 80.

(*z*) See Combe's case, ubi sup.

(*a*) But note, C. B. Gilbert (Ten. 252), says, "It is said to be resolved that a copyholder cannot surrender by attorney without deed, (Pract. Reg. 136), but he may be admitted by attorney without deed. Quære of this?"

(*b*) Blunt *v.* Clark, 2 Sid. 61, 62; ib. 6 Vin. Cop. (M. b.), pl. 5; Gilb. Ten. 285.

tion; and that the steward's acceptance of a surrender from an unadmitted surrenderee, is not an implied admittance of him (*c*).

But the admittance upon a valid surrender has relation to it so as to defeat all *mesne* acts, as well of the surrenderor (*d*) as of the lord of the manor (*e*), and so as to enable the surrenderee to recover in ejectment upon a demise laid between the date of the surrender and the admittance (*f*); and it will be sufficient if the surrenderee obtain admittance at any time before trial (*g*).

If the surrenderee be in possession, he may maintain trespass before admittance, being a possessory action (*h*), but before his entry trespass could only be maintained by the surrenderor (*i*); yet, after admittance of the surrenderee, he may have an action of debt of all the rent (*k*).

The heir of an unadmitted surrenderee, and the devisee of an unadmitted devisee, can have no title at law before admission, the legal title remaining in the surrenderor in the first case, and in the heir of the first testator in the second; but there is this distinction in the effect of their admittance in favour of such customary heir, namely, that his admission has relation to the surrender, equally with the admittance of the surrenderee himself, but the admission of the devisee of an unadmitted devisee gives no legal title (*l*). The latter point was established in *Doe* d. *Vernon* v. *Vernon and others* (*m*), which was an action of ejectment arising out of the residuary devise in the will of Thomas Earl of Strafford, already briefly stated (*n*): and the court

(*c*) Ante, p. 140; post, "Admittance by Implication."

(*d*) Benson *v.* Scott, Carth. 276; S. C. 3 Lev. 385; Doe *d.* Wheeler *v.* Gibbons, 7 Car. & Pa. 161; ante, pp. 223, 224. And so as to create a title to dower and curtesy, and by descent, but not to give validity to an intermediate surrender, ante, p. 140.

(*e*) Grantham *v.* Copley et al., 2 Saund. 422.

(*f*) Whether this rule extends to customary freeholds passing by bargain and sale, or surrender and admittance, see Doe *d.* Danson *v.* Parke, 4 Adol. & Ell. 816; ante, p. 83, n. (*d*); post, p. 304, n. (*u*).

(*g*) Holdfast *d.* Woollams *v.* Clapham, 1 T. R. 600; Doe *d.* Bennington *v.* Hall, 16 East, 208.

(*h*) Holdfast & Clapham, ubi sup.

(*i*) Berry *v.* Greene, Cro. Eliz. 349; ante, p. 142.

(*k*) Collins *v.* Harding, Cro. Eliz. 606, 622; Mo. 544; 13 Co. 57, 58; Lane, 33.

(*l*) Ante, pp. 266, 267; and see Doe *d.* Winder and Wife *v.* Lawes, 2 Nev. & Per. 195; 7 Adol. & Ell. 195. But the heir of the first devisee might claim to be admitted, although the lord could not compel him.

And note, that by the 3rd sect. of 1 Vict. c. 26, a devise of copyholds is good, notwithstanding the devisor "being entitled as heir, devisee, *or otherwise*, to be admitted, shall not have been admitted thereto."

(*m*) 7 East, 8. Prior to 1 Vict. c. 26, a devise by an unadmitted devisee was not good, although such devisee took admittance subsequently; Phillips *v.* Phillips, 1 Myl. & Keen, 649.

(*n*) See Roe *d.* Conolly *v.* Vernon and Vyse, ante, p. 158.

observed, that the daughter of the Earl of Strafford never was in fact admitted under the devise made by her father pursuant to a surrender to the uses of his will, and held that her devisee, although admitted tenant to the lord, could not be in a better situation than herself, as such admittance had no relation to the last legal surrender, and could not give the party admitted a title, but merely clothed him with a *legal* title to the possession, if he had before a *legal* title to the estate; and that supposing him to have an equity (*o*), a court of law could not help him.

The above case of *Doe & Vernon* more particularly shows the propriety of establishing a deduction of legal title to every copyhold on the face of the court rolls, which is indeed, in every instance, the best criterion for the guidance of the lord or steward, when he entertains a doubt as to the rights of different parties; here it is seen that the chain of legal title was broken from the surrender to the use of the Earl of Strafford's will, the next act on the rolls of the manor being an admittance of the devisee of a person not in the seizin, who could not have obtained a legal title, except through the seizin of the heir of the Earl of Strafford, or the seizin to be obtained by the heir of his daughter, by admission under the devise to her of the customary fee.

An application to a court of equity is generally thought to be absolutely necessary when the heir refuses to give effect to the intention of the ancestor; for although a manor court is to some purposes a court of equity as well as law, yet it does not possess the powers by which the superior courts may compel a trustee to unite the legal estate to the equitable; but according to the case in 1 Leo. (*p*), if the copyholder should not obey the decree of the manor court, it is in the power of the lord to seize and admit the rightful tenant.

It has long been settled that the admittance of the tenant for life or years, is the admittance of all in remainder, so as to vest the estate in them (*q*), and therefore that the interest of a remainder-man is the subject of a surrender (*r*). But it is to be observed that the admit-

(*o*) See Wainewright *v.* Elwell, 1 Madd. 634; ante, pp. 266, 267.

(*p*) P. 2, ca. 2; ante, pp. 97, 98.

(*q*) See the resolution in Brown's case, post, p. 295, n. (*y*).

(*r*) See the cases, ante, p. 138, n. (*d*); vide also Dell & Higden, Mo. 358; Brown's case, 4 Co. 22 b; Fitch's case, ib. 23 a; Auncelme *v.* Auncelme, Cro. Jac. 31; Jurden *v.* Stone, Hutt. 18; Warsopp *v.* Abell, 5 Mod. 306; Blackborn or Batmore or Blackborough and others *v.* Greaves and others, 2 Lev. 107; 1 Mod. 102, 120; 3 Keb. 263, 329; 1 Vent. 260; Barnes *v.* Corke, 3 Lev. 308; Earl of Bath *v.* Abney, 1 Burr. 206; Cowp. 713; Doe *d.* Whitbread *v.* Jenney, 5 East, 522; 7 East, 22; Lord Kensington *v.* Mansell, 13 Ves. 246, 253; but see Co. Cop. s. 56, Tr. 130; Gilb. Ten. 163, 194. And it should seem by the case of Doe *d.* Winder and Wife *v.* Lawes, sup., that a reversioner is admitted by the admission of a devisee for life.

tance of a tenant for life creates only a seizin in law, and not the seizin required by the statute of limitations (*s*), *that* being an actual seizin or possession by taking the esplees; so that the *seizin* of the tenant for life is not that of the remainder-man (*t*).

The surrenderee of the particular tenant, and also the heir or surrenderee of a remainder-man or reversioner, must be admitted (*u*); of course, therefore, the devisee of a reversion (*x*).

And a custom for tenants in remainder to come in and be admitted and pay a fine, has been held to be good (*y*); but the custom must be clearly established (*z*), as was done in the case of *Doe & Jenney*.

If a copyholder surrendered to particular uses which determined, even if he parted with his whole estate, limiting the reversion in fee to himself; or if he surrendered on condition, and the condition was performed by the surrenderor, or was broken by the surrenderee, as the case might happen to be, he was *in* of his old seisin, and no admittance therefore was requisite (*a*).

But if by the surrender to uses the copyholder take back a life estate or other particular interest, then he must be re-admitted to give effect to the surrender (*b*).

And on a surrender by a surviving trustee to the use of himself and newly appointed trustees, such surviving trustee takes a new estate, and must be re-admitted; and the lord will be entitled to the same amount of fine as if the surrenderor had been a newly appointed trustee (*c*).

(*s*) 32 Hen. 8, c. 2.

(*t*) Widdowson *v.* The Earl of Harrington, 1 Jac. & Walk. 558.

(*u*) Gyppyn *v.* Bunney, Cro. Eliz. 504; Mo. 465; Auncelme *&* Auncelme, Cro. Jac. 31; Watk. Gilb. Ten. 416, 417, (n. 77); Dy. 137, pl. 26; Fearne's P. W. 103, 105; The Queen *v.* The Lady and Steward of the Manor of Dullingham, 8 Adol. & Ell. 858; 1 Per. & Dav. 172; post, titles "Fine;" "Mandamus."

(*x*) Doe *d.* Winder and Wife *v.* Lawes, ubi sup.

(*y*) Brown's case, 4 Co. 22 b. The words of the resolution in Brown's case on this point were, "the admittance of a tenant for life is the admittance of him in remainder *to vest the estate in him*, but shall not bar the lord of his fine, which he ought to have *by the custom*. And see Fitch's case, ib. 23 a; Gyppyn *&* Bunney, sup.; Barnes *&* Corke, 3 Lev. 308; Doe *d.* Whitbread *v.* Jenney, 5 East, 531; Gilb. Ten. 194.

(*z*) Dean and Chapter of Ely *v.* Caldecot, 8 Bing. 448; S. C. 1 Mo. & Sco. 633; post, tit. "Fine."

(*a*) Margaret Podger's case, 9 Co. 107 a; Bulleyn *&* Graunt's case, 1 Leo. 175; S. C. Cro. Eliz. 148; Co. Cop. s. 56, Tr. 129; Thrustout *d.* Gower *v.* Cunningham, 2 Sir W. Bl. 1046. But by the 3rd sect. of 3 & 4 Will. 4, c. 106, a limitation by any assurance to the person conveying, or his heirs, will create an estate by purchase, and he will not be considered entitled as of his former estate; ante, pp. 55, n., 175, n.; post, tit. "Fine."

(*b*) Roe *d.* Noden *v.* Griffiths or Griffits, 1 Sir W. Bl. 605; S. C. 4 Burr. 1952.

(*c*) Sheppard *v.* Woodford and others, 9 Law Jour. Rep. (N. S.), Ex. 90; 5 Mee. & Wel. 608; post, tit. "Fine."

JOINT-TENANTS are seized *per mie et per tout*, therefore the admission of one is the admittance of all of them, and if one die or release to the others (*d*), no new admittance is necessary (*e*); and this, because of the *jus accrescendi* incident to an estate in joint-tenancy. These rules apply to the admission of one of several devisees in trust; but it is to be recollected that if one refuse to act, the entire legal interest will vest in the co-devisees in trust (*f*).

COPARCENERS are but as one heir (*g*), consequently one admission

Lord Abinger, C. B., in delivering the judgment of the court in Sheppard *v.* Woodford, said, "In this case we have arrived at the conclusion that the mode of calculation of the two fines proposed by the plaintiff is correct. It is admitted that according to the custom of the manor such mode would be adopted in the case of an admission de novo of three tenants as joint-tenants of an estate; but it is contended that, inasmuch as one of the surrenderors is also a surrenderee in this case, the admission must be treated as the admission of only two instead of three joint-tenants. But what is the fine due for? Plainly in respect of the new estate. And here the party who surrenders takes with the other two a new estate by the admittance of the lord. If the value of the lives were taken into consideration, it would subject the lord to great inconvenience. He does not select the new tenants, and could have no means of judging of the value of the additional lives. Even if he knew their ages, which it does not appear how he is to ascertain, he would be unable to judge of their relative health or probability of survivorship. Again, if we are to omit in this calculation Sir John Woodford, who is common to both, is he to be put first or third in the calculation of the fine? In the one case the fine will be three years' value; in the other one and a half years' value:—or if, as thrown out in argument, you treat the estate as composed of three portions, and each of the joint-tenants as admitted to one-third, then as the two new tenants would each pay two years' improved value of their respective shares, the fine would be one year's and one-third improved rent of the whole estate. But if the first suggestion were adopted, it would readily afford a mode of practically depriving the lord of all fines after the first admittance. For suppose twenty joint-tenants once admitted, and on the successive death of each a fresh admittance of the remaining nineteen, with a new tenant, it is easy to see that, even in an estate of the value here stated, the fine would be below the lowest coin known to us, and the lord would have for his successive admittances fines of a farthing each. It is true that, if the new life be put as the first, the lord would have two years' improved rent for each admittance; but we can find no authority for fixing upon the one rather than the other rule; and the natural order of these tenants would lead us to place the old tenants first, and to treat the others as added to them. Upon the whole we think there ought to be judgment for the plaintiff."

(*d*) Wase *v.* Pretty, Win. 3; Mortimore's case, Hetl. 150.

(*e*) Co. Cop. s. 35, Tr. 79; ib. s. 56, Tr. 130; Co. Lit. 193 a, 318 a; ib. s. 286, 288; Mortimore's case, Het. 150; Gilb. Ten. 289, 330; Kitch. 240; Roe *d.* Ashton *v.* Hutton and others, 2 Wils. 162; ante, p. 139.

(*f*) Reid *v.* Shergold, 10 Ves. 370; ante, p. 271.

(*g*) Lit. s. 241, 313; Com. Dig. Parceners, A. 3; Bro. Coparcen. 3; Morrice *v.* Prince, Cro. Car. 521; 3 Leo. 13, ca 30; Gilb. Ten. n. 174; 1 Watk. on Cop. 277; 2 Bing. 286, in Garland *v.* Jekyll. But see per Lord Kenyon, 3 T. R. 165.

will suffice for all; and they may claim to be admitted by one copy, and on payment of one set of fees (*h*); and it would seem that they may release to each other as joint-tenants may do (*i*), for they have precisely the same unities of interest, title, and possession (*k*). It sometimes happens that coparceners are admitted separately, and it has been doubted whether the tenure is not thereby altered from a tenancy in coparcenary, to a tenancy in common; it is however to be recollected that in such instances there is no act *inter partes* to produce that effect, and that an admission always enures according to the actual title of the party admitted (*l*).

On the death of one of several coparceners, though the unity of possession continues, yet the survivors have no right except by descent; and therefore the customary heir of a deceased coparcener must be admitted (*m*).

But if one *coparcener* should surrender to the others, the surrenderees, the author conceives, would be *in* of a new seizin, and not by the common ancestor, and consequently must be admitted to the portion so surrendered.

TENANTS IN COMMON are altogether different from either joint tenants or coparceners; there is no survivorship between them, and as they take and transmit several estates, they cannot release to each other, and the customary heir of each must be admitted (*n*). But it is now settled that if the several undivided shares of a copyhold become re-united in one person, they again form one entire estate and tenement (*o*).

BARON AND FEME.—As the husband in right of his wife is seized of her freehold estates during the coverture (*p*), so he becomes the tenant of her copyhold lands, and is to sit on the homage, and perform the services to the lord; but being seized in right only of his wife, without any secession from the tenancy, his admission is not

(*h*) Rex *v.* The Lord of the Manor of Bonsall and his Steward, 3 Barn. & Cress. 175.

(*i*) Co. Lit. 9 b, 10 a, 273 b; Gilb. Ten. 73; 1 Watk. on Cop. 279.

(*k*) 2 Bl. Com. 188; 2 Bing. 286.

(*l*) See 2 Bing. 286, 289; ante, p. 144, 145.

(*m*) Co. Lit. 185 a; Co. Cop. s. 56, Tr. 130; Gilb. Ten. 478, n. 174; 1 Watk. on Cop. 272, 279.

(*n*) Co. Cop. s. 56, Tr. 130; Fisher *v.* Wigg, 1 Lord Raym. 631; S. C. 1 P. W. 21; S. C. 1 Salk. 391; 1 Watk. on Cop. 280; Attree *&* Scutt, 6 East, 484; S. C. 2 Smith, 458.

(*o*) 2 Bing. 303, in Garland *&* Jekyll; 6 Barn. & Cress. 14, in Holloway *&* Berkeley.

(*p*) The husband is not solely seized: —the proper mode of pleading is that the husband and wife, in right of the wife, are seized, &c. post, tit. "Pleading."

requisite (*q*): and if the wife took by descent, it would seem that the husband may even enter in her right before her admittance (*r*).

When the customary curtesy or dower in copyholds of inheritance is of the whole of the copyhold and not of a portion only, the law, the author apprehends, casts the possession on the husband or wife, the same as in curtesy at common law, or in dower *ad ostium ecclesiæ*, or *ex assensu patris*, where assignment was not necessary, the lands being ascertained; and as in these cases the heir is prevented from entering and acquiring seizin, and the estate is to be considered therefore a continuation of the seizin of the deceased wife or husband, the author would submit that no admittance of the survivor is requisite; but when the curtesy or dower is of a portion only of the copyholds, it would seem that the husband surviving the wife, or the wife surviving the husband, cannot enter without assignment by the heir (*s*), and consequently that admittance would be requisite (*t*), the possession or seizin of the husband or wife being broken by the right of entry in the heir (*u*). And this rule appears to extend to lands held of a manor in which gavelkind tenure prevails (*v*). But in some manors the custom is that the wife shall be admitted to her dower of all the land of which her husband died seized during her widowhood, and that the heir shall not be admitted to it during her life (*x*).

And the author apprehends that the distinction which he has just suggested applies equally to copyholds of inheritance and for lives, and consequently that when in the case of copyholds for lives, the freebench is of the whole for the life of the widow, her admission is not necessary, except by special custom.

(*q*) Hedd *v.* Chalener, Cro. Eliz. 149; Calth. 52; Co. Cop. s. 56, Tr. 129; Gilb. Ten. 289, 291; ib. 461, n. 139.

(*r*) 1 Watk. on Cop. 273, cites Watk. on Desc. 53, 54, (n.); ante, p. 80.

(*s*) See Davies *&* Selby, Cro. Eliz. 825.

(*t*) Doe *d.* Rose Riddell *v.* Gwinnell, S. C. 1 Adol. & Ell. (N. S.), 682; ante, p. 78.

(*u*) Chapman *&* Sharpe, 2 Show. 184; Jurden *v.* Stone, Hutt. 18; Howard *v.* Bartlet, Hob. 181; Cro. Jac. 573; 1 Lev. 20, 172; Gilb. Ten. 373, n. 25; Rennington *v.* Cole, Noy, 29; Watk. on Desc. 101 to 105; ante, p. 77.

(*v*) Ante, pp. 78, 79.

(*x*) Borneford *v.* Packington, 1 Leo. 1; 6 Vin. Cop. (H. e.), pl. 1.

In Forder *v.* Wade and others, 4 Bro. C. C. 525, where the widow of *cestui que trust* had entered as guardian to her son, Lord Loughborough, on the question whether the widow was dowable, said, "Then to consider it as the case of a copyhold, the widow was not entitled to enter till she had paid her fine and been admitted: *admission only makes her title*, and in this case till admitted, *non constat* whether she would be admitted. Even a dowress who has not entered, need not be named in a recovery." And in decreeing that the widow was not dowable, being of a trust estate, his lordship added, "If I am right *that the freebench would not exclude the heir's seizin*, it would be immaterial whether the widow was entitled to freebench or not." And see 5 Burr. 2766.

It must however be borne in mind that this distinction, if it be a correct one, is to be supported only by the argument that admittance *cannot be necessary* when there is a continuation of the possession of the deceased husband or wife, which is the case when no mesne seizin can take place; and that by the same rule *it is necessary*, when the entry of the heir would create a chasm between the death of the wife or husband and the possession of the survivor, and does not draw to it the sanction of an important difference between curtesy and dower at common law, namely, that the tenant by the curtesy holds immediately of the lord and is tenant to him, whereas the dowress holds of the heir, and is attendant on such heir for the third of the services (*y*); for in copyhold cases the tenant, whether in fee or for life, or any less estate, holds immediately of the lord by the customary rents and services.

But the presumed necessity of an admittance to the customary curtesy or dower, when it is of a portion only of the copyhold, may of course be controlled by a special custom that such admittance shall not be requisite, or that the curtesy or dower shall be of a portion of the *interest* in the land and not of the *land* itself, or of a portion of the rent only (*z*).

The necessity in former times of the lord's consent to the marriage, and the payment in some instances of a fine on marriage, are used by Mr. Watkins as arguments against the necessity of a new admission of the wife on the death of the husband, or of the husband on the death of the wife, when dower or curtesy is allowed by the custom of the manor (*a*); but it must be recollected that the fine which the lord exacted for his licence or consent to the marriage of his tenant, was of a very different nature to a fine on an admittance of a copyholder; and where no such fine can be demanded, the argument deduced from the right to exact it surely ceases.

And it is not to be forgotten that Sir Edward Coke says (*b*), "So if a copyhold descendeth and the lord admitteth the heir, where by the custom of the manor the wife is to have dower, and the husband is to be tenant by the curtesy of a copyhold, either of them shall be admitted, and shall pay a fine to the lord."

When the wife is entitled to a copyhold for a term of years, it would seem that as her interest in chattels real vests absolutely in the husband, if he survive her (*c*), and as there is no change of tenancy,

(*y*) Watk. on Desc. 104; Gilb. Ten. 173.

(*z*) 2 Col. Jurid. 382, Customs of Westsheen, &c.; and see Gilb. Ten. n. 97; ante, p. 72.

(*a*) 1 Cop. 275; N. 136 to Gilb. Ten. p. 460.

(*b*) Cop. s. 56, Tr. 128; and see Wheeler's case, 4 Leo. 240.

(*c*) Co. Lit. 46 b; ib. 300 a; ib. 351 a; and n. (1).

the husband being the lord's tenant during the coverture, it is not necessary that he should be admitted (*d*).

EXECUTOR AND ADMINISTRATOR.—But it was held in the *Earl of Bath* v. *Abney* (*e*), that the executor or administrator of a termor is compellable to be admitted: and though it was said *arguendo* in that case that the lord is not obliged to admit for terms of years, yet no authority was quoted to support the proposition, and it appears contrary to all principle as well as practice (*f*).

POWER.—When a power of appointment is created by a surrender of copyholds, or a testamentary power of sale by way of appointment is given by a copyholder, *pursuant to a surrender to the use of his will* (*g*), it is not the donee of the power, but the person in whose favour the appointment may be made that is to be admitted, the former having no interest (*h*). And when the power is exercisable, subject to an existing life-interest or other particular estate, the appointee stands in all respects in the situation of a remainder-man (*i*).

COMMISSIONERS AND ASSIGNEES OF BANKRUPTS.—As the persons to whom the copyhold estates of a bankrupt were conveyed by the commissioners, pursuant to the powers vested in them by the stat. of 13 Eliz. c. 7, and other statutes now repealed (*k*), were considered as appointees within the above-mentioned rule, it became a necessary consequence that such appointees were to be admitted: when, therefore, the copyholds of a bankrupt were included in the bargain and

(*d*) Hauchet's case, Dy. 251 a; S. C. (called Dedicott's case), 3 Leo. 9; Co. Cop. s. 56, Tr. 129; Gilb. Ten. 333.

(*e*) 1 Burr. 206. And the author apprehends that an executor or administrator entitled to a copyhold *pur autre vie*, under the 6th sect. of the late statute of wills, (1 Vict. c. 26, see the act in the Appendix), must be admitted. Post, tit. "Fine," (*occupancy*).

(*f*) Gravenor & Ted, 4 Co. 23 a; Co. Cop. s. 47, Tr. 110; Batmore or Blackborn or Blackburn v. Graves, 1 Vent. 260; 2 Lev. 107; 1 Mod. 102, 120; post, tit. "Fine," (EXECUTOR AND ADMINISTRATOR); but in Dedicott's case, 3 Leo. 9, it was said by Brown and Dyer, Js., against the opinion of Weston, J.; that executors shall take a term of years without any admittance. And see Heydon's case, Mo. 128; Gilb. Ten. 290; Comb. 445; Otlery Monastery case, 4 Leo. 118; 1 Leo. 4; Sav. 66.

(*g*) Vide note (*a*), ante, p. 247.

(*h*) Beal or Brent v. Shepherd, Cro. Jac. 199; Holder *d.* Sulyard v. Preston, 2 Wils. 400; post, tit. "Fine," (POWER). When the testamentary power of sale is given to a particular person, the heir need not join. Ante, p. 257; 2 Russ. 496, in White & Vitty.

A power to sell does not imply a right to enter and turn persons out. Per Lord Denman, C. J., in Watson v. Waltham and others, 2 Adol. & El. 495; ante, p. 142, note (*h*).

(*i*) Lord Kensington v. Mansell, 13 Ves. 243, 246.

(*k*) Ante, p. 83.

sale from the commissioners to the assignees, the admission of the assignees was of course requisite; and so, consequently, any purchaser of them if he would acquire the legal estate (*l*). With a view therefore to avoid the payment of a double fine, copyholds were generally excepted out of the bargain and sale of the bankrupt's estates to the assignees, and by which no inconvenience could arise with reference to crown debts, as an extent of the crown did not affect copyholds (*m*): this expedient was first suggested by Lord Chancellor Hardwicke in the case of *Drury* v. *Man* (*n*), who observed that the commissioners, where the creditors could meet with a purchaser of the copyhold, might convey to him in the first instance; and though there might be occasion sometimes for temporary assignments for the better preserving the bankrupt's estate, yet commissioners were not obliged by the clause in the 5th Geo. II. (*o*), *relating to temporary assignments*, to appoint an assignee of the whole estate, because the words were in the disjunctive, immediately to appoint one or more assignee or assignees of the estate or effects, *or any part thereof*.

A doubt some time since arose as to the power of excepting copyholds in the assignment from the commissioners to the *assignees chosen by the creditors*, the act of 5 Geo. II., c. 30, s. 26, having provided that the commissioners, or the major part of them authorized, should assign every such bankrupt's *estate and effects* unto such person or persons as the major part in value of such creditors, according to the several debts then proved, should choose as aforesaid (*p*).

But upon an objection taken to a title of copyholds which had been sold by the assignees, that the commissioners had executed the bargain and sale to the vendee *in the first instance* instead of surrendering to the assignees, and then the assignees surrendering to the purchaser, the then Vice Chancellor, after a very full argument, (wherein it was admitted that considerable doubts existed in the profession on this point, notwithstanding the decision of Lord Hardwicke), held that the objection could not be sustained (*q*).

The admittance of the vendee or appointee of commissioners of

(*l*) Where a commission was superseded on the ground that when it issued the petitioning creditor's debt was not due, it was held that the assignees ceased to have the legal estate, and could not enforce a previous contract for sale of copyhold lands, which had been abandoned on the objection to the validity of the commission, although another commission had issued, under which the same persons were chosen assignees; Bartlett *v.* Tuchin, 6 Taunt. 259; ante, p. 206, n. (*t*).

(*m*) Ante, pp. 47, 48, 88. But by sect. 11 of 1 & 2 Vict. c. 110, the entirety of copyhold and customary land is extendible; ante, p. 47, note (*o*); post, title "Fine."

(*n*) 1 Atk. 96; Co. Tr. 128.

(*o*) Ch. 30, s. 30.

(*p*) 2 Montag. Bpt. L. 130, 131.

(*q*) Ex parte Holland, in re Harvey, 4 Madd. 483; Buck, 493.

bankrupt, had relation to the bargain and sale or instrument of appointment, in the same manner as the admittance of a surrenderee relates in point of interest to the date of the surrender, and with precisely the same consequences, so that the bankrupt ceased to be a copyholder on the inrolment of the bargain and sale (*r*).

The author has already briefly noticed (*s*), that important changes have been made in the mode of transferring the copyhold estates of a bankrupt by the act of 6 Geo. IV. c. 16 (*t*), and of an insolvent debtor by the act of 7 Geo. IV. c. 57; and he proposes now to make some few observations on the nature and effect of those statutes with regard to copyhold property.

By the 68th sect. of the bankrupt act of 6 Geo. IV., the commissioners were empowered, by deed indented and inrolled in any of his majesty's courts of record, to make sale for the benefit of the creditors of the bankrupt's copyhold *or customary* (*u*) lands, or of his interest therein (*x*), and thereby to authorize any person on their behalf to

(*r*) Parker *v.* Bleake, Cro. Car. 568; S. C. W. Jones, 451; 1 Cooke's Bpt. L. 285, 286; ante, pp. 73, 170, 171. It was from the *inrolment*, and not from the *date* of the bargain and sale, that the estate of a bankrupt passed, the former not having relation to the latter as in a bargain and sale inrolled under the stat. Hen. 8; Elliot & Danby, 12 Mod. 3; Perry *v.* Bowes, 1 Vent. 360; S. C. T. Jones, 196; Bennet *v.* Gandy, Carth. 178; Doe *d.* Esdaile *v.* Mitchell, 2 Mau. & Selw. 446.

(*s*) Ante, p. 141.

(*t*) And see 1 & 2 Will. 4, c. 56, (post, p. 303 et seq.), and 2 & 3 Will. 4, c. 114. Extracts from the several above mentioned acts are given in the Appendix.

(*u*) In the late case of Doe *d.* Danson, *v.* Parke, 4 Adol. & Ell. 818, it was stated arguendo, that "customary-hold was first mentioned in this act, (sect. 64, 68, &c.)," [but see 13 Eliz. c. 7, sect. 2], and that the judge at the trial of the ejectment at Nisi Prius on that ground directed the verdict to be taken upon the demise of the heir at law. Ante, p. 83, note (*d*). It appears by the report of this case, that the customary premises in question were conveyed by the commissioners to the assignees by bargain and sale inrolled, in the lifetime of the bankrupt, and that after the death of the bankrupt the assignees were admitted. Vide also Ex parte Somerville, re Loscomb, 1 Mont. & Ayr. 403; ante, p. 64, n. (*d*).

(*x*) As to the power of the commissioners under the 65th sect. of the act, over estates vested in a bankrupt for an estate tail, vide ante, pp. 64, 65. And N. B., the act of 1 & 2 Will. 4, c. 56, does not contain an express provision as to any such estates, but it is clear that, under the 7th and 16th sect., any one of the six commissioners, or the commissioners named in the fiat, may by deed inrolled convey to a purchaser any copyhold lands vested in a bankrupt for an estate tail, so as to enable the purchaser to be admitted thereto in fee simple, supposing the bankrupt to be entitled in possession, or for a base fee, supposing him to be entitled in remainder, ante, p. 65; ib. n. (*f*). The reader is here again referred to the provisions of 3 & 4 Will. 4, c. 74, as to the entailed lands of a bankrupt, and by which act the 6 Geo. 4, as far as relates to the powers of the commissioners, (with an excepted case), was repealed; ante, p. 65; post, Appendix, "Rules to be observed in holding a customary Court Baron," [*Instructions in particular cases*].

surrender the same for the purpose of the purchaser's being admitted thereto: and the 69th sect. directed that the vendee should compound with the lord for the accustomed fine, &c., and that thereupon the lord should grant to him the copyhold land for the interest which should have been sold to him, and admit him tenant thereof: and the author apprehends that the effect of those provisions was to render the bargain and sale by the commissioners of the bankrupt's copyhold property to the purchaser a transfer of the *beneficial* right only, and to make the surrender under the authority contained in that deed the operative conveyance, as regards the *legal* customary interest; and the more usual practice has been for the commissioners to authorize the bankrupt himself to make the surrender for the purpose of the purchaser's admission under the 68th sect. of the last-mentioned act, which surrender would have the effect of divesting the bankrupt of his legal interest, in case the commission or the proceedings under it were open to any impeachment for irregularity.

By the Bankruptcy Court Act (1 & 2 Will. IV. c. 56 (*y*)), the lord chancellor, the master of the rolls, the vice-chancellor, and each of the masters in chancery, acting under the appointment of the lord chancellor for that purpose, on petition against a trader by any creditor, and on his filing such affidavit, and giving such bond as therein mentioned, are empowered to issue a fiat in lieu of a commission, authorizing the creditor to prosecute his complaint in the court of bankruptcy or elsewhere, and before such persons as may be named in such fiat; and the act gives the persons so appointed the like power and authority as if they were appointed special commissioners by virtue of a commission under the great seal: and by the 14th sect. provision is made for the appointment of commissioners in the country; and the act directs that the fiat or fiats aforesaid not directed to the court of bankruptcy, should be directed to some one or more of the persons so appointed commissioners. Under the 7th sect. any one or more of the six commissioners appointed pursuant to the first section of the act, may perform and execute all the powers and duties formerly vested in commissioners of bankrupt, with an exception as to the commitment of any bankrupt or other person examined before them.

By the 16th sect. of the act of 1 & 2 Will. IV., the laws and statutes, rules and orders then in force relating to bankrupts, or to commissioners of bankrupt, or to proceedings under commissions, are made applicable to that act, and to fiats issued in pursuance thereof; and the 26th sect., vesting the real estates of the bankrupt in the assignees, does not apply to copyhold property, but is confined to

(*y*) Sect. 12.

such *real* estate as by the act of 6 Geo. IV. was directed to be conveyed by the commissioners to the assignees, namely, the bankrupt's *freehold* property; so that the powers given by the 68th sect. of the 6th Geo. IV. to the commissioners to make sale of the copyhold lands of a bankrupt by deed inrolled, and to empower some person to surrender the same, are exercisable by any one of the commissioners of the court of bankruptcy; but it would seem that in a country fiat the powers of the act of 1 & 2 Will. IV. could not be exercised by one only of the commissioners (*z*).

And it is clear, the author submits, that no admission, either of the commissioners or assignees, under the 6th Geo. IV. or the Bankruptcy Court Act, to any copyhold property belonging to the bankrupt, was in the contemplation of the legislature, and in fact that any such admittance by the lord of the manor would be deemed nugatory (*a*).

The 77th section of 6 Geo. IV. directs that all powers vested in the bankrupt, which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same; and by the 23d section of the 1 & 2 Will. IV., the official assignees are restricted from interfering with the sale of the bankrupt's estates: supposing, therefore, a bankrupt to have a power of appointment over copyholds, such power would be exercisable by the assignees chosen by the creditors, so as to entitle the appointee (assuming that the power embraced the legal customary fee) to apply to the lord or steward of the manor for admission (*b*).

The 5 & 6 Vict. c. 122, intituled "An Act for the Amendment of the Law of Bankruptcy," affords certain facilities to the making of creditors bankrupts, and gives existence to certain new acts of bankruptcy, and points out several cases in which a bankrupt shall not be entitled to his certificate, and authorizes the court acting in the pro-

(*z*) Vide 3 & 4 Will. 4, c. 47, "to authorize his majesty to give further powers to the judges of the Court of Bankruptcy, and to direct the time of sitting of the judges and commissioners of the said court." And note, any one or more of the judges of the court may by warrant exercise the same powers as are given by 1 & 2 Vict. c. 56, to any three of them; 3 Mont. & Ayr. (B.), 285; 2 Dea. 491.

Et vide 2 Vict. c. 11, ss. 12, 13; 2 & 3 Vict. c. 29, in the Appendix.

(*a*) See reference to the 55 and 56 sect. of 3 & 4 Will. 4, c. 74, repealing (partially) the power created by 6 Geo. 4, for the sale of lands, &c. vested in a bankrupt for an estate tail, and re-creating the power, ante, p. 65.

(*b*) Note,—it was held in Lloyd *v.* Lander, 5 Madd. 283, that a bankrupt was not a necessary party to a bill of foreclosure, an equity of redemption of copyhold being potentially vested in the assignees, although no bargain and sale was made to them.

secution of any fiat to allow the bankrupt's certificate, or to refuse or suspend the same.

The 48th section of the act provides for the appointment of official assignees in all bankruptcies prosecuted in the country, one of whom is to be an assignee of each bankrupt's estate, together with the assignee or assignees chosen by the creditors; but by section 49, such official assignee is not to interfere in directing the time and manner of effecting any sale of the bankrupt's estate.

The 59th section of the act provides for the appointment of persons to be commissioners of the Court of Bankruptcy, in addition to the then present commissioners, to act in the prosecution of fiats in the country, and that any one or more of such additional commissioners shall form a district court of bankruptcy for the purpose of the act.

The 7 & 8 Vict. c. 70, for facilitating arrangements between debtors and creditors, authorises any debtor, not being a trader within the bankrupt laws, with the concurrence of one-third in number and value of his creditors, to present a petition to the Court of Bankruptcy, setting forth an account of his debts, and the names of his creditors, and of his estate and effects, and that he is unable to meet his engagements, and setting forth such proposal as he is able to make for the payment of his debts or engagements, and praying that such proposal may be carried into effect under the control of the court: and the statute, after providing for the sanction of such proposal by a resolution or agreement of the creditors, enacts (sect. 8), that after the date of the filing of such resolution and agreement, all the estate and effects of the petitioning debtor shall vest in the trustee (if any) appointed by virtue of such resolution, and without any deed, as fully as if such trustee were an assignee under the statutes relating to bankrupts, and that such trustee may sue and be sued as if he were such assignee.

Assignees of Insolvent Debtors.—A great difference of opinion prevailed in the profession as to the necessity of an admission to copyhold property belonging to an insolvent debtor, under the act of 53 Geo. III. c. 102, by which he was required to surrender his copyholds to the assignees, or to any purchaser from them as the court should direct (*c*); and also under the 54 Geo. III. c. 28, by which the interest of every insolvent in custody on the 6th of November, 1813, in any copyholds was, after the adjudication therein mentioned, vested in the clerk of the peace, who was to convey the same to one or more of the

(*c*) The author apprehends that under this act the legal customary estate of an insolvent continued in him, until his surrender pursuant to an order of the Insolvent Court, under the 11th and 18th sections.

creditors, by direction of the justices in sessions, for the purpose of being sold; and likewise, under the act of 1 Geo. IV. c. 119 (*d*), whereby an insolvent was required to convey his copyhold estate as the court should direct, so as to *vest* the same in the provisional assignee (*e*), who was to assign all the insolvent's estate and effects to the assignee chosen by the court, such assignment to be entered on the court-rolls of the manor, and thereupon the assignee to surrender to the purchaser as the court should direct, and the rents in the meantime to be received by such assignee for the benefit of the creditors, without prejudice nevertheless to the lord of the manor of which such copyhold should be holden.

But the act of 7 Geo. IV. c. 57, provided (*f*), that the insolvent should, at the time of subscribing his petition, execute a conveyance and assignment of all his interest in any *real* and personal estate to the provisional assignee of the court, in the form annexed to the act, such conveyance and assignment to *vest* the real and personal estate in the provisional assignee accordingly: and by the 19th section, the court was empowered to appoint one or more of the creditors to be an assignee or assignees of the estate and effects of the insolvent; and upon his or their acceptance of the appointment, the act provided that the estate and effects, rights and powers of the insolvent, vested in such provisional assignee, should be conveyed and assigned by him to the assignee or assignees so appointed by the court, in trust for the benefit of the creditors; and that after such conveyance and assignment by the provisional assignee, all the estate and effects of the insolvent should be to all intents and purposes as effectually and *legally invested, by relation* (*g*), *in such assignee or assignees, as if the said conveyance and assignment had been made by the insolvent to him*

(*d*) Amended by 3 Geo. 4, c. 123; and see 5 Geo. 4, c. 61.

(*e*) It was decided in Doe *d.* Clark *v.* Spencer, 3 Bing. 203, that the provisional assignee might under the act of 1 Geo. 4 sue in ejectment for property assigned to him, without any authority from the creditors or the court under the 11th section of that act.

And in Twiss *v.* White, 3 Bing. 486, 11 Moore, 413, the Court of Common Pleas held that the act passed the equitable interest of an insolvent debtor in copyhold property to the assignee, so as to entitle him to recover the purchase money which had been paid for the use of the insolvent subsequently to his discharge, although he contracted for the sale of the copyhold before he went to prison, and acquired the legal customary interest after his discharge.

(*f*) Sect. 11.

(*g*) Under this provision it has been held that the estate and effects of the insolvent vest in the assignee chosen by the court, by the assignment from the provisional assignee, notwithstanding the death of the insolvent prior to the execution of that assignment, although it is provided by the 11th section of 7 Geo. 4, that in case the petition of any prisoner shall be dismissed, the assignment to the provisional assignee shall, after such dismission, be void. See Willes & Elliott, 4 Bing. 392.

or them (*h*). The 20th section provided for the sale of the estate and effects of the insolvent, and concluded thus: "And in case such prisoner shall be entitled to any copyhold or customary estate, the conveyance and assignment by such provisional assignee to such assignee or assignees as aforesaid, shall be entered on the court-rolls of the manor of which such copyhold or customary estate shall be holden; and thereupon it shall be lawful for such assignee or assignees to surrender or convey such copyhold or customary estate to any purchaser or purchasers of the same from such assignee or assignees, as the said court shall direct; and the rents and profits thereof shall be in the meantime received by such assignee or assignees for the benefit of the creditors of such prisoner (*i*), without prejudice nevertheless to the lord or lords of the manor of which any such copyhold or customary estate shall be holden (*k*)."

By the 5th section of 1 Will. IV. c. 38 (for continuing and amending the act of 7 Geo. IV. c. 57), after noticing that some interest in lands, &c. might become vested in the provisional assignee which appeared to be of no value, but nevertheless that it might be expedient that such provisional assignee should make or join in making some conveyance or assignment of the same, it was enacted that the court, where no assignee should have been appointed, might direct the provisional assignee to make or join in making any such conveyance or assignment, without observing the provisions of the act of 7 Geo. IV. as to the sale of real property by the provisional or other assignee of the insolvent debtor's estate. And by the 7th section it was provided that the conveyance and assignment from the provisional assignee to any assignee or assignees by virtue of any order of the court, should be in the form annexed to that act.

The effect of the two last-mentioned acts of parliament appears to the author to be to render any admittance, either of the provisional

(*h*) And see the proviso in conclusion of the 19th section (post, Appendix), declaring that such relation should not avoid any act done under the first conveyance and assignment, and requiring that every conveyance and assignment to the provisional assignee, and a counterpart of the conveyance and assignment by him to such other assignee, should be filed of record of the said court; and that a copy of such record, with a certificate of the provisional assignee, or his deputy, indorsed thereon, and sealed with the seal of the court, should be sufficient evidence of the conveyances and assignments.

(*i*) This clause, taken in connection with the 11th section, clearly shows that the legal seizin is in the assignee, and that the entry of the assignment on the rolls is not essential otherwise than as regards the derivative title of a purchaser. See Doe *d.* Smith *v.* Glenfield, 1 Bing. N. C. 729; 1 Sc. 699.

(*k*) This is analogous to the compounding clause in the Bankrupt Act of 6 Geo. 4, c. 16, s. 69, showing that a purchaser is to be admitted and fine; and perhaps it was also intended to preserve to the lord his quit rents, &c.

or general assignee of an insolvent debtor, unnecessary; the copyhold estates of the insolvent *vesting* in the provisional assignee by the conveyance executed pursuant to the 11th section of 7 Geo. IV., and that interest being divested and transferred to the general assignee by the conveyance and assignment under the 19th sect. of 7 Geo. IV. and the 7th section of 1 Will. IV.

And by the 22d section of 7 Geo. IV., all powers over real or personal estate, vested in the insolvent, or created for his benefit (except the right of nomination to any vacant ecclesiastical benefice), are vested in the assignee under that act, to be executed by him for the benefit of the creditors: supposing, therefore, an insolvent debtor to have a power of appointment over copyholds, such power would be exercisable by the general assignee, and so as to entitle the appointee (should the power extend over the legal customary fee) to claim to be admitted the lord's tenant of the particular estate.

An important change was created in this branch of the law of copyholds by the act of 1 & 2 Vict. c. 110, (for abolishing Arrest on Mesne Process, see extract in the Appendix). It is provided by the 47th section of that statute, that the *real* estate of an insolvent shall be sold within six months after the appointment of the assignee or assignees, or within such other time as the court shall direct, and by public auction, in such manner as shall thirty days before the sale be approved in writing under the hands of the major part in value of the creditors present at a meeting held under fourteen days' notice in the London Gazette, and in some daily newspaper published in London, or within the bills of mortality; or if the insolvent shall reside elsewhere, then in some newspaper circulated in or near the place of his residence: and that in case the insolvent shall be entitled to any *copyhold* or *customary* estate, a certified copy of the order *vesting* the insolvent's estate in the provisional assignee, and of the appointment of the general assignee or assignees, shall be entered on the court rolls of the manor, and that thereupon the assignee or assignees shall surrender or convey such *copyhold* or *customary* estate to the purchaser or purchasers as the court shall direct, and that the rents in the meantime shall be received by the assignee or assignees, without prejudice nevertheless to the lord or lords of the manor of which any *copyhold* or *customary* estate shall be holden.

Further, the 5 & 6 Vict. c. 116, intituled " An Act for the relief of Insolvent Debtors," authorizes any person, not being a trader within the statutes relating to bankrupts, or being such trader, but owing debts amounting to less than 300*l.*, on giving such notice as required by the act, to present such petition for protection from process as in the act mentioned; and enacts, that on the presentation of such petition, all the estate and effects of the petitioner shall become vested in the

official assignee nominated by the commissioners acting in the matter of the petition, and that such assignee shall take possession of so much thereof as can be obtained without suit, and hold the same in like manner as official assignees under the statute relating to bankrupts: and the seventh section enacts, that on the passing of such final order as in the act mentioned, the real and personal estate of the petitioner shall become absolutely vested in the official assignee and assignee chosen by the creditors without any deed or conveyance, which assignees are to hold the same as fully as if the petitioner had been made a bankrupt, and they had been assignees under his fiat.

The statute of 7 & 8 Vict. c. 96, for amending the law of insolvency, bankruptcy and execution, after authorizing a petition for protection from process under the 5 & 6 Vict. c. 116, to be presented to any court or district court of bankruptcy, and providing for notice being given of such petition to the creditors by the commissioner authorized to act therein, and for the examination of the petitioner, and the choice of the creditors' assignee, enacts that the property of the petitioner shall, for the purposes of that act and of the act above referred to, vest in the assignee or assignees for the time being by virtue of his or their appointment.

The 10th section enacts, that until an assignee shall be chosen by the creditors, the official assignee nominated by the commissioners may dispose of the property of the petitioner, if the commissioner shall so order.

The 11th section enacts, that all powers vested in any petitioner for protection from process, whose estate should have been vested in an assignee or assignees, which such petitioner might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), shall be vested in such assignee or assignees, to be executed for the benefit of the creditors.

And the 41st section of the act empowers the Lord Chancellor, on the petition of any trader who should have filed a declaration of insolvency in manner prescribed by the statute relating to bankrupts, to issue a fiat in bankruptcy against such trader, and to authorize the prosecution thereof in the court of bankruptcy in London, or in any district court.

ADMITTANCE BY IMPLICATION.—It was formerly thought that the steward's acceptance of a surrender from the surrenderee of a copyhold would be an implied admittance (*l*), and for which the cases of *Baker* or *Barker* v. *Denham* or *Dereham* (*m*), *Gyppyn* v. *Bunney* (*n*),

(*l*) Elkin *v.* Wastall, 3 Bulst. 232; 1 Roll. Ab. 505, X. pl. 1; 6 Vin. Cop. (E. b); Co. Lit. 60 a, n. 2; 1 Watk. on Cop. 269, 270.

(*m*) Sty. 145; 1 Mod. 102.

(*n*) Cro. Eliz. 504.

Colchin v. *Colchin* (*o*), and *Rawlinson* v. *Green* (*p*), appear to have been relied upon as authorities; but it was ably shown by Lord Ellenborough, in the case of *Doe* & *Tofield* (*q*), that such a surrender is void, and that the above authorities do not support the position, it appearing by the supplement to Coke's Copyholder, s. 4, that if the point in question arose at all in *Baker* & *Denham*, it was ruled the other way; that *Gyppyn* & *Bunney* was the case of a surrender by a remainder-man, the tenant for life having been admitted, and which was the admission of all in remainder (*r*); that *Colchin* & *Colchin* was the case of an heir, and who may surrender before admittance on satisfying the lord his fine (*s*); and that the surrender in the case of *Rawlinson* & *Greeves* (or *Green*) was clearly proved to be void by an able argument in the report in Bridgman (*t*).

The case of *Rawlinson* & *Greeves* (or *Green*) appears to have been decided on the ground that no admittance could be implied, either from the presentment of the surrender, the acceptance and entry of it by the steward, or the delivery of a copy of such entry to the surrenderee, those acts by the steward being ministerial only, and not *of necessity* implying an admittance.

It would seem, however, by the report of *Rawlinson* & *Greeves*, or (*Robinson* & *Greves*,) in Bridgm. and in Bulst., that if the lord himself had accepted the surrender, it would have implied an admittance (*u*). But in *Brown* v. *Dyer* (*x*), in the case of a surrender to the use of *A.*, it was found that the lands had been surrendered into the hands of the lord himself in full court, and that the lord assessed a fine upon the surrenderee, *but never admitted him;* and it was adjudged, *per tot. cur.*, that the heir of the surrenderee had no title; "for that the title of the surrenderee is wholly by the copy of the court-roll, made from the entry upon the court-roll (*y*), which *before admittance* cannot be."

And yet it has been held that the lord saying to a surrenderee that he agrees to the surrender, and that he shall be his tenant, is a sufficient admittance, and perfects the estate of the surrenderee before presentment and inrolment of the surrender (*z*).

(*o*) Cro. Eliz. 662.

(*p*) Poph. 127; S. C. (called Rawlinson *v.* Greeves), 3 Bulst. 237; S. C. (called Robinson *v.* Greves), Bridgman's Rep. 81.

(*q*) 11 East, 249; and see 2 Bl. Com. 368; Wilson *v.* Weddell, Yelv. 145; S. C. 1 Brownl. 143; Dixie's case, 24 Eliz. cited Co. Lit. 60 a, n. 2, and in 11 East, 252; ante, p. 140.

(*r*) Ante, p. 138.

(*s*) Ante, p. 140.

(*t*) Ante, p. 140.

(*u*) Bridgm. 82, 83; 3 Bulst. 239, 240; and see ib. 232; 4 Burr. 1955; 5 Burr. 2780 et seq.; 11 Mod. 70; Gilb. Ten. 282, 283.

(*x*) 11 Mod. 73; 6 Vin. Cop. (G. b.), pl. 19.

(*y*) Ante, p. 229.

(*z*) Elkin *v.* Wastall, 3 Bulst. 232; Rosewell or Frosel *v.* Welsh, ib. 219;

And also that the lord's acceptance of rent from the surrenderee, *if expressly accepted from him as a copyholder*, is a good admittance (*a*). Sell Ld Ecclesiastical Cases & Pars 1894. 2. L.B. 420.

According to the above case of *Brown & Dyer*, the lord's *assessing* a fine upon the surrenderee is not a virtual admittance, although the *acceptance* from him of a fine, or of fealty, it appears would be so (*b*).

And if the lord or steward should swear the surrenderee on the homage, it would, the author apprehends, amount to an admittance (*c*).

It has been doubted whether the lord can avow on the heir for rents and services before admission, or rather whether the avowing upon the heir would not be tantamount to an admission (*d*), and the better opinion seems to be that it would (*e*), especially if the delay of admission be occasioned by the lord (*f*).

Whether a conveyance by the lord of the freehold interest to a surrenderee, or devisee of copyholds, would be an implied admittance, and consequently operate as an enfranchisement, may bear a question; but the author inclines to think that such a conveyance would be by implication an admittance to the customary inheritance (*g*).

It is clear that admittance does not in itself constitute a possession, but only gives the party the means of obtaining possession, if he has a right to it (*h*); and as no person can recover in ejectment without having been admitted, except indeed a customary heir (*i*), the lord is

S. C. Cro. Jac. 403; S. C. Bridgm. 52; S. C. 1 Roll. Rep. 415; S. C. Godb. 268; 1 Roll. Abr. 502, Cop. (M.), pl. 4; ib. 505, (X.), pl. 2.

(*a*) Calth. 47, 2d ed.; Rosewell or Frosel *v.* Welsh, sup. See particularly 1 Roll. Abr. 505; but it is observable that in the report of this case in Cro. Jac. it is said to have been held that the acceptance of rent from the surrenderee does not give any interest until the surrender is presented in court; and that in Barker *v.* Denham, Sty. 146, Bacon, J. doubted whether the lord's acceptance of rent amounted to an admission; Gilb. Ten. 282, 283; 4 Mod. 252; ante, tit. "Presentment of Surrender," p. 229 et seq. Acceptance of rent is of an ambiguous nature; Doe & Hellier, 3 T. R. 171; post, tit. "Of Licences and other Dispensations."

(*b*) 3 Bulst. 239; Dyer, 292 a, pl. 68; Gilb. Ten. 283; 6 Vin. Cop. (B. b. 2), pl. 4; Calth. 47; 5 Burr. 2781.

(*c*) Calth. 47; 4 Burr. 1955; 1 Watk. on Cop. 246.

(*d*) 1 Watk. on Cop. 246, 247; Gilb. Ten. n. 135, p. 459. Kitch. says the lord may avow before admittance, p. 170.

(*e*) Co. Cop. s. 41, Tr. 94; Gilb. Ten. 287; Dixey's case, cited Mo. 272.

(*f*) Gilb. Ten. N. 135; 1 Watk. on Cop. 246.

(*g*) See Wilson *v.* Allen, 1 Jac. & Walk. 613; post, tit. "Enfranchisement." And see further as to admittance by implication, Gilb. Ten. 282, 283; 6 Vin. Cop. (B. b. 2), pl. 4; Com. Dig. Cop. (G. 4); 5 Burr. 2780 et seq.

(*h*) Anon. Lofft, 390; Hasset *v.* Hanson, Win. 67; Right *v.* Bawden, 3 East, 274.

(*i*) A grantee for life in reversion, as well as the customary heir, has a perfect legal title, and may therefore maintain ejectment when his reversionary estate falls into possession; Roe & Loveless, 2 Barn. & Ald. 453; post, tit. "Of Ejectment."

not justified in refusing admission where there is a colourable title (*k*); and if two persons claim by different titles, the lord must admit both (*l*); even the heir of a copyholder, as we have already seen (*m*), may compel the lord to admit him.

A grant wrongfully made is wholly void, and the lord or steward may afterwards admit according to the surrender (*n*).

And if there be any variation between the surrender and admittance, the estate will be according to the surrender; as if the grant be to the surrenderee and a stranger, the whole shall enure to the surrenderee; or if the surrender be absolute, and the surrenderee is admitted on condition, the condition is void (*o*).

And again, if a copyholder surrender for life, and the lord admit in fee, the surrenderee has but an estate for life, for he is *in* by force of the surrender (*p*), that is, by him who made the surrender (*q*), for the lord is but an instrument to make admittance (*r*); and the admittance, in whatever terms it is made, always enures according to the title (*s*); but not, the author apprehends, so as to be an admission to an estate in remainder, limited to a person who is admitted for life, where, by the custom of the manor, remainder-men are compellable to take admission, and pay a fine to the lord: nor so as to render an admittance of the heir of a remainder-man or reversioner to the customary fee by descent, his admittance to an estate tail previously devolving upon him as heir of the body of such ancestor, under the surrender to uses.

(*k*) Lofft, 390; 11 East, 250; ante, p. 291.

(*l*) Rex *v.* Hexham, 1 Nev. & Per. 53; 5 Adol. & Ell. 559.

(*m*) Ante, p. 290; and see post, tit. "Mandamus."

(*n*) Kitch. 162; Co. Cop. s. 41, Tr. 92; Westwick *v.* Wyer, 4 Co. 28 b; Baddeley *v.* Leppingwell, 3 Burr. 1543; Allin & Nash, Noy, 152; S. C. 1 Brownl. 127; Hether & Bowman, Sty. 462; 3 Leo. 210, ca. 274.

(*o*) Co. Cop. s. 41, Tr. 92, 93; Westwick & Wyer, Allin & Nash. sup.; Kitch. 171.

(*p*) Westwick & Wyer, sup.; Bunting *v.* Leppingwell, 4 Co. 29 b; Baddeley *v.* Leppingwell, sup.; 4 Burr. 1961; Kitch. 171; Gilb. Ten. 255; Calth. Read. 46, 2d ed.

(*q*) Taverner & Cromwell, 4 Co. 27 b; Westwick *v.* Wyer, sup. And yet in pleading copyhold it is sufficient to show the grant of the lord, and to allege any admittance as a grant; post, tit. "Pleading."

(*r*) Taverner & Cromwell, sup.

(*s*) 3 Bulst. 240; Lane & Pannel, 1 Roll. Rep. 317, 438. Per M. R. in Church *v.* Mundy, 12 Ves. 431. But Coke in his Cop. s. 41, Tr. 93, says, "If I surrender with the reservation of a rent, and the lord admits, not reserving a rent, or reserving a rent less than I reserved upon the surrender, this admittance is *wholly void*; but if the lord reserveth a greater rent, then is the reservation void only for the surplusage, and the admittance so far current as it agreeth with my surrender." And again, "If I surrender upon condition, and the lord omits the condition, the admittance is *wholly void*;" ante, pp. 143, 144.

So where a copyholder made a surrender to the use of himself for life, remainder to his wife for life, remainder to the baron and feme in tail, remainder to the heirs of the body of the baron, and after the death of baron and feme the eldest son and heir of the body of the surrenderor was admitted generally as heir, but not to the estate tail, and then mortgaged and died, leaving issue, whom the lord admitted, the mortgagee recovered in ejectment, it being held that the legal title to the fee simple, which descended from the father to the eldest son, remained in the son until admittance under the surrender made by the father (*t*).

And as the admission in itself confers no title, the party admitted is a wrong doer as against any person having a rightful title (*u*).

It is said that if the uses of the admittance are more extensive than the surrender, the admission may, in respect of the lord's interest, operate as a new grant (*x*); but that when a person is admitted in a particular character with reference to a former grant, and no new estate is in the contemplation of the parties, the admission, if void, shall not operate as a grant in respect of the interest of the admitting lord.

So in *Zouch*, on the demise of *Forse* v. *Forse* (*y*), it was held, by the Court of King's Bench, that the administrator of a grantee of a copyhold *pur autre vie*, who had no title in that character, as there could not have been a general occupancy of copyholds (*z*), could not have recovered in ejectment under an admittance by the lord, as upon a substantive grant of a new estate.

It must, however, be recollected, that a release by a person entitled to be admitted to one who has been admitted wrongfully, and is in actual possession, will enure by way of extinguishment (*a*); and that if no estate is mentioned in the surrender, it may, in some cases at least, be implied from the admittance (*b*).

The power of compelling the lord to admit a copyholder was first assumed, it would seem, by the courts of equity (*c*), and now a mandamus at law will lie, as we shall see hereafter (*d*); but neither the

(*t*) 6 Vin. Cop. (G. b.), pl. 19, Hil. 5 Ann. B. R.

(*u*) Anon. Lofft, 390; Payne v. Barker, Orl. Bridg. 33; Gilb. Ten. N. 129, p. 457.

(*x*) 4 Leo. 88, ca. 186; 1 Freem. 246; 1 Watk. on Cop. 52, n. (*p*); Gilb. Ten. N. 119, 120; ante, p. 383, n. (*a*).

(*y*) 7 East, 186; and see Right *d.* Dean and Chapter of Wells v. Bawden and others, 3 East, 260; 1 Jac. & Walk. 615; ante, p. 149.

(*z*) Ante, pp. 50, 89. But by 1 Vict. c. 26, "for the amendment of the laws with respect to wills" (sect. 6), the provisions of the statutes of occupancy, 29 Car. 2, and 14 Geo. 2, were made applicable to copyholds; ante, pp. 52, 89.

(*a*) Ante, p. 195.

(*b*) Ante, p. 147; Gilb. Ten. 255; but see Co. Cop. s. 41, Tr. 93.

(*c*) 4 Co. 24 a, 28 b; Ford v. Hoskins, Cro. Jac. 368; S. C. Mo. 842; S. C. 1 Roll. Rep. 125; Gilb. Ten. 291; post, Ch. 16.

(*d*) Post, Ch. 16.

surrenderor nor the surrenderee can maintain an action against the lord for refusing admittance (*e*).

The lord cannot bring a bill in equity against the heir, or a surrenderee or devisee (*f*), to compel admission, but his proper remedy is by proclamation and seizure, or, in the case of an infant, feme covert or lunatic, under the statute of 1 Will. IV. c. 65 (*g*).

So permanently established is the estate of the copyholder, that it cannot be prejudiced by any act of the lord; if, therefore, the lord grant the freehold of a single copyhold to a stranger, so that a court cannot be held, such grantee of the freehold interest will be bound by the copy, and the title of the heir of the copyholder will be complete without admittance (*h*). Again, should the lord oust his lawful tenant, the party injured shall have trespass (*i*), or may maintain an ejectment against the lord (*k*), or even indict the lord (*l*), or might have maintained a writ of right (*m*).

(*e*) Ford *v.* Hoskins, sup.; Phillibrown *v.* Ryland, 8 Mod. 352; 2 Vent. 27; Carth. 492, in Groenvelt *v.* Burnell; Gilb. Ten. 291; but see Gallaway's case, cited 3 Bulst. 217, and 5 Burr. 2769; Lex Cust. 158.

(*f*) And it is only by special custom that surrenderees or devisees can be compelled to take admission; ante, p. 291.

(*g*) Clayton *v.* Cookes, 2 Atk. 449; ante, p. 289.

(*h*) Bell or Beale *&* Langley, 2 Leo. 208, 209; 4 ib. 230; ante, pp. 9, 10.

(*i*) Co. Lit. 60 b; Co. Cop. s. 51, Tr. 118; 1 Watk. on Cop. 45; Br. tenant per Copie, &c., pl. 13, cites 21 E. 4, 80; Lex Cust. 15; 1 Leo. 4; 4 Leo. 118, Otlery Monastery case; Scott *v.* Kettlewell, 19 Ves. 335, n. And an action of trespass lies against the lord for cutting down trees, when by custom they belong to the tenant; Co. Cop. s. 51, Tr. 119; ante, pp. 173, 174, n.; post, tit. "Trees and Mines."

(*k*) Rennington *v.* Cole, Noy, 29.

(*l*) Ante, p. 173.

(*m*) Per Danby, C. J. of C. B., Br. tenant per copie, &c. pl. 10, citing 7 E. 4, 19; but copyholder could not have impleaded a stranger by the king's writ.

In the instance of a lord's putting out his lawful copyhold tenant, the proper remedy would clearly be in the superior courts, either of law or equity, and not in the court of the manor, as the lord would then, in effect, be both judge and party. See 1 Salk. 56, in Baker *&* Wich; ib. 186, and 1 Lord Raym. 43, in Brittle *v.* Dade (or Bade). Mr. Watkins says, "If however any dispute arise between lord and tenant, it must of necessity be referred to the courts above, as the lord must not be both party and judge;" 2 vol. on Cop. 35; see ib. 1, 2. But the writ of right has been abolished; post, tit. "Customary Plaints."

CHAPTER VII.

Of the Lord's Fine (a).

A FINE is due on the act of admittance; consequently where there

(a) The principal feature of the first division of the late COMMUTATION and ENFRANCHISEMENT ACT, 4 & 5 Vict. c. 35, is the provision made for converting arbitrary fines on admission to copyhold and customaryhold lands, into fines certain and small, with a compensation to the lord of the manor, in reference to the reduced amount of the admission fines, and the extinction of quit rents, rents of assise, &c., and of heriots, and of the lord's proprietory interest in timber, and any other manorial rights agreed to be commuted by means of a yearly rent charge to be valued, and (when exceeding 20*s.*) to be variable according to the price of corn, as in the case of a tithe commutation rent-charge.

By the 14 sect. of the act, the amount of every rent-charge may be specifically stated in the agreement, or separate rent-charges be agreed upon between the lord and any one or more tenants; or the agreement may provide that the entire rent-charge, though stated therein, shall be subject to increase or diminution by the valuer or valuers to be appointed at a meeting for commutation as mentioned in sect. 24, (or if not so appointed within six months, then by the commissioners, as mentioned in sect. 38,) to an amount per centum to be therein expressed, or that the separate rent-charges shall be subject to increase or diminution to a given amount per centum, in certain events to be specified; and it may determine the apportionment for each tenant, or provide that the entire rent-charge, or the apportionment thereof, shall be fixed by the valuers, subject to the approbation of the commissioners; and may also stipulate that so much of the rent-charge to be apportioned in respect of the lands of any tenant, as shall be in lieu of fines or other manorial rights to which such tenant would not be liable thereafter during his tenancy, shall not commence until the period of the next act or event on which a fine, or such other manorial right, would have become payable or due, and that the amount of such rent-charge shall be then increased accordingly.

The 47 sect. of the act creates the remedy of entry and distress for the recovery of the rent-charge, if any half-yearly payment should be in arrear for twenty-one days, and after ten days' notice in writing left at the usual or last known residence of the tenant in possession, but not to exceed two years' arrears.

And by the 48 sect., if any half year's payment should be in arrear forty days, the owner of the rent-charge, on an affidavit before a judge of one of the Queen's courts at Westminster, may obtain a writ to the sheriff to assess the arrears, and to return the inquisition into one of those courts, and the owner to be then entitled to sue a writ of hab. fac. poss. to the sheriff, but not more than two years' arrears beyond the time of possession and the costs to be recoverable.

It is however further provided (s. 15), that the agreement for a commutation of the lord's rights may be for the payment of a fine on death or alienation, or at any fixed period or periods to be agreed upon by the parties; and every such fine to be fixed by the agreement, or to be subject to increase or diminution by the valuers,

is no necessity for admittance, no fine can accrue to the lord (*b*). And by the special custom of some few manors, no fine is payable on the admission of the customary heir.

There is however an exception to the rule that a fine accrues by the act of admittance *only*, as in several manors, and more particularly in the tenant-right estates in the north of England, a fine is due on the death of the lord, as well as on the change or alteration of the tenant (*c*), even where the manor has been alienated by the lord in his lifetime, which custom was on an appeal to the House of Lords held to be good (*d*).

In the *Duke of Somerset* v. *France et al.* (*e*), the custom was for the lord or lady for the time being to admit the several tenants to their respective estates, and that by virtue of such admittance the tenants had a right to hold during the joint lives of such tenant and

to such an amount per centum as shall be expressed in the agreement, but to be valued in corn, and variable as the tithe commutation rent-charge.

The mode of convening meetings for entering into agreements for the general commutation of rents, fines and heriots, payable to lords of manors, and of the lord's rights in timber growing on copyhold or customaryhold land, is prescribed by the 13 sect. of the act, which also provides that any such agreement of commutation may be entered into by the lord and tenants present at a meeting so called, such tenants not being less in number than three-fourths of the tenants of the manor, and the interest of the lord and the interest of the tenants in the manor and lands respectively, not being less than three-fourths of the interest in the value thereof respectively, computing the interest of the tenants as mentioned in section 17.

The 16 sect. enables the lord and tenants present at any such meeting as aforesaid, or any portion of them, (though some of the tenants should dissent,) to enter into a provisional agreement of commutation of the like tenor, and which, should it be sufficiently executed within six calendar months, is declared to be as binding as if it had been executed at the meeting by persons sufficient in number and interest.

The 17 sect. prescribes a rule for estimating the proportional interests of the tenants, as far as regards their power to make such agreements or provisional agreements for commutation, or to appoint valuers, or to give any notice to the commissioners or assistant commissioners, as provided for by the act, having reference to the liability of the tenants to arbitrary or uncertain fines or to fines certain, or to heriots in kind.

And by the 23 sect. every such commutation agreement is to be confirmed by the commissioners. The above act was amended by 6 & 7 Vict. c. 23 and 7 & 8 Vict. c. 55, which see in Appendix.

(*b*) Co. Cop. s. 56, Tr. 127, &c.; Hobart & Hammond, 4 Co. 28 a, (cites Bacon v. Flatman); Sands' case, cited ib.; Kitch. 240; Gilb. Ten. 218; 2 Wils. 401; 3 Burr. 1543; Rex v. The Lord of the Manor of Hendon, 2 T. R. 485; Graham v. Sime, 1 East, 634.

(*c*) Doe *d.* Earl of Carlisle and others v. Towns, 2 Barn. & Adolp. 585; Earl of Carlisle v. Armstrong, 1 Burr. 333; Co. Lit. 59 b; Vin. Abr. Cop. (W. b.) See as to alienation fines, Holland v. Lancaster, 2 Vent. 134:—And note, that fines on alienation were expressly excepted in the stat. 12 Car. 2, c. 24, for abolishing the incidents of feudal tenure.

(*d*) Lowther, Appel., Raw, Resp., 2 Bro. P. C. 451; Tenants of Gaddesden v. Carey, Toth. 165.

(*e*) 1 Stra. 654; S. C. Fortesc. 41.

the admitting lord or lady (*f*); and it was adjudged that the customary general fine or *gressum*, as distinguishable from the fines payable on the death or alienation of a tenant, and called *dropping* fines, was not restricted to those claiming by descent; but that the husband, who was tenant for life under the provisions of a marriage settlement, was entitled to a fine upon the death of his wife, the last admitting lady.

It is a settled rule that a fine on the change of the lord can only be due when such change is by the act of God, for although a custom to have a fine as well upon alienation as upon the death of a tenant is good, yet a custom to have a fine on every change or alteration of the lord, whether by death or otherwise, would be most unreasonable, and therefore bad (*g*).

The fine on admittance, and also the steward's fees on the surrender and admission, are payable by the purchaser (*h*); and it has been decided that a covenant to surrender copyholds at the costs of the vendor is not broken by non-payment of the fine, the title being perfected by admittance (*i*).

An admission fine is *primâ facie* uncertain or (in legal phraseology) arbitrary, but in some manors fines are certain, as 6*s*. 8*d*. for the admission to each house or to every acre of land (*k*); in others they are uncertain or at the will of the lord; but the fine on admission to copyholds of inheritance, or for lives when renewable, even if arbitrary, must be reasonable (*l*); and two years' *improved* value of the land, deducting quit rents (*m*) but not land-tax (*n*), is the full extent which the courts will allow the lord to demand in the exercise of this

(*f*) See the case of Doe *d*. Hamilton and Wife *v*. Clift, 12 Adol. & Ell. 566, 580, ante, p. 27, n. (*h*), in which the court held that the heir acquired seizin by entry without admittance, the land being customaryhold of inheritance; but that if it had been held for the joint lives of the tenant admitted and the lord, with a tenant right of renewal, the special customary descent proved to exist would not have attached.

(*g*) Co. Lit. 59 b, cites Armstrong's case; Litt. Rep. 231, cites S. C. Gilb. Ten. 292; Egerton's case, Cary, 9; Lex Cust. 161, 162. And see Earl of Bath & Abney, 1 Burr. 206, in which the great point was whether a fine became due on every change of the tenant, or on change of the estate only.

(*h*) Drury *v*. Man, 1 Atk. 95, Sanders's edit.; Sugd. Vend. and Purch. 388, 8th edit.

(*i*) Graham *v*. Sime, ubi sup.

(*k*) Kitch. 200, 201, 202; Skin. 248.

(*l*) Willowe's case, (or Stallon *v*. Brayde), 13 Co. 1; Dalton *v*. Hamond (or Hobart & Hammond), Cro. Eliz. 779; Mo. 622; 4 Co. 27 b; Jackman *v*. Hoddesdon, Cro. Eliz. 351; 1 Roll. Rep. 75; Gilb. Ten. 219; Co. Lit. 60 a, cites Stallon *v*. Brady, P. 1 Jac. C. B., meaning no doubt Stallon & Brayde or Willowe's case, sup.; and see Wharton *v*. King, 3 Anst. 673; 3 Swanst. 666, in Lord Holles *v*. Hutchinson.

(*m*) Halton *v*. Hassel, 2 Stra. 1042.

(*n*) Grant & Astle, infra.

arbitrary power (*o*): and in order to keep within the limits of the rule, and in a discreet distinction between the admittance to copyholds of inheritance on a sale and on a descent, operating equally to the advantage of the lord and tenant, it is, the author believes, usual for the lord to take not more than a year and three quarters' value on a descent, and a year and half's value on a purchase. But in the case of *Lord Holles* v. *Hutchinson*, in 31 Car. II. (1679) (*p*), where a commission was issued to ascertain the value of the tenements under a decree by consent, the principle of which was disapproved by Lord Nottingham, it appeared that upon a decree in the time of Lord Bacon, the fines were ascertained at two years' value upon alienation, and a year and half's value upon a descent, or an alienation to a wife or to children.

The fine is to be set in all cases according to the improved value of the land, whether by buildings or otherwise (*q*), which it was observed by Lord Hardwicke in the case of *Halton & Hassel* (*r*), is all the lord has to look after. That was the case of an action brought to recover

(*o*) Grant *v.* Astle, 2 Doug. 722. See a full extract of that case, post, 335. And see Morgan *v.* Scudamore, 2 Ch. Rep. 134; S. C. Rep. temp. Finch, 464; Wharton *v.* King, 3 Anst. 674; Gittings *v.* Browe, Toth. 164; Lake *v.* Jetherell, ib.; Atwood & Apsley, ib.; Allen *v.* Abraham, 2 Bulst. 32; Co. Lit. 60 a, (n. 1.) But in Willowe's case, (ubi sup.), the court held that two years' value was unreasonable. In the case of Dow & Golding, Cro. Car. 196, the lord demanded two years and a half's value, but the court thought it unreasonable, and that a year and a half's improved rent was high enough; but see Stoner *v.* Smith, Toth. 164; Tenants of Accledon *v.* Kinnesley, ib. It appears by Mr. Watkins's note on the case of Morgan & Scudamore, in his 1st vol. on Cop. Ten. p. 310, that Lord Nottingham also considered a year and a half to be a proper *maximum* in common cases, but allowed two years' value in that particular case, the grant being for ninety-nine years, renewable within one year after the expiration of the term; and the court appearing to have been influenced by the *dictum*, that the lord could not demand a fine of the executors of a copyholder for years, but the contrary it must be recollected, was determined in the Earl of Bath & Abney, post. Vide also Middleton *v.* Jackson, 1 Ch. Rep. 33; Toth. 164; and Popham *v.* Lancaster, 1 Ch. Rep. 96, (in which the Court of Chancery deemed an improved year's value a proper fine on admission to tenant-right estates). S. C. (Popham *v.* Larcesse), Toth. 164; Monsier *v.* Ducket, ib.; Cooper *alias* Stayning *v.* Blunt, ib.; Tenants of Gaddesden *v.* Carey, ib. 165; Fox *v.* Huddleston, ib.; Watson *v.* Maine, ib.; Blackwall *v.* Low, Cary, 77; Neville *v.* Albany, Toth. 165; Beare *v.* Seymor, ib.; Lord Gerrard *v.* Parker, ib.; Elrington *v.* Whetstone, ib.

In Wharton *v.* King, sup. (3 Anst. 674), Macdonald, C. B., said, "After long struggles and several fluctuations, the courts have at length fixed upon two years' value, as being the fine most nearly approaching to the agreement which the parties probably made. *That* therefore is called a reasonable fine."

(*p*) Lord Nottingham's MSS. See 3 Swanst. 665.

(*q*) 1 Ca. & Op. 174; and see the case of Lord Verulam *v.* Howard, 7 Bing. 327.

(*r*) 2 Str. 1042.

a fine upon the admission of the defendant to a copyhold, and wherein it appeared that the premises were of the value of 50*l.* per annum, and a year and half, being 75*l.*, was assessed: the defendant insisted on paying only 24*l.*, it appearing that his rent was but 16*l.* and the rest arising from improvements made under an old lease, granted by licence of the lord: and there was a verdict for the plaintiff for 75*l.* It is a necessary inference from the above case, that in the absence of any special contract, the lord's licence to a copyholder to lease his copyhold operates only as a dispensation of a forfeiture, and does not preclude the lord from assessing his fine according to the improved value of the property at the time of admission.

The rule by which the lord is precluded from insisting on more than two years' value for the fine of admission, would seem to be confined to those cases where he is compellable to admit, and the heir of the copyholder is subject to a fine on the devolution of the estate, and not to be applicable to voluntary grants, nor to cases where by the custom remainder-men must be admitted, or where the purchaser only, and not his heir, is subject to a fine, or where the fine on descent is nominal only (*s*); nor to cases where a fine is payable on the first purchase only within the manor, as in the manors of Harrow on the Hill, Croydon, Lambeth and Richmond (*t*); nor to copyholds for lives where there is no right of renewal, nor even to renewable copyholds for lives where the custom allows the copyholder to put in more than one life, for there each life is considered as a separate admission, and it would be unjust to the lord if it were otherwise and quite an inconsistency, as a copyhold for lives would in that case be more valuable than a copyhold of inheritance, where the heir or devisee is subject to a fine on admission.

The custom of the manor of Mere and Forton (*u*) is, that if any person *not* before being a customary tenant, or not dwelling within the manor, shall take any estate as a purchaser, by surrender or otherwise, he shall pay for a fine as the lord and he can agree, and the custom has been to assess such fine at the full amount of two years' value; but by the custom, persons being already customary tenants pay a small fine only on admission to other copyholds.

And the purchase of a small estate made bonâ fide (and not colourably only) for the purpose of being admitted thereto, and so saving a fine in respect of a larger estate *previously* purchased, is not

(*s*) Doe & Hillier, 3 T. R. 164; 1 Watk. on Cop. 308.

(*t*) 1 Watk. on Cop. 308; 2 ib. Appen. King *v.* Dillington (or Dilliston), 1 Freem. 496; 1 Show. 86.

(*u*) Rex *v.* Boughey, 1 Barn. & Cress. 565; S. C. (Rex *v.* Meer and Forton,) 2 Dow. & Ry. 824.

a fraud on the lord, a purchaser not being bound to be admitted to the estates in the order in which the purchases were made (*x*).

In the above case of *King* v. *Dillington* (*y*), it was held that if an infant would stand out three or four years before he came to be admitted, the lord might increase his fine accordingly, though not upon one that came after him, if the infant died before he was admitted. And in that case Dolben, J., cited a case of *Pinsent*, the prothonotary, who purchased a house at Croydon, and five years' value was set for a fine, and which came to a trial, when it was held that the fine was reasonable, and that in such a case the lord might have set seven years' value.

The usage in most manors on a renewal of copyholds for three lives, is to take for the first life a year and a half's value; for the second life, half as much as the fine for the first; and for the third life, half as much as the fine for the second (*z*); but the lord might demand two years' value for the first life, and so in proportion for the two additional lives.

The author in his first edition ventured to suggest, that as the rule with respect to two years' value was relaxed in favour of the lord on admission for lives, so it would be where a copyholder of inheritance surrendered or devised to several persons as joint-tenants; otherwise as the admission of one joint-tenant is the admission of his companions, there would be a very ready mode of defeating the lord of his advantages from fines, by introducing an unlimited number of lives into the tenancy.

He also stated his belief that the question had not then been agitated, but that entertaining a strong inclination of opinion that the case of joint-tenants was also an exception to the above rule, he felt himself bound to suggest it on laying the work before the public; and that the opinion he had formed appeared to receive a considerable degree of sanction from the practice of a half-fine being usually paid by a remainder-man, when a fine was due from him by the custom of the manor; and that no question had ever been made as to the reasonableness of the custom (*a*).

(*x*) Rex *v.* Boughey, sup.

(*y*) See 1 Freem. 495, 496.

(*z*) Earl of Bath *v.* Abney, 1 Burr. 207, 217, marg. where it is said, "The fine for two lives is the sesqui of that taken for one; and the fine for three is sesqui of that taken for two, by the usage of this manor," (viz. Stoke Newington, Middlesex.) But the real meaning probably was, that the fine for the third life was the half of that taken for the second life. See per Lord Tenterden in Wilson, Bart., *v.* Hoare, infra.

"Sesquialter: *Sesquialteral.* In Geometry is a ratio, where the quantity or number contains another once and a half as much more, as six and nine."—Johns. Dict.

(*a*) Kitch. 241; and see Roe & Hutton, 2 Wils. 162; 1 Watk. on Cop. 309, 311.

Sir Edward Northey, Attorney General,

He submitted, however, that it might be contended against his conclusion, that the admittance of a tenant for life was the admittance of all in remainder (*b*); and also perhaps that it was not in the power of the lord to prevent a copyholder of inheritance from carving out his estate in such manner as he might think proper, but that the argument was very far from proving that the rule in question would be held to extend to the case of an admission of joint-tenants, for that it was to be recollected that the heir or surrenderee of a remainder-man or reversioner must be admitted and pay a fine, but that joint-tenants did not transmit any estate to their heirs, and that they might release to each other, and so effect a transfer of their interests without any change of tenancy, and consequently without entitling the lord to a fine: and in conclusion of those remarks he stated also that they were applicable only to the amount of the fine, it being quite clear that one fine only was due on the admission of joint-tenants, however unlimited their number might be.

Some short time after the first edition of this work was published, the author obtained information that a special case was argued in the Court of King's Bench in Michaelmas term, 1815 (*c*), by Holroyd for the plaintiff, and Richardson for the defendant, where three joint-tenants had been admitted to a copyhold tenement in the manor of Sutton Holland, in Lincolnshire, and that the lord had demanded as a fine for the first life two years' improved value; for the second half the sum assessed for the first; and for the third half the sum assessed for the second. According to the shorthand writer's note of the case (which was shown to the author at that period), the court were unanimously of opinion that the fine was reasonable; but the case was never reported.

The observations of the Court of B. R. in a recent case (*d*), would seem however to have put this question at rest, and to have established the proper mode of assessing the fine upon an admission of joint-tenants to a copyhold of inheritance. It was an action of *assumpsit*, brought by Sir T. M. Wilson, Bart., the lord of the manor of Hampstead, against fourteen persons, who had been admitted as trustees of valuable property, formerly parts of Hampstead Heath,

being consulted as to what fine a steward might set upon admitting five or six devisees in trust of a copyhold estate, gave the following opinion: "If the trustees were to be admitted, the usual method is to pay a full fine for the first life, and half as much for every other life, they being taken as admissions of lives in reversion." MS.

(*b*) And see 1 Watk. on Cop. 297, 298, n. (d), 2d ed.

(*c*) Taylor *v.* Pembroke. The case was cited in Wilson & Hoare, infra; and it was there stated by Mr. (afterwards Baron) Gurney, that the court intimated a strong opinion that the fine was reasonable, "*inasmuch as it would never amount to four years' improved value.*"

(*d*) Wilson *v.* Hoare and others, 2 Barn. & Adol. 350.

for the recovery of the sum of 5657*l.* 19*s.* for the fine of admission, and was tried before Mr. Justice J. Parke. The circumstances were these: On 20th December, 1698, a grant was made by the then lord (an infant), with the assent of the homage, to fourteen persons, of six acres of heath ground, to hold *in fee* at the will of the lord, &c., at the yearly rent of 5*s.*: and by deed of the same date, between the mother of the said infant lord of the one part, and the grantees of the other part, it was declared and agreed that the grantees should stand seized of the premises and all improvements thereof, for the use and benefit of the poor of the parish of Hampstead for ever. A suit was subsequently instituted in Chancery by the Attorney General, at the relation of *J. B.* and *W. K.*, on behalf of themselves and others, the inhabitants and poor of the parish of Hampstead, and to which the then trustees of the charity and the then lord of the manor were parties: and by a decree in 1729, it was ordered that the above mentioned charity should be established and the said land be held according to the said grant, paying the rent of 5*s.* per annum to the lord, and a reasonable fine upon every surrender and admittance, according to the custom of the manor: and the trustees being all dead except three, and two of them having declined to act, it was ordered that the lord should, with the approbation of one of the masters in Chancery, nominate thirteen others of the copyhold tenants of the manor and inhabitants of the parish, to make up the original number of fourteen trustees, and that the premises should be surrendered to the continuing trustee and thirteen others, on the trusts of the deed of 20th December, 1698, and that the lord should admit them paying a *reasonable* fine: and that when at any time thereafter the number of trustees should be reduced to five, the lord, *with the approbation of the master*, should nominate nine others, qualified as aforesaid, to be added to the five, and a new surrender should be made to their use on the same trusts; and that the lord should admit them, paying a *reasonable fine* (*e*).

In 1826, there being two surviving trustees only, who were of a very advanced age, fourteen new trustees were appointed by the lord,

(*e*) In a case of this peculiar nature, it may be doubtful whether the Court of Chancery would not (independently of any possible custom) restrain the lord from taking a fine in respect of the re-admission of the five surviving trustees; and if so, the assessment commencing with the first of the nine newly appointed trustees, the fine would be very inconsiderable: and then this case would furnish an exception to the established rule, that two years' value is a *reasonable* fine for the first of two or more joint-tenants; and to the further apparently established rule, that, on the re-admission of surviving trustees under a surrender to the use of themselves and newly appointed trustees, the surrenderors are to re-fine. See the judgment of the Court of Exchequer in Sheppard *v.* Woodford and others, ante, p. 295, n. (*c*).

with the approbation of the master, and in fact with the sanction of the lessee of the property, and a surrender was made by the two surviving trustees to the fourteen new trustees (the defendants), who, on the 13th July, 1826, were admitted to the charity estate, which consisted of the original six acres of land, and of some new pieces of land added thereto by subsequent grants of the lord; and it was agreed that the lord should assess one fine only in respect of the estate, although held under several grants. The tenements were admitted to be worth by the year 1000*l.*, after deducting quit rents. The fine was assessed on the following principle: two years' value for the first life, half of two years' value for the second life, a third for the third life, and so on to the ninth life; and no additional sum demanded for the last five lives. It appeared that by the custom two years' improved value was the fine for a single life, and that the principle more generally adopted by the steward on the admission of joint-tenants, was to take two years' improved value for the first life; for the second, one half the sum charged for the first; and for the third, one half the sum taken for the second; and so on. The learned judge expressed an opinion that even if in an ordinary case the principle of assessment adopted was right, still, in assessing this fine, it ought to have been taken into consideration that the lord selected the lives (*f*), and that vacancies in the trust occurred by resignation as well as by death, and that the jury were to weigh those circumstances in deciding whether or not the fine was reasonable, and therefore his lordship nonsuited the plaintiff, but with liberty for him to move to enter a verdict for the amount of the fine assessed, if the court should think fit (*g*).

A rule *nisi* was accordingly applied for and obtained in Michaelmas term, 1830; and the counsel for the lord of the manor, in making the application, stated to the court that the chief object of the lord was to obtain the opinion of the court as to the principle upon which the fines should be assessed on the admission of future trustees.

On showing cause against the above rule, the counsel for the defendants urged, that the principle of assessment, in ordinary cases, was to take for a second life half of the first, and for the third half

(*f*) The decree directed that the lord should nominate, *with the approbation of the master*, ante, p. 322.

(*g*) It appeared in evidence that the estate (with the exception of a spring head of water) was leased in 1789 for a term of twenty-one years at the annual rent of 70*l.*, with covenants to renew for the further terms of twenty-one years and nineteen years at the same rent, the lessee paying the fines to be assessed by the lord of the manor upon the admission of additional trustees, under the terms of the above decree, save only that the trustees were to contribute 70*l.* (being one year's rent) towards the fine and expenses of such admission.

of the second, and so on; but that the rule did not apply to joint tenants; and that, with reference to reasonableness, the trustees, in the present case, stood in an unusual position from the mode of their appointment, and that as new trustees were to be appointed, when the number was reduced to five, the risk was upon nine lives, and those the worst of the fourteen. The counsel for the plaintiff contended that, even if the lord in assessing the fine ought to have taken into his consideration his right of nomination or selection, controlled as it was by the master in Chancery, and the advantage likely to accrue to him by resignation of the trustees, still it would have been competent to the lord, if the case had proceeded, to have proved other circumstances (*h*), which might have shown the propriety of increasing the fine, and then it would have been a question, under all the circumstances, to be submitted to the jury, whether the fine were reasonable or not: and that the question not having been left to the jury, the nonsuit was wrong.

Lord Tenterden, in delivering the judgment of the court, observed, that they were of opinion that the nonsuit ought not to be set aside, the sum charged being an excessive and unreasonable fine, adding, "We might content ourselves with saying that, and no more; but we have been requested, for the sake of enabling all parties to know what their rights are, to say what ought to be the proper fine; and our opinion is, that the proper mode of estimating the fine is to take, for the second life, half the sum taken for the first; for the third, half the sum taken for the second; and for the fourth, half that which is taken for the third, and so on. The effect of that will be, that you can never quite arrive at double the sum taken upon the first life, whereas the fine at present assessed very much exceeds that; for the principle on which it was assessed was this: two years' value was taken for the first life, half of that for the second life, a third for the third life, and a fourth for the fourth, and so on to the ninth life. The rule that we have laid down appears to have been the rule approved of in *Taylor* v. *Pembroke*, and is referred to in the *Earl of Bath* v. *Abney* (*i*), though it is not very accurately stated either in the margin of the report, or in Watkins's Treatise on Copyholds (*k*). There is an inaccurate use of the word "sesqui." It is said that the fine for two lives is the sesqui of that taken for one, and so far it is correct; and that the fine for three is the sesqui of that taken for two, which is incorrect. The meaning is plain enough, that the sum taken for the third

(*h*) The circumstances alluded to were the disadvantages to the lord which resulted from the estate not being alienable by way of sale or settlement, or devise, and not yielding a descent-fine, as in an ordinary case of a copyhold of inheritance.

(*i*) 1 Burr. 211.

(*k*) Vol. i. p. 483, 2d edit.

life is the sesqui (half) of that taken for the second (*l*). The rule must be discharged."

A fine was afterwards assessed by the lord of the manor for the admission of the fourteen trustees in 1826, on the principle sanctioned by the Court of King's Bench in the above judgment, stopping at the ninth life, or rather putting a somewhat smaller sum for the ninth life than the rule would have justified: and an action was brought for the recovery of the last mentioned fine, amounting to 3985*l.* 10*s.* (*m*), which was tried in the Court of B. R., before Mr. Justice Patteson, when the counsel for the defendants contended that the fine was set too high; first, because it ought to be regulated by the value of the lives admitted, and, secondly, because the admission of fourteen lives, to be renewed on the death of nine, was more advantageous to the lord than an admission for nine lives absolutely: and Mr. Arthur Morgan, the actuary of the Equitable Life Assurance Society, was called to prove the amount of the fine which ought to have been assessed with reference to the ages of the persons admitted, and that a grant for nine lives absolutely is more valuable than a grant for fourteen lives, determinable with the death of nine. The argument as to the ages of the trustees who were admitted in 1826 was repudiated by the learned judge, and indeed was not much relied upon on the part of the defendants.

After some discussion as to the propriety of the jury finding whether, in their opinion, the admission of nine lives only were more or less valuable than an admission for fourteen lives, to be renewed on the death of nine, the learned judge put it to the jury that, *in point of law*, it was immaterial whether the admission were for nine lives absolutely, or for fourteen lives determinable on the death of nine, and observed that, it being in evidence that there were nine lives admitted, and that the estate was worth 1000*l.* a year, it was matter of law that the mode of assessing the fine was to take two years' improved value for the first life, half that sum for the second, half that sum for the third life, and so on; and taking it in that way, the fine would be rather more than the sum demanded, and it therefore seemed to his lordship that the plaintiff was entitled to a verdict, and if he were wrong in the point of law, the counsel for the defendants would have an opportunity of setting that matter right. Verdict for the plaintiff, 3985*l.* 10*s.*

The counsel for the defendants tendered a bill of exceptions, principally to raise the question on the alleged distinction between an

(*l*) Ante, p. 320, n. (*s*).

(*m*) It was agreed in this as in the former action that one fine only should be assessed, and that the property should be considered as of the clear annual value of 1000*l.*

admission for nine lives absolute, and for fourteen lives renewable on the death of nine (*n*).

The writ of error came on for argument in the Exchequer Chamber the 22d April, 1834, when R. V. Richards, for the plaintiffs in error (the trustees of the copyhold estate), after stating the substance of the pleadings and the bill of exceptions, contended that the judge at nisi prius misdirected the jury, and that the defendants were entitled to the judgment of the court below.

Mr. Richards was proceeding to state the grounds of the alleged misdirection of the learned judge, and to draw the attention of the court to the report of the present case in 2 Barn. & Adol. p. 358 (ante, p. 321 et seq.), when Lord Lyndhurst, C. B., observed that the fine was properly calculated if it had been assessed for nine lives absolute: "Then (added his lordship) as it was not, but something worse than nine lives absolute, should there not be a deduction on that account?" And Tindal, C. J. said, "There is a very large dying power continually in operation: I think if this is well calculated for nine lives, if you throw in any matter that deducts from the value, it is not unreasonable to make some allowance for that so thrown in. The lord's fine comes sooner into operation: therefore is it reasonable that

(*n*) N.B. Before the commencement of the action for the fine of 5657*l.* 19*s.*, an information and bill was filed in chancery to reform the decree of 1729, and for an injunction to restrain the lord from suing for the fine, or proceeding for a forfeiture for non-payment of it. To that information and bill there was a demurrer, which was disallowed by Lord Lyndhurst, C. An answer was then put in; and on an application to dissolve the injunction, exceptions were shown for cause. Then a further answer was put in, and another application made on the merits to dissolve the injunction; and Lord Lyndhurst accordingly dissolved it, so far as the injunction restrained the plaintiff from commencing an action at law for the fine assessed, but continued it to restrict the plaintiff from taking out execution against the trustees on any judgment that might be obtained, and from proceeding as for a forfeiture. The action for recovering the fine of 5657*l.* 19*s.* was then brought, and with the result already stated. After the commencement of the second action, a supplemental bill was filed in chancery for an injunction to restrain the plaintiff from any proceeding at law in respect of the fine for which that action was brought; and on the argument of the motion for the latter injunction before Lord Brougham, C., his lordship observed that he did not feel called upon to say whether the trustees were exempt from the fine, because they held for a charitable use; but nevertheless he must admit that he could not see how that circumstance should differ the case from the case of any other trustee or copyholder, and that the fines were as much a part of the custom as the rent of 5*s.*; and that nothing could be a more fit subject for trial than the custom of the manor, and whether the fine demanded was reasonable or not. And his lordship refused the motion for an injunction, with costs; but directed that such part of the former injunction as remained in force should be taken to extend to restrain any execution upon any judgment that might be obtained in the action then pending, and also any proceedings on the ground of a forfeiture for non-payment of the fine.

he should have it as if for nine lives absolute, when he has a power continually working in his favour to bring it sooner into operation? I think we ought to hear the other side:"—

When Scriven, Serjt., for the defendant in error (the lord of the manor), urged that the rule of law as to fines payable by joint-tenants was settled by the case of *Taylor* v. *Pembroke* (vide ante, p. 321), and its applicability to the present action by the judgment of the Court of King's Bench which had been adverted to; and that, as the lord would be bound on future admissions to accept of a reversionary fine for the nine new trustees, passing over the five surviving trustees in respect of their re-admission (*o*), a full fine could never again accrue, if the trustees did justice to the persons interested in the rents of the estate, by calling on the lord to fill up the number of trustees, according to the decree of the Court of Chancery, when reduced by death or otherwise to nine; and in fact that the fines in future, although accelerated by the terms of the decree, would be of very inconsiderable amount. And he further contended that, as the lord had in the present instance none of the ordinary advantages incident to copyhold tenure, such as admissions on descent, devise, sales or mortgages, or surrenders by way of family settlement, he might fairly expect a relaxation of the rule, as to two years' value, in his favour, as in *King* v. *Dillington*, or *Dilliston* (1 Freem. 495, 496; 1 Sho. 86); and also in *Pinsent's* case (cited by Dolben, J. in *King & Dillington*), where the court, from the peculiarity of the custom of the manor, said, that if he had asked five or seven years' value, they should not have deemed it unreasonable.

Lord Lyndhurst, "You would be entitled to two years' value, the half of that, and so on, if it were nine lives absolute. Well, nine out of fourteen are less valuable than nine lives absolute. It strikes me that in that respect there ought to be some deduction, and that you are not entitled to set off against that claim of deduction any disadvantages you may have sustained in consequence of your ancestor having made a charitable disposition of this property. I do not see how the circumstances of disadvantage apply to the case at all." Tindal, C. J. "They are not disadvantages *ejusdem generis*,—they are of a long by-gone calculation, relating to matter of a century back. The lord of the manor having the disposing power thought proper to incur these disadvantages, and I do not see how they can be made the subject of a set-off; but it would be a very cruel thing to send this down again in the dark, so that the lord would have to try it so often at the hazard of costs."

(*o*) Mr. Richards contended that this conclusion was not supported by the evidence adduced at the trial; and it is observable that the jury negatived any custom for a former tenant who is re-admitted to pay no fine. But see ante, p. 323, n. (*g*).

The court suggested that the parties would do well to agree on a reasonable deduction, throwing the nine lives (supposing the fine to have been properly assessed for nine lives absolute) into a larger number, which might bring the renewal of the fine sooner into operation; or to refer the question to an actuary, as a mere mathematical calculation (*p*); or to consent to an application being made to the Court of Chancery to refer it to the master to ascertain what reasonable deduction should be made from the fine imposed upon nine lives absolute; Tindal, C. J. observing, that the case would stand over in the hope that that which the court had thrown out would be acceded to by both parties.

On the 10th May, 1834, the attention of the Court of Error was drawn to the discussion of the present case in the preceding month, and, as the parties could not agree, their lordships' judgment was prayed.

Their lordships observed that, thinking it likely the parties would come to some arrangement, the court had not met to consider the case, but that they would do so;—again, however, repeating the recommendation of the court on the argument.

And on the 29th May, 1834, it was represented to the Court of Error that the parties had not come to any arrangement, when Tindal, C. J. said, "Then the case must go before another jury, there must be a venire de novo."

The plaintiff having re-assessed the fine on the admission of the fourteen trustees at 3900*l.*, the cause came on again for trial at Westminster at the sittings after Trinity term, 1837, before Lord Denman, C. J., when the counsel for the plaintiff rested his case on the absence of any special custom controlling the established rule of law as to two years' value being a reasonable fine; and on the case of *Taylor & Pembroke*, and the observations of Lord Tenterden in the case between the parties in the present action, as reported in 2 Barn. & Adol. 358, and on the reduction made from the last assessment of the fine, of a sum exceeding the difference between an admission of nine trustees absolute, and fourteen to be filled up on the death of nine, in conformity with the opinion expressed by the Court of Error (*q*).

(*p*) In the course of the argument it was contended by Mr Richards, on the part of the trustees, that an actuary would probably be of opinion that a very considerable sum ought to be deducted in respect of the difference between nine lives absolute and nine lives out of fourteen; and by Mr. Serjeant Scriven, on the part of the lord of the manor, that a valuation of lives by annuity tables was never before heard of in copyhold cases, especially in copyholds of inheritance, but that if adopted on the present occasion, the sum to be fixed by an actuary would probably be almost nominal.

(*q*) Mr. Arthur Morgan, the actuary, was called to prove, and stated his opinion to be, that the reduction made in the

It was contended for the defendants, that the rule as to two years' value did not apply to the present case, and that the fine assessed on that principle was unreasonable, on the ground that the lord had an advantage from his right by the decree of the Court of Chancery to select new trustees to fill up any vacancies, and that the deduction in respect of the acceleration of a fine by renewal, whenever the number of fourteen trustees should be reduced to five by death or resignation, was calculated on the erroneous assumption of the lord's not being entitled to a fine in respect of the re-admission of the five surviving or continuing trustees, and that the right to the amount of the fine for which the present action was brought, was not supported by evidence of any special custom.

Lord C. J. Denman recapitulated the material parts of the evidence, and stated his lordship's view of the rules of law applicable thereto (*r*); and the jury found, that by the custom of the manor the lord was entitled to an arbitrary fine on an admission to a copyhold of inheritance; that there was no special custom applicable to the case of joint tenants, or to the case of parties re-admitted upon a surrender; and that the fine assessed was unreasonable. A verdict was entered for the defendants, with leave to move to enter it for the plaintiff.

In the following term a rule nisi was obtained to enter a verdict for the plaintiff, and for a new trial, on the grounds of a misdirection by the learned judge, and of the verdict being against evidence.

And in the ensuing Easter Term (1839), cause was showed, on the part of the defendants, against the above rule, and it was contended that the plaintiff was bound to establish a right to the whole 3900*l.*, and

amount of the fine was more than a sufficient deduction on account of the difference in value between the admission of nine lives absolute, and fourteen lives to be filled up when nine out of the fourteen dropped; but the opinion was, of course, founded on the assumption of no fine being payable on the re-admission of the five surviving trustees, and that the five should be first named in the order of admission of themselves and the nine persons to be joined with them in the trust. On his cross-examination by the Attorney-General, Mr. Morgan (as on the last trial) stated his opinion to be that, if copyhold premises be held on a single life of thirty years, the interest in them would last on an average twenty-eight years; that if one life aged thirty would be worth on renewal 2000*l.*, then two lives of the same age would be worth 2430*l.*, and three such lives 2608*l.*, and that the addition of any further number could not exceed 3000*l.*; that if 2000*l.* was a reasonable fine on an admission of one life, the admission of fourteen of the several ages of the defendants, to be renewed when reduced to five, would be 2111*l.*; and that the interest in fourteen lives, which are to be surrendered and re-admitted when reduced to five, is not so valuable as the interest in nine absolute lives.

(*r*) The material parts of the evidence, and the points left by his lordship to the jury, will be easily collected from the address of the counsel against and in support of the rule for altering the verdict, post.

could not recover on the quantum meruit; that the jury had found that the fine was excessive, and that they had negatived any custom of calculating the fine payable on admission of joint tenants, so that it was incumbent on the plaintiff to show that he was entitled to the fine claimed as a pure matter of law; that the fines paid on former admissions to the estates in question, showed that the principle on which the plaintiff relied had no foundation; that even if there were any general rule of law to support the plaintiff's principle of calculation in the case of joint tenants, it would not apply to the present case, where the lives were nominated by the lord out of a particular class of persons, and where the lord was entitled to a further fine on the dropping of the nine worst lives out of the number, whether by death or resignation.

That with regard to the opinion of the court, expressed after a former trial of this case, that the fine assessed according to the principle now contended for by the plaintiff was proper, the opinion was unnecessary on the decision, and even pronounced by the Court of Exchequer Chamber to be erroneous, on the ground that a deduction was to be made at all events in respect of the tenure being not for nine lives absolute, but for nine out of fourteen.

That as the plaintiff consented to a deduction on that ground, the objection which prevailed in the Court of Exchequer Chamber was removed, but that it was not to be inferred that there was no other objection to the fine in the opinion of that court, for it was unnecessary so to argue the case; that it was enough to rely on one objection which proved fatal, and therefore no use could be made by the plaintiff of that decision; that there could be no rule of law by which the plaintiff could demand more than the full fine on one life, together with such additional compensation as the additional value, if any, of an estate held for the nine worst lives out of fourteen, under all the circumstances of the case, might be thought to entitle him to.

That as the jury negatived any custom for a former tenant who was re-admitted to pay no fine, the lord would not be restrained, on the dropping of nine lives out of the fourteen, from assessing a fine on the re-admission of the five old trustees, as well as on the admission of the nine new trustees, and commencing with 2000*l.* on the first of the fourteen, as in the present instance; that it was contended at the trial (and the deduction was calculated on that footing), that the lord in such a case would take no fine on re-admitting the old trustees, but that the fine would commence on the sixth life with 62*l.* 10*s.*, being the sixth term in the series: but that if the present claim was allowed, there was neither any rule of law, nor any special custom, so to limit the claim of the plaintiff, or the lord for the time

being; that the only cases in support of such a custom in the manor were cases of husband and wife, who are not joint tenants.

That the jury had come to a right conclusion with regard to the peculiar circumstances of this estate, which excluded the possibility of applying to it any definite rule of law; that the lord did not necessarily appoint new trustees as soon as there were nine vacancies, and, indeed, it was his interest not to do so, as was shown by the present case. [Lord Denman, C. J. Would it not be the duty of the trustees to apply to him, and could he take advantage of his own wrong, if he did not put in fresh lives at their request?] That it was for the lord to ascertain whether he had a tenant, and to nominate the new lives, and if he had been guilty of laches in not completing the number of trustees at the time they were reduced to five, he had no right to a larger fine than would have been then payable; that the entries too of the fines paid on former admissions made it probable that he never did receive any larger fine than he would have had if vacancies had been filled up as soon as they amounted to nine, for that the amount of fine had been progressively increasing from the first, which the increasing value of the property would account for, and that it had not varied according to the number of trustees admitted.

And lastly, it was urged that the finding of the jury, that the fine was excessive, ought not to be disturbed.

The counsel who appeared in support of the rule admitted that the plaintiff must establish a right to the whole fine demanded. They contended that the judgment of that court and of the Exchequer Chamber together furnished a rule for assessing the fine, except as to the quantum of deduction to be made in conformity with the judgment in the Exchequer Chamber, in respect of the lives nominated not being nine specified lives, but nine out of fourteen.

That every other point in the case had been disposed of by the two courts. (Several passages were here read from a MS. report by a shorthand writer of the case in the Exchequer Chamber, for the purpose of showing that the quantum of deduction on the ground above mentioned, was considered both by the court and the counsel to be the only remaining point.) [Littledale, J. Even if it be admitted that the fine is rightly calculated to some extent, still the question arises, according to the decree of the Court of Chancery, is it not the duty of the lord to renew as soon as the lives are reduced to five, and whether, therefore, under the present circumstances, he can take advantage of his own default and charge a fine on all the fourteen lives?] That it seems to be a general principle of copyhold law, that so long as one tenant remains to the lord, he cannot compel

an admission by seizing the estate. [Lord Denman, C. J. The original grant in this case says nothing as to who is to nominate the lives; the difficulty is created by the decree in Chancery.] That the lord cannot be supposed to be cognizant of the state of the trust; the trustees may be dispersed in different parts of the country. That it is for the interests of the trust to pay as small a fine as possible, and it is therefore the duty of the trustees to give notice to the lord as soon as nine lives have dropped; but that, at all events, this point, with all the other circumstances of the case, was before the court when they laid down the rule by which the fine is calculated on the admission of all the fourteen trustees. [Patteson, J. It appears from the report of that case to have been stated on moving for the rule, that the object was rather to obtain the opinion of the court as to the principle upon which the fine should be calculated on the admission of future trustees, than to succeed in that action, still it may be contended that what we have done was extra-judicial. When this case afterwards came before me at nisi prius, I acted on the rule laid down by us, thinking it decisive. I was asked to engraft upon it the allowance to be made on account of the tenure not being for nine specified lives. I should have thought that had nothing to do with the question, but of course I feel bound by the decision of the Exchequer Chamber.] That every other point in the case had been clearly decided in favour of the plaintiff, and in consequence of the decision in the Exchequer Chamber, the plaintiff had made an allowance which it appeared was three times as much as was proper.

They contended also, that although the new trustees were selected by the lord, his nomination was subject to the control of the Court of Chancery, by the terms of the decree; and that though the present fine was large in consequence of the death or resignation of all the trustees, instances of that kind could not occur again, if the number was duly filled up as soon as it was reduced to five, and that when the lord had to name and admit the next nine trustees, the fine could barely exceed 120*l.*, unless the property was much improved.

And lastly, that evidence as to the value of the lives in the case should not have been admitted; that whether the fine was reasonable was a matter of law, and that the finding of the jury, both on that and the preceding question, was contrary to the evidence.

Cur. adv. vult.

On the 28th May, 1839, the judgment of the Court of Queen's Bench was delivered by Lord Denman, C. J., as follows (*s*):

(*s*) 2 Per. & Dav. 659; 10 Adol. & Ell. 241.

"This long pending case has at length found its termination. It was an action for a fine of 3900*l.* due to the lord of the manor of Hampstead, in respect of the admission of fourteen persons, joint trustees of a charity, to a copyhold estate within the manor. This estate was granted near 150 years ago; new trustees are directed under a decree of the Court of Chancery, of a date not much later, to be successively appointed by the lord, subject to the approbation of a master in Chancery, and whenever nine should have dropped, nine new ones were to be in like manner nominated and approved, to complete the number.

"It happened that all the fourteen were removed by death or resignation, and the whole number of fourteen was admitted. The lord claimed a fine of upwards of 5000*l.*, calculated on the principle of two years' value for the first life, one year's value for the second, one third of the same amount for the third, and so downward. My brother Parke tried the cause, and thinking the fine so calculated unreasonable, directed a nonsuit. Lord Tenterden and the court agreed in his opinion; but being much pressed, and (as they certainly understood) by both parties, to lay down a rule for making the calculation, they took time for consideration, and then pronounced the rule. It was this, that the fine on the first life should be 2000*l.*, double the admitted yearly value of 1000*l.*; that on the second the half of that sum, or the single yearly value; that on the third the half of that last amount, or 500*l.*; thus always halving the last addition to the fine in a descending series. This was on the ordinary principle, that an arbitrary fine means a reasonable fine, and that such is the correct legal method of estimating a reasonable fine. A second action having been brought for this amount of fine, my brother Patteson on the trial laid down this rule, and the jury delivered a verdict accordingly. But the defendants were still dissatisfied, and took the case by bill of exceptions to the Exchequer Chamber, on the ground that the learned judge had refused to direct the jury that the fine ought to be reduced, by the consideration that the renewal was to be not on the dropping of nine specified lives, but on the dropping of nine out of fourteen specified lives, and would therefore occur sooner.

"There was but little discussion, but Tindal, C. J. and Lord Lyndhurst, C. B., both expressed an opinion that a reduction ought to have been made on the ground suggested, and the plaintiff appears to have acquiesced in it, and to have left the court persuaded that he had its authority for claiming the fine so estimated as in 2 Barn. & Adol. 350, and so reduced, as reasonable in point of law.

"A venire de novo was then awarded, and the case came before me at nisi prius. Very different reports were brought from the opposite sides of what had occurred in the Court of Error; a new difficulty

was started by the defendants, who recovered a verdict for want of the plaintiff's showing himself to be thus entitled under any custom of the manor, and because the jury found the fine to be unreasonable.

"The court, however, thought that the case did not turn upon the custom, and that the question as to the reasonableness of the fine was not for the jury, and a new trial was granted.

"On this fourth trial Mr. Pollock rested the plaintiff's case on the law as propounded by my brother Parke and this court in the first instance, as qualified by what was afterwards introduced into it in the Exchequer Chamber. He gave some evidence of a custom, where a second life was added, to exact half of the fine that had been paid on the first; but the instances were not numerous; they proved but little as to any number of tenants admitted at once, and on the whole laid so slender a foundation for a custom, that we can by no means condemn the verdict finding that there was no proof of such custom. The plaintiff, however, proceeded to prove what deduction ought to be made in respect to the renewal being on the dropping of nine lives out of fourteen, and not of nine specified lives, and having established his point by undisputed evidence, claimed the verdict for a fine of somewhat lower amount as a necessary consequence of law. The defendants were allowed to give evidence, subject to what the court should decide on its applicability, that that fine would be in fact unreasonable from the lord's privilege of naming the lives, and the probability that for that reason, and on account of the necessity of charity trustees being persons of mature age, the lives would fall more frequently than if they had been nominated by the grantees. This issue of fact the jury also found for the defendants; but the plaintiff contended that it was immaterial, and had leave to move that a verdict should be entered in his favour.

"We are of opinion that this must be done. The original grant by the lord must be considered as if it had been made and accepted by the trustees on the terms afterwards prescribed by the decree in Chancery. Whenever they applied for a renewal, they would have to pay an arbitrary, that is a reasonable fine. We agree with the decision of this court, that a reasonable fine is to be calculated on the number of lives, by beginning with two years' improved value, and halving it, and then halving the half of it, and so on in a geometrical series, by which means the fine can never equal four years' improved value.

"Whether we agree or not with the Exchequer Chamber, that the reduction adopted by that court ought to be made, is immaterial for the present purpose, since the plaintiff is contented to reduce it on that principle.

"Rule absolute to enter the verdict for the plaintiff for 3900*l*."

The case of *Grant & Astle* (*t*), already cited, of which the author proposes to give a full extract, is very important and interesting on the question of fines at will: it was an action of assumpsit in the Court of Common Pleas by Astle, as lord of the manor of Great Tay, in Essex, against Grant, for the fines assessed on his admission to eight different customary tenements, and which fines were stated to be arbitrary. Grant was admitted in fee, on the death of his father, to all the above copyholds, upon which admission a fine of 98*l.* 18*s.* 4*d.* was assessed, which appeared to be two years' improved value of the tenements, after deducting 2*l.* 19*s.* 8*d.* for two years' quit rents.

Astle not having deducted anything for the land-tax, Grant, who pleaded the general issue, paid 84*l.* 5*s.* 8*d.* into court upon the common rule.

The cause was tried before Ashhurst, J. at the assizes for Essex, when a *general* verdict was found for Astle, with 98*l.* 18*s.* 4*d.* damages, subject to the opinion of the Court of Common Pleas on a case in which the question was, whether the lord of the manor was bound to allow any sum for land-tax out of the fine,—if he were, a nonsuit was to be entered, and if not, the verdict to stand.

By Lord Loughborough, "This question was truly considered as of great concern to the public at large. It has undergone a very deliberate examination, and we are all of opinion that the lord of the manor is not bound to make any deduction for the land-tax out of a fine due for admission on a descent, which is the present case.

"The grounds which led us to this determination lie in a very narrow compass.

"In the first place, the land-tax is annual, and however probable its continuance may be, there can be no legal presumption as to the future intentions of the legislature, and there can be no deduction, by anticipation, of an uncertain future burthen.

"In the second place, the tax, though commonly called a tax upon land, is not, in its nature, a charge upon the land. It is a tax upon the faculties of men, estimated, first, according to their personal estate; secondly, by the offices they hold; and, lastly, by the land in their occupation. The land is but the measure by which the faculties of the person taxed are estimated, and where it is intended by the legislature that the burthen should not ultimately rest upon the person charged, a power of deducting is given him by the act; as in the case of rents and other certain outgoings. But no deduction is allowed for fines which are uncertain. In the last place, this claim being new, and there being no precedent nor instance to support it, the

(*t*) 2 Dougl. 722; ante, pp. 317, 318.

usage of almost a century is a strong proof that no such deduction ought to be made, and amounts to a contemporary and permanent exposition of the land-tax acts in favour of the lord.

"These are the reasons which have weighed in the opinion of the Court, to determine this case in the manner I have stated."

And, after the observations on the antiquity of copyhold tenure, which will be found in the early part of this treatise, Lord Loughborough proceeds: "A fine to be paid on the change of a tenant is almost a constant incident of a copyhold estate, and it does not seem to have been long before the end of the reign of Queen Elizabeth, that courts of law interposed to moderate the exercise of the lord's right to a fine, where the custom had left the amount of it uncertain; for it is pretty remarkable, that a question on this subject was depending in the 36th and 37th of Queen Elizabeth, in the Court of King's Bench, and in this Court at the same time; you will find it in 1 Rolle's Abr. 507, and in the contemporary reporters. The question was this, under what circumstances a refusal to pay a fine should amount, in a court of law, to a forfeiture of the copyhold estate.

"It was contended on the part of the lord, that the mere non-payment of the fine assessed would amount to a forfeiture.

"That proposition appeared too strong even in a court of law; however, the Court of King's Bench, in the 36th of Elizabeth, held, that after the demand of a fine by the lord, and the refusal of the tenant to pay, though the fine should be unreasonable, the estate should be forfeited.

"This court, a term or two afterwards, in the case of *Jackman* v. *Hoddesdon*, reported in Cro. Eliz. 351, held, that in such case there was no forfeiture. The Court of King's Bench (as has been just stated) had held the contrary, but the opinion of this court prevailed; and in the 43rd of Eliz., in the case of *Hobart* v. *Hammond*, reported in 4 Co. 27 b, the Court of King's Bench, referring to the case of *Jackman* v. *Hoddesdon* in the Common Pleas, varied their idea, and held that the refusal to pay an unreasonable fine was no forfeiture of the estate. From the manner in which the report of that case is stated, and the anxiety with which the judges support the proposition, one would be apt to conclude it had not been of great antiquity.

"A few years afterwards, in the 6th of King James, in *Willowe's* case, 13 Co. 1, this point again occurred, and the law was not then taken to be so settled, as for the court simply to say 'the point is so;' but the report states a great deal of reasoning and argument to support the position, that the judges not only might, but ought, either upon the facts appearing upon a demurrer, or upon evidence to go to a jury, to determine what was a reasonable fine; and in that case the court held that *two* years' value was an unreasonable fine.

"Thus then the matter rested; the fine was to be assessed by the lord; and whether it was reasonable or unreasonable, was a question for the consideration of *the court and jury* (*u*), and it would obviously be subject to much fluctuation and uncertainty. To prove upon a trial the annual improved value of land, and then to calculate how much of that value should be paid for a fine, was likely to be attended with so much dissatisfaction, that recourse would frequently be had to the Court of Chancery, which had always relieved against the forfeiture, and taken upon itself, without a jury, to determine what should be a reasonable fine.

"Lord Keeper Coventry, in the 5th of Charles I., and again in the 12th of the same reign (1 Chan. Rep. 18 or 33 [*Middleton* v. *Jackson*], and ibid. 51 or 96) [*Popham* v. *Lancaster*], held, that one year's improved value was a reasonable fine, guarding the decree, that one year's value should not be counted a fine certain, but referrible to the discretion of the court whether it was reasonable, and that the payment was then directed because it was reasonable.

"In the 29th of Charles II., in the year 1677, Lord Nottingham, in the case in 2 Rep. in Chan. 135 [*Morgan* v. *Scudamore*], held that *two* years' value was a reasonable fine, and at the time of this determination in 1677, two years' value was not a much higher payment than one year's value had been at the time of Lord Coventry's determination. The interest of money had been reduced, and, from that and other causes, the value of land had risen. One year's value might be nearly as large as an *aliquot* part of the selling price of land in the 5th of Charles I., as two years' value at the time of Lord Nottingham's determination. From that time to the present, the idea of two years' value being a reasonable fine, in the case of a fine arbitrary, (or, in the more proper phrase, *arbitrable*,) [Cro. El. 351,] has prevailed uniformly, and the adhering to this rule has been a matter of very great convenience, though it cannot be said to be a matter of strict justice.

"Two years' value, the interest of money being six *per cent.*, as at the time of Lord Nottingham's determination, is a much larger proportion of the selling price of a copyhold estate, than the same number of years' purchase, the interest of money being at five and four *per cent.* But to follow the variations of price would create confusion in this property, would occasion a depreciation of it, and is not the true interest of a copyholder. Public convenience, therefore, that great source of law and justice, has established the authority of the rule laid down by Lord Nottingham; and it is to be observed that the decision was not above eighteen years prior to the first land-tax act.

(*u*) Ante, p. 26.

From that time to the present hour, not an instance can be found, where there has ever been a deduction from the two years' value, (then fixed as the utmost amount of a fine,) upon account of the land-tax.

"It seems, therefore, to me, much better for the interest of copyhold tenants, and for the public advantage, as there is a great deal of that property in the kingdom, that the fine to be paid upon the renewal of a copyhold estate should be strictly kept to that sum which has subsisted now above a century, namely, two years' improved value, without any deduction except for quit-rents, which can hardly be called a deduction, for the lord must allow that which he has received or is to receive."

The Court of Common Pleas having decided in favour of Astle, he remitted the 84*l.* 5*s.* 8*d.* upon the record, and took judgment for the difference. Grant then brought a writ of error, and assigned several errors on the first count of the declaration, and among others on the second count, the following one, namely, *that one gross sum had been assessed, and was claimed as a fine for divers distinct and separate customary tenements; whereas, by the law of the land, separate and distinct fines ought to be set and assessed upon each several and respective tenement.*

By Lord Mansfield: "I have exceedingly lamented, that ever so inconvenient and ill-founded a rule should have been established, as that, where there are several counts, entire damages, and one count is bad, and the others not, this shall be fatal; upon the fictitious reasoning, that the jury has assessed damages on all, although they, in truth, never thought of the different counts, but the verdict was so taken from the inadvertence of counsel in the hurry of *nisi prius*. And what makes that rule appear more absurd is, that it does not hold in the case of criminal prosecutions: for when there is a general verdict of *guilty* on an indictment consisting of several counts, if any one of them is good that is held to be sufficient. But in civil cases the rule is now settled, and we have gone as far as we can by allowing verdicts in such cases to be amended by the judge's notes. That might have been done in this instance, in an earlier stage of the proceedings, but cannot now after judgment."

By Buller, J.: "The court may grant a *venire de novo*. A good cause of action is shown in the first count; and that it is true, appears by the verdict; but the plaintiff has also damages assessed to him on a count in which he has not shown any cause of action. The court, under these circumstances, may send the case back to have damages assessed only on that count on which, in point of law, he is entitled to recover." (*v*) And a *venire de novo* was awarded.

(*v*) But it has been decided that a fine may be recovered under a general indebitatus assumpsit, post.

The cause came on to be tried on the *venire de novo*, before Ashhurst, J., at the Lent assizes for Essex, 1782, when the jury, upon the evidence, thought that the sum of 46*l.* 17*s.* 6*d.*, stated to have been assessed as a fine on the admission to the first of the eight tenements, exceeded two years' value, and that the fine ought only to have been 46*l.* 4*s.* 3*d.* The learned judge was of opinion that the plaintiff could not have a verdict for that smaller sum, but must recover either to the exact amount of the fine declared upon or not at all. The plantiff's counsel insisting strongly that he might recover according to whatever the jury should find the two years' value to be, a verdict was found for the plaintiff by consent, on that ground, with liberty to enter the verdict for the defendant, if the court should think the plaintiff was bound to prove the exact sum laid. This question was argued before the Court of K. B. in Easter term; and in the same term Lord Mansfield delivered the opinion of the court in favour of the defendant, observing, that "on the evidence it appeared that the fine should have been only 46*l.* 4*s.* 3*d.*, that being the full amount of two years' value, and the question now is, whether the plaintiff can in this case recover a smaller sum than the fine assessed. Two things are necessary parts of this custom: 1. the fine must be assessed: 2. it must be reasonable. The lord says in his declaration that he has assessed 46*l.* 17*s.* 6*d.* for a fine, and that this sum was *reasonable*, and brings his action for that precise sum. The question for the jury was whether 46*l.* 17*s.* 6*d.* was a reasonable fine, and they found it was not, therefore the plaintiff is not entitled to recover. He has not assessed two years' value, but a precise gross sum; and by what rule he went in assessing that sum does not appear upon the record. It is true he has averred that the estate is of a large yearly value, viz. of the yearly value of 23*l.* 8*s.* 9*d.*, but that is no averment of what the yearly value really is; and the averment in this case is totally immaterial. It would have been enough if the plaintiff had stated that he had assessed the sum of 46*l.* 17*s.* 6*d.* as a fine, and that such sum was reasonable; and it would *then* have been matter of evidence, just as it was *on this record*, whether the sum assessed exceeded two years' value or not, *because that is the established criterion whether it be reasonable or not.* In the present case the duty is numerically certain, for it is not assessed with relation and in proportion to the annual value, but is fixed at a gross sum. The only case on this precise subject is *Titus* v. *Perkins* (*x*). The Chief Justice there says, if the lord demand more than he ought, he may make his demand *de novo*, for the judge, in case of a *greater* demand than is due, ought

(*x*) [Or Perkins v. Titus,] Skin. 247, 249; Carth. 12; 3 Lev. 249, 255; 3 Mod. 132; Comber. 43; 2 Show. 507, ca. 463; 1 Freem. 494, ca. 669; Lilly's Ent. 371.

not to adjudge as much as is due to the lord, and bar him for the residue, but ought to adjudge against him for the whole, and that his entry was tortious, *if he had entered*, and put him to a new demand. This," continues Lord Mansfield, "goes to the demand itself, and is not confined to the case of a forfeiture, and there is no distinction made in that case;" (which the reporter observes had been insisted on at the bar.) "The gist and foundation of every action must be proved as laid in the declaration. This action is for a certain precise sum, and, under the circumstances of the case, it could not be brought in any other way." And after noticing the cases cited for the plaintiff, which the court deemed inapplicable, Lord Mansfield thus concludes: "We give no opinion whether the lord might not have assessed a fine for two years' value, and made that solely the foundation of his declaration. In *Titus* v. *Perkins*, a custom to have a year's value generally for a fine was held to be good. But however that might be, it is very clear that the evidence here did not support the declaration, for the plaintiff has no right to anything but the sum assessed; the duty arises upon the assessment; and *that*, by the evidence, is proved to have been illegal and void. Therefore the case stands as if no assessment had ever been made, and consequently the plaintiff's right to demand a fine is not yet complete."

Whether the fine be certain or arbitrary is to be decided by the court-rolls of the manor (*y*); and length of time will not establish certainty, if a variation can be proved by a long and uniform series of entries in very ancient court-rolls, the law presuming that a fine is uncertain until the contrary be shown; nor will a few contradictory instances be evidence either way (*z*).

Yet, in order to constitute certainty, it is not requisite that the amount of the fine should be positively fixed; but it will be sufficient if it is relatively certain: so it has been held that a custom for every

(*y*) Allen *v.* Abraham, 2 Bulst. 32; Hopton *v.* Higgins, Toth. 167; Barraston *v.* Walsh, ib.; and see Pincheon *v.* Keeling, 9 Car. Toth. 111; Smith *v.* Sallett, 2 Ch. Rep. 76.

(*z*) Trotter *v.* Blake, 2 Mod. 231; Lex Cust. 159, 160. And see Lord Gerard's case, 13 Jac. Godb. 265, which is thus reported: "It was holden in the chancery in the Lord Gerard's case against his copyholds [copyholders] of Audley, in the county of Stafford, that, where by ancient rolls of court it appeareth that the fines of the copyholds had been uncertain from the time of King Hen. the 3 to the 19 of Hen. the 6, and from thence to this day had been certain, except *twenty* or *thirty*: that these few ancient rolls did destroy the custom for certainty of fine. But if from 19 Hen. 6 all are certain except a few, and so [*no*] incertain rolls before, the few shall be intended to have escaped, and should not destroy the custom for certain fines."

copyholder, upon his admittance, to pay a year's value of the land, as it is worth at the time of admission, is a good custom (*a*).

It is already stated that, with some exceptions, a fine is due on the act of admittance only, which the author will now proceeed to exemplify, premising that by the custom of some manors the non-appearance of the heir is a forfeiture (*b*); and that although the lord cannot compel the heir to accept admission, yet it is not in his power by waiving it to defeat the lord of his fine; for if he neglect to come in within the period prescribed by the custom of the manor, the lord may seize the lands into his own hands until the heir requires to be admitted (*c*); or in case of infancy, or coverture, or lunacy, the lord may either seize *quousque*, or recover the fine under the provisions of the statute of 1 Will. IV. c. 65 (*d*).

And the heir could not compel the lord or steward to accept a surrender, except on satisfying the lord the customary fine (*e*).

No fine can be due from the guardian of an infant, as it is the infant and not the guardian that is to be admitted (*f*).

We have seen that it is not in the power of the lord to compel a surrenderee to come in and be admitted, except indeed by special custom; so that when no such custom exists, the lord cannot have a fine of a surrenderee, if he will dispense with admission; and although it may be contended, that as the lord may be compelled to admit a surrenderee, so he ought in his turn to have the power of enforcing the surrender for the purpose of receiving the fine of admission, yet it is to be recollected that the tenancy continues full by the surrenderor; so that if he die, his heir must be admitted and pay a fine, or the lord might seize *quousque* after three proclamations, or upon the neglect of the heir to take admission after due notice served upon him (*g*).

And for this reason the author is induced to suppose that on the death of the surrenderee before admission, the lord must admit his heir on payment of a single fine only. The contrary was stated *arguendo* in the *King* v. *Coggan* (*h*), on a motion for a mandamus to compel the lord to admit the heir of a surrenderee, but the court appear to have entertained a different opinion, or at least must have doubted on the point, the rule for a mandamus being made abso-

(*a*) Titus *v.* Perkins, ubi supra.

(*b*) North *v.* Earl and Countess of Strafford, 3 P. W. 151. But such a custom is not binding on infants, &c.; ante, pp. 24, 288.

(*c*) Earl of Salisbury's case, 1 Lev. 63; S. C. 1 Keb. 287; Clayton *v.* Cookes, 2 Atk. 449; ante, p. 285.

(*d*) Amending and altering the act of 9 Geo. 1, c. 29; ante, p. 289.

(*e*) Ante, p. 290.

(*f*) Ante, p. 290.

(*g*) Ante, pp. 286, 287.

(*h*) 6 East, 431; S. C. 2 Smith's Rep. 418.

lute upon the heir's undertaking to pay such fine *or fines* as should be due to the lord.

But if the heir of a copyholder die before admission, the author apprehends that his heir or devisee could not compel admission, except on payment of a double fine (*i*).

If the surrenderee is compellable by custom to be admitted, he must pay a fine on his admission (*k*); and when a person is desirous of being admitted under a forfeited condition, as in the case of a conditional surrender by way of mortgage, where the money is not paid at the appointed time, a fine will accrue to the lord on such admission, and also on the re-admission of the surrenderor (*l*).

And if by the custom of the manor the copyhold lands are extendible, the lord will be entitled to a fine upon the admission of the extendor (*m*).

The steward's acceptance of a surrender from an unadmitted surrenderee does not amount to an implied admittance, so that it cannot entitle the lord to a fine (*n*); but it is supposed that the lord's acceptance of the surrender would amount to an admittance, and if so a fine would become payable (*o*).

As the admittance of the tenant for life or years is the admittance of all in remainder, the limitations forming together only one estate (*p*), but one fine can be due, except by special custom (*q*).

And the fine on admission to an estate in remainder is usually one half (*r*).

In the case of *Barnes & Corke* (*s*), although the remainder-man was admitted, *at his own desire*, after the death of his father and mother, who were tenants for life, yet as no special custom was shown

(*i*) See 1 Aust. 13, in Morse *v.* Faulkner and others.

(*k*) Fawcett *v.* Lowther, 2 Ves. 302.

(*l*) Ante, pp. 194, 195.

(*m*) Co. Cop. s. 56, Tr. 128; 1 New. Abr. 479. We have seen that under the 11th section of 1 & 2 Vict. c. 110, (the Mesne Process Act, vide extracts in the Appendix,) the entirety of *copyhold* and *customary* lands is to be delivered to the creditor by the sheriff, upon the issuing of a writ of elegit: and the provision that the extendor shall make, perform and render to the lord all such payments and services as the debtor would have been bound to make, perform and render, in case the execution had not issued, together with the lord's acceptance of the customary rents and services, would probably be deemed an implied admittance, and consequently entitle the lord to a fine; but it may be doubtful whether the extendor would by such admittance acquire a *perfect* legal customary interest.

(*n*) Ante, pp. 140, 309, 310.

(*o*) Ante, p. 311.

(*p*) Ante, p. 294; Kitch. 240, 241. It is a question whether on such an admittance the rule as to two years' value is not to be relaxed, as in the case of joint tenants; and if so, the author thinks the lord would be compellable to apportion the fine.

(*q*) Brown's case, 4 Co. 22 b; Doe *d.* Whitbread *v.* Jenney, 5 East, 531; ante, p. 294.

(*r*) 1 Watk. on Cop. 374.

(*s*) 3 Lev. 309.

entitling the lord to a fine from remainder-men, the court held that no fine became payable on such admission, so that, strictly speaking, it is not true that a fine is due as of course upon every admittance.

And when the particular tenant and the remainder-man join in a surrender, as their interests form but one estate, one fine only is due from the surrenderee (*t*).

The lord may assess the fine on the tenant of the particular estate, or he may apportion it between him and the remainder-man (*u*).

In *Lord Kensington* v. *Mansfield* (*x*), Lord Eldon said that when tenant for life comes on behalf of himself and all in remainder, if the lord does not take the fine he cannot aftewards insist on it from those in remainder, but he may apportion it. It appears, however, that the person in remainder is not compellable to pay his proportion of the fine until his estate comes into possession (*y*).

And where by the custom a remainder-man must be admitted and pay a fine (*z*), the fine is not payable until the death of the tenant for life (*a*).

Very clear evidence is requisite to establish the lord's right to a full fine from a remainder-man, and the courts lean to the presump-

(*t*) Co. Cop. s. 56, Tr. 130; Kitch. 242; Attree *v.* Scutt, 6 East, 484; S. C. 2 Smith, 449; Gilb. Ten. 416, N. 77; 6 Vin. Cop. (X. b) pl. 3, 13.

(*u*) Mr. Watkins seemed to think that if a tenant for life paid the whole fine, he would have a lien on the lands for a contribution from those in remainder; referring to the principle of fines on renewal of leases, and citing Adderley & Clavering, 2 Bro. C. C. 659; Stone & Theed, ib. 243. See 1 Watk. on Cop. 311, n. 2nd ed.; and see Nightingale & Lawson, 1 Bro. C. C. 443, Belt's ed.

The rule now is that a tenant for life shall contribute to a renewal fine, in proportion only to the interest actually derived by him; see Pickering *v.* Vowles, 1 Bro. C. C. 199, n. 4, Belt's ed., cites Nightingale & Lawson, Stone & Theed, sup.; White *v.* White, 9 Ves. 554, &c.; Allan & Backhouse, 2 Ves. & Bea. 65; and Lord Montford *v.* Lord Cadogan, 17 Ves. 485.

It has been decided that a person having a rent-charge out of a copyhold estate is not contributory to the fine; Maxwell *v.* Ashe, fully stated by Sir William Grant, M. R., in Moody *v.* Matthews, 7 Ves. 184; and cited in Nightingale *v.* Lawson, sup.

(*x*) 13 Ves. 246; but see ib. 252, where Lord Erskine is reported to have intimated during the argument that the effect of remitting the fine upon the admission of the tenant for life could not be that the remainder-men were discharged. See also ib. 253, 254, where Lord Erskine said that there had been a difference of opinion among the judges whether the lord might not make separate assessments. The author apprehends that he might. See per Lord Hale in Batmore (or Blackburne) *v.* Graves, 1 Vent. 260; 1 Mod, 120; post, 345; vide also 1 Burr. 212, 218; vide a full statement of the case of Lord Kensington & Mansell, ante, p. 178.

(*y*) 1 Vent. 260, in Batmore & Graves; 1 Burr. 212; Gilb. Ten. 163; Bull *v.* Birkbeck, 2 Yo. & Coll. 447.

(*z*) Fitch & Hockley, 4 Co. 23 a; Kitch. 241; Mo. 465, in Tiping & Bunning; Doe & Jenney, 5 East, 531; ante, p. 295.

(*a*) 1 Bac. Abr. 735; ante, n. (*y*).

tion that a fine paid by a remainder-man upon his admission, was an apportionment only of the full fine assessed on the admission of the tenant for life. This is deducible from the case of the *Dean and Chapter of Ely* v. *Caldecot* (*b*), which was an action of assumpsit for recovering the amount of certain fines alleged to be due from the defendant, upon his admission to copyholds within the manor of Lakenheath, in Suffolk. At the trial a verdict was taken for the plaintiffs, damages 182*l.*, subject to the opinion of the court on a case which was in substance as follows: The father of the defendant was admitted under the will of *I. B.* as tenant for life, and paid a full fine. By that will the copyholds were devised to the defendant in fee in remainder, expectant on the decease of his father. After the death of the father, the defendant was admitted in fee. The steward was called at the trial, and gave evidence in favour of a custom for a tenant in remainder to pay a full fine upon his admission on the death of the tenant for life, but it appeared that with the exception of two instances of recent admissions of tenants in remainder after the death of the respective tenants for life, his knowledge of the fact was derived from the entries in the court-rolls; and there was no evidence of reputation or declaration by deceased tenants of the manor as to any such custom. It was agreed at the trial that the court should be at liberty to draw any conclusion of fact as to the existence or non-existence of any special custom within the manor, and of the extent of such special custom, as they might think the jury ought to have drawn.

On the part of the plaintiffs it was argued, that although by the general rule of law the admittance of tenant for life is the admittance of him in remainder, yet by special custom a full fine may be claimed for the admission of a remainder-man, and that there was sufficient evidence in the particular case to show the existence of such a custom: and also that the numerous entries of admissions of remainder-men established the custom, a fine being the consequence of an admittance (*c*): and that even a single instance was sufficient to prove the existence of a custom (*d*).

On behalf of the defendant it was contended that the plaintiffs were bound to prove a special custom by very conclusive evidence, and that the evidence adduced was equivocal, and not sufficient to

(*b*) 8 Bing. 439. A question was also raised in this case as to the necessity of estimating the annual value of the land, subject to a deduction of the local drainage or fen rate. The court gave no opinion on that point, but evidently inclined to think that it ought to be deducted, and that it was distinguishable from the land-tax. See Grant & Astle, ante, p. 335.

(*c*) Rex v. Hendon, 2 T. R. 484; Graham v. Sime, 1 East, 631; Hobart v. Hammond, 4 Co. 28 a.

(*d*) Doe & Mason, 3 Wils. 63; Roe *d.* Bennett v. Jeffery, 2 Mau. & Selw. 92.

establish the custom; and *Barnes* v. *Corke*(*e*) was cited as an authority that a fine is not necessarily payable on every admittance.

Tindal, C. J., in delivering the judgment of the court, observed that it was conceded on the part of the plaintiffs that unless they were entitled to claim a full fine on the admittance of the defendant, they could not succeed: that the question was whether they had affirmatively established that point, in order to do which it was necessary that they should show a special custom for that purpose: that in *Barnes* v. *Corke* it is laid down, on argument by the two judges in court, "that no fine was due on the admittance of a remainder-man, after admittance and payment of a fine by the tenant for life, unless there be a special custom for it, but that the admittance to the particular estate was an admittance to the remainder; and that which was said in 4 Rep. 22 b, 'that it should not be to the prejudice of the lord in respect of his fine' (*f*), was to be intended where a fine is due by custom for an admittance of the remainder-man; but that without a special custom none is due." Indeed that in referring to 4 Rep. 22 b, it appeared to have been so laid down in terms by Lord Coke; for he said that "the admittance of the tenant for life is the admittance of him in remainder *to vest the estate in him*, but should not bar the lord of his fine, which he ought to have *by the custom*" (*g*): (see also 23 a): and that he put the tenant in remainder in such a case upon the same footing as the heir, who, though he is *in* by the admittance of his ancestor, may nevertheless be compelled to come in and be admitted, in order that the lord may have his fine, due by the custom of the manor upon the descent. It should seem, therefore, (added the Ch. J.) that Lord Coke himself puts it on the custom; but that in *Blackburne* v. *Graves*, it was very distinctly laid down by Lord Hale, who, after stating that he did not see any inconvenience why the admittance of tenant for life or years should not be the admittance of all in remainder, for fines are to be paid notwithstanding by the particular remainders, adds afterwards, "It shall not prejudice the lord; for if a fine be assessed for the whole estate, there is an end of the business; but if a fine be assessed only for a particular estate, the lord ought to have another (*h*)." That the law as thus laid down by Lord Hale appeared to the court to explain and

(*e*) 3 Lev. 308.

(*f*) See 5 Barn. & Ald. 463, in Doe *d.* Spencer *v.* Clark.

(*g*) Ante, p. 295. But Coke in his Copyholder, (sect. 66), says, "If a copyhold be surrendered for life, the remainder to a stranger, though the admittance of tenant for life be sufficient to invest the estate in him in the remainder, yet upon the death of tenant for life, he in the remainder shall be admitted and pay a fine."

(*h*) See 1 Mod. 120; Blackburne & Graves (or Blackborn & Greaves, or Batmore *v.* Graves), is also reported in 2 Lev. 107; 1 Vent. 260; ante, p. 269, n. (*u*).

reconcile all the dicta on this subject, by distinguishing between those where the judges in speaking of a *fine*, must be understood as meaning a full fine; and others where, in using the same expression, they only mean an apportioned part of the full fine. That it explained also all the instances of admittances, with the exception of one, which were to be found in the statement of the particular case.

The above authorities for the legal principle, that without a special custom for it, the remainder-man is not liable on the death of the tenant for life to pay a fine, were confirmed in the late case of *Phypers* v. *Eburn* (*i*), where a copyholder in fee surrendered to the use of himself for life with remainder over, and on being admitted to such life estate, paid a nominal fine of one shilling only; and on the death of the tenant for life, the lord seized *quousque;* and the question was whether the steward's warrant of seizure was valid: the Court of C. B. held that it was bad, no custom having been proved for the lord to have a fine of remainder-men: but the observations of the court in that case were also confirmatory of the decision in *Doe* d. *Whitbread* v. *Jenney*, 5 East, 531, that a custom for tenants in remainder to come in and be admitted and pay a fine, is good.

As it would seem that the lord cannot remit the fine to a tenant for life, and charge it on the remainder-man, the lord or steward should always demand a fine on the re-admission of a person who settles his copyhold, taking back a life interest or other particular estate.

It would certainly appear that a fine is due in such a case, if the copyholder should claim to be admitted; but the lord could not compel admission except by special custom; yet, on the death of the surrenderor, he might seize *quousque*, if neither the heir nor the remainder-man came in to be admitted after being duly summoned, or after three proclamations (*k*).

And if a copyholder in fee surrender to the use of *A.* for life or for a term of years, without any further limitation, or limiting the reversion in fee to himself, the lord is to have a fine of *A.* upon his admission; but as the surrenderor is already admitted, being *in* of his former seisin as to so much of his interest as is not parted with by the surrender, or as to the reversion, if the whole interest be surrendered, no fine will be due from him on the determination of the particular estate (*l*).

(*i*) 3 Bing. N. C. 250; 3 Sc. 634.

(*k*) See the report of Roe *d.* Noden *v.* Griffiths, or Griffits, in Sir W. Bl. and 4 Burr.; and see 1 Watk. on Cop. 288, &c.; ante, p. 295.

(*l*) Ante, p. 295; Gilb. Ten. 194. But we have seen that in the latter case here supposed, the ultimate limitation would create an estate by purchase, ante, p. 295, n. (*a*), so that a fine would accrue to the lord from the surrenderor, if, by special custom, the admission of a remainder-man could be compelled.

But the heir or surrenderee of a reversioner or remainder-man, as well as the surrenderee of the particular tenant, must be admitted and pay a fine (*m*). And such customary heir could not compel the acceptance of a surrender by the lord or steward until payment of the fine due on the descent (*n*). So in the case of an application for a mandamus, it was decided that the heir, and, *à fortiori*, his surrenderee, could not compel the lord or steward to receive or inrol a surrender made by the heir of his *reversionary* interest, without payment of the descent-fine (*o*).

If a tenant in tail of copyholds, after having been admitted and paid a fine to the lord, suffered a recovery by plaint in the nature of a writ of entry *en le post*, merely for the purpose of acquiring the fee simple, no further fine would have been due on the admittance of the tenant in tail to the customary fee simple upon the surrender of the demandant; but where by plaint a copyhold was recovered upon the accruer of a new title, he that recovered never having been admitted or paid a fine, (as if a copyholder died seised, a stranger abated, and the heir recovered by plaint in the nature of an assise of *mort d'ancestor*), there a fine would have been due on his admission (*p*).

But Mr. Watkins was of opinion that if a tenant in tail of copyholds surrendered to a stranger to make him tenant to the plaint, a fine would have accrued to the lord on the admission of such stranger (*q*). *Sed quære*, as the admission was expressly granted by the lord for the purpose of the contemplated assurance for barring the estate tail (*r*); at all events the fine, if not conventionally waved by the lord, might have been saved by the plaint being brought immediately against the tenant in tail or tenant for life (*s*).

As a copyholder who surrenders to another on a condition which is performed by the surrenderor or broken by the surrenderee, remains *in* of his original seisin and admission, no fine can accrue on the performance or breach of the condition (*t*).

JOINT-TENANTS we have seen are but as one tenant to the lord (*u*), consequently but one fine is due on their admission (*x*), or on the

(*m*) Ante, p. 295; 1 Burr. 213.

(*n*) Fearne, Posth. W. 105.

(*o*) The Queen *v.* The Lady and Steward of the Manor of Dullingham, 8 Adol. & Ell. 858; 1 Per. & Dav. 172; ante, pp. 295, 341; post, tit. "Mandamus."

(*p*) Co. Cop. s. 56, Tr. 129, 130, 131; and see 4 Co. 27 b, in Taverner & Cromwell.

(*q*) 1 Cop. 305, (n. k), 2d ed.

(*r*) See Kitch. 241.

(*s*) Plaints for barring estates tail are abolished; vide 3 & 4 Will. 4, c. 27, s. 36.

(*t*) Ante, pp. 194, 295; Kitch. 242; Gilb. Ten. 181, 276, 277.

(*u*) Ante, p. 296.

(*x*) But see the author's opinion, and the recent case of Wilson & Hoare, as to the right of the lord to demand more than two years' value on the admission of several persons as joint-tenants, ante, p. 320 et seq.

admission of their surrenderee, for a conveyance by joint-tenants operates as one assurance (*y*); and when one joint-tenant dies or releases to the others, as no new admittance is necessary, no fine accrues to the lord (*z*).

It frequently happens that the fine is paid by one joint-tenant only, his admission being the admission of his companions; and when that is the case, he may compel the others to a contribution.

COPARCENERS are but as one heir (*a*), therefore one fine only is due on their admission, or on the admittance of their surrenderee (*b*); and as it would seem that they may release to each other (*c*), no fine would be due on the acquisition of any such additional portion.

But if one *joint-tenant* or one *coparcener* should surrender to the others, admittance to the share so surrendered would seem to be necessary, and a fine would therefore accrue to the lord (*d*).

On the admission of coparceners the fine is generally paid in equal proportions; but should the fine be wholly paid by one coparcener, she may compel the others to a contribution, as in the case of joint-tenants.

And as the customary heir or heirs of each coparcener must be admitted (*e*), the lord is of course entitled to fines on such respective admissions.

TENANTS IN COMMON are to be admitted severally, and must therefore pay several fines; and as there is no survivorship between them, their respective heirs must also be admitted and pay several fines (*f*). But if tenants in common join in a surrender of the entirety of the copyhold lands, although perhaps such surrender would operate as a conveyance of distinct estates by each (*g*), yet one fine only would become due on the admission of the surrenderee, because of the re-union of the several undivided shares. This was the opinion of Sir Edward Coke (*h*); and it was expressly so decided by the Court of Common Pleas in the case of *Garland* v. *Jekyll* (*i*), and by the Court of King's Bench in the case of *Holloway* v. *Berkeley* (*k*), overruling

(*y*) Co. Cop. s. 56, Tr. 130; Kitch. 242; Attree v. Scutt, 6 East, 484; S. C. 2 Smith, 449.

(*z*) Ante, p. 296.

(*a*) Ante, p. 296.

(*b*) 1 Watk. on Cop. 303; Kitch. 242.

(*c*) Ante, p. 297.

(*d*) Ib.; Kitch. 168.

(*e*) Ante, p. 297.

(*f*) Ante, p. 297; and see 4 Co. 28 a, in Hobart & Hammond.

(*g*) Perk. s. 107; 6 East, 484, in Attree & Scutt; but see cont. Co. Cop. s. 56, Tr. 130.

(*h*) Cop. s. 56, Tr. 130; and see Kitch. 242; vide cont. 1 Watk. on Cop. 304.

(*i*) 2 Bing. 273; ante, p. 297; post, tit. "Heriots."

(*k*) 6 Barn. & Cress. 2; S. C. 9 Dow. & Ry. 83; ante, p. 297; post, tit. "Heriots."

Lord Ellenborough's decision in *Attree* v. *Scutt* (*l*), that the multiplication of fines and services shall continue, notwithstanding the reunion of the undivided shares in one person.

BARON AND FEME.—The husband, as we have seen (*m*), becomes seized of the copyholds of his wife in her right, but need not be admitted, consequently the lord shall not have a fine from him (*n*).

If the customary *curtesy* or *dower* is of the whole of the copyhold, it would seem that the estate is a continuation of the seizin of the deceased wife or husband, and no admission therefore necessary, and in that case no fine can be due; but if the author is right in supposing that the husband surviving the wife, or the wife surviving the husband, unless there be a special custom to the contrary, must be admitted when the curtesy or dower is of a portion only of the copyholds (the possession or seizin of the deceased being interrupted by the right of entry in the heir), then a fine will accrue to the lord (*o*).

As it does not appear to be necessary that the husband of a feme copyholder for years should be admitted on her death, the lord is not, in that event, entitled to a fine (*p*).

EXECUTOR AND ADMINISTRATOR.—It is now settled that an executor or administrator of a copyholder for years must be admitted, and consequently he must pay a fine (*q*).

POWER.—It is not the donee of a power of sale or of appointment as to copyhold lands, but the person in whose favour the power is executed that is to be admitted, so that the fine is due in all cases from the appointee.

If, therefore, a copyholder intend that his estate should be sold at his decease, he may save a double fine by giving a power of sale to his executors (*r*), instead of devising the copyhold to trustees upon the usual trusts for that purpose, and which would render it necessary for the trustees to be admitted (*s*); but if no person should claim to be

(*l*) 6 East, 476; S. C. 2 Smith, 449.

(*m*) Ante, p. 297.

(*n*) By the custom of Yetminster prima in Dorsetshire, the husband shall pay a penny to the steward. Append. to 2 Watkins on Cop. 2d ed. p. 242.

(*o*) Ante, p. 298; and see Kitch. 242.

(*p*) Ante, pp. 299, 300.

(*q*) Ante, p. 300; post, tit. "Occupancy," n. (*a*).

(*r*) Beal *v.* Shepherd, Cro. Jac. 199; Holder *d.* Sulyard *v.* Preston, 2 Wils. 400; and see Bright *v.* Hubbard, Cro. Eliz. 68; Godb. 46, ca. 57; Blatch & Agnis *v.* Wilder, 1 Atk. 420; White & Vitty, 2 Russ. 496; ante, pp. 257, 300. In Guiddy's case in Canc. 4 Jac. Duke's Char. Uses by Bridg. 135, the heir was decreed to surrender; the power of sale, however, was not given in that case to a particular person, but to the parson, churchwarden, and four honest men of the parish of Allhallows.

(*s*) Whether or not a surrender was supplied by the late act of 55 Geo. 3, c. 192, in favour of such a power (vide ante,

admitted under an exercise of the power of sale, the lord, after three proclamations, or after notice served upon the customary heir, may seize *quousque* (*t*); otherwise he might be kept for an indefinite period without a tenant to perform the services, and, in effect, be deprived of his fine, especially as it is not in the lord's power to compel a surrenderee (and consequently not an appointee) to come in and be admitted, unless indeed by special custom.

COMMISSIONERS AND ASSIGNEES OF BANKRUPTS.—And under the above rule, when copyholds, prior to the act of 6 Geo. IV. c. 16 (*u*), were included in the bargain and sale from the commissioners to the assignees of a bankrupt, the admission of the assignees was necessary, and their admittance entitled the lord to a fine; but when, according to the more general practice, the commissioners conveyed the copyholds immediately to a purchaser, a fine became due from him only, and not from the assignees (*x*).

The author has shown that, under the 68th section of the act of 6 Geo. IV., and the new bankruptcy court act, the bargain and sale of one or more of the six commissioners, or the bargain and sale of the commissioners named in the fiat, passes the beneficial interest only in the bankrupt's copyholds to the purchaser, and that he acquires the legal customary fee by his admission, under a surrender made to him by some person authorized for that purpose by the deed of bargain and sale, so that no fine can now become payable to the lord out of the bankrupt's estate. But the lord is of course entitled to a fine on the admission of the purchaser.

The author apprehends, however, that in the event of the bankrupt's death, and of any delay in the sale by the assignees, or in the admission of the purchaser under the surrender made by the authority of the commissioners, the lord might seize *quousque*, after three proclamations.

ASSIGNEES OF INSOLVENT DEBTORS.—We have seen that under the act of 7 Geo. IV. c. 57, the copyhold estates of an insolvent debtor become vested in the provisional assignee, and afterwards, by his assignment, in the general assignee (*y*), without the necessity of an ad-

p. 247); and see the suggestion there (n. (*a*)), that since the act of 1 Vict. c. 26 (by which the 55 Geo. 3 was repealed), a testamentary power of sale of copyholds would not be good in law.

(*t*) Or, as for a forfeiture, if the custom be such; ante, pp. 24, 286, 287, 288; and see 1 Watk. on Cop. 294, n. (*s*), 2d ed. Vide also 1 Adol. & Ell. 296, in The King v. Lord of the Manor of Oundle.

(*u*) See ante, p. 300.

(*x*) Ante, p. 302.

(*y*) Ante, p. 306; and see ante, p. 307, as to the power under 1 Will. 4, c. 38, for the court to direct a conveyance of real estate by the provisional assignee, where no creditor shall have been appointed assignee.

mittance of either the one or the other; so that the lord does not become entitled to any fine out of the estate of an insolvent debtor, but must be satisfied with the fine payable by the purchaser, on his admission under a surrender from the general assignee (*z*).

OCCUPANCY.—We have seen that the principle of general occupancy is not applicable to copyhold lands, except under a special custom extending it to them (*a*); but it is right to notice that Sir Edward Coke says (*b*), "If a copyhold be granted *durante vitâ*, and the grantee dieth, living *cestui que vie*, and a stranger entereth as a general occupant, he shall be admitted, and shall pay a fine."

As there may be a special occupancy of copyholds, a fine is due upon the admission of the heir or other person taking as special occupant (*c*). So if a copyhold be limited to *A. and his heirs*, during the life of *B.*, the lord would be compellable to admit the heir of *A.* according to the tenor of the grant or surrender, and a fine would therefore accrue to the lord on such admission (*d*).

Mr. Watkins was of opinion that the fine of a special occupant should be proportioned to the probable duration of the life of the *cestui que vie*, and that if an unreasonable fine were imposed, the court would equally interpose as on an admission upon a strict descent (*e*).

(*z*) The 47th section of the 1 & 2 Vict. c. 110, has virtually repealed the provisions and schedules of 7 Geo. 4 & 1 Will. 4, as to the conveyance of the interest of an insolvent in copyhold or customary estates, by *vesting* any such estates in the provisional assignee (for such the author takes to be the effect of the general order of the court referred to in section 47), and creating a power in the assignee or assignees chosen by the creditors to surrender the insolvent's copyhold or customary estates to a purchaser, and so precluding the lord from claiming any fine, except from such purchaser, upon his admission; ante, pp. 141, 308

(*a*) Ante, p. 50.

(*b*) Co. Cop. s. 56, Tr. 128.

(*c*) It has been thought that the heir takes by descent; see Vaug. 201, 202; Sir W. Bl. 1150; but the author cannot acquiesce in that opinion.

(*d*) Co. Cop. s. 56, Tr. 128; Doe *d.* Lempriere *v.* Martin, 2 Sir W. Bl. 1148; ante, p. 51.

Gilbert, C. B. (see Ten. 327) says, "It seems he (the heir) must only pay a purchase fine, and not such a one as is paid upon a descent; for he doth not take by descent, but by special occupancy."

N.B. Under a grant of copyholds to *A. B.* his executors and administrators, for the life of *C. D.*, the executors or administrators would take as special occupants, and it cannot be contended that they would take by descent.

And the author apprehends that an executor or administrator, entitled to a copyhold *pur autre vie*, under the 6th section of the late statute of wills (1 Vict. c. 26, see the act in the Appendix), is a *quasi* special occupant, and must be admitted and pay a fine to the lord.

(*e*) 1 Watk. on Cop. 313; Watk. Gilb. Ten. N. 171, p. 476.

No fine is due on the release by a rightful tenant to the tenant by wrong, the latter having already been admitted and paid a fine (*f*).

And as it was not necessary for a disseisee, on entry or recovery by plaint, to be admitted, no fine accrued to the lord (*g*).

The trustee, and not the *cestui que trust*, is the person to be admitted the lord's tenant (*h*); therefore no fine can accrue from the *cestui que trust*, or his assignee or heir, or devisee (*i*). And as a fine is payable by a mortgagee who takes admission, and by his heir or devisee (*k*), so, therefore, where a mortgagee has been admitted, the lord is not entitled to a fine from the heir of the mortgagor, nor from the assignee or devisee of the equity of redemption (*l*); nor from the mortgagee upon a release to him of the equity of redemption by the mortgagor (*m*).

It belongs of common right to the lord or steward to assess the fine (*n*); but a custom that a copyholder for life in *extremis* may nominate his successor to have the copyhold, paying a reasonable fine to be agreed upon with the lord, or, if that fail, to be assessed *by the homage;* and another custom, that a copyholder for life may nominate one or two that shall have the copyhold lands after his death, for a fine to be assessed *by the homage*, if they cannot agree with the lord, have been adjudged to be good customs (*o*).

Where a person has several copyhold tenements by several titles, the lord must assess and demand his fines severally; and there is no distinction in this respect between a customary heir and a surrenderee; nor is it material, for this purpose, whether the admissions be contained in one or several copies (*p*).

(*f*) Ante, pp. 195, 313; Gilb. Ten. N. 69, p. 411.

(*g*) Ante, 139; Co. Cop. s. 56, Tr. 129.

As to the necessity of entry by a disseisee previous to his surrendering the copyhold lands, vide ante, p. 139; and see Clerke *v.* How, 1 Lord Raym. 726, ubi sup.

(*h*) And the trustee shall be reimbursed the fine and fees out of the profits of the estate; Rivet's case, Mo. 890; 1 Watk. on Cop. 293, n. (*), 2d ed.

(*i*) Ante, pp. 215, 267; Gilb. Ten. N. 69, pp. 410, 411; Trinity College, Cambridge, *v.* Browne, 1 Vern. 441.

(*k*) See Cro. Jac. 403; 2 Pow. on Mortg. 1068, sect. 5.

(*l*) Ante, pp. 194, 215.

(*m*) Hull *v.* Sharbrook, Cro. Jac. 36; ante, p. 195.

(*n*) Lord Northwick *v.* Stanway (or Stanton), 6 East, 57; 2 Smith, 226, per Lawrence, Just.

(*o*) Yelmester Custom's case, Noy, 2 (cites Powell & Pencock); Crab *v.* Biles, ib. 3, cites H. 6 Jac. C. B. 13 Rot. 2613, Raubus *v.* Mason; and see 1 Roll. Rep. 48; 1 Freem. 494, ca. 669; Ford *v.* Hoskins, Cro. Jac. 368; Freeman *v.* Phillipps, 4 Mau. & Selw. 486.

(*p*) Dalton *v.* Hamond, Cro. Eliz. 779; S. C. Mo. 622; S. C. (Hobart & Hammond), 4 Co. 28 a; Taverner's case, ib. 27 a; Hitch *v.* Wallis, cited Dougl, 729; Co. Cop. s. 56, Tr. 130; Gilb. Ten. 218; Searle & Marsh, cited in Everest & Glyn, 6 Taunt. 428; and see Fisher on Cop. pp. 97, 120; Grant & Astle, Dougl. 722; but see Whitfield *v.* Hunt, cited ib. 727, n.

The lord may bring his action for the aggregate amount of the several fines assessed, with one count only in the declaration, stating that the sum sought to be recovered is compounded of several distinct assessments; and, supposing the defendant to rely on an excess in the assessment of one only of the distinct fines, he should pay into court the amount of the fines admitted to be reasonable, and plead the general issue as to the particular fine deemed to be excessive.

It has been said that the fine may not only be assessed, but may be made payable out of the manor (*q*); such a custom, however, appears much too unreasonable to be supported: the before cited case of *Yaxley & Rainer* is the only authority for this position, and it is to be observed that the fine there was for a licence to alien (*r*), and that the court said that if it had been for a forfeiture, it might have been otherwise (*s*).

The sum assessed as the fine need not be entered on the court rolls; but a demand on behalf of the lord, it being a reasonable and legal fine, is sufficient (*t*).

It is, however, essential, when an entry is made of the amount of the fine on the rolls of the manor, that the sum actually assessed should appear to be a legal and proper fine, without regard to any sum to be remitted by the lord out of favour; for where the entry in the court rolls was that the lord had assessed a fine of 100*l.*, but out of favour remitted 40*l.*, which had reduced the fine to 60*l.*, and the jury finding the annual value of the premises to be 30*l.*, gave a verdict for the plaintiff for 60*l.*, being two years' annual value; a rule obtained in the Court of Common Pleas, calling on the plaintiff to show cause why a nonsuit should not be entered, was made absolute, the court being of opinion that the assessment was an assessment of 100*l.*, and that the latter part of the entry was nothing more than a remission of the payment of part of that assessment, and observing that much mischief might arise to copyholders, if similar entries were permitted to be made upon the court rolls of manors (*u*).

If the fine be certain, the tenant should come prepared to pay it, but the lord cannot refuse admittance because the fine is not tendered

A surrender by a copyholder to particular uses under which his son should be admitted in tail, would operate as a severance of the estate from any other lands left to descend to such son, or devised to him by his father, so as to entitle the lord and steward to separate fines and fees; Snagg & Fox, Palm. 342.

(*q*) Yaxley *v.* Rainer, 1 Lord Raym. 44; 1 Watk. on Cop. 314.

(*r*) Ante, p. 316, 317.

(*s*) See also 1 Watk. on Cop. 317, 318.

(*t*) Lord Northwick *v.* Stanway, 6 East, 56. In that case Grose, J. said, he had known instances of entries not stating any particular sum assessed for a fine, but only that a certain sum had been offered as a fine, with which the lord was content.

(*u*) Lord Northwick *v.* Stanway, 3 Bos. & Pul. 346.

to him, even when the fine is certain in amount (*x*); and when the fine is uncertain, the lord must allow a convenient and reasonable time for the payment of it, and the practice is to fix a day and place for such payment (*y*).

In some manors it is customary not to take the fine until the succeeding general court, or some fixed period after the admission; but the author apprehends that the lord or steward may refuse to accept a surrender from the person admitted tenant, or to admit his surrenderee upon a surrender taken by one or more tenants, or the bailiff or reeve of the manor, where a custom of that nature exists, until the fine due on his admission be paid.

A custom not to pay a fine till of full age has been held to be a good custom (*z*): so also a custom for the lord to seize until the fine be paid (*a*).

Should the fine be unreasonable, or if the copyholder has good cause for thinking it to be so, he may refuse to pay it, and it shall be no cause of forfeiture (*b*); but it is proper for the tenant to tender what he conceives to be due: and it was held in the case of *Gardiner* v. *Norman* (*c*), that the fine *certain* due by the custom must, in order to save a forfeiture in law, be tendered at the day appointed by the lord for the payment of the fine assessed, and that a tender made at the time of the assessment is not sufficient; *sed quære?* For although when the fine is manifestly reasonable, denial of payment will be a cause of forfeiture (*d*), yet it has been held that the lord is not justified in entering for a forfeiture, if he has not demanded the fine at

(*x*) Fish & Rogers, Tr. 4, Jac. B. R. 1 Roll. Abr. 506 (A.); 6 Vin. Cop. (A. c.), pl. 1; Hobart *v.* Hammond, 4 Co. 28 a; but see S. C. (called Dalton *v.* Hamond), Cro. Eliz. 779; Mo. 623; and see Skin. 249.

(*y*) Gilb. Ten. 219, n. (*o*): Willowes' case (or Stallon *v.* Brayde), 13 Co. 2; Co. Lit. 60 a, N. (1); Hobart & Hammond (or Dalton & Hamond), ubi sup.; Titus & Perkins, Skin. 250.

(*z*) Champion & Atkinson, 3 Keb. 90; Lex Cust. 162.

(*a*) Cro. Eliz. 351, in Jackman & Hoddesdon; Titus & Perkins, sup.

(*b*) See Dalton & Hamond, (or Hobart & Hammond), and Willowes' case, (or Stallon & Brayde), sup.; Barnes *v.* Corke, 3 Lev. 309; Trotter *v.* Blake, 2 Mod. 229; Wheeler *v.* Honour, Sir T. Raym. 42, (cites Parker *v.* Cook, Sty. 241); S. C. 1 Keb. 154; 1 Sid. 58. In Barnes & Corke, the refusal was on the ground that no fine was due: and in Wheeler & Honour, the defence was rested on a reasonable doubt as to the fine being *certain* or *uncertain*. The fine being unreasonable in amount with reference to the actual annual value of the property, would save the forfeiture, for it is only in a plain case that the lord can enter for a forfeiture; 2 Mod. 231, in Trotter & Blake.

(*c*) Cro. Jac. 617; Skin. 250. In Willowes' case, sup. (in the third resolution), it is said, "and if the fine which the lord or his steward assesseth be reasonable, let the copyholder well advise himself before he deny the payment of it."

(*d*) Co. Lit. 60 a, n. (1), cites Parker's case.

the time it was due, or some time after, of the person of the tenant (*e*); but the demand may be made by the steward, and that without any express authority in writing (*f*): and it must be of the specific sum and not of any larger amount, otherwise the lord cannot recover at law (*g*). But if the lord demand more than he is entitled to, he may re-assess the fine, and make his demand *de novo* (*h*).

Whether the fine be reasonable or unreasonable is for the determination of a jury, upon the evidence to be submitted on the part both of the lord and tenant (*i*), aided by the court as to settled rules of law (*k*); and the jury are not bound to consider the rent payable under an existing lease as conclusive evidence of the annual value (*l*).

In a recent case of assumpsit (*m*) for a fine of 200*l.* as two years' value of a public-house belonging to the defendant, and which he had let by auction for a term of eight years at a rent of 112*l.* a year, conflicting evidence was given as to the yearly value, and the witnesses for the defendant said that unless the premises were occupied as a public-house, they would be worth much less than 100*l.* a year; and Lord Tenterden, who tried the cause, directed the jury to find for the plaintiff, if they thought the fine did not exceed two years' improved value. The jury however found for the defendant: and on cause being shown against a rule obtained in the Court of Common Pleas for setting aside the verdict, on the ground that the defendant, after letting the premises by auction for 112*l.* a year, was estopped to say they were not worth 100*l.* a year, the court discharged the rule, holding that the reservation, although weighty evidence against the defendant, was not conclusive; and that the effect of it was for the consideration of the jury, who had decided that the property was not worth 100*l.* a year (*n*).

It is not necessary however for the lord to aver that the fine is reasonable, but the copyholder must show the unreasonableness of it (*o*).

A single copyholder cannot obtain relief in equity against an unreasonable fine; but in order to avoid a multiplicity of suits, several

(*e*) 1 Roll. Rep. 75; Gilb. Ten. 227; Denny *v.* Lemman, Hob. 135; Wheeler & Honour, ubi sup.

(*f*) Trotter & Blake, 2 Mod. 229.

(*g*) Titus & Perkins, Skin. 249.

(*h*) Skin. 249; 2 Dowl. 734, n.; and see 6 East, 56, 57; Wilson & Hoare, ubi sup.

(*i*) See Willowes' case, and Dalton *v.* Hamond, (or Hobart & Hammond), ubi sup.; Cowper *v.* Clerk, 3 P. W. 157; Bell *v.* Wardell, Willes, 204; ante, p. 340; but see Cary, 4, 38; 3 Anst. 663.

(*k*) Ante, pp. 26, 336.

(*l*) Sir W. Halton, Bart. *v.* Hassel, 2 Str. 1042; ante, p. 318.

(*m*) Lord Verulam *v.* Howard, 7 Bing. 327.

(*n*) In that case, Tindal, C. J., said, "the annual value means the fair annual average value during the whole period over which the fine is to extend."

(*o*) Denny *v.* Lemman, Hob. 135; Lex Cust. 161.

copyholders may join in a bill in equity, to settle a general fine to be paid by all the copyhold tenants of the manor (*p*).

The fine on admission is recoverable by the lord or his executors in an action of debt, or on a general *indebitatus* assumpsit (*q*); but is no charge on the lands (*r*). An action for a copyhold fine was not within the statute of limitations, 21 Jac. c. 16, (*s*); but by sect. 3 of 3 & 4 Will. IV. c. 42, it must be brought within six years after the cause of action accrues (*t*).

The lord is not required to identify the lands in an action for the recovery of a fine (*u*). *Contrà* in an action of debt for quit rents (*x*).

In *Evelyn* v. *Chichester* (*y*) it was held by the Court of King's Bench, that the executor of the admitting lord might bring assumpsit against a copyholder who was a minor at the time the fine was assessed, but had since attained his full age; and Yates, J., thought that assumpsit would lie if the defendant was still an infant, though perhaps debt would not (*z*); it is however observable that the infant was admitted in person, without reference to the stat. of 9 Geo. I., and that he or his guardians (assigned by the court) had been in possession from the time of admission till the commencement of the action, which was two years after he came of age.

But when an infant, feme covert, or lunatic, is admitted under the act of 1 Will. IV. (repealing and altering the act of 9 Geo. I.) (*a*), the lord can only recover the fine by the methods prescribed by that statute.

In the case of *North* v. *The Earl and Countess of Strafford* (*b*),

(*p*) Middleton v. Jackson, Popham v. Lancaster, Cowper v. Clerk, ubi sup.; Baker v. Rogers, Sel. Ca. Temp. King, 74; vide also Mayor of York v. Pilkington and others, 1 Atk. 282; Brown v. Howard, 1 Eq. Ca. Abr. 163, pl. 4; Disney et al. v. Robertson et al., Bunb. 41; and see Meadows v. Patherick, Fin. R. 154; Bouverie v. Prentice, 1 Bro. C. C. 200.

(*q*) Shuttleworth v. Garnet, Carth. 92; S. C. 1 Show. 35; S. C. 3 Mod. 239; S. C. 3 Lev. 261; S. C. Comb. 151; Bellot v. Cartwright, 1 Lutw. 597; Lex Man. 117; Wheeler v. Honour, 1 Sid. 58; Evelyn v. Chichester, 3 Burr. 1717; Grant v. Astle, 2 Doug. 722; Whitfield v. Hunt, cited ib. 727, n.; Duke of Devonshire v. Craddock, cited ib. 728, n.; Gilb. Ten. 291; 6 Mod. 129; 1 T. R. 619; Com. Dig. Cop. (H. 6); and see the pleadings in Bellot & Cartwright, Lex Man. Append. pl. 25.

(*r*) See Hitcham v. Finch, 1 Roll. Abr. 374, Chancerie (P.); 1 Watk. on Cop. 321.

(*s*) Hodgson v. Harris, 1 Lev. 273; S. C. 2 Keb. 536; S. C. 2 Saund. 64; S. C. 1 Sid. 415; ante, p. 88. But the payment would have been presumed after the lapse of several years.

(*t*) Ante, pp. 82, n. (*x*), 88, n. (*g*).

(*u*) North v. Earl and Countess of Strafford, 3 P. W. 151; and see Holder v. Chambury, ib. 256, and the cases, ib. 257, n. (2).

(*x*) North v. Earl and Countess of Strafford, sup.

(*y*) 3 Burr. 1717.

(*z*) See Borough's case, 1 Lord Raym. 36.

(*a*) Ante, pp. 288, 289, 341.

(*b*) 3 P. W. 151; and see Bouverie v. Prentice, ubi sup.; post, tit. "Rents."

the Court of Chancery allowed a demurrer to a bill in equity for a fine on admission and arrears of quit rents, on the grounds that the fine, if an admission had taken place, was recoverable by debt or assumpsit, and that if there had been no admittance, the lord had his remedy by proclamations and seizure; and that with respect to the rents, the plaintiff might distrain or bring debt for the arrears due to him as executor, and might distrain for the arrears of rent due to him as lord of the manor: but unless there is a demurrer, the court will relieve on the hearing (*c*).

In terminating the present inquiry, the author proposes to make a few observations on the subject of tenant right of renewal of copyholds for lives.

By the custom of many manors, copyholds are renewable for three lives or any less number, and in some for three lives in possession and three in reversion (*d*), and in others for a term of years on payment of a fine certain (*e*); but in order to establish a tenant right of renewal of copyholds, it must be shown that the fine is certain, or at least relatively certain, as a year or half a year's value at the time of the grant (*f*); and it is not sufficient to prove a right to renew on payment of a *reasonable* fine, as any uncertainty negatives the allegation of compulsion (*g*); nor can the presumption of the duration of the estate from the grant itself be rebutted, except by evidence of constant renewals for fines certain.

In the above cited case of the *Duke of Grafton* v. *Horton*, the plaintiff in the suit in equity, who was the heir of the last of three lives named in a grant of copyholds held of the manor of Potterspury and More-end, parcel of the honour of Grafton, alleged a custom for the heir of the surviving life to renew on payment of a *reasonable* fine, and afterwards amended his bill by stating that instead of a reasonable fine, the fine was a year and a half's improved rent if insisted upon for each life, or lesser sums if the lord thought fit to accept thereof, together with 2*s*. for a heriot; and the defendant in his answer to the amended bill, insisted that the pretended custom was not sufficiently certain, nor warranted by the rules required by law in cases of customs; and on the hearing of the cause, Lord Chancellor

(*c*) North *v.* Earl and Countess of Strafford, sup.; and see Duke of Leeds *v.* The Corporation of New Radnor, 2 Bro. C. C. 338, 518, Belt's ed. Equity will entertain a bill for settling a general fine, ante, p. 355.

(*d*) Ante, pp. 99, 100. By the custom of the manor of Bleadon with Priddie, in Somersetshire, the copyholds are granted for four lives successively, and the grantee in possession may surrender his own interest, and also the reversionary interests. See Prankerd *v.* Prankerd, 1 Sim. & Stu. 1.

(*e*) Page's case, Cro. Jac. 671.

(*f*) Titus *v.* Perkins, ubi sup.

(*g*) Wharton *v.* King, 3 Anst. 659; Duke of Grafton *v.* Horton, 2 Bro. Parl. Ca. 284, 2d ed.; Cop. ca. 3.

King directed an issue to try the custom at the assizes for the county of Northampton: from this order the Duke appealed to the House of Lords, complaining that the respondent had not produced a single instance of such customs from the court rolls of the manor, and that they were contradictory to those under which he derived his title, and that the respondent ought not to be at liberty to insist upon these customs, or any other he should set up as the terms of renewal, when they were not put in issue in the cause, so that the defendant could not be prepared to make a defence thereto upon the trial; and the lords reversed the order of the Court of Chancery, and directed that the respondent should deliver up possession of the premises, and account for the rents to the appellant.

The principle that a copyholder for lives cannot set up a custom to renew, except on payment of a fine certain, was further established by the case of *Lord Abergavenny* v. *Thomas* (*h*), which was a bill for a commission to distinguish copyholds from freeholds. The defendant by his answer insisted that by the custom of the manor the heir was entitled to have a new copy for three lives, and so on for ever, paying to the lord a reasonable fine; but upon the hearing of the cause there did not appear any evidence to support this custom, and if there had, the Lord Chancellor declared it to be a void custom: he admitted that there might be a custom in a manor for the heir of such a copyholder to have a new copy, *paying a certain fine*, but not upon payment of a *reasonable* fine: and in adverting to the interposition of the law to prevent the lord from taking more than two years' value, his lordship observed that this was applicable only to copyholds of inheritance, and that copyholds grantable for lives only, if the fine was not certain, were like leases of freehold lands for lives, and renewable only upon the best terms the party could make.

And again in *Wharton* v. *King* (*i*), the first of four issues sent from the equity side of the Court of Exchequer to be tried at law, was whether by the customs of the manor the plaintiff was entitled to renew for two additional lives during the life of the surviving *cestui que vie*, on payment of a fair and reasonable or customary fine. Evidence was offered for the defendant from the rolls of the manor, to show that the fines had fluctuated according to the number of lives and other circumstances, and that the fines had sometimes much exceeded two years' value. Lord Kenyon rejected this evidence, holding that the fluctuation and excessiveness of the fines only proved

(*h*) E. 12 Geo. 2. In Canc. before Lord Hardwicke, who cited the case of the Duke of Grafton and his tenants for the manor [honour] of Grafton, 3 Anst. 668, (n.); 1 Eq. Ca. Abr. 120, c. 15, (n.); but the note was not in the first ed.; see 3 Anst. 663, n. (a).

(*i*) 3 Anst. 659; and see Walker v. Lord Abingdon, Law Journ. Rep. vol. 10, part 2, N. S. 289.

that the lords had acted contrary to law, two years' value being the limit fixed by the law as a reasonable fine in all cases of admission to copyholds: and a verdict was found for the plaintiff on all the issues. A rule for a new trial was obtained, on the ground of misdirection of the judge, which was made absolute, Macdonald, C. B., observing that there were in effect two points to be ascertained by the issues; first, whether by the custom of the manor the plaintiff was entitled to renew at all?—2nd, on what terms? That to prove the first of the propositions, the plaintiff produced entries selected by him from the rolls of the manor in which the heir was allowed to renew: and that on the other side entries were offered to be produced where strangers were admitted, and others where the price paid bore a more near proportion to that upon a purchase, than upon the admission to the tenant's own estate: that a variety of inferences had been drawn in argument from those entries, and it hardly could be doubted that those might possibly have weakened the effect, or explained the meaning of those entries produced by the plaintiff: and that unless all the material entries upon the subject were collected, it seemed very improbable that the court could be sure of the true sense or proper inference of any one. The cause came on to be tried again before Mr. Baron Thomson. The plaintiff gave evidence of uninterrupted renewals in favour of the heir, and then offered evidence of the same practice prevailing as to the other copyholds of the manor, and that the fine, though not certain, had never in fact exceeded two years' value: and also offered parol evidence to prove reputation of a right in the heir to renew: this evidence was rejected by the learned judge, who relied on the cases of the *Duke of Grafton & Horton*, and *Lord Abergavenny & Thomas*, as establishing the principle that a copyholder for lives could not set up a custom to renew, *unless on payment of a fine certain*. A rule obtained for a new trial was discharged, Macdonald, C. B., observing, that at the trial the learned judge held that the evidence offered by the plaintiff was inadmissible, as tending to prove a custom not supportable in law; that the certainty of the fine was an essential term in a custom for copyholders for lives to renew; and that the court were all of opinion that that direction was perfectly right; and that the amount of the fine could not, in the case of copyholds for lives, be rendered definite and certain by reference to the principle upon which the courts have acted with regard to copyholds of inheritance, where an arbitrary claim of unlimited fines would be inconsistent with the right of the heir.

The rule established by the above authorities as to the tenant right of renewal of copyholds for lives, appears not to have been noticed in the case of *Freeman* v. *Phillipps* (*k*), which was an action by a copy-

(*k*) 4 Mau. & Selw. 486. See this case, post, tit. "Evidence."

holder against the lord for a false return to a mandamus. A custom was set forth in the mandamus for the surviving life to renew, *paying to the lord such fine as should be set by the homage, to be equal to two years' improved value:* and at the trial the judge admitted in evidence depositions made in an ancient suit against a former lord of the manor, by a person who claimed to be admitted to a copyhold for lives, under a custom for any copyhold tenant for life to change the lives or to fill up the copy by adding lives, *paying to the lord a reasonable fine to be set by the lord or his steward;* and upon a rule *nisi* for a new trial, those depositions were held to be admissible evidence for the lord. But it is observable that the fine payable under the custom set forth in the mandamus might be considered as *relatively*, although not positively certain (*l*).

The author concludes the present considerations by suggesting, that although a tenant right of renewal could be proved to exist, yet a copyholder for lives could not change the lives by surrendering into the lord's hands to the use of others for their lives, for without a special custom, a copyholder for life is incapable of surrendering to the use of another, even for his (the copyholder's) own life; and the author has shown that under such a surrender the estate would vest absolutely in the lord (*m*).

(*l*) Ante, pp. 340, 357.

(*m*) Ante, p. 145. C. B. Gilbert says, (Ten. p. 256), "Custom that lessee for life may let for another's life is void. It seems if there be a visible inconvenience that one copyholder for life should change the lives by surrendering into the lord's hands to the use of another for life, that the lord will not be compelled to make admittances thereupon."

CHAPTER VIII.

Of Fealty, Suit of Court, Rents and Reliefs.

[Reserving the subject of HERIOTS for a distinct section.]

THE *services* due from the copyholder to the lord by the established custom of most manors consist of fealty, suit of court, and small annual payments in nature of quit rents; and in some manors the lord is also entitled to a heriot.

Before copyholds became hereditary, the lord frequently stipulated for base or corporeal services, such as reaping or carrying his corn, tiling his houses, or thatching his barns (*a*), or ploughing his lands a certain number of days in the year, usually denominated *boon* or *due days;* and there are, it is understood, some rare instances of the existence at this day of services of that nature, at least of the form of the tenants assembling with their teams, ploughs, &c. (*b*).

FEALTY, which is incident to every tenure, except tenants in frank-almoigne, and tenants at will (*c*), signifies the oath which was administered to every tenant upon his admittance to become a faithful tenant to the lord, and to do suit at his courts, &c. (*d*), and is an imitation of the homage required by every lord (*e*), and rigidly enforced during the existence of military tenures (*f*); and the oath of fealty may be administered either by the lord or his steward (*g*).

Fealty cannot be done by attorney (*h*), nor by an infant either personally or by guardian (*i*); and it is to be performed, as it would

(*a*) Co. Cop. s. 22, Tr. 17.

(*b*) Kitch. 202; Fisher, 73; 2 Watk. on Cop. 184.

(*c*) Co. Lit. 67 b, 68 a, 68 b, n. 5; ib. 93 a and b; Co. Cop. ss. 20, 21, Tr. 16, cites Brudnet & Toxley (or Brudnal & Yoxley), 5 Hen. 7; and see Kitch. 260. But in 10 Hen. 6, the justices of the Court of Common Pleas held that lessee for years could not do fealty; Co. Cop. s. 21, Tr. 16, marg.; and see Kitch. 260.

(*d*) Co. Lit. ss. 91—94; Co. Cop. ss. 19, 20, 21, Tr. 14, 15, 16; Kitch. 260.

(*e*) If required, *fealty* is to be iterated on every change of the lord, and on every new purchase or descent, and in this respect it differs from homage; post (third part), tit. "Courts Baron."

(*f*) These tenures were abolished by the stat. 12 Car. 2, c. 24.

(*g*) Co. Lit. s. 92; Co. Cop. s. 20, Tr. 15.

(*h*) Co. Lit. s. 93; ib. n. (5); Combes' case, 9 Co. 76 a; Co. Cop. s. 35, Tr. 80; Floyer v. Hedgingham, 2 Ch. Rep. 56; 1 Watk. on Cop. 265; ante, p. 292. But in France and other countries fealty may be done by attorney; see n. (5) to Co. Lit. 68 a.

(*i*) 2 Inst. 11; Co. Lit. 65 b; ib. n. (4.)

seem, in respect of copyholds, by the wife only, and not by the husband (*k*).

Joint-tenants are to do fealty as they were formerly to do homage, jointly (*l*); but the fealty of coparceners is, the author apprehends, to be done by the eldest sister (*m*); if, however, they make partition, then every one is to do fealty, the land not then being *una sed diversa hæreditas.*

And by Lord Coke (*n*), if there be two coparceners or joint-tenants of a seigniory, if the tenant doth homage and fealty to one of them, he shall be excused against the other.

When a tenant cannot attend personally, and is therefore admitted by attorney, or when the tenant is an infant or a remainderman, his fealty is respited until he can appear and is competent to take the oath, and this sometimes on payment of a small customary fee.

And as the allegiance or homage, which was formerly deemed so essential on the admittance of a new tenant, ceased with the abolition of military tenures, so the introduction of an oath of fealty in imitation of it appears to have been both useless and indiscreet: useless, as the lord has a remedy for the subtraction of suit of court and other services, and for non-payment of rent; and indiscreet, as being calculated to lessen the importance and weaken the solemnity which should ever attach to the administration of an oath.

It might be well, therefore, that the fealty should be commuted in all cases, except in those where fealty is the only service due (*o*), by a small payment, and be entered as respited (*p*); and there can be no doubt that a court of equity would relieve against a forfeiture for refusing to take an oath so very unnecessary at this day (*q*).

The proper remedy for neglect of the service of fealty is distress, and which distress, in contemplation of law, cannot be excessive (*r*).

And in *Crawley* v. *Kingsmill* (*s*) it was held, that if the lord demand the fealty of his tenant, who refuses, and dies, the lord may distrain for it after the tenant's death.

SUIT OF COURT.—Every copyholder is bound to attend the lord's courts and to perform the duties of a homager; and these courts, it

(*k*) 1 Watk. on Cop. 265; but see Co. Lit. 66 a and b; post, pt. 3, tit. "Courts Baron," (Fealty).

(*l*) Co. Lit. 67 b.

(*m*) Ib. 67 a, 164 b.

(*n*) Ib. 67 b.

(*o*) See Co. Lit. 68 b, n. (5).

(*p*) Ib.

(*q*) Cox v. Higford, 2 Vern. 664; S. C. 1 Eq. Ca. Abr. 121, pl. 20; Cudmore & Raven (or Edmore & Craven), cited 2 Vern. 664, and Prec. in Ch. 574; and see 6 Vin. Cop. (D. c.) pl. 9; ib. (E. d.) pl. 7, 8.

(*r*) Co. Lit. 68 b, n. (5); 42 E. 3, 26 a; Bevil's case, 4 Co. 8 b.

(*s*) Noy, 24; Hob. 207.

has been said, may be held as frequently as the lord pleases, where the custom has not established any fixed periods: this would appear, indeed, to be a natural consequence of the lord's being compellable to hold a court whenever the business of the tenants calls for it (*t*); but the lord would not be justified in convening courts unnecessarily, and for the purpose only of harassing the tenants.

If the copyholder is resident within the manor, and neither appears nor essoigns, after a general notice in writing affixed to the church door or otherwise publicly proclaimed, he may be amerced (*u*); but the author apprehends that the amercement must be affeered by at least two of the other copyholders, in analogy to the rule in freehold cases (*x*); and if he should not attend, or should not be duly essoigned on a personal summons, it would be a cause of forfeiture of his copyhold (*y*).

To make essoign is to justify the tenant's absence by reason of sickness or other sufficient cause (*z*). And the author apprehends that the steward is to judge of the sufficiency of the excuse (*a*).

Copyholders may be essoigned, but cannot do suit by another (*b*), as they are not within the statute of Merton, 20 Hen. III. c. 10, which enables freeholders only to do suit by attorney (*c*).

The lord may distrain his copyhold tenant for subtraction or non-performance of suit (*d*), and, as it should seem, may avow for such distress without showing a custom or prescription (*e*); but the distress is considered as a pledge to compel the performance of the services, and cannot be sold (*f*); and on that account the distress,

(*t*) Co. Cop. s. 31, Tr. 50; Supp. s. 3, Tr. 149; 2 Watk. on Cop. 19; ante, p. 5.

(*u*) Belfield *v.* Adams, 3 Bulst. 80, 81; S. C. (Southcot & Adams) 1 Roll. Rep. 256; Sir John Braunche's case, 1 Leo. 104.

(*x*) Baldwin *v.* Tudge, 2 Wils. 20; Chetwode *v.* Crew, Willes, 619, n. (2).

(*y*) Taverner *v.* Cromwell, Cro. Eliz. 353; Sir John Braunche's case, Belfield & Adams (or Southcot & Adams), ubi sup.; post, tit. "Forfeiture."

(*z*) 2 Watk. on Cop. 33, 177.

(*a*) Fish. 178.

(*b*) Sir John Braunche's case, 1 Leo. 104; 4 East, 280; and see Kitch. 145, who says that a copyholder cannot make his attorney to follow his suits, but, by assent of the lord, he may compound to pay a certainty yearly to release his suit. Vide also in Isaac *v.* Ledgingham, 1 Vent. 167, a custom that copyholders living remote from the manor should be excused their suit for one year by paying a small sum to the lord and steward.

(*c*) Ante, p. 86. It should seem that a freeholder cannot make an attorney to do suit for him by parol; Kitch. 145.

(*d*) Co Lit. ss. 225, 226, 227; 1 Roll. Abr. 665, Dis. (E.) pl. 1; Gilb. Dis. 5; 2 Watk. on Cop. 177; 2 Inst. 118; Rivet *v.* Dowe, Noy, 135; S. C. 2 Brownl. 279; and see Crawley *v.* Kingsmill, ubi sup. But as to freehold tenants, see stat. Marlborough, 52 Hen. 3, c. 9.

(*e*) Gilb. Ten. 308; Tonkin *v.* Croker, 2 Lord Raym. 860.

(*f*) Gomersall *v.* Medgate, Yelv. 194; Gomersale *v.* Wayts, Cro. Jac. 255; Hewet *v.* Norberow, 1 Bulst. 52; Gilb. Dis. 13; Greenw. of Co. Courts, 281.

of whatever value, as in the case of fealty, cannot in judgment of law be excessive (*g*).

It would seem that the lord cannot distrain for an amercement, either in a Court Baron or a Customary Court, as of common right, but is put to his action of debt (*h*); and the reason is that he may distrain for the service itself, and therefore ought not to have a double distress (*i*).

But as it appears that the lord may prescribe in a distress for the amercement in a Court Baron (*k*), so by special custom, the author apprehends, an amercement in a Customary Court may be distrained for.

In the case of *Thorne & Tyler* (*l*), the defendant justified the distress under a custom that if a copyholder suffered his house to be out of repair, and the same was presented in court by the homage, the tenant should be amerced, and that the lord might distrain the cattle of the tenant, or any undertenant of the customary tenements, *levant* and *couchant* thereon, for the amercement, and it was held to be a good custom.

The suit which the tenant thus engages to perform may be done by a feme sole or a widow in a Customary Court; but a woman is not allowed to sit on the homage *to try issues* in a Court Baron, where the suitors are the judges (*m*); nor can a widow, in respect of the land she holds in dower, sit on the homage in a Court Baron even to present, unless the husband died without an heir (*n*).

But the husband and not the wife is to perform the services to the lord (*o*), with the exception, as it would seem, of fealty (*p*).

And as suit of court cannot be done by a copyholder by attorney, an infant copyholder appears to be excused from any services during the period he is in ward, at least until the age of fourteen, when he is considered of years of discretion (*q*).

A corporation cannot do suit, on which account it is generally

(*g*) Bevil's case, ubi sup.; 3 Bl. Com. 12.

(*h*) Rowlston *v.* Alman, Cro. Eliz. 748.

(*i*) Gilb. Dis. 11, 16; Allen *v.* Givers, Mo. 185; Lex Man. 22, pl. 4.

(*k*) Gilb. Dis. 16; Richard Godfrey's case, 11 Co. 45 a; Pell *v.* Towers, Noy, 20; Doctor & Student, 47.

(*l*) Mar. 161, 164.

(*m*) Ante, p. 77. So, the author apprehends, a woman cannot sit on the homage in a trial in the Customary Court by plaint in the nature of a real action.

(*n*) 2 Watk. on Cop. 69, 70. For the wife is not to be distrained for the freehold land which she holdeth in dower, if the heir have sufficient land in the same county to be distrained for the same; F. N. B. 159, (A.) (B.).

(*o*) Hed *v.* Chalener, Cro. Eliz. 149.

(*p*) Ante, p. 361, 362.

(*q*) 2 Watk. on Cop. 175; post, tit. "Guardianship." An attorney cannot be amerced for not doing suit to his lord's court at such time as his attendance is required at Westminster; Stone's case, 1 Vent. 16, 29.

supposed that a corporation cannot hold lands by copy of court roll (*r*).

Joint-tenants and coparceners are as one tenant to the lord, and shall therefore do but one suit (*s*); but tenants in common take several estates, and must severally do suit (*t*); and as copyholders are not within the statute of Marlborough (*u*), it does not seem that they can compel contribution of suit (*x*).

RENT OF ASSISE (*y*).—This is the ancient term for the small reservation on the original grants of freehold and copyhold lands, where the rents were assised or reduced to a certainty by the lord of the manor (*z*), and which was sometimes made in money, and at others in pepper cummins or the like; the former, being usually paid in silver, was called white rent, and the latter was called black rent (*a*). These payments are now more usually denominated quit rents, but that term, strictly speaking, is applicable only to a rent reserved in lieu of all services, because then the tenant, in respect of it, is quit from other services (*b*); and those paid by freeholders are frequently termed chief rents: it is essential to the title to these rents that they should have been paid immemorially, and without variation (*c*).

A rent originally reserved in respect of copyhold property may be lost by suffering it to be received for a very long period of time by the lord of another manor; and this sometimes occurs by two manors becoming united in one person, and afterwards getting again into the

(*r*) Ante, p. 108.

(*s*) The suit by coparceners is, the author apprehends, to be performed by the eldest sister, as in the case of freeholds; Kitch. 108; 2 Inst. c. 9; ante, p. 362. But when lands holden of the king descend to coparceners, it seems that all the coparceners are to do suit as well after partition as before; F. N. B. 159 C.

(*t*) Bruerton's case, 6 Co. 1 & 2; Attree *v.* Scutt, 6 East. 476.

(*u*) 52 Hen. 3, c. 9; 2 Inst. c. 9; ante, p. 86.

(*x*) See 2 Inst. c. 9; F. N. B. 162; Bruerton's case, sup.

(*y*) All manorial rents and services (not being service at the lord's court), are included in the general term "Rents," in the Commutation and Enfranchisement Act, 4 & 5 Vict. c. 35. See the preamble, and s. 13, and also the interpretation clause, s. 102.

And note, by the 51 sect. the act is not to affect the lord's right to any rents, fines, or heriots, &c. due on or before 1st January next following the confirmation of the apportionment.

The provisions of that act must, the author apprehends, be held to embrace "Rents" and "Heriots" payable in respect of lands of *freehold* tenure. See the words "and in respect of other lands subject to such payments, or any of them," used in the first section; vide also the form given in sect. 12, for the appointment of an attorney or agent, which commences thus: "I, A. B., of, &c., lord, or copyholder, customary tenant, or *freeholder* of the said manor."

(*z*) Com. Dig. Rent (C. 2.).

(*a*) Ib.

(*b*) Ib.

(*c*) 2 Inst. 19; 2 Bl. Com. 42.

possession of distinct owners. So where the lord of the manor of *D.*, which he purchased from *B.*, who formerly was owner of the manors of *I.* and *D.*, brought his bill to compel payment of a rent of 8*s.* per annum, admitting that it was copyhold of the manor of *I.*, and having no other evidence to produce than the payment to him of the rent for near twenty years, the arrears and growing rent were decreed to him, and a trial at law denied, the Lord Keeper saying, it was agreeable to the rules of the law, where in case of incroachment of rent, if the tenant makes but one payment of more than was due, he shall never go back from it, and that after a payment of 20 years, a grant of the freehold of the copyhold from the lord of the manor of *I.* should be presumed (*d*).

A rent service is not extinguished by purchase of part of the tenancy, but shall be apportioned (*e*); yet it is otherwise as to services which are entire, and not annual, as in the case of heriot service (*f*). And except, perhaps, in the instance of a regrant by a person having a limited interest in the manor, the doctrine of apportionment, the author apprehends, is applicable to copyholds (*g*).

The lord may distrain for rents of assise of common right (*h*); and now by the 4 Geo. II. c. 28, s. 5, all persons have the like remedy by distress for rents of assise, chief rents, and rents seck (*i*), as in case of rents reserved upon lease; and the statute we have seen extends to copyhold lands (*k*). But distress is not incident to a fee-farm rent, except the case is brought within the stat. of 4 Geo. II. (*l*).

This distress may be upon the lands in the hands of a lessee (*m*), yet it is supposed that they are not chargeable in the hands of a new tenant, for any arrears (*n*); but then the arrears would be recoverable in an action of debt (*o*); such action, however, being within the stat. of limitation of 21 Jac. (*p*).

The lord may avow for the rent of a copyholder in the courts of

(*d*) Steward *v.* Bridger, 2 Vern. 517.

(*e*) Ante, p. 94.

(*f*) Co. Lit. 149, a & b; Bruerton's case, 6 Co. 1.

(*g*) Kitch. 170; Com. Dig. Susp. E.; Doe & Huntington, 4 East, 289; Swinnerton *v.* Miller, Hob. 117; Randall *v.* Breese, 2 Sho. 398, n.; ante, p. 94. But see Co. Cop. s. 41, Tr. 91; Gilb. Ten. 200.

(*h*) Lit. sect. 213; Co. Lit. 150 b; Gilb. Dis. 5.

(*i*) This is usually described as a dry rent reserved by deed, without a cause of distress; Gilb. Dis. 6.

(*k*) Ante, p. 85; Gilb. Dis. 6; Gilb. Ten. N. 150; 2 Watk. on Cop. 181, 182.

(*l*) Bradbury *v.* Wright, 2 Dougl. 624.

(*m*) Rivet *v.* Dowe, Noy, 135; S. C. 2 Brownl. 279.

(*n*) Hitcham *v.* Finch et al., 1 D'Anv. 752 (P.) pl. 1; 1 Roll. Abr. 374, 375, Chancerie, (P.) pl. 1; Ib. (Q.) pl. 3; 2 Watk. on Cop. 180.

(*o*) Gilb. Ten. 309. In an action of debt for quit rents, the lord, it seems, must show the particular lands; ante, p. 356.

(*p*) C. 16, s. 3.

law(*q*); but it seems doubtful whether debt will lie, unless the lord has conveyed away the manor, and so lost the remedy by distress (*r*); and in case of wilful and absolute refusal to pay rent, the lord may seize as for a forfeiture (*s*).

No length of time within the period limited by the stat. of 32 Hen. VIII. (*t*) for the recovery of customary and prescriptive rents, was a bar to a distress for quit rents, as between the same lord and tenant; nor would *mere* length of time have furnished a pretence for presuming a release or extinguishment of the rent(*u*).

Copyholds not being within the statute of 32 Hen. VIII. c. 37, the arrears of rent for copyhold tenements cannot be recovered by executors in an action, or by distress, under the provisions of that act (*x*).

It has been said, that the lord has no remedy in equity, after he parts with the manor, for rents due before his alienation (*y*); and this, the author conceives, is perfectly consistent with the rules of equity, as it would seem that the lord could recover the arrears, to the extent of six years, in an action of debt (*z*).

(*q*) Laughter *v.* Humphrey, Cro. Eliz. 524; Skin. 9; Gilb. Ten. 308.

(*r*) N. (1.) Co. Lit. 57 b; Hitcham & Finch, sup.; 2 Watk. on Cop. 181, 183; Gilb. Ten. 308. And see 3 P. W. 151, in North *v.* Earl of Strafford.

(*s*) Post, tit. "Forfeiture."

(*t*) C. 2, viz. fifty years. The stat does not extend to a rent arising by grant or under a will; Collins *v.* Goodall, 2 Vern. 235.

(*u*) Eldridge *v.* Knott, Cowp. 216; Stackhouse *v.* Barnston, 10 Ves. 467; Freeman *v.* Stacy, Hutt. 109. But under the 2nd sect. of the late Statute of Limitations, 3 & 4 Will. 4, c. 27, no person can distrain or bring an action for *any rent*, but within twenty years after the right thereto first accrued to the claimant, or to the person through whom he makes title. The 3rd, 4th and 5th sections define the respective periods when the right shall be deemed to have accrued to persons having an estate or interest in possession, in remainder, and in reversion respectively.

By the 16th sect. a further period of ten years is given to claimants under the disability either of infancy, coverture, lunacy, or absence beyond seas.

But by the 17th sect. no distress or action can, under any circumstances, be made or brought, but within forty years next after the right first accrued.

As all real actions are abolished by the 36th section of the act, there is no longer *any* remedy whatever for a quit rent if in arrear twenty years or upwards, save as to the operation of the 16th section in cases of disability.

And the author apprehends, that under the 34th section, the right to the quit rent would be absolutely extinguished, but with a possible extension of the period of twenty years even to forty years, by the claimant's being under the disability of infancy, coverture, lunacy, or absence beyond seas.

Vide post, tit. "Ejectment;" part 3, tit. "Courts Baron," (Rents of Assize, &c.); and see the above act in the Appendix.

(*x*) Ognel's case, 4 Co. 50; 2 Bac. Abr. 282; Toll. 452; Brad. Dist. 77. And see Appleton *v.* Doily, and other authorities, ante, p. 87, n. (*b*). Sed vide Carth. 91, per Eyre, J.; Gilb. Ten. 187, 188.

(*y*) Hitcham *v.* Finch et al. sup.; 2 Watk. on Cop. 181.

(*z*) N. 1, Co. Lit. 57 b; 2 Watk. on Cop. 181, (n. e), 183; 6 Vin. Cop. (N. d.) pl. 3, marg.

But when, from the uncertainty of the nature of the rents, or of the lands out of which they are payable, or otherwise, the lord is deprived of his remedy at law, a court of equity will relieve him (*a*); if, however, he has a legal remedy, he must pursue it (*b*). So a bill for suit of court to a manor, and for a fee farm rent or law day silver at a Court Leet was dismissed, the remedy being at law (*c*).

Reliefs (*d*). Before we enter upon the subject of *heriots*, the author thinks it right to notice that reliefs, which are generally supposed to be payable by freeholders only (*e*), may by special custom be payable by copyholders (*f*).

Reliefs are divided into two sorts,—the one by service, the other by custom: the former is paid on death, and the latter on death or alienation, according to the custom (*g*); but the relief on alienation is rather an alienation fine, than a relief (*h*).

The remedy for the *proper* relief is by distress (*i*), and an action of debt, it has been said, does not lie, except by executors or administrators (*k*), who shall have debt, but cannot distrain (*l*): yet it should seem to be the better opinion that the lord himself may bring debt for the proper relief (*m*); and for an *improper* or *prescriptive* relief, debt clearly lies, for the lord shall not distrain unless he can likewise prescribe in the distress (*n*).

(*a*) Holder *v.* Chambury, 3 P. W. 256; Duke of Leeds *v.* Powell, 1 Ves. 171; Thorndike *v.* Allington, 1 Ch. Ca. 79; Collet *v.* Jaques, ib. 120; Eton College *v.* Beauchamp & Riggs, ib. 121; Davy *v.* Davy, ib. 144; Benson *v.* Baldwyn, 1 Atk. 598; Cox *v.* Foley, 1 Vern. 359; Duke of Bridgewater *v.* Edwards, 6 Bro. Par. Ca. 368; and see 2 Vern. 382—386.

(*b*) Bouverie *v.* Prentice, 1 Bro. C. C. 200; Duke of Leeds *v.* the Corporation of New Radnor, 2 ib. 388, 518; ante, p. 356, 357.

(*c*) Thornhagh *v.* Hartshorn, Bunb. 237.

(*d*) N. B. "Reliefs" are included in the general term "Rents" in the Commutation and Enfranchisement Act, 4 & 5 Vict. c. 35. See the interpretation clause, s. 102.

(*e*) Gilb. Ten. 330; Co. Cop. s. 25, Tr. 34; and see Wright's Ten. 97; Gilb. Dis. 7; Kitch. 286. Post, tit. "Courts Baron (Reliefs)."

(*f*) Kitch. 202; Hungerford *v.* Haviland, 3 Bulst. 323; S. C. 2 Roll. Rep. 370; S. C. W. Jones, 132; S. C. Lat. 37, 95, 130; Com. Dig. Cop. (K. 11.); 2 Bl. Com. 97; Gilb. Ten. N. 173.

(*g*) Co. Cop. s. 25, Tr. 27, 28.

(*h*) W. Jones, 133, in Hungerford *v.* Haviland (sup.); 20 Vin. 246.

(*i*) Co. Cop. s. 31, Tr. 45; Gilb. Dis. 7; Ognel's case, 4 Co. 47 b; 1 Roll. Abr. 665, (E.) pl. 4; Scroggs, 102; Hungerford & Haviland, sup.

(*k*) Co. Lit. 83 b.

(*l*) Co. Lit. 47 b, 83 b; 32 H. 8, 20; 19 H. 6; Kitch. 86; Shuttleworth *v.* Garnett, 1 Sho. 36; S. C. Carth. 91; Ognel's case, sup.; Dy. 24 a, pl. 149.

(*m*) Co. Cop. s. 31, Tr. 45; Hungerford *v.* Haviland, sup.; Lord North's case, 2 Leo. 179; Kitch. 86.

(*n*) Gilb. Dis. 8. See further as to reliefs, and the distinction between *proper* reliefs and *improper* reliefs, post, 2 vol. tit. "Court Baron (*Services* due from freehold tenants)." Vide also Co. Lit, 85 a, n. (1).

It has been held that a relief is not apportionable, and cannot be claimed on the death of one of several coparceners (*o*); and the author apprehends that the rule is applicable to joint tenants.

Of Heriots (*p*).

The term "heriot" is supposed to be derived from "*Here*" in Saxon "an army," and "*Geat*," signifying provision (*q*). The service is a badge of the feudal system, and may, at the present day, be deemed the most, if not the only, obnoxious part of copyhold tenure; but the existence of this service is very limited, and it attaches partially on freehold as well as copyhold estates; such freehold estates, however, being, for the most part, enfranchised copyholds (*r*).

This service has been stated to be of Danish institution, but the Danish heriot would seem to have been transmuted into a relief, payable in the nature of a double rent, by the heir on the death of the tenant, and to be the relief payable by freeholders in the present day (*s*).

The heriot appears to have been, originally, a tribute to the lord of the horse or habiliments of the deceased tenant, in order that the *militiæ apparatus* might continue to be used for the purposes of national defence by each succeeding tenant; it was natural, therefore, that on the decline of military tenure, the heriot should be commuted for a payment in money, or for the tenant's best live or dead chattel. But it should seem that the payment in money was usual in the time of Henry the Second (*t*), and of John (*u*), and in Normandy before the conquest (*x*); and that the heriot of the villein or husbandman was more usually the best beast.

According to some writers, the heriot of the best beast is not in all cases a commutation or substitution for the military heriot, but was

(*o*) 3 Leo. 13, ca. 30.

(*p*) The extinction of heriots (both heriot service and heriot custom) was one of the objects of the stat. 4 & 5 Vict. c. 35 (see sect. 13, &c. in the Appendix). It is clear, the author submits, that the act embraces heriots payable in respect of lands of *freehold* tenure, ante, p. 365, n. (*y*); post, part 3, tit. "Courts Baron (where and when to be kept.)"

(*q*) Willes, 194, contrary to Lord Coke's definition, Co. Lit. 185 b, that "Here" signified *lord*, and "Geat" *beste*, i. e. the *lord's beste*. See also as to the origin of this service, Co. Cop. s. 24; 2 Bl. Com. 97, 423, 424; Nels. Lex Man. 113; 2 Watk. on Cop. 127, 128; ante, p. 41, per C. J. Best, in Garland *v.* Jekyll.

(*r*) 2 Bl Com. 424.

(*s*) Ib. 423.

(*t*) Glanv. lib. 9, c. 4, f. 143, 144, ed. 1780; Lord Littleton's Hist. H. 2, b. 2, p. 100, n.; vol. 3, p. 325, 330; 2 Watk. on Cop. 128.

(*u*) Mag. Cart. Reg. Johan. cap. 2. ap. Blackst.; 2 Watk. on Cop. 128.

(*x*) Graund. Coust. de Norm. c. 34, f. 56, b; 2 Watk. on Cop. 128.

orginally rendered by the villein or husbandman for the purposes of agriculture, in analogy to the warlike heriot on the death of a military tenant; and this by the indulgence of the lord, who was the absolute owner of all the goods and chattels of the pure villein (*y*). And in the opinion of others (*z*), the heriot was a voluntary or gratuitous bequest of the tenant; but the better opinion is that there are instances, in ancient times, of bequests of heriots to the lord (*a*), yet that they were the lord's legal right, and were so considered even in the time of King Canute (*b*).

A different custom became established in different manors, and accordingly we find that in some manors it is customary to render to the lord the best animal of which the tenant dies possessed; and in others, the second best beast; and again in others, the only beast, if but one, or if the tenant has no beast, then to pay a fixed sum in lieu of heriot (*c*); and in others, to render the best beast or good, *or* to pay a sum certain at the election of the lord; and again in other manors, the lord is entitled to the best beast, if the tenant die possessed of a beast, otherwise the best dead good (*d*), or a sum certain (*e*).

Heriot Service. is not a badge of free tenure, it can exist in other tenures
Western v Bailey 1896. 2. Q.B. 284.

HERIOT SERVICE.—The heriot service being a reservation by the lord upon his feudal donation, and arising from the tenure between the lord and tenant, is in the nature of a rent (*f*), which lies in *render*, and the remedy was therefore originally by distress (*g*).

And this distress may be of any goods on the land, although the property of a stranger (*h*).

A distress for heriot service is within the statutes of 7 Hen. VIII., c. 4; 21 Hen. VIII. c. 19, and 11 Geo. II. c. 19, as to costs (*i*). But an avowry for such distress is not within the statute of limitation of 32 Hen. VIII. c. 2, a heriot being a casual service (*k*).

(*y*) 2 Bl. Com. 97, 423; 2 Watk. on Cop. 128.

(*z*) Bract. l. 2, c. 36, s. 9, f. 86 a; Fleta, l. 3, c. 18, f. 212; Britt. c. 69, f. 178 a. (493.)

(*a*) 2 Watk. on Cop. 130.

(*b*) Ib.

(*c*) Griffin *v.* Blandford, Cowp. 62.

(*d*) Customs of the manor of Dymock, and the manor of Berkeley and Thornbury, Glos.; 2 Watk. on Cop. 144, n. (o).

(*e*) 2 Watk. 144, n (p).

(*f*) 2 Saund. 166, in Lanyon *v.* Carne.

(*g*) Kitch. 262, 263; 3 Bl. Com. 15; Bro. Abr. tit. "Hariots," pl. 2, 6, 7; 2 Watk. on Cop. 167, 168.

(*h*) Major *v.* Brandwood, Cro. Car. 260; S. C. W. Jones, 300; Bro. tit. "Hariots," pl. 6; Osborn *v.* Steward or Sture, 3 Mod. 231; S. C. 2 Lutw. 1366; S. C. 3 Salk. 181; Thorne *v.* Tyler, Mar. 165; Lex Man. 120, App. 90; but see per Anderson in Goosey *v.* Pot, Ow. 146.

(*i*) Haselip *v.* Chaplen, Cro. Eliz. 257, 258, 329; Mackworth *v.* Shipward, Cro. Jac. 28; Loyd *v.* Winton, 2 Wils. 28; S C. Barnes, C. P. 148; 2 Watk. on Cop. 168.

(*k*) 2 Inst. 95, 96. Bevil's case, 4 Co. 8; ante, p. 82, n. (*u*). See as to distinc-

Mr. Watkins observes (*l*), that "according to the old law, it is said he [the lord] could not distrain after the term, on which the heriot was reserved, ended: yet *quære*, whether this be not helped by the statute of Anne [8 Anne, c. 14, s. 6 and 7], as a heriot service is a rent; and a rent need not be annual [Co. Lit. 47 a; 1 Vent. 91, *Lion* v. *Carew*]." But it would seem that the power of distress for rent in arrear, after the determination of the particular term, under the stat. of Anne, extends only to common law leases (*m*).

It was formerly doubted whether the lord might seize the heriot service (*n*); it has, however, been adjudged, that when the tenure is by the best beast, the service lies in *prender* as well as *render*, and that the lord may seize, and avow the taking as his own beast, as in the case of heriot custom (*o*), because the choice of the best beast is in the lord, and not in the tenant, and by seizing thereof the lord reduces that to his *possession*, wherein he had a *property* at the death of the tenant (*p*); but if the tenure is by the rent of a hen or capon, or the like, the lord's only remedy is by distress (*q*).

tion between entire services, annual, as suit, &c., and not annual, as heriot, &c. Bruerton's case, 6 Co. 1; ante, p. 366.

(*l*) 2 vol. on Cop. 168. And see Inchiquin *v.* Burrell, 3 Ridgw. P. C. 426, where Yelverton, C. B., noticed that the judges were equally divided in Osborn & Steward, 3 Mod. 230, on the question whether the beast of any person on the land could be distrained for a heriot after the expiration of the term, and that the case occurred in 4 Jac. 2, when probably the strict feudal notions had not left the minds of the judges who presided; and, in contrasting the case of a heriot with that of a mere covenant to pay a fine at the expiration of a demise, his lordship observed, that "the heriot is a retribution for the thing granted, and according to the authority of Drake & Munday [Cro. Car. 207], it would go to the heir as one of the fruits of tenure, and therefore must be considered, though not payable till the end of the term, as issuing out of the thing granted."

(*m*) See Webb *v.* Jiggs, 4 Mau. & Selw. 120. See also Bennet's case, 2 Str. 787; ante. p. 370, n. (*g*).

(*n*) 8 H. 7, f. 10; Bro. tit. "Hariots," pl. 7; Kitch. 263; Keilw. 82; Doct. & Stud. 76; Gresham *v.* Gainsford, Bendl. 18; Wilson *v.* Wise or Vyse, ib. 39 a, pl. 154; S. C. Mo. 16; 2 Nels. Abr. 931, pl. 1. But see Co. Cop. s. 31, Tr. 44; Woodland *v.* Mantel, Plow. 95, 96; 16 H. 7, f. 5; Fitz. tit. "Hariott," 2; Bro. tit. "Hariots," 2; Odiham *v.* Smith, Cro. Eliz. 589; S. C. (Bodyam *v.* Smith), Gouldsb. 191; 1 And. 288, 289; S. C. Mo. 540; Parker *v.* Gage, 1 Show. 81; Edwards & another *v.* Moseley & another, Willes, 192; Gilb. Dis. 9.

(*o*) Kitch. 263; ib. 266, cites 27 Ass. 24; 8 H. 7, f. 10; Bro. tit. "Hariots," 6, 11; Sir John Peter *v.* Knoll, Cro. Eliz. 32; Hungerford *v.* Haviland, 3 Bulst. 325; Major *v.* Brandwood, Osborn *v.* Steward, ubi sup.; sup. n. (*n*).

(*p*) 3 Bac. Abr. 491.

(*q*) Gilb. Dis. 10, 11; Woodland *v.* Mantel, sup. It was resolved in Odiham & Smith, Cro. Eliz. 590, that if a tenant hold by the render annually of *an ox*, it is in the election of the tenant what ox he will yield.

It is also settled that the seizure for heriot service may be either within or without the limits of the manor (*r*).

In avowing for heriot service, the exact nature of the heriot, whether the best beast or other thing, must be set forth (*s*); but where in replevin the heriot had been eloigned, and the defendant made conusance as bailiff to the lord, it was adjudged on demurrer that it was not necessary to set forth the nature of the heriot, or the value thereof, for that might not be known to the defendant, and the plaintiff had done wrong by his aloignment (*t*).

When the original grant is lost, the lord must prescribe, which prescription necessarily presumes an ancient grant in fee simple (*u*).

And the heriot service being due by reservation, shall go with the reversion to the heir or grantee, and shall follow the seigniory if the grant be in fee (*x*).

It is said to be due on the death of a tenant in fee simple only (*y*), but the author will presently show that this is open to doubt, where heriotable lands of ancient tenure are conveyed to one for life, with remainder to another for life, with remainder over in fee, for there the particular tenant shall hold of the superior lord, and not of him who made the grant (*z*); and clearly a heriot may be reserved on a lease for life, or on the death of every particular tenant, whether for life or years (*a*), or even at will (*b*).

Some of the books treat of heriots by reservation on deeds, as distinguishable from heriot service, and state as a ground for this distinction that the heriot service is a heriot arising from tenure, and the

(*r*) Kitch. 263, 265; 2 Inst. 132; 3 Bl. Com. 15; Dr. & Stud. 128; Woodland *v.* Mantel, Parker *v.* Gage, sup.; Austin *v.* Bennet, 1 Salk. 356. See 3 ib. 333; 2 Saund. 168 a, n. But see Keilw. 82 a, pl. 2, 84 b, pl. 8. And it is certain that one cannot distrain for heriot service out of the manor; Austin *v.* Bennet, sup.

(*s*) Shaw *v.* Tayler, Hob. 176; S. C. Hut. 4, 5. And see Parkin & Radcliffe, 1 Bos. & Pul. 282, 393; post, "Heriot Custom."

(*t*) Major *v.* Brandwood. Cro. Car. 260, (cites Dicker *v.* Higgens, Tr. 18 Eliz. Rot. 506; Anon. Tr. 13 Jac. Rot. 1148); S. C. W. Jones, 300; Lex Man. 117, 118. See further as to avowry for heriot, Statham, tit. "Avowrie;" Kitch. 266.

(*u*) Kitch. 262, 263; 3 Salk. 332; 2 Watk. on Cop. 134, 135.

(*x*) Bishop of Gloucester *v.* Wood, Win. 46, 57; 2 Watk. on Cop. 133, 134.

(*y*) Kitch. 262, 263, says, that to have a heriot after the death of tenant for life or years is heriot custom, and that heriot service is after the death of tenant in fee; cites 14 H. 4, f. 5; 8 H. 7, f. 11; 21 H. 7, f. 13 and 16. So (he adds) a heriot upon every surrender, or every alienation, is heriot custom; cites 3 H. 6, tit. 8, B.; and see Kitch. 265, 266; Bro. tit. "Hariots," 5; Lex Cust. 238.

(*z*) Bro. Ten. 21; Dy. 362 b, pl. 19; 2 Inst. 505; Co. Lit. 21 b, 98 b; Webbe & Potter, Godb. 18.

(*a*) Kitch. 262, 263; Keilw. 84 a and b; 3 Salk. 332; Lion *v.* Carew, Osborn *v.* Steward or Sture, ubi sup.; Ingram *v.* Tothill, 1 Mod. 216; S. C. 2 Mod. 93, 281; S. C. 1 Vent. 314; 2 Lev. 210; 3 Keb. 785; Lex Man. 118, 119.

(*b*) 2 Bulst. 196, in Hix *v.* Gardiner; 2 Watk. on Cop. 146.

former not so; but if on a grant at this day of freehold lands, a heriot should be reserved, and to which there can be no objection the author conceives (*c*), it would clearly be a heriot arising from tenure, though not from ancient tenure, to which heriot service, strictly speaking, is referrible; and there is a distinction in the remedy for heriots payable by freeholders to lords of manors under ancient grants, and denominated heriot service, and for heriots reserved by deed since the statute of *quia emptores:* the former, we have seen, lie in prender as well as in render, and may be taken even out of the manor; and where a tenant in fee, holding by heriot service, dies, the tenure remains at the time of the seizure of the heriot (*d*); but a heriot reserved on lease, or *suit heriot*, partakes strictly of the nature of rent, so that the lord cannot seize, but must either distrain upon the land, or bring an action for nonpayment (*e*); and suit heriot cannot be made payable after the determination of the term, any more than rent (*f*).

As a reservation of a heriot is to be construed strictly, the heriot would not be payable by an assignee, unless so particularly expressed in the deed (*g*).

Again, as the remedy for suit heriot is distress or action, it follows that separate distresses must be made for each separate heriot reserved, as in the case of a distress for rent (*h*).

It was stated *arguendo* in a case where there was a disjunctive reservation of a best beast or 5*l.* for a heriot, at the election of the lessor, that the lessor might distrain without first declaring his election, but that the bailiff could not, for that he could not justify for an arbitrable thing in avowry, without express command (*i*); but on the latter point nothing appears to have been said by the court (*k*); and as to the former, the author apprehends that the lessor would have made his election by the act of distraining (*l*).

All entire services, such, for instance, as to render an entire chattel upon the death of a tenant, shall be multiplied by alienation of any part of the tenancy (*m*); but Mr. Watkins was of opinion (*n*) that the

(*c*) Lion *v.* Carew, Osborn *v.* Steward or Sture, sup.

This has frequently been called *Suit Heriot*.

(*d*) Ingram *v.* Tothill, Osborn *v.* Steward or Sture, ubi sup.; Keilw. 84 b; and see 2 Nels. Abr. 931, 932.

(*e*) Parker *v.* Gage, 1 Sho. 81; Gilb. Dis. 11; Edwards and another *v.* Moseley and another, Willes, 192.

(*f*) Ingram & Tothill, Osborn & Steward or Sture, sup.

(*g*) Scory *v.* Randall, Cro. Car. 313; S. C. Hetl. 57; Osborn & Steward or Sture, Ingram & Tothill, sup.

(*h*) Rogers *v.* Birkmire, Rep. temp. Hardw. 247; S. C. 2 Stra. 1040.

(*i*) Beare *v.* Hodges, Hetl. 12, 16; S. C. Litt. Rep. 33.

(*k*) 14 Vin. p. 299, pl. 9, "Heriot."

(*l*) See 2 Watk. on Cop. 144; vide also Hob. 207, in Cranley *v.* Kingswell, which appears to be the same case as Crawley & Kingsmill, ante, pp. 362, 363.

(*m*) Co. Lit. s. 222, 223; Bruerton's case, 6 Co. 1; Talbot's case, 8 Co. 105; 1 Keb. 357, in Baker *v.* Berisford.

(*n*) 2 Watk. on Cop. 135, 136; and see Co. Lit. s. 19, 215; Perk. s. 637.

heriot service could not be multiplied in prejudice of the donee or grantee in fee, unless he parted with his whole estate, as the person to whom he should grant an estate for life, or years, or in tail, would hold of him and not of the lord; but that on a grant by the tenant in fee to *A.* for life or in tail, with remainder over in fee, there a heriot would be due on the death of *A.*, as he would hold of the lord (*o*); and this, as the whole fee passes by the grant, is perfectly reconcilable with settled principles, for when particular estates are created by the tenant in fee, and the whole fee is not parted with, he himself remains the lord's tenant, and a heriot would be due on his death (*p*).

But Mr. Watkins in another part (*q*) observes, that if a person seized in fee of freehold lands (by which must be meant freehold lands subject to heriot service by ancient tenure) grant to *A.* for life, with remainder to *B.* for life, with remainder to *C.* for life, with remainder to *D.* in fee; *A.*, *B.*, *C.* and *D.*, shall hold of the lord, as the whole fee is disposed of; but that as the particular interest granted to *A.*, and the several remainders limited to *B.*, *C.* and *D.*, form together but one estate (*r*), it should seem to follow that *A.*, *B.*, *C.* and *D.*, form but one tenant to the lord, and consequently that but one heriot can be due, and *that* on the decease of the survivor of them (*s*). But that if either alien his portion, it should seem also that an heriot would be due on the alienation of each, as the respective alienors would cease to be tenants by their own act, and the respective alienees would be in of a new estate. It, however, appears to the author that in such a case *A.*, *B.*, *C.* and *D.* could not be considered as one tenant, but that each of them holding of the lord paramount, and not of the grantor, a heriot would be due on the death of each.

Again, Mr. Watkins distinguishes between persons taking by *the act of law*, as the husband in respect of his curtesy and the wife of her dower, and by *the act of the party*, as the grantee for life, or years, or in tail, the heriot being due in the former case, but not in the latter, as it can only be claimed on the death of the person who is tenant to the lord (*t*); and as the widow, except she take the whole estate, is tenant to the heir (*u*), no heriot, he observes, would be due on her death; but these distinctions are inapplicable to copyholds, not only as being confined to heriot service, but also because the copyholder in every case holds immediately of the lord (*x*).

(*o*) 2 Watk. on Cop. 136; Bro. Ten. 21; Dy. 362 b, pl. 19; 2 Inst. 505; Co. Lit. 21 b; Webbe & Potter, Godb. 18; see S. C. Owen, 26.

(*p*) 2 Watk. on Cop. 135.

(*q*) Pp. 149, 150.

(*r*) Co. Lit. 143 a.

(*s*) Cites Keilw. 83 b, 84 a, pl. 7 and 8, and adds quære de hoc?

(*t*) 2 Watk. on Cop. 136, 137, 138; but see Keilw. 84 b; 14 Vin. 296.

(*u*) 2 Watk. 137, cites Bro. Ten. 84; Watk. on Desc. 83.

(*x*) See further as to heriot service, post, tit. "Heriot Custom."

HERIOT CUSTOM.—With the exception of heriot service, of which the author has already taken some notice, the only heriot recognized by the ancient law of this kingdom, since feuds became hereditary, and since copyholders ceased to be mere tenants at will, is that which is usually denominated heriot custom, and which is due by virtue of an *immemorial* usage from every tenant of the particular manor (*y*), more frequently on the death of the tenant (*z*), but sometimes on alienation also, or on alienation only (*a*).

In a note to the second edition of Watkins on Cop. (*b*), a doubt is expressed whether a custom to have a heriot on alienation is supportable, inasmuch as the heriot was given to the lord when the person who had it could no longer use it; but that, under the custom in question, it would seem to be taken away from the person who ought to have it for the purpose of defence or agriculture. It is probable, however, that the custom would be deemed to be good, as the heriot on alienation is in the nature of a fine (*c*).

This species of heriot is due in respect of copyhold as well as freehold lands, and is said to lie in *prender* only, and not in *render*; therefore the lord cannot distrain for it (*d*), except, as it should seem, by special custom (*e*).

Heriot custom may also be due on the death or alienation of a copyholder for life or years, as well as of a tenant in fee simple; and although in freehold cases, when particular estates are carved out by a person seised in fee, and the whole fee disposed of, it has been

(*y*) Co. Cop. s. 24, Tr. 24, 25; Talbot's case, 8 Co. 106. And see Kitch. 262, 265, and the cases there cited from the Year Books. A composition made within time of memory would not be binding; Co. Cop. s. 31, Tr. 46; 2 Bl. Com. 424.

(*z*) A custom that the lord should have the best beast of every *person* dying within his manor, would be void as to strangers; Parker & Combleford, Cro. Eliz. 725.

Where by the custom the lord was to have for an heriot on every descent the best quick cattle for every yard and half land, and if any tenant should let his land, and the lord at his decease should not be answered the best beast for his heriot which did commonly manure the premises, the person to whom the land ought to come should pay to the lord, within six weeks after the death of the tenant, three pounds for every yard of land, and forty shillings for every half yard land, instead of a heriot, it was held that when the tenant died after having let his land, the lord was entitled only to the pecuniary payment in lieu of the heriot; Croome *v.* Guise, 4 Bing. N. S. 148.

(*a*) Kitch. 265; Hil. 8 H. 8, fol. 10 a and b, pl. 3; Bro. tit. "Hariots," 8; 2 Watk. on Cop. 133. Whether a custom for the incoming copyholder to pay a sum to be assessed by the homage, *in the name of a heriot*, be good or not, see Parkin *v.* Radcliffe, 1 Bos. & Pul. 282.

(*b*) Page 145.

(*c*) Gilb. Ten. 50; ib. N. 32; see post, p. 377, n. (*s*), as to heriots on alienation by persons seized in joint tenancy.

(*d*) Kitch. 263, 266, 267; 38 Edw. 3, fol. 7; 37 Ass. 24; 8 Hen. 7, fol. 10; 13 Edw. 3; Bro. tit. "Hariots," 2, 6, 7, 9; Gilb. Dis. 10; 3 Bl. Com. 15.

(*e*) Hungerford *v.* Haviland, 3 Bulst. 324, 325; S. C. W. Jones, 132; S. C. 2 Roll. Rep. 370.

doubted whether more than one heriot is due (particularly if it be heriot service), and *that*, on the death of the survivor of the particular tenants and remainder-man (*f*); yet in copyhold cases, as each particular tenant holds immediately of the lord, a heriot must be due on the death of such tenant, whether or not the whole fee is disposed of by the surrender or will under which he derives his title.

Mr. Watkins, in treating of heriots due by custom on *alienation*, makes the same distinction between the creation of a particular interest, and the disposition of the whole fee simple, as in the case of heriot service (*g*), and therefore assumes that the heriot would not be due on the grant of a less estate than a fee simple, such grant not being a change of tenancy with respect to the lord: this is quite clear, the author conceives, but it is irrelevant to copyhold tenure for the reason just assigned, namely, that the copyholder in every case holds immediately of the lord, so that a surrender of any portion of his interest must of necessity create a change of tenancy.

A heriot is due on the death of the reversioner, both as to freehold and copyhold estates (*h*), for he is equally in the seizin as a person entitled in possession (*i*).

And by custom a heriot may be claimed on the death of the head of a body politic (*k*).

The heriot is due on the decease of the lord's tenant, and therefore on the death of the trustee, and not of the *cestui que trust* (*l*).

And a heriot is not due on the death of a person having only an *interesse termini*; for instance, if a lease be made to two for ninety-nine years, if three persons should so long live, to commence at the expiration of an existing lease, at a certain rent, and rendering a heriot after the death of the lessees, or either of them, and one of the lessees for ninety-nine years die before the expiration of the first lease, a heriot could not be demanded, as there would be no reversion until the commencement of the term, and for want of a reversion the reservation could not take effect (*m*).

(*f*) Ante, p. 374.

(*g*) 2 Watk. on Cop. 156, 157; ante, p. 374; post, p. 386.

(*h*) Butler *v.* Archer, Ow. 152; Br. Hariots, 1; Br. Avowrie, 142; Br. Entre Cong. pl. 20; 2 Watk. on Cop. 149.

(*i*) Bro. Escheat, 6; ib. Waste, 40; Dy. 127 b, pl. 56; Gilb. Ten. 88; 2 Watk. 149; ante, p. 138.

(*k*) Fitz. Har. 7; 5 Edw. 4, 72 b, Long's case; 2 Watk. on Cop. 155, cites S. C., and also 1 Edw. 2, 14 a; Fisher, 81, cites Long's case, and two instances in *Oxford University*. But a heriot could not be claimed of him without a custom for it; 32 Edw. 2; Fitz. Har. 7; Kitch. 264.

(*l*) Trin. Coll. Camb. *v.* Browne, 1 Vern. 441; 1 Sir W. Bl. 141; Smartle *v.* Penhallow, 2 Lord Raym. 1000; S. C. 1 Salk. 189; S. C. 6 Mod. 67; 3 Atk. 77, in Car *v.* Ellison.

(*m*) Lion *v.* Carew, 1 Vent. 91; S. C. (Lanyon *v.* Carne), 2 Saund. 165; S. C. (Langan *v.* Carne), 1 Lev. 294; S. C. (Lemal *v.* Cara), 2 Keb. 505, 572, 588, 677; S. C. (Hangon & Carve), Sid. 437; Lex Cust. 242, 243; Lex Man. 119; 2 Watk. on Cop. 150.

It would seem that the heriot, in case of disseizin, will be due on the death of the disseizee, and not of the disseizor, as the former continues tenant to the lord by right (*n*), unless indeed the entry of the disseizee or his heir was tolled (*o*); but it is to be recollected that a copyholder cannot, properly speaking, be disseized (*p*), and that the entry of him who has the customary right is not tolled by descent (*q*).

A heriot will be due on the death of the surrenderor of copyholds, if he die before the admission of the surrenderee, the latter not becoming the lord's tenant until admittance (*r*).

As joint-tenants make together but one tenant to the lord, and a heriot being payable only on the death of a person who dies *solely* seized (*s*), no heriot is due until the death of the survivor of them (*t*).

And the law is the same with respect to coparceners, as they also are but as one tenant to the lord, being seized *per mie et per tout* (*u*): and the author apprehends that no heriot will be due in respect of any share of the property, so long as the privity of estate continues between surviving coparceners and the heir or heirs of one or more deceased coparcener (*x*); but should coparceners take admission separately, on the basis of a contract for a partition, then it may admit of an argument that the holding would be converted into a tenancy in common, and so render it necessary for them to plead their respective admis-

(*n*) Co. Cop. s. 56, Tr. 129.

(*o*) Gilb. Ten. N. 24, p. 372; Kitch. 263, 264; 44 Ed. 3, fol. 13; 7 Hen. 4, fol. 17; Bro. tit. "Hariots," 1; Norrice *v.* Norrice, Mar. 23; S. C. (Norris *v.* Norris), 2 Roll. Abr. "Heriot," 2; 2 Watk. on Cop. 146, 147.

(*p*) Ante, pp. 75, 139, 352; but see 2 Roll. Abr. "Heriot," 2.

(*q*) Ante, p. 46. And now by the 39th sect. of 3 & 4 Will. 4, c. 27, no descent, discontinuance or warranty, will bar a right of entry for the recovery of *any land*.

(*r*) Kitch. 265. Mr. Watkins, in the 2d ed. of his Copyholder, p. 147, n. (e), makes a qu. whether if the surrenderee die, and his heir be admitted (which admission would relate back to the date of the surrender), the lord could claim a heriot on the death of the surrenderee; and adds, "If so, the lord must return the heriot taken on the death of the surrenderor."

The author apprehends that in the case of a surrenderee dying without having been admitted, his heir, upon admission, would be compellable in equity to make good to the lord the loss he should have sustained by the neglect of the surrenderee to be admitted, and so subject himself to pay and render the customary fine and services.

(*s*) Butler *v.* Archer, Ow. 152; Bro. tit. "Hariots," 4; 2 Wat. on Cop. 147, 148; Ramshaw & Robottom, Duke's Char. U. by Bridg. 135. The doctrine of *sole* seizin does not seem to be applicable to the case of an alienation by joint-tenants, where an alienation heriot is payable by the custom of the manor; ante, p. 375.

(*t*) Kitch. 264, cites 24 Ed. 3, 3; 19 R. 2, 5; Fitz. Har. pl. 3, 5; Com. Dig. Cop. (K. 24.)

(*u*) 3 Leo. 13, ca. 30; Lib. Ass. 210 b; Pasch. 34 Ed. 3, pl. 15; 2 Bing. 286, in Garland & Jekyll. As between themselves they have a sole seizin, but as to other persons they have a joint seizin; 2 Watk. on Cop. 148, 149; ante, pp. 296, 348.

(*x*) Co. Lit. 163 b, 164 a; 2 P. W. 614.

sions as new grants, and not allege seizin in the ancestor. But the author inclines to think that the mere act of admission, in whatever form it might be made by the lord, could not operate as a severance of the legal tenancy under the descent (*y*).

Tenants in common are *solely* seized, so that a heriot is due to the lord on the death of each of them. This principle has been repeatedly recognized in the courts of law (*z*), and was fully established by the decision of the Court of King's Bench in *Attree* v. *Scutt* (*a*), which case has frequently been acted upon as an authority that, even after undivided shares of a copyhold estate become united in one person, the several shares continue, in contemplation of law, as distinct copyholds, as well for the purpose of the lord's fines and services, as the steward's fees, where, by the custom of the manor, a separate set of fees is payable in respect of each distinct tenement (*b*); but the case of *Attree* & *Scutt*, as far as relates to the legal effect of a reunion of the several undivided shares of copyhold property, was overruled by the Court of Common Pleas in the case of *Garland* v. *Jekyll and another* (*c*), and by the Court of King's Bench in the case of *Holloway and another* v. *Berkeley* (*d*).

The case of *Garland* & *Jekyll* was an action of assumpsit for money had and received, brought by the lord of the manor of Weeks Park Hall, in Essex, against the executors of Sir *T. C. Bunbury*, and was tried at the sittings after Hilary Term, 1822, before Dallas, C. J., when a verdict was found for the plaintiff, subject to a case in substance as follows: In 1735, *Samuel Warner* died seized of two copyhold heriotable tenements within the said manor, the one containing about nine, and the other about ten acres, and *Catherine Graham* (late *C. W.* spinster), *Mary W.*, *Eleanor W.* and *Ann W.*, his four daughters and coheirs, were, at a court in October 1735, admitted *separately*, each to an undivided fourth part of the premises, but one fine only was set on such admission. At a court in September 1736, the death of the said *C. G.* was presented; and at a court in September 1737, the death of the said *M. W.* was presented. At a court in November 1737, *Kitty*, the wife of *L. Warren*, *Eleanora*, the wife of *W. Bunbury*, *Ann Graham*, spinster, and *J. Elliston* an infant, son of *J. E.* and *S.* his wife, late *S. Graham* spinster, were admitted, at their own desire, *as tenants in common*, to the undivided fourth share late of the said *C. G.*, *as her coheirs*. At a court in May 1738, *K. W.* surrendered to the use of her will; and at a court in

(*y*) Ante, p. 297.
(*z*) See ante, pp. 297, 348.
(*a*) 6 East, 481; S. C. 2 Smith, 449.
(*b*) And see 1 Ca. & Op. 221, 223.
(*c*) 2 Bing. 273.
(*d*) 6 Barn. & Cress. 2; S. C. 9 Dow. & Ry. 83.

January 1743, the death of the said *J. E.*, the infant son, was presented, and thereupon the said *E. W.* and *A. W.*, the said *K.* the wife of *L. W.*, the said *E.* the wife of *W. B.*, and the said *A. G.* were admitted as follows; *E. W.* and *A. W.* each to an undivided third part of a third part of the fourth part of which *M. W.* their sister died seized; *K. W.*, *E. B.* and *A. G.* each to a third of the fourth of a fourth, which *J. E.* their sister's son was admitted to and died seized of, and also each to a third of the fourth of which *M. W.* their aunt died seized, to hold to them respectively and their respective heirs and assigns for ever, of the lord, &c.; and at the same court *E. W.* and *A. W.* surrendered to the use of their respective wills. At a court in February 1743, *K. W.* surrendered to the use of her will. At a court in May 1762, the death of *E. B.* was presented; and at a court in March 1763, the death of *K. W.* was presented, leaving *Erasmus W.* her only son and heir. At a court in September 1763, *A. W.* was admitted, under the will of her sister *E. W.*, to all her shares; and at the same court the said *Erasmus W.* was admitted to the shares of *K. W.* as her only son and heir and devisee under her will. At the same court the said *T. C. Bunbury* was admitted to the shares of *E. B.* as her only son and heir. At a court in June 1773, the death of *A. W.* was presented; and at a court in August 1773, the said *T. C. Bunbury* was admitted, as one of the coheirs of the said *A. W.*, to an undivided third part of a fourth part of the premises to which she was admitted in October 1735, as one of the daughters and coheirs of *S. W.*; and also to a third part of a third of a fourth part, to which she was admitted in January 1743, on the death of *M. W.* her sister; and also to one other third part of a fourth part, to which she was admitted in September 1763, under the will of her sister *E. W.*, to hold to him the said *T. C. Bunbury* in fee. At the same court *Ann Hanmer*, the wife of *Walden Hanmer* (formerly *A. Graham*), was admitted to the like shares, and in like manner, as one of the heirs of *A. W.*; and at the same court the said *Erasmus W.* was in like manner admitted as one of the heirs of *A. W.*: and it was at that court found and presented by the homage, that the executors of *A. W.* paid to the lord 10*l.* 10*s.* as a composition for the heriots due on her death. At a court in October 1778, the death of *Ann Hanmer* was presented; and at a court in June 1780, *Job Hanmer*, one of the sons of the said *A. H.* and devisee in the will of the said *A. W.*, his late aunt, claimed to be admitted to all the said parts, and was admitted accordingly, the said shares amounting in the whole to one-third of the estate. At a court in July 1807, the death of the said *Erasmus W.* was presented. At a court in June 1809, *Henry Warren* was admitted as youngest son and heir to all the undivided parts to which his father the said *Eras-*

mus W. was so admitted, subject to any heriot or heriots of which his father might have died possessed, or to a composition or compositions in lieu thereof: and at a court in August 1814, the homage presented the death of the said *Job H.*, referring to his admission in June 1780 to divers shares, constituting one-third of the estate, leaving *Job H.* his youngest son and heir according to the custom of the said manor, and concluding thus, "but whether he left any heriot the court is not informed."

The above mentioned entries were relied upon, as constituting the title of Sir *T. C. Bunbury.*

Other entries upon the court roll were produced as evidence of the alleged custom for the lord, upon the death of every copyhold tenant of any heriotable tenements, to take for heriots so many of his beasts as the number of such tenements amounted to.

Sir *T. C. Bunbury* died in 1821, and was the owner of divers horses, twenty-six of which were at Barton in Suffolk. The plaintiff claimed twenty-two of the best beasts of Sir *T. C. B.* as heriots, and sent his bailiff to Barton, to take an account of the horses of Sir *T. C. B.*, and the groom delivered to him the names of twenty-five horses which were there, and of others which were at Newmarket. By agreement between the plaintiff and the executors of Sir *T. C. B.*, twenty-two of the horses which were at Barton were sold at Tattersall's: and the question for the opinion of the court was, whether the plaintiff, as lord of the manor, was upon the death of Sir *T. C. B.* entitled to more than two heriots, and if to more than two, to how many, not exceeding fourteen in the whole. It was contended for the plaintiff that he was entitled to twenty-two heriots, upon the principle established in *Attree & Scutt*, that upon the division of property into several estates, the distinct services consequent on such division would continue, although the property should be afterwards re-united; and that, as far as the interest of the lord was concerned, the estate of a coparcener stood on the same footing as that of a tenant in common. The particular attention of the court was called to the circumstance of the four daughters of *S. W.* having been admitted on their own prayer, *as tenants in common.* For the defendants it was urged, that a custom to take several heriots after the reunion of several estates, ought expressly to have appeared, which was not the fact, and that even then the custom would not avail with regard to estates held in coparcenary, and that the circumstance of the coparceners having been admitted severally was not important, as such admission did not operate as a partition; and that the result of the entries on the rolls was, that Sir *T. C. B.* died seized of his shares by descent and as a parcener; but it was admitted that under the devise by *E. W.* to *A. W.*, *A. W.* took her sister's shares as a

purchaser, and held them in common with herself and the other coparceners, so that if the dictum in *Attree & Scutt* were law, the heriots might be doubled by the devise, and two might be payable at the death of *A. W.*, but that the coparcenary as to the rest remained undisturbed, and that Sir *T. C. B.* took all the shares of his aunt as a parcener.

Ch. J. Best, in giving the judgment of the court, observed, that all the shares of the daughters of *Samuel Warner* had descended regularly to Sir *T. C. B.*, except as to the part of *E. W.*, which was devised by her to *A. W.*, and upon the death of *A. W.* without issue, passed on to her nieces, and that as to the last mentioned one-fourth share, *Erasmus W.* and Sir *T. C. B.* were coparceners, but holding under the severance made by the will of *E. W.*, so that if *Attree & Scutt* were good law, the plaintiff would be entitled to at least four heriots, but if it were not good law, then only to two heriots. His lordship then noticed that the decision in the case of *Attree & Scutt* seemed to have been founded on the authority of the case in Fitzherbert's Abridgment (*e*), which appeared to him not to be entitled to any weight, and remarked that it was a settled rule that the fines and other claims of the lord were not to be carried to such an extent as to work the disherison of the copyholder, or in other words to make the estate what the civilians call *damnosa hæreditas.* His lordship denied the authority in Fitzh., observing that there was some great mistake about it, and that probably it was the decision of a judge at Nisi Prius, that it was not to be found in Brooke, Rolle's Abridg., Viner or Comyns; and that Kitchin clearly thought it was not an authority, for he stopped short at the point at which the court in the present case stopped; he made the tenants in common, while they continued in common, to pay several heriots, but went no further (*f*).

(*e*) (Tit. "Heriots," pl. 1), viz. "If my tenant who holds of me by a heriot, alien parcel of his land to another, each of them is chargeable to me with a heriot, for that it is entire; and if the tenant purchase the land again, yet, if I were seized of the heriot by another man, I shall have of him, *for each portion*, a heriot."

It was justly observed by the Court of K. B. in the case of Holloway *v.* Berkeley, post, p. 384, that the authority of Fitzh. was the case, not of the creation of a tenancy in common, but of a severance of the estate into distinct parcels, and the alienation of one of those parcels to others. But Bayley, J., towards the conclusion of the judgment of the court in that case, said, that "whether the case in Fitzh. was a right or wrong decision, the court considered to be matter still open for discussion." Sed qu.? Vide post, pp. 383, 384.

(*f*) Ch. J. Best, in commenting on Lord Ellenborough's reliance upon the case in Fitzh. in giving judgment in the case of Attree & Scutt, further observed, "Now let us see whether there is any deference due to the authority of the case in Fitzherbert. To avoid any mistake I have copied it in the Norman French,

" If," said the learned Chief Justice, in conclusion of the judgment, " the jury had found that there was a custom of this kind within this manor, and it had been put to us to say whether the custom was good or not, perhaps we might have been of a different opinion. It is not necessary to say what our opinion would have been. There is no custom found that on a re-union the multiplied heriots are to be paid. It has been discussed as a question of law, and we

which I translate thus: ' If my tenant who holds from me aliene parcels of his land to others, every one of them will owe to me an heriot, because the heriot is entire; and if the same tenant purchases back again, I shall have two heriots from him.' And Fitzherbert says that was the opinion of Wyl and Shard; Fitzherbert does not mean to refer to the Year-Books, as Lord Ellenborough supposes, for when he does, he not only mentions the term and the year of the reign as ' Hilary, 43 Edw. 3,' but he puts a figure to denote the number of the case in the Year-Book. Here there is no figure. It is certainly not in the Year-Books which have come down to us, for looking at the Year-Books of Edward 3, they stop at the 30 Edw. 3, and they do not begin again till the 38th, so that there is no Year-Book for the 34 Edw. 3. It may be said that Fitzherbert was possessed of an edition which is not accessible to us: that is possible, but we have looked at the *Liber Assizarum*, and there is no case similar to this. The next thing I have to advert to destroys the case altogether; it is, that there were no judges living in the 34 Edw. 3, whose names answer to Wyl and Shard. The only judges I can find,—and I have looked into Dugdale, who has given us a list of the judges of the Court of Common Pleas, though not of the judges of the other courts,—the only two judges I can find who would answer the description of Wyl and Shard, are Richard De Wylughby and John De Sharden; both these were dead by the 34 Edw. 3. I find by the *Chronica series*, that there was a John De Wild, who was Chief Baron of the Exchequer in 34 Edw. 3. If he was, he never could have sat in any court of Westminster Hall with John De Sharden, a judge of the Common Pleas, for the Exchequer Chamber, in which the Common Pleas and Exchequer judges meet, did not then exist."

In the report of the case of Holloway & Berkeley, to which the author is about to refer the reader, the counsel for the defendant made the following observation, in support of the accuracy of the alleged statement in Fitz. Abr. viz., " It is true that in the printed Year-Books which have come down to us, there is a chasm from the 30th to the 38th Edw. 3, but still many manuscript notes of cases decided in the interval may have been, and probably were, at some time extant. There are other chasms in the Year-Books, and the cases decided during one of them (viz. from the 10 to the 18 Edw. 3 inclusive,) are extant in MS. in the Inner Temple library. In Statham's Digest, the earliest published, several cases are stated as having been decided in the interval between the 30 and 38 Edw. 3; and under title Heriot, the case in dispute is found. In Com. Dig. tit. " Copyhold," (K. 19), the same is adopted. Then as to Kitchen, it is true that in p. 264, (ed. 1657), he cites only that part of the case in Fitzherbert which is mentioned in 2 Bing. 301; but in p. 266, the whole case as stated by Fitzherbert and Statham is adopted, and reference is made to the latter book. Lord Coke, in stating the resolutions of the two chief justices and the Court of Wards in Bruerton's case, also refers to it; and in Talbot's case (8 Co. 208), he states that it was cited by the plaintiff's counsel. It is also adopted in Scroggs on Courts Leet, 157; and there is not in any one of these books a doubt suggested as to the accuracy of the statement in Fitz., or the propriety of the decision."

are to say whether, without any custom being found, it is the necessary legal consequence that when an estate has been divided and again re-united, all the heriots are to be paid after the re-union of the several estates, that were paid whilst it was divided; we say there is no such law, no such doctrine. Our judgment therefore is that *two* heriots only are payable, notwithstanding the tenancy in common that has intervened in the passage of this property down to Sir *Charles Bunbury*, and we are of opinion that only *two* heriots were payable on the death of Sir *Charles Bunbury*."

Park, J. " The verdict must be entered for the value of the two first heriots 158*l.* 11*s.*, and the judgment accordingly."

The case of *Holloway and another* v. *Berkeley* (*g*), (in which the Court of King's Bench also overruled the authority of *Attree & Scutt* on the particular point under consideration, although it left the case in Fitzh. unimpeached), was an action of trover for six horses, and was tried at the Hampshire summer assizes 1825, in which a verdict was found for the plaintiffs for nominal damages, subject to the opinion of the Court of B. R., whether the defendant, the lord of the manor, was entitled to twelve or only six heriots, in respect of certain copyhold tenements whereof *G. H. A.* died seized. The counsel for the plaintiffs relied on the above case of *Garland & Jekyll*, and the counsel for the defendant on that of *Attree & Scutt*.—Bayley, J., in delivering the judgment of the court, stated in substance, that in April 1812, *J. A.* died seized of certain copyholds held of the manor of Bosham, which had been formerly six tenements, having surrendered them to the use of his will, and having devised them to his two sons, *G. H. A.* and *J. A.*, as tenants in common in fee: that in August 1812, the two brothers were respectively admitted to undivided moieties, and in February 1818, *J. A.* surrendered his moiety to his brother *G. H. A.*, who was admitted thereto. In 1824, *G. H. A.* died, and the lord seized two beasts in respect to each of the six copyholds, and for the seizure of six, *i. e.* all but one on each, the action was brought. The question therefore was whether upon a tenancy in common the share of each tenement constituted *a distinct tenement*, or whether, notwithstanding the distinct *estates* of each tenant in common, the copyhold remained an entire tenement; that the custom (which was against common right, and to be construed strictly,) gave a heriot in respect of each *tenement*, and not in respect of *each estate* in a copyhold tenement of which the tenant died seized. The learned judge then adverted to Lord Coke's commentary on the 2nd chap. of the statute of *quia emptores*, in illustration of the distinction which the law contemplates between an alienation of a

(*g*) 6 Barn. & Cress. 2.

distinct parcel of a freehold tenement and the creation of a tenancy in common; and from which he deduced that in the case of freehold lands, which are within the statute of *quia emptores*, the creation of a tenancy in common leaves the services entire, and consequently must leave the tenement entire also; and if (said his lordship) this be the case in freeholds, "*à fortiori* must it in the case of copyholds," and he cited as an authority for the applicability of the principle to copyholds, Co. Cop. s. 56, p. 130; 6 Vin. 105; Kitch. 245; establishing a plain distinction between the alienation of an entire part and the creation of a tenancy in common, and observed that though the former might split one tenement into several, the latter would not. The judgment concludes thus, "The authority from Fitzh. is the case, not of the creation of a tenancy in common, but of a severance of the estate into distinct *parcels*, and the alienation of one of those parcels of his land to others (*h*). And if we are right in supposing that the creation of a tenancy in common in what was previously an entire tenement, will not destroy the entirety of the tenement, it is immaterial to consider what will be the effect of severing a tenement into distinct parcels. It does not appear from Fitzh. whether that was the case of a *copyhold* or of a *freehold* tenement, but it has been frequently noticed in subsequent cases, [6 Co. 1 a, 8 Co. 105 a; Palm. 342; Kitch. 269; Com. Dig. Cop. K. 19;] and it is a relief to us not to be called upon to impeach it. *Whether it be a right or a wrong decision, we consider a matter still open for discussion.* In *Attree & Scutt*, it may be difficult to collect from the report whether there was not a severance of the tenements so as to allot to one tenement what had previously been parcel of another; but the judgment of the court appears to have proceeded upon the ground that the creation of a tenancy in common, though there was no division or severance of the property, created distinct and separate tenements, and in that respect we think that decision wrong. *Garland & Jekyll* was a case of the creation of a tenancy in common, and upon the principle that the creation of a tenancy in common leaves the tenement entire, we think the decision in that case right. *It is not necessary for us to say what would have been our opinion had that been a case in which there had been an actual severance and division of a tenement into distinct and separate parcels, so as to have given to separate holders separate properties in severalty, and we cautiously abstain from saying any thing on that point.* Postea to the plaintiffs.

As a feme covert can have no ownership in personal chattels, it would seem that the lord shall not have a heriot on her death (*i*);

(*h*) Ante, p. 381, n. (*e*).

(*i*) 2 Bl. Com. 424, cites Keilw. 84 b; 4 Leo. 239, pl. 377.

but it is observed by Mr. Watkins (*k*), that this reasoning will not hold where she has a separate estate.

When a feme copyholder marries, the husband and wife are seized in her right, and the seizin continues in the wife, if she survive the husband; and as there is no change of tenancy on the death of the husband, no heriot will accrue to the lord (*l*).

A heriot is due in copyhold cases on the death of the husband, tenant by the curtesy, and of the wife tenant in dower, whether the curtesy or dower is of the whole or a portion only of the estate, as they respectively hold immediately of the lord in both instances (*m*); and when the widow has her freebench of a portion only of the land, a heriot will be due on the death of both the heir and widow (*n*).

But the author apprehends that if the customary heir, or the husband entitled to curtesy in the copyhold of his wife, or the wife entitled to freebench in the copyhold of her husband, where the lord could compel admission to such curtesy or freebench, should die without being admitted, no heriot would be due (*o*).

In freehold cases, however, as the heir and not the widow is the tenant to the lord, it would seem that a heriot is not due on the death of the widow (*p*).

According to the case of *Smartle* v. *Penhallow* (*q*), the lord is not entitled to a heriot on the death of an assignee of a bankrupt, but shall have his heriot on the death of the bankrupt. Since the stat. of 6 Geo. IV. c. 16, the author apprehends that a heriot would accrue to the lord in respect of copyhold land, by the death of the bankrupt before the execution of the power of sale given to the commissioners (*r*); but that the death of the bankrupt after assignees are chosen would not entitle the lord to a heriot in respect of freehold land, as the 26 sect. of the act of 1 & 2 Will. IV. c. 56, vests the freehold estates of a bankrupt in the assignees upon their appointment, without any conveyance (*s*).

A heriot is due in respect of the land, so that when a person dies seized of several heriotable tenements, a heriot must be paid for each (*t*). And in such a case it is sufficient to allege, that by the

(*k*) 2 Cop. 151.

(*l*) Co. Lit. 351 a, 185 b; Plowd. Queries, Qu. 64; 2 Watk. 151; 1 Dougl. 329; Plowd. 191 a; 2 Inst. 301.

(*m*) Ante, p. 299; Gilb. Ten. 172, 173; Chapman v. Sharpe, 2 Show. 184; 2 Watk. 154.

(*n*) See 1 Keb. 357, per Windham, J.

(*o*) See Mo. 272, in Ever v. Aston.

(*p*) Ante, p. 374. Neither does this reason hold when there is no heir; in such case therefore, perhaps, a heriot would be due; 2 Watk. on Cop. 152; Watk. on Desc. 83, n. (n).

(*q*) 2 Lord Raym. 1002, 1003; S. C. 1 Salk. 188, 189; 3 ib. 181; S. C. 6 Mod. 63.

(*r*) Ante, p. 302, 303.

(*s*) Ante, p. 303.

(*t*) Kitch. 264; Bruerton's case, 6 Co. 1; Rogers v. Birkmire, ubi sup.

custom, the lord is entitled upon the death of every tenant to have a heriot for every distinct tenement of which he died seized. So in *Syliard's* case (*u*), the defendant avowed the taking *nomine heriotorum*, &c., and laid the custom of the manor to be, "*that upon the death of every free tenant, the lord for the time being hath used to have a heriot for each parcel thus held*," and that the plaintiff's father held several parcels, &c. and died seized. Exceptions were taken, because the taking is said to be nomine heriotorum, and *not shown particularly for what*, as what he took for the one and what for the other, nor did he show *of what estate he died seized*. But it was answered that he need not do so; for the law says that he takes them for heriots, and that it is a duty presently and an interest settled, and that the showing that he took them nomine heriotorum is good, and so it was held by the court, and adjudged for the defendant, and a return awarded.

But by the custom of some manors, one heriot only is due on the death of a person who dies seized of several distinct copyholds (*x*).

When a heriot is due on alienation, it is capable of being multiplied by the disposition of a portion either of the interest in the land or of the land itself, and consequently the alienor would be liable to a heriot in respect of the reversion in the former case, and of the land he should retain in the latter (*y*); and after alienation of any part of heriotable lands, separate heriots would be payable, although the lands should again unite in the same person (*z*).

It is clear that heriot service would be extinguished by the lands uniting with the manor, either by purchase or escheat, as it is a service annexed to the land; but if the custom of the manor be that upon the death of every tenant of the manor the lord shall have a heriot, although the lord purchase part of the tenancy, yet he shall have a heriot by the custom for the residue; for the tenancy remains, and the custom extends to every tenant: and it would seem that in the case of heriot custom, if the lord re-granted the lands, they would still be liable to a heriot, although it be entire and not annual (*a*).

(*u*) 1 Bulst. 101; 14 Vin. 301, pl. 9; 2 Nels. Abr. 931, pl. 7.

(*x*) This the author has understood is the custom of the manor of Eardisley Foreign, in Herefordshire, and of Lowden Leighton, in Kent; and see 2 Watk. on Cop. 155, n. (i), 278, 298. Customs of Mayfield and Framfield, Kitch. 265.

(*y*) Bruerton's case, 6 Co. 1; Talbot's case, 8 Co. 105; Chapman *v.* Pendleton, 2 Brownl. 293; H. 34 Ed. 3; Fitz. Har. 1; Kitch. 264, 266; 2 Watk. on Cop. 159; Baker *&* Berisford, 1 Keb. 357; and see Attree *&* Scutt, 6 East, 483; S.C. 2 Smith, 449.

(*z*) Kitch. 265; Talbot's case, sup.; Fitz. Har. 1, H. 34 Ed. 3; 2 Watk. on Cop. 160; and see Attree *&* Scutt, Garland *&* Jekyll, Holloway *&* Berkeley, ubi sup.

(*a*) 14 H. 4, f. 8; 8 H. 7, f. 11; Kitch. 264; 14 H. 4, 5; Bro. "Hariots," 8; Bruerton's case, Talbot's case, Chapman *v.* Pendleton, sup.; Gilb. Rents, 171; 2 Watk. on Cop. 160, 161; Co. Lit. 149 b; Com. Dig. Cop. 519 (K. 23.)

When the heriot is the best beast or good, the property in such beast or good is in the lord immediately on the death of the tenant (*b*), or on the alienation, (when by the custom a heriot is due on alienation :) and the lord will be bound by his election, although he should not take the best beast of which the tenant was possessed (*c*).

It behoves the lord to seize immediately after the heriot accrues, as his right would be concluded by a *bonâ fide* sale made by the executors in market overt, by which the property in any goods so sold is altered (*d*). But it should seem that in the case of a horse, the provisions of the acts of 2 P. & M. c. 7, and 31 Eliz. c. 12, (and see more particularly the 2d sect. of the latter stat.) must be complied with.

And the author apprehends that after the lapse of a great length of time, a *bonâ fide* purchase of the horse or other chattel liable to be seized as a heriot, made in ignorance of the lord's right, would be protected, in equity at least, from the fair presumption of the lord's having waved his right by neglecting to assert it (*e*).

But the right of the lord to his heriot is not to be defeated by devise (*f*); and by 13 Eliz. c. 5 (*g*), all gifts, &c. made expressly "to the end, purpose, and intent to defraud the lord of his heriot," are, as against him, his heirs, executors, &c. declared to be void; but the fraudulent intent must be proved by the lord (*h*).

The seizure must be of the best beast belonging to the tenant at the time of the death or alienation, and it will be a good plea in avowry, that the property was not in the tenant at that period (*i*).

(*b*) Bro. tit. "Hariots," pl. 2; 38 Ed. 3, f. 7; Kitch. 263, 264; 2 Bl. Com. 424; Plow. 96; 2 Watk. on Cop. 162; 3 Mod. 231, in Osborn & Steward; post, 388, n. (*u*); and see Abington *v.* Lipscomb, post, 389.

(*c*) Odiham *v.* Smith, Cro. Eliz. 590; 18 H. 7, 5; Bro. tit. "Hariots," 11; and see Hob. 60.

(*d*) 16 E. 3; Fitz. Har. pl. 2; Kitch. 265; 2 Inst. 713; 2 Bl. Com. 450; Horwood *v.* Smith, 2 T. R. 755; Gimson *v.* Woodfall, 2 Car. & Pa. 41; Peer *v.* Humphrey, 2 Adol. & Ell. 495.

(*e*) But Kitch. 265, says, "If one which holds by heriot service to pay the best beast dies, and hath a cow at the time of his death, which is the best, though that the executors sell that, the lord may seize that in the hands of him to whom she is sold, if the sale be not in an open market, and not there if without fraud; 16 Ed. 3; Fitzh. 2."

(*f*) See Co. Lit. 185 b, where it is said that the heriot shall be paid before the mortuary, which Mr. Just. Blackstone denominates a sort of ecclesiastical heriot; 2 Com. 425; vide also Fleta, lib. 2, c. 50; Bract. lib. 2, f. 60; Britt. f. 178; Kitch. 264; 1 Ca. & Op. 219.

(*g*) By the 2d sect. of that act, the party to such fraudulent gift, &c., forfeits the whole of the goods and chattels so disposed of, one moiety to the crown, and the other to the party grieved by such feigned and fraudulent gift, &c.

(*h*) Tyre *v.* Littleton, 2 Brownl. 187; and see 10 Co. 56 a and b; 2 Leo. 8; 2 Ves. 397; 2 Watk. on Cop. 169, 170.

(*i*) Kitch. 267; Gilb. Dis. 146.

And it should seem by the case of *Trinity College, Cambridge*, v. *Browne* (*k*), that a bill will lie in equity for the discovery of the best beast. Yet a court of equity is slow to interpose to enforce an alleged customary right to a heriot. In the case of *Wirty* v. *Pemberton* (*l*), which was a bill to establish a custom entitling the lord to heriots from his freehold tenants upon every alienation or death, and the tenants by making long leases deprived the lord of his heriots, the Lord Chancellor refused to assist the lord, as there did not appear to be any trust, and observed that the custom of heriots was unreasonable, the loss a family sustains thereby being aggravated.

The lord of necessity loses his heriot if the tenant at the time of his death or alienation have no beast (*m*); yet if the executor deliver his own beast, it is thought that he cannot afterwards say it was not the beast of the deceased tenant (*n*).

As the heriot is an entire service or render, and incapable of being divided (*o*), it should seem that the lord will be defeated of his heriot, if the tenant have a partnership interest only in the beast claimed (*p*).

The heriot of the best dead good is confined to a personal chattel, and is no charge on the land any more than a relief (*q*), or a fine on admission to copyholds (*r*).

Heriot custom may be seized by the bailiff or other officer of the manor for the lord's use (*s*), wherever it may happen to be found, whether upon or in any place out of the manor (*t*); and if it be eloigned the lord may have trover or detinue for it, for the law adjudgeth possession in him without seizure (*u*); but he cannot break open a stable,

(*k*) 1 Vern. 441. But not for the discovery whether this or that person is most able to answer the heriot; Lord Montague v. Dudman, 2 Ves. 399.

(*l*) 2 Eq. Ca. Abr. 279.

(*m*) Shaw v. Taylor, Hut. 4, 5; S. C. Hob. 176; Carter, 86; Kitch. 264; and see 2 Watk. on Cop. 166, n. (n), 2d ed.

(*n*) 2 Watk. on Cop. 167, cites Mich. 7 Ed. 3, pl. 26, fol. 50, 51.

(*o*) Bruerton's case, 6 Co. 1; Talbot's case, 8 Co. 105; Kitch. 264.

(*p*) 2 Watk. on Cop. 166, n.

(*q*) Co. Cop. s. 24, Tr. 24; 2 Bl. Com. 424; Fitz. "Avowrie," 233; Bract. lib. 2, c. 36, s. 9, f. 86 a; Fleta, lib. 3, c. 18, f. 212; Britt. c. 69; but see Hill. 8 H. 7, 10 b, 11 a, cited contra as to heriot service, 2 Watk. Cop. 142, n. (e).

(*r*) Ante, p. 356.

(*s*) Fitz. Har. 5; 2 Watk. on Cop. 166, cites Termes de la Ley, tit. "Hariot." And it has been said that even a stranger may seize to the use of the lord; 2 Watk. on Cop. 166, cites per Keble, P. 2, H. 7, 1, f. 15 b; 2 Watk. on Cop. 166.

(*t*) Kitch. 264, 265; 2 Inst. 131, 132; Gresham v. Gainsford, Bendl. 18; 2 Nels. Abr. 931; Parker v. Gage, 1 Show. 81; Austin v. Bennet, 1 Salk. 356; 3 Salk. 333; 2 Roll. Rep. 208; Keilw. 84 b. So also as to heriot service founded on ancient tenure: but *suit heriot*, or heriot reserved by deed at this day, could not be seized off the manor. Ante, pp. 372, 373.

(*u*) Kitch. 263, 267, cites 13 Ed. 3; Bro. tit. "Hariots," 9; Co. Cop. s. 31, Tr. 44; 3 Bac. Abr. 491; ante, p. 372.

nor even enter on the land of a stranger, unless the beast or other chattel be stolen (*x*). And if the lord does not make a legal choice, there is no conversion, as if the lord being entitled to five beasts, claims and marks seven, so that the demand would be referrible to the whole seven, and not to any five (*y*).

The action of trover or detinue seems to be the lord's best remedy in all cases where a seizure cannot be made; but in case of a disputed claim to a heriot of the best beast, and a sale of the deceased tenant's horses, by convention of the lord of the manor and the personal representatives of the tenant, without prejudice to the rights of the parties, an action of assumpsit would be the proper remedy (*z*).

And when the lord is deprived of his heriot by a fraudulent conveyance, he may have an action *qui tam*, under the third sect. of 13 Eliz. c. 5, and shall recover the value of the heriot, if not the moiety of the value of the whole of the chattels which may have been fraudulently conveyed (*a*).

The above case of *Creswell & Coke* was an action of debt upon the second clause of the stat. of 13 Eliz. for the value of thirty horses given by a deceased customary tenant to the defendant, with the intent, as alleged, to defraud the plaintiff and other lords of their heriots; and Mounson, J., held, that the plaintiff should recover the whole two hundred marks (the value of the thirty horses), although defrauded of one heriot only: but Dyer, C. J., and Manwood were of opinion that the plaintiff should recover the value of one of the horses only. Barham, Serj., contended that the fraud extended to all the horses, as the plaintiff was to have the choice of all "which he would take for the best beast," and that by the fraudulent gift he was defrauded of his election. The report of this case concludes thus: "But Dyer and Mounson said to the Serjeant, set a price upon any of the thirty horses as the best horse in your election, and demand the value of that horse as forfeit by the statute, and then your election is saved to you."

As the heriot must be of the beast of the tenant, it follows that the lord cannot *seize* the beast of a stranger, *levant et couchant* on the lands, not even by a special custom, because that thereby the

(*x*) 2 Roll. Rep. 56, in Higgins v. Andrews; 3 Bl. Com. 4.

(*y*) Abington v. Lipscomb, 1 Adol. & Ell. N. S. 776; 1 Gale & Dav. 230.

(*z*) Garland & Jekyll, ubi sup.

(*a*) Creswell & Coke's case, 2 Leo. 8; S. C. Dy. 351 b; Hut. 4, in Shaw & Taylor. If the alienor held lands of several lords, each of them, as it would seem, might have an action *qui tam* on the statute, to recover according to his grievance, Lex Man. 114; and this is an argument against the lord's right to recover more than the value of the heriot, under the action *qui tam*; but see 2 Watk. on Cop. 170, 171.

property is altered (*b*), but the person replevying must show that it was not the tenant's beast (*c*).

And when no heriot is due, and the lord seizes, the owner may replevy or have an action of trover or trespass (*d*).

Where a plea of justification in trespass for taking two horses as heriots stated a custom that the lord of the manor for the time being, from the time whereof, &c. *until the division into moieties* of a certain tenement, had taken upon the death of every tenant dying seized *in respect of such tenement*, and *since the said division* had taken after the death of every tenant dying seized of the said moieties or either of them *in respect of each such moiety*, one of the beasts, &c., and it appearing in evidence at the trial that the division of the tenement was made since the time of legal memory, a question arose upon the construction of the plea, whether it confined the division of the tenement to time beyond legal memory or not. A verdict was taken for the defendants by direction of the judge, Mr. B. Thomson, on this as well as upon certain other pleas, and for the plaintiffs upon the rest, with liberty for the plaintiffs to move to enter a verdict for them on the issue in question. A rule nisi was granted for this purpose by the Court of King's Bench, and the counsel for the defendants, in showing cause against the rule, contended that the evidence supported the substance of the plea, which did not necessarily import that the division of the tenement was before the time of legal memory, but it might be read either way. The court, however, (stopping the counsel in support of the rule) observed, that the whole was stated as one immemorial custom, which was disproved by showing the division to have taken place within time of memory; and therefore made the rule absolute (*e*).

It was decided in the case of *Parkin* v. *Radcliffe* (*f*), that evidence of a custom for the homage to assess a certain sum of money as a heriot, and that such assessment had always been made with reference to the bsst chattel of the tenant, would not support an avowry for a heriot in kind. And when by the custom of the manor the homage find that a particular animal or chattel is due to the lord for a heriot,

(*b*) Wilson *v.* Wise, Mo. 16; S. C. Bendl. 39; Lyne or Pyne *&* Bennet, Benl. & Dal. 302; Henley *v.* Taylor, ib. 77; S. C. Bendl. 39; Parker *v.* Combleford, Cro. Eliz. 725; Parton *v.* Mason, Dy. 199 b; 2 And. 153; 2 D'Anv. 427, pl. 6; Thorne *v.* Tyler, Mar. 165; 5 Mod. 115; Lex Man. 116; 2 Watk. on Cop. 166. But see 27 Ass. pl. 24. And note that a custom to *distrain* the cattle of a stranger for a heriot, is a good custom, because the distress is only as a pledge and means to gain the heriot; Thorne *&* Tyler, sup.; Major *v.* Brandwood, Cro. Car. 260; ante, p. 370.

(*c*) Jordan *&* Martin, 1 Mod. 63.

(*d*) Bishop *v.* Viscountess Montague, Cro. Eliz. 824; S. C. Cro. Jac. 50; 2 Watk. on Cop. 167.

(*e*) Kingsmill *v.* Bull, 9 East, 185.

(*f*) 1 Bos. & Pul. 282, 393; ante, p. 372.

and assess the value of it, the author apprehends that such finding negatives the right of the lord to the animal or chattel in specie. In the above case of *Parkin & Radcliffe*, Eyre, C. J., said, "The entries in question tend to show that no heriot in kind is due, even in the case of descent, but a pecuniary payment only. Whether the jury in estimating the sum to be paid refer to the value of the best chattel, or whether they assess a sum in gross, it is equally clear that the lord receives nothing in specie. The right of the tenant to have a sum assessed in lieu of the chattel is inseparable from the right of the lord; the right of the latter, therefore, is not an absolute right to the chattel, but to something to be commuted for it by the jury."

And in the case of *Adderly* v. *Hart* (*g*), the lord of the manor justified under a custom that he should have the best beast on the tenant's death, but the custom proved was, that the lord should have the best beast *or good*, &c., and the variance was held fatal by the whole Court of C. B.; and the reason that you cannot avow for a heriot generally is, that the plaintiff would otherwise be ousted of his plea in bar, that the tenant left no beast (*h*).

We have seen (*i*) that when the husband is seized of the manor in right of his wife, it is essential to the validity of a grant of copyholds that it should be made in both their names; and it follows, that the husband could not proceed by seizure or distress for the recovery of a heriot in his own name only, but that if put to avow, they must make title through the wife, and those under whom she claims, and then allege the marriage, and that the entry and seizure or distress were made by the husband and wife, in her right, and so justify.

(*g*) Tr. 4 Geo. 1, 1 Bos. & Pul 394, n. a. And see Griffin *v.* Blandford, Cowp. 62; Supp. Vin. Cop. (P. 2) pl. 6.

(*h*) Gilb. Dis. 146. And see Shaw *v.* Taylor, Hut. 4; Hob. 176; Major *v.* Brandwood, Cro. Car. 260.

In replevin, as well as in trespass, if the defendant avows or justifies for *heriot custom*, he ought to allege the seizin of himself and the tenant, the custom for a heriot, the death of the tenant and seizure of the heriot; Co. Ent. 613; Baldwin *v.* Noaks, 2 Lutw. 1309, 1310. And it is not sufficient to allege a custom to take the best beast, without saying "for a heriot," or "in the name of a heriot," Parton *v.* Mason, Dy. 199 b; Parkin *v.* Radcliffe, 1 Bos. & Pul. 282; 2 Watk. on Cop. 168 n. And see also as to avowry for heriots, 9 Wentw. Plead. 279; Wilk. Repl. 59; Com. Dig. Cop. (K. 27.)

(*i*) Ante, p. 92; 1 Ca. & Op. 216, 217.

CHAPTER IX.

Of the Steward's Fees (a).

THE steward's fees, like the lord's fine on admittance, are established by custom (*b*), and vary in almost every manor.

(*a*) The *commutation* and *enfranchisement* act (4 & 5 Vict. c. 35), besides the provisions as to the duties and powers of stewards of manors referred to ante, tit. "Of the Office and Power of the Steward, &c." p. 109, n. (*y*), contains the following enactments with regard to the fees attached to the stewardship of a manor.

The 14th sect., prescribing the terms of agreements for a commutation of the rents, fines and heriots, in respect of lands held of the manors respectively, and of the lord's rights in timber, (and extending, if expressly so agreed, but not otherwise, to the lord's rights in mines and minerals,) enacts as follows,—"and such agreement may fix a scale of fees to be payable to the steward from and after the confirmation of the apportionment, but so nevertheless as not to affect the interests of any steward in office at the time of the passing of this act, who shall hold his office for life, or during good behaviour, or of any steward of a manor so in office as aforesaid, where the usage shall have been such as, in the opinion of the said commissioners, to lead to a just expectation that the steward will hold his office during his life or good behaviour."

By the 52 sect., empowering the lord and any tenant or tenants to effect a voluntary commutation of rents, fines, and heriots, &c., with an apportionment in the agreement of the rent-charge or other consideration, and of the costs and expences, and fixing a scale of fees to be payable to the steward after the confirmation of the agreement, it is thus enacted, "but so nevertheless as not to affect the interests of any steward in office at the time of the passing of this act, who shall hold his office for life or during good behaviour, or of any steward of a manor so in office as aforesaid, where the usage shall have been such as in the opinion of the said commissioners to lead to a just expectation that the steward will hold his office during his life or good behaviour."

The 56 sect., authorizing lords and tenants to make voluntary enfranchisements, enacts as follows, viz. "And where any compensation shall have been agreed to be paid to the steward or other officers of the manor for the loss he or they may sustain by such enfranchisement, which compensation shall in all cases be provided for where a steward shall hold his office by patent or other instrument for the term of his life or during good behaviour, or where, in the absence of such patent or other instrument, the usage shall have been such as in the opinion of the said commissioners to lead to a just expectation that the steward will hold his office during life or good behaviour, the schedule shall contain an apportionment of the sum agreed to be paid."

And by the 89 sect., requiring that every surrender and deed of surrender to be accepted by the lord, and every will and codicil, a copy whereof shall be delivered to the lord, or the steward or his deputy, either at any court to be held without the presence of homagers, or out of court, and also every grant and admission by the lord, or the steward or his deputy, pursuant to the act, should be forthwith entered on the court rolls of the manor, it is enacted thus, "And the steward, or his deputy, shall be intitled to the same fees and other charges for making such entry on the court rolls, as he would have been entitled to in respect of such entry, in case the same had been made in pursuance of a presentment made at a court holden for such manor by the homage assembled thereat." Ante, p. 102, n. (*f*).

(*b*) Sir Edward Coke, in his copyholder, s. 33, Tr. 61, in dilating on customs, says

A custumal of the fees taken, both in and out of court, on the surrender, and other acts connected with the transmission of the copyhold property within the manor, is generally handed down from steward to steward; but it frequently happens that no such evidence of ancient usage has been preserved, and then it has been erroneously supposed that the amount of the fees is in the discretion of the steward, from whence it would follow, that if the fees which have been usually paid are not consonant with the cravings of an extortionate mind, the steward has only to destroy any evidence which he may possess of the charges made by his predecessors, and substitute a more extravagant table of fees.

But as it is the practice for the steward to deliver a bill of fees to every copyholder upon his admission, and for all subsequent acts of customary assurance, the author cannot imagine that there would be any difficulty in proving the ancient usage as to fees in every manor throughout the kingdom; and where documents of this nature should not be produced in evidence, the steward could only recover such fees, in an action at law, as he might show by collateral evidence to be reasonable.

When the charges made and insisted upon by the steward are deemed exorbitant, the copyholder may bring an action on the case to recover back the excess; and it has been suggested that an indictment would lie for extortion *colore officii* (*c*).

It has been a prevailing notion, that the established customary fees of whatever nature are to be paid in respect of each separate copyhold, even if estates held under distinct titles are inserted in one copy (*d*), and the case of *Searle* v. *Marsh* (*e*) has been considered as

"Customs and prescriptions ought to be according to common right, and therefore if the lord will prescribe to have of every copyholder belonging to his manor, for every court he keepeth, a certain sum of money, this is a void prescription, because it is not according to common right, for he ought for justice sake to do it *gratis*; but if the lord prescribe to have a certain fee of his tenants for keeping an extraordinary court, which is purchased only for the benefit of some particular tenants, to take up their copyholds and such like, this is a good prescription, and according to common right."

It has been decided that by custom, a steward, or his deputy, may have the sole right of preparing all surrenders of copyhold estates within the manor; Rex v. Rigge, 2 Barn. & Ald. 550; ante, pp. 24, 25.

(*c*) 1 Ca. & Opin. 233. The reader will find several opinions on the reasonableness of fees, ib. p. 223 to 233.

Vide 1 Jac. 1, c. 5, for preventing overcharges by stewards of Courts Leet and Courts Baron.

The fees of the steward of a manor, who is a solicitor, but acts in the character of steward only, are not taxable under the 37th sect. of 6 & 7 Vict. c. 73; Allen v. Aldridge, 5 Beav. 401.

(*d*) A surrender to uses of particular lands will sometimes operate as an act of severance, to entitle the lord and steward to separate fines and fees; ante, p. 352, n.(*h*).

(*e*) B. R. Hil. 29 G. 3.

an authority for the proposition; but it is clear from the decision of the Court of Common Pleas in the case of *Everest* v. *Glyn* (*f*), that, when no special custom exists, the steward cannot charge a distinct set of fees on an admission by one copy to several distinct copyholds; and the Court held in that case that the steward could only recover fees in respect of each tenement beyond the first, upon a *quantum meruit*, although he had prepared a separate admission to each distinct copyhold with the sanction of the defendant, who was the devisee of his father, the last tenant. And it would seem that the above case of *Searle* & *Marsh* was decided by Lord Kenyon upon evidence of usage, (*g*) and that without usage, it would have stood on a *quantum meruit* (*h*).

And when by the custom of the manor distinct fees are payable in respect of each separate tenement, the custom, the author apprehends, if resting on such general and undefined terms, would be held to extend only to the fees payable on surrender and admittance, and not to the fees for presentment of a death, or for proclamations, or the like (*i*); nor could a steward have justified a demand of distinct sets of fees on suffering a recovery of distinct copyhold tenements, as it was clear that the whole might have been included in one plaint (*k*).

And the author apprehends that persons entitled to copyhold lands as tenants in common in tail might have been jointly vouched in a customary recovery (*l*), and that they might therefore have insisted on joining in a surrender to a tenant to the plaint, for the purpose of suffering one recovery only of their several undivided shares.

But when a copyhold is held in undivided shares, each share is a separate copyhold, for which a distinct set of fees may be demanded, if by the established custom of the manor the steward is entitled to a separate set of fees in respect of each distinct tenement. It was so decided in the case of *Attree* & *Scutt* (*m*), which was an action brought by the steward of the manor of Brighthelmston and Atlingworth in Sussex for bills of fees, tried at Lewes Summer Assizes, 1804. The defendant paid a sum into court, and there was a verdict for the plaintiff, subject to the opinion of the Court of King's Bench on a case reserved, which was in effect, whether on a sale by one of two tenants in common of part of five distinct copyhold tenements, after

(*f*) 6 Taunt. 426; S. C. 2 Marsh. 84.

(*g*) See 1 Ca. & Opin. 227, 228.

(*h*) 6 Taunt. 429, (in Everest & Glyn).

(*i*) Everest & Glyn, 6 Taunt. 427, 429, 430; 1 Ca. & Opin. 232.

(*k*) 8 Co. 47 b, 48 a, in Webb's case. Ante, p. 139.

(*l*) See 1 Prest. on Convey. 168 et seq.

(*m*) 6 East, 476; S. C. 2 Smith's Rep. 449. But I have shown that this case has been over-ruled, as far as regards the effect of a re-union of the undivided shares of heriotable land; Garland & Jekyll, Holloway & Berkeley, ante, p. 378.

a partition between them and their admittance to the lands allotted in severalty, the steward could demand ten distinct sets of fees, viz. five sets of fees for the moiety which the copyholder took by devise, and five for the moiety which he took by the surrender under the partition; and Lord *Ellenborough*, (after observing that there was no privity between tenants in common, who hold by several titles, and shall do several services (*n*), and that one of the arguments by Lord Holt, in *Fisher* & *Wigg* (*o*), against construing a surrender to A., B., and C., equally to be divided between them, as creating a tenancy in common, was, according to the report in Peer Williams, that by such a construction, instead of one copyhold estate and one fine and single service, there would be five several copyholds, and as many fines and services,) held that the tenements must be considered as distinct for the purpose of the steward's demand, which was consequent upon the right of the lord to several services, and the necessity of several admittances to the several tenements.

But although this multiplication of fees in favour of the steward is unquestionable, yet it is but an act of justice to say, that it is a very general practice to compound the fees, when, from the subdivision of the property, as among tenants in common, an enforcement of the strict right would be a serious hardship to the copyholder (*p*).

It has been doubted whether the steward is not entitled to distinct fees on the admittance of coparceners; but as one fine only is payable by them, so the author apprehends only one set of fees can be claimed by the steward, unless indeed it should be arranged for the coparceners to be admitted separately to their respective undivided shares, and then of course a distinct set of fees might be charged for each distinct admission; but as no convenience could result from such an arrangement (*q*), it is probably one of very rare occurrence.

It may be urged, that the interests of coparceners, in connection with the above question as to fees, are more to be assimilated to the interests of tenants in common than of joint-tenants, and therefore that, where by the custom a distinct set of fees is payable in respect of each distinct tenement, separate fees may be demanded as of tenants in common—but it is to be recollected that one fine only is payable on admission in coparcenary, and that coparceners, though they transmit distinct estates on death, come in to one entire feud, and may at common law release privately to each other as joint-tenants may do, and which tenants in common cannot.

This question, however, is considered to have been set at rest by

(*n*) Ante, pp. 297, 348.
(*o*) Ante, p. 149 et seq.
(*p*) 1 Ca. & Opin. 230.
(*q*) The author apprehends that separate admissions would not affect the title of coparcenary; ante, p. 297.

the case of *The King* v. *The Lord of the Manor of Bonsall* (*r*), where C. J. *Abbott* said, "As to the question whether coparceners are entitled to be admitted as one heir, as at present advised, I think that the lord is bound to admit them as one heir, and on the payment of such fees as ought to be paid by a single heir."

(*r*) 3 Barn. & Cress. 176; S. C. 4 Dow. & Ry. 825. Note:—As a caution to stewards to avoid unnecessary delay in preparing and delivering to the proper parties copies of surrenders, admittances, and voluntary grants, and licences to demise, made in court, the author thinks it right, in conclusion of the present chapter, to notice, that it is doubtful whether a steward who has made out copies, but neglected to deliver them conformably to the 33rd section of the 48 Geo. 3, c. 149, when called for after the expiration of four calendar months, and if not called for, then to the bailiff or the crier of the court, or some copyhold or customary tenant of the manor, for the use of the parties entitled thereto, at the next general court, could maintain an action for his fees in respect of them. But where the copies were delivered to a person who filled an equivocal character as between the steward and the tenant, the court of King's Bench held such delivery to be substantially a compliance by the steward with the provisions of the act; Underwood *v.* Woodhouse, 1 Law Journ. Rep. (N. S.) 219.

CHAPTER X.

Of Guardianship.

We have seen that, by special custom, the lord may be entitled to the profits of the land of an infant copyholder, or may assign the guardianship to whom he pleases (*a*).

But when no such custom exists, the wardship of the infant belongs of right to the guardian in socage, which means the next of kin of such infant to whom the copyhold cannot descend (*b*), so that when there is any peculiar custom as to descent, the socage guardian, by possibility, may not be entitled to the wardship of the infant copyholder.

It must be recollected, that it is a moot point whether the father can appoint a guardian to his child as to copyhold lands under the statute of Charles the Second, when there is no special custom authorising the lord to take the profits, or appoint a guardian to the infant copyholder, though the better opinion is that the father has that power (*c*); and it is also to be recollected, that the guardianship of such infant ceases at fourteen, though, by the custom of some manors, it continues till fifteen, and even perhaps until one-and-twenty (*d*).

If neither the infant nor his guardian appear after personal notice, or after three proclamations made at three consecutive general courts (*e*), the lord may seize *quousque*; but an infant, even before the statute of 9 Geo. I. c. 29, was not bound by a custom that the lands might be seized as forfeited for non-appearance (*f*); and by infancy in this particular case, the author apprehends, is meant the whole minority of the heir, and not that portion of it only during which the heir is in ward.

And by the statute of 1 Will. IV. c. 65, repealing and amending the act of 9 Geo. I., if an infant, whether claiming by descent or surrender to will, or otherwise (*g*), does not appear to be admitted, either in person or by guardian, after the customary proclamations, the lord

(*a*) Ante, p. 53.

(*b*) Egleton's case, 2 Roll. Abr. 40, Gard. (P.) pl. 1; Keilw. 186 a, pl. 1; Co. Cop. s. 59, Tr. 136; Co. Lit. 88 b, n. 12 and 13; Gilb. Ten. N. 172; Com. Dig. Cop. (E.); Plow. 297. See the cases, ante, p. 66, n. (*z*.)

(*c*) Ante, pp. 83, 89. And see Keilw. 186 a, pl. 1.

(*d*) 2 Watk. on Cop. 109, 110; Wade v. Baker & Cole, 1 Lord Raym. 131.

(*e*) Ante, p. 286.

(*f*) Ante, p. 288.

(*g*) Ante, p. 289.

may appoint a guardian or attorney to the infant for the purpose of such admittance and for the recovery of the fine, in the manner prescribed by the act.

The guardian of an infant copyholder is accountable to the infant in like manner as a socage guardian in freehold cases, except indeed in the instance of a special custom entitling the lord to the profits of the copyhold tenement during the minority of the infant (*h*).

The author apprehends that the personal service to the lord of suit of court must be performed by the infant, and not by the guardian, it being in all cases the infant, and not the guardian, that is admitted (*i*); but that an infant is excused from services until the age of fourteen, and that neither the infant nor his guardian can be called upon to do fealty (*k*).

The interests of the infant copyholder cannot be affected by the acts of the guardian; but if the guardian commit waste, or neglect the duties of his office, he shall forfeit the wardship.

Those duties we are told by Mr. Watkins (*l*) are twofold. In the first place, he observes, it is his province to cultivate and manage the lands as may be most advantageous for the infant; and for this purpose (he adds) he may make such a lease as is warranted by the custom, so it exceed not the minority of the ward, and also maintain debt for the arrears of rent (*m*).

In the next place, says Mr. Watkins, he is to render such returns to the lord as a copyholder may render by another (*n*). He must pay the rents and perform the rustic or agricultural services, as to plough the lord's land, to reap or gather in his corn, &c. (*o*).

Neither a guardian in socage, nor a guardian appointed under the statute of Car. II. (*p*), nor a guardian of a copyholder appointed by the lord of the manor pursuant to a special custom (*q*), take any interest of profit in the land of the infant, but an interest only to the use of the infant (*r*); and, consistently with this rule, a lease granted by a guardian in socage would become void on the determination of the minority of the ward (*s*).

But it should seem that a grant of copyholds by the guardian in socage of an infant lord (*t*) in his own name is good (*u*).

(*h*) See 1 Leo. 266, Ca. 357; ante, p. 53.

(*i*) Ante, p. 290.

(*k*) Ante, pp. 361, 364.

(*l*) 2 vol. on Cop. 105, 106.

(*m*) For which Mr. Watkins cites Sowper *v.* Goodbody, Dy. 303 a, marg.

(*n*) Calth. 51, 52.

(*o*) Ante, p. 361.

(*p*) Ante, pp. 83, 89.

(*q*) Ante, p. 83.

(*r*) Bedell *v.* Constable, Vaugh. 183; Osborn *v.* Carden & Joye, Plow. 293; Keilw. 186 a, pl. 1.

(*s*) Roe *d.* Parry *v.* Hodgson, 2 Wils. 129, 135. And see 1 Lord Raym. 131; Vaugh. 182. But see 3 Bac. Abr. 414, (G).

(*t*) i. e. a lord under the age of fourteen years, see ante, p. 91; Appendix, "Precedents of Court Rolls," (the first note).

(*u*) Shoplane *v.* Roydler, Cro. Jac. 55,

And it is clear that a guardian in socage has more than a mere naked office or authority, for he may maintain trespass and ejectment, and avow for damage feasant (*x*). And it was held in the case of *Coles* v. *Walles* (*y*), that a guardian appointed by the lord, pursuant to a special custom, might maintain an action upon the case in the nature of an ejectione custodiæ.

98, 99; 14 Vin. 186, pl. 9; Wade v. Baker & Cole, 1 Lord Raym. 131.

(*x*) Brisden v. Hussey, 2 Roll. Abr. 41, (Q.) pl. 4; Dy. 302 b, pl. 46; Shoplane & Roydler, Wade v. Baker & Cole, Osborn v. Carden & Joye, Bedell & Constable, sup.; The King v. The Inhab. of Oakley, 10 East, 494, 495.

(*y*) 1 Leo. 328; S. C. (called Cole v. Wall & Burnell), Cro. Eliz. 224; 2 Roll. Abr. 41. See further as to the office of guardian, 14 Vin. 186, pl. 10, and marg.

It was decided in the above case of The King v. The Inhab. of Oakley, that a guardian in socage, residing on the ward's estate for forty days, gains a settlement in the parish, being irremovable from the property during the guardianship; and see Rex v. The Inhab. of Wilby, 2 Mau. & Selw. 504. But a guardianship in socage exists only in the case of a legal estate, and where the heir takes by descent; Rex v. The Inhab. of Toddington, 1 Barn. & Ald. 560.

A trustee or mortgagee of copyholds, if admitted and in possession, may gain a settlement by forty days' residence; see Rex v. Inhab. of Stone, 6 T. R. 295; Rex v. Oakley, ubi sup.; 2 Nolan, 85, 105.

A purchaser, where the consideration is under 30*l.*, cannot gain a settlement by forty days' residence on the property; 9 Geo. 1, c. 7, s. 5. And yet he is irremovable; Rex v. Martley, 5 East, 40. Nor can the expences paid to the attorney for the surrender be taken as part of the consideration, so as to bring the purchase within the 9 Geo. 1, and to constitute a settlement; Rex v. The Inhab. of Cottingham, 1 Man. & Ry. 469. See also as to gaining a settlement by the purchase of a copyhold tenement within the stat. 9 Geo. 1, Rex v. Inhab. of Warblington, 1 T. R. 241, (ante, p. 18); Rex v. Mattingley, (Inhab.) 2 T. R. 12; Rex v. Chailey, (Inhab.) 6 ib. 755; Rex v. Horndon on the Hill, (Inhab.) 4 Mau. & Selw. 565; Rex v. Hornchurch, (Inhab.) 2 Barn. & Ald. 189; 2 Bott, 564 et seq.; Rex v. Inhab. of Hatfield Broad Oak, 3 Barn. & Adolp. 566.

In The King v. The Inhab. of Long Bennington, 6 Mau. & Selw. 403, the Court of B. R. held that the possession of a copyhold house under a parol agreement for the purchase, part of the purchase money having been paid, and the contract afterwards rescinded, did not confer a settlement. See further as to the kind of estate which is required to confer a settlement, 2 Bott, 490 et seq.; ante, p. 73, n. (*s*); vide also Rex v. Ardleigh, 2 Nev. & Per. 240.

CHAPTER XI.

Of Trust Estates.

THE author proposes to divide the subject of our present consideration under the three distinct heads of Trusts Executed, Resulting Trusts, and Executory Trusts.

TRUSTS EXECUTED. (*And herein of contingent remainders, and of the lord's recognition of trusts.*)

Copyholds we have seen are not within the statute of uses (*a*), but if a surrender be made by *A.* to the use of *B.* in trust for *C.*, the legal estate will remain in *B.* according to the express terms of the surrender, and *C.* will take no interest except in equity; and although no trust should be expressed in the surrender, the copyholder, as between himself and any other person except the lord, may by a separate instrument so model the usufructuary interest, as to meet all the purposes of convenience or caprice, yet so only that the equitable interest (as far as the lord would be compellable to give effect to any instrument, the object of which was to unite the legal estate to the equitable), should not be inconsistent with the established customs of the manor (*b*); and, with the same qualification in favour of the lord, all the rules which the courts of equity have established for enforcing moral or natural obligations in freehold cases, equally apply to copyholds.

The case of *White* v. *Stock* (*c*) is an exemplification of this proposition. *S. G.*, who had contracted for the purchase of a copyhold estate, by his will devised it to his wife for life, with remainder to his two sons as tenants in common in fee; and after his death his eldest son and customary heir was, upon the surrender of the vendor, admitted to the copyhold in fee by an arrangement with his mother and brother, and executed a declaration of trust consistently with the devise by his father's will. Both the sons became bankrupts,

(*a*) Ante, p. 86.

(*b*) Ante, p. 68; and a custom inconsistent with the doctrine of resulting trusts would be deemed unreasonable and bad; ante, p. 24, n. (*m*); and see post.

(*c*) 6 Mad. 327. And see ante, p. 205 et seq.

and their assignees sold their reversion, not stating it to be a mere equitable reversion; and the purchaser filed a bill against the eldest son, the mother and the assignees, to compel such a surrender as would give him the legal reversion. The Vice Chancellor held that the plaintiff had a right to consider himself as contracting for a legal reversion; but that as the bankrupts had no right to clothe their equitable reversion with the legal estate, so the assignees, standing in their place, had no right to call in the legal estate, and could not therefore sell a legal reversion; and that the plaintiff was at liberty to retire from his purchase: and that, as between the mother and the sons, the eldest son had been vested with the whole legal fee for their common advantage, and that the case was the same as if a stranger had been created a trustee by their common consent; and such a trustee could not be permitted afterwards to deal with the trust estate against the intention and to the prejudice of any one of his *cestuis que trust.*

Contingent remainders (*d*). It is the usual practice in settlements

(*d*) At pp. 23, n. (*h*), 86, 138, n. (*b*), and 196, n. (*g*), sup., reference has been made to the 7 & 8 Vict. c. 76, intituled "An Act to simplify the Transfer of Property," the 8th section of which enacted, that after the time at which the act came into operation, no estate in land should be created by way of contingent remainder; but that every estate which before that time would have taken effect as a contingent remainder, should take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature and having the same properties as an executory devise: and contingent remainders under deeds, wills or instruments, executed before the act came into operation, were not to fail by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was on its creation limited to determine. But by section 13, the act was not to extend to any deed, act or thing executed or done, or (except so far as regarded the provisions thereinbefore contained as to existing contingent remainders) to any estate, right or interest created before the 1st January, 1845.

It was not perfectly clear on the face of the act, that the 8th section applied to contingent remainders in copyhold property; but having regard to the objects intended to be effected, it is apprehended that it would have been held so to extend.

By the 8 & 9 Vict. c. 106, intituled "An Act to amend the Law of Real Property," the 8th section of 7 & 8 Vict. c. 76 was repealed as from the time of the commencement and taking effect of the act, and the residue of the act was repealed as from the 1st of October, 1845.

And the 6th section of 8 & 9 Vict. c. 106 enacts, that after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force of the act, defeat or enlarge an estate tail;

of copyhold estates, not to insert a limitation to a trustee to preserve contingent remainders (*e*); and the reason of this variation from the form of settlements of freehold property is, that any contingent remainders limited by the surrender are supported by the freehold in the lord of the manor: this reasoning is attacked by Mr. Watkins, who observes (*f*), that it appears rather extraordinary that an estate of freehold in the lord should be supposed capable of supporting a copyhold remainder, since they are wholly distinct in their nature; but that learned gentleman seems to have thought, that the lord would be compellable to admit the contingent remainder-man on the death of the tenant for life, on whose forfeiture the lord seized, if the contingency happened in the lifetime of such tenant for life, and *that*, because of the lord's own act in accepting the surrender (*g*). But although there is an apparent inconsistency in a freehold interest being capable of supporting a contingent remainder of copyholds, yet the author submits that the interest in the lord, and that only, does preserve to the contingent remainder-man a right which would not otherwise exist; for supposing the remainder-man, and not the lord, was entitled to enter upon the forfeiture, then inasmuch as the precedent estate was forfeited before the period when the remainder was designated to commence, it could never take effect, unless indeed the rule, that a contingent remainder must take effect either during the continuance of the particular estate, or *eo instanti* that it determines, is not applicable to copyholds; and the author can discover no good reason for any distinction in this respect between freeholds and copyholds (*h*), except only in the effect of the forfeiture by the tenant of the particular estate, which, in freehold cases, lets in the first vested remainder, and in copyhold cases brings the estate into the hands of the lord for the life only, or other interest of the person

and that every such disposition by a married woman shall be made conformably to the provisions of 4 & 5 Will. 4, c. 92.

And the 8th section enacts, that a contingent remainder existing at any time *after* the 31st day of December, 1844, shall be, and if created *before* the passing of the act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold, in the same manner as if such determination had not happened.

It may be observed, that the 8 & 9 Vict. c. 119, intituled "An Act to facilitate the Conveyance of Real Property," applies only to such customary land as will pass by deed, or deed or admittance, and not by surrender.

(*e*) But this is sometimes done with the consent of the lord; and even a surrender to *A.* on condition to perform the will of the surrenderor, would vest an estate in the dormant surrenderee, sufficient to support a contingent remainder limited by such will; Gale *v.* Gale, 2 Cox, Ch. Ca. 136.

(*f*) 1 Watk. on Cop. 193. And see Atherley on Marr. Sett. p. 365.

(*g*) 1 Watk. on Cop. 195.

(*h*) See 2 Cox, Ch. Ca. 141, in Gale *v.* Gale.

committing the forfeiture, it being decided that the forfeiture by the tenant of a particular estate does not affect those interested in remainder (*i*). And if the lord, because of his privity in the settlement of the estate, is bound to admit the contingent remainder-man, should the contingency happen before the determination of the particular estate, is not the lord's possession to be deemed a constructive continuation of that estate, for the benefit of such contingent remainder-man?

But the expression, that the lord is bound to grant the estate to the remainder-man, agreeably to his own act, on the happening of the contingency, would seem to be incorrect, as the admittance of the tenant for life is the admission of all in remainder (*k*); in either way, however, the right is preserved to the contingent remainder-man by the possession of the lord; if admittance be not necessary, then such right is a legal one, and if it be necessary, then the right is in equity.

And it is to be observed, that although the interest of the particular tenant is forfeited, yet the demisable nature of the estate continues, and the lord may, if he please, re-grant it to hold by copy (*l*); and the existence of this peculiar quality, even after the union with the freehold interest, would seem to explain away the apparent inconsistency of the interest in the lord being capable of preserving a contingent remainder in copyholds.

The application of the above rule, as to the destruction of the particular estate before the happening of the contingency, to copyhold lands, is sanctioned by Chief Baron Gilbert, who says, "If an estate be given to a copyholder for life, the remainder to the right heirs of *J. S.*, if the tenant for life die, living *J. S.*, there it seems clear that the remainder is destroyed, for it cannot take effect as by the limitation it ought. But then if tenant for life in that case had committed a forfeiture, or made a surrender, and then living tenant for life, *J. S.* had died, it seems to be very clear that his right heir might take; for his estate in remainder was not to take effect after the determination of the interest of tenant for life, but after his death, and when that happened he was able to take (*m*)."

The lord's interest being capable of supporting a contingent remainder, was also recognized in *Mildmay* v. *Hungerford* (*n*), *Lovell* v. *Lovell* (*o*), *Habergham* v. *Vincent* (*p*), *Stansfield* v. *Habergham* (*q*), *Roe* d. *Clemett* v. *Briggs* (*r*), and in many other cases.

(*i*) Post, tit. "Forfeiture."
(*k*) Ante, p. 294.
(*l*) Ante, pp. 14, 15, 94 et seq., 98.
(*m*) Ten. 265, 266; but see ib. N. 122.
(*n*) 2 Vern. 243.
(*o*) 3 Atk. 12, 13.
(*p*) 2 Ves. jun. 209, 210, 214; S. C. 4 Bro. C. C. 364.
(*q*) 10 Ves. 282.
(*r*) 16 East, 413. And see 1 Fearne, 470; Pawsey & Lowdall, Sty. 249, 273; Margaret Podger's case, 9 Co. 107; 2

The author must not however pass over an interesting observation of Mr. Watkins on the subject now under consideration. He says, "In the case of freeholds there must have been a tenant of the freehold, against whom a *præcipe* might have been brought (*s*); but no *præcipe* can be brought of copyhold lands as such. Claims to copyhold interests must be supported against strangers by *plaint*, and against the lord by petition. With respect to the plaint, one would presume that the law would be analogous to that of the *præcipe*, and consequently, that the rule *would* therefore apply; since there seems to be the same reason for an existing tenant to the latter as the former. Though, perhaps, the right to sue by petition, when the premises were in the hands of the lord, may be supposed to do away its necessity (*t*)."

It must, the author thinks, be allowed, that the concluding passage removes any doubt which the previous observations may have raised, as to the freehold interest in the lord being capable of preserving a contingent remainder, and leaves no possible ground of opposition to the affirmative of the proposition, by any analogy to the rule in freehold cases, that there should be a person against whom a *præcipe* might have been brought; more especially if due weight be given to the important circumstance of the continuation of the demisable quality of the copyhold after the forfeiture to the lord (*u*).

It is, at all events, quite clear that there is no distinction between freehold and copyhold estates, in those cases where the particular estate expires before the happening of the contingency; but that if a tenant for life of copyholds, who has forfeited his interest to the lord, should die before the remainder becomes vested, such remainder can never take effect (*x*).

It has been suggested that, as the lord, in case of a forfeiture by tenant for life, is entitled to the land for his own use during such particular estate, a limitation to a trustee to preserve contingent remainders should be always inserted in copyhold settlements, the same as is done in freehold cases, that is, when the legal inheritance is not vested in a trustee (*y*). And again, that as on a limitation to

Roll. Abr. 794, pl. 6; Bromfield *v.* Crowder, 1 N. R. 320 et seq.

(*s*) See 2 Cox, Ch. Ca. 151.

(*t*) 1 Wat. on Cop. 193, 194.

(*u*) And see 3 Atk. 12, 13; 2 Vern. 243; 1 Fearne, 470; Chapman *v.* Blisset, Ca. temp. Talb. 151.

(*x*) Lane *v.* Pannell, 1 Roll. Rep. 238, 317, 438; Habergham *v.* Vincent, 2 Ves. jun. 214; S. C. 4 Bro. C. C. 364; see n. (a); ib. Eden's ed., who gives a MS. note of Mr. Serjeant Hill, in his copy of Gilb. Ten., showing that the report of Lane & Pannell (sup.) is falsely stated in 1 Rol. Rep. 238, and imperfectly in Rol. 317, but rightly stated in Rol. 438; Gilb. Ten. 265, 303; 1 Fearne, 470, 471.

(*y*) Atherley's Marr. Sett. 570. And see Stansfield *v.* Habergham, 10 Ves. 282; and the observations on S. C. post, tit. "Right of Property in Trees and Mines."

A. for life, with remainder over to *B.*, the estate of *B.* cannot take effect in possession till the death of *A.*, and that the lord may enter between the determination of *A.'s* estate and his death, it is therefore proper in limiting the remainder of copyholds, to limit the estate expressly to *A.*, for his *natural* life, and from and after the determination of that estate by death, *forfeiture*, or otherwise, to the use of, &c. (*z*).

The author agrees in the expediency of these suggestions, but he apprehends that the lord or steward of a manor would not be compellable to accept a surrender so framed, and which would be calculated to defeat the lord's right of entry for an act of forfeiture by the tenant for life; this would at least merit great consideration by any lord or steward who should be required to accept a surrender of that nature (*a*).

The Lord's Recognition of Trusts.—A doubt has frequently arisen in practice whether the lord of a manor is bound to take notice of the trusts which a copyholder may be desirous of creating (*b*); and the reason generally assigned by stewards for refusing to record notice of trusts is, that the lord would be involved in any breach of trust on the part of the trustee: it is, however, quite absurd to suppose that the lord, who is merely custom's instrument, should be bound to see to the performance of any trusts expressed in or referred to by the surrender.

Although the lord is not compellable to take notice of any private agreement or trust of the parties, yet to refuse a copyholder the privilege of surrendering upon particular trusts, or, at least, of referring in the surrender to the instrument by which it is proposed to declare the trusts is, under ordinary circumstances, an act of great injustice, as it involves him in considerable additional expense in substituting a set of legal limitations, or in the still greater evil of putting it in the power of the trustee to defeat the objects of the trust, leaving the *cestui que trusts* no remedy but in equity (*c*); and for want of the aid of the statute of uses, the various provisions of a marriage settlement can seldom be carried into complete effect as to copyhold property, without the intervention of a trustee.

The author must also protest against the pertinacity of stewards of manors, in sometimes refusing to inrol a marriage settlement, or other deed of trust, merely with reference to the date of it, and the names and descriptions of the parties, as it is only deferring the disclosure

(*z*) 1 Watk. on Cop. 197; post, tit. "Forfeiture."

(*a*) See Car & Ellison, 3 Atk. 75; ante, p. 285; 1 Watk. on Cop. 197.

(*b*) An immemorial custom to surrender lands in trust is good; Snook *v.* Southwood, 5 Adol. & Ell. 239.

(*c*) See Robes *v.* Bent & Cock, Mo. 552.

of the particular trusts until a necessity arises for some copyhold assurance on the part of the trustee, when the court will satisfy itself, by the production and inrolment of the relative provisions of the deed, of the propriety and consistency of the proposed act, and in the meantime, as the tenancy is filled by the trustee or his heir, the lord can sustain no inconvenience: but the right to call for a complete disclosure of the trusts on the admittance of a trustee (*d*) is consequent on the right to refuse to take notice of any trusts whatever.

And when the legal estate is not vested in a trustee, the uses should be specified, as it might be very inconvenient to frame the surrender with reference to the uses of a settlement of freehold property (*e*).

Viewing this question merely as it regards the lord's interest, the author is at a loss to discover any good reason for withholding from the copyholder the privilege of putting notice of such trusts as he may be desirous of creating upon the face of the court rolls.

It is true that the lord partakes of any trusts by an inrolment of the surrender, whether it be to a purchaser, or to the use of a will (*f*), and whether the trusts are expressed in or referred to by the sur-

(*d*) See 13 Ves. 240, in Lord Kensington *v.* Mansell.

(*e*) See the observations of Lord Erskine, C., in Lord Kensington *v.* Mansell, 13 Ves. 244.

(*f*) See 3 Ves. 756, in Williams *v.* Lord Lonsdale. But it is generally supposed that the lord is not compellable to admit a surrenderee, whether he be a purchaser or mortgagee, who should allow the surrenderor to remain tenant on the rolls, but who, after an act of forfeiture by the surrenderor, or after his decease without leaving a customary heir, should seek to be admitted, with the view of establishing a title by relation from the date of the surrender, and thereby to defeat the lord's right of entry for the forfeiture or escheat. In the consideration of this point, it is to be recollected, that by an established rule of law, the lord has no power to compel a surrenderee to come in and be admitted. See Sir Harry Peachy & Duke of Somerset in 2 Eq. Ca. Abr. 228.

Even if an admission could be compelled in a case of this nature, the author submits that the rule by which, as between the surrenderor and surrenderee, the admission of the surrenderee relates back to the date of the surrender, would be held not to apply, and consequently that the lord's right of entry for an act of forfeiture by the surrenderor would not be prejudiced by such admission.

In Sir Harry Peachy *v.* The Duke of Somerset, 1 Stra. 454, Lord Macclesfield, C., said, "Suppose one lets a trustee be admitted for him who commits a forfeiture, no doubt the estate would be forfeited, and the *cestui que trust* would have no equity against the lord." "Suppose the trustee should die without heir, the lord would be entitled by escheat, without being subject to the trust." And see Roe *d.* Jefferys *v.* Hicks, 2 Wils. 13, deciding that the lord cannot take advantage of an act of forfeiture by an unadmitted surrenderee.

The late case of The King *v.* Lady Jane St. John Mildmay, 5 Barn. & Adol. 254, 2 Nev. & Mann. 776, is an express authority against the right of a surrenderee to compel admission after a forfeiture by the surrenderor; see post, tit. "Forfeiture."

It may, however, be a question whether an unadmitted mortgagee would not be allowed, in a court of equity, to enforce his *inrolled* security, as against the lord's title by forfeiture or escheat.

render (*g*); and it is equally true that the lord is not bound by any trusts to which he is not privy (*h*), so that on the death of a trustee, without leaving a customary heir, where the trusts should not have been put upon the court rolls, the estate would have escheated to the lord, discharged of the trusts (*i*).

(*g*) Weaver *v.* Maule, 2 Russ. & Myl. 97. Sect. 5 of 1 Vict. c. 26, makes provision for the entry of wills on court rolls, referring to the will as to any trusts.

(*h*) Chudleigh's case, 1 Co. 122 a. And see Burgess *v.* Wheate, 1 Sir W. Bl. 167, where Lord Mansfield, as to the objection that in copyholds the lord cannot be subject to trusts, but takes the estate on the death of the tenant without heir, said, "This objection proceeds from not distinguishing between freehold and copyhold manors. In all manors where admission is necessary to alienation, the escheat is absolute, the lord's consent being still necessary. In those copyholds the lord is not bound by debts, alienation or trusts; they are all void against him. But if he consents to a condition or trust on the court roll, then he is bound by it, for he cannot claim against his own act. But in freeholds, the form of his concurrence not being necessary, he is always considered as much bound as if he was a party to the deed of alienation which makes the trust, because the power which the tenant now has by law is equivalent to the lord's consent to the grant, when it was a strict reversion;" S. C. 1 Eden, 177. Yet see 1 Sir W. Bl. 179 (S. C.), where the Lord Keeper (Northington) expressed a doubt whether the estate should escheat discharged of the trusts. Vide Attorney-General *v.* Duke of Leeds, 2 Myl. & Keen, 343, in which it was held that the lord was entitled to enter upon the copyhold as an escheat, the mortgagee having died without heirs, and no condition having been expressed in the surrender. And now see 4 & 5 Will. 4, c. 23, referred to inf. n. (*i*).

(*i*) 1 Stra. 454, in Sir Harry Peachy *v.* The Duke of Somerset. And see the above observation of Lord Mansfield, in Burgess & Wheate. Vide also Doe *d.* Freestone *v.* Parratt & Wife, 5 T. R. 655, where Lord Kenyon, C. J., said, "this estate was given absolutely, and it has been considered as irredeemable by all the parties through whose hands it has passed. If the mortgagee conveys subject to the equity of redemption, the right may be kept alive for an indefinite length of time as far as I know; the Court of Chancery has determined that it may be preserved for fifty years. But if twenty years have passed without any redemption, in whom does the legal estate vest? In the mortgagee; *and it would escheat to the lord for want of the heirs of that person.*" Vide Att. Gen. *v.* Duke of Leeds, sup.

But supposing an equity of redemption to have subsisted, the lord claiming a copyhold by escheat, on the death of the mortgagee without heirs, where the mortgagee had been admitted, would have taken subject to the mortgage, and the money must have been paid to the personal representative. See 1 Sir W. Bl. 170, 171, in Burgess & Wheate; Pawlett *v.* Att. Gen., Hardr. 469, where Hale, C. B., and Mr. Baron Atkyns considered the interest of the mortgagee in the estate as a security only, and the chief baron pointed out the distinction between a trust and a power of redemption. Vide also Weaver *v.* Maule, 2 Russ. & Myl. 97.

And by 4 & 5 Will. 4, c. 23, copyhold lands no longer escheat in consequence of the death of a trustee or mortgagee without an heir, but the Court of Chancery may appoint a person to convey; ante, p. 84, n.

And by the same statute copyhold lands are no longer forfeited by reason of the attainder of a trustee or mortgagee: and the act extends to a trust arising by implication, or resulting by construction of equity; see the act in the Appendix.

N.B. It was decided in the above case

But it may be urged against the pertinacious refusal of the lord to allow of the inrolment of any trusts, that it is now fully settled that the lord can claim by escheat only *propter defectum tenentis*, and therefore that, so long as there is a tenant on the rolls subject to perform the customary services, whether such tenant be a trustee or mortgagee (*k*), the lord has no claim, or, in other words, that notwithstanding the opinion expressed by Lord Mansfield in *Burgess & Wheate*, and by Lord Thurlow in *Middleton & Spicer* (*l*), the lord cannot claim by the title of an equitable escheat (*m*); and that, although a court of equity will not interpose as between the lord and the heir of a trustee claiming to be admitted, when the *cestui que trust* dies without an heir (*n*), yet that a court of law will, in such a case, compel the lord to admit the heir of the trustee, to enable him to try his title (*o*); and when so admitted, what equity can the lord have, paramount such heir, supposing the lord to have refused to take notice of any trusts? A still stronger reason for the lord's consenting to take notice of trusts may be that probably, in the event of the death of the *cestui que trust* intestate, and without an heir, supposing the trusts to have been inrolled, a court of equity would decree the person having the legal estate to be a trustee for the lord, on the ground that the trustee had accepted admission from the lord, upon the terms of his disposing of the rents of the estate, conformably to the legal right which would have been acquired by the *cestui que trust*, if he had become the lord's tenant.

Resulting Trusts.

The person to whom the legal estate in copyholds is surrendered or granted will be decreed in equity to be a trustee for him who advances the purchase money, or fine of admission, on due proof of the fact of such payment. This general proposition is supported by all

of Doe *v.* Parratt & Wife that a surrender by the husband alone passed no interest in the copyhold land which had been devised to him and his wife in fee by a mortgagee in possession under a forfeited mortgage, for, when a devise is to husband and wife, they take by entireties, and not by moieties, so that the husband cannot by his conveyance alone devest the estate of the wife; see Doe & Wilson, ante, pp. 135, 136.

(*k*) See per Lord Eldon, in Gordon *v.* Gordon, 3 Swanst. 470; 1 Sir W. Bl. 175, in Burgess & Wheate.

(*l*) 1 Bro. C. C. 204; vide also Walker *v.* Denne, 2 Ves. jun. 170, 174; Barclay *v.* Russell, 3 Ves. 430; Henchman *v.* Att. Gen., 2 Sim. & Stu. 498; S. C. on appeal, 3 Myl. & Keen, 485; ante, p. 201.

(*m*) Burgess *v.* Wheate, sup.; Hardr. 496, in Att. Gen. *v.* Sands; S. C. 3 Ch. Rep. 36. And see Cary, 14, 15, where it is said, "If *cestui que use* be attainted of felony, the lord shall not be aided by subpœna to have his escheat; and if the heir be barred by the corruption of his blood, then the feoffee, as it seemeth, shall retain the land to his own use," cites 5 Edw. 4, 7, Br. Feoffments al. uses, pl. 34.

(*n*) Williams *v.* Lord Lonsdale, 3 Ves. 756, 757.

(*o*) The King *v.* Coggan and another, 6 East, 431; S. C. 2 Smith's Rep. 417.

the cases, and is strictly analogous to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor (*p*).

So in manors where copyholds are granted for two, three, or more lives in succession, if one only of the *cestui que vies* pay the fine, the other lives are trustees for him (*q*), whether or not there is a custom for the first taker to surrender the copy (*r*).

But where a copyhold was purchased by *B.* with the money of *A.*, on account of differences between the lord of the manor and *A.*, and the grant was taken to *B.* and his children, the Court of Chancery, on a bill filed by *A.* against *B.* for a surrender, would not relieve the plaintiff, as it would have been to ground a decree on a falsity, where there was a scheme to thrust a tenant upon the lord against his will (*s*).

The trust of an estate *pour autre vie* of copyholds shall go to the executors or administrators, the same as in the case of freehold property (*t*).

In *Smith* v. *Baker* (*u*) it was held, that although there was a custom in the particular manor, that whoever purchased in it, the estate should go in succession, yet that *A.*, who purchased for his own and two other lives, had an equitable interest, which passed by a general de-

(*p*) Dyer *v.* Dyer, 2 Cox, Ch. Ca. 93; Fin. 341.

(*q*) Clark *v.* Danvers, 1 Ch. Ca. 310; Lofft, 232; Benger *v.* Drew, 1 P. W. 780; Withers *v.* Withers and others, Amb. 151; N. 1, ib. Blunt's ed.; Roe *v.* Summerset, 2 Sir W. Bl. 694; Rumbold *v.* Rumbold, Amb. 151, (marg.); 2 Eden, 15; S. C. cited in Dyer *v.* Dyer, 2 Cox, Ch. Ca. 93; 1 Watk. on Cop. 223; 2 Atk. 75; Goodright *d.* Langfield *v.* Hodges, 1 Watk. on Cop. 227; see Lofft, 230; Finch *v.* Finch, 15 Ves. 43; and see Rider *v.* Kidder, 10 Ves. 360; Lewis *v.* Lane, 2 Myl. & Keen, 453; post, 412.

(*r*) 2 Freem. 123, ca. 138; Smith *v.* Baker, 1 Atk. 385; Howe *v.* Howe, 1 Vern. 415.

(*s*) Gold *v.* Dore, Lex Cust. 325.

(*t*) Howe *v.* Howe, Withers *v.* Withers, sup.; Rundle *v.* Rundle, 2 Vern. 264; Goodright & Hodges, sup. And see Watkins *v.* Lea, 6 Ves. 633, where the trust was held to pass under the residuary disposition of personalty, and not under a previous devise of freehold and copyhold property: but by the custom of the manor the trust, in case of intestacy, was distributable as personal estate, and the testator had other copyhold property.

By the third section of the statute 1 Vict. c. 26 (see the Appendix), customary freeholds and copyholds, as well as absolute freeholds, held *pur autre vie*, are devisable, whether there shall or shall not be a special occupant thereof. And by the sixth section it is provided, that in case there shall be no special occupant of any estate *pur autre vie*, whether freehold, customary freehold or copyhold, or of any other tenure, and whether corporeal or incorporeal, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and that if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of that act, it shall be assets in his hands, and be applied and distributed in the same manner as the personal estate of the testator or intestate; ante, p. 52.

(*u*) 1 Atk. 385; and see Lewis *v.* Lane, sup.

vise of all his estate *real* and personal, in possession or reversion, it appearing that the testator had no freehold property.

But where on a grant to three successively, there was no custom for the first taker to surrender the copy and dispose of the estate (*x*), and no proof of either having paid the fine, the court would not decree the remaining life to be a trustee for the first taker (*y*).

It sometimes happens that there is no other evidence of the payment of the fine than the statement with respect to it in the copy, but that could only be contradicted by evidence of a very clear and satisfactory nature. In *Benger* v. *Drew* (*z*), copyhold lands were granted to the husband and wife and *J. S.* for their lives *successivè*, and by the copy the fine appeared to have been paid by the husband and wife, and Lord Chancellor Macclesfield said, "This third person (*J. S.*) named in the grant is in equity to be intended but as a trustee for the husband and wife, and the survivor of them, by whom the purchase money was advanced; and it being mentioned in the copy that the fine was paid by the husband and wife, is strong evidence of the fact being so; which, though the court will not look upon as conclusive, yet any evidence given to contradict it ought, in order to prevail, to be very clear and full."

In *Clark* v. *Danvers* (*a*), *S. W.* took a copy in reversion for three lives, and the first life (*E.*) was made the purchaser in the copy; and the Chancellor held, that though *S. W.* paid the fine, yet when by his consent *E.* was made purchaser in the copy, it was to be taken as if she had paid it.

And the presumption which is raised from the payment of the purchase money, may be rebutted even by parol evidence (*b*).

A purchase in the name of a child, or nominating a child as a *cestui que vie* in the purchase of a copyhold for lives, is, from the natural obligation of a father to provide for his children, a circumstance of evidence to rebut a resulting trust of copyholds (*c*), unless

(*x*) See post, 412.

(*y*) Rundle *v.* Rundle, 2 Vern. 264.

(*z*) 1 P. W. 780.

(*a*) 1 Ch. Ca. 310.

(*b*) Dyer *v* Dyer, Goodright *v.* Hodges, ubi sup.; 1 Vern. 366; Taylor *v.* Taylor, 1 Atk. 386, 387.

(*c*) Mumma *v.* Mumma, 2 Vern. 19; S. C. 1 Eq. Cas. Abr. 382, pl. 8; Taylor *v.* Taylor, sup.; Dyer *v.* Dyer, 2 Cox Ch. Ca. 92; Taylor *v.* Alston, cited ib. 96; Lamplugh *v.* Lamplugh, 1 P. W. 111; Bedwell *v.* Froome & Kingdome *v.* Bridges, cited in Dyer & Dyer; Scroope *v.* Scroope, 1 Ch. Ca. 28; Lord Grey *v.* Lady Grey, ib. 296; S. C. Finch, 338; Elliot *v.* Elliot, 2 Ch. Ca. 231; 3 Salk. 367; Shales *v.* Shales, 2 Freem. 252; Woodman *v.* Morrel et ux., ib. 32; Crop *v.* Norton, 2 Atk. 75; Stileman *v.* Ashdown, 2 Atk. 480; Jennings *v.* Selleck, 1 Vern. 467; Sheffield *v.* Lord Mulgrave, 5 T. R. 574; Finch *v.* Finch, 15 Ves. 43; 8 East, 354, in Doe & Reade.

In Dickinson *v.* Shaw, see 1 P. W. 112, n. (1), 2 Col. Jurid. 261, (n.), 2 Cox Ch. Ca. 95, 96, the children were held to be trustees for the father as he had paid

the father's intention that the child should be considered as a trustee for him be shown by some *contemporaneous act* (*d*); and this, without regard to any other provision which the child may have (*e*); and whether the purchase by the father be for his own life, and the life or lives of a child or children successively, or for the life or lives of a child or children only (*f*).

But the author apprehends that a custom for the father, in a purchase by him for his own life and the life of a child, to surrender the whole copy, and so defeat the child's title under the doctrine of advancement, would be good (*g*).

In *Swift* d. *Farr* v. *Davis* (*h*), where the father put in his own life and the lives of his two sons, it was held that the father, by taking at the same court a licence to himself and his mother (who had her widowhood right in the copyhold) to lease for seventy years, showed that he did not intend that his sons should take beneficially. The report adds, "If the father afterwards grant a lease by way of mortgage, pursuant to such licence to lease, and there be a custom in the manor for the first taker to dispose of the estate, as against the other lives; such custom may so far operate as to divest the legal estate of the lives in reversion, and give it to the lessee."

Where a father purchased copyhold lands in the name of his son, an infant, although the father had possession till his death, it was considered as an advancement for the son, and not a trust for the father (*i*); but this would seem to have been decided on the ground that the father is the natural guardian of his children during their minority (*k*). And in *Murless* v. *Franklin* (*l*) Lord Eldon held, that possession *taken* by the father at the time would amount to evidence that he intended the purchase to be for his own benefit: and when

the purchase money. But it appears that leases were granted by the father, which might have made an ingredient in the determination, as rebutting the implication of an advancement. See 2 Cox Ch. Ca. 96: Swift & Davis, infra.

(*d*) Dyer v. Dyer, Elliot v. Elliot, ubi sup.; Ebrand v. Dancer, 2 Ch. Ca. 26; Swift d. Farr v. Davis, infra; Woodman & Morrel, supra; Murless & wife v. Franklin, 1 Swanst. 13. And see Sidmouth v. Sidmouth, 2 Beav. 447.

(*e*) Dyer v. Dyer, sup.; ante, p. 219. But see Finch, 341; Pole & Pole, 1 Ves. 76; 2 Cox. 94.

(*f*) See the cases, sup. n. (*d*).

(*g*) Such a custom, the author believes, exists in the manor of Iffley, in Oxfordshire.

(*h*) 8 East, 354, n.; 1 Swanst. 19. And see the observations on Dickinson v. Shaw, 2 Cox, 96; 2 Col. Jurid. 261.

(*i*) Taylor v. Taylor, 1 Atk. 386. And see Elliot v. Elliot, 2 Ch. Ca. 231; Mumma v. Mumma, Lamplugh v. Lamplugh, ubi sup. In Dowdswel v. Dowdswel, 1 Ch. Ca. 261, the Lord Keeper agreed that the father being lord of the manor could not declare the trusts of copyholds granted to his son, though he took the profits by his consent. The reporter adds "Eâdem die decreed between Holford & ——."

(*k*) 2 Atk. 480.

(*l*) 1 Swanst. 13.

the purchase is of a reversionary interest, possession can afford no evidence until the death of the tenant for life (*m*).

In the case of *Prankerd* v. *Prankerd* (*n*), the plaintiff being in possession for his own life, with reversion to his two daughters for their lives successively, procured a grant to be made in reversion to his son (the defendant) for his life, and at the same time surrendered all his estate and interest in the premises during his own life, and the lives of his two daughters and the defendant, to the use of his will. By the custom of the manor (*o*), the copyholds are granted to four persons for their lives successively (*p*), and the grantee in possession is enabled, by surrendering all his estate in possession, reversion, and remainder, to pass his own estate, and also the estates in reversion or remainder expectant thereupon (*q*).

The plaintiff's daughters having died, the defendant claimed to be entitled upon the determination of the plaintiff's estate, for his own use, by way of advancement; but the Vice Chancellor held that, as the plaintiff had surrendered the estate to the use of his will, it was clear he meant it to remain at his own disposal, and that as the surrender was contemporaneous with the grant, the defendant ought to be declared a trustee of the interest which he took under the grant, for the plaintiff, and he decreed accordingly, but refused to give the plaintiff his costs.

A purchase in the joint names of father and son would be deemed an advancement of the son, and not a resulting trust for the father (*r*); but the right of a child may be controlled by some particular custom (*s*).

It has, however, been decided, that a custom controlling the right to dispose by will of an equitable resulting estate, and entitling the second life (a volunteer) to the beneficial interest, is unreasonable (*t*).

A purchase in the name of a wife would be equally an advancement as in the case of a child, but if the purchase were in the names

(*m*) Murless & Franklin, sup.

(*n*) 1 Sim. & Stu. 1.

(*o*) Bleadon with Priddie, Somersetshire.

(*p*) Ante, p. 357, n. (*d*).

(*q*) Ante, p. 27.

(*r*) Scroope *v.* Scroope, 1 Ch. Ca. 28; Back *v.* Andrews, 2 Vern. 120; S. C. Pre. Ch. 1. But see Stileman *v.* Ashdown, 2 Atk. 480; Pole *v.* Pole, 1 Ves. 76.

(*s*) Edwards *v.* Fidel, 3 Madd. 237. And see Greenwood *v.* Hare, 1 Ch. Rep. 272; ante, p. 411.

(*t*) Lewis *v.* Lane, 2 Myl. & Keen, 449, in which the Master of the Rolls (Sir C. Pepys) said, "in the case of Edwards *v.* Fidel [3 Mad. 237], the late Master of the Rolls considers this as a question of custom, and says it was a reasonable custom, and prevented disputes. I cannot agree that this is a question of custom at all, or that, if it were, it would be reasonable. So to consider it would be contrary to the principles of resulting trusts, and would be inconsistent with what was decided in Smith *v.* Baker, and assumed in Dyer *v.* Dyer;" ante, p. 24.

of the wife and a stranger, it would be a resulting trust for the husband as far as related to the estate of the stranger (*u*).

It would seem also that a purchase in the names of grandchildren, *the father being dead*, would be a provision for the grandchildren, and not a trust, unless a contrary intention was declared at the time of the purchase (*x*).

But where there is no moral obligation to make a provision, this doctrine does not apply; so that a purchase in the names of nephews and nieces will not be considered as an advancement for them, unless aided by clear evidence of intention (*y*); and certainly, therefore, not so, when the purchase is in the names of *great* nephews and nieces (*z*).

Should a copyholder surrender or devise his estate to a trustee, in trust to sell for payment of debts, or for other partial purposes of conversion, the surplus estate, after the objects of the trusts are satisfied, or the whole, should those objects entirely fail, will belong to the customary heir by way of resulting trust, the same as in freehold cases (*a*).

But where the testatrix, after directing the trustees to pay the clear rents of all such part of her freehold, copyhold, and leasehold estates,

(*u*) Kingdome *v.* Bridges, 2 Vern. 67. And see Benger *v.* Drew, 1 P. W. 780; Back *v.* Andrews, sup.; 21 Vin. 502, pl. 14; Woodman *v.* Morrell, ubi sup.

(*x*) Ebrand *v.* Dancer, 2 Ch. Ca. 26; S. C. 1 Eq. Ca. Abr. 382. In that case the Chancellor said "there *is* difference in the case where the father is dead and where he is alive; for when the father is dead the grandchildren are in the immediate care of the grandfather." And this distinction was recognised by Lord Eldon, in Perry & Whitehead, 6 Ves. 548. See the latter case, and Rodgers *v.* Marshall, ante, pp. 208, 219. And see Right *v.* Bawden, 3 East, 260.

(*y*) Taylor *v.* Alston, cited in Dyer & Dyer, ubi sup.; Goodright *d.* Langfield *v.* Hodges, ubi sup.; Lewis *v.* Lane, 2 Myl. & Keen, 453. The decision in Taylor & Alston was in favour of the nephew and niece, not as relations, but on the weight of parol evidence. See 2 Cox, 97.

(*z*) Edwards *v.* Fidel, 3 Madd. 237; ante, p. 24. Vide Edwards *v.* Edwards, 2 Yo. & Coll. (Ex. Eq.) 123. The author apprehends that the doctrine could not be held to extend to natural children, ante, pp. 208, n. (*p*), 222; but see Fearne's P. W. 327; Beckford *v.* Beckford, Lofft, 490; 2 Fonbl. Eq. 123, 124, n.; Sugd. V. & P. 535 (5th edit.), and quære?

(*a*) Cruse *v.* Barley & Banson, 3 P. W. 20, N. (1); ib. 22; Wilson *v.* Major, 11 Ves. 205; Lowes *v.* Hackward, 18 Ves. 168. And see Chew *v.* Chew, Nels. Ch. Rep. 190. The following cases will be found interesting on the subject of resulting trusts in favour of the heir: Mallabar *v.* Mallabar, Ca. temp. Talb. 78; Durour *v.* Motteux, 1 Ves. 322; Cook *v.* Duckenfield, 2 Atk. 567; Hewitt *v.* Wright, 1 Bro. C. C. 86, [Belt's ed.]; Fletcher *v.* Ashburner, ib. 497; Ackroyd *v.* Smithson, ib. 503; Robinson *v.* Taylor & others, 2 ib. 589; Collins *v.* Wakeman, 2 Ves. jun. 683; Sheddon *v.* Goodrich, 8 Ves. 481; Berry *v.* Usher, 11 Ves. 87; Wright *v.* Wright, 16 Ves. 188; Hooper *v.* Goodwin, 18 Ves. 156; Van *v.* Barnett, 19 Ves. 102; Hill *v.* Cock, 1 Ves. & Bea. 173; Maugham *v.* Mason, ib. 410; Ashby *v.* Palmer, 1 Meriv. 296.

as should not havs been sold for the purposes mentioned in her will, unto *J. W.* for his life, and after his decease devised and bequeathed such unsold property unto the heir or heirs of her cousin *W. C.*, and the heirs, executors, or administrators of such heir, or heirs, and directed the trustees to convey and assign the same accordingly, Lord Eldon, C., held, that the effect of the devise to the trustees who were to have for certain purposes the management of the *legal* estate, was to break the descent; and that although the devisees happened to be the heirs of the testatrix, yet the devise being to them as the heirs of another person, they did not take by descent, but as joint-tenants by purchase, and therefore subject to survivorship (*b*).

And where two copyholders, upon a treaty of marriage between them, surrendered their respective copyholds to the use of them and the survivor of them, and the marriage did not take place according to the treaty, and the man died, and the woman entered and enjoyed the property for thirty years, Lord Jefferies, C., decreed a re-surrender, and an account of the profits from the death of the man (*c*).

If freehold estates be devised to trustees for sale, and a power be given by the will to the same persons to sell copyhold estates, the trustees will not be allowed to hold the copyholds for their own benefit, although by contingent events it may be doubtful whether there is a resulting trust for an unascertained customary heir, or whether the copyhold estates had become impressed with the character of personalty for the benefit of the testator's next of kin (*d*).

A curious case occurred some little time since in the Court of Chancery (*e*), involving a question between the legal personal representative and the next of kin, under a settlement of copyhold land, held of the manor of Slape, in Dorsetshire. By the custom of the manor, the largest estate to which admittance is allowed is to two for their joint lives, and the life of the longest liver of them; but any tenant admitted for his life has a power to nominate one or two persons to succeed him, "jointly and successively," as tenant or tenants; and that right of nomination may be exercised either by surrender in open court, or out of court by writing executed in the presence of two tenants of the manor, who must attest the same; and the form of such surrender or nomination is to the surrenderee or nominee "and his assigns for ever;" or, if two, to them "and their assigns for ever." It appears also by the report of this case, that the nomination need

(*b*) Swaine *v.* Burton, 15 Ves. 365. By the 3rd sect. of 3 & 4 Will. 4, c. 106, the heir will take as devisee and not by descent, if an estate be devised to him; and by the same section, a limitation to the grantor, or his heirs, will create an estate by purchase; ante, p. 55.

(*c*) Hamond *v.* Hicks, 1 Vern. 432.

(*d*) Burton *v.* Hodsoll, 2 Sim. 24; ante, p. 318.

(*e*) Wellman *v.* Bowring, 1 Sim. & Stu. 24.

not be presented to the steward, or at the court, before the nominee applies to be admitted; and that there is a further custom in the manor, that a surrenderee, before he has himself been admitted, may surrender in favour of another person, who is entitled to be admitted, although the original surrenderee has never been admitted, provided he pays a double fine; and that where there has been no surrender or nomination, the heir of the last tenant is entitled to be admitted, subject to the right of the widow to the estate during her widowhood: that the fine payable by the widow is one penny, and by the heir or nominee ten pounds.

The circumstances of the case appeared to be these: Joseph Bryant in 1764, in consideration of his intended marriage with Eliz. Wellman, duly surrendered this estate to the use of Benjamin Wellman and John Bowring for their lives and the life of the survivor of them, and of their assigns for ever, according to the custom of the manor, upon trust for Bryant during his life, and after his decease for E. Wellman during her life; afterwards for the benefit of the issue of the marriage, and failing issue, in trust to surrender the estate to the use of such person or persons for his or their life or lives, and of his or their assigns for ever, as Bryant should by any writing or by will appoint, and for want of such appointment, upon trust to surrender *to the use of the executors or administrators of* Bryant, *if not exceeding two, for the term of their lives, and of their assigns for ever, but if he should leave more than two executors, or administration to him should be granted to more than two, then to the use of the two that should be first named in his will as his executors, or in the administration as his administrators, for the term of their lives and of the life of the longest liver of them, and of his or her assigns for ever.*

At the same time and in pursuance of the same agreement, E. Wellman surrendered lands holden by her of the manor of *N.* to similar uses, except that the ultimate limitation in default of nomination, instead of being to the executors or administrators of the husband, was to the use of the executors or administrators of E. Wellman, if not exceeding two, &c. as in the ultimate limitation in the surrender made by Bryant. There was no issue of the marriage. Bryant in 1779 died intestate, and without exercising his power of nomination. The widow took out administration to him, and called upon the trustees to surrender the copyholds in Slape, and a surrender was made accordingly, and the widow was admitted in the form giving the largest estate known to the custom of the manor. After her admittance she nominated *B. W.* and *B. W.* the younger his son, to be admitted to the estate upon her decease, and she herself continued in possession up to the time of her death; and it appeared that she discharged all her husband's debts. It was at length

discovered that the trustees of the marriage settlement had never been admitted to the copyhold, so that the legal estate remained in Bryant until his death; and Joseph Bowring, the customary heir of Bryant, brought an ejectment against the tenant in possession, and obtained a verdict.

A bill was then filed in Chancery against Joseph Bowring and the next of kin of Bryant, praying that Joseph Bowring might be declared a trustee of the premises for the plaintiff, who claimed under *B. W.* the younger, the surviving nominee of the widow of Bryant; or if the court should be of opinion that Bryant's next of kin had any interest, then that the plaintiff might be declared entitled to all such interest as Mrs. Bryant had therein; and that Joseph Bowring might be restrained from proceeding in the ejectment. On the hearing of the cause, the Vice Chancellor (Sir Lancelot Shadwell) observed, "This is a mere case of intention upon the construction of the settlement. There is here no question that the administratrix was a *persona designata*, with apt words of limitation, according to the nature of the property, and was entitled to take the copyhold as a purchaser. The real question in the cause is, whether the husband intended that the administratrix should take the copyhold beneficially or as a trustee. A trust may be either expressed or implied. There is clearly here no trust expressed, nor is there anything in this settlement from which a trust can be implied, unless it can be maintained that the copyhold is given, not to the persons of the executors or administrators, but to their office. But if this could be maintained, it would not benefit the defendant in his character of copyhold heir: it might benefit him in his character of one of the testator's next of kin: but before I can consider the claim of the next of kin, I must know that I have before me all the persons, who, being next of kin, are entitled to be heard upon this question. All therefore I can do at present is to declare that the defendant, Joseph Bowring, as the copyhold heir of Joseph Bryant the husband, was a trustee of the legal estate for the widow as administratrix of her husband; and to refer it to the master to enquire who are the next of kin; and to reserve the consideration of all further directions until after the master shall have made his report."

The heir appealed from the above mentioned decree to the Lord Chancellor (*f*), who concurred in the opinion of the Vice Chancellor, that the widow of Bryant, as his administratrix, was entitled to relief in equity against the heir; but whether or not she was to be considered as a trustee for the husband's next of kin, or the persons interested in his personal estate, the Chancellor said were questions

(*f*) See 2 Russ. 377.

which he was not then called upon to decide: but that should it turn out that the widow took as a trustee for her husband's next of kin, she might have a claim from having paid his debts, without having had assets in her hands.

The above cause of *Wellman & Bowring* afterwards came on to be heard before Sir Lancelot Shadwell, V. C., for further directions, when his Honour observed (*g*) that the judgment delivered by Lord Eldon upon the appeal contained a clear expression of opinion that the ultimate limitation to the executors or administrators could only be supported as a mutual contract between the husband and wife that, in the events of there being no issue of the marriage, and of the powers of appointment not being exercised, the personal estate of each of them should have a reciprocal benefit (*h*); and that it appeared to him therefore that he had an unerring light to guide him in deciding the particular point; and he decreed that Elizabeth Bryant, as the administratrix of her late husband, was entitled to the equitable fee of the copyhold estate in question as part of his personal estate, for the benefit of herself and the next of kin of the husband, according to the statute for the distribution of intestates' estates (*i*). And it was referred back to the master to take an account of the rents received by the plaintiff or for his use; and it was further ordered that the said copyhold should be sold, and the purchase money paid into the Bank of England to the credit of the said cause, to be applied first in payment of costs, and then the surplus to be thus divided, one moiety to the legal personal representative of E. Bryant in trust for the plaintiff, who derived his title from her, and the other moiety equally among the six persons whom the master had reported to be the only next of kin of the said Joseph Bryant living at his death, or their legal personal representatives.

It is clear that a resulting trust of copyholds, even where the custom of the manor was not to recognize an alienation by will, nor to permit any trusts to appear upon the court rolls, was devisable (*k*) before the recent statute of wills.

In conclusion of this section it may be useful to notice, that if a copyhold be purchased by the husband in the joint names of himself and his wife, they will both and each be tenants of the *entirety*, so that the husband cannot alien or devise the estate to the prejudice of the wife's right of survivorship (*l*).

(*g*) 3 Sim. 336.

(*h*) See 2 Russ. 379, 380.

(*i*) The V. C. in decreeing the whole of the fund to the persons entitled under the statute of distributions, observed, that the husband had been so long dead, that there could be no question as to whether all his debts had been paid or not.

(*k*) Wilson *v.* Dent, 3 Sim. 385; and see 1 Vict. c. 26, s. 3.

(*l*) Green *d.* Crew *v.* King, 2 Sir W. Bl. 1211; Back *v.* Andrews, 2 Vern. 120; S. C. Pre. Ch. 1; Purefoy *&* Rogers, 2 Lev. 39; Doe *&* Wilson, ante, pp. 135, 136; Doe *v.* Parratt and Wife, ante, p. 407, in notis.

Executory Trusts.

In decreeing an execution of trusts created of copyholds, a court of equity is governed by the same rules as prevail with respect to freeholds, and it therefore distinguishes between trusts executed and executory (*m*).

So where a surrender was made of an estate of the nature of *borough english* to the use of trustees, in trust, after payment of an annuity and some particular debts, to surrender the same to the use of the heirs of the body of the husband and wife, who had two sons; and when the annuities had ceased and the debts were satisfied, each of the sons claimed the surrender in their favour, the eldest as heir at common law, and the youngest as heir by the custom;—but the trust being merely executory, the court directed a surrender to be made to the eldest son, as heir general by the common law (*n*).

And in *Roberts* v. *Dixwell* (*o*), the trust being executory, the Court of Chancery directed a conveyance to be made according to the rule of common law, and not according to the custom of gavelkind.

And again, by analogy to the rule in freehold cases, that an executory interest could not have been passed except by a fine operating as an estoppel (*p*), but that whatever is descendible is the subject of devise and contract (*q*), it would seem that an executory interest in copyholds cannot be bound by a surrender, as that assurance does not operate by estoppel (*r*), but that it may be transferred by such modes as an executory interest in freeholds is transferrible; and, as a consequence, that it is devisable (*s*), and may be extinguished by release (*t*), and would be bound in equity by any contract for a valuable or meritorious consideration (*u*).

(*m*) See Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 570.

(*n*) Fearne, 142, 143; Starkey *v.* Starkey, in Ex. Tr. 19 G. 2; 7 Bac. Abr. 179; Kitch. 168; and see Com. Dig. Cop. (G. 1).

(*o*) 1 Atk. 607; ante, p. 30. See further as to the distinction between trusts executed and executory, Bagshaw *v.* Spencer, 1 Ves. 142.

(*p*) Fearne, 366, 551, 7th ed.

(*q*) Ib. 368, 548, n. (f); Roe *d.* Perry *v.* Jones and others, 1 H. Bl. 33, (cites Moor et ux. *v.* Hawkins, in Canc. 1765); Jones and others *v.* Roe, lessee of Perry, in error, 3 T. R. 88, cites Goodtitle *d.* Gurnel *v.* Wood, Tr 14 G. 2, C B.

(*r*) Fearne, Ex. Dev. 528, n. (a); ib. Cont. Rem. 319 et seq., 7th ed.; Goodtitle *v.* Morse, 3 T. R. 365; Taylor *&* Philips, 1 Ves. 229; and see Fearne's Posth. W. 108; ante, p. 138.

(*s*) Fearne, 368, 7th ed.; Selwin *v.* Selwin, 1 Sir W. Bl. 225, 254; S. P. 2 Burr. 1134; Roe *d.* Noden *v.* Griffiths, 1 Sir W. Bl. 605, 606; and now see 1 Vict. c. 26, s. 3; ante, p. 138, n. (*b*).

(*t*) Fearne, 421, 548, 549, 7th ed.; Posth. W. 109; and see Lampet's case, 10 Co. 46 b; Wright *v.* Wright, 1 Ves. 411.

(*u*) Fearne, 551, 7th ed.; Posth. W. 109; Hobson *v.* Trevor, 2 P. W. 191; Wright *&* Wright, sup. And now see 8 & 9 Vict. c. 106, s. 6, authorizing the disposition by deed of contingent, executory and future interests, possibilities coupled with an interest, and rights of entry; vide sup. p. 401, n. (*d*).

CHAPTER XII.

Of the relative Right of Property of the Lord and Tenant in Trees and Mines (a).

FIRST, AS TO TREES.

THIS subject is generally thought to be involved in great obscurity, and yet it is governed, the author conceives, by clear and settled principles, similar to those which prevail as to freehold estates, and by which every case appears to him to be capable of easy solution.

Copyholders, it has been shown, are considered as tenants at will; and even when the estate is descendible, the tenant has only a *quasi*

(a) The annexation of the proprietory interest of the lord of the manor in timber growing on copyhold or customaryhold lands, to the possessory interest therein of the tenant, was not the least important object of the first division of the late commutation and enfranchisement act, ante, pp. 5, n. (s), 315, n. (a), &c., and although the act has not varied the relative rights of lords and tenants in such timber, yet, as it has empowered the lord and tenants (such tenants not being less than three-fourths in number, and their interest not being less than three-fourths of the interest in the value of the land, estimated by the rule laid down in the 17th section, and the lord's interest not being less than three-fourths of the interest in the value of the manor) present at a meeting convened under the 13th section, to make an agreement for the general commutation of the lord's rights in "Rents," "Fines" and "Heriots," and in "Timber," to bind absent and non-consenting tenants (such agreement being confirmed by the commissioners, see section 23), it is probable that a commutation of the lord's proprietory right in timber will, in most manors, be effected, and thereby the general improvement of the copyhold and customaryhold property be facilitated.

So far from any interference with the proprietory rights of lords of manors in mines and minerals having been in the contemplation of the legislature, the high value and importance of the lord's relative interest therein is strongly marked by the exclusion of that royalty from the operation of the act, unless by express convention between the lords and tenants (see ss. 13, 39 and 82, in which latter section "quarries" are expressly named), and by the power created by the 84th section of the act, in aid of such reservation of the lord's rights in mines and minerals, for the tenants, upon any commutation or enfranchisement under the act, to grant to the lord of the manor such rights of entry and way, and other easements, in or upon and through their respective lands, as may be requisite for the purpose of enabling the said lord, or his agents or workmen, the more effectually to win and carry away any mines or minerals under the lands of such tenants, or any of them; by which section it is provided that, for the purpose of such grant, it shall be sufficient, in the case of a commutation, to state the fact, and the consideration, if any, of the grant, in the agreement for commutation; but that in the case of an enfranchisement of lands, subject to the lord's rights in mines and minerals, such rights of entry and way, and other easements, shall be reserved and granted in the enfranchisement conveyance. See also s. 97.

inheritance, and can do no act which would prejudice the lord's right in case of escheat or forfeiture.

In analogy to the rules at common law, the copyholder, whether of inheritance, or for life, or years, has the same possessory interest in the trees as he has in the land.

But he is equally as incapable of cutting down trees, or doing any other act to the injury of the freehold, except with the lord's concurrence, as a tenant for life or years of freehold lands is, without the concurrence of those in whom the remainder in fee simple is vested; yet, as the law in copyhold cases takes notice of all reasonable customs, a copyholder of inheritance, under an immemorial usage, may exercise an absolute proprietory right over trees, or other thing appendant to the copyhold tenement: but by the same rule, a copyholder for life or years is not permitted, even under an alleged usage, to cut timber, such a custom being considered too unreasonable to be supported: it is to be observed, however, that by a copyholder for life or years is meant a person to whom such an interest is granted by the lord, and not the particular tenant whose estate is carved out of the inheritance by the copyholder in fee, nor a copyholder for life, with a power to renew, or who by the custom is allowed to nominate his successor.

The author will now proceed to a reference to the cases which have been decided on the subject under discussion, establishing, as he conceives, the above premises, and this deduction from them, namely, that in the absence of any particular custom, neither the lord without the consent of the tenant (*b*), nor the tenant without the licence of the lord (*c*), can cut down trees, any more than the particular tenant in possession without the leave of the remainder-man in fee, or the remainder-man in fee without the concurrence of the particular tenant, can cut down trees in freehold cases; except, indeed, that by custom, the licence of the lord under the terms of the original grant, to an act partaking of an absolute unrestrained dominion over copyhold lands *of inheritance*, may be presumed, in analogy to the exemption from waste, frequently attached to the interest of the tenant for life or years of freehold lands; and when such a custom is shown to exist, an action of trespass will lie against the lord for cutting down trees standing upon copyhold land (*d*). The author apprehends, indeed,

(*b*) This is now fully established by the case of Whitechurch *v.* Holworthy, 4 Mau. & Selw. 340; 19 Ves. 213. But it was formerly thought that the lord might cut down the trees on copyhold land, provided he left sufficient for estovers; Gilb. Ten. 239, 240; Heydon & Smith's case, 13 Co. 68, 69; S. C. Godb. 174, cites Doylie's case, Mich. 25 & 26 Eliz.; and see Ashmead *v.* Ranger, post.

(*c*) See Edwards *v.* Heather, Sel. Ca. in Ch. temp. King, 3; Chapple's case, 6 Vin. Cop. (R. e. 2), pl. 13.

(*d*) Co. Cop. s. 51, Tr. 119; ante, p. 314, n. (*i*).

that a copyholder may, in respect of his possessory interest, maintain trespass against the lord for cutting down trees (*e*), when not justified by the custom, and even without showing that the lord had not left sufficient for customary estovers.

The reader will find that the possessory interest of the tenant in the trees upon his copyhold land was distinctly recognized in *Heydon & Smith's* case, 13 Co. 69; Godb. 173, 174; *Rockey* v. *Huggens*, Cro. Car. 220; S. C. W. Jones, 245; *Earl of Kent* v. *Walters*, 12 Mod. 317; *Ashmead* v. *Ranger*, 12 Mod. 378; 11 Mod. 18; Salk. 638; Comy. 71; 1 Lord Raym. 551; Holt, 162; Fortes. 152; *Lord Banbury's* case, 11 Mod. 94, 95; *Whitechurch* v. *Holworthy*, 4 Mau. & Selw. 340; 19 Ves. 213.

And that the proprietory right in trees *by particular custom* is established in the copyholder of inheritance, or for life, with power to renew, or to nominate his successor, but is denied to the grantee for life without such power, by the authorities of *Stebbing* v. *Gosnal*, Cro. Eliz. 629; Mo. 546; *Earl of Northumberland* v. *Wheeler and others*, 1 Bulst. 158, citing *Lutterall & Wood's* case, C. B. Brownl. 236; *Anon.* Noy, 2; *Anon.* Winch, 1; Hob. 11; *Glascock & Peche*, P. 6 Ja. B. cited 2 D'Anv. 426 (*f*); *Brock* v. *Spencer*, Hob. 6; *Brock* v. *Beare*, 1 Bulst. 50; *Fuller* v. *Terry*, 1 Roll. Abr. 509; *Rowles & Mason*, 1 Brownl. 132; 2 Brownl. 85, 192; 2 D'Anv. 426; *Rockey* v. *Huggens*, Cro. Car. 220; *Powel & Peacock*, Cro. Jac. 29; Noy, 2; *Cage & Dod*, Sty. 233; *Mardiner* v. *Elliot*, 2 T. R. 746; and see Dal. 8; Lex Man. 63, 64; Gilb. Ten. 237; 2 Ves. 303.

The author has already stated that there is a distinction between a grantee for life or years of copyholds, and the particular tenant whose estate is carved out of the inheritance: and in the case of *Denn* d. *Joddrell* v. *Johnson* (*g*), which was an action of ejectment by the lord for a supposed forfeiture by tenant for life, the Court of King's Bench ruled that, although a copyholder for life, under a grant by copy for life, cannot cut timber, yet a copyholder of inheritance, having power to do so by the custom of the manor, may make a person to whom he gives a life interest only in the estate dispunishable for waste, and this, on the ground that the whole inheritance is out of the lord; and the above case coming within that distinction, the plaintiff was nonsuited.

It frequently happens that the copyholder is allowed by the custom of the manor to cut down timber for repairs only, and when that is

(*e*) See per Lord Tenterden in Lewis v. Branthwaite, 2 Barn. & Adolph. 443. But see, and particularly in the case of a copyholder for life, Ashmead & Ranger, post; vide also Co. Lit. 60 b, n. (4).

(*f*) This case is also reported in 4 Leo. 238; and the custom is not stated there to be confined to copyholders of inheritance, but that is probably an omission.

(*g*) 10 East, 266.

the case, and he does not make immediate use of the timber, the intention of cutting it for the purpose of repairs, and of applying it in due course, will be evidence to the jury in any action for a supposed forfeiture (*h*).

When the custom is to have wood for repairs *or other necessary uses*, the right to sell any part of it will not be supported but upon the clearest evidence of usage: so in *Blackett* v. *Lowes* (*i*), where, by an agreement in 1656 between the lord and customary tenants, the former was authorized to take and dispose of wood and underwood, leaving sufficient for the necessary use and occasions of the tenants, and making them reasonable satisfaction for the damage they should sustain by taking and carrying away the same; and the tenants bound themselves not to cut down, sell or dispose of timber or wood without the licence of the lord, who agreed to allow them sufficient timber and wood growing on their respective tenements, for repairs and all other necessary occasions and uses, and that in case they planted any wood, they might cut down, use, and dispose of the same for *repairs, or any other their necessary uses*, and which agreement was confirmed by a decree of the Court of Chancery; the defendant having cut down and sold wood without licence, the lord recovered the value in an action of trover; but a question was reserved for the opinion of the Court of King's Bench, whether the tenant ought to have had the benefit of the evidence he tendered at the trial, of the tenants of the estate having for thirty years and upwards cut and sold planted wood without interruption, and of a general reputation of the tenant's right to cut and sell such wood at pleasure. By Lord Ellenborough, C. J.: "Although the whole of the planted wood is the fund out of which the tenant is entitled to cut down, and he might maintain trespass against a stranger who cut them down, yet, if he being only entitled to cut them as estovers, cuts them down for aliene purposes, the lord will be entitled. As soon as the tenant cuts down for a foreign purpose, his right determines, and the lord's right commences (*j*). Now

(*h*) Doe *d.* Foley and others *v.* Wilson, 11 East, 56; and see Cro. Eliz. 499, in East *v.* Harding. Where a person had two copyholds held of the same manor, and cut down timber on the one for the repairs of the other, equity relieved; Nash *v.* Earl Derby, 2 Vern. 537; 1 Stra. 450. But the estovers of one estate cannot of right be applied to another; Lee *v.* Alston, 1 Bro. C. C. 194, Belt's ed.

(*i*) 2 Mau. & Selw. 494.

(*j*) When timber trees on *copyhold* land are separated from the soil, by whatever act or casualty, the tenant's possessory right ends, and the lord may take them; Ailner's case, 1 Keb. 691; Cage *v.* Dod, Sty. 233; Lord Banbury's case, 11 Mod. 94, 95; ib. 68, pl. 1; Brownl. 42; Mackerel *v.* Harrison, Mich. 5 Ann. B. R., cited as S. C. 6 Vin. Cop. (R. e.), pl. 11; Herlakenden's case, 4 Co. 62; Berry *v.* Heard, Cro. Car. 242; Palm. 327; Gordon *v.* Harper, 7 T. R. 13; S. C. cited 2 Mau. & Selw. 499; Berriman *v.* Peacock, 9 Bing. 384. But as to pollards, dotards, bushes, &c., the law is otherwise; and if

here the tenant's right to cut is for repairing, and for any other necessary uses; and can it be argued to be for a necessary use when the tenant cuts down, not for any botes, but for a purpose perfectly aliene? It seems to me that it cannot; and therefore by the cutting the tenant's right determined. As to the rejection of the evidence, reputation is certainly out of the question, because the tenant's right could only arise by some grant or deed; but as to the rest, I own my impression would have been to have admitted it, though I should probably have advised the jury that it was not of much weight against the plaintiff's evidence; but still, if there be any species of grant, which, being presumed, would have authorized the tenant to deal with the wood as she has done, she ought to have the benefit, whatever that may be, of the evidence." And Bayley, J. and Dampier, J. concurring, the rule for a new trial was made absolute (*k*).

thrown down, they belong to the tenant; Com. Dig. Biens, (H.); 1 Roll. Rep. 181; Herlakenden's case, Berriman & Peacock, sup.; Channon *v.* Patch, 5 Barn. & Cress. 897.

Timber growing on *freehold* land, when felled by tenant for life impeachable of waste, belongs to the person entitled to the first estate of inheritance; Whitfield *v.* Bewit, 2 P. W. 240; Bewick *v.* Whitfield, 3 P. W. 266; 1 Ves. jun. 481; 12 East, 215, n. But if it is ordered by a court of equity to be cut down, or if a tenant for life without impeachment of waste sell under a power, the author apprehends that the particular tenants in succession will be entitled to the benefit of the fund produced by sale; Wickham *v.* Wickham, 19 Ves. 429; Doran *v.* Wiltshire, 3 Swanst. 699.

The author inclines to think that a copyholder is not entitled to any trees growing on the land for the purpose of sale, although not of the denomination of timber (see Fisher, 114); and even supposing that the felling of such trees would not be deemed waste, should a copyholder cut down any trees, although not timber, it should seem that they would belong to the lord; but see 1 Lev. 274, pl. 365; and S. C., differently stated, 6 Vin. Cop. 228 (R. e. 3), pl. 2.—N. B. It was held by Plowden and Popham, that if the lord grant a copyholder the trees growing and afterwards to grow on the land, and liberty to fell them and carry them away, he might fell those which were then growing, without committing a forfeiture, as the grant would be a dispensation of the forfeiture, but that the grant would be void as to trees afterwards growing; Mo. 94, pl. 234. Grubbing up underwood is waste; Co. Lit. 53 a; 22 Vin. 443. So rooting up quicksets of white thorn, &c., or germins of timber under twenty years growth, or of underwood allowed to be cut; Co. Lit. 53; Godb. 210; Com. Dig. Waste (D. 5); 22 Vin. 442, 444.

"Cutting and carrying away of shrouds or underwood is no forfeiture without a special custom to make it so;" Preced. Cop. Ct. Rolls, p. 168. "Or loppeth the trees, or selleth the loppings, or if he cutteth down any fruit trees for fuel, having other wood sufficient, these are forfeitures;" Ct. Keeper's Comp. 175.

Waste may be committed by cutting trees which are not timber, under some peculiar circumstances, as by cutting birch, willow, maple, &c. growing in defence of a house; or apple or pear trees growing in a garden; 22 Vin. "Waste," 443.

See further as to waste by copyholders, post, tit. "Forfeiture."

(*k*) A grant of woods and underwoods to a copyholder of inheritance, by a lord entitled by the custom to the cut of the woods growing on the copyhold lands, does not merge the profit in the copyhold; Fawlkner *v.* Fawlkner, 1 Vern. 21, 22.

But it would seem that when the copyholder may cut timber for repairs, he may sell the lops, tops and bark, towards defraying the charges of reparation (*l*).

Although a copyholder is not entitled to trees by the custom of the manor, yet he may bring trespass against a stranger (*m*). And it should seem that the lord may maintain an action on the case for the same trespass, in respect to the prejudice done to his inheritance (*n*).

It is also the better opinion that an action on the case will lie by a copyholder in remainder against a copyholder for life, for waste done by him (*o*).

Estovers.—It has been doubted by very eminent lawyers whether copyholders are entitled to estovers of common right; and although it is generally considered that the right is incident to the grant (*p*), yet it must be recollected that all copyholders hold at the will of the lord for an estate enlarged only by custom, and that tenants at will of freehold lands are not entitled to estovers (*q*); but there are few manors, if any, the author apprehends, where the custom has not established the right (*r*).

(*l*) Sandford *v.* Stevens & Smith, 3 Bulst. 282.

(*m*) 2 Hen. 4, 12; Kitch. 157; Co. Cop. s. 51, Tr. 119; Jefferson *v.* Jefferson, 3 Lev. 131; ante, p. 422.

(*n*) Jefferson *v.* Jefferson, sup.; 2 Rol. Abr. 551, pl. 50.

(*o*) Jefferson *v.* Jefferson, sup. But see Com. Dig. Cop. (K. 7). The author apprehends that copyholds are not within the statute of Gloucester (6 Edw. 1, c. 5), "as to the several tenants against whom an action of waste is maintainable." The words are: "It is provided also that a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste shall leese the thing that he hath wasted, and moreover shall recompence thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the Great Charter, and where it is contained in the Great Charter that he which did waste during the custody shall leese the wardship, it is agreed that he shall recompence the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship."

(*p*) As copyholders are bound to keep the tenements in repair, there is certainly great reason to contend that the right of estovers is incident to the grant, and that no special custom need be shown. See the fifth resolution in Heydon & Smith's case, 13 Co. 69; S. C. 2 Brownl. 319; S. C. Godb. 173, cites 9 Hen. 4; Fitz. Wast. 59. But if there is no house, it would seem that there can be no right to estovers; Bishop of Chichester & Strodwick, Godb. 234, 235; yet see Kitch. 113, 114.

(*q*) But a tenant who holds strictly at will is not bound to do repairs; Co. Lit. 57 a.

(*r*) See Swaine *v.* Becket, Mo. 811, 812, where the cutting and lopping trees was justified on the ground of there being a custom for the copyhold tenants to have estovers; S. C. 1 Brownl. 231; S. C. 8 Co. 63 b.

The Court of Chancery will direct a commission to set out sufficient timber and wood for the copyholder, for botes and es-

And by custom, estovers may be taken on any part of the manor whereof the copyhold is held, even in the woods of the lord (*s*).

In the case of *Lord Montague* v. *Sheppard* (*t*), it was held that a copyholder could not, except by special custom, take trees for housebote, &c., as tenant for life or years might do, "which have an estate certain."

And in *Dawbridge* v. *Cocks* (*u*), the court ruled that a copyholder might cut off the under boughs, which could not cause waste, though not the top boughs, as that might occasion the destruction of the tree.

But in *Heydon & Smith's* case (*x*), it was expressly resolved, that a copyholder was entitled to estovers of common right, *as a thing incident to the grant.* The report adds, "but the same may be restrained by custom, *scil.* that the copyholder shall not take it, unless by assignment of the lord or his bailiff, &c."

It was further resolved in the above case of *Heydon & Smith*, that trespass would lie by a copyholder against the lord for cutting down trees, where the rest was not sufficient for estovers.

And in *Stebbing* v. *Gosnal* (*y*), Popham and Fenner held that, as there was a custom that every copyholder *in fee* should have the loppings of the *pollingers*, an action lay by a copyholder against the lord for cutting down two oaks, being *pollingers*, whereby the copyholder lost the benefit of the future loppings, although it appeared that the lord left the then loppings for the plaintiff.

tovers, according to the custom; Ayray *v.* Bellingham, Finch. 199; 6 Vin. Cop. (R. e.), pl. 9. And should the lord alien the waste or woods, or except them in a demise of the manor, it would not defeat the copyholder's right to botes and estovers; Swaine *v.* Becket, sup.

If a grant or lease contain an exception of timber trees, and they are the only words, the soil will not be excepted, but only sufficient nutriment out of the land to sustain the vegetative life of the trees; Liford's case, 11 Co. 50 a; and see Rolls *v.* Rock, 2 Selw. N. P. 1287; Harrison's Index, 2075; Shep. To. 95. If wood and underwood *alone* be excepted, so is the soil; Whilster *v.* Paslow, Cro. Jac. 487; but if *timber*, wood and underwood be excepted, then as the soil of the timber is not excepted, so is not the soil of the wood and underwood; Legh *v.* Heald, 1 Barn. & Adolph. 622.

(*s*) Foiston & Crachroode, 4 Co. 32 a; Withers *v.* Iseham, Dy. 70, 71; 6 Vin. Cop. (R. e.), pl. 1. And the custom is not extinguished by a neglect to exercise the right; Bishop of Chichester *v.* Strodwick, ubi sup.

(*t*) Cro. Eliz. 5.

(*u*) Cro. Eliz. 361. And see East *v.* Harding, ib. 292; 1 Leo. 272, ca. 365.

(*x*) 13 Co. 68.

(*y*) Cro. Eliz. 629. (But Gawdy was absent and Clinch doubted, as leaving the timber to decay would be a prejudice to the commonwealth. See also Salk. 638; Comy. 72.) Vide S. C. Mo. 546, pl. 727; 1 Roll. Abr. 108, pl. 22; 13 Co. 69. And see Crosse & Abbot, Noy, 14; Crogate *v.* Morris, 1 Brownl. 197; Whitehand's case and England's case, cited 2 Brownl. 149; Com. Dig. Cop. (K. 7.)

In *Ashmead* v. *Ranger* (*z*), Holt, C. J. (denying the authority of *Lord Montague & Sheppard* (*a*)) held, that if the lord cut down trees so as not to leave sufficient estovers, a copyholder *for life*, in respect of his possessory interest, might maintain trespass against him, and this judgment was afterwards affirmed in the Exchequer Chamber; but both judgments were reversed in the House of Lords, *ten* lords being for affirming, and *eleven* for reversing (*b*).

Where copyholders are allowed by the custom to cut down trees, equity will interpose in favour of a remainder-man to restrain a party in possession from committing waste, the same as in freehold cases (*c*).

And in the case of *Stansfield* v. *Habergham* (*d*), the customary heir of a copyholder *taking by way of resulting trust until the happening of a contingency*, was restrained by injunction from committing waste, Lord Eldon, Chancellor, observing, that the heir so taking was better entitled to preserve the timber than a trustee for preserving contingent remainders, and could have no right in the consideration of a court of equity to cut timber; for that, even where there is an executory devise over of a legal estate, the court would not permit the timber to be cut down, more especially not in an executory devise of a trust estate: and an application to dissolve the injunction was refused.

In this case Lord Eldon, after expatiating on the practice of the court in giving effect to contingent limitations of freehold estates by the interposition of trustees, when called upon to execute a trust, observed, "There is no difference as to the copyhold estate, for though it is true the lord will preserve contingent remainders, I am not prepared to say it is as clearly his duty to do so, as it is the duty of trustees to preserve contingent remainders of freehold estate to interpose actively to prevent waste; and though trustees to preserve contingent remainders are sometimes omitted in limitations of copyhold estates both by settlement and will, they are frequently created by express limitation; and, whatever may be the case as to the lord, if trustees are created by express limitation for the purpose of preserving contingent estates, they would be guilty of a neglect of their duty, by permitting a tenant for life liable to impeachment for waste, or a tenant *pur auter vie*, who by the nature of his estate is liable for waste, to destroy that part of the estate, viz. the timber."

(*z*) 1 Lord Raym. 551; S. C. 3 Salk. 638; S. C. Comy. 71. And see Bourne v. Taylor, post.

(*a*) 3 Salk. 638.

(*b*) The printed case in this appeal is in Mr. Serjt. Hill's collection of cases in the House of Lords (now in Lincoln's Inn Library), on the back of which is written by Lord Chief Baron Ward—"This judgment was reversed by eleven against ten lords, and against the opinion of all the judges of England;" 1 Cru. Dig. 324.

(*c*) Cornish v. New, Fin. 220.

(*d*) 10 Ves. 278.

It had been generally supposed after the case of *Dench* v. *Bampton* (*e*), that equity would not interpose to prevent waste as between the lord and copyholder, but leave the lord to his remedy for the forfeiture: that principle was, however, overruled in *Richards* v. *Noble* (*f*), which was a bill filed by the lord of a manor against copyholders for an account of turves cut and taken, and for an injunction, not waving the forfeiture; and the Chancellor (Lord Eldon) said, that in many cases the forfeiture was a very inadequate remedy, and noticed the instance of a barren spot, upon which many valuable timber trees grew, where, if the copyhold tenant only forfeited his copyhold by cutting down those trees, he might be a gainer by his own wrongful act.

Secondly, as to Mines.

A copyholder, whether of inheritance, or for life or years only, has a possessory interest in mines (*g*) as well as trees; and the copyholder of inheritance, or for life with power to renew or to nominate a successor, may also have a proprietory right in mines by immemorial custom; but without such an established custom, the right of property in mines is in the lord: and it follows that, in the absence of any particular usage, neither the tenant without licence from the lord, nor the lord without the consent of the tenant, can open and work new mines (*h*).

This rule was established about a century ago by the case of *The*

(*e*) 4 Ves. 703—707. And see Att. Gen. v. Vincent, Bunb. 192; Lord Uxbridge v. Staveland, 1 Ves. 56.

(*f*) 3 Meriv. 673; Reg. Lib. 1806, B. fo. 1224. But see Att. Gen. & Vincent, and Lord Uxbridge & Staveland, sup.

(*g*) But although a copyholder has only a possessory interest, yet in a case where a purchaser refused to complete his contract because the mines were under a common, wherein others had a right of common, which would subject him to actions for sinking shafts, Lord Eldon decreed a specific performance, from the improbability of any obstruction, observing, that in case an action were brought, a farthing damages would be sufficient; Sugd. Vend. & Pur. 326, 8th ed.

(*h*) See 1 Vent. 123; 2 Lev. 2, in Hoskins v. Robbins. When, in freehold cases, *the whole inheritance* is granted, even if mines and trees are expressly named, a person taking a particular interest only under the grant cannot open mines or cut down trees; Whitfield v. Bewit, 2 P. W. 240. And although a lessee may dig mines when the word "mine" is expressly used, or if opened, being part of the profits, yet his opening new mines would be waste; Saunders' case, 5 Co. 12; Co. Litt. 53 b; 2 Barn. & Adolp. 439. For a mine is not properly so called till it is opened, it is but a vein of coal before; Astry v. Ballard, 2 Mod. 193; S. C. 2 Lev. 185; T. Jo. 71; 3 Keb. 709, 723; 15 Vin. 402; Co. Litt. 53 b, 54 b. In Astry & Ballard it was determined, that when there are mines, some open and others hidden, the words "lands and mines" will pass the open mines only.

The crown has no power, under a bare reservation of royal mines, to enter on the subject's land, or grant a licence to work the mines; but if opened, may restrain the owner from working them, and may license others to work them; Lyddal v. Weston, 2 Atk. 19.

Bishop of Winchester v. *Knight* (*i*), where the bishop brought a bill in equity against the executor and heir of a customary tenant who had opened a copper mine, praying an account of the ore dug by each of them, and Lord Hardwicke said, "This question being doubtful, and at law, let the bishop bring his action of trover as to the ore dug and disposed of by the present tenant." It appears by the report that this was accordingly tried, and that there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might, by custom, dig and open new copper mines; so that, upon producing the *postea*, the court held, that neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, could dig in the copper mines, *being new mines.*

And in *Bourne* v. *Taylor* (*k*), Lord Ellenborough, C. J., in delivering the opinion of the court, gave his full sanction to the principle, holding, that trespass would lie against the lord for entering upon copyhold lands, to bore for and work mines and veins of coal, unless under a special custom: and his lordship in support of that doctrine cited the case of *Player* v. *Roberts* (*l*), in which the court held, that neither the lord nor his lessee of mines could enter on the copyholder for life to dig coals, without being subject to an action of trespass by him (*m*); and also Gilbert's Tenures, 327, where the Lord Chief Baron says, "It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines; *neither can the lord dig in the copyholder's lands*, for the great prejudice he would do to the copyhold estate;" and likewise *Townley* v. *Gibson and others* (*n*), where it had been urged in argument, that the lord of the manor was entitled to the mines under the copyholds, unless there were some custom to exclude him; and Buller J. said, "I do not agree with the defendant's counsel that the lord may, unless restrained by custom, dig for mines on the copyholder's lands; but it is not necessary to consider that question here." And Lord Ellenborough further observed, "If such a right as is claimed exist, it is singular that it is not noticed in any of the books which treat of manors and copyholds; that it is now for the first time brought forward; that not a single instance is given of the exercise of it; and that with the single exception of a dictum in *Rutland* v. *Greene* [or *Gie*], what authorities

(*i*) 1 P. W. 406. But it would seem that a copyholder may dig for marl to lay on the land; Paston's case, Win. 8; Gilb. Ten. 327.

(*k*) 10 East, 189. (See this case, post, tit. "Pleading.")

(*l*) W. Jones, 243.

(*m*) But the court, in Player & Roberts, ruled that when the lessor or lessee, or a stranger, enters and digs the coal out of the pits, it belongs to the lessee, and that if any other take the coal the lessee shall have trover.

(*n*) 2 T. R. 707.

there are upon the point are all against it. *Rutland* v. *Greene* is in 1 Keb. 557; 1 Sid. 152, and 1 Lev. 107. The case was this: a parson opened a mine upon his glebe; the patron moved for a prohibition to restrain him, under the equity of the statute 35 Ed. I. st. 2. The court thought him entitled to open and work the mine, because otherwise none of the mines under glebe lands throughout England would be opened: but it being urged that this was the only way the patron had to try his right, the court granted a rule. Siderfin adds, the same law seems of a copyholder of inheritance. *Quære bien?* Whether this were his own conclusion, or collected from what fell from the court, does not appear: but if any inference is to be drawn from it, it is that the *copyholder* may open the mine, not the *lord.* Levinz says nothing as to lord or copyholder: but Keble says, 'Twisden conceived the lord may open a mine in a copyhold of inheritance.' Foster held it a trespass, and Keeling conceived he could not do it. The utmost extent therefore of this authority is, that there is the *obiter dictum* of one judge, viz. Twisden, against the *obiter dicta* of two others, Foster and Keeling."

And the possessory right of the tenant will sustain an action of trespass against the owner of an adjoining colliery for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface, the general rule being that he who has the possession of the surface has the possession of the subsoil (*n*); so that a copyholder has possession of the subsoil, although he has no property in it (*o*).

The above mentioned case of *Townley & Gibson* (*p*) has established that mines are part of the demesnes of a manor, and not a distinct property from the freehold, so that they should be reserved in express terms, when intended to be excepted out of the grant of waste or the enfranchisement of copyholds. But in the northern counties it frequently happens that one person has in him a freehold title to land, whilst another has an exclusive right to the mines under it (*q*). And the presumption of title to the minerals, arising from the enjoyment of the surface of the land, may be rebutted by evidence that others had raised and carried away the ore under it (*r*).

(*n*) Lewis v. Branthwaite, 2 Barn. & Adol. 437. In this case Lord Tenterden said, "Unless there be a distinction between trees on the surface of the soil and minerals below, the authorities cited as to trees are in point. No decision or dictum has been cited which warrants any such distinction." But see post, 431, as to waste.

(*o*) See 2 Barn. & Adol. 443.

(*p*) 2 T. R. 707; ante, pp. 19, 20; and see 1 Mod. 75, in Hoskins v. Robins; 1 Vent. 398.

(*q*) Per Lord Ellenborough, in Barnes v. Mawson, 1 Mau. & Selw. 84.

(*r*) Rowe v. Grenfel, 1 Ry. & Moody, (N. P.) 396.

In the case of *Rowe* v. *Brenton* (*s*), which was a trial at bar (*t*) in trover for a quantity of copper ore, it was proved that the plaintiff, being in possession of lands in the manor of Tewington, in Cornwall, sunk a shaft there and raised copper ore, which was afterwards carried away by the defendant, a shareholder in the mine, the shaft of which was sunk in adjoining land, and the working of which extended under the land of the plaintiff: the defendant claimed the ore as lessee under the crown in right of the Duchy of Cornwall, contending that the plaintiff's land was a conventionary tenement; and that although such tenements were held to the tenants, their heirs and assigns, from seven years to seven years, renewable for ever, they were of a base tenure, and the tenants had no right to the minerals. Lord Tenterden, in summing up, told the jury that the question was, whether the owner of a conventionary tenement was entitled to the copper found under it, or whether it belonged to the Duke of Cornwall, and that there was no question as to the right to enter and dig for it: that in many manors it happened that the lord of the soil was entitled to the minerals, but had no right to enter upon the lands of the copyhold tenants to search for and obtain those minerals without the consent of the tenants, and that all the evidence given by the plaintiff as to the interruption of workings might be explained by the right of the tenant to prevent the owner of the minerals from digging for them without his consent. His lordship then directed the attention of the jury to the documentary and parol evidence, and observed, that even allowing the conventionary tenants (*u*) to have in their estates the largest interest that they had ever claimed, viz. from seven years to seven years, renewable for ever, that would not give them a right to the minerals; and although a distinct positive usage for the conventionary tenants to take the minerals might be valid in law, it was incumbent on them to prove it, for otherwise the right would remain in the lord. And a verdict was found for the defendant.

As mines may be a distinct possession from the manor, evidence of the possession of the manor will not avoid the statute of limitations in an ejectment by the lord for mines, where the defendant shows a possession of them for twenty years (*x*).

(*s*) 8 Barn. & Cress. 737; 3 Man. & Ry. 133.

(*t*) Where the crown is interested the Attorney General may, as a matter of right, demand a trial at bar; see in S. C.; and also 2 Inst. 424; F. N. B. 241 a, tit. "Procedendo;" Paddock *v.* Forrester and another, 3 Scott, C. P. 783, n.; and see a reference to the latter case, post, tit. "Prescription."

(*u*) See further as to lands of conventionary or customary hereditary leasehold tenure existing in the assessionable manors of the Duchy of Cornwall, Ley *v.* Ley, 2 Mann. & Gr. 780; ante, tit. "Devise," p. 325; post, tit. "Customary Freeholds."

(*x*) Rich *d.* Lord Cullen et al. *v.* Johnson et al., 2 Str. 1142.

And in *Curtis* v. *Daniel* (*y*), it was decided that an adverse possession of *copper* mines by freehold and customary tenants for above twenty years, was evidence to establish a right against the lord of the manor, although he proved his right to all *tin* mines within the manor, as well under the customary tenements as under the freehold tenements and the waste lands.

In the case of *The Bishop of Winchester* v. *Knight* (*z*), Lord Chancellor Cowper held that a bill would lie for an account against the executor of a customary tenant who had opened a copper mine and dug thereout, and sold great quantities of copper ore, without any special custom in support of the pretended right; and that if the ore came to the executor's hands, trover would lie for it. His lordship also observed, that the evidence that the tenant might do one sort of waste, as cut down and dispose of timber, was no evidence of a power to commit any other sort of waste, as that of disposing of minerals (*a*): but that a custom empowering the tenants to dispose of one sort of mineral, as coals, might be evidence of their right to dispose of another sort of mineral, as lead.

And in *Jesus College* v. *Bloome* (*b*), Lord Hardwicke dismissed a bill for a mere account of timber cut down, as being the proper subject of an action at law; but his lordship observed, that the court presumes when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time an account of the waste done; for though a court of law may give damages, yet it cannot prevent further waste; that a court of equity always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade (*c*); and that there were many cases where the court would relieve and decree an account of ore taken, when in any other tort or wrong done it has refused relief.

The Court of Chancery will grant an injunction against the opening of a mine, when no custom is shown in support of the right (*d*): and in *Grey* v. *The Duke of Northumberland* (*e*), on a motion for an injunction to restrain the defendant from opening a mine upon the

(*y*) 10 East, 273; and see Bull. N. P. 104.

(*z*) Ante, p. 428.

(*a*) And see Lord Darcy *v.* Askwith, Hob. 234.

(*b*) Amb. 54; S. C. 3 Atk. 262, n. (1); Cox's P. W. 408; and see Dench *v.* Bampton, and Richards *v.* Noble, ante, p. 427.

(*c*) 2 Atk. 630, in Story *v.* Lord Windsor.

(*d*) See Gibson *v.* Smith, Barnard. C. R. 497; but with such a custom, equity will not restrain even a tenant for life from opening new pits or shafts, in order to pursue the old vein of coals or other mineral; Clavering *v.* Clavering, 2 P. W. 388.

(*e*) 13 Ves. 236, Dec. 1806.

plaintiff's copyhold land, the defendant being the lord of the manor, it was urged in support of the motion, that the court would be unwilling to interpose where a mine had been opened and was actually in a working state, the consequence of which might be irreparable mischief (*f*); and that upon the same principle the court would interpose, under the circumstances stated in the affidavits of the preparations to open a mine, as the question whether the lord could without a special custom open a mine, ought to be tried at law; and the assizes for the county of Northumberland being held only once a year, the trial could not take place before July; and Lord Erskine, C., asked if there was any case upon the point whether the lord could without a special custom open a mine, observing, that the effect might be a disherison of the whole estate of the copyholder; and that even without an authority, he conceived the distinction between stopping the working of a mine already opened and opening to be as it had been stated: and the court granted the injunction. In November, 1809, a motion was made to dissolve the injunction (*g*), and after stating the purport of the bill, Lord Eldon, C., said, that in granting the injunction the court was influenced by the fact, that it had frequently interfered in the case of trespass by a local knowledge of the means of working coal mines, and that the exercise of the right in the mean time would change and deeply affect the property; and therefore it was proper that a trial should take place, but that great mischief might ensue to the lord of the manor by upholding the injunction too long;—that he had looked at the report of the case of *Bourne & Taylor* in the King's Bench, from which he collected that the lord of a manor may be in the same situation with respect to *mines* as to *trees*, that is, the property may be in him, but it did not follow that he could enter and take it without consent, which must be acquired by purchase or otherwise: and his lordship added, that it was understood both by Lord Erskine and himself, that the action which had been commenced would try the question; that if the merits had not been tried from the fault of the plaintiff in equity, that presented a strong case for dissolving the injunction; and that unless some means of procuring a speedy trial could be insured, he would dissolve it.

And in the case of *Field* v. *Beaumont* (*h*), Lord Eldon said, that to

(*f*) In the late case of Hilton v. Lord Granville, a lessee claimed the right of working mines, without giving the copyholders compensation for any damages they might sustain. The mines had been worked for many years, and the Court of Chancery refused an injunction, but directed an action to be brought to try the right in dispute; Law Journ. Rep. vol. 10, pt. 12, N. S. p. 398; 4 Beav. 130; and see Viner v. Vaughan, 2 Beav. 466.

(*g*) 17 Ves. 281.

(*h*) 1 Swanst. 208.

stop the working of a coal mine was a serious injury, and that the expenditure incurred in the course of eight years would raise an equitable ground to prevent the hasty interference of the court.

A copyholder who grants a lease of mines, which is a forfeiture of his estate, has no equity against his lessee: so in *Wentworth* v. *Turner* (*i*), tenant for life made a lease of coal mines, and he and the remainder-man in fee joined in a bill for an injunction to restrain the defendant from taking coal, alleging that the lease was made by mistake, and was a forfeiture of the estate for life; but the Chancellor held that a man should not disaffirm his own lease, observing, that if tenant for life liable to waste had sold timber, he could not prevent the vendee from cutting it: that it was collusion to bring forward the remainder-man, who, if he complained, must file a bill alone.

QUARRY.—The author apprehends that there is no distinction between a mine and a quarry upon copyhold land, but that the lord and tenant must concur for the purpose of justifying either of them in opening and working a quarry of stone, slate, &c. (*k*). In *Bourne & Taylor* (*l*), Holroyd (afterwards Mr. Justice Holroyd) said, in his reply on the general question as to the right of the lord to enter and dig for coals, "If a mine, lime pit, or stone quarry, were once lawfully opened upon the copyhold, the copyholder may dig and enjoy it, which showed that an interest passed to him in the land beyond the mere use of the surface." But this dictum appears to the author much too general to be supported.

(*i*) 3 Ves. 3. It clearly appears, therefore, that a remainder-man may have an injunction to stay waste in copyhold as well as in freehold cases, ante, p. 426.

(*k*) See the case of Sir Harry Peachy v. The Duke of Somerset, 1 Str. 447, 454; see also Dearden v. Evans, 5 Mee. & Wel. (Ex.) 11; Hoyle v. Coupe, 9 ib. 450; post, p. 443; et vide s. 82 of the commutation and enfranchisement act, 4 & 5 Vict. c. 35.

(*l*) 10 East, 199; ante, p. 428; and see that case post, tit. "Pleading."

CHAPTER XIII.

Of Forfeiture.

HAVING already treated briefly of the lord's right of entry upon copyhold lands by the title of ESCHEAT (*a*), the author will now endeavour to show by what acts a copyhold interest may be forfeited to the lord, and the distinction between absolute and conditional forfeitures.

Although copyholders are no longer dependent on the caprice of the lord of the manor, yet as they hold at his will *secundum consuetudinem manerii*, any act incompatible with the copyhold interest as established by custom will operate as a forfeiture.

Therefore if a copyholder execute a feoffment with livery, (which would indeed not only create a common-law interest, but amount to a disseisin), the lord may claim the estate as forfeited (*b*).

And it has been said that a copyholder levying a fine in the Court of Common Pleas would have forfeited his copyhold (*c*): but as a

(*a*) Ante, p. 407 et seq.

(*b*) Taverner & Cromwell's case, 3 Leo. 109; S. C. 4 Co. 27 a; S. C. Cro. Eliz. 353; Co. Lit. 59 a; ib. n. 3; Brown's case, 4 Co. 21 b; 2 D'Anv. 195, 197; 1 New. Ab. 484; Kitch. 158, cites 11 H. 4, 81; ib. 177; and see 3 Mod. 151. The 4th sect. of 8 & 9 Vict. c. 106, for amending the law of real property, enacts, that a feoffment made after the 1st day of October, 1845, shall not have any tortious operation.

(*c*) Cru. on Fines, 281, pl. 387, cites Supp. Co. Cop. s. 11; and see Freem. 516, 517; Eastcourt *v.* Weeks, 1 Salk. 187; S. C. Lutw. 503; 3 T. R. 166 et seq., in Doe & Hellier. In the case of Wintle and Margaret his Wife, and Washborne et ux. *v.* Carpenter and Pisburgh, Fin. Rep. 462, the homage presented the estate as forfeited by a fine being levied thereof at the common law; but the case was far from being an authority for any such effect of a fine of copyholds, as the following extract of it will show. *W. C.* a copyholder in fee within a manor, the court-rolls whereof were lost, devised to his grandson *R. C.* who (3 Car. 1) conveyed the lands as freehold to *E. W.* by deed and fine, who in like manner conveyed to *T.* and his heirs. *T.* commenced a suit against *R. C.* on the covenants between him and *E. W.*, and at length it was agreed that *R. C.* should pay 30*l.* to *T.*, to be applied as a fine to the lord to admit *T.*, and that *R. C.* should surrender at the next court; but before that time *T.* died, and his son, an infant, enjoyed the land forty-eight years, and then devised to the defendants in fee, to the exclusion of plaintiffs Margaret his sister, and Washborne his eldest sister's son, (*who probably were the testator's customary heirs.*) Afterwards a court was held at which the homage presented the forfeiture of the lands, *being sold as freehold by fine at common law;* and in consideration of a fine paid by the plaintiffs, the lords granted the lands to them and their heirs. The defendants dug up the boundaries, so that

fine was void against the lord (*d*), even if grounded on a previous feoffment, unless indeed there had been an actual change of possession (*e*), there were strong grounds for the opinion entertained by many eminent lawyers, that a fine levied by a copyholder did not operate as a forfeiture (*f*). On the other hand it was supposed by some persons, whose opinions were entitled to very great respect, that a fine by a copyholder was an assertion of a freehold right, totally inconsistent with the continuance of a copyhold interest, and that it was therefore to be considered as a determination of the tenancy, and so bringing the lord's reversionary freehold interest into possession, and consequently giving him a right to enter. And if a fine had been levied by a copyholder on a disseisin without any collusion, it would clearly have been a forfeiture, and against which no relief could have been had in equity (*g*).

the copyhold could not be distinguished from freehold lands belonging to the defendants and others, and the plaintiffs therefore exhibited their bill to preserve the testimony of ancient witnesses, and for a commission to set out boundaries. The defendants in their answer denied the title of the plaintiffs under the lords of the manor, *for that the premises had been enjoyed as freehold for sixty years and more, and had during all that time passed by deed and fine.*

The plaintiffs replied, that since the bill exhibited, they had obtained a verdict *on full evidence*, and judgment in ejectment, so that the defendants' title had become void both in law and equity. The court decreed a commission to set out and distinguish sixty acres of *copyhold lands*, and for that purpose witnesses to be examined, &c.

(*d*) Kitch. 246; Hughes *v.* Thomas, 13 East, 487.

(*e*) Fermor's case, 3 Co. 77; Margaret Podger's case, 9 Co. 105; Saffyn's case, 5 Co. 124 a; 4 Co. 21 b; Co. Cop. s. 55, Tr. 126; Howlet *v.* Carpenter, 3 Keb. 775; S. C. 1 Vent. 311; Cru. on Fines, 212; Doe *d.* Tarrant *v.* Hellier, 3 T. R. 162; Co. Lit. 330 b, n. (1); ante, pp. 70, 81.

(*f*) In the above case of Doe & Hellier, Lord Kenyon evidently entertained considerable doubts as to the alleged effect of the fine, even if it could have been held to extend to the copyholds; and, with reference to the dictum in the Supp. to Co. Cop. observed, that the Supplement was not Lord Coke's work, though from whose hands it came he said he did not know: and Buller, J., observed, "that it did not follow because the deed to declare the uses of the fine comprehended a greater number of acres than the amount of the freehold estate, that the copyhold was included in the fine; and supposing it was, that the fine as to the lord was void, because the copyholder continued in possession: that the passage in the Supp. to Co. Cop. and the dictum of Treby, C. J., in Eastcourt *v.* Weeks, was to be understood as applicable only to those cases where the fine destroyed the estate: that if there was a transmutation of possession either by a fine or feoffment, it divested the lord's right, because it gained a fee-simple to the person to whom it should be made or levied: but that was not so where the possession continued which was the principal case: that it was like the case of a mortgagor levying a fine and continuing in possession, which was no bar to the mortgagee."

(*g*) Sir Harry Peachy *v.* Duke of Somerset, Prec. Ch. 568; S. C. 2 Eq. Ca. Abr. 227; S. C. 1 Stra. 451; Lady Whet-

Again, if a copyholder, without having previously obtained the lord's licence, grant a lease not warranted by the custom (*h*), it will be an *immediate* forfeiture of his interest, even if it be a lease by parol, to commence at a future period (*i*); and, as it would seem, although the lessee does not enter (*k*), for it would be a good lease between the parties, so even that the lessee might maintain ejectment (*l*). The reason given for this in some of the books is, that the lease is an illegal contract made to the disherison of the lord (*m*); but it has been denied that the lease, although a cause of forfeiture, is a disseisin to the lord (*n*); and this would appear to be the better opinion.

And there would seem to be no distinction between an ordinary lease, and a term created by way of security or indemnification, or otherwise (*o*).

The author apprehends that a lease for years of copyholds by *parol* is equally a cause of forfeiture (*p*).

And that a court of equity will not relieve against a forfeiture by the execution of a lease of copyholds, not warranted by the custom of the manor (*q*).

The grant of a lease which would not be a good demise between the parties, as a lease by a copyholder for life for a term *certain*, under a licence to let for that term, *if he so long lived*, would not be a forfeiture; contra by a copyholder in fee (*r*).

stone *v.* Sainsbury, Prec. Ch. 591; S. C. 2 P. W. 147; and see 2 Vern. 537. Vide also references to 3 & 4 Will. 4, c. 74, abolishing fines and recoveries, ante, p. 57, n.

(*h*) Co. Lit. 59 a; Murrel's case, 4 Co. 25 a; 1 Sho. 287. A few instances of leases, even forty years back, will not establish a custom; Jackman *v.* Hoddesdon, Cro. Eliz. 351.

A lease for one year is warranted by the general custom of the realm; Melwich's case, 4 Co. 26; Turner *v.* Hodges, Hutt. 101; S. C. Litt. Rep. 233; Combes's case, 9 Co. 75 b; Jory & Pawly, 2 Keb. 467. But this was formerly doubted, Co. Lit. 59 a, n. 4; post, tit. "Ejectment."

(*i*) Harding *v.* Turpin, Hetl. 122; Co. Lit. 59 a.

(*k*) East *v.* Harding, Cro. Eliz. 499; S. C. Mo. 392, 393; Mo. 184, 185; per Anderson, 2 D'Anv. 194, 195; 1 New Ab. 484; 6 Vin. Cop. (G. c.)

(*l*) East *v.* Harding, sup.; post, tit. "Of Ejectment."

(*m*) East *v.* Harding, sup.; 4 Co. 21 b; 1 Stra. 450, 451; Gilb. Ten. 234.

(*n*) Gilb. Ten. 231, 232; Ashfield *v.* Ashfield, Noy, 92; S. C. Godb. 364; S. C. W. Jones, 157; 6 Vin. Cop. (G. c.), pl. 11; 4 Bac. Abr. tit. "Leases and Terms for Years," 132, cites Mo. 184; Salk. 186, pl. 5; post, pp. 449, 453.

(*o*) Richards *v.* Sely, 2 Mod. 79; S. C. 3 Keb. 638, (Richards *v.* Ceely).

(*p*) Jackman *v.* Hoddesdon, East *v.* Harding, ubi sup.

(*q*) Sir H. Peachy *v.* The Duke of Somerset, Prec. Ch. 568; S. C. 2 Eq. Ca. Abr. 222; S. C. 1 Stra. 447; S. C. cited 2 P. W. 147, in Lady Whetstone *v.* Sainsbury; but see cont. Shelley *v.* Mason, 5 Car. 1, cited 1 Stra. 449, and 6 Vin. p. 114.

(*r*) Hall *v.* Arrowsmith, Poph. 105; S. C. (Haddon *v.* Arrowsmith), Cro. Eliz. 462 a; S. C. Ow. 73; and see Worledge *v.* Banbury, Cro. Jac. 436, 437; Holland *v.* Fisher, Orl. Bridg. 205; post, p. 459.

A lease for one year, excepting the last day, and so from year to year excepting the last day in every year, as long as the copyholder lives, operates as a lease for more than a year, and is a forfeiture (*s*).

And in *Mathews* v. *Whetton* (*t*), it was adjudged that three separate leases for one year each, there being two days between the beginning of each of the new leases and the end of the former, was a device only to avoid the forfeiture, and that the entry of the lord's lessee, although the copyhold had been surrendered to the lord subsequent to the forfeiture, but without notice of it, was lawful.

But a lease to create a forfeiture must have a certain beginning and end or it is void, and will convey at most an estate at will, which is no forfeiture.

So it has been held that a lease for one year according to a custom, and a covenant for enjoyment *de anno in annum* during ten years, is not a demise for more than one year, and consequently no forfeiture (*u*).

In *Doe* d. *Nunn* v. *Lufkin and others* (*x*), the Court of King's Bench decided that a demise for one year, and so from year to year for thirteen years more if *the lord would give licence, and so as the same should not be a forfeiture*, made the licence a condition precedent, and was not therefore a lease to create a forfeiture.

And a demise of a copyhold for three years, with a covenant to execute a new lease for three years within three months next before the expiration of the term, and so *toties quoties* to make up a term of twenty-one years, with a covenant for quiet enjoyment until such new

(*s*) Luttrell *v.* Weston, Cro. Jac. 308; S. C. Bulst. 215; Co. Lit. 59 a, n. 4.

(*t*) Cro. Car. 233; S. C. W. Jones, 249; 1 Roll. Abr. 508, pl. 10; ib. 510, pl. 5.

(*u*) Hamlen *v.* Hamlen, 1 Bulst. 189; Lady Montague's case, Cro. Jac. 301, n. 4; Co. Lit. 59 a; 1 New. Ab. 484; Lenthall and Wallup *v.* Thomas, 2 Keb. 267; Fenny *v.* Child, and Doe *v.* Morris, infra; but see Richards *v.* Sely, or Richards *v.* Ceely, ubi sup. So a lease for lives without livery, is no forfeiture; Godb. 269, pl. 374; Gilb. Ten. 234, 235.

(*x*) 4 East, 221; S. C. 1 Smith, 90; and see Hall *v.* Arrowsmith, ubi sup., post, p. 459.

The lord having in the above case of Doe *v.* Lufkin purchased the interest of the tenant with notice of the demise, a bill was filed for an injunction, but no motion being made the ejectment proceeded. Upon a motion afterwards for an injunction, the Chancellor ordered a case for the opinion of the Court of C. B., whether an ejectment would lie before the expiration of fourteen years from the commencement of the lease, and if it would, and the tenant should be ousted, whether any action could be maintained on the covenant for quiet enjoyment. And the judges of that court certified, that an ejectment would lie before the expiration of the term; and that if the tenant should be thereby evicted, no action could be maintained on the covenant. And Lord Eldon, C., being of opinion that there was not equity enough to sustain the bill, it was dismissed. Vide Lufkin *v.* Nunn, 11 Ves. 170; Luffkin and others *v.* Nunn and Hanson, 1 N. R. 163.

leases should be executed, has been held not to amount to a lease for more than three years (*y*).

And again in *Doe* d. *Wood* v. *Morris* (*z*), the Court of Common Pleas admitted that an agreement to lease a copyhold for twenty-one years, if the licence of the lord could be obtained, did not amount to a lease for a longer time than a year. In this case the court held, that if a copyholder undertakes to obtain a licence for his lessee to do an act which would be waste, as, for instance, to dig fullers-earth, on condition that the lessee should fill up the holes again, an ejectment will not lie by the copyholder or his assignee as for a forfeiture, although the lessee does not comply with the condition.

In an ejectment for copyhold premises at Hendon (*a*), the defendant produced a written instrument upon an agreement stamp, under the hand and seal of *A.*, of whom the lessor of the plaintiff purchased, which recited that *A.* had agreed with *B.*, that in case he should be seized of or entitled to the premises on the death of *C.*, he would immediately on the death of the said *C.* demise and let the same to the said *B.* on the terms thereinafter mentioned; and then it proceeded thus, "Now therefore the said *A.* doth hereby agree to demise and let unto the said *B.* all, &c., to hold, &c., from and immediately after the death of the said *C.* for the term of twenty-one years:" and *B.* covenanted and agreed with *A.* to take the premises accordingly, and before the expiration of the term to lay out a certain sum in improvements. *A.* further agreed with *B.* that he (*A.*), on the death of *C.*, and on his becoming entitled to the premises, would procure a licence to let the said premises, and that *B.* should peaceably enjoy, &c.(*b*); and at the trial Lord Kenyon was of opinion that the instrument amounted to a lease, and therefore nonsuited the plaintiff; but upon a rule obtained for a new trial his lordship said,

(*y*) Fenny *d.* Eastham *v.* Child, 2 Mau. & Selw. 255. But a lease for three years, and so from three years to three years until nine years, would operate as a lease for at least six years; see Wilcock's case, 2 D'Anv. 195, pl. 9; vide also Lady Montague's case, Cro. Jac. 301; 1 Bulst. 180.

(*z*) 2 Taunt. 52.

(*a*) Doe *d.* Coore *v.* Clare, 2 T. R. 739.

(*b*) An agreement that *A.* shall hold and enjoy, without restraining words, operates as a lease; Doe *d.* Jackson *v.* Ashburner, 5 T. R. 163. In deciding whether an instrument is executory only, or whether it conveys a present interest, the courts look not only to the words of it, but to the acts of the parties. See Staniforth *v.* Fox, 7 Bing. 590, where all the previous authorities are collected; and in which the court held that there is no difference between *agree to let* and *let*, where the relation of landlord and tenant is to commence immediately; vide also Doe & Ries, 8 Bing. 178; 1 Mo. & Sc. 259. The 3d section of 8 & 9 Vict. c. 106, for amending the law of real property, enacts, that a lease, required by law to be in writing, of any tenements or hereditaments, shall be void at law, unless made by deed.

that having consulted with the other judges, he was clearly convinced that he was mistaken in the opinion which he had held at the trial, and that the court were all of opinion that the instrument in question was an executory agreement only, and not a lease, for two reasons; first, because if it were held to be a lease, a forfeiture would be incurred, contrary to the express intention of the parties; and secondly, that the stamp was conformable to the nature of an agreement, and not adapted to an absolute lease.

A copyholder who has leased with licence may forfeit his interest in reversion or remainder, a reversioner or vested remainder-man being in the seizin equally with a tenant in possession (*c*); but such forfeiture will not affect the lease (*d*).

The crimes of treason (*e*) and felony are also causes of forfeiture to the lord (even without a custom), immediately on attainder, as the copyholder is then considered as dead in law (*f*); but not so as to

(*c*) Ante, p. 138. And see 1 Watk. on Cop. 336.

(*d*) Turner *v.* Hodges, Hut. 101, 102; S. C. Litt. Rep. 233; Gilb. Ten. N. 153; 8 Co. 45 a; Swinnerton *v.* Miller, Hob. 177; 6 Vin. Cop. (N. e.) pl. 5.

(*e*) It has been said that if the tenant be attainted of high treason, the king shall have the escheat of whomsoever he held; Scroggs, 168. But see ante, p. 81; Bacan's Use of the Law, 40; 10 Vin. 147, pl. 7; post, 3d Part, tit. "Escheat."

(*f*) Lord Cornwallis's case, 2 Vent. 38, 39; Benison (or Benson) *v.* Strode, Skin. 8, 29; S. C. 3 Lev. 94; S. C. 2 Sho. 150; S. C. Pollexf. 617; S. C. T. Jones, 189; Roe *d.* Jefferys *v.* Hicks, 2 Wils. 13; Co. Cop. s. 59, Tr. 137; 1 New Abr. 486; Gilb. Ten. 241; 2 Hawk. Pl. C. c. 49, s. 7; Kitch. 161; 1 Watk. on Cop. 325. And see Gittings *v.* Cooper, 1 Bulst. 13; 2 Brownl. 217; Paginton & Huet, Godb. 267, which seems to be S. C. Jory *v.* Pawly, 2 Keb. 451, 466; S. C. 1 Lev. 263; Harris *v.* Jay, 4 Co. 30.

Should the heir of a copyholder commit treason or felony in the lifetime of his ancestor, and be attainted, then as he is considered to be dead in law, the author apprehends that the copyhold would escheat to the lord on the death of the ancestor, and that the lord would have a permanent holding: so also supposing the father to have had two sons, and the eldest son to have been attainted, and to have died in his father's lifetime, leaving issue, as such issue must necessarily derive descent through the attainted son; but if, in the latter instance, the attainted son had died without issue, then the younger son would inherit from the father, because in showing the descent to him from the father he need not mention his elder brother; Dy. 48 a, pl. 16; Hob. 334; Cro. Car. 435; Hale, P. C. p. 1, 356, 357; Vin. Abr. tit. "Escheat;" ib. "Blood corrupted."

N.B. The descent between brothers was immediate, so that the attainder of the father did not prevent his sons from inheriting from each other; 1 Inst. 8 a; Palm. 19; 1 Vent. 413; 3 Salk. 129; Watk. on Desc. 111. But if there be two brothers, and the youngest has issue a son, and be attainted, this son could not inherit from his uncle, as he must derive his descent through his father; Dy. 274; Cro. Car. 543. So if there were two brothers, *A.* and *B.*, and *A.* was attainted, and died leaving issue *C.*, who purchased land and died without issue, *B.* his uncle could not have inherited from *C.*, as he must have derived his descent through *A.*, who was the *medius ancestor*, and incapable of inheriting from the nephew; 1 Vent. 416, 426; 1 Inst. 391 b.

divest the copyhold interest until the lord enters (*g*); and it is only by express words in a statute that the king, and not the lord, is to have the copyholds of a person attainted (*h*).

By attainder a copyhold estate is forfeited absolutely, so that no presentment of the forfeiture is necessary (*i*); but in some manors corruption of blood does not take place (*k*).

A copyhold is not forfeited by a conviction of felony without *attainder*, except indeed by special custom (*l*). This was fully decided by the Court of B. R. in the case of *The King* v. *Sir Francis Willes* (*m*), in analogy to the rule that there can be no forfeiture of freehold property for a capital crime without attainder (*n*).

Pardon after attainder is not a dispensation of the forfeiture (*o*),

But note, that by 3 & 4 Will. 4, c. 106, s. 5, the descent from a brother or sister is to be traced through the parent.

By 54 Geo. 3, c. 145, forfeiture by attainder is confined to the life of the offender, except in treason and murder. But the author apprehends that the act does not extend to copyholds. See Sir Edward Coke's exposition of acts of parliament, ante, p. 81.

(*g*) Doe & Evans, post, p. 441; 1 Watk. on Cop. 349.

(*h*) Lord Cornwallis's case, 2 Vent. 38, 39; Heydon's case, 3 Co. 8 a; but see Saliard & Everat's case, 1 Leo. 97; ante, 439, n. (*e*).

(*i*) Benson v. Strode, 2 Sho. 152; post, p. 450 et seq.

(*k*) Rob. Gav. b. 2, c. 4; 2 Watk. on Cop. 326; ib. Append. No. 1, Customs of Dymock, 2d ed. And now see 54 Geo. 3, c. 145, sup.

(*l*) Hawk. P. C. l. 2, c. 49, s. 7. So that unless there is a special custom that copyholds shall be forfeited on conviction of felony, as in the manor of Marwell, Rex v. Lady Jane St. John Mildmay, 5 Bar. & Ad. 254, 2 Nev. & Mann. 776, ante, p. 406, n., there is no forfeiture without attainder; and if the offence is not capital, no forfeiture will accrue by the conviction and sentence.

(*m*) 3 Barn. & Ald. 510. And see Lord Cornwallis's case, and Paginton v. Huet, ubi sup.; Com. Dig. Cop. (M. 1); Rex v. Bridgen, 3 Cr. Mee. & Ros. (Ex.) 145; 1 Tyr. & Gra. 437; 1 Mee. & Wel. 145.

In the above case of The King v. Willes, which arose out of a mandamus to admit the surrenderee of *A. B.* to certain copyhold tenements held of the manor of Biggleswade in Bedfordshire, it appeared that *A. B.*, previously to his making the surrender, had been guilty of the offence of receiving stolen goods, and was subsequently to the surrender tried and convicted under the stat. 5 Ann. c. 21. By that statute it was enacted, that such offenders should suffer death as a felon convict, (but the act did not take away the benefit of clergy;) and by 4 Geo. 1, c. 11, s. 1, they may be transported for fourteen years. The judgment of the Court of Sessions was, that the prisoner should be transported for fourteen years. N.B. It did not appear that he prayed the benefit of clergy, nor was there any special custom within the manor respecting forfeitures for felony. The Court of B. R. held, that as there was no forfeiture, the party was entitled to be admitted.

(*n*) Steven's case, Cro. Car. 566; Doe *d.* Griffith v. Pritchard, 5 Bar. & Ad. 765, 775; which case not only confirmed the principle that an estate in *freeholds* is not divested by attainder until office found, but that an action of ejectment can be maintained upon the demise of a person attainted of felony.

(*o*) Benison v. Strode, ubi sup.

for as Mr. Watkins justly observes (*p*), the pardon necessarily confesses the guilt which was the cause of forfeiture, and the king cannot remit the claims of the lord.

It is necessary, however, that some step should be taken by the lord in order to divest the copyholder of his interest. Where, therefore, a copyholder was convicted of larceny, and sentenced to seven years' transportation, and was afterwards capitally convicted of being at large in this country before the period of his transportation had expired, and was thereupon attainted, but received a pardon under the sign manual, on condition of being imprisoned for two years, and after the expiration of the two years, having been ousted, he brought his ejectment and had a verdict (*q*), the Court of King's Bench held, on motion made to enter a nonsuit, that the pardon, by virtue of the 6 Geo. IV. c. 25 (*r*), restored the felon to his competency to hold lands, although it could not divest an interest which had previously been vested in another, and that as nothing was done by the lord to vest the estate in him, the ejectment was sustained by the demise of the felon.

The author apprehends that the seizure by the bailiff, although the possession should not be given up to him, or the bringing of an ejectment, or a regrant by the lord, even without seizure (*s*), would be sufficient.

Although no advantage can be taken of a forfeiture for treason until attainder, yet after attainder it has relation to the treasonable act (*t*); and the law, the author apprehends, is the same in the case of felony (*u*). But as a felon has a property in chattels, both real and personal, until conviction, an assignment of his personal property for a valuable consideration, on the eve of his trial, will be supported, though a voluntary disposition would be deemed fraudulent (*x*).

If there be a custom to seize for a capital crime before the conviction is recorded (*y*), the forfeiture will be purged by acquittal (*z*); but not, the author apprehends, by the allowance of clergy after

(*p*) 1 vol. on Cop. 348, 349.

(*q*) Doe *d.* Evans *v.* Evans, 5 Barn. & Cress. 584; S. C. 8 Dow. & Ry. 399; Doe *&* Pritchard, sup.

(*r*) Sect. 1, post, p. 442, n. (*b*).

(*s*) Milfax *v.* Baker, 1 Lev. 26; 3 Salk. 100; post, 452.

(*t*) Rex *v.* Willes, ubi sup.

(*u*) Lord Cornwallis's case, 2 Vent. 38, 39; Com. Dig. Forfeiture, (B. 6); Co. Lit. 390 b.

(*x*) Shaw *v.* Bran, 1 Stark. 319. And see Jones *v.* Ashurt, Skin. 357.

(*y*) See Borneford *v.* Packington, 1 Leo. 1, where there was a custom for the lord to seize on presentment of a conviction for felony, and the heir convicted in the lifetime of his mother, who was admitted to her freebench, was held to have forfeited his estate. See also 2 Hawk. P. C. c. 49, s. 7; Lex Cust. 48, cites Gittings *&* Cooper, ubi sup.

(*z*) Gittings *&* Cooper, Paginton *&* Huet, Jory *&* Pawly, ubi sup.

conviction (*a*); yet when there is no such custom, the forfeiture it should seem would be discharged by the allowance of clergy before attainder (*b*).

It has been said that outlawry is also a cause of forfeiture of copyholds (*c*); but Chief Baron Gilbert, in his treatise of tenures (*d*), makes a *quære* whether a copyholder forfeits any thing in outlawry, unless for a capital crime; and this would seem to be a correct distinction (*e*).

Waste, either *voluntary* or *permissive*, is also a cause of forfeiture of copyholds (*f*): of the former character are the acts of pulling

(*a*) Jory & Pawly, sup.; 2 Hawk. P. C. c. 33, s. 129.

(*b*) Jory & Pawly, sup. According to Lord Hale, the effect of the benefit of clergy was, that presently upon the burning in the hand, the party was to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof; 2 Hale, P. C. 389. And see 5 Co. 110 b; 4 Bl. Com. 374.

By the 2d section of 6 Geo. 4, c. 25, after noticing that divers acts of parliament had created offences within the benefit of clergy, and divers others had given the benefit of clergy where it was not before allowed, and that such acts had not expressly declared that the punishments thereby authorised should be in lieu of burning or marking, it was enacted that the punishment of offenders convicted of *clergyable* felonies should have the like effects and consequences as burning in the hand.

N.B. The 1st section of 6 Geo. 4, c. 25, enacts, that in all cases in which the king shall extend his royal mercy to any offender convicted of any felony, *not clergyable*, and by warrant under his sign manual, countersigned by one of his principal secretaries of state, shall grant to the offender either a free pardon or a pardon upon condition of transportation, imprisonment or other punishment, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition, in case of conditional pardon, shall have the effect of a pardon under the great seal.

Note also, the 3d section of the act of 9 Geo. 4, c. 32, in order to prevent all doubts respecting the civil rights of persons convicted of felonies, *not capital*, who have undergone the adjudged punishment, enacts that the punishment so endured shall have the like effects and consequences as a pardon under the great seal.

(*c*) See Co. Cop. s. 58, Tr. 135, where Sir Edward Coke says, that if a copyholder be outlawed or excommunicated, that the lord may have the profits of his copyhold land, a presentment is necessary.

It is said in Lex Cust. 210, that a copyhold is not forfeited by outlawry in a personal action, the lord not being prejudiced by it, and yet that the king shall have the profits. And see 1 Leo. 99, in Saliard & Everat's case.

(*d*) P. 242.

(*e*) Vide Kitch. 242, 243; Gilb. Ten. 328; The King *v.* Budd, Parker's Rep. 190; 2 D'Anv. 200, (G.) marg.; Turner *v.* Hodges, Litt. Rep. 234, where it is stated argo. to have been adjudged in 44 Eliz., that a copyhold is not determined or forfeited by outlawry. And see Hetl. 127; 2 Keb. 467, in Jory & Pawly.

(*f*) Co. Cop. s. 57, Tr. 134; Co. Lit. 63 a; ib. N. 1 & 2; Clifton & Molineux, 4 Co. 27; Downingham's case, Ow. 17, 18; Farmer *v.* Ward, Noy, 51; Eastcourt *v.* Weeks, 1 Salk. 186; S. C. Lutw. 803; Att. Gen. & Vincent, 2 Eq. Ca. Ab. 378, pl. 9; Bunb. 192; Gilb. Ten. 235. But it is sometimes punished only by fine; Customs of Yetminster Prima, 2 Watk. on Cop. App.

It is supposed that waste committed by a surrenderee, *even if in possession*, is not

down houses (*g*), barns or other outbuildings (*h*), or cutting down trees (*i*), or digging for mines of metal, coal, stone, &c. (*k*), or for gravel, clay, &c. when not warranted by the custom (*l*); in short, any active offence whereby the copyhold estate is deteriorated: of the latter character are the neglect of reparation of buildings (*m*), or of banks or mounds, or of the ordinary rules of cultivation of land, whereby the property may become useless or unprofitable (*n*). And

a cause of forfeiture, but that the surrenderor would be answerable for it, it being done by a person who occupies by his permission; vide Mo. 49, pl. 149; 1 Watk. on Cop. 101, n. (o); post, p. 447. At all events a subsequent admission of the surrenderee would be a dispensation of the forfeiture.

Equity will not relieve against wilful waste, as felling trees, opening mines, &c.; Sir Harry Peachy *v.* Duke of Somerset, 1 Str. 454; nor against a forfeiture by leasing without licence; but will do so against a forfeiture by cutting timber, under special circumstances; post, tit. "Aid of the Courts of Equity."

(*g*) It would seem that a copyholder may build a new house without licence, but that if he pulls it down again after it is covered in, it will be a forfeiture; Cecil & Cave, 1 Roll. Abr. 507, Cop. D. pl. 6; Brock *v.* Bear, 1 Bulst. 50; 2 D'Anv. 194; Gilb. Ten. 235; but see the cases referred to, ib. n. (c).

In Hardy *v.* Reeves, 4 Ves. 466, the Master of the Rolls said, "A mortgagee of a copyhold may pull down ruinous houses and build much better. The lord has a right to say that the tenant should not let the houses fall, and might seize if he did."

Erecting a mill on a copyhold is said to be a cause of forfeiture. By Doderidge, Lat. 123, in Gray & Ulisses; Dy. 211 b, pl. 13, marg. Contra if set upon posts; Ward's case, 4 Leo. 241.

(*h*) Dy. 108; Rastal *v.* Turner, Cro. Eliz. 598; Bro. Abr. Waste, pl. 67. The maxim that "where there is no damage there can be no waste," Com. Dig. Waste, (E. 1), ib. Copyhold, (M. 3), Barret *v.* Barret, Hetl. 35, 2 Roll. Abr. 824, Vin. Abr. Copyhold, (K. c), Greene *v.* Cole, 2 Saund. 259, is applicable to questions of waste on copyholds. So in Doe *d.* Grubb *v.* The Earl of Burlington, 5 Barn. & Adol. 507, the jury having found that no damage was occasioned by pulling down a barn, the Court of B. R. held that the consequences of waste did not attach to the act.

(*i*) Ante, p. 422, n. (*j*).

(*k*) It was held by the Court of Exchequer in the late case of Dearden *v.* Evans, 5 Mee. & Wel. 11, that large stones which were embedded in the copyhold land at the time of the copyholder's admission, and which probably had fallen from adjoining cliffs at some unknown period, could not be removed by the copyholder, and that the lord might bring an action of trover for such as had been removed and sold. See also ante, p. 433. But the right of copyholders to take stones may exist by custom; Hoyle *v.* Coupe, 9 Mee. & Wels. (Exch.) 450. And see S. C. post, tit. "Evidence."

(*l*) Brock *v.* Bear, 1 Bulst. 50; Rastal *v.* Turner, Cro. Eliz. 598; Co. Cop. s. 57, Tr. 134; Co. Lit. 53 b; ante, tit. "Trees and Mines."

(*m*) As, for instance, by suffering a house to be uncovered whereby the timber becomes rotten; Ow. 17; 36 Eliz. B. R. Downingham's case.

(*n*) Co. Cop. s. 57, Tr. 134, 135; Kitch. 113; Paston & Utbert, Litt. Rep. 264; S. C. Hut. 102; S. C. (Paston & Mann) Hetl. 5; Pool *v.* Archer, Skin. 211; Palm. 417; Lat. 277; 1 Watk. on Cop. 332.

It was said by Anderson and Walmsley in Farmer & Ward, Noy, 51, that negligent waste is not a cause of forfeiture without a special custom. And see 5 Co. 13 b, in the Countess of Shrewsbury's case; 2

the right of the lord to re-enter upon a copyhold in case of waste is the more favoured in law, as he can get no more than the forfeiture, no action of waste lying as between the lord of a manor and his copyhold tenants (*o*).

The destruction or injury of a copyhold house by fire, unless it is rebuilt or repaired in convenient time, is waste, except as it should seem the burning is by the act of God, as for instance by lightning (*p*). There are also various other causes of forfeiture of copyhold estates; as if a copyholder neglect to attend a court after being summoned (*q*), (but it would seem that the summons must be personal, and that a general summons at the church is not sufficient) (*r*), or should refuse to be sworn of the homage, or being sworn should refuse to present the articles according to his oath (*s*); or if a copyholder disclaimeth his lord (*t*); or refuses to pay the fine, when certain or reasonable (*u*), or the customary rent, when *demanded* (*x*); or *wilfully* withholds the

Keb. 467, in Jory & Pawly; sed vide Downingham's case, and Eastcourt *v.* Weeks, ubi sup.; Co. Litt. 63 a, n. (1).

Manuring of land to hop ground, or converting arable land into a piscary, is said to be a cause of forfeiture; Paston & Utbert, sup.; Lex Cust. 211; 1 Watk. on Cop. 332.

Ploughing meadow land may be very injurious by altering the evidence of title, and is clearly waste; Dy. 37; Co. Lit. 53 b; Darcy, Lord, *v.* Askwith, Hob. 234; Simmons *v.* Norton, 7 Bing. 647; but that case shows that an act, which is *primâ facie* waste, may be excused if proved to be for the melioration of the land.

(*o*) 4 Ves. 706, 707, in Dench *v.* Bampton. But see Richards *v.* Noble, sup. 427; vide reference to the statute of Gloucester (6 Edw. 1, c. 5), ante, p. 424, n. (*o*).

(*p*) Rook *v.* Warth, 1 Ves. 462; Com. Dig. Biens (B).

(*q*) Co. Cop. s. 57, Tr. 131; Hammond *v.* Wemybank, 3 Bulst. 268; S. C. (Buttevant *v.* Pickstaffe), 1 Roll. Rep. 429; Lex Man. 86. But illness or imprisonment, or the fear of arrest, is a good excuse; Co. Cop. s. 57, Tr. 131; Kitch. 244; 1 New Abr. 483.

(*r*) Taverner *v.* Cromwell, Cro. Eliz. 353; S. C. 3 Leo. 107; S. C. 4 Co. 27; Co. Ent. 288; Sir Chr. Hatton's case, (or Farrer & Woodhouse) cited in Crisp *v.* Fryer, Cro. Eliz. 505; Mo. 350; Noy, 58; cited also 3 Leo. 109, in Taverner & Cromwell; 1 Roll. Abr. 507; 1 New Abr. 483; 2 D'Anv. 193, pl. 7, 8; Belfield *v.* Adams, 3 Bulst. 80; S. C. (Southcott *v.* Adams), 1 Roll. Rep. 256; Godb. 142, ca. 176, (cites Lord Dacres & Harleston's case;) Gilb. Ten. 229; ante, p. 363. But see Sir John Braunche's case, 1 Leo. 104.

(*s*) Co. Cop. s. 57, Tr. 132; Gilb. Ten. 231; Dy. 211 b, pl. 31; Southwell & Thurston, cited in Taverner & Cromwell, 3 Leo. 109; Crispe *v.* Fryer, Mo. 350; 1 Roll. Abr. 506 (C.) pl. 1.

(*t*) Co. Cop. s. 57, Tr. 132; Kitch. 245.

(*u*) Co. Cop. s. 67, Tr. 132, 133; Fish & Rogers, 2 D'Anv. 191—194; S. C. 6 Vin. Cop. (P. c.) pl. 1; Trotter *v.* Blake, 2 Mod. 229; Wheeler *v.* Honour, T. Raym. 41; Allen *v.* Abraham, 2 Bulst. 32; Fanshaw & Bond, Sty. 387; Sand's case, cited in Hobard & Hammond, 4 Co. 27, 28; Jackman *v.* Hoddesdon, Cro. Eliz. 351; ante, p. 354.

(*x*) Co. Cop. s. 57, Tr. 133, 134. But it must be a wilful refusal, Barnes *v.* Corke, 3 Lev. 308; Williams's case, cited Lat. 122, in Grey & Ulisses, which seems to be the same case as cited in Godb. 143, and there called Winter's case; 1 New Abr. 483, 484; Beconshaw & Southcote, cited

services (*y*); or sues a replevin upon the lord's lawful distress for rent or services (*z*); or (as it has been said) shall inclose where it was never inclosed before, or shall remove or abate an ancient inclosure or land mark (*a*); or shall forge a custumary to the injury of the lord (*b*); or if a copyholder for life suffered a recovery by plaint in the lord's court as a copyholder of inheritance (*c*): but in *Kerby alias Kirk's* case (*d*), it was doubted whether a recovery by a copyholder for life should operate as a forfeiture, as the lord was a party to every recovery suffered in his court.

It must be recollected, that when the customary heir, or the surrenderee if compellable to take admission, neglects to come in and be admitted, the lord can only seize *quousque*, except by special custom; and that even a custom for a copyhold to be forfeited for non-appearance after three proclamations shall not extend to a person beyond sea, or being under any disability, as infancy or coverture; and also that infants and femes-covert and lunatics are especially protected

in Fraunces's case, 8 Co. 92 a; Crisp *v.* Fryer, Co. Eliz. 505. And therefore the demand, both for rent and fine, should be of the person of the tenant, Denny *v.* Lemman, Hob. 135; Trotter *v.* Blake, sup.; 2 D'Anv. 192, pl. 3: ante, pp. 354, 355.

Whether negligence for several years may amount to a wilful denial, see Crisp *v.* Fryer, sup.; and compare with Belfield *v.* Adams or Southcott *v.* Adams, sup.; Lex Man. 86, 87; Gouldsb. 143, pl. 59.

(*y*) Gilb. Ten. 229; Buttevant *v.* Pickstaffe, 1 Roll. Rep. 429; S. C. (Hammond *v.* Wemybank,) 3 Bulst. 268; Belfield *v.* Adams, or Southcott *v.* Adams, ubi sup. And see Rivet *v.* Dowe, 2 Brownl. 279; Noy, 135; Kitch. 176. But a copyholder saying he would come if the lord had a court, otherwise not, is not a wilful refusal of services, though the lord might seize *quousque*. Corke *v.* Lees cited in Lord Salisbury's case, (or Pateson *v.* Danges,) 1 Keb. 287; and see Parker *v.* Cook, Sty. 241. Vide also Johnson's case, Lat. 14; Barnham *v.* Higgins, Vernon & Huggins, P. 26 Eliz., ib. 14, 123; Grey & Ulisses, ib. 122; Dy. 211, marg.; Lex Man. 87. Hinderance by sickness, or the like, is no forfeiture; ante, p. 444, n. (*q*).

(*z*) Co. Cop. s. 57, Tr. 133; Lex Cust. 210.

(*a*) Gilb. Ten. 327; 1 Watk. on Cop. 333; but see Sir Harry Peachy *v.* The Duke of Somerset, 1 Stra. 454; Paston & Utbert's case, Litt. Rep. 264; S. C. Hut. 102; S. C. (Paston & Mann,) Hetl. 5; Win. 8. Or if a copyholder deface doal marks; Litt. Rep. 268; Lex Cust. 209; Gilb. Ten. 243. But a bare inclosure, the author apprehends, would not be a cause of forfeiture. See Lex Cust. 210, cites Hetl. 7, 8; particularly if the land be improved by it; Paston & Utbert, sup.

(*b*) Taverner & Cromwell's case, ubi sup.; Dy. 322 b. Vide stat. 5 Eliz. c. 14, 2 Geo. 2, c. 25, against forgery of deeds and writings, post Appendix; Co. Cop. s. 52, Tr. 121. "If the steward showeth a court roll to a copyholder to prove that his land is holden by copy, and the copyholder saith he is a freeholder, and showeth a deed, pretending thereby to procure his land to be freehold, and teareth in pieces the court roll, this is a forfeiture *ipso facto*;" Co. Cop. s. 57, Tr. 132.

(*c*) Co. Cop. s. 57, Tr. 134.

(*d*) 1 Freem. 192; S. C. (called Bird & Kirke,) 1 Mod. 199; S. C. (called Keen *v.* Kirby,) 2 Mod. 32; S. C. (called Bird *v.* Kirkby,) Carter, 237; and see Gilb. Ten. 235; ib. N. 102; Lex Cust. 206; 6 Vin. Cop. (I. c.) pl. 9, marg.

against forfeiture for non-admittance, or for neglect or refusal to pay a fine, by the stat. of 1 Will. IV. c. 65 (*e*).

A forfeiture of copyholds does not extend beyond the estate or interest of the person offending; so that if a tenant for life commit a forfeiture, it shall not affect the interest of a remainder-man, whether vested or *contingent*, or of the reversioner, unless perhaps by special custom (*f*).

Again, the forfeiture of one of several joint-tenants will extend to his own part only (*g*).

And the forfeiture of one copyhold tenement is not a cause of forfeiture of any other held under the same copy, but which was originally held separately, for they continue distinct copyholds (*h*).

A release grounded on a bargain and sale for a year, and a bargain and sale inrolled, passing only the interest which the releasor or bargainor may lawfully transfer, and being therefore inoperative as to copyholds, will not create a forfeiture (*i*), any more than a feoffment without livery (*k*).

It has been said that a feoffment with letter of attorney to make livery is a forfeiture, though no livery be made, but that without such letter of attorney it would not be a forfeiture, as it would be in the breast of the copyholder whether he would perfect it or not (*l*). But the author apprehends that even with such a letter of attorney it is no forfeiture till livery be actually made (*m*).

As a surrender is in its nature similar to a release or bargain and

(*e*) Ante, pp. 24, 288. And see Copley's case, Hil. 7 Jac. C. B. cited Supp. to Co. Cop. s. 19, Tr. 206; 17 Ves. 90, in Beckford *v.* Wade.

(*f*) Co. Cop. s. 59, Tr. 138; Gilb. Ten. 245, 246; Podger's case, 9 Co. 107 a; Carter, 238; Baspole & Long, Yelv. 1; S. C. Cro. Eliz. 879; S. C. Noy, 42; Sir T. Raym. 404; 1 Roll. Abr. 568, (G.) pl. 5; Rastal *v.* Turner, Cro. Eliz. 598; Redsal *v.* Lacon, cited, ib. 880, and seems to be S. C. Rastal *v.* Lane, cited Noy, 42, which seems also to be S. C. 6 Vin. Cop. (S. c.) pl. 1 and 7. And see 1 Roll. Abr. 509, F.; ante, pp. 291, 402, 403.

(*g*) Co. Cop. s. 59, Tr. 138; Kitch. 160, 161.

(*h*) Co. Cop. s. 59, Tr. 138; Gilb. Ten. 246, 247; Taverner *v.* Cromwell, ubi sup; Hobart & Hammond, 4 Co. 27 b, 28 a; Dalton *v.* Hammond, Cro. Eliz. 779; S. C. Mo. 622. But an act of forfeiture as to part will be a forfeiture of the whole of the tenements held under the same copy; Taverner *v.* Cromwell, sup.; Pascal *v.* Wood, 3 Keb. 641; 1 New Abr. 486, 487; 1 Watk. on Cop. 335, 336; yet see contra, except as to waste, Fuller *v.* Terry, 41 Eliz., 1 Roll. Abr. 509, (E.). *Contra* also even as to waste, where there is no building; Gilb. Ten. 247.

(*i*) London's case, Godb. 269, pl. 374; Gilb. Ten. 255; 1 Watk. on Cop. 327, 328; 1 Roper's Baron & Feme, 82, 83; Co. Cop. s. 58, Tr. 135, 136. But see 1 Roll. Abr. 508; Cop. (D.) pl. 11.

(*k*) 3 Leo. 109, in Taverner *v.* Cromwell; 1 New Abr. 484; 2 D'Anv. 195, pl. 12, 13; Lex Man. 95; Godb. 269, ca. 374.

(*l*) 1 Roll. Abr. 508; Cop. (D.) pl. 12, 13.

(*m*) Co. Lit. 59 a, (n. 3); 1 Watk. on Cop. 327. As to the operation of a feoffment, vide sup., p. 434, n. (*b*).

sale (*n*), so if a copyholder for life surrender to the use of another in fee, it will not be a forfeiture of his interest (*o*).

It should seem that a forfeiture can only arise by the act of the tenant, and therefore that if a disseisor, or a surrenderee before admittance (*p*), or a *cestui que trust* (*q*), or a guardian, or a stranger without assent of the copyholder, (or even with the assent of the copyholder if a feme covert) commit waste, it is no forfeiture (*r*).

But it followed that the lord might have taken advantage of an act of forfeiture by a trustee (*s*), and that the *cestui que trust* would have had no equity against the lord (*t*).

And it would appear that a copyholder, even if a trustee (*u*), is answerable for waste in all cases, except it be occasioned by the act of God (*x*): and that the lord may take advantage of a forfeiture by a person who has been wrongfully admitted, and to whom the rightful tenant released after the forfeiture (*y*).

A surrenderor, whether the surrender be by way of sale or mortgage, is, until the admittance of the surrenderee, to be regarded as a trustee, as far as relates to the lord's right of entry for a forfeiture, either by attainder, or an act of waste, or otherwise (*z*); the Court of

(*n*) Ante, p. 149.

(*o*) Foxton & Colston, cited 4 Co. 23 a; Co. Cop. s. 57, Tr. 76; Carter, 238, in Bird & Kirkby; Oldcot *v.* Levell, Mo. 753.

(*p*) Co. Cop. s. 59, Tr. 138; Roe *d.* Jeffereys et al. *v.* Hicks et al., 2 Wils. 13; ante, pp. 140, 442, n. (*f*).

(*q*) Co. Cop. s. 59, Tr. 137; Sir H. Peachy *v.* Duke of Somerset, 1 Stra. 454; S. C. Pre. Ch. 573; Cary, 14, 15.

(*r*) Co. Cop. s. 59, Tr. 137; Kitch. 161; Clifton & Molineux, 4 Co. 27 a; Gilb. Ten. 235, 236; 4 Leo. 241, ca. 381.

It is to be recollected that the customary heir, even before admittance, is tenant to the lord for many purposes, including forfeiture, ante, pp. 126, 140.

(*s*) By 4 & 5 Will. 4, c. 23, s. 3, copyhold lands vested in any person upon any trust, or by way of mortgage, are not forfeited to the king, or the lord of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee. And by the 2nd sect., on the death, without an heir, of any person seized of copyhold land upon any trust, or by way of mortgage, the Court of Chancery may appoint a person to convey; ante, pp. 84, n., 407, n.

(*t*) See 1 Stra. 454, per Lord Hardwicke in Sir Harry Peachy *v.* The Duke of Somerset; Roe & Hicks, ubi sup.; ante, p. 407.

(*u*) 1 Stra. 454; Pre. Ch. 573, in Sir H. Peachy *v.* Duke of Somerset. But now see 4 & 5 Will. 4, c. 23, sup. n. (*s*).

(*x*) Mo. 49, pl. 149; Com. Dig. Cop. (M. 3.); Rook *v.* Warth, 1 Ves. 462; Belt's Supp. 200; ante, p. 444. But a court of equity would relieve against a forfeiture by waste, committed by a lessee, without the direction or privity of the copyholder; Taylor & Hooe, Toth. 237, 238; 6 Vin. Cop. (E. d.) pl. 2; Co. Lit. 63 a, n. 2, where on citing Taylor & Hooe, it is said, "but in this latter case it may be doubted whether the waste is a forfeiture. See Mo. 49." And see Litton's case, Cary 8; Dalton *v.* Gill & Pindor, ib. 90; 2 Atk. 189.

(*y*) 2 Watk. on Cop. 337, N. 108; Gilb. Ten.; but see Gilb. Ten. 248, 249; Odingsal *v.* Jackson, 1 Brownl. 149; Lex Cust. 217, 218.

(*z*) It may, however, be doubtful whether a surrenderee by way of mortgage would not be relieved in equity against a forfeiture by the mortgagor, especially if

King's Bench having decided in a case where by the custom of the manor the copyhold lands are forfeited by conviction of felony, that the conviction in a charge of felony against a copyholder, who had surrendered by way of mortgage, was a cause of forfeiture (*a*); for as a surrenderor is tenant for all purposes of service until the admittance of the surrenderee, so he is tenant for the purpose of forfeiting; and the court therefore held in that case, that a peremptory mandamus to the lady of the manor to admit the surrenderee ought not to issue.

It follows that a forfeiture will not accrue to the lord by the attainder of an unadmitted surrenderee or devisee (*b*).

A guardian's committing waste is not a forfeiture of the copyhold, but he shall forfeit the wardship (*c*).

As a general principle, neither a feme covert of herself without the assent of her husband, nor an infant under the age of fourteen, (being till then in ward,) nor a person *non sanæ memoriæ*, an idiot or lunatic, can forfeit a copyhold (*d*).

But if a feme covert be attainted of treason or felony (*e*), or commit waste with the consent of her husband (*f*), her copyhold will be forfeited.

And an infant above fourteen years of age committing treason or felony, or voluntary waste, or other act to the disherison of the lord, or wilfully refusing his services, shall forfeit his copyhold (*g*); though for permissive waste, or replevying against the lord, or for leasing contrary to the custom, or the like, he shall not be liable to forfeiture (*h*).

the act of forfeiture did not tend to the disherison of the lord, and if it took place during the period that the mortgagor continued in possession of the copyhold tenement, consistently with the terms of the conditional surrender accepted by the lord or steward of the manor; and it is to be recollected that in Pawlett *v.* Att. Gen., Hardr. 465, it was held that a mortgagor of freehold property had a right to redeem against the crown, where the mortgagee in possession had been attainted.

(*a*) The King *v.* Lady Jane St. John Mildmay, 5 Barn. & Adol. 254; 2 Nev. & Man. 776; ante, pp. 406, 440.

(*b*) Roe *d.* Hicks, 2 Wils. 13.

(*c*) Co. Cop. s. 59, Tr. 137; ante, p. 398.

(*d*) Co. Cop. s. 59, Tr. 136, 137. And see Gilb. Ten. 293, 294; 1 Str. 451—454. No forfeiture can be incurred by infants, femes coverts, or lunatics, for refusing to be admitted, or to pay the lord's fine; 1 Wm. 4, c. 65, s. 9; ante, p. 288.

(*e*) 4 Bl. Com. 29; 2 Watk. on Cop. 338, cites also 1 Hawk. P. C. c. 1, s. 11.

(*f*) Co. Cop. s. 59, Tr. 137.

(*g*) Ib.; 1 Watk. on Cop. 337, 338; 8 Co. 44 b.

(*h*) Co. Cop. s. 59, Tr. 137; Ashfield *v.* Ashfield, Noy, 92; S. C. Lat. 199; S. C. Godb. 364; S. C. W. Jo. 157. But if the infant accept rent after full age, and so confirm a lease, it should seem that the forfeiture will bind him. See Ashfield *v.* Ashfield, sup; Gilb. Ten. 293, where the learned Chief Baron says, "It seems the lord may enter for the forfeiture during the nonage, and need not stay to see whether the infant will accept the rent or no, for

The act of the husband will be a forfeiture of the wife's copyhold only during the coverture (*i*), with the exception, as it should seem, of a lease for years without licence (*k*), or waste (*l*), or any act tending to the disherison of the lord, or refusing the services due to the lord (*m*).

If a lessee for years by licence make a feoffment, or cut down timber, or do any act which would be a forfeiture if done by the copyholder, this will forfeit only the estate of the lessee, and not the estate of the copyholder (*n*).

It seems to be settled, that upon entry for a forfeiture the lord shall have the emblements as against the copyholder, but not as against his lessee (*o*), for the act of the lord's tenant ought not to prejudice a third person (*p*). If, indeed, the lease itself be the cause of forfeiture, it probably would be otherwise, as the lessee might then be regarded as *particeps criminis* (*q*).

The necessity of a presentment of the act, by which a copyhold estate has become forfeited to the lord, is a point upon which the books are as little agreed as on the necessity of a presentment of every surrender of copyhold lands (*r*).

the particular prejudice done to the lord; and if he should stay his acceptance of services from the infant in the mean time, it would be a dispensation for the forfeiture. But then the infant at his full age, by disagreeing to the lease, may avoid the forfeiture." It would however appear very doubtful whether the lord would be justified in entering as for a forfeiture in such a case. See Zouch *d.* Abbot & Hallet *v.* Parsons, 3 Burr. 1794; Gilb. Ten. 293, 294; ib. N. 144.

(*i*) Saverne *v.* Smith, Cro. Car. 7; S. C. Palm. 383; S. C. 2 Roll. Rep. 344, 361, 372; 1 Roll. Abr. 509, (F.) pl. 5; Godb. 344, 345, ca. 438; 6 Vin. Cop. (S. c.) pl. 5; 2 D'Anv. 198. And see Staundf. P. C. 187 b, cited 1 Watk. on Cop. 339.

(*k*) In the above case cited from Godb., Dodderidge, J., took this difference, "Where a *feme sole* is a copyholder, and she takes a husband, who makes a lease for years without licence, the same is a forfeiture, because it is her folly to take such a husband as will forfeit her land. But where a copyhold is granted to a *feme covert*, and the husband maketh a lease without licence, in such case it is no forfeiture." Vide 6 Vin. Cop. (S. c.) pl. 5, marg. See also Whittingham's case, 8 Co. 446; and note the distinction between an entry for a forfeiture, and an entry by force of a mere condition, with reference to the act of the husband of a feme copyholder.

(*l*) The author apprehends that neither a lease without licence, nor waste, tend to the disherison, but are forfeitures at the election of the lord; ante, pp. 436, 437; post, p. 453.

(*m*) Saverne & Smith, sup.; Clifton & Molineux, 4 Co. 27; Hedd *v.* Chalener, Cro. Eliz. 149; Com. Dig. Cop. (M. 3.); 2 D'Anv. 198. pl. 3, 6; 1 New Abr. 448, pl. 9; 1 Roper's Baron & Feme, p. 82, &c.

(*n*) Kitch. 246; Cage *v.* Dod, Sty. 233, 234; White & Hunt, cited 6 Vin. Cop. (S. c.) pl. 4; 1 Roll. Abr. 509, (F.), pl. 4. And see 1 Watk. on Cop. 336.

(*o*) Oland *v.* Burdwick, Cro. Eliz. 460. The case is differently given in 5 Co. 116 a, but see 1 Roll. Abr. Emblem, (A.), 727, pl. 10; ante, p. 76, n. (*m*).

(*p*) 2 Bl. Com. 123, 124. As to the right to emblements, as between the lessee of a tenant for life and the remainder-man, vide Knivet's case, 5 Co. 85 a; S. C. Cro. Eliz. 463.

(*q*) Gilb. Ten. 446, N. CX.

(*r*) Ante, p. 225 et seq.

Sir Edward Coke says (*s*), "Of acts which amount to a forfeiture, some are forfeits *eo instante* that they are committed, some are not forfeits till presentment. Offences which are apparent and notorious, of which the lord by common presumption cannot chuse but have notice, are forfeitures *eo instante* that they are committed." And among these he classes,—the non-appearance of the heir after three proclamations, being bound to appear by special custom; subtraction of services after due warning,—refusing to be sworn on the homage, or to present the articles according to the oath administered to the homage,—disclaiming the lord,—denying to pay rent or a fine certain on demand, or a reasonable fine within a convenient time after the assessment,—suing a replevin on the lord's lawful distress,—or committing waste voluntary or permissive.

The offences and causes of forfeiture, of which by common presumption the lord cannot of himself have notice, Sir Edward Coke states (*t*) to be,—felony or treason; outlawry or excommunication; going about in any other court to entitle any other lord to the copyhold; and alienation by bargain and sale *inrolled*, or by feoffment *with livery:* and these and the like, he says, ought to be presented.

Lord Chief Baron Gilbert in noticing the above distinction drawn by Sir Edward Coke, says, "The reason given by Coke is of no cogency, that because the lord cannot by intendment have notice of them himself, therefore he shall take no advantage of them without presentment; for if he can take notice of them, why should he not, since presentment is not that which gives title, but only lets him know what he hath a title to? But, however, it is safe to get such things presented; and if there be a custom for it, it must be pursued (*u*)."

Mr. Watkins upon this question thus expresses himself (*x*): "In many cases the lord may enter immediately into the lands without the intervention of a presentment of the forfeiture; in others a regular presentment is previously requisite, or at least advisable. Where the offence which is the cause of forfeiture is, in its very nature, apparent and notorious, and such as by common presumption the lord cannot avoid noticing, no presentment can be necessary, as a presentment is only for his instruction.

"If a person, therefore, be attainted of treason or felony, the lord may seize without any presentment by the homage; since the commission of the offence is ascertained and made of publicity by his conviction in a court of law. So if the forfeiture be in consequence of any act or refusal in the presence of the lord, as in open court, no presentment can be requisite, as the end of presentment is already

(*s*) Co. Cop. s. 57, Tr. 131.
(*t*) Co. Cop. s. 58, Tr. 135; but see Benison *v.* Strode, post, p. 451.
(*u*) Ten. 246.
(*x*) 1 vol. on Cop. 346.

answered. Thus if proclamation be made for an heir to claim, and no claim be made; if a copyholder be personally warned to do suit at a particular court, and he does it not; or if he appear in court, and openly and absolutely refuse to be sworn on the homage according to the custom, or the like, a presentment must be evidently nugatory.

"But when the cause of forfeiture is such that by common presumption the lord cannot have notice, a presentment should be made to apprise and inform him of it: however, it does not appear that even in this case it is any ways of necessity. A presentment is, as we have seen, only the mean of information as to the lord: if the circumstance be already known to him, any further mean of instruction must be needless. If he, therefore, is aware of the event of which a forfeiture would be the consequence, he may avail himself of it without a presentment. Still, however, it is prudent and advisable to present such event in open court, that the matter may be apparent to others, and for the satisfaction of the remaining tenants, as well as a sanction to the lord."

The author would submit that no presentment can be requisite in any case, in order to enable the lord to take advantage of a forfeiture, but that the several acts which he has enumerated are forfeitures of the copyholder's interest *ipso facto*, entitling the lord, if he please, to enter for the offence, *as a determination of his will.*

In *East* v. *Harding* (*y*), where the estate was forfeited by the grant of a lease not warranted by the custom, the court ruled that the presentment was not of necessity, and that the lord might take advantage of it before the presentment.

And one of the resolutions of the Court of B. R. in *Milfax* v. *Baker* (*z*) was, that if a copyholder commit a forfeiture, the lord may grant the copyhold estate to another before any seizure, "for it is a determination of the will, and the estate is immediately in the lord as in his reversion."

Again, in *Benison* (or *Benson*) v. *Strode* (*a*), it was expressly held, that by the attainder the copyhold estate for life was absolutely determined, and that no presentment was necessary, for that the presentment was only for the instruction of the lord, and that he might enter before any presentment.

But where the cause of forfeiture is not by any act in court, so that the lord cannot be presumed to have notice of it, it is certainly the duty of the homage, if apprised of the offence, to present it for the information and instruction of the lord.

(*y*) Cro. Eliz. 499.

(*z*) 1 Lev. 26; and see 3 Salk. 100; 5 Barn. & Adol. 780.

(*a*) T. Jones, 190; S. C. 2 Sho. 150; S. C. Pollexf. 615; S. C. Skin. 8, 29.

And although it should seem that when the plaintiff makes title in the lessor as lord of a manor, who has right by forfeiture of a copyhold, neither a presentment of the forfeiture, nor a seizure by the lord, need be proved (*b*); yet it is essential to establish the fact of forfeiture by the clearest possible evidence (*c*).

Of the Persons who may take advantage of Forfeitures.

If a tenant for life commit a forfeiture, the lord shall take advantage of it, and not the remainder-man (*d*), unless, indeed, the estate of the remainder-man fall into possession on the forfeiture happening, as if the limitation in a surrender be to *A.* for life, and after the death, *forfeiture*, or other determination of the estate of *A.* to *B.*, and *A.* commit a forfeiture, then the estate of *B.* would take effect in possession (*e*); but the author has already observed that this can only happen by the lord's consenting to accept a surrender so framed as to be a dispensation of his right of entry for a forfeiture in favour of the remainder-man.

And it has been determined that if the tenant for life commit *waste*, the lord may enter, even if there be a grant in remainder expectant on the death *or forfeiture* of such tenant for life (*f*).

The lord *pro tempore*, whether in fee, or for life, or years only (*g*), may take advantage of a forfeiture.

(*b*) Per Tracy, Peters *d.* Bishop Winton *v.* Mills, Surry, 1707, Bull. N. P. 107; Runn. on Ejectm. 392, Ballantine's ed.; ante, p. 288; and see Milfax *v.* Baker, ubi sup.; sed vide Lord Salisbury's case, 1 Keb. 287; 1 Lev. 63; 12 Vin. Abr. 105; and note, that some act is necessary on the part of the lord to revest the estate in him; Doe & Evans, ante, pp. 439, 440, 441.

Mr. Watkins, in his 2d ed. on Cop. (vol. i. p. 347, n. t.), has raised a question, whether, if the lord need not prove seizure, a suit to set out boundaries may not be often dispensed with by bringing ejectment, and on a writ of execution being awarded, the sheriff to summon a jury to ascertain the property, as on a fieri facias.

(*c*) Hamlen *v.* Hamlen, 1 Bulst. 190.

(*d*) Margaret Podger's case, 9 Co. 107 a; 1 Saund. 151; 1 Roll. Abr. 509, Cop. (G.); Head *v.* Tyler, Holt, 161; S. C. 12 Mod. 123; Keen *v.* Kirby, 2 Mod. 32; S. C. (Bird & Kirke), 1 Mod. 199; S. C. (Bird & Kirkby), Carter, 237; Smartle *v.* Penhallow, 2 Lord Raym. 1000; S. C. 1 Salk. 189; S. C. 6 Mod. 67; Curtise & Cottel, 2 Leo. 72; 1 N. R. 322, 323, in Bromfield & Crowder, Gilb. Ten. 244, 245.

(*e*) Benison (or Benson) *v.* Strode, Skin. 8, 29; S. C. Pollexf. 619; S. C. T. Jones, 189; S. C. 2 Sho. 150; S. C. (Strode *v.* Dennison), 3 Lev. 94.

(*f*) Doe *d.* Folkes and the Dean and Chapter of Exeter *v.* Clements, 2 Mau. & Selw. 68. In this case the Court of K. B., in confirming the verdict at the trial before Mr. B. Graham at the assizes for Devon, said, that waste was an injury to the lord, for which ejectment would lie at his suit; for if it were otherwise, the tenant for life and remainder-man, by combining together, might strip the inheritance of all the timber.

(*g*) Meeres & Ridout, Godb. 175; 1 Roll. Abr. 858, pl. 13; ib. 509; Cop. (G.) pl. 2; Com. Dig. Cop. (M. 6); 6

And so may the feoffee of a single copyhold, notwithstanding the severance, or even his lessee (*h*).

The legal estate not being in the lord at the time of admittance has been held not to be an objection to the lord's recovering in ejectment for a forfeiture by the widow holding by the custom of freebench, as neither the party admitted, nor any person claiming through him, can dispute the lord's title (*i*).

But as copyholds are within the statutes of limitation, the lord cannot enter for a forfeiture after twenty years (*k*).

In case of a forfeiture in the lifetime of the tenant for life, it has been said that the lord in remainder may take advantage of it when his estate comes into possession, (even if the tenant for life had aliened to another,) as he had an interest in the manor at the time of the forfeiture (*l*): and as the acts of a tenant for life, whether he be the lord or copyholder, ought not to prejudice the remainderman, this would appear to be reasonable when the act of forfeiture destroys the estate, as where a copyholder executes a feoffment with livery (*m*); yet the law is otherwise, the author apprehends, when the act is not a disherison, but a forfeiture at the election of the lord, as in the case of waste, or of a lease without licence (*n*).

And the rule that no lord can take advantage of an absolute forfeiture but he who is lord at the time of the forfeiture incurred, except when the act tends to a disherison, was adopted by Mr. J. Buller at the end of his judgment in the above case of *Doe & Hellier*, and in the judgment given by the Court of King's Bench in the case of *Doe & Trueman* (*o*).

Vin. Cop. (T. c.) pl. 2, cites East & Harding, Cro. Eliz. 498, (S. C. Mo. 392, S. C. Ow. 63,) and Rowles & Mason, Tr. 10 Jac., ubi sup.; 1 New Abr. 488 (8); 2 D'Anv. 198, 199.

(*h*) East *v.* Harding, sup.; Cro. Car. 234, in Mathews *v.* Whetton; 1 Freem. 192, in Kerby or Kirk's case. In the above case of East & Harding, (see Ow. 63,) Popham said, "The feoffee or lessee shall have advantage of all forfeiture belonging to land, as in case of feoffment and the like, but on the contrary, for not doing of fealty;" ante, pp. 9 to 14.

(*i*) Doe *d.* Sir E. Nepean *v.* Budden, 5 Barn. & Ald. 626; 1 Dow. & Ry. 243.

(*k*) Doe *d.* Tarrant *v.* Hellier, 3 T. R. 172; Whitton *v.* Peacock, 3 Myl. & Keen, 325.

(*l*) Co. Cop. s. 60, Tr. 139; Gilb. Ten. 334.

(*m*) See Anon., 1 Freem. 516, 517. Probably the same case as Eastcourt *v.* Weeks. Vide also 1 Barn. & Adol. 744. As to the operation of a feoffment, vide ante, p. 434, n. (*b*).

(*n*) Gilb. Ten. 249; ib. N. 177; Eastcourt *v.* Weeks, 1 Salk. 186; S. C. Lutw. 799; Lady Montague's case, Cro. Jac. 301; Chamberlain *v.* Drake, 2 Sid. 8, 9; Bird & Kirke, ubi sup.; Lex Cust. 219; Doe & Hellier, ubi sup.; Doe & Trueman, infra. But see Cornwallis & Hammond, Lat. 227; S. C. Palm. 416, where a doubt was expressed whether a succeeding lord might not have an ejectment on a forfeiture for waste; and which was noticed by Mr. J. Bayley in Doe & Trueman. Vide ante, pp. 436, 437, 449; post, p. 462, as to acts of disherison.

(*o*) 1 Barn. & Adol. 745.

In the latter case the court decided that a devisee of a manor has a right to the benefit of the proceedings commenced by his testator, laying the foundation of a seizure *quousque* on default of the heir of a copyholder coming in to be admitted; which seems to be a very correct distinction between a *title* of entry for compelling the heir to take admission, and a mere naked *right* of entry for a forfeiture, such a *right* clearly not being devisable. And Mr. J. Bayley, in delivering the judgment of the court on that point (*p*), said, "If this were the case of a forfeiture, we should be of opinion that the succeeding lord could not avail himself of it."

The same distinction between forfeitures at the election of the lord, and those which cause a disherison, would appear to hold with respect to the heir whose ancestor did not take advantage of a forfeiture happening in his lifetime (*q*).

If, however, the ancestor enter for the forfeiture, the heir may maintain ejectment; and it should seem that no acceptance of services after such entry would purge the forfeiture (*r*).

And if the copyholders of a manor belonging to a bishopric, during the vacancy of the see, commit a forfeiture by cutting timber, as no laches are imputable to any one, the succeeding bishop may bring an ejectment (*s*).

But it appears that a grantee or lessee of a manor cannot take advantage even of an absolute forfeiture happening prior to the grant

(*p*) See this case on another point, ante, pp. 286, 287.

(*q*) Vide Cornwallis & Hammond, Palm. 416; S. C. (Cornwallis & Horwood), Lat. 226; Eastcourt *v.* Weeks, sup.; 2 Vent. 39; 1 Freem. 516; 1 Barn. & Adol. 746, in Doe & Trueman. And see the pleadings in Eastcourt & Weeks, Lex Man. App. pl. 40. In that case it was agreed that if one of several coparceners die before entry for a forfeiture, by leasing without licence or by committing waste, no advantage can afterwards be taken of the forfeiture. And the court there held also that a forfeiture cannot be divided, and therefore if coparceners are not agreed, neither can enter.

(*r*) Pascal *v.* Wood, 3 Keb. 641. Yet according to a distinction taken in that case, if the lord accept heriot service it would be a dispensation with a forfeiture, but not if he accept heriot custom. And see Bacon *v.* Thurley, Toth. 107. Sed vide Gilb. Ten. 248.

(*s*) Bull. N. P. 107, cites Read & Allen, as so adjudged by Comyns, Oxford Circuit, 1730. The temporalities of a see, which accrue during a vacancy, belong to the king, and are not within 28 Hen. 8, c. 11. See 1 Burn E. L. 226.; Com. Dig. "Prerogative," 23, 24; F. N. B. 169; Sav. 52; 1 Bl. Com. 282, 283. So therefore heriots happening during the vacancy; but the author doubts whether there is any *legal* remedy for such a heriot, although it should be included in the mandate of the crown for the restoration of the temporalities, after the consecration of the new bishop. Vide the case of Doe *d.* Burgess & Harrison *v.* Thompson, 5 Adol. & Ell. 532, S. C. 1 Nev. & Per. 215, deciding that an admission at a court held during the vacancy of the see, before any grant of the temporalities to the new bishop, and before he had been confirmed, but in his name, was good; ante, pp. 97, n. (*f*), 283, n. (*a*).

or lease, and this, because a right of entry or of action cannot be transferred (*t*).

ALIEN.—If an alien purchase copyhold land, (even if the purchase be made in the name of a trustee,) he shall not retain it; and it has been said that the lord of the manor, and not the king, may take advantage of the purchase (*u*). But as the incapacity of an alien to hold lands within the king's dominions originated in state policy, so, the author apprehends, the advantage to be taken of any purchase made, either of freehold or copyhold land, by a person not being a natural born subject, is part of the royal prerogative, which could not, by the most forced construction, be held to have been transferred to the lord of the manor under any existing or presumed grant of the manor from the crown (*x*). And should the lord consent to admit an alien (*y*), there does not seem to be any good reason for denying the crown the right of exercising this prerogative, at least so far as regards the profits of the estate, leaving the lord to get his services from the alien, a right which is sanctioned by the authority of Lord Coke (*z*); and which principle was urged in *Calvin's* case (*a*), namely, that "when an alien born purchaseth any lands, the king only shall have them, though they be holden of a subject, in which case the subject loseth his seigniory."

And if the purchase be made in the name of a trustee, particularly if the lord were not privy to the trust, the king, the author conceives, would be entitled to have the benefit of the trust, but of that *only*, all the fruits of the copyhold tenure being continued to the lord of the manor from the legal estate in the trustee (*b*).

(*t*) Co. Cop. s. 60, Tr. 139; Penn *v.* Merivall, Ow. 63; 2 Vent. 39; Cornwallis & Hammond, ubi sup.; 6 Vin. Cop. (T. c.) pl. 7. But see cont. per Dyer, 4 Leo. 224, ca. 348; ante, tit. "Statutes," p. 82, n. (*x*). As to the disposition of a right of entry, now see ante, p. 401, n. (*d*).

(*u*) Per Harison, reader of Lincoln's Inn, 1632. See Dy. 302 b, marg.; ib. 2 b, marg. But see 1 Mod. 17; Aleyn, 14, 15. See also Dy. 303 a, pl. 46, marg.; Co. Litt. 2 b, n. 4; Vin. Abr. tit. "Alien," (A. 8).

(*x*) Kitch. f. 2, (citing Stamf. 10,) says, "If the king grant a lordship to one in fee, the grantee shall not have his prerogative."

(*y*) Ante, p. 109; and see n. (*x*), ibid. It would, however, be a very hard case that the lord should lose the advantages of the fines and services in respect of any copyhold purchased by an alien, if the lord admitted him in ignorance of the incapacity. But this would no doubt be remedied in equity.

(*z*) Co Litt. 2 b.

(*a*) 7 Co. 25 a. An alien cannot take freeholds but to the use of the king on office found; nor can an alien stand seized to an use; 1 Leo. 47, ca. 61; 4 Leo. 82, ca. 175. And see Hardr. 495, in the Att. Gen. *v.* Sir George Sands; S. C. 3 Ch. Rep. 36.

(*b*) The King & Holland, Sty. 20, 40, 75, 84; S. C. All. 14. Vide also 1 Roll. Abr. 194, "Alien," (A.) 8; Com. Dig. "Alien," (C. 2), (C. 3); Sand. on Uses and Trusts, 289, 4th ed. See as to an equitable escheat, ante, tit. "Trust Estates."

It may be desirable to put the reader in full possession of the circumstances of the above case of *The King & Holland*, as stated in the report in Styles of the argument upon the special verdict. A copyhold was surrendered to *J. S.* in trust that Holland, an alien, should receive the profits thereof to his own use and benefit; upon this an inquisition was taken for the king and this matter found, whereupon the copyhold was seized into the king's hands, and upon a trial concerning the lands there was a special verdict; and upon the argument in the Court of King's Bench for and against the king's title, Rolle J. demanded of Hales (*c*), who argued for the king's title, how the king should be entitled to the profits of the land where he was not entitled to the land itself, and said that the chancery could not compel one to execute a trust for an alien. The case was moved again (*d*), the counsel against the crown urging that the king could not be entitled to copyhold lands of an alien, much less to the *use* of copyhold lands. On the part of the king it was contended that an alien is incapable of a trust, and that an alien could purchase lands and a *use* at the common law, but could not retain them, therefore the king should have them by his *prerogative*. And Rolle J. said that the remedy of a cestui que trust was in equity, and that if the king had equity he ought not to sue for it at common law. The court afterwards delivered their opinions (*e*), and Rolle thereupon said, "that he did not conceive how the king could have copyhold lands that were in trust for an alien." Cause was ordered to be shown why the party should not be restored to his lands, and shortly afterwards (*f*) the court was moved for an *amoveas manum* to the chancery, that the party might have his land out of the king's hand. The court answered—"The judgment is to be given here, if there be cause, for the king, if not, against him, and you ought not to go to the chancery. All that we can say is that the king shall not have judgment (*g*)."

Of Licences to Demise, &c. and other Dispensations of Forfeiture.

A copyholder, except by special custom (*h*), cannot grant a lease

(*c*) Sty. 21.
(*d*) Ib. 40.
(*e*) Ib. 76.
(*f*) Ib. 84.
(*g*) And see Hardr. 436, in The Duke of York *v.* Sir John Marsham.
(*h*) Wilcock's case, 2 D'Anv. 195, pl. 9; Jackman *v.* Hoddesdon, Cro. Eliz. 351; Kensey *v.* Richardson, ib. 728; Turner *v.* Hodges, Hut. 101; S. C. Litt. Rep. 233; S. C. Hetl. 128; Mathews *v.* Whetton, Cro. Car. 233; Petty *v.* Evans, 2 Brownl. 40; Cramporn *v.* Freshwater, Brownl. 133; Earl of Carlisle *v.* Armstrong, 1 Burr. 333.

of his copyhold tenement beyond the term of a year (*i*), without the licence of the lord of the manor, operating as a dispensation with the forfeiture which the act would create; but a lease of copyhold lands for one year only does not require a licence (*k*): the above restraint is indeed a necessary consequence of the rule, that a copyholder cannot convey away his interest by any common law assurance, nor do any act to the prejudice of the lord's freehold, unless he is consenting thereto (*l*).

But by special custom a copyholder may lease for three or nine years, or more, or from three years to three years, to the term of twenty-one years (*m*), or for life and forty years after (*n*), or for any other definite period of time, without licence of the lord.

There is a custom in the manors of Stepney and Hackney, in Middlesex, that the copyholders may grant leases, without licence from the lord, for any term not exceeding thirty-one years and four months, in possession, so that such leases be presented to the homage, and entered on the rolls at the first or second general court next after the making thereof.

In the case of *Porphyry* v. *Legingham* (*o*), where the court sanctioned a custom for the tenants living at a remote distance to be excused suit of court for twelve months, on tendering or paying eightpence to the lord and one penny to the steward, Moreton said, that in the case of *Grove* & *Bridges*, a custom that on payment of ten years' rent the lord should license to let for ninety-nine years, and if he refused, the tenant might do it without licence, was adjudged good; and the report of *Porphyry* & *Legingham* concludes thus:— "Jones said the intent of this suit was only to destroy a custom in that manor, that copyholders in fee may alien for 1000 years without licence; but the court held this custom also reasonable (*p*)."

But customs of the above nature must be proved by very satisfactory evidence (*q*).

(*i*) Kitch. 113, in his charge to the homage, says, "Also if any copyholder lets his copyhold land for longer time than for a year *and a day* without surrender, unless it be by the custom that he may let for longer time, and if he do, it is a forfeiture and inquirable;" ante, p. 436.

(*k*) Melwich & Luter, 4 Co. 26 a; Combe's case, 9 Co. 75 b; Mathews *v.* Whetton, Cro. Car. 233; Turner *v.* Hodges, Hutt. 101; S. C. Litt. Rep. 233; S. C. Hetl. 126; Com. Dig. Cop. (K. 3); Gilb. Ten. 436, n. 91.

(*l*) Whether parceners of copyhold can make partition without the lord's licence, see ante, p. 87, n. (*y*).

(*m*) Kitch. 201.

(*n*) Mo. 8, pl. 27; Com. Dig. Cop. (K. 3).

(*o*) 2 Keb. 344. And see S. C. cited Gilb. Ten. 294.

(*p*) A tenant at will cannot by any custom make a lease for life by licence of the lord; Godb. 171, ca. 236. And a custom that a lessee for life may make a lease for the life of another is void; Mo. 8, pl. 27; Com. Dig. Cop. (K. 3).

(*q*) Kensey *v.* Richardson, Cro. Eliz. 728; Wells *v.* Partridge, ib. 469.

The terms upon which the lord's licence for a copyholder to demise is to be obtained, must depend upon the custom of each particular manor, in like manner as the fine on admittance; but the licence is usually given either in or out of court, as a matter of course, on payment of a certain fixed sum for each house or acre of land for each year of the term of the proposed lease (*r*).

The fine for a licence to pull down a house or other building, or for any act considered as a deterioration of the estate, is of course dependent on the circumstances of each particular case, and therefore the subject of convention between the lord and tenant (*s*), equally as in the case of a licence to demise where it could not be compelled by the custom of the manor.

In a recent case, where it was not shown with sufficient clearness that a fixed fine was payable to the lord by the custom of the manor for a licence for digging brick earth on copyhold land, the Court of Queen's Bench refused a mandamus "which would have compelled the lord to licence an act amounting to waste (*t*)."

It frequently happens that the licence to demise is applied for and acted upon without a due consideration of the extent of the lord's interest in the manor, for it is quite clear that the lord cannot grant a licence or dispensation for a longer term in the tenancy than he has in the seigniory (*u*), unless under a power springing from the fee.

This circumstance renders it expedient that in all settlements of manors of which copyholds are holden, but more particularly when the property has been usually let on long leases, or is likely to become improveable by buildings or otherwise, a power should be inserted, authorizing the person in possession of the manor for the time being (however limited his interest) to grant licences to demise for such period of time and under such restrictions as circumstances may seem to require, taking the usual fines and conforming in all respects to the custom of the manor.

A steward cannot grant a licence to demise *virtute officii*, as a licence is a voluntary and not a mere ministerial act; but the author apprehends that under a special authority the steward may grant

(*r*) Kitch. 166, 242.

(*s*) When the custom has settled the fine for licences of this nature, it would seem that the lord may be compelled in equity to grant a licence; Ballard *v.* Agard, cited Toth. 107, 108; 6 Vin. Cop. (Y. e.) pl. 3; but not otherwise, see 1 Cas. & Op. 177; Pre. Ch. 572, in Sir H. Peachy *v.* Duke of Somerset. Vide also the case of Reg. *v.* Hale, infra.

An agreement to grant a licence, for which a consideration is paid, will of course be enforced in equity; Hungerford *v.* Austen, Nel. C. R. 49.

(*t*) Reg. *v.* Hale, 1 Perr. & Dav. 293; post, tit. "Mandamus."

(*u*) Petty *v.* Evans, 2 Brownl. 40; S. C. (Pettis & Debbans), 6 Vin. Cop. (I. d.); 1 Roll. Abr. 511 (K.); Gilb. Ten. 203, 299; Munifas *v.* Baker, 1 Keb. 25.

licences to alien by deed, either in full court or out of court (*x*); and that by particular custom, even without an express authority, a licence granted by him in court will be good (*y*).

It would seem that the lord's signing the court book, or receiving the fine, or the like act, would be a confirmation of the licence of the steward (*z*); and that the lord's licence may be presumed from an act of the copyholder coming under the continual view of the steward (*a*).

When a licence or dispensation is obtained for creating a common law interest, or other act operating to the lord's prejudice, the terms of such licence or dispensation must be strictly pursued: so in *Jackson* v. *Neal* (*b*) it was held, that a licence to let for twenty-one years from Michaelmas would not authorize a demise for that term from the Christmas following.

But under a licence to lease for any term not exceeding twenty-one years, and supposing a lease to be granted for seven years, the author apprehends that the copyholder might grant another lease for fourteen years.

Suppose a licence to have been acted upon to the full extent of it, a second lease under it, upon the surrender of the first, would probably be deemed a forfeiture (*c*). But if a copyholder have a licence to lease for twenty-one years from Michaelmas, and he make a lease accordingly, and afterwards and before Michaelmas he make another lease for the same term, also to commence at Michaelmas, then, as the second lease would be void in point of interest, the author conceives that it would not operate as a forfeiture (*d*).

A demise for a less term or interest than is authorized by the licence will be good; therefore, under a licence to demise for five years, a copyholder of inheritance, or for his own life, may lease for three years, or for the five years, determinable with his life (*e*).

And in *Hall* v. *Arrowsmith* (*f*), under a licence to a copyholder *for life* to let for three years if he so long lived, a lease for three years without any limitation was held good as a lease for three years determinable with the life of the copyholder: but it was said that if the copyholder had had an estate in fee, the lease would have been a for-

(*x*) Ante, p. 116; and see 5 Barn. & Adol. 413, 436, in Doe & Whitaker.

(*y*) Kitch. 166; Scroggs, 87.

(*z*) Co. Cop. s. 44, Tr. 101, 102; Kitch. 166; 2 Watk. on Cop. 117.

(*a*) Doe & Wilson, 11 East, 56.

(*b*) Cro. Eliz. 394.

(*c*) 6 Vin. Cop. (H. c.), pl. 1 & 2.

(*d*) Mo. 184, ca. 329. But in this case Anderson thought that such concurrent lease would be a forfeiture; two just. cont.; and see Gilb. Ten. 234.

(*e*) Worledge *v.* Benbury, Cro. Jac. 436, 437.

(*f*) Poph. 105; S. C. (called Haddon *v.* Arrowsmith), Cro. Eliz. 462; S. C. Ow. 73; and see a similar determination in Worledge *v.* Benbury, sup.; vide also Holland *v.* Fisher, Orl. Bridg. 205; ante, p. 436.

feiture, because then he would have done more than he was licensed to do.

And in this case the court agreed that such a licence could not be made to be void by a condition *subsequent*, but that there might be a condition *precedent* (*g*), because then it was no licence until the condition performed.

A lease for years to commence *in futuro*, even by parol, and although the lessee should not enter, is a forfeiture, for it is a good lease between the parties (*h*); and probably, therefore, a lease granted by a copyholder in fee, for a longer term than is warranted by the licence, would be deemed an immediate forfeiture.

The third section of 8 & 9 Vict. c. 106, enacts that a lease required by law to be in writing of any tenements or hereditaments, made after the 1st day of October 1845, shall be void at law unless made by deed.

As a licence to demise operates only as a *personal* dispensation on the part of the lord, and gives no property (*i*), it follows that a lease by tenant in tail, with licence of the lord, will not bind the issue in tail (*k*).

The author apprehends that a licence to a copyholder runs with the land, and that under a licence to *A.* to demise, leases executed by the heir or devisee of *A.*, on the footing of the licence, would be good and not work a forfeiture (*l*).

Although the lord can seize as for a forfeiture, if the tenant should let the houses fall or go to decay, yet it would seem that a copyholder, even if he be a mortgagee only, may without a licence pull down houses that are in a ruinous state and build others (*m*).

A lease with licence, it must be recollected, is a common law and not a copyhold interest, and may be assigned without any further licence of the lord (*n*). And it is with reference to the common law character of a lease of copyholds that the practice has prevailed of

(*g*) Ante, p. 437.

(*h*) Roll. Abr. 508; Mo. 392; Gilb. Ten. 234; ante, p. 436; post, p. 465.

(*i*) Gilb. Ten. 298, 299.

(*k*) Kitch. p. 166, says, "But if the tenant in tail of copyhold let for forty years by the lord's licence, and after the lease make his forfeiture of his copyhold, and the lord seizes it and grants that over again by copy to the tenant in tail and his heirs, or to J. S. and his heirs, it seems there the issue of the lessor, nor J. S. nor the lord, cannot enter and defeat this lease." Kitch. adds, "The same law is if a copyholder of an estate tail lets for forty years by the lord's licence, and dies, and his issue surrender to J. S. and his heirs, this issue nor J. S. cannot enter and defeat this lease."

(*l*) Whitton *v.* Peacock, 3 Myl. & Keen, 325.

(*m*) Hardy *v.* Reeves, 4 Ves. 480.

(*n*) Co. Cop. s. 51, Tr. 119, 120; 3 Leo. 69, ca. 106; Johnson *v.* Smart, 1 Roll. Abr. 508, pl. 14; 2 D'Anv. 105; 1 Watk. on Cop. 301.

registering building leases of copyhold lands, and assignments thereof, under the act of 7 Anne, c. 20 (*o*).

A lease of copyholds with licence is extendible at law (*p*), and will be good, the author apprehends, even against the lord claiming by escheat, or by an act of forfeiture, if the licence were granted by him, or by a former lord seized in fee simple of the manor (*q*); but such a lease would not be good against the lord entitled in remainder or reversion (*r*).

Forfeitures may also be dispensed with or waved in various ways, after the lord's title of entry or seizure has accrued (*s*); as, for instance, by the re-admission of the copyholder who committed the forfeiture (*t*), or by the admittance of his heir (*u*); or even, as it should seem, by the presentment of the death of him who committed the offence, such presentment being an acknowledgment of him as a tenant (*v*); or by the amercement of him for non-appearance (*x*); or by the acceptance of a surrender from him (*y*); or of rent or services, or by distraining for either (*z*).

And an act by a lord *pro tempore*, which amounts to a dispensation, will bind those entitled to the manor in remainder or reversion, but not so as to give effect to a grant of a common law interest (*a*).

(*o*) Rigge Reg. pp. 87, 88.

(*p*) Gilb. Ten. N. 148, 149; see contra, Pictoe's case, 1 Roll. Abr. 888, (M.) pl. 3; Lex Cust. 19; Poph. 188, argo.

(*q*) Swinnerton *v.* Miller, Hob. 177; Kitch. 166; Turner *v.* Hodges, Hutt. 102; S. C. Litt. Rep. 233; S. C. Hetl. 126; Gilb. Ten. 299; ib. N. 153; Poph. 188. It may be doubtful in such a case whether the lessee would not be discharged from the payment of any rent.

(*r*) Ante, p. 458.

(*s*) In Penn *v.* Merivall, Ow. 63, it was held that a grant of the freehold before entry for a forfeiture by leasing without licence, was an affirmance of the lease; sed qu.?

(*t*) Page *v.* Smith, Holt, 161; Milfax *v.* Baker, 1 Lev. 26; Clerk *v.* Wentworth, Toth. 107; Doe & Hellier, 3 T. R. 172.

(*u*) Munifas *v.* Baker, 1 Keb. 26; but see Smith *v.* ——, 30 Eliz., cited Toth. 107; 6 Vin. Cop. (A. d.), pl. 3.

(*v*) See Doe & Hellier, 3 T. R. 171, where Lord Kenyon expressed his opinion that not only admission of the copyholder or his heir, but any act of recognition on the part of the lord would preclude him from taking advantage of a forfeiture.

(*x*) 1 Freem. 517; Sir John Braunche's case, 1 Leo. 104; it was there held to be a dispensation, although the amercement should not be estreated or levied.

(*y*) 1 Freem. 517; Kitch. p. 177, says, "If copyholder lets by indenture, which is forfeiture, and after surrenders to the use of *J. S.*, and he is admitted in, the lord after shall not take advantage of forfeiture."

(*z*) Eastcourt *v.* Weeks, 1 Salk. 186; 1 Freem. 517; Garrard *v.* Lister, 1 Keb. 15; Hamlen *v.* Hamlen, 1 Bulst. 189; Bacon *v.* Thurley, Toth. 107; Gilb. Ten. 247, 248, 334, 335; Co. Cop. s. 61, Tr. 140; 6 Vin. Cop. (A. d.); but see Godb. 47, ca. 58. See also ante, p. 454, n. (*r*), as to the supposed distinction in the effect of the lord's acceptance of heriot service and of heriot custom, after an act of forfeiture.

Acceptance of rent is of an ambiguous nature; Doe & Hellier, 3 T. R. 171, ante, p. 311.

(*a*) Milfax *v.* Baker, 1 Lev. 26; S. C. (Munifas *v.* Baker), 1 Keb. 26; and see Holt, 161; 3 Salk. 100; ante, p. 458.

But a lord by wrong, as by disseizin, cannot dispense with a forfeiture to bind the rightful lord (*b*).

And it is essential that the forfeiture should be known to the lord, otherwise the admittance, acceptance of rent, or like act, will not operate as a dispensation (*c*); but the lord shall be presumed to have notice of failure of suit of court, non-payment of rent, &c. (*d*).

A lease for a term of years without licence, and all such other acts as do not tend to the total destruction of the copyhold interest, such, for instance, as waste, subtraction of suit, &c., may clearly be dispensed with by the lord *pro tempore*, however limited his estate (*e*); but an act which tends to the total annihilation of the copyhold interest, as a feoffment with livery (*f*), appears to preclude any subsequent affirmance of such interest, except under a new substantive grant (*g*).

It has been doubted whether an attainder of treason or felony is not also such a destruction of the copyhold interest as to preclude an act of dispensation (*h*); and the case of *Benison* v. *Strode* (*i*) is relied upon as an authority for this conclusion, where it is said that "by the attainder the copyhold estate for life is absolutely determined, so that after the person attainted is no copyholder, and cannot be of a homage, or take a surrender out of court." But as the crimes of treason and felony go to the incapacity only of the person, the author must suppose that a forfeiture by the commission of either offence is as open to the dispensation of the lord, as any other act inconsistent with the nature of a copyholder's interest under the original grant of the estate; for we have seen that until the lord seizes, or does some act to revest the estate in him, the copyhold interest, even upon an attainder, is not divested (*k*). This principle is consistent with the rule of law, that if a person seized of freehold lands be attainted, he shall be tenant in law to every precipe until office is found for the king (*l*).

We have already seen that there is no relief in equity against an

(*b*) Milfax *v.* Baker, sup.

(*c*) Mathews *v.* Whetton, Cro. Car. 234; Mantle *v.* Wollington, or Mantell & Weckington, Cro. Jac. 166; 1 Roll. Abr. 475 (C.); Co. Cop. s. 61, Tr. 140; Gilb. Ten. 247; ib. N. 178; and see 2 D'Anv. 207; 1 New Abr. 489; 6 Vin. Cop. (A. d.), pl. 14; Com. Dig. Cop. (M. 8). But see Wheeler's case, 4 Leo. 240, where the widow entitled to freebench during chaste viduity, was admitted by the lord after incontinency, but of which he had no notice, and the lord was held to be bound by the admittance.

(*d*) Lord Cornwallis's case, 2 Vent. 39.

(*e*) Sup. n. (*a*); ante, pp. 436, 437, 453.

(*f*) As to the operation of a feoffment, vide n. (*b*), p. 434, sup.

(*g*) Co. Cop. s. 61, Tr. 140.

(*h*) 1 Watk. on Cop. 351.

(*i*) T. Jones, 190; and see the report of S. C. in 2 Sho. 152.

(*k*) Doe & Evans, 5 Barn. & Cress. 587; S. C. 8 Dow. & Ry. 399; ante, p. 440.

(*l*) 5 Barn. & Cress. 587, 588, n. (c); Plowd. 486; but see 3 Co. 10 b.

act of forfeiture which tends to the disherison of the lord (*m*); but when the forfeiture is not wilful, as in the case of permissive waste (*n*), or waste by a stranger (*o*), and where a compensation can be made to the lord, as on non-payment of fines or rents (*p*), or where there is a reasonable excuse (*q*), a court of equity will relieve against the forfeiture.

In the case of *Jesus College* v. *Bloome* (*r*) Lord Hardwicke, C. said, "The more probable reason for decreeing an account in that case (*Bishop of Winchester* v. *Knight*, 1 P. W. 406) seems to be, because it was the case of mines; and the court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many cases where this court will relieve and decree an account of ore taken, when in any other tort or wrong done it has refused relief."

In the case of *Thomas* v. *Porter & The Bishop of Worcester* (*s*), which was a bill in chancery to be relieved against a forfeiture for felling trees, the court directed an issue to try whether the primary intention in felling the timber was to do waste, or (as the order was drawn up) whether the supposed waste was wilful or not. Upon two several trials it was found for the plaintiff, and the decree was that the plaintiff should be relieved, and the defendant deliver possession and account for the mesne profits.

In another case (*t*), where a forfeiture had been committed by cutting down timber on one copyhold to repair the tenements on another, the Court of Chancery relieved against the forfeiture, on payment of all the costs both at law and in equity.

And there can be no doubt that a forfeiture by neglect of reparation of a copyhold tenement, will be purged by the repairs being done before the entry of the lord (*u*).

(*m*) Ante, pp. 435, 436.

(*n*) Thomas v. Porter & Bishop of Worcester, 1 Ch. Ca. 95; 2 Freem. 137; Commin v. Kinsmell, cited Toth. 108, and 6 Vin. Cop. (E. d.), pl. 3; Pre. Ch. 574, in Sir H. Peachy v. Duke of Somerset.

(*o*) Ante, p. 447, n. (*x*).

(*p*) 1 Stra. 449, 453, in Sir H. Peachy v. Duke of Somerset; Marsh v. Fuller, 6 Vin. Cop. (D. c.), pl. 9; Whistler v. Cage, ib.; Lucas v. Pennington, 1 Nel. C. R. 7. But the doctrine of compensation is not extended to acts of voluntary waste, except under particular circumstances. See ante, pp. 447, 448; 1 Eq. Ca. Abr. 121; post, tit. "Aid of Courts of Equity."

(*q*) Cox v. Higford, 1 Eq. Ca. Abr. 121, 122, pl. 20; S. C. 2 Vern. 664; Cudmore v. Raven, or Edmore v. Craven, cited 2 Vern. 664, where relief was afforded in the case of a Quaker's refusal to do suit and service; cited also in Pre. Ch. 574; 1 Stra. 449, 450; and see 6 Vin. Cop. (D. c.), pl. 9.

(*r*) Amb. 56, ante, p. 431.

(*s*) Sup. n. (*n*); and see Doe *d.* Foley v. Wilson, 11 East, 56.

(*t*) Nash v. Earl of Derby, 2 Vern. 537; Pre. Ch. 574; 1 Stra. 450; 2 Eq. Ca. Abr. 121; and see Rowland v. Dean of Exon, cited 1 Stra. 450; Morley v. Earl of Derby, cited 2 Vern. 665; 4 Ves. 705.

(*u*) Gilb. Ten. 249; Mo. 393, in East v. Harding.

CHAPTER XIV.

Of the Action of Ejectment.

It has long been established that a copyholder may try his title in an action of ejectment in the courts of common law brought within the period prescribed by the statute of limitations, 21 Jac. 1, c. 16(*a*).

In the case of *Melwich & Luter* (*b*) the first point resolved was that the lessee of a copyhold for one year might maintain ejectment, inasmuch as his term is warranted by law, and that it is a speedy course to recover the possession of land against a stranger.

But as a copyholder cannot demise beyond the term of a year without the licence of the lord, unless indeed by special custom, it has been doubted whether the lessee *for years* of a copyholder could recover in ejectment, without alleging a custom, or showing a licence(*c*).

The objection has arisen out of the settled rules that the plaintiff in ejectment must recover by the strength of his own title, not by the

(*a*) Viz., twenty years, or a period of ten years from the cesser of the disabilities mentioned in the act, and assuming that the right of entry had not been barred by descent.

N.B. The period of twenty years is also adopted in the statute of limitation, 3 & 4 Will. 4, c. 27, s. 2; and by the 16th section, persons under the disability of infancy, coverture, lunacy or absence beyond seas, and their representatives, are allowed ten years from the termination of such disability, or their death; ante, p. 367, n. (*u*).

Note also, that by the 39th section of 3 & 4 Will. 4, c. 27, no *descent*, *discontinuance* or *warranty*, will bar a right of entry for the recovery of any land; ante, p. 47, n. (*k*); vide the act in the Appendix.

But it has been decided that an ejectment must be brought within twenty years after the right of entry accrued, whatever be the nature of the defendant's possession, the doctrine of non-adverse possession having been done away with by the 2d and 3d sections of the above recent statute of limitation, except in cases falling within the five years' clause (section 15), Nepean, Bart. *v.* Doe *d.* Knight, Ex. Ch. Tr. Term, 7 Will. 4, 2 Mee. & Wel. 894, which case also shows that, although the law presumes the death of a party who has been absent seven years without having been heard of (see 19 Car. 2, c. 6, extracted, post, Appendix), yet there is no legal presumption as to the time of his death.

(*b*) 4 Co. 26 a; S. C. Cro. Eliz. 102; and see Co. Cop. s. 51, Tr. 119; Cole *v.* Wall & Burnell, Cro. Eliz. 224; S. C. (Cole *v.* Walles), 1 Leo. 328; Spark's Case, Cro. Eliz. 676; S. C. (called Sprake's case), Mo. 569; Frosel *v.* Welsh, Cro. Jac. 403; Anon. Godb. 268; Gilb. Ten. 213; sed vide Stephens *v.* Eliot, Cro. Eliz. 483; Laughter *v.* Humphrey, ib. 524.

(*c*) Wells *v.* Partridge, Cro. Eliz. 469 a; 2 Esp. N. P. 449; Erish *v.* Rives, Cro. Eliz. 717; Cramporn *v.* Freshwater, Brownl. 133; Gregory *v.* Harrison, Mo. 679; Supp. Co. Cop. s. 20; and see Ever *v.* Aston, Mo. 272; S. C. (Ewer *v.* Astwike), 1 Anders. 193; Gilb. Ten. 213 et seq.; Adams on Ejectm. 267, 2d ed.; but see Rumney *v.* Eve, 1 Leo. 100; Gilb. Ten. 436, N. 92; inf. n. (*f*) and (*i*).

weakness of his adversary's (*d*), and that it will be sufficient for the defendant in ejectment to prove a title out of the lessor of the plaintiff, though he have no title himself (*e*); and, consequently, if it appear by the plaintiff's own showing that the lord is entitled to enter for a forfeiture, how, it is asked, can the declaration be supported?

There are certainly good grounds for the supposition that it cannot (*f*), but the author submits that it is quite clear that a copyhold may be recovered under a declaration upon a lease for years, without showing a licence or alleging a custom, and this, not only from the common rule that the defendant shall confess lease, entry and ouster (making the execution of a lease unnecessary), and by which any question as to forfeiture is avoided; but that, as between the copyholder and a stranger, the court would presume there had been a dispensation of the forfeiture, unless the lord had actually entered.

And in *Downingham's* case (*g*) it was expressly resolved by the Court of B. R., that if a copyholder make a lease for years which is not according to the custom of the manor, yet the lease is good so that the lessee may maintain an ejectment, for that it had been several times adjudged in that court, that between the lessor and lessee, and all others except the lord of the manor, such a lease was good.

Again, in *Goodwin* v. *Longhurst* (*h*) all the barons of the exchequer held, that the lessee for years of a copyholder might maintain ejectment, for that it was a good lease between the parties, and against all others but the lord.

(*d*) See 4 Burr. 2487; per Lord Mansfield, 2 Esp. N. P. 455.

(*e*) Bull. N. P. 110.

(*f*) Ante, p. 464, n. (*c*). In Petty *v.* Evans, 2 Brownl. 40, it was held that in an ejectment by the lessee of a copyholder, it is sufficient that the count be general, without any mention of the licence, and that if the defendant plead not guilty, then the plaintiff ought to show the licence in evidence; but that if the defendant plead specially, then the plaintiff ought to plead the licence certainly in his replication, and the time and place when it was made.

(*g*) Ow. 17, 18; and see Streat *v.* Virrall, cited Cro. Car. 304; Peter's case, cited Godb. 365; Doe *v.* Tresidder, 1 Gale & Dav. 70.

(*h*) Cro. Eliz. 535. The same was said in the case of Homes & Bingley, see Sty. 380. Again, in Wheeler *v.* Toulson, Hardr. 330, it was said that if a lease be found made by a guardian or a copyholder, such a lease will maintain the declaration, though their leases and grants are void against the lord and the infant; vide also Collins *v.* Harding, Cro. Eliz. 623; Stoper *v.* Gibson, Mo. 539; Rumney *v.* Eves, 1 Leo. 100; Cole *v.* Walles, ib. 328; S. C. (Cole *v.* Wall & Burnell), Cro. Eliz. 224; Spark's case, Cro. Eliz. 676; S. C. (called Sprake's case), Mo. 569; Haddon *v.* Arrowsmith, Cro. Eliz. 462 a; N. 92, Gilb. Ten.; Adams on Ejectm. 63, 65; Runnington on Ejectm. 226, Ballantine's ed. 262; but see Jackson *v.* Neale, Cro. Eliz. 395. In the case of Anderson & Heywood, 3 Leo. 221, 4 Leo. 30, it was holden, that a copyholder of inheritance of a manor in the hands of the king, and who was ousted of his copyhold, had not gained any estate so as he might make a lease for years, upon which to maintain an ejectment, but that he had a possession only against all strangers; and see Nalson *v.* Remington, Clayt. 1; ante, p. 139.

But it is quite clear that an ejectment cannot be maintained by a copyholder, except under a lease at common law (*i*).

It is to be observed, that although the defendant in ejectment need not show a title in himself, yet he must prove a *subsisting* title out of the lessor, so that producing an ancient lease for 1000 years will not in a freehold case be sufficient, unless possession under it within twenty years is also proved: and production of a mortgage deed, where the interest has not been paid, and the mortgagee never entered (*k*), will not be sufficient to defeat the lessor, who claims under the mortgagor, because it will be presumed that the money was paid at the day, and consequently that it is no subsisting title (*l*).

And the rule that it is sufficient for the defendant to show a title out of the lessor, is to be received with this qualification, namely, that if the defendant came in under the title of the plaintiff, he would not be at liberty to dispute it (*m*); the defendant, however, might show that such title had expired (*n*): but where, in an action for use and occupation, it was proved that the defendant entered upon the premises in question (a copyhold tenement of the manor of Edmonton) under the plaintiff, and had paid rent to him until he received notice from the steward of a seizure by the lord for a forfeiture, since which period the defendant had paid rent to the lord, Lord Ellenborough held that the defendant could not controvert the continuance of the plaintiff's title; but that if the defendant, upon the premises being seized by the lord, had disclaimed holding of the plaintiff, and entered under the title of the lord, the court might enquire into the validity of the seizure, and consider who was legally entitled to the premises; but as the defendant had not by any formal act renounced the plaintiff's title, the tenancy created by the original demise continued (*o*).

We have seen that a surrenderee may recover in ejectment upon a demise laid between the date of the surrender and admittance, and that it is sufficient if the lessor of the plaintiff is admitted at any time

(*i*) Spark's or Sprake's case, sup.; Cole *v.* Walles, (or Cole *v.* Wall and Burnell,) sup.

(*k*) A covenant that the mortgagor, so long as he should continue in possession, would pay a yearly rent to the mortgagee, who should have the ordinary remedies for recovery thereof, (provided that the reservation should not prejudice the mortgagee's right to enter on default of payment of the monies secured, or any part thereof,) has been held not to constitute the relation of landlord and tenant, intitling the mortgagor to notice to quit before bringing ejectment; Doe *d.* Garrod *v.* Olly, 4 Per. & Dav. 275; S. C. 12 Ad. & El. 481.

(*l*) Bull. N. P. 110, cites Wilson *v.* Witherby, 8 Ann. in Kent, by Holt, C. J.

(*m*) 5 T. R. 5; 10 East, 353; 1 Barn. & Ald. 53; 1 Bing. 38; 9 Bing. 615; 5 Barn. & Cress. 433; 2 Phill. on Ev. 176; Rosc. on Ev. 117, 284.

(*n*) England & Slade, 4 T. R. 682; and see Fenner *v.* Duplock, 2 Bing. 10; 3 Mau. & Selw. 516; 2 Stark. 533, pt. 4.

(*o*) Balls *v.* Westwood, 2 Campb. 11.

before trial (*p*), and this, because the title of the surrenderee, when admitted, is perfect from the time of the surrender as against all persons but the lord of the manor: this doctrine applies equally to a purchaser and mortgagee (*q*).

And it is already shown that the customary heir may bring an ejectment without having been admitted, such admittance being only necessary as between the heir and the lord (*r*): it is not even requisite that he should be presented to be the heir (*s*).

And under a reversionary grant to *B.* (the nominee of *A.*, a copyholder for life), to hold to *B.* for the term of his life, immediately after the death, surrender or forfeiture of *A.*, the *legal* title of *B.* is perfect without admittance, and he may maintain ejectment on the death of *A.* (*t*).

In the above case of *Holdfast & Clapham*, Ashhurst, J., in delivering the opinion of the court, establishing the relation of the admittance to the date of the surrender, said, "If then the surrenderor is only considered in the light of a trustee for the surrenderee, whatever might have been the case formerly, in these days the courts have considered this species of action with greater liberality, and will never suffer a trustee to set up a formal objection against the plaintiff's recovering the possession of that property, which he only holds in *his* right and for *his* benefit."

But it is now deemed to be fully settled, that a person cannot recover in ejectment even against his own trustee upon an equitable title (*u*); for although a court of law will in many cases direct a jury to presume the surrender of a term of years (*x*), and also a surrender by a copyholder (*y*); yet the legal title will prevail where a surrender cannot by possibility under the circumstances be presumed (*z*).

And in the case of *Doe & Wroot* (*a*), where the heir of the mortgagor, who had not surrendered to the use of his will, recovered in

(*p*) Benson *v.* Scott, 1 Salk. 185, &c., ante, p. 73, n. (*s*); Roe *d* Jeffereys et al. *v.* Hicks et al., 2 Wils. 15; Vaughan *d.* Atkins *v.* Atkins, 5 Burr. 2786, 2787; Holdfast *d.* Woollams *v.* Clapham, 1 T. R. 600; Doe *d.* Bennington *v.* Hall, 16 East, 208; ante, pp. 142, 293. Vide also a case of *customary freehold*, Doe *d.* Danson *v.* Parke, 4 Adol. & Ell. 816.

(*q*) Holdfast *d.* Woollams *v.* Clapham, 1 T. R. 600.

(*r*) Ante, pp. 290, 312.

(*s*) Rumney *&* Eves, 1 Leo. 100; 1 T. R. 601. See further as to ejectment by the customary heir, post, tit. "Evidence."

(*t*) Roe *d.* Cosh *v.* Loveless, 2 Barn. & Ald. 453. But this may be governed by custom; ib.

(*u*) See the cases mentioned in the report of Doe *d.* Shewen *v.* Wroot and others, 5 East, 138, 139, n. (a); and Doe *d.* Wood *v.* Morris, 2 Taunt. 54.

(*x*) Bull. N. P. 110; 2 T. R. 696.

(*y*) Roe *&* Lowe, 1 H. Bl. 457, 459; 1 Ves. 235, in Cookes *v.* Hellier; ante, pp. 210, 222.

(*z*) 2 T. R. 696.

(*a*) Sup.

ejectment against his devisees, the mortgagee not having been admitted, Lord Ellenborough, C. J., said, "We can only look to the legal estate, and that is clearly not in the devisees, but in the heir at law of the surrenderor; and if the devisees have an equitable interest, they must claim it elsewhere and not in a court of law: for as to the doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust*, that has been long repudiated, ever since a case which was argued in the Exchequer Chamber some years ago (*b*)."

Where the lord brought an ejectment for a forfeiture against the widow of a copyholder claiming by the title of freebench, the Court of B. R. held that she could not dispute the title of the lord by whom her husband was admitted (*c*).

It was decided in the case of *Chapman* v. *Sharpe* (*d*), that an ejectment will not lie for a third part of a copyhold tenement in nature of dower, "for they ought to levy a plaint in nature of a writ of dower in the manor court, and the homage to sever and set out the same."

In bringing the action of ejectment for recovering the possession of copyholds, it must be recollected that tenants in common cannot recover upon a joint demise (*e*); but that joint-tenants (*f*) or coparceners may join in the demise (*g*), or recover on the single demise of their respective shares (*h*).

And it may be well to notice here, that in an ejectment by a tenant

(*b*) Lord Ellenborough is supposed to have alluded to the case of Weakley *d.* Yea, Bart. *v.* Rogers, B. R. Tr. T. 29 Geo. 3; see n. (a), 5 East, 138; Adams on Ejectm. 33.

(*c*) Doe *d.* Sir E. Nepean *v.* Budden, 5 Barn. & Ald. 627; S. C. 1 Dow. & Ry. 243.

(*d*) 2 Sho. 184; post, p. 485, n. (*k*), sed vide Doe *d.* Rose Riddell *v.* Gwinnell, under a special custom, ante, p. 78, n. (*u*).

(*e*) Cro. Jac. 83, 166; 2 Wils. 232; 1 Sho. 342; 2 Sir W. Bl. 1077; Bull. N. P. 107. But tenants in common may join in a lease for years, which however would operate as several demises; Co. Lit. 45 a; 1 Roll. Abr. 877 B.; and may maintain personal actions, as trespass, jointly, Lit. sect. 315; or action of debt, or covenant for rent, ib. sect. 316; Cutting *v.* Derby, 2 Sir W. Bl. 1077; Midgley *v.* Lovelace, Carth. 289; Harrison *v.* Barnby, 5 T. R. 246; Powis *v.* Smith, 5 Barn. & Ald. 850.

(*f*) Service on one of several joint-tenants is sufficient; Doe *d.* Clothier *v.* Roe, 6 Dowl. P. C. 291.

(*g*) Boner *v.* Juner, 1 Lord Raym. 726, in which Holt, C. J., held, that the case of Milliner *v.* Robinson, in Mo. 682, was not law; and see Bull. N. P. 107.

(*h*) 6 East, 181, 182; Roe *d.* Raper *v.* Lonsdale, 12 East, 39; ib. 61; or on a demise of the whole by each, Doe & Fenn, 3 Campb. 190. See further as to proceedings in ejectment to recover possession of copyholds, post, tit. "Evidence."

And note,—the 12th sect. of the statute of limitation, 3 & 4 Will. 4, c. 27, enacts, that the possession of one coparcener, joint-tenant, or tenant in common, shall not be deemed the possession of the other or others.

in common against his companion, it is necessary to give evidence of an actual ouster (*i*), or to produce the consent rule to confess lease, entry, and ouster (*k*).

The mere fact of receiving the whole rent is not alone sufficient evidence of ouster (*l*), but claiming the whole and denying possession to the plaintiff is so (*m*); and an ouster may be presumed from a long uninterrupted possession (*n*).

When a person has a legal title, he may defend himself in ejectment, although twenty years' possession (not being the possession of the lessor of the plaintiff,) should have run against him before he took possession, *Doe* d. *Burrough and wife* v. *Reade* (*o*): in that case copyhold lands were granted in 1735 to *A.* to hold to him and his sons *B.* and *C.* successively during their lives, and the life of the longest liver; *B.* being dead, *C.* in 1777 purchased by copy the reversion of the premises on the determination of the estate of *A.* and of his own life estate, to hold to his son *D.* then an infant, during his life, who was admitted. In 1786 *C.* surrendered his own life interest and the reversionary interest of his son *D.*, then still a minor, (but over which interest he had no control,) and took another grant to hold to *C.*, his daughter *E.*, and his said son *D.* successively, and *C.* was admitted thereon, and continued in possession till his death in 1806, whereupon *D.* entered, against whom his sister *E.* and her husband brought an ejectment. At the trial at Salisbury a verdict was given for the plaintiff, with liberty for the defendant to move to set it aside, if the court should be of opinion with him: on the motion for a new trial, the ground relied upon by the defendant was, that the purchase of the reversionary estate by *C.* to hold to the defendant *D.* (his son), was, according to the case of *Dyer* v. *Dyer* (*p*) and other cases of that class, an advancement of the son by the father, and which gave the son the legal and beneficial interest, unless a custom in the manor had been shown, by which he was a trustee for his father, or it had appeared by any concurrent act of the father that he did not so intend it. For the plaintiff it was urged that there was an adverse possession in *C.* for above twenty years, as his possession must be referred

(*i*) Reading's case, Salk. 392.

(*k*) 3 Burr. 1897; Doe *d.* White *v.* Cuff, 1 Campb. N. P. 173.

(*l*) 5 Burr. 2607; 3 Wils. 120; Lord Raym. 312; Bull. N. P. 102; 6 Mod. 44.

(*m*) Peaceable *v.* Read, 1 East, 568; Doe *d.* Hellings *v.* Bird, 11 East, 50; Co. Lit. 199 b; 3 Wils. 119, 120.

(*n*) Doe *d.* Fisher *v.* Prosser, Cowp. 217; Adams on Ejectm. 54, 55.

(*o*) 8 East, 353. Twenty years' possession by a mortgagee of copyholds is *primâ facie* a bar to the equity of redemption, but special circumstances may have the effect of keeping the redemption open; Barron *v.* Martin, 19 Ves. 327; Coop. 189; post, tit. "Aid of the Courts of Equity;" and see 3 & 4 Will. 4, c. 27, s. 28.

(*p*) 2 Cox, Ch. Ca. 92; ante, p. 410 et seq.

to the new copy, in which the defendant's life was postponed to that of the lessor of the plaintiff; and that as *D.* could not have maintained an ejectment, his right of entry being ousted, so it did not vary the question that he got into possession after the twenty years' adverse possession; but the court held that *D.* had the legal and equitable right, and might retain possession; the possession of *C.* for twenty years after the surrender of his life estate, by which the reversion was let in, not being the possession of the lessor of the plaintiff: and a rule to show cause why a new trial should not be granted was made absolute.

Although mines are not considered as a distinct right from the right to the soil of the freehold, but are part of the demesnes of the manor (*q*), yet they may be not only a distinct possession but a distinct inheritance; so that in ejectment for mines, evidence of being lord of the manor is not sufficient to avoid the statute of limitations, (21 Jac. I. c. 16), where a copyholder can show a possession for twenty years (*r*); and as it is necessary for the lord to show an actual possession, a verdict in trover for lead dug out of the mine is no evidence, for trover may be brought on property without possession (*s*).

But the above statute of limitations being applicable to copyhold property, a copyholder after twenty years' *adverse* possession was driven to the several customary plaints, in nature of possessory actions and writs of right, of which the author proposes to treat in the succeeding chapter (*t*); yet as the possession must have been adverse, a copyholder, or his heir or devisee might have entered at any time within twenty years after the expiration of an existing lease, although a right of re-entry should have accrued, as for a condition broken by non-payment of rent; for during the lease the lessor could not have entered

(*q*) Ante, pp. 19, 429.

(*r*) Rich *d.* Lord Cullen et al. *v.* Johnson et al., 2 Stra. 1142; and see Curtis *v.* Daniel, 10 East, 273; ante, p. 431.

This rule equally applies to cottages built on the lord's waste, unless the lord could show that the possession was permissive only. See Bishop *v.* Edwards, Bull. N. P. 103, 104; per Lee, C. J., in Creach *v.* Wilmot, 2 Taunt. 160; 2 Eq. Ca. Abr. 229, pl. 13, marg. So that it is not true, as supposed to have been observed by the Lord Chancellor in Loyd *v.* Bartlet, 6 Vin. (X. d.), p. 183, pl. 1, 2 Eq. Ca. Abr. 228, pl. 13, "that the lord of the manor is never said to be out of possession;" ante, p. 431.

In a late case it was held that lands inclosed from the waste of a manor belonging to the crown, without licence, more than twenty years before the conveyance of the manor by the Commissioners of Woods and Forests to a purchaser, did not pass by the contract and certificate of the commissioners, so that the purchaser could not maintain an ejectment against the possessor of the land; Doe *d.* Watt *v.* Morris, 2 Bing. N. C. 189; ante, p. 35.

(*s*) Bull. N. P. 102.

(*t*) But see post, p. 473, n. (*a*).

nor supported an ejectment, neither was he bound to enter for a forfeiture committed (*u*).

It was formerly thought that if a person died under any of the disabilities excepted in the statute of fines (4 Hen. 7), his heir might have entered at any indefinite period of time (*x*), but the contrary was determined in the case of *Dillon & Leman* (*y*). This point was expressly met by the stat. of 21 Jac. c. 16. The first section enacted, that all writs of formedon should be sued within twenty years after the cause of action first descended or fell (*z*); and that no person should thereafter make any entry into any lands, &c., but within twenty years after his right or title should first descend or accrue. And by the second section it was enacted, that if any person or persons entitled to such writ or writs, or having such right or title of entry, should be at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, feme covert, non compos mentis, imprisoned, or beyond the seas, then such person or persons, and his and their heirs, should or might, notwithstanding the said twenty years were expired, bring his action, or make his entry, as he might have done before that act, so as such person and persons, or his or their heirs, should, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, *or death*, take benefit of and sue forth the same, and at no time after the said ten years (*a*).

If, therefore, a person to whom the right first descended died under a disability, his heir must have entered within ten years after his death (*b*), or if the heir was also under disability, then within ten years from the cesser of such last-mentioned disability (*c*).

(*u*) Doe *d.* Cook et ux. *v.* Danvers, 7 East, 299; and see Doe *&* Brightwen, 10 East, 591.

(*x*) Cru. 258 et seq.; Sugd. Vend. & Purch. 350, 8th ed.

(*y*) 2 H. Bl. 584.

(*z*) See post, tit. "Customary Plaints."

(*a*) If the statute began to run, no subsequent disability would avail; Doe *&* Jones, 4 T. R. 300. And this rule extended to the ten years' clause; Wright *v.* Perkins, Lin. Lent. Ass. 1733-4, MS.

(*b*) Jenk. 4, cent. pl. 97; Doe *&* Jesson, 6 East, 80.

(*c*) Cotterell *v.* Dutton, 4 Taunt. 826. The 16th sect. of the statute of limitation, 3 & 4 Will. 4, c. 27, ante, p. 464, n., enacts, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as therein aforesaid, such person shall have been under the disability of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued

shall have ceased to be under any such disability, or shall have died (which shall have first happened).

By the 17th sect. it is nevertheless provided, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities thereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued; although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. Vide Doe *d.* Corbyn *v.* Bramston, 3 Adol. & Ell. 63; vide also the 3d, 4th and 5th sections of the above act, explanatory of the period when the right shall be deemed to have accrued; ante, p. 367, note (*u*).

CHAPTER XV.

Of Customary Plaints, in nature of Possessory Actions and Writs of Right (*a*).

A COPYHOLDER must, in every action real (*b*), have impleaded and been impleaded in respect of his copyhold land in the court of the manor of which it was holden (*c*); and therefore, in case of ouster by a stranger, he could not have impleaded him by the king's writ, but only by plaint in the lord's court, with protestation to prosecute his suit in the nature of a writ of entry, or of assise of novel disseizin, or *mort d'ancestor*, or in the nature of the grand writ of right (*d*); the process upon plaints for copyhold lands having been analogous to the common law writs in real actions (*e*).

And this rule applied equally to copyhold lands held of a manor of ancient demesne (*f*).

In the case of *Scott* v. *Kettlewell* (*g*), the demandant in a real action for a copyhold estate in the lord's court having served the sheriff with the writ of *accedas ad curiam* to remove it to the Court of Common Pleas, a motion was made to supersede the writ. In support of the motion it was contended that the Court of C. B. had no jurisdiction as to copyholds, which was stated to be the ground that the Lord Chancellor in *Searle* & *Kitner* (*h*) superseded the writ

(*a*) As real actions, and plaints in nature thereof, were abolished by 3 & 4 Will. 4, c. 27, with the exception of a writ of right of dower, or writ of dower unde nihil habet, and plaints of freebench or dower, (see sect. 36, vide also ss. 16, 17, sup.,) this chapter will be of little comparative interest or utility; but the author thinks it ought, independently of the exceptive clauses of the act, to retain a place in the present work.

(*b*) Every real action was either *possessory*, viz of his own possession or seizin, OR *auncestrel*, viz. of the seizin or possession of his ancestor; 6 Co. 3. And real actions auncestrel were either *possessory*, viz. where the ancestor died in possession, and the lands decended, OR *rightful*, viz. when only the right descended from the ancestor; ib.

(*c*) Stephens v. Eliot, Cro. Eliz. 483.

(*d*) Co. Cop. s. 51, Tr. 118; Co. Lit. s. 76; Pymmock v. Hilder, Cro. Jac. 559.

(*e*) Kitch. 153.

(*f*) F. N. B. 12 b.

(*g*) 19 Ves. 335, 11th Apr. 1815.

(*h*) In Ch. 15th Apr. 1809. The reporter adds, "See 4 Co. 21 b, referring to 13 R. 2, Lit. ss. 76, 77, and Lord Coke's commentary, stating the reason that the copyholder cannot have the writ of false judgment, being only tenant at will according to the custom; his remedy, therefore, petition to the lord; and in the case of ouster by the lord without cause of forfeiture, an action of trespass." Ante, p. 314.

It appears that in the above case of Searle & Kitner, (which was a writ of intrusion,) the demandant afterwards recovered in the manor court of Little Wal-

with costs: the motion was not opposed, and the Lord Chancellor made the order accordingly.

In considering what remedies were afforded to a copyholder by plaint, in analogy to the common law writs, it may be desirable to make some few observations on the distinguishing nature of real injuries, and in doing this the author proposes to pursue the arrangement of Mr. Justice Blackstone in his Commentaries, as a mode the best calculated to elucidate this abstruse branch of copyhold tenure.

Ouster, or dispossession, is in copyhold cases confined to the following methods: abatement, intrusion, disseizin, and deforcement.

Abatement is, where a person dies seized of an *inheritance*, either in fee simple or fee tail(*l*), and before the customary heir or the devisee enters, a stranger gets possession of the copyhold tenement (*m*).

Intrusion is the entry of a stranger after the determination of a particular estate, and before the entry of him in remainder or reversion (*n*).

Disseizin is a wrongful putting out of him that is seized in possession for an estate of inheritance, or for life (*o*).

Deforcement is the unlawful detention of copyhold lands, where the original entry was lawful (*p*); as where the termor, or a stranger in possession at the expiration of the term, holds over to the exclusion of the remainder-man, or reversioner (*q*); or where lands are withheld from the widow in the case of freebench (*r*); or from the lord in the case of escheat (*s*); but the remedy in the latter case would be at common law, as the lord cannot be judge in his own cause (*t*).

So if copyhold lands are surrendered on condition, which condition is not performed by the surrenderor, or is broken by the surrenderee, as the case may be, and the surrenderor in the first case,

singham, in Norfolk. See n. (*b*), p. 553, 1 Jac. & Walk. in Widdowson *v.* The Earl of Harrington.

(*l*) F. N. B. 212, F.; Perk. S. 383.

(*m*) Co. Lit. 277 a.

(*n*) Ib.; F. N. B. 203, 204.

(*o*) Co. Lit. 277 a. But this species of injury must be understood qualifiedly, and as in contemplation of law only, for a copyholder cannot properly be disseized; 3 Leo. 210, ca. 274; see also Mo. 189, in Hill *v.* Morse; ante, pp. 46, 75. And this consideration rendered the doctrine of *continual claim* inapplicable to copyhold property. See 3 Bl. Com. 175. And N.B. A right even as to freeholds can no longer be preserved by continual claim; see 3 & 4 Will. 4, c. 27, s. 11, in the Appendix. It should seem that a copyholder who had been ousted need not have been readmitted in order to bring a plaint in nature of an assise of novel disseizin; Co. Cop. s. 56, Tr. 129; Kitch. 118, 119. But he must enter before he can surrender; ante, pp. 139, 352, 466, n. (*i*). As to disseizin of *incorporeal hereditaments*, see 3 Bl. Com. 170.

(*p*) Co. Lit. 277 b; 3 Bl. Com. 172, 173.

(*q*) F. N. B. 201.

(*r*) Ib. 147.

(*s*) Ib. 143, 144.

(*t*) Ib. 11, M.; Baker *v.* Wich, 1 Salk. 56; Brittle *v.* Dade, ib. 185; S. C. 1 Lord Raym. 43.

or the surrenderee in the second, continues to hold the lands; this is also a deforcement (*u*).

So likewise is the withholding lands after avoidance on alienation by an infant or person of *non sane* memory, as against the alienor or his heir (*x*).

And if one coparcener enter upon and keep possession of the whole copyhold tenement against the other coparceners, this is also a deforcement (*y*).

So likewise is the non-performance of a covenant to surrender a copyhold to another (*z*).

A deforcement also signifies the holding of any copyhold lands to which another person hath a right; and therefore includes the injuries of abatement, intrusion, and disseizin, and every other wrong not comprised under those terms (*a*).

The author proposes now to point out the remedies which the law, until lately, afforded for the above injuries.

ENTRY.—When the original entry of the wrong-doer was unlawful, as in the injuries of abatement, intrusion, and disseizin, the party injured might have made a formal but peaceable entry (*b*) on any part of the land within the same manor, in the name of the whole; and such entry, we have seen, was not tolled by a descent (*c*).

But when, upon a deforcement, the original entry was lawful, the owner was driven to his customary plaint; yet entry was allowed on a tenant by sufferance, as he had only a bare possession (*d*).

And it is already shown that no entry could have been made unless within twenty years after the right accrued (*e*); nor would such entry have been of force to satisfy the statute, or to avoid a fine levied of

(*u*) F. N. B. 204, 205; 3 Bl. Com. 173.

(*x*) F. N. B. 192, 202; 3 Bl. Com. 173, 174.

(*y*) F. N. B. 197; 3 Bl. Com. 174.

(*z*) 3 Bl. Com. 174; F. N. B. 146.

(*a*) Co. Lit. 277 b.

(*b*) 5 R. 2, st. 1, c. 8; 15 R. 2, c. 2; 4 H. 4, c. 8; 8 H. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15. This last stat. expressly authorized the restitution of possession by judges, justices, &c. to tenants by copy of court roll, &c. upon indictments for forcible entries, the same as to tenants of an estate of freehold.

(*c*) Ante, p. 46.

(*d*) Co. Lit. 57, 271; 3 Bl. Com. 175. But the copyholder might have admitted himself to be out of possession. On the doctrine of disseisin at election, see Blunden *v.* Baugh, Cro. Car. 302; W. Jones, 315; Taylor *&* Horde, 1 Burr. 78, 79, 111; 6 Bro. P. C. 645; Doe *d.* Atkyns *v.* Horde, Cowp. 694.

(*e*) 21 Jac. 1, c. 16; ante, tit. "Ejectment;" Shaw *v.* Thompson, Mo. 411; Rich *d.* Lord Cullen *v.* Johnson, 2 Stra. 1142; Doe *d.* Tarrant *v.* Hellier, 3 T. R. 172, 173; Doe *d.* Cook and Wife *v.* Danvers, 7 East, 321.

copyhold lands by a disseizor, unless an action had been thereupon commenced within one year after, and prosecuted with effect (*f*).

PLAINTS IN NATURE OF POSSESSORY ACTIONS.—The *possessory* remedies of the copyholder were by plaints in the nature of *writs of entry* sur disseizin, intrusion, &c., or of *assise*, but which merely restored the party to his possession, without prejudice to the *right of property;* and the judgment or recovery in either of those real actions was a bar against the other.

The *writ of entry* disproved the title of him who was in possession, by showing the unlawful means by which he entered, or continued possession.

The plaint, in analogy to the *precipe quod reddat*, called upon the abator, intruder, or the like, either to deliver seizin of the lands, or to show cause why he would not; which cause might have been either a denial of the fact of having entered by the means suggested, or a justification of his entry by reason of title in himself, or those under whom he claimed, whereupon possession was awarded to him who had the clearest right (*g*).

When the plaint was brought againt the abator or intruder, or the like, the defect of his possessory title alone need have been stated; but if he had aliened, or if the land had descended to his heir, that circumstance must also have been alleged.

One such alienation or descent made the first degree, which was called the *per*, the form of the plaint being, that the tenant had not entry but *by* the original wrong-doer, who alienated the land, or from whom it descended to him. A second alienation or descent made another degree, called the *per* and *cui;* the form then was, that the tenant had not entry but *by* or *under* a prior alienee, to whom the intruder demised it (*h*).

After two degrees (that is, two alienations or descents) there lay no writ of entry at the common law, but the demandant was put to his writ of right (*i*), except in abatement, intrusion and disseizin, where the original entry was unlawful, and in those cases there was a writ of entry in the *post* at common law (*k*).

(*f*) 4 H. 7, c. 24; 4 Ann. c. 16; Co. Cop. s. 55, Tr. 126; Cru. on Fines, pp. 118, 211, 212, 344.

(*g*) 3 Bl. Com. 181.

(*h*) Booth, 173, 174, 175; F. N. B. 191, (C.) (D.); Co. Lit. 238 b. But in the plaint in nature of a writ of entry in the *per*, it should be supposed in the *per* by the copyholder, not by the lord; Co. Cop. s. 41, Tr. 91. Booth, 172, made three degrees; viz. the first in the original wrong done, the second in the *per*, and the third in the *per* and *cui*, which is noticed by Mr. Just. Blackstone with the remark, that the difference was immaterial; 3 Com. 181, n. (9). Vide F. N. B. 204.

(*i*) Booth, 173; 2 Inst. 153, 154; 3 Bl. Com. 181, 182.

(*k*) Booth, 173, 174.

And by the Statute of Marlb. 52 Hen. III. c. 30, when the number of alienations or descents exceeded the usual degrees, a new writ was allowed without any mention of degrees, and the writ framed under that statute was called a writ of entry in the *post* (*l*), which alleged the original injury without deducing the intermediate title; and it was upon a plaint in the nature of this latter writ that recoveries of copyholds were suffered.

But a man should not have had a writ of entry in the *post*, where he might have had it within the degrees, namely, in the *per* or the *per* and *cui* (*m*).

The plaint in the nature of a writ of entry was applicable to all the cases of ouster before mentioned, except some peculiar species of deforcements. Such, the author submits, is that of deforcement of dower, by not assigning proper dower to the widow, where she is dowable by the custom of the whole or a portion of her husband's copyholds, and for which the author conceives she has her remedy by plaint in the nature of a writ of dower, *unde nihil habet* (*n*), if she be deforced of the whole of her dower; or if of part only, so that she cannot say *nihil habet*, then by plaint in the nature of a *writ of right of dower* (*o*).

And if the heir (being within age) or his guardian assigned the widow more than she ought to have had, it might have been remedied, the author apprehends, by a plaint in the nature of a writ of *admeasurement of dower* (*p*).

The more ordinary writs of entry were—1. The several writs *sur-disseizin*, in nature of an assise (*q*). 2. *Of intrusion* (*r*). 3. *Dum fuit*

(*l*) See Mo. 68, pl. 185; Co. Lit. sect. 386.

(*m*) Booth, 173; F. N. B. 192, C. "One may falsify the degrees by plea after a prece partium;" 14 H. 4, 39 F. Brief, 248; ib. n. (a).

(*n*) F. N. B. 147.

(*o*) 3 Bl. Com. 183, 193; Booth, 118; F. N. B. 8, 147; Chapman *v.* Sharpe, 2 Sho. 184.

The author was informed that the proceedings and pleadings on a plaint in the lord's court in nature of a writ of dower, are recorded in the manor of Sutton Holland, inter Humphrey Cox and wife theretofore the wife of Richard Raynton, demandants, and Thomas Raynton, son and heir of the said Richard Raynton, tenant; Aug. 10 Jac. 1, 1614.

(*p*) F. N. B. 148.

(*q*) F. N. B. 191, 192; Booth, 172 to 175; and which might have been simply *de quibus*, grounded on a disseizin, by the person against whom the writ was brought, to the demandant himself or some ancestor; or in the *per*, i. e. when the writ was brought against him who came under him that did the disseizin, either to the party himself or his ancestor; or in the *per* and *cui*, i. e. when the writ was brought against him who claimed under him who claimed under the disseizor. And see Booth, 215, as to the inquiry under an assise brought by an infant.

(*r*) F. N. B. 203; Booth, 174, 181. See Eastman *v.* Baker, 1 Taunt. 174; 3 Chit. Pl. 611; Romilly *v.* James, 6 Taunt. 263; S. C. 1 Marsh. 599; Searle *v.* Kitner, cited 19 Ves. 335; and see 1 Jac. & Walk. 553, n. (b).

The writ of entry *sur intrusion* was for the reversioner or remainder-man in fee or

infra ætatem (*s*). 4. *Dum fuit non compos mentis* (*t*). 5. *Cui in vitâ*, and *cui ante divortium* (*u*). 6. *Ad communem legem* (*v*). 7. *In casu proviso* and *in consimili casu* (*x*). 8. *Ad terminum qui præteriit* (*y*). 9. *Causâ matrimonii prælocuti* (*z*).

Where, however, there was no disseizin but an *abatement*, the proper remedy was a writ of assise (*a*); but it should seem that resort might have been had to a writ of entry *sur abatement* (*b*).

The WRIT OF ASSISE was a real action which proved the title of the demandant, merely by showing his or his ancestor's possession, and was invented to do justice to the people by determining questions of title in the proper counties, but before the king's justices, and this

for life, after a previous life estate, or for the grantee or assignee of such reversioner or remainder-man, but not for a remainder-man in tail, whose remedy was formedon; F. N. B. 204, D.; ib. 217, C.; ib. D.; ib. 470. And see as to remainder-man in tail, arg. Widdowson *v.* Earl of Harrington, 1 Jac. & Walk. 550, (citing Booth, 183; Finch. 266; F. N. B. 204; Reg. 235;) per M. R. in S. C. 545, Romilly *v.* James, sup.

The writ of intrusion lay for a remainder-man after the determination of an estate *pur autre vie*, and might have been maintained by a devisee; Piercy, dem. Gardner, ten., 3 Bing. N. C. 748.

(*s*) F. N. B. 192; Booth, 193. See Knight *v.* Footman, 1 Leo. 95; Cro. Eliz. 90; 3 Bl. Com. 173.

(*t*) F. N. B. 202 (C.); Booth, 190; 3 Bl. Com. 173, 174.

For the heir of him who had aliened his land by matter in pais, being at the time of unsound mind, and even, as it should seem, for the idiot himself; F. N. B. 202; Booth, 190; Roscoe on Real Actions, 92. But the issue in tail should only have recovered by formedon; 18 E. 3, 31; F. N. B. 202, n.

(*u*) For a woman, when a widow or divorced, whose husband during the coverture (*cui in vitâ suâ, vel cui ante divortium, ipsa contradicere non potuit,*) hath alienated her estate; F. N. B. 193, 204 (F.); Booth, 186, 188. But the surrender of the tenant in tail or the husband was not a discontinuance, to put the heir or the wife (if she survived the husband) to a plaint; ante, pp. 46, 47, 81, 86. So that a plaint of this nature was only where recovery by default was against the husband and wife; Bullock & Dibler, Poph. 39; S. C. Mo. 596. Or perhaps for the wife living the husband; Roswell's case, Dy. 264.

(*v*) For the reversioner in fee, in tail or for life after the alienation and death of a tenant for life; F. N. B. 207 (G.); Booth, 191. But according to Lord Coke, it was for tenant in fee or in tail only; Co. Lit 341 b.

(*x*) Which lay not *ad communem legem*, but were given by stat. Glosc. 6 Edw. 1, c. 7, and West. 2, 13 Edw. 1, c. 24, for the reversioner after the alienation, but during the life of the tenant in dower or other tenant for life; F. N. B. 205, 206; Booth, 198, 200; 6 Taunt. 268.

(*y*) For the reversioner, when the possession was withheld by the lessee or a stranger, after the determination of a lease for years; F. N. B. 201; Booth, 195.

(*z*) For a woman who gave land to a man in fee or for life, to the intent that he might marry her, and he did not; F. N. B. 205; Booth, 197.

(*a*) Booth, 206; ib. 174, n. (b).

(*b*) It was held in Smith & others, assignees of Eustace a bankrupt, *v.* Coffin & wife, 2 H. Bl. 444, that a right of entry sur abatement passed to the assignees by the bargain and sale of the commissioners. And see Roscoe's Real Act. 88.

writ did not admit of many dilatory pleas to which other real actions were subject (*c*).

It was applicable only to the injuries of abatement and novel disseizin (*d*).

And when the abatement was on the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy was by plaint in the nature of an assise of *mort d'ancestor* (*e*).

If the abatement was on the death of the grandfather or grandmother, then the assise of *mort d'ancestor* no longer lay, and the remedy was by plaint in the nature of a writ of *ayle* or *de avo* (*f*): if on the death of the great grandfather or great grandmother, then by plaint in the nature of a writ of *besayle* or *de proavo* (*g*): but if it amounted one degree higher to the *tresayle*, or grandfather's grandfather, or if the abatement was on the death of any collateral relation other than those before mentioned, the plaint was in the nature of a writ of *cosinage* or *de consanguineo* (*h*).

These ancestral writs expressly asserted a title in the demandant (viz. the seizin of the ancestor at his death and his own right of inheritance); the assise asserted nothing directly, but only prayed an inquiry whether those points were so (*i*).

There was another ancestrel writ called a *nuper obiit*, to establish an equal division of the land in question, where, on the death of an ancestor who had several heirs, one entered and held the others out of possession (*k*).

But these actions ancestrel did not lie for an abatement consequent on the death of any collateral relation beyond the fourth degree, though in the lineal ascent the demandant might have proceeded *ad infinitum*.

As the assise of *mort d'ancestor* inquired only of the seizin of the ancestor and the heirship of the demandant, it was always held that where lands were devisable by custom, an assise of *mort d'ancestor* did not lie; and it was therefore thought, that after the statute of wills, 32 Hen. VIII. c. 1, making socage lands devisable, and the

(*c*) See 3 Bl. Com. 184; stat. Westm. 2, 13 Edw. 1, c. 24.

(*d*) F. N. B. 177; Booth, 206, 210. And see as to writs of entry in general, Roscoe on Real Actions, 88 et seq.

(*e*) F. N. B. 195; Booth, 206. But a doubt has been expressed whether a plaint in the nature of this writ ever lay of copyhoids; see 2 Watk. on Cop. 36, n. (g), 2d edit.; Gilb. Ten. 288, n. (z). It seems that a count on the seizin of an ancestor, whose seizin was taken away by abatement, was sufficient; Smith *v.* Coffin, 2 H. Bl. 444.

(*f*) F. N. B. 220, 221; Booth, 200 to 204; Lyford *v.* Coward, 1 Vern. 195; S. C. 2 Ch. Ca. 150; Knight *v.* Adamson, 2 Freem. 106.

(*g*) F. N. B. and Booth, as in n. (*f*), sup.

(*h*) Ib.

(*i*) 2 Inst. 399.

(*k*) F. N. B. 197; Booth, 205.

statute 12 Car. II. c. 24 (converting all tenures, a few only excepted, into free and common socage), no assise of *mort d'ancestor* could have been brought, but that in case of abatements recourse must have been had to the writs of entry (*l*).

The correctness of this conclusion would however appear to have been very questionable (*m*), and the distinction was not applicable to copyhold lands, which, it must be recollected, were not within the old statutes of wills, a will of copyholds having operated only as an appointment under the power created by the surrender (*n*).

"The assise of *novel disseisin*," says Mr. Justice Blackstone (*o*), "is an action of the same nature with the assise of *mort d'ancestor*, in that the demandant's possession must be shown; but it differs considerably in other points, particularly in that it recites a complaint by the demandant of the disseizin committed, in terms of direct averment; whereupon the sheriff is commanded to re-seize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assise (which in fact hath been usually omitted), and in the meantime to summon a jury to view the premises and make recognition of the assise before the justices; at which time the tenant may plead either the general issues *nul tort*, *nul disseizin* or any special plea. And if upon the general issue the recognitors find an actual seizin in the demandant, and his subsequent disseizin by the present tenant, he shall have judgment to recover his seizin and damages for the injury sustained, being the only case in which damages were recoverable in any possessory action at the common law; the tenant being in all other cases allowed to retain the intermediate profits of the land to enable him to perform the feudal services. But costs and damages were annexed to many other possessory actions by the statute of Marlberge, 52 Hen. III. c. 16, and of Glocester, 6 Edw. I. c. 1. And to prevent frequent and vexatious disseizins, it is enacted by the statute of Merton, 20 Hen. III. c. 3, that if a person disseized recover seizin of the land again by assise of *novel disseizin*, and be again disseized of the same tenements by the same disseizor, he shall have a writ of *re-disseizin*, and if he recover therein the re-disseizor shall be imprisoned; and by the statute of Marlberge, 52 Hen. III. c. 8, shall also pay a fine to the king;

(*l*) 3 Bl. Com. 187; 2 Watk. on Cop. 36, n. (g).

(*m*) See Booth, 208, n.; Bro. Abr. tit. "Mordauncester;" Vin. Abr. same tit.; Rast. Ent. fo. 129. Vide also Co. Lit. 111 a and b; 1 Leo. 267, ca. 358.

(*n*) Ante, p. 233. But under the late statute of wills (1 Vict. c. 26), customary freeholds and copyholds are now devisable; ante, tit. "Devise," p. 233, n. (*e*); though they may still be surrendered to uses to be declared by will, ante, p. 247, n. (*a*); such will being executed as required by the 9th sect. of the above act; ante, p. 234, n. (*f*).

(*o*) 3 Com. 187, 188.

to which the statute Westm. 2, 13 Edw. I. c. 26, hath superadded double damages to the party aggrieved. In like manner by the same statute of Merton, when any lands or tenements are recovered by assise of *mort d'ancestor* or other jury, or any judgment of the court, if the party be afterwards disseized by the same person against whom judgment was obtained, he shall have a writ of *post disseizin* against him, which subjects the post disseizor to the same penalties as a re-disseizor."

Limitation of Possessory Actions.—Formerly the limitation was from the date of a particular event, as from the return of King John from Ireland, &c.; but by the statute of 32 Hen. VIII. c. 2, all writs grounded on the possession of the demandant himself must have been sued out within thirty years after the disseizin complained of, that having been considered a proper restriction in point of period for the term *novel disseizin*.

And the writ in all other possessory actions must have been sued out within fifty years after the alleged injury (*p*); which limitation extended to customary and prescriptive rents, suits and services (*q*): but this, says Mr. Justice Blackstone, did not extend to services which, by common possibility, might not have happened to become due more than once in the lord's or tenant's life, as fealty and the like (*r*).

(*p*) 3 Bl. Com. 189; 6 Taunt. 263, 268, in Romilly *v.* James; S. C. 1 Marsh. 599; and see 1 Vern. 195, in Lyford *v.* Coward. The limitation of fifty years extended to writs of intrusion; Piercy, dem. Gardner, ten., 3 Bing. N. C. 748, ante, p. 568, n. (*e*).

(*q*) Mr. Justice Blackstone cites for this Berthelet's original edition of the statute, A. D. 1540, and Cay's, Pickering's, and Ruffhead's editions, examined with the record, but adds, that Rastell's and other intermediate editions which Sir Edward Coke (2 Inst. 95) and other subsequent writers have followed, made it only forty years for rents, &c.; 3 Com. 182, n. (*s*).

(*r*) 3 Com. 189, cites Co. Lit. 115; and see Bevil's case, 4 Co. 10 b. There was no time of limitation upon rents created by deed, or reserved on a particular estate; 3 Bl. Com. 189, cites 8 Co. 65.

Neither is time a bar *in equity*, as between a trustee and a cestui que trust. See 2 Meriv. 360, in Cholmondeley *&* Clinton; 1 Jac. & Walk. 58; Hamond *v.* Hicks, 1 Vern. 432; Mosel. 298, 299; Barnard. 449; 2 Russ. & Myl. 683, in Collard *v.* Hare. Nor can a person who has taken a conveyance from a trustee shelter himself under a plea of the statute of limitation; 3 Atk. 459. See section 25 of the statute of limitation, 3 & 4 Will. 4, c. 27, by which, in the case of an express trust, the right of a cestui que trust to bring a suit against the trustee is not deemed to accrue until a conveyance to a purchaser. In a constructive trust, long acquiescence will be a bar; Beckford *&* Wade, 17 Ves. 97; Townsend *&* Townsend, 1 Bro. C. C. 554; 1 Jac. & Walk. 58.

Note—Equitable interests are put on

It is proper to notice here, that in a case which came before Sir Thomas Plumer, M. R. (*s*), he expressed a confident opinion that the statute of 21 Jac. c. 16, which took away the right of entry after twenty years, took away the remedy of writs of entry also; and that case is an authority that, although a tenant for life should have lived upwards of fifty years, yet a writ of intrusion could not have been brought by the remainder-man, as he then could not have shown the seizin of the ancestor, by taking the esplees, within fifty years (*t*); and it is also an authority that the grantor or settlor of the land was to be considered as an ancestor of the remainder-man within the meaning of the act of 32 Hen. VIII., which enacted (*u*), that no manner of person or persons should thereafter sue, have or maintain any assise or mort-ancestor, cosinage, ayel, writ of entry upon disseizin done to any of his ancestors or predecessors (*x*), or any other action possessory, upon the possession of any of his ancestors or predecessors, for any manors, lands, tenements or other hereditaments, of any further seizin or possession of his or their ancestor or predecessor, but only of the seizin or possession of his or their ancestor or predecessor, which was, or thereafter should be seized of the same manors, lands, tenements, or other hereditaments, within fifty years next before the *teste* of the original of the same writ thereafter to be brought.

Remittur.—When the person who has the right to copyhold lands takes possession by virtue of some subsequent defective title (*y*), he is remitted to his prior title, and put in the same condition as if he had recovered the land by plaint in the nature of a possessory action, in analogy to the law of remitter in freehold cases; so that the possession which he gained by a defective title was not liable to be overturned by showing that defect in a plaint, in the nature of a writ of entry, the effect of which would have been to drive him to his customary writ of right. See further on the doctrine of remitter, 11 Mod. 128; 1 Bos. & Pul. 602; 8 Ves. 282; Co. Lit. 347 b et seq.

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the same footing as legal estates by the 24th section of the above act of 3 & 4 Will. 4, c. 27.

(*s*) Widdowson *v.* The Earl of Harrington, 1 Jac. & Walk. 548.

(*t*) But see Romilly *v.* James, 1 Marsh. 599, 6 Taunt. 272, where Gibbs, C. J. said, "Can it be law that if the tenant for life live for fifty years, the remainder-man loses his remedy?"

(*u*) C. 2, s. 2.

(*x*) The term "predecessor" had relation to corporations only, and had no application to a tenant for life; 1 Jac. & Walk. 546, 547, 558.

(*y*) But a remitter can only be by the act of law, and not when the party comes to the defeasible estate by his own act, or his own consent; Co. Lit. 347 b, n. 1; 3 Bl. Com. 20; 1 Bos. & Pul. 603.

PLAINTS IN NATURE OF WRITS OF RIGHT.—As the *right of property* is not consequent on the *possession*, or on *the right of possession*, it will now be considered what was the final remedy by customary plaints, analogous to the common law writs of right.

The mere *writ of right*, being in its nature the highest writ in the law (*z*), was (strictly speaking) applicable only to an estate in fee simple (*a*).

But even at common law, before the statute *de donis*, if a gift were made to a man and the heirs of his body, and the donee aliened before he had performed the condition of the gift by having issue, and afterwards died without any, the reversioner might have had a writ of right called a *formedon* in the *reverter*, to recover the lands, wherein he suggested the gift, his own title to the reversion, minutely derived from the donor, and the failure of issue upon which his reversion took place (*b*).

After the statute *de donis*, or Westm. 2, 13 Edw. I. c. 1, a tenant in tail by descent, or in remainder, had a peculiar writ of right, called also a *formedon*. A writ of *formedon* in the *descender* lay for the heir in tail, where the tenant in tail aliened the lands entailed, or was disseized of them, and died; in which action the demandant was bound to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni* (*c*). A *formedon* in the remainder lay

(*z*) F. N. B. 1.

(*a*) It was not alone applicable, for if lands escheated to the lord by the death of the copyholder in fee simple, without heirs, the lord might have had a writ of escheat in the nature of a writ of right, even if the tenant had been disseized; F. N. B. 143, 144; Booth, 135. But if tenant in tail died without heirs inheritable, and there was no remainder, the lord in reversion should not have had a writ of escheat, but a *formedon* in the reverter. And if a copyholder in fee, in remainder, or reversion, died without heirs, and afterwards the tenant for life died, and a stranger entered, the author apprehends the lord might have had a writ of intrusion, F. N. B. 144; or might have tried his title by escheat in ejectment, Booth, 136; and see Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1290, 1303, where an ejectment was brought by one claiming as the heir of a copyholder, and the lords, claiming by escheat, obtained a rule to show cause why they should not be admitted defendants. At the recommendation of the Court of B. R. the action was discontinued, and another ejectment brought in the name of the lords of the manor, the heir being admitted defendant. And afterwards Lord Mansfield declared that he was clear that this method of putting the person claiming to be lord by escheat to bring his ejectment, was the proper way of trying the right upon the merits; and that if the heir had refused, the court would have admitted the lords to defend, and if they had refused to consent, the court would have discharged the rule.

(*b*) F. N. B. 219; Booth, 154; Buckmere's case, 8 Co. 88.

(*c*) F. N. B. 212; Booth, 141; Buckmere's case, 8 Co. 88; Kitch. 247, 248, 249.

The author apprehends that the writ of formedon (and so therefore in copyhold cases a plaint in nature of that writ) was applicable to the case of an entry or abatement by a stranger, upon the decease of the ancestor, tenant in tail. This case is

where a gift was made to one for life or in tail, with remainder to another in tail, and he who had the particular estate died without issue inheritable, and a stranger intruded upon him in remainder in tail, and kept him out of possession, in that case the remainder-man had a writ of *formedon* in the *remainder*, wherein the whole form of the gift was stated, and the happening of the event upon which the remainder depended (*d*).

This writ (says Mr. Justice Blackstone) (*e*) was not given in express words by the statute *de donis*, but was founded upon the equity of the statute, and upon this maxim in law, that if any one had a right to the land, he ought also to have an action to recover it (*f*).

By the statute of limitation, 21 Jac. I. c. 16, the writ of *formedon* (which was limited to fifty years by the statute 32 Hen. VIII.) (*g*) must have been brought within twenty years after the title accrued, and the twenty years in the case of a *formedon* in the descender began to run when the title descended to the *first* heir in tail, unless he lay under some legal disability (*h*); and once beginning to run, no subsequent disability would have availed (*i*). As, however, a copyholder, as well as a freeholder, could try his title by the action of ejectment at any time within the period of this limitation, the writ of *formedon* might have been considered almost an obsolete branch of the law of real actions; but cases have arisen in which the remedy of *formedon* was thought more expedient than the action of ejectment, notwithstanding the objection presented by the greater subtlety and strictness of the pleadings, as affording the more ready means of obtaining a knowledge of the title relied upon by the defendant.

not put by Blackstone, but in F. N. B. 212 (F.), it is said, "And if tenant in tail hath issue two sons, and dieth, and a stranger abateth, and entereth into the land, and afterwards the eldest son dieth before he entereth into the land, the youngest son shall have a writ of formedon in the descender, and needeth not name his eldest brother heir to his father in the writ, but only son, because he never had seizin of the land, but only held the estate; but if the eldest brother did enter, and was seized by force thereof, and died without heir of his body, then the youngest son who is his brother and heir, ought to mention the eldest in the writ, and him son and heir to his father, and to make himself brother and heir unto him;" and see Perk. sect. 383.

(*d*) F. N. B. 217; Booth, 151; Buckmere's case, sup.; Kitch. 242. Whether formedon was the only proper remedy, ante, p. 477, n. (*r*).

(*e*) 3 Com. 192.

(*f*) See Br. Tenant per Copie, pl. 24.

(*g*) C. 2. But that act did not mention formedon in the *descender;* see Co. Lit. 115 a; ib. n. (2).

(*h*) Tolson *v* Kaye, 3 Brod. & Bing. 217; 3 Barn. & Adolp. 741, 742; and see Cotterell *v.* Dutton, 4 Taunt. 826. But it has been held that an heir in tail, whose ancestor had seizin, was not barred of his ejectment merely by the defendant's showing that he had been in possession for thirty years during the life of the ancestor, and seven years after his death, for it might have been a possession under a conveyance which did not work a discontinuance, and therefore not adverse; Doe *d.* Smith *v.* Pike, 3 Barn. & Adolp. 738.

(*i*) Doe & Jones, 4 T. R. 300; ante, p. 471, n. (*a*).

The owners of a particular estate, as in fee tail, for life, in dower (*k*), or by the curtesy, were without remedy at common law, when barred of entry, or of the right of possession, by recovery against them in a possessory action, and still remained so, after recovery *upon defence*, in the inferior possessory suit (*l*); but the statute of Westm. 2, 13 Edw. I. c. 4, gave a new writ for those persons, after their lands had been so recovered against them *by their own default or non-appearance*, called a *quod ei deforceat*, which restored the right to him who had been deforced by his own default (*m*).

When one coparcener deforced the other by usurping the sole possession, the party ousted might have had a writ of right, *de rationabili parte* (*n*), which might have been grounded on the seizin of the ancestor at any time during his life; whereas in the possessory remedy of a *nuper obiit*, he must have been seized at the time of his death.

The several abovementioned remedies in freehold cases were equally open to a copyholder, whether of inheritance, in fee simple, or fee tail, or having a particular estate only, as for life or years, in dower or by the curtesy, who by plaint in the court of the manor, analogous to and corresponding with the several writs of right at common law, might have been restored to the possession, and confirmed in the property of the copyhold tenement, of which he had been unjustly deprived (*o*).

But as the possession might, in freehold cases, be recovered in a more easy and expeditious manner by a possessory action, this final remedy was seldom resorted to when the claimant was not driven to it by length of adverse possession; this distinction, however, did not hold so forcibly in copyhold cases, where the proceedings in nature of a writ of right were by no means so complicated and abstruse as was generally supposed.

And where the mise was joined upon the mere right, there needed little of special pleading, as all or most of such matter (except a collateral warranty) might then have been given in evidence (*p*).

(*k*) But a dowress, it must be recollected, has her writ of right of dower in freehold cases, extending either to a part or the whole; and therefore may have a plaint in nature thereof in the manor court, when entitled to freebench, and the homage to sever and set out the same; ante, pp. 468, 477; post, tit. "Aid of the Courts of Equity."

(*l*) Hence it was that a common recovery on a writ of entry in the post, had by default of the vouchee of tenant in tail, upon defence, was, prior to 3 & 4 Will. 4, c. 74, the usual mode of barring an estate tail; 4 Co. 23 a, (3).

(*m*) F. N. B. 8, 155; Booth, 253; 3 Bl. Com. 193.

(*n*) F. N. B. 9.

(*o*) Whether a copyhold tenant had any remedy by writ of right or plaint in nature thereof, in case of ouster by the lord, see Br. Tenant per copie, pl. 10; 6 Vin. Cop. (L. d.), pl. 1; ante, pp. 314, 473, n. (*h*), 474.

(*p*) Booth, 112, cites Br. Droit, 8; and see 3 Wils. 420, in Tissen *v.* Clarke.

But precisely the same accuracy would seem to have been requisite in the pleadings in copyhold cases as in freehold (*q*), the several writs of right, and, as a consequence, plaints in nature thereof, having been much discouraged by the courts, and there were very few cases in which the demandant would have been permitted to amend.

In the case of *Charlwood* v. *Morgan* (*r*) Mr. Justice Heath said, "In *Dumsday* v. *Hughes* (*s*) we thought that writs of right ought not to be encouraged, and that the least slip was fatal to the demandant. We did not choose to say at that time that in no case whatever would an amendment be allowed, since a fit case might by possibility be brought before us. The mistake here is a common mistake, and not such as entitles the demandant to any favour."

And in a subsequent case (*t*) the court refused to permit the demandant to amend his count by introducing an additional step in the descent, though it was sworn that the mistake had arisen from the demandant having been misinformed in the country, and that he would be barred by the statute of limitations unless the amendment were allowed.

Again, in the case of *Tooth* & *Boddington* (*u*), the Court of C. B. would not permit an amendment in a writ of right, after plea pleaded, and writ of view served, to enable the demandant instead of demanding freehold lands, to allege that he was seized at the will of the lord.

The power of the courts to amend even in writs of right was, however, unquestionable, and the late case of *Webb* & *Lane* (*x*) showed that the very proper rigour of the long established practice would have been relaxed under special circumstances. In that case a blank having been left in the count for the word "*esplees*," and no London attorney's name being indorsed on it, judgment was signed by the tenant, and the Court of Common Pleas held that this was not irre-

(*q*) If the demandant in deducing his title through a female described her as "sister and heir of *J. S.*," and it appeared upon the face of the count that *J. S.* left a son who survived his aunt, it was fatal, although it should also have appeared that upon failure of issue of the son, the issue of the sister of *J. S.* became his heirs; Slade et ux. *v.* Dowland, 2 Bos. & Pul. 570. And in the count of a writ of right, it was not sufficient to say that the lands descended to four women as nieces and co-heirs of *J. S.*, without showing how they were nieces; 3 Bos. & Pul. 453, in Dumsday *v.* Hughes and another. See Dumsday *v.* Hughes, 3 Bing. N. C. 439.

(*r*) 1 N. R. 64.

(*s*) Sup.

(*t*) Baylis *v.* Manning, 1 N. R. 233.

(*u*) 1 Bing. 208.

(*x*) 5 Bing. 285; 2 Mo. & P. 478; and see Turner *v.* Palmer. Cro. Car. 74; Scott *v.* Perry, 3 Wils. 206; Cholmely *v.* Paxton, 3 Bing. 1. Vide also Miller, dem. Mary Miller, w°. ten.; 2 Bing. N. C. 66, where, after delivery of a writ of summons to the sheriff, but before it was executed, the demandant's attorney, discovering that it was returnable on a dies non, altered the return day, and had the writ re-sealed, giving the tenant notice; and the Court of C. B. refused to set aside the writ and proceedings for irregularity.

gularity for which the tenant could take judgment, and the demandant was permitted to amend on payment of costs.

In the case of *Worley* v. *Blunt* (*y*) the Court of C. B. gave its full sanction to the uniform practice of not allowing a demandant to amend in a writ of right, except in cases similar to that of *Webb & Lane* (*z*), where the tenant had taken the law into his own hands, and instead of demurring signed judgment. The court in *Worley & Blunt* remarked, that the discouragement of a writ, which sought to disturb a possession after the lapse of very many years, was a sound exercise of their discretion; and that another objection to the amendment arose out of the peculiar form of the writ, in which the tenant could often have taken no other course than that of joining the mise upon the mere right, in which case he must have begun, and so exposed his whole title, and put it in the power of the claimant to pick a hole in it. And the court took occasion to observe, (in reference to the case of *Goore & Goore* (*a*), where Mr. Baron Wood, in the Common Pleas of Lancaster, allowed the demandant to insert the word "*right*," which had been omitted in the count,) that it was well known that the learned baron entertained notions on the subject of writs of right, very different from those which the Court of Common Pleas had sanctioned.

When the demandant was not allowed to amend, he would not have been permitted to discontinue (*b*); nor would a new trial have been granted, except in a case of fraud, or where a manifest injustice would have resulted from the refusal of it (*c*).

But a distinction was made between applications on the part of the demandant and on the part of the tenant; and in a recent case the Court of C. B. allowed the tenant to withdraw a demurrer, and plead de novo (*d*).

It is to be recollected that the writ of right, which was the only remedy when the right of possession was lost by length of time, or by judgment against the true owner in an inferior suit, would also lie concurrently with all other real actions, as well as after them.

The demandant in the writ of right must have alleged in his count some seizin of the lands in himself, or in some person under whom he claimed, and that his ancestor was seized *of right*, as well as that he was seized in his demesne as of fee (*e*), and then deduced the right to

(*y*) 9 Bing. 635.
(*z*) Sup.
(*a*) Roscoe, Real Act. 179.
(*b*) Maidment & Jukes, 2 N. R. 429.
(*c*) Tyssen v. Clarke, 2 Sir W. Bl. 941; S. C. 3 Wils. 419, 541.
(*d*) Twining, dem., Lowndes, ten., 2 Bing. N. C. 133.
(*e*) Slade et ux. v. Dowland, in false judgment, 2 Bos. & Pul. 570; S. C. in error, 5 East, 272; 1 Smith, 543; Dumsday, dem., Hughes, ten., 3 Bing. N. C. 439.

himself (*f*), and shown an actual seizin, by taking the esplees, either in himself or ancestor (*g*), to which the tenant might have answered by denying the demandant's right, and averring that he had more right to hold the lands than the demandant had to demand them; and this right of the tenant being shown, it put the demandant upon the proof of his title; in which, if he failed, or if the tenant had shown a better, the demandant and his heirs were perpetually barred of their claim; but if he could have made it appear that his right was superior to the tenant's, he should have recovered the land against the tenant and his heirs for ever (*h*).

In real actions the estate sought to be recovered must have been described with great precision, the word *tenement*, therefore, was too general and uncertain; and a judgment in dower for *tenements* was reversed for that reason, though the tenant confessed the action, and the sheriff had delivered seizin (*i*).

After issue was once joined in a writ of right, the judgment was final, and the recovery might have been pleaded in bar of any other claim; but if one lost by default before issue joined, yet he might have had a writ of right against him who recovered (*k*).

A writ of false judgment did not lie of copyholds, but the party wronged was to be relieved by petition to the lord in the nature of a bill in chancery (*l*); and it should seem that a court of equity would have compelled the lord to do justice, in case of an error in any adverse proceedings, which the author must presume to have meant in case of any unconscientious matter, whereof a court of equity ought to take cognizance (*m*).

(*f*) Booth, 112.

(*g*) Ib.; and see 1 H. Bl. 1, in Dally *v.* King.

(*h*) F. N. B. 5 (M.); 3 Bl. Com. 195, 196; see further as to pleadings in a writ of right, Booth, 112 et seq.; ib. 87 et seq.; F. N. B. 1—6; Bull. N. P. 115, 116; Slade et ux. *v.* Dowland, sup.; Rushton *v.* Nesbitt, 6 Adol. & Ell. 103; post, tit. "Pleading," &c.

(*i*) 2 Lord Raym. 1384; 1 Str. 625. But in Goodtitle *v.* Otway, 8 East, 257, *in ejectment* for a messuage and *tenement*, the court gave leave to enter the verdict according to the judge's notes for the messuage *only* (pending the rule to arrest the judgment), without obliging the lessor of the plaintiff to release the damages.

Coparceners and joint-tenants must have joined in real actions, or the non-joinder might have been pleaded in abatement; 1 Chit. on Plead. 56.

(*k*) F. N. B. 6 (N.); Kitch. 151, 152, cites 26 Hen. 8, 10; 12 Hen. 7, 10; 3 Bl. Com. 194; Co. Lit. 157.

(*l*) Co. Cop. s. 51, Tr. 118; Co. Lit. 60 a; F. N. B. 18 (H.); Winch, 8; Brown's case, 4 Co. 21 b; Mo. 68, 69, pl. 185; Edwards's case, Lane, 98; 14 Hen. 4, 34; Kitch. 158, cites 7 Edw. 4, 19; ante, p. 473, n. (*h*).

(*m*) Ash *v.* Rogle and the Dean and Chapter of St. Paul's, 1 Vern. 367; S. C. 2 Ch. Rep. 387; Sho. Par. Ca. 67; Patteshul's case, Hil. 8 Jac. Scac. 4 Vin. Abr. p. 385; S. C. cited in Edwards's case, ubi sup.; and see 6 Vin. Abr. p. 167; Bell *v.* Cundall, Amb. 101.

In the case of *Shaw & Thompson* (*n*), where the plaintiff, the widow of a copyholder in fee, recovered dower by plaint in the lord's court, with 50*l.* damages for the profits from the death of her husband, and brought an action of debt for the 50*l.* in the Court of B. R., one of the resolutions of the court was, that upon such judgment no writ of error or false judgment lay, but the remedy was in the court of the manor, or in the chancery, which was consonant to the resolution in *Brown's* case (*o*). And Fenner, J. said that he had seen a record of 36 Hen. VIII., where the lord, upon a petition to him, had, for certain errors in the proceedings, reversed such judgment given in his own court.

And in *Christian* v. *Corren* (*p*) Lord Chief Justice Parker observed, that if a copyholder should sue by petition in the lord's court, upon which the lord should give judgment, though no appeal or writ of error would lie of such judgment, yet the Court of Chancery would correct the proceedings, in case any thing were done therein against conscience (*q*).

It would seem by a recent case (*r*), that if a plaint in nature of a writ of right was improperly set aside and annulled by the customary Court Baron, by reason of alleged errors and irregularities, the demandant could not have had relief by a mandamus, but must have sought it on a proceeding in the nature of a petition of right, or in equity.

Where one recovered in the lord's court by plaint in the nature of a writ of right, it was moved in the Court of Common Pleas that a precept might be awarded to put him who recovered in possession by the *posse manerii*, as with the *posse comitatus* at common law; but it was resolved that force was not justifiable, except by mandate out of the king's courts (*s*).

(*n*) 4 Co. 30 b.

(*o*) Ib. 22.

(*p*) 1 P. W. 330. In that case the Earl of Derby, King of the Isle of Man, had made a decree concerning lands, against which an appeal was made to the king in council, and Lord Chief Justice Parker was of opinion that the king had necessarily a jurisdiction in that case, in order to prevent a failure of justice.

(*q*) Ante, p. 66; 1 Jac. & Walk. 553, in Widdowson v. Earl of Harrington.

(*r*) The Queen v. The Lord and Steward of the Manor of Old Hall, 8 Law Journ. 243, N. S.; S. C. 2 Per. & Dav. 515; S. C. 10 Adol. & Ell. 248; post, tit. "Mandamus."

(*s*) 4 Leo. 87, ca. 183. But though the tenants of the manor would not be justified in using force, the author apprehends that the Court of King's Bench would enforce the execution of the precept to the bailiff of the manor court, to put the demandant into possession, and probably the judgment would be held to sustain an action of ejectment. The author apprehends that a judgment in a court not of record, or a foreign court, is conclusive as between the same parties, though the jurisdiction of the court might be controverted; 1 Stark. 208; 2 Burr. 1009; 6 T. R. 245; 5 East, 475, n. (*b*); 2 Bing. 213.

The periods of limitation fixed by the statute of 32 Hen. VIII. c. 2, for writs of right in freehold cases, were, by analogy, the periods of limitation for customary plaints in the nature of writs of right; and as the statute of 32 Hen. VIII. c. 2, enacted (*t*), that no person or persons should thenceforth sue, have or maintain any writ of right, or make any prescription, title or claim of to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and allege any further seizin or possession of his or their ancestor or predecessor, but only of the seizin or possession of his ancestor or predecessor, which had been, or then was, or should be seized of the said manors, &c., within threescore years next before the teste of the same writ, or next before the said prescription, title or claim so thereafter to be sued, commenced, brought, made or had; and again (*u*), that no person or persons should thereafter sue, have or maintain any action for any manors, lands, tenements or other hereditaments, of or upon his or their own seizin or possession therein, above thirty years next before the teste of the original of the same writ thereafter to be brought; so the remedy by a plaint in the nature of a writ of right for the recovery of copyholds was lost, unless the demandant could have counted upon the seizin of his ancestor or predecessor within sixty years, or of his own seizin within thirty years (*x*).

In Jenk. Centuries (*y*) we read, "a peaceable possession for sixty years makes a right; for 21 Jac. I. c. 16, takes away the entry and assise; 32 Hen. VIII. takes away the writ of right and the formedon. The *quare impedit* and ravishment of ward, and right of advowson, and jure patronatus, are excepted by the 1 Mar. c. 5." And again, in the margin, "So are the assise of darrein presentment, writ of right of ward, and seizure of the ward's body; for these rights might happen not to fall in *esse* within sixty years (*z*)."

And Mr. Justice Blackstone observes (*a*), "that the possession of lands in fee simple uninterruptedly for threescore years is at present a sufficient title against all the world." Mr. Christian, in a note to the above passage, says, "this is far from being universally true, for an uninterrupted possession for sixty years will not create a title, where the claimant or demandant had no right to enter within that time, as where an estate tail for life or for years continues above sixty years, still the reversioner may enter and recover the estate," &c.

It was certainly possible that an estate might have been enjoyed

(*t*) Sect. 1.
(*u*) Sect. 3.
(*x*) And see Bevil's case, 4 Co. 10 a; 1 Bulst. 162; Booth, 2, n. (*b*).
(*y*) P. 26, ca. 49.
(*z*) And see Plow. 371; Co. Lit. 115 a.
(*a*) 3 Com. 196.

adversely for many hundred years, and yet have been ultimately recovered by the remainder-man or reversioner in fee, not by a writ of right, which, as we have seen, could not have been brought where there had been an adverse possession of sixty years, but by an action of ejectment, brought within twenty years after the right of entry of such remainder-man or reversioner accrued.

The cases of *Taylor* & *Horde* and *Doe* & *Horde* illustrate this proposition. An estate was settled by *R. A.* the father on himself for life, with remainder to his wife for life, with remainder to *R. A.* the son in tail male special, with remainder to the right heirs of *R. A.* the father; and one of the remainder-men in tail under the will of *R. A.* the father, brought an ejectment, which was held to be barred by the stat. of 21 Jac., it being more than twenty years after the lessor's title of entry accrued (*b*); but subsequently, upon a failure of issue male of *R. A.* the son, the heir at law of the ultimate devisee in fee, or remainder-man, within twenty years after such failure of issue male brought an ejectment, and recovered possession of the estate (*c*).

In general the tenant was not entitled to costs in real actions, for, except in particular cases (*d*), the demandant himself was not entitled to any; and the rule extended to the case of a nolle prosequi (*e*).

(*b*) Taylor *d.* Atkyns *v.* Horde, 1 Burr. 60; 6 Bro. P. C. 633; Co. Lit. 330 b, n. (1); 2 Saund. (by Serj. Williams), p. 44, n. (4).

(*c*) Doe *d.* Atkyns *v.* Horde, Cowp. 689, 698.

(*d*) The writ of intrusion was not one; see 1 Bing. N. C. 14, in Williams *v.* Harris.

(*e*) Williams *v.* Harris, sup.

CHAPTER XVI.

Of Evidence.

THE following cases, involving points of some interest with regard to the law of evidence, *where the existence of a manor, or the boundary of different manors* is in dispute, were lately decided, and may be deserving of notice on entering upon the subject of the present chapter.

In *Doe* d. *Beck* v. *Heakin* (*a*), which was the case of an ejectment by a party claiming to be devisee of a manor, the facts of the devisor having held a court thirty-five years ago, and the lessor of the plaintiff on several occasions since his death, and the appointment of gamekeepers, were deemed to be primâ facie proof of the existence of the manor, and of the lessor's title to it, without production of court rolls, or any documentary evidence of courts having been held.

It was decided by the Court of B. R. in *Brisco* v. *Lomax* (*b*), that the finding by commissioners of boundaries that a boundary between two manors was a natural boundary, was admissible evidence upon a question as to the boundary of one of those manors and an adjoining one, to enable the jury to say whether the continuation of the natural boundary was not also the boundary between the latter manors; and that although the verdict might not strictly be evidence of reputation, yet that it was a record of proceedings of such a public nature as to make it admissible.

And in the case of *Evans* v. *Rees* (*c*), a question arose as to the boundary of two manors, and a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to determine for which party the verdict was to be finally entered, and to set out the boundaries; the arbitrator directed the verdict to be entered for the plaintiff: and in a subsequent action by the defendant against a third party, where the question was as to the boundary of the same manors, the verdict was received, but the award rejected, as evidence of reputation.

In the same case an ancient presentment by the homage, in the form of a book, set out the boundaries of a manor, and then gave, in alphabetical order, the names of the several parishes within it, and of the tenants resident in each parish, but this part of the presentment

(*a*) 6 Adol. & Ell. 495; ante, p. 4; post, p. 509, n. (*k*).

(*b*) 3 Nev. & Per. 388.

(*c*) 2 Per. & Dav. 626.

contained nothing as to boundaries: two or three sheets of the concluding part of it, where the parish of *Y.* should have followed in order, had been cut off, but under what circumstances did not appear: it was admitted that the manor and the parish of *Y.* were coterminous in the direction of the locus in quo, and the presentment was received as evidence of the reputed boundary, as the document, although mutilated, was perfect in that part of it which related to the subject of the boundary.

We will now turn our consideration to the evidence which the courts will admit or reject in *copyhold* cases, as well where the title comes in question as where it does not.

But as the documentary evidence of title to be furnished by a vendor to a purchaser under a contract for sale of copyholds, is the subject of frequent doubt and controversy, the author will first venture to lay before his readers the opinion he has formed on this practical rule.

He apprehends that unless there be a special stipulation to the contrary, the vendor of copyholds is bound, at his own expense, to produce to a purchaser the originals, or authenticated copies of such documents as are comprised in the abstract of title, *whether on record or not* (*d*), and must therefore obtain further certified copies of any surrenders, admissions or other acts entered on the court rolls, when the copies originally made out and delivered by the steward are lost; and that the vendor cannot insist on the purchaser's tracing the title on the rolls of the manor, or any public records.

This appears to the author to be a necessary consequence of the right of the steward to refuse to produce the court rolls to a purchaser, who is a mere stranger to the lord until admittance. It is usual, however, for the steward to permit the purchaser's solicitor to compare the abstract of title with the court rolls, which affords him the opportunity of ascertaining that no recorded acts of the vendor, or of those under whom he claims, are omitted (*e*). But in some manors the practice is for the steward to certify the abstract to be a full and faithful statement of the title, as it appears upon the rolls of the manor.

The author also conceives that it is an established practice, in copyhold as well as in freehold cases, that all original instruments of

(*d*) See Boughton *v.* Jewell, 15 Ves. 176; 2 Sugd. Vend. & P. 121.

(*e*) In 2 Sugd. Ven. & P. 478, it is said, "A purchaser of a copyhold estate is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but in point of fact the court rolls are scarcely ever searched by a purchaser, and it has always been understood, in practice, that he is not bound by notice of their contents."

assurance, or authenticated copies, are to be delivered up to the purchaser, unless the vendor should retain, or should have sold to another, an estate of greater value held under the same title; and in that case, that the purchaser, if it be not provided against by special contract, is entitled, at the vendor's expense, to attested copies of such documents as are not on record (*f*), and to a deed of covenant for production of all instruments constituting the title to the estate (*g*).

But the court rolls of a manor, although strictly speaking not records (*h*), are nevertheless, the author submits, within the rule which is considered by the profession to have been established by the case of *Campbell* v. *Campbell* (*i*), namely, that as the Court of Chancery, in taxing costs on the sale of estates, will not allow the expense of attested copies of instruments on record, so a vendor cannot be compelled to furnish them at his own expense; and if the author is right in this proposition, it follows that a purchaser cannot call for attested copies of any authenticated copies of entries on the court rolls, of which the vendor is entitled to the custody.

Sir William Grant, M. R., in the case of *Hansard* v. *Hardy* (*k*), abstained from giving any opinion on a question raised at the bar, how far a person purchasing a copyhold estate must be presumed to have notice of every thing on the court rolls relative to it; but Sir John Leach (when Vice Chancellor), in the case of *Pearce* v. *Newlyn* (*l*) observed, that the court rolls were the title deeds of copyholds, and held that a purchaser is affected with notice of the contents of the court rolls as far back as a search is necessary for the security of the title.

The practice is certainly opposed to the latter opinion, and it has been correctly observed, that the dictum does not accord with the general rule as to judgments, registered deeds and the like (*m*).

The court rolls of a manor are not considered as the evidence of the lord only, but are in the nature of public books for the benefit of the tenants as well as the lord (*n*), so that it is a matter of course for

(*f*) See 2 Sugden's Vend. & Purch. 119, citing Dare *v.* Tucker, 6 Ves. 460; and Berry & Young, 2 Esp. Ca. 640, n.

(*g*) Ib. 468, cites Berry & Young, sup.; 11 Mod. 110, ca. 3; Cooper *v.* Emery, 10 Sim. 609.

(*h*) Snow *v.* Cutler, 1 Keb. 567.

(*i*) 2 Sugd. 466. (Rolls' sitting after —— Term, 1793.)

(*k*) 18 Ves. 462.

(*l*) 3 Mad. 188.

(*m*) Sugd. Vend. & P. 759, 8th ed.; vide Bugden *v.* Bignold, 2 Yo. & Col. 377.

(*n*) Warriner *v.* Giles, 2 Stra. 955; ib. 1005, in Crew, qui tam, *v.* Saunders; Humble *v.* Hunt, 1 Holt, 601; Love *v.* Bentley, 11 Mod. 134; 2 Bac. Abr. 632, cites Hil. Ass. 1701. And see Fotheringal *v.* Edsington, and Gervas *v.* Gawen, cited Toth. 122; 2 Ves. 621; 5 Mod. 396, in Cox *v.* Copping. But court rolls are evidence only as against the lord and the tenants; Att. Gen. *v.* Lord Hotham, 1 Turn. 217.

the courts of law to grant an inspection of the court rolls in a question between two tenants (*o*). But the right to the inspection of them is confined to the case of persons interested (*p*); and where the lord brought an ejectment to recover the land as copyhold, and the defendant claimed it as freehold, the court refused a rule for the inspection of the court rolls (*q*). And it has also refused its aid where the inspection was desired in support of an indictment against the lord, for not repairing the bank of a river (*r*).

In an action by one copyholder of the manor of Hampstead against another for an encroachment on the common, the court was moved for a rule on the steward of the manor to permit the plaintiff to inspect *and take copies of the original minutes* of two manor courts, and to produce all books and court rolls relating to the title of the defendant at the trial; and on cause shown for the defendant, the court made the rule absolute for inspecting all books and rolls relating to the defendant's title, and producing them at the trial (*s*).

Formerly, if such a rule were moved in the Court of King's Bench, it was absolute in the first instance, and in the Common Pleas it was a rule nisi (*t*); but now by the rules for establishing a uniformity of practice in the Courts of B. R., C. B. and Exc. of Pleas, it is absolute in the first instance in all the courts, upon an affidavit that the copyhold tenant has applied for and been refused inspection (*u*). It was always the practice to require an affidavit to show that the applicant was *tenant of the manor*, and had been denied an inspection and copies of the court rolls by the lord or his steward (*x*).

All matters of record are said to prove themselves, and to admit of

(*o*) Slade *v.* Walter, 6 Ann. B. R. 12 Vin. 146; Wood *v.* Whitcomb, 6 Ann. C. B. ib.; The King *v.* Shelley, 3 T. R. 141; Bateman *v.* Phillips, 4 Taunt. 162, per Heath, J.

(*p*) Crew, qui tam, *v.* Saunders, sup.; 2 Ves. 621. And see 3 T. R. 142; Talbot *v.* Borsal, and other authorities, referred to in Tidd, 648, 8th ed.; Finch *v.* Bishop of Ely, 2 Mann. & Ry. 128, (n.); post, tit. "Mandamus." And it is not sufficient that the demand be only made by an agent; Huth, ex parte, 7 Dowl. (P. C.) 690.

(*q*) Smith *v.* Davies, 1 Wils. 104. But see Addington *v.* Clode, 15 Geo. 3, C. B., 2 Sir W. Bl. 1030, where in a question concerning right of common claimed by the defendant as a freeholder, a rule was made absolute, no cause being shown, to permit the defendant to inspect the court rolls of the plaintiff, who was lord of the manor.

(*r*) Rex *v.* Lord Cadogan, 5 Barn. & Ald. 902; S. C. 1 Dow. & Ry. 559.

(*s*) Folkard *v.* Hemet, C. B. 16 Geo. 3, 2 Sir W. Bl. 1061. And see Cox *v.* Copping, ubi sup.

(*t*) Tidd, 492, 648, 8th ed.

(*u*) Rule 102.

(*x*) Barn. 236; 3 Wils. 399; Tidd, 648. But see per Heath, J., 4 Taunt. 163. But in a recent case the court granted a rule absolute in the first instance for the usual limited inspection of the court rolls, to enable the devisee of a rent charge out of copyholds to complete his title; Ex parte Barnes, 2 Dowl. N. S. 20.

no averment against the truth of them; but as the court rolls of a manor, in strictness, are not records (*y*), the courts will admit an averment of any error in them (*z*).

In the case of *Doe* d. *Bennington* v. *Hall* (*a*), one objection to the plaintiff's recovering in the ejectment was, that no stamped copy of court roll was given in evidence, to prove the surrender and admittance, and that production of the original books containing the entries of them was not sufficient since the stamp act of 48 Geo. III. c. 149; for that if the evidence of the original entry on the court roll could be received, the stamp would be always evaded. But Lord Ellenborough, C. J., in delivering the opinion of the court, held, that the statute not having required a stamp upon the original court roll itself, but only on the copy, it could not be deemed an evasion, and that it is not necessary for the tenant to produce his copy, if he chooses to risk the evidence of his title in not taking a copy. And his lordship added, "how can a copy be evidence, unless the original be evidence?"

In practice it is more usual to rely upon the evidence of the court rolls than of copies (*b*); but it was long since held that a copy of a court roll under the steward's hand was good evidence of the copyholder's estate (*c*); and that an examined copy of the court roll is also evidence, if sworn to be a true one (*d*).

Not only the original court rolls, but also examined stamped copies of them are evidence of a surrender taken out of court, and of the admittance under it (*e*).

In the case of *The Dean and Chapter of Ely* v. *Stewart* (*f*) Lord Hardwicke ruled, that where the admittance of a copyhold was of

(*y*) Ante, p. 494.

(*z*) Ante, p. 203, 204.

(*a*) 16 East, 208. And see Fawkner v. Billingham, Hetl. 46.

(*b*) Adams on Ejectm. 265; Doe *d.* Garrod v. Olly, 4 Per. & Dav. 275; S. C. 12 Adol. & Ell. 481; ante, p. 466, n. (*k*).

It has been decided that a court roll is secondary evidence of a power of attorney to surrender copyholds, if the power cannot be found; Doe v. Caperton, 9 Car. & Pa. (N. P.) 115.

(*c*) Snow v. Cutler & Stanley, 1 Keb. 567; Lee v. Boothby, ib. 720. [N.B. In this case the steward was counsel for the lord as plaintiff; Scroggs, 97.] And see 12 Vin. Abr. 101, pl. 35; Chance v. Dod, 2 Barnard. B. R. 406; Street v. Roper, ib.; 12 Vin. 214, 215; Rowe v. Brenton, 3 Mann. & Ry. 296.

In Pilkington v. Bagshaw, Sty. 450, Rolle, C. J., said, "If copies of court rolls be showed to prove a customary estate, the enjoyment of such estate must also be proved, otherwise the proof is not good."

(*d*) 2 Bac. Abr. 632, cites Comb. 337; 12 Mod. 24. And see Doe & Cook, 5 Esp. Rep. 221; Mann. Dig. 94; 3 Man. & Ry. 297, in Rowe v. Brenton.

(*e*) Doe *d.* Cawthorn v. Mee, 4 Barn. & Adol. 617; S. C. (Hawthorn v. Mee,) 1 Nev. & Mann. 424. And see Doe v. Olly, 4 Per. & Dav. 275; Carpenter v. Buller, 2 Mood. & R. 298.

(*f*) 2 Atk. 45.

thirty years' standing, a copy of such admittance might be read in evidence, and that it was not necessary that it should be signed by the steward of the court.

And in *Wynne* v. *Tyrwhitt* (*g*), which was an action by the lord for trespasses on the waste, it was contended that entries in the steward's books, though above thirty years old, could not be received in evidence without proof of his handwriting, and the fact that he was dead; but Richardson J. overruled the objection; and a rule nisi obtained for a new trial was discharged, the court holding that the rule was not confined to deeds or wills, but extended to letters, and other written documents *coming from the proper custody*, and observing that it was founded on the antiquity of the instrument, and the great difficulty, nay, impossibility of proving the handwriting of the party after such a lapse of time.

Yet in the report in Fortescue (*h*) of the *Duke of Somerset & France*, there is a note, that an admission under the hand of the steward, though above forty years old, was rejected in evidence, because they could not prove the steward's hand.

And as the steward of a customary court does not stand in the situation of a public officer (*i*), it would certainly appear to be essential that his handwriting should be proved, to establish the authenticity of any copy of court roll, unless under circumstances similar to those in *Wynne & Tyrwhitt*.

A custumary of a manor of antiquity, and handed down from steward to steward, although not signed by any one, has been received as good evidence to prove the course of descent (*k*).

If the lord claim an ancient and accustomed payment from his tenants on certain events, the books of the steward or bailiff of the manor, whereby he charges himself with monies received, may be produced: unless, however, it appears that such a sum of money has been from time to time paid by the tenants, the mere entry by the steward is very weak evidence (*l*).

But in a recent case (*m*), a book received by the steward from his predecessor, in which were entered the fines assessed, whether paid or not paid, and which was accessible to all the copyholders, was held by the Court of Common Pleas to have been properly rejected as evidence, C. J. Tindal observing, "How are we to say whether the fines were ever paid or not? The evidence is purely conjectural.

(*g*) 4 Barn. & Ald. 376.

(*h*) P. 43.

(*i*) See 2 Bac. Abr. 611.

(*k*) Denn *d.* Goodwin *&* Wragg et ux. *v.* Spray, 1 T. R. 466; Roe *v.* Parker, 5 T. R. 30.

(*l*) See 12 Vin. 105, pl. 3. Practice alone is admitted as sufficient evidence to a jury of the existence of a custom; Doe *&* Mellersh, 5 Adol. & Ell. 541; 1 Nev. & Per. 30; ante, pp. 26, 126.

(*m*) Dean and Chapter of Ely *v.* Caldecot, 7 Bing. 433.

Nor can it be said that the book contains evidence of the steward's having charged himself; for it appears he made up a second book at the end of each year, in which he put down the fines which had been actually paid."

The case of *Folkard* v. *Hemet* (*n*) shows that the steward's minutes of the proceedings at the customary Court Baron are open to the inspection of the tenants of the manor, as well as the court books in which those proceedings are afterwards formally recorded; and as any error in the court rolls may be corrected (*o*), it follows that not only such minutes, but also the drafts of the rolls should be carefully preserved, and handed down from steward to steward.

In a dispute between the lord and a devisee of a copyholder, Holt C. J. held at N. P., that the recital of a will in the copy of admission was good evidence of the devise against the lord or any stranger; but that if the dispute had been between the heir and the devisee, the will itself ought to have been produced; and he ruled, that the rough draft of the steward of the manor of the admittance was admissible evidence (*p*).

In the case of *Doe* d. *Priestley and Wife* v. *Calloway* (*q*), the Court of B. R. decided that the draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage who made the presentment, were properly admitted at the trial by the learned judge (Mr. J. Holroyd) as evidence of such surrender and presentment, although no entry thereof appeared on the court rolls. Lord Tenterden in that case took notice of the above authority of C. J. Holt, and observed, "It does not appear whether, in that case, a fair roll had been engrossed and lost; but I cannot think that material. The draft may have been not a copy, but the original from which the roll was afterwards to be made out. The draft itself is more in the nature of an original than the copy, though the latter is more convenient for reference, and therefore is the document which is generally resorted to."

And in *Rex* v. *The Inhabitants of Thruscross* (*r*), where the record book of the manor of an admittance to a copyhold recited a surrender to the uses of the will, but the surrender could not be found, the originals being kept loose and irregularly, nor was the surrender recorded on the rolls,—the book was held to be admissible evidence of such surrender.

In an action of ejectment by a devisee of copyhold property, the

(*n*) 2 Sir W. Bl. 1062; ante, p. 495.

(*o*) See Kite & Queinton, Brend *v.* Brend, Burgess *v.* Foster, and other authorities, ante, p. 203 et seq.

(*p*) 1 Ld. Raym. 735; 12 Vin. Abr. 214.

(*q*) 6 Barn. & Cress. 484; S. C. 9 Dow. & Ry. 518. See this case ante, p. 224.

(*r*) 1 Adol. & Ell. 126; 3 Nev. & Mann. 284; ante, p. 73, n. (*s*).

claimant must formerly have proved not only his own admittance, and the will itself under which he claimed (*s*), but the admittance of the testator (*t*); and likewise his surrender to will, (if the will had been made prior to the late stat. of 55 Geo. 3, c. 192) (*u*), and his death, and the determination of any prior estates (*x*).

And proof of the admission of a person of the name of the lessor of the plaintiff in ejectment, by production of the court rolls, is not *alone* sufficient, but evidence of the lessor's identity is requisite (*y*).

As the admittance of a tenant for life is the admittance of all in remainder (*z*), a person claiming under a remainder-man only need prove the admittance of the tenant for life (*a*).

Where the title does not come in question, it is not necessary to give evidence of the admittance or grant, and consequently not in replevin (*b*).

In ejectment by the customary heir, the seizin of the ancestor must be proved by showing actual possession, or that he received rent from the person in possession (*c*), or by showing the possession of his lessee for years (*d*).

Proof of possession and pernancy of the rents is *primâ facie* evidence of a seizin in fee (*e*), but it may be rebutted by stronger circumstantial evidence: so the proof of above forty years' subsequent possession by a daughter, whilst a son and heir lived near, was deemed sufficient presumptive evidence that the first possessor had only a particular estate (*f*).

And in ejectment by the heir, the descent to the plaintiff is to be proved by a pedigree, authenticated by examined copies of the parish registers, or production of the registers themselves (*g*).

The possession of a guardian in socage is evidence of the seizin of the infant (*h*).

And the declarations of a deceased occupier of whom he held the land, is evidence of the seizin of that person (*i*).

(*s*) Jenkins *v.* Barker, 2 Bac. Abr. 632; Roe *&* Hicks, 2 Wils. 15, 16; Roscoe, 276; 2 Starkie, 417. The probate is not evidence of a devise of real property; Bull. N. P. 246; 2 Camp. 389; Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 570; 1 Phill. on Evid. 264; Rosc. 57.

(*t*) Wilson *v.* Weddell, Yel. 145.

(*u*) Roscoe, 276.

(*x*) Roscoe, 274. The reader will bear in mind that an unadmitted devisee may now devise, and that the 55 Geo. 3, c. 192, is now repealed.

(*y*) Doe *d.* Hanson and others *v.* Smith and another, 1 Campb. 196; 2 Stark. 416; 2 Phill. 200.

(*z*) Ante, p. 294.

(*a*) 2 Phill. 201; Roscoe, 276; 2 Stark. 417.

(*b*) Adams *v.* Cross, 2 Vent. 181.

(*c*) Co. Lit. 15 a; Bull. N. P. 103; Rosc. 272.

(*d*) Co. Lit. 243 a.

(*e*) Rosc. 11, 272.

(*f*) Jayne *v.* Price, 5 Taunt. 326.

(*g*) Bull. N. P. 247; 1 Phill. 325, 328; Rosc. 50.

(*h*) Goodtitle *&* Newman, 3 Wils. 518; ante, p. 46.

(*i*) Peaceable *v.* Watson, 4 Taunt. 16.

Evidence of the customs in one manor is not allowed to prove a custom in another manor (*k*), except where there is a probable ground for similitude, as in the case of the border law, governing one entire district (*l*), or in the three northern counties, Cumberland, Westmoreland, and Northumberland, in the tenant right estates; and there the custom of neighbouring manors has been deemed admissible evidence (*m*).

And in the *Dean and Chapter of Ely* v. *Warren* (*n*) Lord Hardwicke held, that although the evidence of neighbouring manors should not generally be admitted to show the custom of another manor, yet that the rule was not so universal as not to be varied in some instances; as in mine countries, the courts have admitted evidence with regard to profits of mines out of other manors, where there was a similitude to explain or corroborate the custom of the manor in question; and his lordship permitted evidence to be read, which went to establish a right in the tenants to common of turbary.

But evidence as to other manors is not so properly to be considered evidence of the custom of one manor to prove the custom of another, as evidence to prove one and the same custom pervading the whole district of manors (*o*).

In the case of customary commoners, a verdict in an action for or against one is evidence for or against another, claiming in the same right. And so in other cases of public prescription (*p*), as, for instance, in the case of customary tolls; and it is not material whether the verdict be recent or ancient (*q*). But the verdict in such cases is not conclusive (*r*).

It has been ruled that a tenant of the manor not claiming by a custom may give evidence to prove the custom, but that a tenant claiming by such custom cannot be a witness (*s*).

(*k*) Duke of Somerset *v.* France et al., 1 Stra. 654; S. C. Fortesc. 41. And see Dean and Chapter of Ely *v.* Warren, post; Cowp. 807; Roe *v.* Parker, 5 T. R. 30; Marquis of Anglesey *v.* Lord Hatherton, 10 Mees. & Wels. 218.

(*l*) Ruding *v.* Newell, 2 Stra. 957; Stanley *v.* White, 14 East, 338, 341; 4 Madd. 224, in White *v.* Lisle.

(*m*) Roe *v.* Parker, sup.; Champian & Atkinson, 3 Keb. 90. And see per Lord Ellenborough in The King *v.* Ellis, 1 Mau. & Selw. 662, citing the Lord Barclay's case from Hale de Jur. Mar. 35; Rowe *v.* Brenton, 8 Barn. & Cress. 758; S. C. 3 Mann. & Ry. 144, 229; ante, p. 430. In the above case of Champian & Atkinson, it was held that the steward, though he had a fee for the admission, might be a witness.

(*n*) 2 Atk. 189.

(*o*) Sup. n. (*m*).

(*p*) Reed *v.* Jackson, 1 East, 357, per Lord Kenyon, C. J.

(*q*) The City of London *v.* Clerke, Carth. 181; Bull. N. P. 233.

(*r*) See Biddulph *v.* Ather, 2 Wils. 23; 2 Ca. & Op. 452; Roscoe, 80. In the above case of Biddulph & Ather, the Court of C. B. held, that two allowances in Eyre, and a judgment in trespass 400 years back, were not conclusive evidence against usage for near a century to have wreck of the sea.

(*s*) 12 Mod. 24. And as to the admissibility of the evidence of the lord for

And in a late case the Court of B. R. held, that a copyholder was an incompetent witness to prove a customary right in the manor for copyholders to take timber for repairs without assignment of the lord (*t*).

And in the before-mentioned case of the *Duke of Somerset & France*, the lords of other manors were not allowed as witnesses to prove a custom as to fines payable in the particular manor, but the recent submission of several tenants to such payments was deemed admissible evidence.

It was adjudged in the case of *Freeman* v. *Phillipps and another* (*u*), that an alleged custom may be disproved by depositions, in a suit instituted against a former lord, by a person claiming to be admitted under a custom at variance with the one so alleged to prevail in the manor; which depositions were there made by the witnesses of the claimant; and it was also held that such depositions, if only admissible as declarations of persons deceased, could not be rejected as being made *post litem motam*, the same custom not being in controversy in the former suit. This question was brought before the Court of King's Bench upon a rule for a new trial in an action on the case by a copyholder against the lord of a manor and his steward, for a false return to a mandamus directing the defendants to hold a court, and accept from the plaintiff, (the second surviving life of two, and having named one *M. L.* in place of the first,) a surrender, &c., and re-grant, &c., under a custom for the second life in copyholds, (usually granted for two lives,) if he survived the first, to add another life in place of the first, and surrender to the lord or his steward in court such copyhold, for the purpose of having a re-grant thereof for his life and such other life named, and for the lord or his steward to

a copyholder, see Garrard *v.* Lister, 1 Keb. 15. Where the lord of a manor sought to recover a piece of land as parcel of the wastes over which the copyhold tenants were entitled to a right of common, their evidence was held, before the 6 & 7 Vict. c. 85, to be inadmissible, on the ground of interest, to prove that they had exercised rights of common over the land in question; Doe *d.* Pye *v.* Bramwell, 3 Q. B. Rep. 307. The 6 & 7 Vict. c. 85, intituled "An Act for improving the Law of Evidence," provides, that no person offered as a witness shall be excluded, by reason of incapacity from crime or other interest, from giving evidence, either in person or by deposition; but that every person so offered shall be admitted to give evidence, notwithstanding he may have an interest in the matter in question, and notwithstanding his previous conviction of any crime or offence; but the act is not to render competent any party to any suit named in the record, or any lessor of the plaintiff, or tenant of the premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate behalf any action may be brought or defended, or the husband or wife of such persons respectively.

(*t*) Lady Le Fleming *v.* Simpson, 2 Man. & Ry. 169.

(*u*) 4 Mau. & Selw. 486.

accept and re-grant the same as aforesaid, the surviving life paying by way of fine *such sum of money as by the jury or homage of the said court might be assessed or ascertained to be equal to two years' improved value of the tenement so surrendered and re-granted.* The defendants made a return to the mandamus denying such custom, and pleaded not guilty.

At the trial before Graham, B., at Leicester, the above evidence was admitted for the purpose of establishing a custom for any copyhold tenant for life or lives to change his lives; or if any of his lives were dead, to fill up the copy by adding or naming one or two lives to the life in being, for which the copyhold tenant should pay to the lord *a reasonable fine to be set by the lord or his steward;* and there was a verdict for the defendants.

The court thought that the evidence was properly admitted, and discharged the rule for a new trial. Lord Ellenborough said, that in all cases of customs, such as the custom to grind at mills, as in the case of *Settle Mill* (*x*) and various other mills, depositions of the above nature had ever been received: that he had heard them read twenty or thirty times on the circuit he used to go, without objection, and he remembered particularly in the case of *Leeds Mill*, that they were admitted as the depositions of persons standing in *pari jure.* And the court further observed, in answer to an objection made to the evidence as being *res inter alios acta*, that the plaintiff made common claim with other copyholds granted for two lives, by which he was entitled to go into the question of usage, as it applied to all the like tenements within the manor, and that, on the other hand, he exposed his claim to be met by evidence relating to any other tenement within the manor, standing in the same situation as his own (*y*).

We have seen that evidence of usage will be received, and have the effect of controlling the operation of ancient admissions, so that the word *prati*, with reference to usage and acts of ownership, may be confined to the *prima tonsura* of the land (*z*).

And where the question was whether the lord was entitled to the coals under a freehold tenement within the manor, the Court of B. R. held that it was competent to him to show by parol evidence that the plaintiff's lands lay within the ambit of the *new* land, as distinguished

(*x*) See Cort *v.* Birkbeck, Doug. 219. Vide also Nichols *v.* Parker, 14 East, 331, n.; Weeks *v.* Sparke, 1 Mau. & Selw. 679.

(*y*) See further as to the admissibility of depositions and declarations in evidence, Bull. N. P. 239 et seq.; Tooker *v.* Duke of Beaufort, 1 Burr. 146; Walker *v.* Walker, 2 Atk. 98; S. C. Barnard. 217; Berkeley Peerage case, 4 Campb. 401; Banbury Peerage case, 2 Selw. N. P. 712; Rex *v.* Cotton, 3 Campb. 444; 1 Phill. 189, n., 193, 209, 230, n., 286, 287, 290; 2 ib. 188, 189; Rosc. 15 et seq.; ib. 47, 84, 85; ante, pp. 148, n. (*d*); 250, n. (*a*).

(*z*) Stammers *v.* Dixon, 7 East, 200; ante, p. 158.

from the old land, and also to show by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coals under the plaintiff's lands was in the lord (*a*).

If a custom be proved by entries on the rolls, for a widow to hold the estate during her chaste viduity, it is sufficient evidence of the condition to ground an ejectment against her by the remainder-man, as for a forfeiture on incontinence, though there be no instance of such a forfeiture having been enforced (*b*).

But the author imagines that reputation alone, unassisted by entries on the rolls, could not be received as evidence of a custom (*c*); although it should seem that reputation alone is admissible evidence to prove the existence of a manor (*d*); the distinction being, that a general or public right may be proved by reputation, but a particular right cannot (*e*).

We have also seen, that a general reputation extending a recorded custom is evidence to be left to a jury (*f*), and which decision at least qualified the doctrine of Lord Coke in *Ratcliffe & Chaplin* (*g*), that to prove a custom it must be shown by proceedings to have been put in use.

So in the case of *Roe* d. *Beebee* v. *Parker* (*h*), an entry on the rolls of a manor, stating the mode of descent, was deemed to be admissible evidence of the custom, though no instances could be proved of any persons having taken under it.

A single instance will, under some circumstances, be sufficient evidence to prove a custom, as in *Doe* d. *Mason* v. *Mason* (*i*), where the jury found in favour of the alleged custom for the lands to descend to a youngest nephew, upon the evidence given of the admittance of a youngest nephew as the customary heir, at a Court Leet and Court Baron in 1657, although for the defendant it appeared that in 1692

(*a*) Barnes *v.* Mawson, 1 Mau. & Selw. 77.

(*b*) Doe *d.* Askew and another *v.* Askew, 10 East, 520; ante, p. 72.

(*c*) Ante, pp. 28, 29. And see 1 Mau. & Selw. 690, in Weeks *v.* Sparke; 14 East, 330, in Morewood *v.* Wood; Harwood *v.* Sims, Wight. 113; Peake's Evid. App. iii.

(*d*) Steel *v.* Prickett, 2 Stark. 466; Smith *v.* Smith, 2 Pri. 111; Curson *v.* Lomax, 5 Esp. 60.

(*e*) Outram *v.* Morewood, 5 T. R. 123; Weeks *&* Sparke, Morewood *&* Wood, sup.; White *v.* Lisle, 4 Madd. 224, 225; Reed *v.* Jackson, 1 East, 357; Richards *v.* Bassett, 10 Bar. & Cr. 661; ante, 500.

(*f*) Doe *d.* Foster and another *v.* Sisson, 12 East, 62; ante, p. 28. But see 12 Vin. tit. "Evidence," (T. b. 25), pl. 4.

(*g*) 4 Leo. 242.

(*h*) 5 T. R. 26; ante, p. 28. In this case Lord Kenyon held, that an account taken by the homage a century and half ago of the customs of the manor, under the sanction of an oath, ought to be considered as a true one, and that the jury had very properly given credit to it.

(*i*) 3 Wils. 63; ante, pp. 28, 61. But instances or entries of a recent date would not prove a custom; Jackman *v.* Hoddesdon, Cro. Eliz. 351.

the jury and homage presented, that the custom of descent extended only to the youngest brother, and two witnesses swore to the reputation of the custom going no farther.

So in *Roe* d. *Bennett* v. *Jeffery* (*k*), where only one recorded surrender in fee by tenant in tail of a copyhold estate was admitted as evidence to prove a custom to bar intails by surrender, although there was one instance of a recovery in the same manor.

When in ejectment the jury decide upon evidence of a doubtful and contradictory nature, the court above will not grant a new trial on the suggestion of the verdict being contrary to evidence, as the custom may be tried again in another ejectment (*l*).

In an ejectment against the widow of a copyholder, she justified because the wife of a copyholder by the custom *ought to have for life:* the custom was traversed, and it was held, that evidence by the defendant, *of a widow's estate only*, did not maintain the issue (*m*).

A casual destruction of deeds will not induce either a court of law or equity to favour the presumption of evidence; but if a man destroy a court roll or copy, designed to be evidence against himself, the courts will presume every thing capable of being presumed (*n*).

In *Chapman* v. *Cowlan* (*o*), which was an action by a copyholder against a freeholder for overstocking the common, a parchment writing from amongst the muniments of the manor, dated in 1698, and purporting to be signed by many copyholders, stating an unlimited right of common, and agreeing to a restricted manner of stocking it, and another parchment writing of the same sort, dated in 1717, were admitted as evidence of the reputation of the prescriptive right of common at that period, against the restricted right set up by the plaintiff.

But the tenants of a manor are not competent judges to decide a question of an exclusive right claimed adversely to an alleged interest in themselves; so an ancient presentment by the homage jury at a Court Baron, that particular persons had no other right to certain waste land than such as the other freehold tenants of the manor had for their commonable cattle, was held not to be admissible evidence against the plaintiff claiming to be exclusive owner of such land (*p*).

In an action by the lord against a copyholder for taking stones, to be used on his copyhold premises, another copyholder is a competent witness for the defendant since 3 & 4 Will. IV. c. 42, ss. 26, 27 (*q*).

(*k*) 2 Mau. & Selw. 92; ante, pp. 57, 60.

(*l*) Doe & Mason, sup.

(*m*) Linsey v. Dixon, Dy. 192, pl. 23. When customs are to be construed strictly and when not so, see ante, p. 27.

(*n*) 1 Lord Raym. 731; Cookes v. Hellier, 1 Ves. 235; Hob. 109.

(*o*) 13 East, 10.

(*p*) Richards v. Bassett, 10 Barn. & Cress. 657.

(*q*) Hoyle v. Coupe, 9 Mee. & Wels. (Exch.) 450.

By the same rule that old leases are receivable in evidence in favour of those claiming under the lessors (*r*), licences granted by the lords of manors, and entered on the court rolls, may be given in evidence in support of a prescriptive right of fishery, provided that payments have been made to the lord, in modern times, of rents under similar licences, or that the lords have exercised other acts of ownership over the fishery (*s*).

But entries of presentments in the books of a manor are not evidence of acts of ownership by the lord (*t*).

In *Sir J. Bridgman* v. *Jennings* (*u*), Holt C. J. ruled, that if *A.*, seized of the manors of *B.* and *C.*, cause a survey to be taken of *B.*, which manor is afterwards conveyed to *E.*, and long subsequently disputes arise between the lords of *B.* and *C.* about their boundaries, this old survey may be given in evidence; *contra*, if the two manors had not been in the hands of the same person at the time the survey was taken.

This distinction was also recognised in a case at nisi prius in Middlesex before Pratt, C. J. (*x*), where the question in ejectment being parcel or not parcel, a survey was offered in evidence on the plaintiff's side, which was taken by one under whom the lessor claimed, wherein the lands in question were included; and the court rejected it, as being an act to which the defendants were not privy, and consequently not bound; observing, that to receive it as evidence would be dangerous, and tend to encourage people to take more than their own into a survey (*y*).

In a recent case of trespass (*z*), on a question whether the land was part of the plaintiff's estate or waste land, a perambulation of the lord of the manor was held to be admissible as evidence of an assertion of ownership, although of slight importance; and it was not proved that any person was present on the part of the plaintiff, or that the plaintiff knew of the perambulation.

The Court of B. R. in the case of *Roe* v. *Brenton* (*a*) held, that an

(*r*) It was held by Mr. Baron Wood in Humble *v.* Hunt and others, 1 Holt, 602, that a book, in which copies were made of counterparts of leases granted by the bishop of Durham, which enrolment book was kept in the office of the bishop's auditor, was a public muniment, and to be received in evidence to sustain the claims of a lessee, the counterpart being lost, and the original not produced.

It may be useful to notice here, that the surrender of a lease will be presumed under the practice to return an old lease with the seals torn off; Walker *v.* Richardson, 2 Mee. & Wel. 882.

(*s*) Rogers *v.* Allen, 1 Campb. 311.

(*t*) Irwin *v.* Simpson, 7 Bro. P. C. 317.

(*u*) 1 Lord Raym. 734.

(*x*) Anon. 1 Stra. 95.

(*y*) And see Cary's Rep. 33, 34; 1 Turn. 217, in Att. Gen. *v.* Lord Hotham.

(*z*) Woolway *v.* Rowe, 1 Adol. & Ell. 114.

(*a*) 8 Barn. & Cress. 747; S. C. 3 Man. & Ry. 164; ante, p. 430. In that case the answers of tenants to interroga-

ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its construction the directions of the stat. 4 Edw. I., must be presumed to have been taken under competent authority, although the commission could not be found. And Littledale J., observed, that if the document had been a survey or rental of a private manor, it could not have been received.

In order to establish a proprietory right in slips of waste land lying between inclosed grounds and a public road, the lord of a manor must show some act of ownership, for the presumption is in favour of the owner of the adjoining inclosure (*b*), whether he be a freeholder, leaseholder or copyholder (*c*). But if a narrow slip of waste be contiguous to or communicate with open commons or larger portions of land, the presumption is either done away or considerably narrowed; for the evidence of ownership which applies to the larger portions, applies also to the narrow slip which communicates with them (*d*).

And it was held by the Court of Common Pleas, in the case of *Doe* d. *Barrett* v. *Kemp* (*e*), tried before Mr. Justice Littledale, that

tories put to them at an assession court, 1 Eliz., were allowed to be read without producing the interrogatories, which had been searched for, but could not be found; 8 Barn. & Cress. 765. In Evans *v.* Taylor, 3 Nev. & Per. 174, a survey was deemed inadmissible as evidence, there being no inquisition or commission for making it.

(*b*) Steel *v.* Prickett, 2 Stark. 463; Grose *v.* West, 7 Taunt. 39; Cooke *v.* Green, 11 Pri. 736. And see 11 East, 51; Scoones *v.* Morell, 1 Beav. Ch. 250. In a recent case Lord Denman, C. J., alluding to the presumption as to the ownership of strips of land lying by the sides of roads, said he had always thought the doctrine of presumption laid down very widely in the reported cases; White *v.* Hill and others, 9 Jur. 129.

(*c*) Doe *d.* Pring & Roberts *v.* Pearsey, 7 Barn. & Cress. 304. Note.—It should seem that a lessee does not acquire a fee by an encroachment upon wastes adjoining the demised premises, but will be held to have inclosed for the benefit of his lessor after the term expired; Bryan *d.* Child *v.* Winwood, 1 Taunt. 208; Doe *&* Davies, 1 Esp. 462; Doe *v.* Murrell, 8 Car. & P. (N. P.) 135. But see Doe *&* Mulliner, ib. 460.

In a late case it was held that the father's occupation of an encroachment would not prevent the descent to the heir, but that the heir was barred by the widow's occupation for twenty years; Doe *v.* Jauncey, 8 Car. & P. (N. P.) 99.

(*d*) Per Gibbs, C. J. in Grose *&* West, ubi sup. And see Barnes *&* Mawson, 1 Mau. & Sel. 85; Maxwell *v.* Martin, 6 Bing. 524, 526.

Whether the presumption applies to balks lying between cultivated parts of a common, see Bailiff of Godmanchester *v.* Phillips, 4 Adol. & Ell. 560.

Note.—The owner of the adjoining inclosure has a protection against any annoyance by the lord's letting out the waste to persons desirous of building cottages thereon, by the provisions of the stat. of 31 Eliz. c. 7, which require the annexation of four acres of land of the party's own freehold to any such grant; ante, p. 88. And see extracts from the act, post, pt. iii., "Articles inquirable in Court Leet, [Cottages,"] and in the Appendix.

(*e*) 7 Bing. 332; 5 Mo. & Pa. 173. Vide also Bryan *d.* Child *v.* Winwood, 1 Taunt. 208.

evidence of acts of ownership by the lord upon slips of ground in one part of a manor, may be extended to acts on similar lands within the same manor, and that it is for the judge to say whether there is such a unity of character or ownership in the different parts, as to render evidence affecting a part not in dispute admissible with respect to the part in dispute. C. J. Tindal said, "If we were to reject such evidence, it might come to this,—that though evidence might be forthcoming of inclosure of frontages by the lord in every other part of the manor, yet he might lose the spot in question, if the assertion of his right there had been accidentally omitted." In that case it appeared that the road was skirted on both sides by slips of green or waste land, partly adjoining to land belonging to the lord, and partly to land belonging to strangers; and that there was an interruption of the slips by a bridge, and then a renewal again at a little distance, *ultimately terminating in a large common:* and although the court held that such evidence ought to have been received at the trial, they avoided expressing any opinion as to the effect of it; Bosanquet, J. observing, that all the slips being within the same manor, gave them a general unity of character; but that distance from the spot in question might weaken the effect of the evidence (*f*).

The court granted a new trial, on the ground that evidence of acts of ownership by the lord on slips of land adjoining the highway ought to have been received; and at the second trial before Lord Lyndhurst, C. B., such evidence was admitted, and a verdict found for the defendants.—A bill of exceptions was tendered to the reception of the above evidence, and the case was argued in the Exchequer Chamber (*g*), when Lord Denman, in delivering the judgment of the court, said,—"We think that there is a sufficient foundation laid to render the first three grants admissible, upon the ground that they are grants of parcels of one and the same waste or common, lying on both sides of the road, although the continuity of the waste is interrupted for a short distance by the intervention of the houses by the sides of the road. It then remains to be considered, whether the other three grants were admissible; and we are of opinion that they

(*f*) The decided cases on the point under consideration proceed on the ground of unity of ownership or character between the spot in question, and other places with respect to which the acts of ownership given in evidence are adduced. See per Bayley, J. in Hollis *v.* Goldfinch, 1 Barn. & Cress. 219.

(*g*) Doe *d.* Barrett *v.* Kemp, 2 Bing. N. C. 102.

In the late case of Taylor *v.* Parry, 1 Sc. N. S. 576, 1 Man. & Gr. 604, the Court of C. B. held, that the lease being a grant of all mines, &c. within a certain district, if the locus in quo were proved to be part of that district, evidence of the plaintiff having exercised acts of ownership in different parts of the district comprised in the lease, although not upon the precise spot, was sufficient proof of possession under the lease.

were not, even conceding that they were grants of parts of the waste lying between a high road and the lands of private persons. All that these three grants show is, that, in some parts of this manor, the lord has exercised acts of ownership over pieces of land which are denominated waste, but there is no proof whatever where those pieces were situate:—they might have been many miles from the spot in question, wholly unconnected with it, parcels of large wastes, the soil of which was the undoubted property of the lord of the manor. The only unity of character between these parcels and the spot in dispute is, that they lie within the same manor, and between private inclosures and a public road, but we think that there is not a sufficient foundation to let in evidence of acts of ownership over one of such parcels as proof of title to others. If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another in the same manor, although both may be similarly situated with respect to the highway:—assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands that he retained another; nor if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels which, from their local situation, may be deemed parts of one waste or common. Acts of ownership in one part of the same field are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common. Upon the whole, therefore, we are of opinion the bill of exceptions must prevail, and that there must be a *venire de novo*."

The presumption which is made in favour of the owner of inclosed lands adjoining to slips of waste, is extended to land bounded by the sea shore, i. e. lying above high water mark: so it was lately decided (*h*), that the soil of recesses overspread with sea weed and beach, and covered by the high water of ordinary spring tides, but not by the medium tides, in the absence of any evidence of acts of ownership, belonged to the owner of the adjoining estate, and not to the crown, and did not therefore pass by an act of parliament (*i*) to the company of proprietors for embanking part of the Lairy near Plymouth.

(*h*) Lowe & another *v.* Govett, 3 Barn. & Adolp. 863. Vide also The King *v.* Lord Yarborough, ante, p. 33.

(*i*) 42 Geo. 3, c. 32.

The Court of B. R. held in *Tyrwhitt & Wynne* (*k*), that leases of minerals, &c., granted by the lord to other persons, in other parts of the inclosed waste, were not receivable in evidence, unless it was first shown that the *locus in quo* formed part of one entire waste to which those leases were applicable.

In a case already noticed (*l*), the defendant had occupied the ground for 30 years without paying any rent, and at the expiration of that time, the owner of the adjoining ground demanded 6*d.* rent, which the defendant paid on three occasions; and on a motion for a new trial, the Court of B. R. held, that in the absence of other evidence, the payments were an acknowledgment that the occupation began by permission, and sustained the verdict for the plaintiff.

But it has been held, that evidence of the payment of rent to the lord of the manor, though for a period of near 40 years, will not support a title to the land for which the rent is paid, as the courts favour the presumption of such a rent being a quit rent (*m*).

(*k*) 2 Barn. &. Ald. 554. In that case Bailey, J. said, "Upon this latter district, which includes the locus in quo, the plaintiff alone has exercised acts of ownership. For those given in evidence by the defendant, of shooting and appointing a gamekeeper, &c. are not properly referrible to a right of soil." Ib. p. 560. But see Doe *d.* Beck *v.* Heakin, 6 Ad. & El. 495; ante, p. 492; and see Chit. on G. L. 25.

(*l*) Doe *&* Wilkinson, 3 Barn. & Cress. 413.

In the above case of Doe *&* Heakin, the ground in dispute had been inclosed from the waste for ten years with the knowledge of the lord, who broke down the fences three days before the action of ejectment was brought, and his doing so was held to be a sufficient revocation of any licence which could be presumed from previous acquiescence.

So payment of a small acknowledgment, even after twenty years, will be evidence that the occupation began by permission, and give a right of re-entry. Doe *&* Wilkinson, 3 Barn. & Cress. 413.

And in the case of Doe *d.* Thompson *v.* Clark, 8 Barn. & Cress. 717, the court held that the possession of a cottage on a slip of waste was not necessarily adverse, but might be presumed to have commenced with the permission of the lord, although he had never received any rent. The cottage had been occupied for above twenty years, when possession was reluctantly given up to the lord, the occupier being again let into possession, and continuing it for fifteen years more: but he was told on resuming the possession of the cottage, that he could only come there in future during the lord's pleasure.

And where J. occupied land for twenty years previous to his death in 1833, by permission of W., (who was seized in fee,) and not adversely, and an ejectment was brought by the devisees of W. against the heir of J. in 1836, it was held that the right was not barred by the 2 and 7 sections of 3 & 4 Will. 4, c. 27, but was saved by the 15 sect., the action being brought within five years from the passing of the act, and that it was not necessary for the devisees to give J. notice to quit, nor to demand possession; Doe *d.* Burgess and another *v.* Thompson, 1 Nev. & Per. 215; S. C. 5 Adol. & Ell. 532.

But an uninterrupted possession for twenty years of a building on the waste, without any acknowledgment having been made, so as to show that it was built with the lord's permission, will be a bar to an ejectment by the lord; Bull. N. P. 104.

(*m*) Doe *d.* Whittick *v.* Johnson, Gow, (N. P.) 173.

If the plaintiff make title in the lessor, as lord of a manor who has right by forfeiture of a copyhold, he ought to prove that his lessor is lord, and the defendant a copyholder, and that he committed a forfeiture (*n*); but we have seen that the presentment of the forfeiture need not be proved, nor the entry and seizure of the lord (*o*).

When the lord of a manor incloses part of the waste lands, as an approvement under the powers of the statutes of 20 Hen. III. c. 4, and 13 Ed. I. st. 1, c. 46; or when by the custom of the manor the lord may inclose waste lands, even as against common of turbary, leaving a sufficiency of common of pasturage, it lies on the lord, or his grantee, to show that a sufficiency of common is left (*p*).

In an assise, if the tenant pleaded *nul tort nul disseizin*, he could not have given in evidence a release after the disseizin; but a release before the disseizin he might, for then there was no disseizin upon the matter (*q*).

And if in a writ of right the tenant joined the mise upon the mere right, he could not have given in evidence a collateral warranty; for he had not any right by it, and therefore it ought to have been pleaded (*r*).

Of Pleading, Prescription, &c.

Pleading.—A copyholder in fee, or for life, may, in pleading, describe his estate as a freehold interest, for "a freehold is taken in a double sense, either it is named a freehold in respect of the state of the land, or in respect of the state of the law (*s*)."

(*n*) Bull. N. P. 107, cites Peters ex dem. Episc. Winton *v.* Mills et al., per Tracy, Surry, 1707.

(*o*) Ib.; ante, pp. 288, 451.

(*p*) Smith *v.* Feverel, 2 Mod. 6; Glover *v.* Lane, 3 T. R. 445; Grant *v.* Gunner, 1 Taunt. 438; Arlett *v.* Ellis, 7 Barn. & Cress. 346, 370, 376; 9 Dowl. & Ry. 897; 9 Barn. & Cress. 671.

Upon an issue of de injuriâ between the lord and a commoner, the plaintiff cannot give evidence that there was sufficiency of common left; D'Ayrolls *v.* Howard, 3 Burr. 1385.

Trespass for entering plaintiff's close and consuming the herbage: plea, that the locus in quo was part of a common over which defendant had a right of common for sheep: replication, that the locus in quo had been inclosed by consent of the lord: on special demurrer to the replication, it was held bad for not going on to state, that after the inclosure there was sufficient common left for the commoners; Rogers *v.* Wyne, 7 Dow. & Ry. 521; Harrison's Index, Common, 5937.

(*q*) Co. Lit. 283 a.

(*r*) Ib.; ante, p. 485.

(*s*) Co. Cop. s. 15. And Sir Edward Coke says (ib. s. 16), "In respect of the state of the land, so copyholders may be freeholders: for any that hath any estate for his life, or any greater estate, in any land whatsoever, may in this sense be termed a freeholder." Again, (ib.) "In respect of the state of the law; and so it

As a copyhold cannot be created in time of memory, it must always be pleaded to have been demisable by copy of court roll time out of mind, and it is not sufficient to state that it is held *ad voluntatem domini secundum consuetudinem manerii* (*t*).

But it is indispensably necessary in pleading in copyhold tenure to state that the lands are held *at the will of the lord*, as they might by implication not be of copyhold tenure, strictly speaking, and yet be held by copy according to the custom of the manor (*u*).

And in an action on the case in the Court of Common Pleas for inclosing common *per quod in tam amplo, &c.*, and wherein the plaintiff had a verdict, the court, upon a motion in arrest of judgment, held that the declaration was bad for want of the words *ad voluntatem domini*, and gave judgment for the defendant. A writ of error was brought in B. R., when that court fully sanctioned the rule of pleading as laid down in the Common Pleas, but nevertheless reversed the judgment for the defendant, the fault in the declaration being helped by the verdict finding the estate to be copyhold (*x*).

is opposed to copyholders, that what land soever is not copyhold is freehold."

Kitchen says, (p. 157), "Tenant for life by copy shall say in his pleading, that he is seized in his demesne as of a freehold, according to the custom of the manor; and if he have fee, that he is seized in his demesne as of fee, according to the custom of the manor, and justify not that they have [no] freehold at the common law, but by the custom; so that copyholder hath fee and freehold by the custom, and not by the common law, as it seems by this book, 21 Ed. 4. f. 96."

(*t*) Co. Lit. 57 b; Murrel & Smith, 4 Co. 24 b; French's case, ib. 31; Roe *d.* Newman *v.* Newman, 2 Wils. 125; 2 Doug. 720; Gregory *v.* Cosens, Bendl. 197; 2 Chitty's Plead. 247.

It should also be shown that the estate created is allowed by the custom of the manor; the Archbishop of Canterbury's case, Sav. 131; but this does not seem necessary in a claim of common; Hoskins *v.* Robins, 2 Saund. 326. And as the greater estate includes the less, the frequent addition of the words *in tail, for life, &c.* in pleading, also seems unnecessary in copyholds of inheritance; 1 Saund. Rep. by Serj. Williams, p. 348, n. 8; ante, p. 99.

But the mere allegation of being "seized or otherwise well entitled," is a ground of demurrer, for want of sufficient clearness as to the nature of the title to copyhold land; see per M. R. Balls *v.* Margrave, Law Journ. vol. 10, pt. 3, N. S. p 37.

(*u*) Hughes *v.* Harrys, Cro. Car. 229; Rogers *v.* Bradly, 2 Vent. 144; Elkin *v.* Wastell, 3 Bulst. 230; Gale *v.* Noble, Carth. 432; Hill *v.* Bolton et al. 2 Lutw. 1171; Follet *v.* Troake, 2 Lord Raym. 1186; Co. Lit. 58 a, n. 1. Vide also Hutchison *v.* Jackson and Dawson, Lutw. 1324, where in trespass for taking the plaintiff's cattle in *G.*, the defendant pleaded that the Earl of Sussex was seized in fee of the manor of *S.*, of which the lands, &c. were parcel, and descendible from ancestor to heir in a course of succession called *Tenant Right*, which on demurrer was held to be repugnant to the previous allegation. See the pleadings in this case, Lex Man. App. pl. 28; vide also 2 Chitty's Plead. 249.

(*x*) Crowther *v.* Oldfield, 1 Lutw. 125; S. C. in error, 2 Lord Raym. 1225; S. C. 1 Salk. 170, 364; S. C. 6 Mod. 19; S. C. Holt, 146; and see the pleadings in this case, Lex Man. Append. pl. 29.

When copyholds are held of a manor which is ancient demesne, it is also very essential that the copyhold tenure should be pleaded, for if pleaded that they are held of *A.* of his manor of *B.*, which is ancient demesne, it would have been considered that they were pleadable in the lord's court by writ of right close, and if pleaded that they are *parcel* of the manor, it must be understood that the lands are part of the demesnes, and therefore together with the manor impleadable only at common law (*y*).

Although the proper mode of pleading by copyholders is by way of custom (*z*), yet a copyholder in *A.* who has common in *B.* must prescribe for it in the *que estate* of the lord, as common out of the manor belongs to the land and not to the estate (*a*); and if he enfranchise, he must plead that up to such a time the lord had common for him and his customary tenants, and that at that time the lord enfranchised the tenement, and conveyed it to the defendant, and that since that time the feoffee and his tenants have had the right of common (*b*).

It has been held that a plea, justifying under a custom for the tenants of a *particular* copyhold estate to cut turf and dig sand, &c. to be used and spent on the tenement, is not supported by evidence of a custom embracing the copyholders of the manor *generally*, without proving the particular usage as to the tenement stated in the plea (*c*).

In *Boraston* v. *Hay* (*d*) in trespass, the custom being pleaded as a general custom, and found to be with an exception, and special, the court held that there was not any conclusion of the point in issue.

And we have seen that evidence of a widow's estate only will not support a plea that the widow is entitled to an estate for her life (*e*).

In any action or plaint relating to the copyholds of a feme covert, it must be pleaded that the husband and wife are seized in right of the

(*y*) Brittle *v.* Bade, 1 Lord Raym. 43; S. C. 1 Salk. 186; Doe *d.* Rust *v.* Roe, 2 Burr. 1046; Kite *v.* Laury, 3 Salk. 34; Baker *v.* Wich, or Parker *v.* Winch, 1 Salk. 56; 12 Mod. 13; Comb. 186; and see Smith *v.* Frampton, 3 Lev. 405. But in a replevin, Rolle, C. J., held, that after imparlance, the defendant could not plead ancient demesne, as it admitted the jurisdiction of the court; Vincent *v.* Wallis, Sty. 197; and see post, vol. ii. tit. "Ancient Demesne."

(*z*) Crowther & Oldfield, sup.; Thompson *v.* Roberts, Fortesc. 340; Kenchin *v.* Knight, 1 Wils. 254; S. C. 1 Sir W. Bl. 49; and see Nicholson *v.* Smith, Lutw. 126; 1 Vent. 97.

(*a*) Foiston *v.* Crachroode, 4 Co. 31 b; post, p. 517, n. (*b*).

(*b*) Davy *v.* Watts, 1 Keb. 652; Barwick *v.* Matthews, 5 Taunt. 365; S. C. 1 Marsh. 50.

(*c*) Wilson *v.* Page, 4 Esp. 71; Mann. Dig. 84.

(*d*) Cro. Eliz. 415.

(*e*) Linsey *v.* Dixon, Dy. 192; ante, p. 504.

wife, and it is bad pleading to aver that the husband alone is seized in his demesne as of fee, in right of his wife (*f*).

A copyholder in pleading may allege any admittance, either upon a descent or upon a surrender, *as a grant*; or allege the admittance of his ancestor *as a grant*, and show the descent to him, and that he entered, which is good without any admittance; but it is not sufficient for the heir to plead that his father was seized in fee by copy of court-roll at the will of the lord according to the custom, and that he died seized, and the estate descended to him (*g*).

It should seem, however, that there is this material difference between copyholds and customary freeholds passing by surrender, namely, that in pleading copyhold it is sufficient to show the grant of the lord, and in customary freeholds the estate of the surrenderor must be shown (*h*).

But where the title to copyholds does not come in question, as in replevin, it is not necessary to show an admittance (*i*).

In the case of *Phillips* v. *Fielding* (*k*), which was an action of assumpsit in the Court of Common Pleas against the vendee of copyholds, for not performing his contract and paying the purchase money, it was held that the averment by the plaintiff in his declaration, that he had always been ready and willing, and had frequently offered to make a good title, and to make a proper surrender, was insufficient; and that he ought to have averred a sufficient performance of his part of the agreement, by stating an actual surrender to the defendant, or a tender and refusal, and to have shown what title he had to the estate.

It however is not necessary in such a case to detail the nature of the title, but is sufficient to aver that the plaintiff was seized in fee, and that the title was made good, perfect, and satisfactory, and that he had always been ready and willing, and had offered to convey the estate to the defendant (*l*).

Upon trespass in a grant for lives in reversion, it was pleaded that the grant was "*tenementa prædicta, per nomen* of a messuage which

(*f*) Polyblank *v.* Hawkins, Doug. 329; Catlin *v.* Milner, 2 Lutw. 1421; ante, pp. 297, 385.

(*g*) See the third resolution in Brown's case, 4 Co. 22 b; Co. Cop. s. 41, Tr. 95, 96; vide also Robinson *v.* Smith, 4 Mod. 346; Fisher *v.* Wigg, 12 Mod. 297; Pyster *v.* Hemling, Cro. Jac. 103; Shepheard's case, Cro. Car. 190; Wade *v.* Baker & Cole, 1 Lord Raym. 130.

(*h*) Salk. 365, in Crowther & Oldfeild.

(*i*) Adams *v.* Cross, 2 Vent. 182; Wade *v.* Baker & Cole, ubi sup.; ante, p. 499.

(*k*) 2 H. Bl. 123; and see Edwards *v.* Heather, Sel. Ca. Ch. temp. King, 3.

(*l*) Martin and others *v.* Smith, 6 East, 555; 2 Smith's Rep. 543; see also 1 Sugden's Vend. and Purch. c. 4, s. 4, "of the remedies for a breach of contract," and the cases there cited to show that the purchaser, and not the vendor, ought to prepare and tender the conveyance; p. 375.

A. P. held for life," and it was held to be pleaded as a grant in possession and not in reversion, and incurable (*m*).

Where a defendant, in an action of trespass by a copyholder for entering his copyhold and boring for coals, justified under the lord of the manor as seized in fee of the veins of coals under the copyhold tenement, *with liberty of boring, &c.*, it was held not to be sufficient for the plaintiff to reply that such veins, &c. had immemorially been parcel of the manor, and demised, &c. without reservation of the coal, unless he also traversed the liberty of working the mines; and upon the court's observing that the replications were bad on that ground, and that the plaintiff ought to have leave to amend, or that there should be judgment for the defendant, the plaintiff's counsel prayed leave to amend his replications, which was granted (*n*).

Where, in trespass, a plea of a right of way stated a surrender to the defendant of a copyhold tenement, with all ways then used by the tenants and occupiers thereof, the seizin in fee of the surrenderor, that a way was, at the time of the surrender, used by the tenants and occupiers of the copyhold over the *locus in quo* to a public street, that defendant was admitted and continued seized, and being so seized, and having occasion to use the way, committed the supposed trespass; replication traversed the way being used at the time of the surrender; new assignment, that defendant used the way at other times, on other occasions, and for other purposes: the right of way was established at the trial, but it appeared that the copyhold tenement was in possession of a tenant, and that the defendant as landlord asserted the right to the way, which had been obstructed: verdict for the defendant generally, with liberty to move to enter a verdict on the new assignment for the plaintiff, with 1*s.* damages: held, that defendant might as landlord use the way to view waste or demand rent, or to remove an obstruction; and that the language of the plea comprehended all the purposes for which a person seized of the tenement might use the way, and that the new assignment meant that the defendant had trespassed on the close for some purpose unconnected with the use of the way claimed in the plea, so that the defendant was entitled to a general verdict on the whole record (*o*).

(*m*) Gay *v.* Kay, Cro. Eliz. 661.

(*n*) Bourne *v.* Taylor, 10 East, 189.

(*o*) Proud *v.* Hollis, 1 Barn. & Cress. 8. Whether there can be a highway which is not a thoroughfare, see Wood *v.* Veal, 5 Barn. & Ald. 456, which case has decided that there cannot be a dedication to the public by a lessee, except with the consent of the owner of the fee. A dedication means only a right of passing, and a street or road must be finished, to induce the presumption of a dedication; see Woodyer *v.* Hadden, 5 Taunt. 142.—And note, that the observations of C. J.

The defendant in an ejectment pleaded a surrender of a copyhold by the hand of the steward, and issue was joined *absque hoc*, that he was steward; and the court held this no issue, for that the traverse ought to be general that he did not surrender, as the surrender was void if he were not steward: so of a surrender pleaded into the hands of the tenants of the manor: and it was ruled that where issue is taken upon a surrender, it shall be tried where it was alleged to be done, and not where the manor is (*p*).

If a vendee of copyholds, who takes a bond for quiet enjoyment, by his own act occasions a forfeiture, the obligor is discharged from the condition: therefore in debt on bond for surrendering copyholds, and permitting the purchaser to enjoy without interruption of any one, the defendant pleaded performance, and that the plaintiff continued in possession for a certain time, and then the lord, for rent in arrear, entered according to the custom for a forfeiture; and the court held it was a good plea (*q*).

In an action upon the case for not performing a promise to join in a surrender of copyholds, the plaintiff must allege in his declaration that he made a request to the defendant to join in the surrender; and when the plaintiff assigns a particular mode of surrender, viz. into the hands of two tenants, he should show that there is such a custom, or a demurrer will hold (*r*).

But a general custom of the realm, as for a copyholder to surrender in court, or out of court, into the hands of the lord, need not be alleged (*s*).

Nor is it necessary, under a covenant to surrender copyhold lands, for the purchaser to show a court to have been holden, as the vendor ought to procure a court to be holden (*t*).

The case of *Duberley* v. *Page & another* (*u*), (which was an action for breaking the plaintiff's close, then lately part of the waste of a

Mansfield in that case are thought to have shaken the opinion expressed by Lord Kenyon in the case of the Rugby Charity *v.* Merryweather, 11 East, 376, (n.), that eight years' acquiescence by the reversioner, after the determination of a long lease, was a sufficient time for presuming a dereliction of way to the public, and that the *locus in quo* not being a thoroughfare made no difference.

(*p*) Wood *v.* Butts, Cro. Eliz. 260; see Co. Cop. s. 46, Tr. 108. In pleading a grant of copyholds, it is necessary to state the steward's name; Brown *v.* Foster, Cro. Eliz. 392; the Archbishop of Canterbury's case, Sav. 131; 2 Chit. on Plead. 248, 269.

(*q*) Dy. 30 a. In debt upon bond for quiet enjoyment of copyholds, the plaintiff must show that he was evicted by lawful title; Hamond *v.* Dod, Cro. Car. 5.

(*r*) Freeborn *v.* Purchase, Sty. 107. And see Turner *v.* Beany, 1 Mod. 61; ante, p. 125.

(*s*) Co. Lit. 59 a.

(*t*) Vide Fletcher *v.* Pynfett, Cro. Jac. 102.

See further as to the form and manner of pleading in copyhold cases, 2 Chit. on Pleading, 38, 47, 247, &c. 269, &c. 547.

(*u*) 2 T. R. 391.

manor,) has established, that a plaintiff is entitled to the costs of pleadings, where one of several pleas pleaded by the defendant is adjudged bad on demurrer, although the defendant has a verdict on the issues joined on the other pleas, and though it appears on the whole of the record that the plaintiff has no cause of action. The court observed, that the costs of double pleading were by the statute 4 Anne, c. 16, left at their discretion, but that the quantum only, and not the allowance of costs at all, was in the discretion of the court; that the demurrer was in consequence of the bad plea by the defendants, and as the plaintiff had judgment on that plea, he was entitled to the costs of it (*x*).

Real actions, and plaints in nature thereof, having been abolished (*y*), it will not be necessary to go into detail on the subject of pleadings in customary plaints, in the nature of possessory actions and writs of right. Something has been already said on this head in treating of the nature and redress of REAL INJURIES, and under the section of EVIDENCE. Much useful learning will also be found on this subject in the case of *Dowland* v. *Slade & Wife*, in error from the Court of Common Pleas (*z*), on reversal of the judgment of the court below, reported by Mr. East, vol. v. p. 272.

The reader is likewise referred to the third volume of Mr. Chitty's Treatise on Pleading, 593 to 668.

PRESCRIPTION.—A copyholder as against all strangers must prescribe by way of custom through the lord (*a*), that is, that the lord

(*x*) See as to pleadings in replevin, ante, tit. "Heriots."

Formerly, when the plaintiff prevailed upon one of his counts, he had a right to have his costs upon that count, without any deduction on account of the defendant's having had judgment upon a demurrer to the other count. See Postan *v.* Stanway, 5 East, 264, citing Butcher *v.* Green, B. R. E. 21 Geo. 3. Vide also Say. 211; 2 Burr. 1232; Hullock, 145; 2 Tidd, 1008, 8th ed.; 1 Chit. 458, 3rd ed. But by the new rules, (ante, p. 495,) "No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs."—Rule 74. And this rule is considered as declaratory of the meaning of the statute 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, and to entitle the defendant who obtains judgment on demurrer, to deduct the costs, showing therefore that the above decisions were wrong. See Adams & Gibney, in Error, Exch. Cham. Easter Vac. 1833, MS.

(*y*) Ante, p. 473, n. (*a*).

(*z*) 2 Bos. & Pul. 570; ante, p. 581.

(*a*) Sharp *v.* Lowther, Tr. 9 Geo. 2, Rep. temp. Hardw. 293; Thompson *v.* Roberts, Fortesc. 339; 1 Chit. on Plead. 578; 2 ib. 592, 3rd ed.; Supp. Vin. Cop. (P. 2.) pl. 1, 2. A prescription by way of que estate in the lessee for years of the manor is ill; Grammer *v.* Watson, 1 Lutw. 81. And see Lex Man. 49, 53, and the pleadings in Grammer & Watson, ib. App. pl. 14. Prescription by customary freeholder in a *que estate* good; Follet *v.* Troake, 2 Ld. Raym. 1188.

and his ancestors, and all those whose estate he has, have had common in such a place for him and his tenants at will, &c.; but as against the lord he must prescribe by way of usage only (*b*).

It would seem, however, that the copyholders of a manor belonging to a See, may prescribe generally upon usage in *non decimando*, on a prohibition for staying a suit for tithes (*c*).

Unity of possession alone of the manor and parsonage in an abbot or a prior, has been held not to be a discharge of tithes for the copyholders (*d*).

But copyhold lands may be exempt from tithes on the ground of unity of possession of the rectory, manor and lands, in one of the greater monasteries dissolved by 31 Hen. VIII., although other copyholds of the manor belonged to the monastery at the dissolution, and were subject to tithe, for the monastery might have granted out the latter before the union, and the former after it (*e*).

(*b*) Foiston *&* Crachroode, 4 Co. 31 b; Pearce *v.* Bacon or Barker, Cro. Eliz. 390; Gouldsb. 133; Mo. 461, Ca. 647; Crowther *&* Oldfield, ante, p. 512, note (*z*); Kenchin *&* Knight, 1 Wils. 253, 254; S. C. 1 Sir W. Bla. 49; Gateward's case, 6 Co. 60. And see 2 Sir W. Bla. 927, 928.

It sometimes happens that copyholders have a right of common in wastes out of the manor, and when that is the case, they must prescribe by way of *que estate* in the lord, and not by way of custom. Vide Sharp *v.* Lowther, supra; Barwick *v.* Matthews, 5 Taunt. 365; S. C. 1 Marsh. 50; 7 East, 485; Roberts *v.* Young, Hob. 286; Foiston *&* Crachroode, sup.; 1 Barn. & Ald. 361, in Rex *v.* Inhab. of Ecclesfield; Dy. 363, pl. 27; Trigge *v.* Turner, 3 Lev. 98; 2 Chit. Plead. 592; ante, p. 512.

If the party prescribe absolutely, and the evidence is of a prescription under a condition, it is a variance; *secus* if the condition is not annexed to the prescription; Gray's case, 5 Co. 78 b.

(*c*) In a recent case in the Court of Common Pleas, which was a trial at bar in consequence of a suggestion of the attorney-general that the interests of the crown in right of the duchy of Lancaster would come in question, trespass was brought for breaking and entering the plaintiff's closes, digging the soil, and sinking mines, pits and shafts, and carrying away and converting *coals*, culm, earth, soil, stones, *ore and other minerals*. The defendants in certain pleas justified under a *prescription* in the name of King George the Third, in right of the duchy of Lancaster, to enter upon the lands in question for the purpose of getting coals, &c., and to dig and open mines therein, and take and carry away the minerals, doing no more damage than was necessary. The replication traversed the prescription, and issue was joined thereon. In other pleas the prescription was coupled with the following qualification or condition, videlicet, "making and paying to the tenant or occupier for the time being of such lands, a reasonable compensation and satisfaction, when demanded, for the uses thereof, and for all damage occasioned to the surface of the lands thereby." On the latter pleas the verdict was found for the defendants: held, that the prescription was *entire*, and consequently did not sustain the pleas which omitted the qualification; Paddock *v.* Forrester and another, 3 Scott, C. P. 715; ante, p. 430, n. (*t*); Crouch *v.* Fryer, Cro. Eliz. 704, 784; S. C. Mo. 618; S. C. Yelv. 2; and see Stephenson *v.* Hill, 3 Burr. 1273, which was an action upon the stat. 2 & 3 Edw. 6, c. 13, for treble damages for not setting out tithes.

(*d*) Branche's case, Mo. 219; 1 Gwill. 156; see also Stephenson *v.* Hill, ubi sup.

(*e*) Monck *v.* Huskisson, 1 Sim. 280.

Yet it must not be supposed that *all* copyholders can prescribe against their lord. In the case of *Cage & Dod* (*f*) the court said that a copyholder for life could not prescribe against his lord, but that a copyholder in fee might.

This distinction is sanctioned by the rule in freehold cases (*g*); but the author would submit that by analogy to the power of committing waste on copyhold lands (*h*), a copyholder for life, with power to renew or to nominate a successor, is on the same footing with a copyholder of inheritance, and may prescribe against his lord.

But a copyholder of inheritance, the author apprehends, cannot prescribe to have common in exclusion of the lord, though a prescription for copyholders to have sole pasture has been held good (*i*).

A custom for the lord to make grants of the waste, *with the consent of the homage*, to the prejudice of a right of common in the tenants of the manor, is good, the practice being evidence of a reservation of the right, upon the original grant by the lord, of the privilege of common over the waste, rendering therefore the right of the tenant subservient to that of the lord (*k*).

(*f*) Styles, 233; Tropnell *v.* Kyllyk, Keilw. 77.

(*g*) Thompson *v.* Roberts, Fortesc. 339; Smith *v.* Morris, ib. 340; 6 Co. 60.

(*h*) Ante, p. 420.

(*i*) Hoskins *v.* Robins, 1 Mod. 74; S. C. 2 Saund. 324; S. C. 2 Keb. 842; S. C. 2 Lev. 2; S. C. Pollexf. 13; S. C. 1 Vent. 123, 163; and see the pleadings in this case, Lex Man. App. pl. 13; vide also Potter & North, 1 Vent. 383; S. C. 1 Saund. 347; S. C. 2 Keb. 513—517; S. C. 1 Lev. 268. It was held in this case, that prescription by freeholders and custom by copyholders may be joined in one plea. See the pleadings in this case, Lex Man. App. pl. 12. Vide also North *v.* Coe, Vaugh. 251; 1 Lev. 253; 2 Bulst. 87, n. (6); Co. Lit. 122 a; Kentick *v.* Pargiter, Cro. Jac. 208; S. C. Yelv. 129; Dowglass *v.* Kendal, ibid. 256; Pitt v. Chick, Hut. 45.

The want of averment of levancy and couchancy, when such is the prescription, will be aided by verdict; see 1 Vent. 165, in Hoskins & Robins. So also the insufficiency of pleading a licence for a stranger to put in his cattle, which licence must be by deed; Hoskins & Robins, sup. And see Cro. Jac. 575, in Monk *v.* Butler.

No person can prescribe to have any manner of common in another man's lands, to the total exclusion of the owner of the land; Co. Lit. 122 a. And see Heath *v.* Elliott, 4 Bing. N. S. 388; in which case it was held that a person cannot support a claim of common *pur cause de vicinage* over open downs adjoining his own common, which are the exclusive property of the owner, although there is no boundary fence separating the lands.

(*k*) Folkard *v.* Hemmett and others, 5 T. R. 417, n. (*a*); and see Lady Wentworth *v.* Clay, Fin. Rep. 263, 264; Boulcott *v.* Winmill, 2 Campb. 261; Lord Northwick *v.* Stanway, 3 Bos. & Pul. 346; ante, p. 23.

The grant in the above case of Folkard & Hemmett was made for the purpose of building houses on the ground. De Grey, C. J. said, "The plaintiff must prove himself to be in possession of a right of common, and that this right has been prejudiced; any prejudice in the minutest degree is sufficient. The defendants justify under the usage. I will not call it a custom, because I look on it as a reserved right of the lord. There are two considerations: 1st, If this usage be true? 2dly, If true, whether legal? As to the

And by the same rule the lord may, by immemorial usage, have the right to dig pits, or to empower others to do so, although there be not sufficient herbage left for the commoners (*l*). It is to be recollected however, that rights of this nature are perfectly distinct from the privilege which every lord of a manor possesses under the statute of Merton (*m*) of inclosing and approving any part of the wastes, thereby converting the same into his own exclusive soil (*n*), provided he leave sufficient common of pasture for the tenants (*o*); and which privilege is not confined to the lord of the entire manor, for in the construction of the above statute, any person seized in fee of part of the waste may approve, though not lord of the manor (*p*).

But in *Place* v. *Jackson* (*q*), where the right of the commoners was shown to be subservient to the right of the lord to minerals, the Court of B. R. held, that if the lord were to exercise the right of taking stone wantonly, and so unnecessarily to interfere with the commoner's right of pasture, he would be liable to an action; but not so if he acted honestly and bonâ fide in getting stone as occasion required.

The case of *Drury* v. *Moore* (*r*) is an authority that the lord of a manor, except with the assent of the homage under an established custom, cannot inclose and build upon the waste lands, *to the prejudice of rights of common.*

And in the case of *Badger* v. *Ford* (*s*), where the lord of the

first, the defendants have proved by the court rolls that it has been the usage ever since 1599. As to the second, it is a matter of law; a question of novelty and importance. The reason of such a reservation by the lord might be its vicinity to London." The jury thought the land was of no value, and consequently that the plaintiff was not damaged, and they found a verdict for the defendants.

(*l*) Bateson *v.* Green and another, 5 T. R. 411.

In some manors a custom exists for the owners of land in the common fields to inclose them of their own authority, and hold them in severalty, giving up their rights of common on the other common field lands.

(*m*) 20 Hen. 3, c. 4; and see 13 Edw. 1, st. 1, c. 46. But quære whether the right of approver is not at common law, although specially provided for as regards common of pasture by these statutes. See 2 Inst. 87; 2 Wils. 59; 1 Taunt. 444, 445; 2 T. R. 392, n.

(*n*) 7 Ves. 309, in Hanson & Gardiner. And this privilege is not abrogated or abridged by the provisions of the Commutation and Enfranchisement Act, 4 & 5 Vict. c. 35, ante, p. 5, n. (*s*), 23, n. (*e*), 315, n. (*a*); inf. tit. "Of Enfranchisement."

(*o*) The lord must show, and should allege on the record, that there is sufficiency of common left; ante, tit. "Evidence," p. 604.

It has been doubted whether equity has any jurisdiction on this subject; see How *v.* Bromsgrove Tenants, 1 Vern. 22; but the court has frequently directed issues to try if sufficient common were left for the tenants; Weekes *v.* Slake, 2 Vern. 301; Artlington *v.* Fawkes, ib. 356; S. C. 1 Eq. Ca. Abr. 103; Filewood *v.* Palmer, Mos. 169; Hanson *v.* Gardiner, 7 Ves. 305.

(*p*) Glover *v.* Lane, 3 T. R. 445.

(*q*) 4 Dow. & Ry. 318.

(*r*) Manor of Hadley, 1 Stark. 102.

(*s*) 3 Barn. & Ald. 153; and see 7 Barn. & Cress. 365, 372, in Arlett *v.* Ellis.

manor had been in the habit of granting leases of parcels of the waste (ex mero motu) for upwards of 150 years, under which the whole of a common had been inclosed, Abbott, C. J., said it was too much to presume a reservation of a power by the lord at the time of the original grant, the effect of which would be to enable him to annihilate the right of common altogether.

But if a building be erected on the waste under a grant made by the lord, even without the assent of the homage, and the tenants, having rights of common, stand by and make no objection on laying the foundation of it, the author apprehends that a court of equity would interpose to prevent the building being pulled down (*u*).

And supposing the lord of a manor to have projected a line of building on part of the wastes over which the tenants had a right of common, and a considerable expense to have been incurred by the lord or his lessee in erecting some few houses, without any opposition on the part of the persons entitled to commonable rights, the author inclines to think that a court of equity would protect the lord or his lessee in the completion of the whole range of building, on the ground of an implied assent of the commoners to the design manifested by the erection of the few houses; and an assent of that nature once given could not afterwards be withdrawn (*x*).

The courts require clear evidence to support even partial rights by the lord to the prejudice of the commonable rights. But it would seem that, in point of law, the lord of a manor may have a partial right, in respect of the wastes of his manor, even over the wastes of another manor (*y*).

And the lord, the author apprehends, provided he leave sufficient common, where commonable rights exist, may erect cottages, open mines, and dig brick earth, &c., and plant upon the wastes of the manor, as a necessary consequence of his right to the soil of the wastes, and of the rule that the tenants have no interest except to take the herbage by the mouths of their cattle (*z*).

(*u*) See 6 Vin. Cop. (W. d.) pl. 3; 2 Atk. 83; per Lawrence, J., 6 T. R. 556. The inclosure of a common is a private wrong only; 9 Co. 113. And it is clear that a common that has been inclosed for a great number of years cannot afterwards be thrown open; Silway *v.* Compton, 1 Vern. 32. [In that case the common had been inclosed for thirty years.] And see Toth. 174, citing Piggot *v.* Kniveton, 4 Jac. But it is otherwise as to an inclosure in a forest. See Leicester Forest case, Cro. Jac. 156.

(*x*) Fox *v.* Shrewsbury, Toth. 176. And see Palm. 71; 8 East, 308; 7 Taunt. 374; 7 Bing. 693, 694; Jackson *v.* Cator, 5 Ves. 688; Rex *v.* The Inhabitants of Thorndon on the Hill, 4 Mau. & Selw. 565; Rex *v.* The Inhabitants of Butterton, 6 T. R. 556. A commoner assenting to an encroachment is concluded by it; but not expressing a dissent does not bar his right of action; Harvey *v.* Reynolds, 1 Carr. 141.

(*y*) Per Bayley, J., in Earl of Sefton *v.* Court, 5 Barn. & Cres. 921; S. C. 8 Dow. & Ry. 741.

(*z*) Bolton *v.* Lowther, 2 Dick. 677;

It is proper to notice here, that in the case of *Fawcet* v. *Strickland et al.* (*a*) it was ruled by the Court of Common Pleas, that although the statute of Merton speaks only of common of pasture, so that the lord cannot approve against common of turbary as of common right (*b*); yet, where there is common of pasture and common of turbary on the same waste, he may inclose against the common of pasture, for an action would lie against the lord in case of an interruption or injury to the right of common of turbary (*c*); but such an interruption is not a necessary consequence of an approvement of part of the waste (*d*); therefore in an action against the lord, complaining of such inclosure, the tenant must show not only that there is an insufficiency of pasture left, but also an interruption in the enjoyment of the common of turbary (*e*). But the lord may *by custom* inclose parcels of the waste, even as against common of turbary (*f*).

It has been decided that a commoner may enter forcibly, if the lord by any act wholly exclude him from an exercise of his right (*g*). And although it was formerly thought that if the lord inclosed the wastes of his manor, the tenants could only remove so much of the fences as was requisite to enable them to enjoy their rights of common, by admitting cattle to enter into the inclosure; yet it is now clearly settled that the commoners may remove the whole of the fences, if erected on the commonable land (*h*).

If, however, the commoner is not wholly excluded from the common, but his rights be merely abridged by the planting of trees, or

Horsey v. Hagberton, Cro. Jac. 229; Cooper v. Marshall, 1 Burr. 265; Sadgrove v. Kirby, 6 T. R. 486; Kirby v. Sadgrove, in error, 1 Bos. & Pul. 17; Filewood v. Palmer, Mos. 169; 5 Vin. 8, pl. 33.

A commoner cannot maintain trespass for damage to the soil or grass, for he has no interest but to take the pasture by the mouths of his cattle; Com. Dig. "Common," (H.), cites Bridg. 10, 12 H. 8, 2; 2 Rol. 552, l. 7.

(*a*) 2 Comy. 578; S. C. Willes, 57. And see a similar determination in Shakespear v. Peppin, 6 T. R. 741; vide also 2 Inst. 87; Duberley v. Page and another, 2 T. R. 391; Smith v. Fetherwell, 1 Freem. 190; 2 Mod. 6; Leech v. Widsley or Medgley, 1 Vent. 54; 1 Lev. 283; 2 Keb. 590, 601; 1 T. Raym. 185; Clarkson v. Woodhouse, 5 T. R. 412, n. (a). And as to extinguishment of common, see Bacon & Palmer, 1 Brownl. 174; post, tit. "Enfranchisement."

(*b*) Grant v. Gunner, 1 Taunt. 435.

(*c*) Fawcet v. Strickland, sup.

(*d*) See 6 T. R. 748, in Shakespear v. Peppin.

(*e*) See per Ashurst, J., in Sadgrove v. Kirby, sup.; and per Lord Kenyon, in Shakespear & Peppin, sup.

(*f*) Arlett v. Ellis and others, 7 Barn. & Cress. 346, 374; ante, p. 510.

(*g*) Mason v. Cæsar, 2 Mod. 65; Cooper v. Marshall, 1 Burr. 259; 2 Wils. 51; Sadgrove v. Kirby, 6 T. R. 485.

(*h*) Arlett v. Ellis, 7 Barn. & Cress. 360, 362, 364, 372, 377, cites Bro. Abr. tit. "Common," pl. 9; 15 H. 7, 10 b; 2 Inst. 88. In Smith v. Bonsall, Gouldsb. 117, it was stated *arguendo* by Drew, that if parcel of a common be inclosed, a commoner ought to make but one gap to put in cattle; but Anderson said, "he may make as many gaps as he will."

other like acts of the lord, the remedy of the commoner is action on the case, or, formerly, of assise (*i*); but in order to maintain such an action against the lord, the commoner must show that there was not a sufficiency of common left (*k*).

A copyholder, in case of intrusion on his commonable rights by a stranger, may distrain the cattle damage feasant, or bring his action on the case (*l*); but one commoner cannot distrain the cattle of another for damage feasant, except, as it should seem, where the number of cattle is stinted (*m*), though an action will lie against the lord, or by one commoner against another, for surcharging the common, however trifling the injury (*n*), and although the plaintiff has himself overstocked (*o*).

Nor can the lord distrain for surcharge of common where there is a colour of right (*p*).

An observation in this place on the right frequently claimed by copyholders of digging and taking away gravel, sand, and the like articles found on the lord's waste, under an alleged immemorial usage, may probably be acceptable.

An *unrestricted* right to dig and carry away gravel and loam, &c. from the waste lands of the manor is sometimes claimed by the tenants, and in other instances the right is confined to such quantity as the tenants may desire for the purpose of being used and spent on their copyhold tenements (*q*); and the author inclines to think that even the latter custom could not be supported, with reference to the established rule of law that all customs must be reasonable (*r*). In order to bring such a custom within that rule, the author apprehends

(*i*) Clayton *v.* Horsey, 1 Roll. Abr. 106 (M.), pl. 19; Bridgm. 11; Cooper *&* Marshall, Sadgrove *&* Kirby, sup. And see per Lee, C. J., in Creach *v.* Wilmot, 2 Taunt. 160.

It has however been said, that a copyholder could have had no assise of common right against his lord, but was to be relieved in equity; Toth. 108, cites Tenants of Petworth *v.* Earl of Northumberland, 38 & 39 Eliz., and Calcot *v.* Lea, same year, and 43 Eliz.

(*k*) Sadgrove *&* Kirby, sup.

(*l*) Robert Marys's case, 9 Co. 111; Dixon *v.* James, 1 Freem. 273; S. C. Lutw. 1238; Terrey *v.* Godier, 1 Roll. Abr. 89, pl. 8; Atkinson *v.* Teasdale, 3 Wils. 287; S. C. 2 Sir W. Bl. 817.

(*m*) 1 Saund. 346, n.; Dixon *v.* James, sup.; Hall *v.* Harding, 4 Burr. 2427; S. C. 1 Sir W. Bl. 673; Woolr. on Rights of Common, 247.

(*n*) Hall *v.* Harding, 4 Burr. 2427; S. C. 1 Sir W. Bl. 673; Wells *v.* Watling, 2 Sir W. Bl. 1233; Fisher *v.* Wren, 3 Mod. 251. And see sup.; Vin. Abr. tit. "Commoner," (B.) pl. 2, 5. In such an action the commoner must particularly show the surcharge; 2 Mod. 7, in Smith *&* Feverel; Lutw. 107; 3 Wils. 281, 290, in Atkinson *&* Teasdale.

(*o*) Hobson *v.* Todd, 4 T. R. 71.

(*p*) 3 Wils. 126.

(*q*) See Wilson *v.* Page, 4 Esp. 71.

(*r*) This principle is recognised in great body of authorities, which are brou together in Broadbent *v.* Wilks, W 362; S. C. in error, 1 Wils. 63; S. Str. 1224. And see Wilson *v.* Will East, 127; ante, p. 25.

that the right to dig and carry away the soil of the waste ought to be confined to *necessary* consumption and repairs (*s*) upon the *ancient* copyholds of the manor (*t*).

In the case of *Peppin & Shakespear* (*u*) the Court of B. R. held, that in pleading a right to enter a common, to dig for and carry away sand and gravel for the repairs of a house, it was necessary to allege that the house was out of repair, that the party entered for the purpose of digging for and carrying away sand and gravel for the *necessary* repairs of the house, and that the materials were used for the purpose. It was stated in the defendant's plea, that the entry was for the purpose of digging "for the necessary repairs of the defendant," which was held to be a defect.

In the author's anxiety to render this work as useful as possible to the profession at large, he is induced to conclude the present chapter with some few additional observations on the subject of commonable rights.

Common levant et couchant (*x*) cannot be claimed by prescription, either by freeholders or copyholders, as appurtenant to a house without any curtilage or land (*y*); nor can a right of common be claimed by

(*s*) See 2 Atk. 190, in Dean and Chapter of Ely *v.* Warren; Broadbent *v.* Wilks, Wilson *v.* Willes, sup.

(*t*) Such a custom could not embrace copyholds created within time of memory under the immemorial usage existing in some few manors, for the lord, with the consent of the homage, to make grants of the waste, to be held by copy of court roll. And see 5 Ass. 2, Bro. Comoner, pl. 16; F. N. B. 180, B.; 1 Roll. Abr. 397, E. 3; Com. Dig. tit. "Common" (B.); 4 Vin. 581, pl. 3; Costard & Wingfield, or Wakefield's case, post, p. 524.

A reasonable custom would probably be held to be within the provisions of the act of 2 & 3 Will. 4, c. 71, "for shortening the time of prescription in certain cases." Ante, p. 25, n. (*q*).

(*u*) 6 T. R. 748. But see the case of Duberley *v.* Page, 2 T. R. 391, which seems contra: yet note, that the restricted or unrestricted nature of the custom set up in that case does not appear in the report. See also Clayton *v.* Corby, 8 Jur. 212.

As to the mode of pleading in respect of Commons, after severance of the waste, see Co. Cop. s. 42, Tr. 98.

And the reader is referred for further information on the subject of prescription by copyholders, and for some interesting remarks on the legality of a prescription by the lord, for fines on marriage of copyhold tenants, and for special courts, &c., to Calth. Read. p. 29 et seq., and 6 Vin. tit. "Copyhold" (P. e.).

(*x*) When the right is not stinted, levancy and couchancy is the measure of the common, i. e. so many beasts, &c. as the land itself will maintain in the winter; Cole *v.* Foxman, Noy, 30; Patrick *v.* Lowre, 2 Brownl. 101; Smith *v.* Bonsall, Gouldsb. 117; 5 T. R. 48, 49, in Scholes *v.* Hargreaves; or (according to the case of Whitelock *v.* Hutchinson, 2 Mood. & Rob. (N. P.) 205,) such number as the winter eatage of the ancient tenement, together with the hay and other produce obtained from it during the summer, is capable of maintaining. But the number of cattle is sometimes in proportion to the quantity of land, which is a mode of admeasurement similar to levancy and couchancy; Cheesman *v.* Hardham, 1 Barn. & Ald. 708.

(*y*) Scholes *v.* Hargreaves, Patrick *v.* Lowre, sup.; Benson *v.* Chester, 8 T. R. 396; Bunn *v.* Channen, 5 Taunt. 244.

prescription in respect of houses newly erected, except when erected on the site of an ancient messuage, to which commonable rights were attached (*z*); nor can common for cattle levant and couchant be used with the cattle of a stranger, except such as the commoner may hire or borrow for ploughing or manuring his land, or which may yield nurture for his family (*a*).

Rights of common and turbary are in many places illegally exercised by the *inhabitants* generally; for it is a settled rule of law, that although inhabitants may prescribe for an easement, as a right of way to a church or a market, yet that commonable rights cannot be claimed in respect of inhabitancy only (*b*); but when so exercised, it may probably, in frequent instances, be traced to an ancient usage, as appurtenant to curtilages or lands on which houses have been built, or to the equitable title of the parishioners at large under some deed of feoffment to trustees for their benefit (*c*).

Where, before the stat. of 5 & 6 Will. 4, c. 76, all *freemen* inhabiting within an ancient borough claimed right of common on certain lands, and that act (s. 7) has extended the limits of the borough, the right of common can no longer be described in pleading to be a right "in all freemen inhabiting within the borough," for that act only reserves the right to those who reside within the old limits, and does not make the newly defined borough the same to *all* intents and purposes as the old one: and where the right was so alleged in an action by a freeman for disturbance of common, and the plea denied the right, it was held that the variance was fatal, though it was proved that the plaintiff, in fact, inhabited within the ancient limits (*d*).

It has been decided that the thirty years period on which a prescriptive right is to be founded under 2 & 3 Will. 4, c. 71, ss. 1, 4, 7, need not be thirty years before the commencement of the action, but may be made up by two periods preceding and following a life estate (*e*).

(*z*) Costard *v.* Wingfield, 2 Leo. 44; S. C. Godb. 97; S. C. Sav. 81; S. C. (Wakefield's case), Ow. 4; Gouldsb. 38; 1 Anders. 151.

(*a*) 1 Roll. Abr. 402; Com. Dig. "Common" (F. 2).

(*b*) Gateward's case, 6 Co. 59 b; S. C. Cro. Jac. 152; Fowler *v.* Dale, Cro. Eliz. 362; Goodday *v.* Michell, ib. 441; Ordeway *v.* Orme, 1 Bulst. 183; Tinnery *v.* Fisher, cited 2 ib. 87; Weekly *v.* Wildman, 1 Lord Raym. 405; Bean *v.* Bloom, 2 Sir W. Bl. 926; 3 Wils. 456; Selby *v.* Robinson, 2 T. R. 758; Grimstead *v.* Marlowe, 4 T. R. 717; 3 Bing. 67.

(*c*) Common is sometimes claimed under a grant to a corporation for the benefit of the members at large; 3 Keb. 247; 1 Saund. 346; Grimstead *v.* Marlowe, sup.; Rex *v.* Churchill and another, 4 Barn. & Cress. 755.

For more of common in general, see Vin. Abr. and Supp. tit. "Common" and "Commoner." Vide also Bacon's Abr. and Com. Dig. tit. "Common." And see extract from 2 & 3 Will. 4, c. 71, ("for shortening the time of prescription in certain cases,") in the Appendix.

(*d*) Beadsworth *v.* Torkington, 1 Adol. & Ell. N. S. 782.

(*e*) Clayton *v.* Corby, 2 Adol. & Ell. N. S. 813.

CHAPTER XVII.

Of the Prerogative Writ of Mandamus; and of Aid in the Courts of Equity. And first,

Of the Writ of Mandamus.

The Court of King's Bench will grant a mandamus to compel the lord of a manor to admit a person who can show a colourable title to a copyhold estate; and, if necessary, to hold a court (*a*).

The lord is also compellable by this writ to accept a surrender from a copyholder, either of the whole or a portion of his copyhold lands (*b*), and either of the whole or a portion of his interest therein (*c*).

This power has certainly been questioned, but any doubts formerly entertained on the subject are completely removed by the several decisions to which the author is about to refer.

It is true, that when a party has a specific *legal* remedy (*d*), the Court of King's Bench has in several instances refused to grant a *mandamus* (*e*): but as both the surrenderor and surrenderee are, the

(*a*) When two persons claim by different titles, the lord must admit both; Rex *v.* Hexham, 5 Adol. & Ell. 559; 1 Nev. & Per. 53; ante, p. 312.

(*b*) Snag *v.* Fox, Palm. 342.

But in a recent case the court refused a mandamus to compel the acceptance of a surrender in general terms, as "all those tenements which *A.* had surrendered on a particular day," although the tenements were particularly stated in such former surrender; Reg. *v.* The Lord of the Manor of Bishopstoke, 8 Dowl. (P. C.) 608.

(*c*) Fitch *v.* Hockley, Cro. Eliz. 441, 442.

(*d*) But having a remedy in equity is no answer to an application for a mandamus; 3 T. R. 652.

A court of equity has no jurisdiction to grant an injunction to stay proceedings on a mandamus; Lord Montague *v.* Dudman, 2 Ves. 398. Nor, in strictness, any restraining power over criminal prosecutions; but it will stay proceedings in an action of trespass *vi et armis*, or even on an indictment at sessions, under special circumstances; see The Mayor of York *v.* Pilkington, 1 Atk. 282; 2 Atk. 302; 2 Ves. 398.

(*e*) Vide The King *v.* The Marquis of Stafford and another, 3 T. R. 646, in which the Court of B. R. had granted a rule to show cause why a mandamus should not issue, commanding the defendants, as lords of the manor of Stowe Heath in Staffordshire, to allow and present to the ordinary of the peculiar jurisdiction of the royal free chapel and parish of Wolverhampton, the nomination of *W. M.* clerk, to be stipendiary priest or curate of the chapel of Willenhall, in the said manor, in order that he might obtain a licence from the ordinary. The application in this case was made in consequence of the refusal of the defendants, as lords of the manor, to allow and present to the ordinary the nominee of the majority of the inhabitants; and was founded on affidavits, stating, that on a commission of charitable uses, it was agreed between the then lord

author conceives, without remedy at law against the lord of the manor for refusing admittance (*f*), it appears to the author somewhat singular, that any question should have arisen on this point of jurisdiction.

It must certainly be allowed that a mandamus is never granted to compel a mere ministerial officer to do his duty (*g*); but it is to be recollected that the lord or steward is the judge of the Customary Court Baron, and that the steward even of a Common Law Court Baron, where the suitors are the judges, as far as relates to any suits pending there, is a constituent part of the court, and not a *mere* ministerial officer (*h*).

In Ile's case (*i*), (which was an application to the court of B. R.

of the manor of Stowe Heath and the freeholders, being inhabitants of Willenhall, within the said manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the said chapel of Willenhall, to be nominated by a majority of the said inhabitants, and to be allowed by the lord, by whom the curate was to be presented to the lord for a licence to preach, and that the usage of nomination, &c. had ever been pursuant to the said agreement. The court observed, that it seemed as if the inhabitants had only an *equitable right*, and that if they had a *legal* right, it might be asserted in a *quare impedit* (Rast. 506 b), and that perhaps the better remedy would have been an information in chancery, in the name of the attorney-general. See also The King *v.* The Bishop of Chester, 1 T. R. 396, in which a *mandamus* to the bishop to license a curate of an augmented curacy, where there was a cross nomination, was refused, the party having a specific legal remedy by *quare impedit*. Vide also The King *v.* Bristow, 6 T. R. 168, where the court refused to grant a mandamus to the treasurer of a county to obey an order of the Court of Quarter Sessions, the proper remedy being by indictment: and The King *v.* The Mayor of Colchester, 2 T. R. 259, where the court refused a *mandamus* to admit a recorder of the borough, because there was a recorder *de facto*, and the parties had another remedy by *quo warranto*. Vide also 3 Burr. 1266; Rex *v.* The Churchwardens of St. Peter's, Thetford, 5 T. R. 364; Rex *v.* The Chancellor of the University of Cambridge (Frend's case), 6 T. R. 110.

Vide also the late case of The Queen *v.* Pitt, 2 Per. & Dav. 385, S. C. 10 Adol. & Ell. 272, where a party claiming to be entitled as cestui que trust of a copyhold estate, petitioned the Court of Chancery under 1 Will. 4, c. 60 (ante, p. 84), when it was referred to the master to ascertain whether there was any heir of the last trustee, and on the master's report that there was no such heir, the court made an order appointing *R. G.* to convey or surrender the legal estate to the petitioner; and the Court of Queen's Bench refused to interfere by mandamus to compel the lord of the manor to accept a surrender from *R. G.*, "as the Court of Chancery had full jurisdiction, and was a fitter tribunal to investigate the matter." It appeared also that the lord had seized quousque, and regranted part of the property for a valuable consideration.

(*f*) Ante, pp. 313, 314; Towel *v.* Cornish, 2 Keb. 357; but see, as to a surrenderor, Gallaway's case, cited 3 Bulst. 217, in Lex Cust. 158, and in 5 Burr. 2769.

(*g*) Rex *v.* Dr. Walker, Bull. N. P. 199.

(*h*) Holroyd *v.* Breare & Holmes, 2 Barn. & Ald. 473; ante, p. 4.

(*i*) 1 Vent. 153. The King *v.* The Churchwardens of Kingscleere, 2 Lev. 18, appears to be S. C., and there C. J. Hale is reported to have said, that a mandamus lay for the steward of a Court Baron, "if

for a mandamus against churchwardens, to be restored to the place of sexton, and the writ was granted because by the custom the sexton was an officer for life,) Twisden said, "It was ruled in 1652 in this court, that a mandamus did not lie to be restored to a stewardship of a Court Baron, but of a Court Leet it did, for there the steward is judge, but of a Court Baron the suitors are judges." [1 Sid. 48, 169; 3 Mod. 334; Sir T. Raym. 12.] But Hale, C. J. said he was of another opinion, "for the steward is judge of that part of the court which concerns the copyholds, and is register of the other."

So long back as in the 24th of Geo. 2nd (*k*), the Court of B. R. assumed this power for the purpose of compelling the lord of the manor of the burgh of Midhurst, or his steward, to hold a court, and the homage to present certain conveyances of burgage tenements, entitling the purchasers to be sworn in burgesses of the corporation, and to vote for members of parliament; and there the court observed, that to deny the writ would be to say there was a right without a remedy.

In *Roe* d. *Noden* v. *Griffits and others* (*l*) Lord Mansfield said, that the act of admittance to a copyhold was mere form, and that the lord was an instrument only, and compellable to admit according to the surrender, and that a *mandamus*, or a decree in chancery would compel him.

And in *The King* v. *Rennett* (*m*), the Court of King's Bench expressed their decided opinion that a *mandamus* ought to be granted to compel a lord to admit a copyholder, on a proper case being laid before them, but they refused to interfere in the particular instance, as the party claimed by descent, and had therefore a complete title without admittance against all the world except the lord; but it will be presently shown that the aid is extended to a customary heir.

In *The King* v. *The Lord of the Manor of Hendon and his Steward* (*n*), a rule for a *mandamus* to admit *C.* on the surrender of *A.*, *A.* having previously sold and covenanted to surrender to *B.*, who had assigned to *C.*, was made absolute.

And again, in *The King* v. *Coggan* (*o*), on an application for a

he be not at will only, because he is an officer of justice." But upon an application for a mandamus to swear in a steward of a copyhold court, Holt said he would not care to do it for the steward of a leet, "though heretofore it were used to swear a physician of the college; and it is rare to grant it where one has any other remedy, and here it is a private officer to do service for the lord;" 12 Mod. 666; vide also post, pt. 3, tit. "Court Baron" and "Court Leet."

(*k*) Rex *v.* The Borough of Midhurst, 1 Wils. 283. And see S. C. 1 Sir W. Bl. 60.

(*l*) 4 Burr. 1961; see also Vaughan *d.* Atkins *v.* Atkins, 5 Burr. 2787; Lofft, 390; 2 Bl. Com. 368; 3 ib. 110.

(*m*) 2 T. R. 198.

(*n*) Ib. 484; ante, p. 211.

(*o*) 6 East, 431; S. C. 2 Smith, 417; and the court had just before granted

mandamus to the lord and steward of the manor of Laleham Billets to admit *W.* to a copyhold tenement, to which his father was entitled as purchaser, but who died before admittance, Lord Ellenborough expressed himself aware of the doubt entertained on the other side of the hall (*p*), yet the courts having for many years been in the habit of granting such writs, he could not, he said, doubt the power; and his lordship added, that he had himself, when at the bar, obtained such writs in two or three instances against the noble lord who had been named (Lord Lonsdale), to compel him to admit tenants to copyholds.

The circumstance of the customary heir having a complete title without admittance, as noticed by the court in *The King & Rennett* (*q*), is clearly no ground for denying the heir this summary remedy, for, independent of the rule that the heir must have been admitted before he could have brought a plaint in the nature of a real action, he may have objects in view which the remedy may assist, namely, to be put on the homage, or in nomination for various offices, or to surrender to a mortgagee (*r*).

The aid of the Court of B. R. to compel the admission of a customary heir was carried to the fullest extent in the late case of *The King* v. *Sir T. M. Wilson* (lord of the manor of Hampstead), and his steward (*s*). It appeared by the writ and the return made thereto (*t*), that *H. F.* a copyholder of inheritance died, leaving *J. W.* his customary heir, who applied to the steward for admission at a customary court in May, 1827, but was refused on account of the disposition made of the copyhold by the will of *H. F.* and the surrender to the uses thereof:—that the devise by *H. F.* was to his mother for life, with remainder to *J. F.* for life, with remainder to trustees to preserve contingent estates, with remainder to *A. M. F.* for life, with remainder to the testator's own right heirs:—that by deed of 24th August, 1826, *J. F.* and *A. M. F.*, for the considerations therein expressed, remised, released and for ever quitted claim unto *J. W.* and

mandamus to the Duke of Leeds to admit Mr. Conolly, for the purpose of enabling him to try his title to customary tenements in the manor of Wakefield, Yorkshire, for which he afterwards brought an ejectment; see Roe *d.* Conolly *v.* Vernon & Vyse, 5 East, 51; S. C. 1 Smith, 318. Vide also The King *v.* The Marquis of Stafford and others, 7 East, 521; S. C. 3 Smith, 459; The King *v.* The Lord and Steward of the Manor of Water Eaton, 2 Smith, 54; The King *v.* Willes, 3 Barn. & Ald. 510; ante, p. 440.

(*p*) Vide Williams *v.* Lord Lonsdale, 3 Ves. 752—754.

(*q*) Ubi sup.

(*r*) Rex *v.* Brewers' Company, 3 Barn. & Cress. 172; S. C. 4 Dow. & Ry. 492. And see Rex *v.* The Lord of the Manor of Bonsall, 3 Barn. & Cress. 173; 4 Dow. & Ry. 825.

(*s*) 10 Barn. & Cress. 80; S. C. 5 Mann. & Ry. 140, 153.

(*t*) It is essential that a return to a mandamus should be certain and explicit, and not argumentative; Rex *v.* Lyme Regis, Dougl. 181.

his heirs, all the copyhold hereditaments within the manor of Hampstead, of or to which *H. F.* was seized or entitled at the time of making his will, and at his death, and all the estate, &c. of the said *J. F.* and *A. M. F.* therein, to hold to *J. W.* his heirs and assigns for and during all the rights and interests by or under the said will of *H. F.* devised to, or otherwise vested in *J. F.* and *A. M. F.*, or either of them:—and that by an indenture dated 25th August, 1826, in consideration of a covenant mentioned to have been entered into by *J. F.* and *A. M. F.* to surrender all their estate and interest in certain copyhold estates of *H. F.*, and of 2500*l.* paid *J. W.* by *J. F.*, the said *J. W.* with the consent and at the request of *A. M. F.* granted, bargained, sold, aliened and confirmed unto *J. F.* and his heirs, all that the remainder or reversion in fee simple, to take effect in possession on the several deceases of *J. F.* and *A. M. F.*, and failure of issue of their respective bodies, of and in the therein described hereditaments, and all other the manors and hereditaments of *H. F.* in the county of Middlesex, to hold (expectant as aforesaid) unto *J. W.*, his heirs and assigns for ever:—that the said copyholds mentioned in the indenture of 24th August, 1826, and in the indenture of 25th August, 1826, were the same copyholds, and comprised the copyhold tenements devised by the will of *H. F.*:—the return alleged that the disclaimer was *colourable* only, and made for the purpose of defeating the lord of the manor of the fines which would have been payable to him on the admissions of *J. F.* and *A. M. F.* as devisees of *H. F.*, according to the custom of the manor.

It was contended on the part of *J. W.*, the customary heir of *H. F.*, that the return was insufficient, and that *J. W.* was entitled to a peremptory mandamus, the estate having descended to him on the death of *H. F.*, so that by the devisee's neglecting to come in and take admisssion, *J. W.* had a right to be admitted, for which *Roe & Hicks* (*u*) and *Smith & Triggs* (*x*) were cited: and it was urged also, that a devisee might refuse to accept an estate, according to *Townson* v. *Tickell* (*y*), and that there was, in the present case, a distinct disclaimer; and that it might be true that devisees had frequently come in and been admitted, but that the lord had no power to compel their admission. The court held that they could only look at the *legal* right of the heir, and that the only obstruction which stood in the way of it was removed, by the devisees declaring that they would not come in. Littledale J. observed, that it was suggested by the

(*u*) 2 Wils. 13.

(*x*) 1 Str. 484.

(*y*) 3 Barn. & Ald. 31. ("A devise or use limited to one for life, the remainder in tail, the first devisee doth disagree. Cook, the remainder doth vest presently;" 1 Leo. 195.)

return, that the course pursued was in furtherance of a scheme to defeat the lord's right, and if so, that no doubt the law would provide a remedy, but that the court *then* had nothing to do with that. And Parke J. said, "It is clear also that in this case the estate descended to the heir at law of the surrenderor. Even if there had been no disclaimer, he would have been entitled to admittance, but there is a distinct disclaimer."

The case of *The King* v. *Boughey, Bart. and his Steward* (*z*) is a strong and peculiar instance of the interposition of the Court of B. R. to compel the acceptance of a surrender, and to admit the surrenderee. In that case the return set out a custom, that if any person, not being before a customary tenant, or not dwelling within the manor, should take any estate as a purchaser, by surrender or otherwise, of any customary lands, &c., he should pay an arbitrary fine, but that persons *being customary tenants* paid another and smaller fine; and stated that *B.* having purchased the equity of redemption of a customary estate of considerable value, afterwards, and before he was admitted thereto, purchased the land in question, being a small customary estate, in order to be admitted to that first, and alleged this to be a fraud upon the lord. But the court held that such a purchase, in order to bring a party within the custom, was not of necessity a fraudulent act, and that the return was insufficient; but that if the second purchase had been colourable only, they would not have assisted the party by the prerogative writ of mandamus (*a*).

In a late case (*b*), the court granted a mandamus to compel the lord and steward of the manor to proceed upon a plaint in the customary Court Baron, which the demandant contended had been improperly adjudged to be set aside and annulled for alleged errors and irregularities; and a court was held in conformity with the writ, at which the plaint and proceedings were again adjudged to be set aside and annulled, in consequence of the same, and also other alleged errors and irregularities. The return to the writ of mandamus stated, that for the above reasons the defendants could not proceed upon the plaint; and the Court of Queen's Bench held that the return was not

(*z*) 1 Barn. & Cress. 565; S. C. (Rex *v.* Meer & Forton), 2 Dow. & Ry. 824. And see Williams *v.* Lord Lonsdale, 3 Ves. 752; Freeman *v.* Phillipps, 4 Mau. & Selw. 486, which latter case was an action by a copyholder against the lord for a false return to a mandamus; ante, p. 359. Vide also the late case of The King *v.* The Lord of the Manor of Oundle, 1 Adol. & Ell. 283; ante, pp. 175, 181, 184.

(*a*) Bayley J. inclined to the opinion that even if the second purchase had not been *bonâ fide*, the purchaser could compel admittance, and that the lord might have assessed his fine on admission to the larger estate, as if the second purchase had not been made.

(*b*) The Queen *v.* The Lord and Steward of the Manor of Old Hall, 8 Law Journ. Rep. N. S. 243; S. C. 2 Per. & Dav. 515; S. C. 10 Adol. & Ell. 248.

uncertain or repugnant; and that, as they were not sitting as a court of error, they could not examine whether the judgment was wrong or not, and intimated that it would have been sufficient to have returned that a judgment had been pronounced in the court below; and that, assuming the errors assigned to be invalid, the demandant might have relief on a proceeding in the nature of a petition of right, or in equity.

A mandamus to compel admission cannot properly go to the steward alone, but the lord must be joined in it, in order that his interests may be the better protected (*c*).

And in a recent case, that necessity induced the Court of Queen's Bench to quash a mandamus which had been directed to the steward of the Queen's manor of Richmond; and, as the writ could not go to the sovereign, the applicant was left to one or other of the remedies existing prior to the practice of enforcing admission to copyholds by the writ of mandamus, namely, a bill in equity, or a petition of right (*d*).

Should the lord or his steward refuse to receive and inrol a surrender taken by two or more copyhold tenants pursuant to a special custom, it may be enforced by a mandamus. But in one case the writ was refused, the objection being that the surrender had not been prepared by the steward, or his deputy, under a usage of that nature, and which was held to be a good custom (*e*).

And in the late case of *The Queen* v. *The Lady and Steward of the Manor of Dullingham* (*f*), an application for a mandamus to compel the lord to receive and inrol a surrender was refused, the sur-

(*c*) The Queen *v.* The Lord of the Manor of Whitford, 7 Dow. P. C. 709; S. C. 8 Law Journ. N. S. 251.

(*d*) The Queen *v.* Powell, Steward of the Manor of Richmond, 1 Adol. & Ell. N. S. 352. In this case a rule for a mandamus had been made absolute against the steward, J. A. Powell, gent., to admit E. S. Halford, widow, to copyhold land held of the manor of Richmond, surrendered to her 26th April, 1838, by Henry Larchin. The only point on which the judgment proceeded was, whether the writ was insufficient, having been directed to the steward alone, without joining the lord or lady, which the above decision of The Queen & The Lord of the Manor of Whitford had established to be necessary. See also The Queen *v.* Evans, 1 Adol. & Ell. N. S. 355, n.

(*e*) Rex *v.* Rigge, 2 Barn. & Ald. 550; ante, p. 25. And a custom for the steward to prepare all surrenders was held to be good in the case of Reg. *v.* The Lord of the Manor of Bishopstoke, 8 Dowl. P. C. 608.

(*f*) 8 Adol. & Ell. 858; 1 Per. & Dav. 172.

Where customary freehold lands passed by grant and admission, but there were no court rolls, and there was a customary mode of barring estates tail, under which the lord received a considerable fine, it was held that it was a case to which the 3 & 4 Will. 4, c. 74, s. 53 (ante, p. 61) did not apply; and a mandamus to the lord to enter a deed of grant on the rolls was refused; Reg. *v.* The Lord of the Manor of Ingleton, 8 Dowl. P. C. 693.

A mandamus will not be granted to admit the applicant to a copyhold, when his claim thereto appears to be barred by 3 & 4 Will. 4, c. 27; Rex *v.* Lord of the Manor of Agardsley, 5 Dowl. (P. C.) 19.

render being by a customary heir of his *reversionary* interest, and the surrenderee seeking to be admitted without payment of the descent fine.

The lord and steward are also compellable by *mandamus* to permit the court rolls to be inspected by any person claiming an interest under them: so in *The King* v. *Lucas and another* (*g*), the Court of King's Bench granted a *mandamus* to the lord and steward to permit a person who had a *primâ facie* title to certain copyhold lands within the manors of Filby in Norfolk, to inspect the court rolls, and take copies thereof: the right was objected to, as there was no cause depending that involved the title; but Lord Ellenborough observed, that he did not know why there should be a cause depending, to found an application of that sort (*h*), where the person making it was entitled to the copyhold, unless some conveyance had been made by those under whom he claimed.

In conclusion of the present section, the author thinks it proper to state, that the lord of a manor is not compellable by mandamus to grant a licence for digging brick earth, or doing any act amounting

(*g*) 10 East, 235. And see Rex *v.* Shelley, 3 T. R. 142; Rex *v.* Tower, 4 Mau. & Selw. 162. But it is not sufficient that the demand be made by an agent only; Ex parte Hutt, 7 Dowl. P. C. 690; ante, p. 495, tit. "Evidence."

In Rogers *v.* Jones, 5 Dow. & Ry. 484, the steward was compelled to allow an inspection of the court rolls by freehold tenants, litigating a right of common, although the cause was not at issue; sed vide Sty. 128; and note, that in The King *v.* Allgood, 7 T. R. 746, the court held, that a freehold tenant had no right to inspect the court rolls, unless there were some cause depending in which his title might be involved; 1 Tidd's Pract. 648, 8th ed.

It is clear that a mandamus will be granted to compel the lord of a hundred or manor to hold a court leet *forthwith*, and to appoint proper officers; Rex *v.* The Corporation of Grantham, 2 Sir W. Bl. 716; Rex *v.* The Lord of the Hundred of Milverton, 3 Adol. & Ell. 284; and see post, cap. 22, tit. "Mandamus to enforce a Court," and the act of 11 Geo. 1, c. 4, there referred to; but the court will not grant a mandamus for the inspection of the records of a court leet, unless some satisfactory reason be assigned; nor to compel the holding of a court leet for the purpose of having the oath of allegiance administered to an inhabitant; Rex *v.* The Mayor of Maidstone, 6 Dow. & Ry. 334.

Where a manor formerly belonging to a corporation, who held courts leet in the Guildhall, had by an inclosure act been awarded to *A. B.*, excepting to the bailiffs, &c., the Guildhall, the Court of B. R., in order to an inquiry whether the leet could be legally held elsewhere, granted a mandamus to the bailiffs to permit the lord to hold his courts there; Rex *v.* The Borough of Ilchester, 2 Dow. & Ry. 724.

(*h*) This doctrine was distinctly recognised by his lordship and Mr. Justice Bayley, in the case of Rex *v.* Tower, sup.

It is only when no action is depending that the motion is for a mandamus; Nolan's edition of Strange, 1223, in notis; Tidd's Pract. 649, n. (*h*).

See cases of application to the courts of common law for a rule for the inspection and production of court rolls in actions depending, ante, tit. "Evidence," pp. 494, 495. Vide also Bateman *v.* Phillips, 4 Taunt. 162, per Heath, J.

to waste, when the licence is not rendered a matter of right by an established fine, or otherwise (*i*).

Secondly, Of Aid in the Courts of Equity.

The lord of a manor is compellable by a bill in equity to hold a court (*j*), but it is more usual to resort to the jurisdiction of the Court of King's Bench by mandamus (*k*).

The acceptance of a surrender of, and an admittance to copyholds, may also be compelled by a decree in equity (*l*); and it would seem that this power was first assumed by the courts of equitable jurisdiction (*m*).

But a court of equity will not compel the lord to admit a person who does not show a colourable title, and that there is a reasonable prospect of succeeding at law (*n*).

Equity would also have assisted an heir in discovering whether there were any copyholds unsurrendered to the uses of the will; but if the bill sought a relief to which the plaintiff was not entitled, that circumstance would support a general demurrer (*o*).

A court of equity will also make an order on the lord or steward, or other person having the custody of the court rolls, to produce the same for the inspection of any one claiming an interest under them (*p*).

(*i*) Reg. *v.* Hale, 1 Per. & Dav. 293; ante, p. 458, n. (*s*); vide 1 Will. 4, c. 21, extending the provisions of the act of 9 Ann. c. 20, relating to returns to the writs of mandamus therein mentioned, to all other writs of mandamus; and whereby officers and persons, whose functions are merely ministerial in relation to the office or matter in respect whereof a writ of mandamus may be directed, are protected in certain cases against the payment of damages or costs; and by which it is provided, that the proceedings on a writ of mandamus shall not abate by the death, resignation or removal from office of the person making the return to a mandamus, but may be carried on in his name, and that the peremptory writ may be awarded to his successor; and which also enacts, that the costs of the application, and of the writ, if issued, shall be in the discretion of the court.

(*j*) Moorstal *v.* Huntington, Nels. 12.

(*k*) See Chitty's J. P. vol. i. p. 794, vol. ii. p. 421.

(*l*) Roe *d.* Noden *v.* Griffits and others, 4 Burr. 1961; Vaughan *d.* Atkins *v.* Atkins, 5 Bur. 2787; Towel *v.* Cornish, 2 Keb. 357; Moor *v.* Huntington, Nels. C. R. 12; Lunsford *v.* Popham, Toth. 64; Newby *v.* Chamberlain, ib. 65; March *v.* Gage, ib.; Earl of Derby *v.* Wainwright, cited Hardr. 169. And see Roswell's case, Dyer, 264, pl. 38; 6 Vin. Cop. (Y. e.); Hetl. 2; Marquis of Caermarthen *&* Hawson, 3 Swanst. 294, n.

(*m*) Ford *v.* Hoskins, Cro. Jac. 368; S. C. 2 Bulst. 336; S. C. 1 Roll. Rep. 195; Westwick *v.* Wyer, 4 Co. 28 b; 2 Bl. Com. 367; and see F. N. B. 12; Cary, 3, 4; Gilb. Ten. 291; ante, p. 313.

(*n*) Widdowson *v.* Earl of Harrington, 1 Jac. & Walk. 543.

(*o*) Jones *v.* Jones, 3 Meriv. 170, 174, 175.

(*p*) Anon. 2 Ves. 578; Draper *v.* Zouch, Finch, 249; Corbett *v.* Peshall, Toth. 109; Stacy's case, Lat. 182; Dy.

And although a court of law, in a question between the lords of different manors, will not enforce an inspection of the court rolls, yet a court of equity, it appears, will do so, on a bill for a discovery (*q*).

It will also entertain a bill by the lord of the manor for discovery of the boundaries and descriptions of lands, and for a commission to issue, if necessary, to distinguish freeholds from copyholds where they are intermixed (*r*). This, however, is done under special circumstances only, and when some equity is superinduced by the acts of the parties, a confusion of lands not being, *per se*, a ground for the interposition of the court (*s*). But a confusion of boundaries by the defendant, or those under whom he claims, is an equitable ground (*t*).

It is indispensably necessary that the interests of all the parties who may be concerned should be before the court (*u*); and a court of equity will not interfere in a disputed right, until the right has been

264, pl. 38, marg.; Langham *v.* Lawrence, Hardr. 180; 6 Vin. Cop. (Y. d.); ante, p. 494.

The court refused to interfere upon a petition to have court rolls delivered by a steward appointed by trustees, to a steward appointed by a testamentary guardian, as the effect would have been to have set aside an appointment, without suggestion of improper conduct, or of any advantage from the change; Mott *v.* Buxton, 7 Ves. 201

(*q*) Anon. 2 Ves. 621.

(*r*) The Duke of Leeds *v.* Powell, 1 Ves. 172; and see Same *v.* The Earl of Strafford, 4 Ves. 180, 105, where the Lord Chancellor said, "It is the duty of the tenant to keep the boundaries; that is the foundation of the bill;" Clayton *v* Cookes, 2 Atk. 450; Norris *v.* Le Neve, 3 Atk. 82; Lord Abergavenny *v.* Thomas, 3 Anst. 668, n. (a); Lethulier *v.* Castlemain, Sel. Ca. temp. King, 60; S. C. 1 Dick. 46; Wintle and others *v.* Carpenter & Pisburgh, Fin. R. 462; Bunb. 322; 3 P. W. 149, in North *v.* Earl and Countess of Strafford; Robinson *v.* Hodgson, 17 Dec. 1800, Reg. Lib. B. fol. 125; Willis *v.* Parkinson, 2 Meriv. 507; 1 Swanst. 9; 2 Tamlyn, 221; ante, p. 368.

(*s*) Bouverie *v.* Prentice, 1 Bro. C. C. 201; Speer *v.* Crawter, 2 Meriv. 418; Winterton *v.* Lord Egremont, cited 2 Anst. 392; Rouse & Barker, 4 Bro. P. C. 660; vide also Wake *v.* Conyers, 2 Cox Ch. C. 362; S. C. 1 Eden, 331; S. C. (called Webb *v.* Conyers), cited 1 Bro. C. C. 41, 2 Anst. 391, from which it appears that equity has interfered to settle boundaries only when the soil itself has been in question, or to prevent a multiplicity of actions. And see Lord Tenham *v.* Herbert, 2 Atk. 484; 2 Eq. Ca. Abr. 164; Waring *v.* Hotham, 1 Bro. C. C. 40; S. C. 2 Dick. 550.

Vide extract in the Appendix from 2 & 3 Will. 4, c. 80, "to authorise the identifying of lands and other possessions of certain ecclesiastical and collegiate corporations. And N. B. The provisions of that statute are embodied in the Commutation and Enfranchisement Act, 4 & 5 Vict. c. 35, s. 21.

(*t*) Godfrey *v.* Littel, 1 Russ. & Myl. 62; Bouverie *v.* Prentice, ubi sup.

(*u*) Atkins *v.* Hatton, 2 Anst. 386; and see Webb *v.* Banks, 2 Eq. Ca. Abr. 164. In Norris *v.* Le Neve, ubi sup., Lord Hardwicke decided that the parties should bear the expense of the commission equally, though their interests were unequal, but the value of the estate belonging to both was considerable, and there appeared to be no fault in either party. And see 1 Newland's Ch. Pr. 399.

tried at law, except where the justice of the case requires some discovery of facts (*x*).

To sustain a bill for a commission to ascertain and set out boundaries, the plaintiff must establish a clear title to some land in the possession of the defendant, but such title need not appear by the defendant's admission (*y*).

The court may afford relief either by a commission, or by an issue, as will best advance the justice of the case, so that when an issue would not finally settle the question between the parties, a commission is deemed to be the proper proceeding (*z*).

A court of equity will entertain a bill by the lord of a manor to establish a right to tolls; but where it appeared that ancient mills were destroyed, and another mill of a different kind erected, and other legal objections having been raised, the court retained the bill, with liberty to the plaintiffs to bring such action or actions at law as they should be advised (*a*).

Although the existence of a custom is to be tried by a jury (*b*), yet, by consent of parties, a court of equity will refer it to be ascertained by the master (*c*).

We have seen that no common law process could have issued to levy a debt upon copyholds (*d*), yet that they are subject to sequestration on a decree in equity (*e*), and are within the rule established in the courts of equity for marshalling assets (*f*).

In a late case (*g*) the Master of the Rolls held, that prior incumbrancers on the freehold and copyhold property of a trader who died

(*x*) See the cases, ante, p. 534, n. (*r*); Whitchurch *v.* Hide, 2 Atk. 391; Northleigh *v.* Luscombe, Amb. 613; Weller *v.* Smeaton, 1 Bro. C. C. 573, Belt's ed.; Welby *v.* Duke of Rutland, 2 Bro. P. C. 39; 2 Ves. 621, Anon.; Grey *v.* Duke of Northumberland, 13 Ves. 236; Hilton *v.* Lord Granville, 10 Law Journ. Rep. pt. 12, N. S. 398; and see Viner *v.* Vaughan, 2 Beav. Ch. 466; ante, p. 432; post, p. 536. And after several trials at law, equity has refused to direct an issue on the same question; Smith *v.* Sallett, 2 Ch. R. 76.

(*y*) Godfrey *v.* Littel, sup.

(*z*) Ib.; Evans *v.* Taylor, 3 Nev. & Per. 174; ante, p. 505, n. (*a*).

(*a*) Duke of Norfolk and others *v.* Myers and others, 4 Madd. 83. In that case the Vice-Chancellor said, the question whether the custom was destroyed by the conversion of the old water mills and horse mill into a steam mill, was merely of law, and so was the question whether crushing malt was not within the custom of grinding. And see Att. Gen. *v.* Ayre, Bunb. 68.

(*b*) Ante, p. 26.

(*c*) Edwards *v.* Fidel, 3 Madd. 239.

(*d*) This was formerly the law, but copyholds are subjected to an *elegit*, by 1 & 2 Vict. c. 110; ante, p. 47; post, pt. 2, title "Of Customary Freeholds;" and see an extract from the act in the Appendix.

(*e*) Ante, p. 48.

(*f*) Ante, p. 49.

(*g*) Parker *v.* Fuller, 1 Russ. & Myl. 656.

intestate (*h*), ought not to have been made parties to a bill for payment of his debts out of his freehold and copyhold estates (*i*).

Equity will, under particular circumstances, grant an injunction even against an act that is a forfeiture (*k*), though it was formerly supposed that the lord was left to his legal remedy in all cases, and that an injunction would be granted only where an action of waste would lie (*l*).

But as lessees of copyholders are punishable in waste, it was long since held that they ought to be restrained in equity from committing waste (*m*).

A copyhold tenant can have no relief in equity against a forfeiture by leasing without licence, or for wilful waste (*n*); yet under very peculiar circumstances a court of equity, it should seem, would give relief even against voluntary waste and forfeiture (*o*). It has relieved against a forfeiture by cutting down timber on one copyhold, which was employed for repairs on another (*p*); and in the case of cutting timber, it has directed an issue to try *quo animo* it was cut (*q*); and would probably relieve against a forfeiture, where the act was done under a colour of right (*r*).

Where there is a doubtful right between the lord and tenant, a court of equity will restrain the assertion of it, until the right is tried at law. This latter interposition of the courts of equity has already been the subject of discussion, in our consideration of the relative rights of property in trees and mines, and is fully established by the case of *Grey* v. *The Duke of Northumberland* (*s*).

We have also seen, that when the copyhold tenants are dispunishable of waste by the custom of the manor, the heir taking by way of

(*h*) Viz. legatees and annuitants under his father's will.

(*i*) See observations on 47 Geo. 3, sess. 2, c. 74, and 1 W. 4, c. 47, ante, pp. 89, 90.

(*k*) See Richards *v.* Noble, 3 Meriv. 673, which was a bill by the lord against copyholders, for an account of turves cut and taken, and for an injunction, not waiving the forfeiture; ante, p. 427. But a bill for discovery of waste is demurrable to. See Att. Gen. *v.* Vincent, Bunb. 192; Lord Uxbridge *v.* Staveland, 1 Ves. 56.

(*l*) Dench *v.* Bampton, 4 Ves. 700.

(*m*) Dalton *v.* Gill & Pindor, 19 Eliz., cited Cary, 89, 90.

(*n*) Sir H. Peachy *v.* Duke of Somerset, 1 Stra. 447; S. C. Pre. Ch. 568; 2 P. W. 147; Bishop of Worcester *v.* ——, 2 Freem. 137. But in cases of permissive waste equity will generally give relief; ante, p. 463.

(*o*) Cox *v.* Higford, 1 Eq. Ca. Abr. 121; S. C. confusedly stated, 2 Vern. 664.

(*p*) Nash *v.* Earl of Derby, 2 Vern. 537, &c.; ante, p. 463.

(*q*) Thomas *v.* Porter & Bishop of Worcester, 1 Ch. Ca. 95; 2 Freem. 137; ante, p. 463.

(*r*) "Gravener cont' Rake, the court compels the lord to admit a tenant copyholder to sue at law, without any forfeiture of his copyhold, in Mich. 31 & 32 Eliz. fo. 21;" Toth. 65.

(*s*) 13 Ves. 236; 17 ib. 281; and see ante, p. 431.

resulting trust until the happening of a contingency, will be restrained from committing waste by the injunction of a court of equity, and that the court will interpose generally between parties as in freehold cases (*t*).

And that although a court of equity will not interfere between lord and tenant where there is a legal remedy, except in the case of wilful waste, (and then only under particular circumstances,) yet that it will relieve in all cases where the party cannot have redress at law (*u*).

Although one tenant alone cannot institute a suit on a general right, yet equity will entertain a bill which is calculated to avoid a multiplicity of suits (*x*); and on this ground the court will sustain a bill by the tenants of a manor, to establish their right to the profits of a fair (*y*).

A bill of peace may be brought either by the lord against the tenants, or by the tenants against the lord (*z*). And the court has entertained such a bill, where the tenants opposed the lord's approvement under the statute of Merton, and actions of trespass had in consequence been brought against them (*a*).

A court of equity will also interpose its influence under all circumstances of fraud. So where a purchase was made of a copyhold estate from a father, tenant for life, and his son, tenant in tail in remainder, and it appeared that the parties did not meet on equal terms, the vendors, who were in great distress, not having had the benefit of any professional advice, and that the price given was very inadequate, the Vice Chancellor ordered the conveyance to be set aside upon the plaintiff's repaying the amount of the purchase money,

(*t*) Ante, p. 426; and see 3 Atk. 211; Bamborow *v.* Alexander, Cary, 105; Litton *v.* Cooper, ib. 73; Marston *v.* Marston, Nels. C. R. 24.

(*u*) Cary, 3, 4; ante, p. 368.

(*x*) Cowper *v.* Clerk, 3 P. W. 155; 2 Anst. 390, in Atkins *v.* Hatton; Musgrave's case, Cary, 38; How *v.* Tenants of Bromsgrove, 1 Vern. 22; ante, pp. 355, 356, 534, n. (*r*). And see Toth. 111, cites Sterling *v.* Tenants of Burton, that a composition formerly made between lords and tenants, ought to bind a purchaser or an heir, and so decreed 40 Eliz. lib. A. fo. 434; Dyer *v.* Dyer, 6 Vin. 240, "Alteration of a custom by consent of lord and tenants was allowed in Chancery, and decreed accordingly." But a decree against the lord of the manor will not bind copyholders who are no parties to the suit; see Poore *v.* Clerk, 2 Atk. 516.

(*y*) New Elme Hospital *v.* Andover, 1 Vern. 266.

(*z*) Conyers *v.* Lord Abergavenny, 1 Atk. 285; and see Lord Tenham *v.* Herbert, 2 Atk. 484. And it would seem to have been held that in a bill of this nature, though neither the lord nor tenants should have a greater estate than for life, the decree is equally binding; Cary, 29, 30; and see Dunn *v.* Allen, 1 Vern. 427; Meadows *v.* Patherick, Fin. R. 154.

(*a*) Powell & others *v.* Earl of Powis & others, 1 You. & Jerv. 159; and see Arthington *v.* Fawkes, 2 Vern. 356; S. C. 1 Eq. Ca. Abr. 103; Filewood *v.* Palmer, Mos. 169; 5 Vin. 8, pl. 33; Hanson *v.* Gardiner, 7 Ves. 305.

and the expenses of the recovery, with interest at five per cent., observing as to the costs, that although he could not after the cases which had been decided make the defendant pay costs, yet he could not bring his mind to give to a defendant the costs of a suit, made necessary by his unfair dealing (*b*).

In another case (*c*), a copyhold estate of the yearly value of 16*l.*, (on which was timber of the value of 150*l.*,) was sold by *A.* to *B.* for 630*l.*: *A.* covenanted to surrender on or before Michaelmas then next: *B.* paid 10*s.* in part of the purchase, entered on the premises, cut down timber, stocked the land, and did every thing as owner: *A.* brought his bill in Chancery for a specific performance of covenants, and proved that he had given notice in writing that he would surrender the next court day, and attended accordingly. On the defendant's part it was proved that he was disordered in his senses, and urged, that as no custom was alleged of the tenant's having power to cut down the timber, there was a plain imposition. The Lord Chancellor was of opinion that it was a great overvalue, and that the defendant's cutting down timber was a convincing proof of his folly, because a direct forfeiture, and dismissed the bill, further observing, "but as it is, it is a matter merely at law; the covenant is to surrender at or before Michaelmas; you say you were ready at the next court, which does not appear to have been before Michaelmas; if surrender had been, action would have lain at law."

But by the 3 & 4 Will. IV. c. 27 (*d*), no suit in equity can be brought to recover land or rent after the period when the plaintiff, if entitled at law, could have made an entry or distress, or brought an action: and by the 26th section of the same act, in cases of concealed fraud, the twenty years allowed by the act for bringing a suit in equity,

(*b*) Wood *v.* Abrey, 3 Madd. 424; and see Mildmay *v.* Hungerford, 2 Vern. 243, where a copyhold at Newington was devised to the plaintiff for life, remainder to his first and other sons in tail, remainder to the defendant in fee; and the plaintiff being minded to make himself absolute owner of the estate, his wife being then enceinte, was advised that if he bought in the reversion in fee, and took a surrender thereof to his own use, *that* would merge his estate for life, and by consequence destroy the contingent remainder to his son, there being then no issue born. The plaintiff accordingly agreed to give the defendant 550*l.* for the reversion, and now brought his bill to be relieved against the security given to the defendant, for that he was deceived therein, in regard he now understood such surrender of the reversion would not bar the son, *since born*, the freehold and inheritance being in the lord, "so not the like inconvenience as of freehold estates at common law in respect of contingent remainders, where there is none against whom to bring the præcipe. Per Cur. pay principal, interest, and costs, or be dismissed with costs." Ante, p. 401 et seq.

(*c*) Edwards *v.* Heather, Sel. Ca. Ch. temp. King, 3; vide also Hammond *v.* Ainge, a case of relief on an admission of a freeholder by the fraud of the lord and steward, cited 6 Vin. Abr. 115.

(*d*) Sect. 24. See the act in the Appendix.

begin to run from and not before the time at which such fraud shall, or might with reasonable diligence, have been first known or discovered (*e*).

A court of equity will correct the proceedings in the lord's court, in case any thing is done therein against conscience (*f*); and if the manor belongs to the king, the party complaining may sue in the Exchequer Chamber, by bill or petition to the king (*g*).

Although copyholds be surrendered absolutely and without any condition, yet if it can be shown that the surrender was intended as a security only for the repayment of money lent by the surrenderee to the surrenderor, a court of equity will decree a redemption against the surrenderee, or his heirs or devisees (*h*).

But equity has refused to interpose its authority after the lapse of a long period of time, and especially as against a bonâ fide purchaser (*i*).

The author has shown that equity will give effect to some peculiar moral obligations by supplying a surrender (*k*), and in some instances would have granted relief against an ill presentment, or the want of a timely presentment of a surrender (*l*). But if the party is without good equitable grounds, he will be left to the common law (*m*).

And where the legal interest of a copyhold is in one person, and the equitable interest in another, a court of equity can order the trustee to surrender the legal interest, though the *cestui que trust* refuse (*n*).

In the case of *Long* v. *Collier* (*o*), which was a bill filed in the Court of Chancery for the specific performance of a contract for the purchase of copyhold property held by the plaintiff for three lives, the defendant took an exception to the master's report in favour of the title, on the ground that the property, as described in the ancient court rolls, was not identified with the descriptions in the contract for sale; and the Master of the Rolls observed, that the generality and vagueness of descriptions on court rolls were too well known to entitle the objection taken by the purchaser to any weight, and held

(*e*) The last section expressly protects the title of a bonâ fide purchaser, who has no knowledge of the fraud.

(*f*) Patishall's case, H. 8, Jac. Scac. 1 Danv. 750; 1 Vern. 368, 369, in Ash *v.* Rogle & others; Christian *v.* Corren, 1 P. W. 330; 1 Jac. & Walk. 553, in Widdowson *v.* The Earl of Harrington.

(*g*) Edward's case, Lane, 98.

(*h*) Clench & others *v.* Witherly & others, Fin. 376.

(*i*) Ash *v.* Rogle, 1 Vern. 367; S. C. 2 Ch. R. 387; Sho. P. C. 67; Bell *v.* Cundall, Amb. 101; ante, p. 66; and see n. (*e*), sup.

(*k*) Ante, pp. 208, 216.

(*l*) Ante, p. 230.

(*m*) Anon. Skin. 142, Ca. 13; ante, p. 195.

(*n*) Ex parte Butler & Purnell, (assignees of a bankrupt,) 1 Atk. 216.

(*o*) 4 Russ. 267.

that it being established by the evidence that the property, as then occupied by the plaintiff's tenant, had continually passed and been enjoyed by the description in the court rolls, the exception must be over-ruled.

The established course of a court of equity on sales of freehold property is, to direct the immediate distribution of the purchase-money, without regarding any contingent expenses or inconvenience, as is generally done in a case between party and party, and the rule is equally applicable to sales of copyhold estates, although the risk and inconvenience are frequently greater on account of the fine and other liabilities peculiar to that species of property; so that upon a purchase of copyhold under a decree of the Court of Chancery, the legal fee being in an infant, the Master of the Rolls held, that the purchaser was not entitled to have a portion of the purchase-money retained in court, as a provision for payment of the fine which would accrue to the lord on the death of the infant before a conveyance could be made (*p*).

We have seen that a court of equity will not in general decree a specific performance of a voluntary agreement (*q*), but that an agreement partially voluntary will sometimes be enforced (*r*); and that although (in an ordinary case) equity will not restrain a vendor from dealing with the property, yet that an injunction was in one case granted to restrain the vendor from conveying copyholds to trustees for creditors, after delivery of possession and receipt of part of the purchase-money (*s*).

In discussing the aid afforded in copyhold cases by the courts of equity, it may be proper to notice that where a bond had been given by the husband to his wife before marriage, conditioned for the payment of a certain sum to her if she survived him, the security was held to be good in equity, though extinguished at law by the marriage; and the wife was decreed to redeem a mortgage made by the husband of freehold and copyhold lands, both being included in the same security, notwithstanding the rule that copyholds were not assets for specialty debts (*t*).

And it may also be useful to mention, that a mortgagee of copyholds who is not in possession may bring his bill against a mortgagor before admittance for a decree of foreclosure, and after he has obtained such a decree may bring his ejectment for the possession of

(*p*) Morris *v.* Clarkson, 3 Swanst. 558.
(*q*) See ante, p. 207.
(*r*) Ante, p. 207.
(*s*) Ante, p. 208.
(*t*) Acton *v.* Pierce & Saxby, 2 Vern. 480. But by 3 & 4 Will. 4, c. 104, copyholds are made assets for specialty and simple contract debts, ante, pp. 47, n. (*o*), 48, n. (*t*), 90, n. (*l*).

the mortgaged tenements (*u*); but the author apprehends that a mortgagee, after taking possession, would not be allowed in equity to compel payment of the mortgage money, by any proceedings at law upon the covenant or bond, against the personal representatives of the mortgagor, except on the terms of conveying the estate to or selling the same for the benefit of such personal representatives (*x*).

Where two or more mortgagees have equal equities, neither of them having got the protection of the legal estate, the incumbrances are available according to the priority of dates only (*y*). Yet the author apprehends that as between two equitable mortgagees of copyhold property, the second would be preferred, if he had obtained possession of the copies of court roll, and other documentary evidence of title, and particularly if he had procured a power of attorney from the mortgagor to a third person to surrender the property, and so acquired the means of getting in the legal estate, without resorting to a court of equity to give effect to his equitable lien.

It is, however, an established principle in equity, that there must be fraud, concealment, or gross negligence, to postpone a prior mortgagee of the legal estate, to a second mortgagee who obtains possession of the title deeds; and also that a prior mortgagee will not be postponed merely from the circumstance of his not having the possession of the title deeds (*z*).

But it is also a settled rule, that title deeds will not be taken away

(*u*) Sutton *v.* Stone & others, 2 Atk. 101. And in this case it was held, that although the plaintiff had not replied to the answer of the lord of the manor, yet desiring an act to be done by him, viz. the admitting him to the copyhold estate, he must pay the lord his costs, to be taxed by the master. And see Sayle *v.* Reeves, cited Gilb. Eq. Rep. 189.

The mortgagee must bear the expence of any surrender after a foreclosure; Hill *v.* Price, 1 Dick. 640.

(*x*) Whether the heir or executor of a mortgagee of copyholds is entitled in equity to the mortgaged premises, the equity of redemption not having been foreclosed or released, and there being no covenant for payment of the mortgage-money, see Turner *v.* Crane, 2 Ch. Rep. 242; S. C. 1 Vern. 170; 11 Vin. 150, pl. 52; sed vide Tabor *v.* Grover, 2 Vern. 367; S. C. 2 Freem. 227.

(*y*) Frere *v.* Moore & others, 8 Pri. 475.

(*z*) Plumb *v.* Fluitt, 2 Anst. 437, 440; Beckett *v.* Cordley, 1 Bro. C. C. 357 (n. 5); Tourle *v.* Rand, 2 Ib. 650 (n. 1); Evans *v.* Bicknell, 6 Ves. 183, 190; ante, p. 232. But a mortgagee of the equity of redemption may get in the legal estate if he can, and if he does, it gives him a priority over the first mortgagee; Barnett *v.* Weston, 12 Ves. 135.

In a late case, confirming the principle that the deposit of a copy of court roll is sufficient to create an equitable mortgage of copyholds, (ante, p. 206,) the creditor of a London publican took a *legal* mortgage of copyhold, with a knowledge of the practice of such publicans to deposit their leases with their brewers; and it was held, that it was such notice of the transactions between brewers and their debtors as would put a prudent man upon inquiry, and that the equitable mortgage of the brewers was intitled to priority over the legal one. Whitbread *v.* Jordan, 1 You. (Ex. Eq.) 303.

from a second mortgagee in favour of a prior one, the second mortgagee being without notice of the first security, except on payment of the money due upon the second mortgage (*a*). And no distinction is made in this respect between a deposit of title deeds of freehold property, and of copies of court roll of and other evidence of title to copyhold property (*b*).

The jurisdiction of the courts of equity would seem to extend to a claim of freebench, where the widow of a copyholder might prefer that mode of enforcing her right, to a plaint in the lord's court in the nature of a real action. This inference appears to the author to be justified by the principle of the analogous interposition of equity in a claim to dower at common law, namely, that the parties have such an intermixture of right, that it is best for them to have relief in equity, where the title to dower is admitted, and nothing remains to be done but to assign it (*c*).

It is to be recollected, that the courts of equity in all cases adopt the principle of the statutes of limitation, and will not afford relief when, if the case were within the jurisdiction of a court of law, any such statute could be pleaded in bar (*d*). So that an adverse possession of an equity of redemption for twenty years was a bar to any other claim of such equity of redemption, producing the same effect as abatement, intrusion, and disseizin with respect to legal estates (*e*).

(*a*) Head *v.* Egerton, 3 P. W. 281; Ex parte Kensington, 2 Ves. & Beam. 83, 1 You. & Jerv. 117. A covenant to surrender by way of mortgage cannot be set up against a person who afterwards takes a surrender to secure monies advanced to the covenantor, without notice of the prior security; Oxwith *v.* Plummer, 2 Vern. 636; 5 Bac. Abr. 43.

(*b*) Ex parte Warner, 1 Rose Bpt. Ca. 286; S. C. 19 Ves. 202.

(*c*) See Mundy *v.* Mundy, 4 Bro. C. C. 296, n. 3, (Belt's ed.); Co. Lit. 169 a (n. 2); ante, p. 485, n. (*k*). If the right is controverted, it must go to law; Mundy *v.* Mundy, sup.

In Oliver *v.* Richardson, 9 Ves. 222, the Master of the Rolls decreed an account of arrears from the death of the husband, though twelve years had elapsed before the filing of the bill. And see Dormer *v.* Fortescue, 3 Atk. 130, 131.

But by s. 41 of 3 & 4 Will. 4, c. 27, arrears of dower cannot be recovered beyond six years; ante, p. 77, n. (*n*).

(*d*) Widdowson *v.* Earl of Harrington, 1 Jac. & Walk. 532; 3 Madd. 189, in Pearce *v.* Newlyn; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 188; see S. C. 2 Barn. & Ald. 625; 4 Bli. App. C. Dom. Proc. 1st series 1, 105; Cuthbert *v.* Creasy, ib. 125; Foster *v.* Blake, ib. 140; Collard *v.* Hare, 2 Russ & Myl. 675.

(*e*) Per Lord Eldon, in Cholmondeley *v.* Clinton, Dom. Proc. 4 Bli. 105. And see Baron *v.* Martin, 19 Ves. 327; Pim *v.* Goodwin, 4 Bli. App. C. Dom. Proc. 133.

By the 28 section of 3 & 4 Will. 4, c. 27, where a mortgagee has obtained possession, a suit to redeem cannot be brought but within twenty years from that period, or from the last written acknowledgment.—But by 7 Will. 4 & 1 Vict. c. 28, persons intitled under any mortgage of land within the definition in the 1st sect. of 3 & 4 Will. 4, c. 27, may enter, or bring an action at law, or a suit in equity to recover such land, within twenty years after the last payment of any part of the principal or interest.

The author thinks it right, in conclusion of the present chapter, to notice that, although it is quite clear that equity will decree a partition of copyholds between *coparceners*, yet he has not been able to find any case where equity has entertained a suit for a partition of copyholds between *joint-tenants*, or *tenants in common;* and as the jurisdiction it has assumed on this subject in freehold cases (*f*) originated altogether in the expediency of affording its aid to a principle of common law (*g*), and to the provisions of the several statutes of partition of which some notice has already been taken (*h*), the decision that copyholds are not within those statutes induces him to conceive that a court of equity had, until lately, no authority to compel a partition between *joint-tenants* and *tenants in common* of land of copyhold tenure, even if the lord was assenting to it (*i*); and it was expressly so decided in the case of *Scott* v. *Fawcet* (*k*), which was a bill for a partition of a copyhold estate between tenants in common, and the Master of the Rolls (Sir *Thomas Clarke*) held that the parties were not entitled to a partition in equity, if not entitled by common law, or by act of parliament.

(*f*) Com. Dig. Chanc. (3 V. 6.), (4 E.); Mitf. 109. The general rule with respect to costs on a bill for a partition is, that no costs shall be given until the commission, and that the costs of issuing, executing, and confirming the commission, shall be borne by the parties in proportion to the value of their respective interests. See n. (6) Amb. 237, in Parker & Gerard, (2d ed.); Fonbl. 20, (n.)

(*g*) See 2 Freem. 26, in Manaton *v* Squire, where the Lord Chancellor is reported to have held, that the Court of Chancery had equal power to make partition by commission, as the common law had by writ of partition; Fonbl. 18, (n.) But note, that joint tenants, and tenants in common, could not compel partition at common law.

(*h*) Ante, p. 87. The stat. of 31 Hen. 8, c. 1, was passed to render *joint-tenants* and *tenants in common* of *freehold* lands of inheritance compellable, by writ, to make partition, in like manner as coparceners by the common law were compellable to do. And the stat. of 32 Hen. 8, c. 32, extended the powers of the last mentioned act to tenants for life or years of freeholds. The distinction between the right vested in coparceners at common law, and in joint-tenants and tenants in common by act of parliament, was recognised in the act of 8 & 9 Will. 3, c. 31, "for the easier obtaining partitions of [freehold] lands in co-parcenary, &c."

(*i*) Whether the lord's licence is necessary in a partition of copyhold lands, see ante, p. 87, n. (*y*).

(*k*) Dick. 299. And see Allnatt's Pract. Treat. on the Law of Partitions, p. 94, who after citing the case of Scott & Fawcet, adds, "However in Dodson *v*. Dodson, at the Rolls 1795, copyholds as well as freeholds were included in the decree for partition, and I understand it is the practice of the court to decree partition of lands of that tenure."

Sed vide contra, either where the bill relates to lands of copyhold tenure only, or to copyholds and freeholds intermixed; Horncastle *v*. Charlesworth, 11 Sim. 315.

Note, the power is given by the 85th sect. of 4 & 5 Vict. c. 35.

CHAPTER XVIII.

Of Extinguishment and Enfranchisement.

FIRST, OF EXTINGUISHMENT.

THIS term, as contradistinguished from enfranchisement, is more immediately applicable to a transfer of the copyhold interest from the tenant to the lord.

When a copyholder conveys his interest to the lord, whether by surrender or release, or bargain and sale, or does any other act indicatory of an intention to relinquish his tenancy (*a*), the copyhold interest is for ever extinguished.

And it has been decided that a release of copyholds to the grantee of the freehold operates as an extinguishment of the copyhold interest, the same as a conveyance to the lord of the manor, when there has been no severance of the freehold (*b*).

And the extinguishment created by the union of the copyhold and freehold interest will be for the benefit of a mortgagee or devisee, under any previous mortgage or devise of the manor (*c*).

If the lord have a limited estate only in the manor, even if he be a purchaser of the copyhold interest, it has hitherto been considered that such interest will merge for the benefit of the remainder-men (*d*), unless the lord make a re-grant of the property, to hold by copy (*e*): and equally so for the benefit of a person becoming entitled to the manor under an executory devise over, upon a union of the copyhold interest with the estate of the first devisee in fee of the manor (*f*).

(*a*) Blemmerhasset *v.* Humberstone, Hut. 65; S. C. Sir W. Jones, 41; S. C. (Hasset & Hanson), Win. 66; Scroggs, 192; 1 Ca. & Opin. 166; ante, pp. 123, 124. In one case it was held that a copyholder accepting his land to hold of the lord *by bill* under his hand, and not by copy, determined the copyhold interest; Colman *v.* Bedil, 1 Anders. 199; S. C. (called Collman *v.* Portman), 1 Leo. 191.

(*b*) Wakeford's case, 1 Leo. 102; Cro. Eliz. 21; Godb. 101, ca. 117. As the act of the lord cannot prejudice the copyholder's interest, such severance will not in itself operate as an extinguishment; Murrel & Smith, 4 Co. 24 b; S. C. Cro. Eliz. 252; Melwich & Luter, 4 Co. 26 a; S. C. Cro. Eliz. 102; Bell or Beale & Langley's case, 2 Leo. 208; 4 ib. 230; ante, p. 7 et seq.

(*c*) Roe *d.* Hale *v.* Wegg, 6 T. R. 708; Bunter *v.* Coke, 1 Salk. 238; Doe *d.* Gibbons *v.* Pott, Dougl. 710; ante, p. 33 et seq.

(*d*) See the cases supra, n. (*a*), and 2 Watk. on Cop. 354, who says, that in order to effect an extinguishment, the freehold and copyhold interests need not be commensurate with each other.

(*e*) St. Paul *v.* Viscount Dudley and Ward, 15 Ves. 167; ante, pp. 35, 36.

(*f*) King *v.* Moody, 2 Sim. & Stu. 579. In that case the lord was seized of the manor in fee, with an executory devise

But in the case of *Bingham* v. *Woodgate* (*g*) the Master of the Rolls held, that the effect of a union of the fee of a *customary freehold*, with the estate for life of the lord of the manor, was to suspend the seigniory during the lord's life, and that at his death the seigniory revived, and the fee of the customary tenements descended to his heir. The Master of the Rolls said, "If the lord had been seized of the fee of the manor, then the union would have extinguished the customary tenements; but extinguishment takes place only when the two estates have the same duration;" and he referred to Litt. sects. 559, 560, 561, and to Lord Coke's Commentary on those sections.

And it has been said, that a conveyance to a disseizor of the manor would not be an extinguishment (*h*); this distinction, however, appears to be very questionable (*i*).

If lands escheat, or are forfeited to the lord, it is an extinguishment of the copyhold interest (*k*), and consequently of all customs and privileges annexed to it (*l*).

And the author apprehends that this rule extends to copyhold lands, where the custom is in nature of gavelkind or borough-english tenure (*m*).

It is, however, to be recollected, that so long as the demisable quality of the estate subsists, it may be re-granted again by the lord, to hold by copy of court roll (*n*). This rule applies also to the case of an escheat (*o*), and to any commonable rights annexed to the copyhold interest (*p*).

over, and purchased an estate, partly freehold and partly copyhold, within the manor, and on an inclosure which took place he carried in two claims, one in respect of the devised and the other in respect of the purchased estate, and obtained two allotments. The executory devise over took effect, and the Vice-Chancellor held, that the copyhold part of the purchased estate being extinguished, passed with the manor to the executory devisee, who was therefore entitled to an apportionment of the allotment; and it was referred to the Master to apportion the allotment accordingly.

(*g*) 1 Russ. & Myl. 32. But see, as to the more immediate question involved in that case, post, tit. "Customary Freeholds."

(*h*) Pit v. Moore, 2 Show. 153; S. C. 2 Mod. 287; S. C. Sir T. Jones, 153; S. C. 1 Vent. 359; S. C. Skin. 28; S. C. Freem. 245; ante, pp. 95, 97.

(*i*) 1 Freem. 245; 1 Watk. on Cop. 75, 76.

(*k*) Berversham's case, 2 Vent. 345; 2 Ch. C. 194; ante, pp. 7, 14.

(*l*) 2 Sid. 19. All customs, as freebench, curtesy, &c., must of course cease with the extinguishment of the copyhold tenure, by any union of the freehold and copyhold interests; Dugworth v. Radford, W. Jones, 462; Lashmer v. Avery, Cro. Jac. 126; ante, p. 32.

(*m*) Ante, p. 32. But it seems that unity of possession does not destroy the custom of gavelkind or borough-english lands; ante, p. 32.

(*n*) Ante, pp. 15, 16, 98; 1 Ca. & Opin. 166.

(*o*) Even if the lord has continued the copyhold in his own hands for twenty years; Pemble v. Stern, 2 Keb. 213; S. C. Sir T. Raym. 165; ante, pp. 15, 92, 94, 98.

(*p*) Worledg v. Kingswel, Cro. Eliz. 794; S. C. 2 Anders. 168; Badger v. Ford, 3 Barn. & Ald. 153.

And on a re-grant by the lord, the tenant will hold discharged of the dower of the lord's wife, and all liens and charges which would have attached on the estate, if the demisable quality had been entirely destroyed (*q*).

But the copyhold interest may only be suspended by a union with the freehold, as if a copyholder in his own right become seized of the manor, or of the freehold interest in his copyhold tenement, in right only of another, or *vice versâ*, the copyhold interest will be suspended during the period of such union of interests (*r*).

So if a copyholder marry a feme seignioress, the copyhold interest will be suspended during the coverture only (*s*).

There is an anonymous case in Cro. Eliz. (*t*), where a copyholder in fee married the seignioress of the manor, and afterwards the husband and wife suffered a common recovery of the manor to the use of themselves for life, with remainder over: and it was held by Anderson, Meade and Periam, that the copyhold was extinct, for by the recovery the baron had gained an estate of freehold; but they all held, that by the intermarriage it was only suspended.

Stockbridge's case (also in Cro. Eliz.) (*u*) is thus reported: "Baron and feme copyholders, to them and their heirs, and the baron, in consideration of money paid by him to the lord, obtaineth an estate of the freehold to him and his wife, and to the heirs of their bodies; the baron dieth, having issue, the *feme* enters, and suffers a common recovery, and his heir enters by the statute of 11 Hen. 7 (*x*), and agreed the entry was lawful, for the copyhold, by the acceptance of the new estate, was extinguished."

It is stated in a note to Watk. on Cop. (vol. i. p. 355) that a question has occurred, whether, upon the descent of a copyhold in fee to a person already having the fee of the manor by purchase, subject to a lease of it for years, the lessee be entitled to call upon the tenant (his landlord) on whom the copyhold in fee has so descended, to come in and be admitted and pay to the lessee, as lord of the manor, the customary fines; and that Mr. Hargrave considered, that an absolute extinguishment in this case would work great injustice to the lessee, yet that he doubted whether, in strictness of law, such an effect would not be produced; but that probably a court of equity would relieve against the extinguishment. The note

(*q*) Swayne's case, 8 Co. 63 b; Sneyd *v.* Sneyd, 1 Atk. 442; ante, p. 98.

(*r*) 1 Watk. on Cop. 358. See as to the suspension of seigniory, rent, &c., Ascough's case, 9 Co. 134; Kitch. 160, cites 6 Hen. 4, 2. Vide also as to suspension of rent, Vaugh. 39, 199; infra, n. (*y*).

(*s*) Co. Cop. s. 62, Tr. 142; Lex Cust. 231.

(*t*) P. 7.

(*u*) Cro. Eliz. 24.

(*x*) C. 20; ante, p. 86, n. (*u*).

concludes with the following references on the point; Litt. sect. 231; 4 Co. 31; Cro. Eliz. 459; *Doe* v. *Pott*, 2 Doug. 710; Dyer, 10 a, 250 b. The author must confess that the case does not present to his mind the difficulty which is stated to have been felt by Mr. Hargrave. The rule that nemo potest esse dominus et tenens, obviously applies only to a union of the tenancy with the immediate reversionary ownership; and in the case supposed, the union is of the legal *customary* fee-simple *in possession*, with the legal *freehold* and inheritance in fee-simple *in remainder*, subject to and expectant upon the determination of a term of years created out of the freehold interest, so that during the term of years the reversionary lord may, with perfect consistency, be tributary, with respect to the copyhold estate, to the termor of the manor. Such a case might be assimilated to the purchase by a remainder-man in fee of a term of years, granted, under a power to lease, by the tenant for life in possession (*y*).

A copyhold interest may also be extinguished by the annexation of the freehold to the copyhold, as if a copyholder accept a lease for years from the lord of his copyhold tenement, or accept a conveyance, or even a lease for years of the *manor*, or if the manor descend to him, in either case the copyhold interest would be extinguished (*z*). In the former instance, however, that is, by the acceptance of a lease of the particular tenement, the copyhold interest would be absolutely extinguished; but in the latter instance, that is, by the copyholder's

(*y*) See the case of Burton *v.* Barclay and Perkins, 7 Bing. 745, and the authorities there referred to on the doctrine of merger and suspension; and which case confirmed the principle established by Williams & Bosanquet, 1 Brod. & Bing. 238, that a mortgagee is liable in covenant, though he has not taken possession. Note also, that a lessee cannot maintain covenant against the executor of a tenant for life; Adams *v.* Gibney, 6 Bing. 656.

(*z*) Hide & Newport, 17 Eliz. Mo. 185; 4 Co. 31 b; Lane's case, 2 Co. 17 a; S.C. (Smith *v.* Lane), 1 Leo. 170; 1 Anders. 191; Gouldsb. 34, ca. 9; French's case, 4 Co. 31; Gybson *v.* Searl, Cro. Jac. 84, 176; Curtise & Cottel's case, 2 Leo. 72; Godb. 11, ca. 16; ib. 101, ca. 117; Tracey *v.* Noel, M. 2 Jac. Lex Cust. 325; Mo. 185, ca. 330; Lat. 213; 1 Brownl. 32; Kitch. 172; Co. Cop. s. 62, Tr. 141, 142; 1 Watk. on Cop. 360. But see Sav. 70, 71, ca. 146. And note, Kitch. 171, says, "If a copyholder of a manor takes a lease for years of this manor, seek if his copyhold be extinct." Even if a copyholder take a conveyance of the manor in joint-tenancy, it should seem that the copyhold interest would be extinguished, as joint tenants are seized *per mie et per tout*; 1 Wat. on Cop. 357; Calth. 74, 2d ed. And by Calth. p. 74, if a manor be leased for years, and a copyholder purchase the reversion in fee, by this the copyhold is destroyed, and the lessee of the manor may oust the copyholder, and hold the land during his term. And see Lex Cust. 226. Vide also the case of a demise of copyhold by the lord to *C.* for life, and a subsequent conveyance of the freehold interest to *B.* for life, reserving a rent, and then a grant to *C.* by fine *come ceo, &c.*, who accepted the rent of *B.*; and it was questioned whether the copyhold of C. were gone in conscience; 28 Hen. 8.; Compton *v.* Brent, Dyer, 30 b; Cary, 8.

accepting a conveyance or a lease for years of the manor, or becoming entitled to the manor by descent, although the extinguishment would be complete by the union of the freehold and copyhold interest, yet the copyhold tenement would remain demisable, and might therefore be re-granted again, to hold by copy (*a*).

So again, an extinguishment of the copyhold interest would be produced by the copyholder's joining with the lord in a feoffment of the manor (*b*).

But there is this essential difference between a conveyance of a *portion* of the copyhold interest by the tenant to the lord, and a conveyance of a *portion* of the freehold interest by the lord to the tenant, namely, that in the former instance the portion only of the copyhold interest so conveyed to the lord will be extinguished, but the latter will operate as an extinguishment of the whole copyhold interest for ever (*c*).

To exemplify this, if a copyholder in fee surrender to the use of the lord for life, with remainder over to a stranger, or reserving the reversion to himself, it will only be an extinguishment of the estate so limited to the lord, and will not affect the remainder or reversion (*d*); but if a copyholder in fee accept a common-law lease of his copyhold tenement, either from the lord or his grantee, the whole copyhold interest will be extinguished (*e*), but for which circumstance, indeed, the latter might with more propriety be deemed an enfranchisement.

And when a copyhold interest is extinguished by the acceptance of a common-law lease from a person having a limited interest only in the manor, the demisable quality of the copyhold land will not be destroyed, so as to prevent the remainder-man or reversioner from re-granting by copy, after the determination of the particular interest in the manor. So a lease for years of an escheated copyhold, the lessor having a limited interest only in the manor, will destroy the custom to re-grant by copy, to the extent only of such limited interest (*f*).

(*a*) French's case, 4 Co. 31 b; cites Hide & Newport's case, ubi sup.; Gybson *v.* Searl, ubi sup.; ante, pp. 15, 98.

(*b*) God. 11, ca. 16.

(*c*) See Kitch. 171. By a release of the seigniory in a part of the tenancy, all the seigniory is gone; 6 Co. 1 b, in Brueton's case.

(*d*) Co. Cop. s. 34, Tr. 72; and see Curtise & Cottel's case, 2 Leo. 72.

(*e*) Ante, 547, n. (*x*). And in the instance of a feoffment on condition, the copyhold interest will not revive on entry for the condition broken; 4 Co. 31 a; ante, p. 98.

Acceptance of the office of bailiff of the manor will not extinguish the copyhold interest; Gybson & Searl, Cro. Jac. 176. Nor will the acceptance by a lessee for years of a manor, of the office of steward for life, be a merger of the term; ib., cites Sir Valentine Brown's case.

(*f*) Conesbie *v.* Rusky, Cro. Eliz. 459 b; 2 Roll. Abr. 271; Field *v.* Boothby, 2 Sid. 17, 35, 81, 137; 6 Vin. p. 158; ante, 16, 98.

Where the lessee for lives of a manor made a lease for years of a copyhold tenement, and afterwards surrendered the lease of the manor to the lord of the fee, the Court of King's Bench held, that although the lease of the copyhold was not warranted by the custom of the manor, and though it suspended the copyhold tenure, yet it was good to pass an interest, which could not be avoided by the lessee under a renewed lease of the manor during the continuance of the surviving life named in the original lease of the manor, notwithstanding the surrender of that estate (*g*).

A suppositious case is put in a note to Watk. on Cop. (vol. i. p. 355), of a descent of the manor upon an unadmitted mortgagee of a copyhold estate; and which is followed up with the observation, that on the suggestion of the particular case to a gentleman of the first eminence, he considered the copyhold tenure as absolutely extinguished, and advised a new grant, as the only means of reviving the copyhold tenancy; for that immediately on the presentment of the surrender and condition broken, the mortgagee became entitled to be admitted tenant, which admission had become impossible, or, at least, that the necessity of it was superseded. The learned editor suggests, that the legal estate outstanding in the mortgagor would prevent an extinguishment at law, and yet that it might be argued, that there is no difference between such a case, and that of a surrender to the lord's use, where there is a clear extinguishment. There is, however, this obvious distinction between the two cases, namely, that in a surrender by a copyholder to the lord's own use, there is a manifestation of a desire to determine the copyhold interest, and bring the freehold into possession, and that in a surrender to a person by way of mortgage, who afterwards becomes seized of the manor by descent, there is a total absence of any such indication of intention, and, in the case supposed, there would, in legal strictness, be no union of the freehold and copyhold tenure.

It is to be recollected that the law of extinguishment is perfectly distinct from that of *merger*, which latter doctrine, however, is equally applicable to copyhold tenure. In the case of *Dove* v. *Williot* (*h*), *A.*, tenant for life, and *B.*, remainder-man in fee of a copyhold, joined in a surrender to the use of *B.* in fee, and it was held that a lease previously granted by *B.* was good even in the life of *A.*; and that by the surrender of the tenant for life to the use of him in the remainder, his estate was drowned in the fee, and as it were extinct, and could not hinder the lease to have operation; and the court thus

(*g*) Doe *d.* Beadon *v.* Pyke, 5 Mau. & Selw. 146; and see Shep. T. 300, 301; Co. Lit. 338 b; Davenport's case, 8 Co. 145 b.

(*h*) Cro. Eliz. 160; and see S. C. somewhat differently reported, 1 Leo. 174; vide also Preston on Merger, 541.

illustrated the point, "as if he in the remainder grants a rent charge, and after the tenant for life doth surrender, the rent shall commence presently."

And supposing a copyholder to have granted a lease, either with the lord's licence, or in virtue of an established custom, and the lessee afterwards to assign his interest to the copyholder, the author apprehends that by the union the term would merge in the estate of the lessor, although the lease created a common-law interest (*i*).

SECONDLY, OF ENFRANCHISEMENT (*j*).

An enfranchisement is a conversion of copyhold into freehold tenure, by a common-law conveyance of the fee simple of the particular

(*i*) Ante, p. 460.

(*j*) In calling the attention of the reader to the second division of the Commutation and Enfranchisement Act, 4 & 5 Vict. c. 35, viz. the enactments for facilitating the conversion of copyhold and customary tenure into free and common socage by enfranchisement, i. e. by the annexation of the freehold and fee simple of the manor to the copyhold or customary interest of the tenant in possession, the reader is referred to the act in the Appendix, and the notes thereon: but the following observations may serve to illustrate the principal provisions of the act, in their applicability to the subject of the present chapter.

The statute embraces four objects:—

1st. The reduction of arbitrary or uncertain fines, payable on admission to copyholds and customaryholds, or privileged copyholds, to an amount certain and nominal, upon an adequate compensation to the lord and steward of the manor.

2ndly. The extinction, on fair and equitable terms, of the services of quit-rents, reliefs and heriots, each of which services embraces very considerable freehold property, as well as copyholds and customaryholds.

3rdly. The annexation of the lord's proprietory interest in the timber standing on copyhold property to the tenant's possessory interest, upon adequate terms of compensation, and with liberty, by *express* agreement, to include in that arrangement the lord's proprietory interest in any mines and minerals under the copyhold lands.

And, 4thly, by means of such commutation of fines and other manorial rights, to give encouragement to the conversion of all lands throughout the kingdom into the tenure of free and common socage.

In all cases where, previously to the above statute, an enfranchisement of copyholds or customaryholds could have been effected by lords of manors seized absolutely in fee, or by trustees under the usual powers contained in settlements and wills, the enfranchisement may now be accomplished, under the powers of the act, by persons seized of the manor for life, or other particular interest only, with the consent of the commissioners, and giving notice to the party entitled to the next estate of inheritance in remainder or reversion, or, if under the disability of infancy, coverture, lunacy, &c., then to his or her guardian, husband, committee, or trustee, when known or ascertained, and when not so, then to some person to be nominated for the purpose by the commissioners (s. 56).

The act of parliament contains all proper directions and powers for investing the consideration money for enfranchisements in the Bank of England, in the name of the accountant-general of the Court of Exchequer, ex parte "The Copyhold Commissioners," for the benefit of the

tenement (*k*) by the lord of the manor to the copyholder (*l*). And it has been decided that a person who has been admitted and recognised as the lord's tenant, although in strictness he should have an equitable interest only, is capable of receiving a grant of the freehold, for giving effect to a contract of enfranchisement; and that the heir may accept an enfranchisement before admission (*m*); and it may be presumed from the same case, that a conveyance of the freehold to an unadmitted surrenderee or devisee of copyholds, would amount to an implied admittance, and so operate as an enfranchisement.

But it should seem that if a copyholder be enfeoffed by the lord to the use of others, the copyhold interest will be preserved by the saving of the statute of uses, 27 Hen. VIII. c. 10, s. 3 (*n*).

particular tenant of the manor, and the remainder-men or reversioner, when exceeding in amount 20*l.* (ss. 73, 74): and has made provision for lords of manors entitled to a limited interest only, where the commissioners shall have deferred payment of the consideration money for enfranchisement under the powers vested in them for that purpose (ss. 60, 62, 63).

And the act has also enabled persons, having a life or other limited interest only in copyhold or customaryhold lands, to accept of an enfranchisement or *legal* union of the freehold with the copyhold or customary *inheritance*, for the benefit of such particular tenant, and all persons entitled to the land in remainder or reversion. And should all or twelve of the tenants concur, such enfranchisement may be effected by a schedule of apportionment agreeed on with the lord, or prepared by the steward, and in either case to be confirmed by the commissioners (s. 56); and if the agreement should not be entered into by all the tenants, or the number should be less than twelve, or (whatever may be the number) if the parties think fit, the enfranchisement may be made with the consent of the commissioners by such deed as would have been adopted if the lord were seized of the manor in fee simple in possession (s. 57).

But in all cases of apportionment, the commissioners, if required by three or more tenants, are to satisfy themselves of the title of the lord to the manor (s. 58).

The act has subjected the enfranchised lands to the apportioned parts of the consideration money for enfranchisement, and declared that the person seized of the manor for the time being shall stand seized as mortgagee in fee of such lands, for the security of such sums respectively, and lawful interest (ss. 70, 71): and has also empowered any tenant of enfranchised lands to charge the same with the payment of such sums, and the costs of such charge, and lawful interest, to any person advancing the same sums, and to demise the lands to him by way of mortgage for a term of years (s. 72): and, consistently with the powers which the act has so vested in persons having only a limited interes in manors or lands, it has enabled them respectively to charge such manors or lands with the costs to be incurred in relation to such enfranchisements (ss. 68, 69).

(*k*) A conveyance of the whole manor would be an extinguishment of the copyhold interest, and not an enfrauchisement; ante, p. 547, n. (*x*).

(*l*) A conveyance by a stranger, to whom the lord had previously conveyed the freehold, is equally an enfranchisement, as a conveyance *immediately* from the lord to the copyholder; Lane's case, 2 Co. 16 b, &c.; ante, pp. 544, 548.

(*m*) Wilson *v.* Allen, 1 Jac. & Walk. 611.

(*n*) Ised's case, cited 7 Co. 38 a.

It has long been a prevailing opinion, that an enfranchisement is also produced by a release from the lord to the copyhold tenant of *all* seignioral rights (*o*); and the reason given for this is, that the lands are thenceforth held immediately of the lord paramount (*p*). That this would be the effect of such a release in the case of land of ancient demesne tenure, by turning the ancient demesne into free and common socage, there can be no possible question (*q*); but it is to be recollected that the freehold of ancient demesne land is in the tenant, and not in the lord; and although the customary inheritance of a copyholder is capable of being enlarged into an estate of freehold, by a release of the lord's reversionary interest (*r*), yet it may admit of a doubt, whether a mere release to a copyholder of all seignioral rights, without the use of any words capable of being construed into an actual conveyance of the reversionary freehold interest, operating therefore as an enlargement of the copyholder's estate, and consequently as a severance of the particular tenement from the manor (*s*), would be held to have the effect at law of an enfranchisement (*t*); although such a release, founded on a valuable consideration, would no doubt, in equity, be considered as a contract for an enfranchisement.

When the lord has only a limited interest in the manor, he is, independent of legislative enactment, precluded from carrying a treaty of enfranchisement into complete effect; and, as we have seen, that the acceptance of a conveyance of a portion only of the freehold interest would operate as a merger of the whole of the copyhold, the two estates being incompatible, it behoves every copyholder, who is desirous of enfranchising his estate, to satisfy himself that the lord is seized of the manor for an estate in fee simple, or, at all events, that a power has been reserved to him to grant the freehold and inherit-

(*o*) A release by the lord to a copyhold tenant of the quit rent or any specific service, would, the author apprehends, operate as a merger only. See Fawlkner *v.* Fawlkner, 1 Vern. 21.

(*p*) 2 Inst. 502, 504; Co. Lit. 102 b, 280 a; 1 Wat. on Cop. 366, 367.

(*q*) Doe *&* Huntington, 4 East, 271; and see Preston on Merger, 542.

(*r*) Sammes's case, 13 Co. 55; and see as to a release to a tenant at will, Co. Lit. 270 b.

(*s*) The author apprehends that in an ordinary case of enfranchisement there is an absolute merger of the copyhold estate, even so as to accelerate the charges upon the manor; and see Preston on Merger, 541, 542. But this has been questioned, on the supposition, probably, of the possession being still held, after the enfranchisement, under the copyhold title, excluding therefore the general principles applicable to an enlargement of estates for years, &c. by release and confirmation, and for which distinction, with regard to copyhold lands, the anthor is not aware of any authority, unless indeed the case of Doe *d.* Newby *v.* Jackson, post, p. 553, can be deemed one.

(*t*) The reader is referred to an interesting note on this subject in Mr. Atherley's edit. of Shep. Touchst. p. 332.

ance of the copyhold tenement, or that he is acting under some special authority created by act of parliament (*u*).

It would seem to be settled, that a contract for the sale of an estate as freehold, which turns out to be copyhold, cannot be enforced in equity (*x*), should the vendor not be able to procure an enfranchisement; but the case of *Hick* v. *Phillips* (*y*) is not considered as an authority against the aid of equity, under an offer to obtain an enfranchisement of a copyhold estate sold as freehold, the decree in that case appearing to have been induced by the unreasonableness of the price (*z*).

The conveyance by way of enfranchisement should always be taken in the name of the copyholder, and not to a trustee, or the copyhold interest will still subsist (*a*), so that the wife of the copyholder, if dowable by the custom, would remain so, and the heir be entitled to recover in ejectment against the purchaser of the freehold interest from his ancestor, who would be driven to equity for relief. This relief was sought in *Dancer* v. *Evett* (*b*), in which a demurrer to a bill of review to reverse the decree against the heir of the copyholder was allowed. Particular attention should be given to this point, in the frequent instances of enfranchisements under powers in marriage settlements, where, if the freehold be limited to a trustee (for the copyholder) and his heirs, to uses to bar dower, the legal inheritance of the freehold would vest in the trustee by the appointment, and the copyhold interest, therefore, would not unite with it.

(*u*) A power to enfranchise is given to persons having a particular interest only, by the Land Tax Redemption Act, 42 Geo. 3, c. 116; and by the New Church Building Act, 58 Geo. 3, c. 45. And the Commissioners of Woods and Forests are authorised to enfranchise copyhold land held of the crown manors, by 10 Geo. 4, c. 50. See extract in the Appendix.

The 7 & 8 Vict. c. 65, authorizes the council of the Duke of Cornwall during his minority to sell or exchange any of the possessions of the duchy, and to enfranchise any copyhold or customary tenements holden of any manor belonging to the duchy, and to purchase any freehold hereditaments, or any copyhold hereditaments, the freehold whereof should be in the Duke of Cornwall: and the 25th section authorizes the duke to grant licences to copyhold tenants for building and other purposes: and the 26th section enables him to grant sites for churches, &c. The 7 & 8 Vict. c. 105, contains enactments applicable to conventionary tenements within the several assessionable manors mentioned in the first and second schedules to the act, belonging to the duchy of Cornwall, and for converting into freehold tenure such tenements held of any of the manors mentioned in the first schedule as should be determined to be conventionary.

(*x*) Twining *v.* Morrice, 2 Bro. C. C. 330, Belt's ed.; 1 Sugden's Vend. & Purch. 487.

(*y*) Pre. Ch. 575.

(*z*) 10 Mod. 504; Sugd. ut sup.

(*a*) Howard *v.* Bartlet, Hob. 181; S. C. Walter & Bartlett, 2 Roll. Rep. 178; S. C. Waldoe *v.* Bertlet, Cro. Jac. 573; Palm. 111; Lashmer *v.* Avery, Cro. Jac. 126; and see Murrel *v.* Smith, 4 Co. 24 b.

(*b*) 1 Vern. 392.

An enfranchisement by a person having a limited interest only in a copyhold estate, is an absolute enfranchisement for the benefit of those entitled in remainder (*c*), and the devisee or heir of the person so enfranchising will be decreed in equity to convey the legal freehold, on payment of a due proportion of the consideration money for such enfranchisement (*d*).

The above authorities are only confirmatory of the case of *Croft & Lyster*, decided February 22, 1675 (*e*), where husband and wife were joint-tenants of a copyhold for life, remainder in fee to the wife, the husband purchased the freehold and took a conveyance to the use of himself and his wife, and their heirs, and after the husband's death the wife surrendered to the use of a daughter by a former husband, which was decreed accordingly against the heir of the wife and second husband.

In a late case (*f*), *A.*, whose wife had been admitted in fee to land in Cumberland, to hold according to the custom of tenant right, took a conveyance of the freehold from the trustees for sale of the manor, to himself and his heirs, by a deed in which the operative words were "*grant, bargain, sell, alien, enfeoff and confirm*," and upon which livery of seizin was afterwards given. It was contended that the effect of the deed was to create a new estate, descendible to the heirs ex parte paternâ: that if it operated as an extinguishment, then, on the death of the husband, the legal estate descended to his son, subject to a trust for the mother, on whose death the equitable estate would merge; and if as a suspension, then, according to Cro. Eliz. 8, Anon., the freehold and customary estates uniting in the son, would create a new estate, descendible ex parte paternâ. On the other side it was urged that the deed merely operated as an enfranchisement, the only effect of which was to release the services, and not to alter the descent; that if the deed was to be considered as a grant to a stranger, then the customary estate would not be destroyed, but become free; and that if the customary estate did not, under the circumstances, become free, then the freehold had a separate existence, and both that and the customary estate being left to descend, the latter would go to the heirs ex parte maternâ, and the former to the heirs ex parte paternâ. The court said it was not necessary to de-

(*c*) Wynne *v.* Cookes, 1 Bro. C. C. 515; Roe *d.* Clemett *v.* Briggs, 16 East, 415.

(*d*) Wynne *v.* Cookes, sup.; vide also Wilson *v.* Allen, 1 Jac. & Walk. 621. But a remainder-man would have no equity against a tenant in tail in possession. See Blake *v.* Blake, 3 P. W. 10, n. (1); Cann *v.* Cann, 1 Vern. 480.

(*e*) Cited in Bradley & Bradley, 2 Vern. 164.

(*f*) Doe *d.* Newby *v.* Jackson, 1 Barn. & Cress. 448; S. C. 2 Dow. & Ry. 514.

termine that point, which was one of considerable difficulty (*g*), and they abstained from giving any decided opinion upon it; but intimated that they thought the deed operated as an enfranchisement *before livery of seizin was given*, and that the course of descent was not thereby altered.

If a copyhold estate be enfranchised by a tenant in tail, the issue in tail will be barred: this was adjudged in *Parker* v. *Turner* (*h*), where tenant in tail, with remainder to himself in fee, having enfranchised and sold, the Lord Chancellor held that the purchase of the freehold attracted the copyhold interest, and that the purchaser should hold against the issue in tail.

The same point was decided in *Dunn & Green* (*i*), principally on the ground that if the intail of the copyhold were not extinguished it would be a perpetuity, as no recovery could afterwards have been suffered in the lord's court (*k*).

The remainder-men are also barred by the enfranchisement of the tenant in tail in possession, see *Challoner* v. *Murhall* (*l*), which case has been thought to have gone a step beyond the principle of *Parker & Turner*, and others of that class, and to have decided that the union of the estate of the lord with that of the copyholder for life, will be sufficient in equity to destroy the estate tail and all remainders over; but this, the author submits, is a very erroneous deduction from the authority of the case in question, for it is observable that there was a union of the inheritance of the freehold and copyhold interests; the fee simple of the freehold, which was granted by the lord of the manor, having descended to the tenant in tail of the copyhold as the son and heir of the grantee, and the son had disposed of the premises by his will as freehold; and this descent and disposition, the author conceives, alone influenced the Chancellor's decision; for he cannot imagine that a court of equity would allow an enfranchisement by a tenant for life to be not only for the benefit of all interested in the estate, as in *Wynne & Cookes*, but to operate as a bar

followed in Hart 41 Ch. D. 527

(*g*) Ante, pp. 549, 550; and see the case of Rich v. Barker, Hardr. 131; Preston on Merger, pp. 541, 548.

(*h*) 1 Vern. 393, 458; S. C. (Barker v. Turner), 2 Ch. Ca. 174; see also Challoner v. Murhall, 2 Ves. jun. 524; 3 Ves. 127, 128; 4 East, 283; ante, p. 66.

(*i*) 3 P. W. 10.

(*k*) It is proper to attend to the reason here assigned, as it is well known that an estate tail in freeholds does not merge by an accession of a greater estate; Wiscot's case, 2 Co. 61 a; and see 3 Prest. on Conv. 29.

(*l*) Ubi sup. But see Bernard v. Simpson, Clayt. 138; Taylor v. Shaw, Cart. 23, 24, which cases, however, cannot be considered of any weight in opposition to the express authorities which the author has cited in favour of the general proposition, that the issue and remainder-men are barred, by an acceptance of the freehold by the tenant in tail in possession.

to the estate tail and other remainders, without the privity or concurrence of the first tenant in tail. The above peculiar distinctions in the case of *Challoner & Murhall,* appear to have occurred to the late Mr. Serjeant Hill, according to a MS. note which the author found among some valuable relics of that learned gentleman.

A question arose on a petition in *Merest* v. *James* (*m*), whether, when one has an *equitable* estate tail in a copyhold, with a remainder expectant on such estate tail, and the legal fee descends to him, the equitable estate tail is merged in the legal fee, and the remainder defeated. But the Vice Chancellor held, that in order to operate a merger, the equitable and legal estate must be of the same quality. And it is clear that wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former (*n*).

The right of common in the wastes of the lord of the manor is extinguished by enfranchisement (*o*), unless specially preserved to the copyholder under terms equivalent to a re-grant of common (*p*); and it has been held that the grant of all *appurtenances* to the copyhold tenement will not prevent the destruction of the common (*q*); it is therefore usual to insert a re-grant of the commonable rights in the deed of enfranchisement.

And a power to that effect should be given to the trustees, in addition to the usual power of enfranchising, in marriage settlements.

But although the right of common is destroyed at law by an enfranchisement, it will subsist in equity (*r*).

(*m*) 6 Madd. 118; ante, p. 64.

(*n*) Philips *v.* Brydges, 3 Ves. 126; Selby *v.* Alston, ib. 341; Goodright *d.* Alston *v.* Wells, 2 Dougl. 771.

(*o*) Bradshaw *v.* Eyr, Cro. Eliz. 570; Worledg *v.* Kingswel, ib. 794; S. C. 2 And. 168; Fort *v.* Ward, Mo. 667; Marsham *v.* Hunter, Cro. Jac. 253; S. C 1 Bulst. 2; S. C. (called Massam *v.* Hunter), Yelv. 189; S. C. (called Darson *v.* Hunter), Noy, 136; S. C. (Massam *v.* Hunt), 1 Brownl. 220; Marsam *v.* Hunter, 2 ib. 209; Grymes *v.* Peacock, 1 Bulst. 18; Tyrringham's case, 4 Co. 38 a; Co. Lit. 122 a; Styant *v.* Staker, 2 Vern. 250; Speaker *v.* Styant, Comb. 127; Crowther *v.* Oldfeild, 1 Salk. 170, 366; S. C. Holt, 146; S. C. 6 Mod. 20; Com. Dig. Cop. (K. 6); Gilb. Ten. 224; Barwick *v.* Matthews, 5 Taunt. 375; S. C. 1 Marsh. 50; ante, tit. "Prescription."

(*p*) Speaker *v.* Styant, Comb. 127; Doidge *v.* Carpenter, 6 Mau. & Selw. 49.

(*q*) Bradshaw *v.* Eyr, Marsham & Hunter, and Styant & Staker, sup.; Gilb. Ten. 224; Lee *v.* Edwards, 1 Brownl. 173.

(*r*) Styant & Staker, sup.

In the case of Lady Lanesborough, Appel., and Ockshott, Resp., 1 Br. P. C. 151, the lord had entered into an agreement with his copyhold tenants for inclosing part of a common; the tenants released their right of common, and the lord his quit rents and services: the inclosure did not take effect, and the tenants continued to enjoy their right of common, and the lord to receive his rents and services. The agreement was held to be waved, and the releases decreed to be cancelled.

And it has been adjudged, that common in the waste of the lord out of the manor is not lost by enfranchisement, for the copyholder hath it as belonging to his land, and not to his estate (*s*): and also that if a copyholder has immemorially enjoyed a right of way over another's copyhold, and he become the purchaser of the freehold of his own copyhold, yet the way remains (*t*), for as between the copyholder and a stranger, it is the tenure only that is altered by the enfranchisement (*u*).

And it should seem that a way of necessity is not extinguished by unity, contrà if it be a way of easement or pleasure (*x*).

In adverting to the subject of a conversion of copyhold tenure into freehold, the author thinks it right to suggest, that when an allotment is made to a copyholder of waste or other freehold land, under an act of parliament not containing a provision that the allotted land shall be held by the same tenure as the estate in respect whereof the allotment is made, no change of tenure will take place in the land so allotted (*y*); and that a copyholder, therefore, in a case of that nature, would have had a right to vote at an election for the county in respect of such freehold allotment, even before the act of 2 Will. IV. (*z*).

(*s*) Grymes & Peacock, Tyrringham's case, Crowther & Oldfeild, Barwick & Matthews, ante, p. 555, n. (*o*); Co. Lit. 122 a; Com. Dig. Cop. (K. 6); Revell & others *v.* Jodrell, 2 T. R. 421; but see Leets & Edwards, Hob. 190; Lee *v.* Edwards, 1 Brownl. 173.

(*t*) Empson & Williamson, 1 Roll. Abr. 933; Lex Cust. 233; 1 New Abr. 482.

(*u*) Vide Rich *v.* Barker, Hardr. 131; but see also Preston on Merger, pp. 542, 548; ante, pp. 552, 554.

(*x*) Clark *v.* Cogge, Cro. Jac. 170; 8 T. R. 55; Jorden *v.* Atwood, Ow. 122; and see, in connexion with that case, Packer *v.* Welsted, 2 Sid. 39, 111; 11 Vin. 446. In Simpson *v.* Telwright, 2 Lutw. 1248, the lessee of a coal mine claimed a right of way over a copyhold of inheritance, as a consequence of an enfranchisement by the copyholder subsequently to the demise of the mine. It did not appear to be a way of necessity, and the court were therefore at first of opinion against the plaintiff, but the case was adjourned, and afterwards compromised.

(*y*) Doe *d.* Lowes *v.* Davidson, 2 Mau. & Selw. 175; and see Doe & Hellard, 9 Barn. & Cress. 789; ante, p. 20 et seq.; infra, n. (*z*).

(*z*) C. 45. Mr. Rogers in his "Law and Practice of Elections," in discussing the right of voting in respect of fee-farm rents and rents charge, observes, (vol. i. p. 177), that all such rents are considered freehold, and give a right to vote, although, as it should seem, they issue out of lands in right of which the proprietor could not vote; and he adds the following note: "In some cases the nature of the estate itself does not admit of its owner having a freehold tenure in it; therefore a man cannot vote for the advowson of a church, or for common of pasture; but for the free warrens of conies, the profits of wood sales, coal mines, tithes impropriate, or the like, in which he has an estate for life, and producing *communibus annis* 40*s.* by the year, he is entitled to vote. Tithes of copyhold lands have been held to give a

The author apprehends that since the statute of *quia emptores*, 18 Ed. I., the services rendered by a copyholder to the lord cannot be reserved on an enfranchisement, which is a conveyance away of the reversionary estate in respect of which those services were due (*a*); but that after such enfranchisement, the estate will become frank-fee, and be held of the superior lord; and that if a rent be reserved on a grant of the freehold, it will be a rent upon contract or rent-charge, and not a rent service (*b*).

And the observations of the court in *Griffith* v. *Clarke* (*c*), that the rent, suit of court, &c., continued by the saving as the remnant of the ancient seigniory, the custom only being extinguished by the release, and which were adopted by Lord Ellenborough in *Doe* v. *Huntington* (*d*), would seem to apply solely to a release or confirmation of lands of ancient demesne tenure, where the freehold is in the tenant; and there the exception of an existing rent stands on the same footing as a conveyance in fee of freehold lands, reserving a perpetual annual rent, with power to distrain for any arrears (*e*).

An enfranchisement will be presumed even against the crown, to support a very long possession: this was decided in *Roe* d. *Johnson*

right to vote; at the last York election, a person tendered his vote for an allotment of common made to a copyhold estate, and it was allowed."

On the subject of the exclusion of copyholders from the right of voting at elections, vide the second part of this Treatise, tit. "Customary Freeholds." But see 2 Will. 4, c. 45, "To Amend the Representation of the People in England and Wales," and by which (sect. 19) it is enacted, "that every male person of full age, and not subject to any legal incapacity, who shall be seized at law or in equity of any lands or tenements of *copyhold* or any other tenure whatever except freehold, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than ten pounds over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for the county, or for the riding, parts or division of the county, in which such lands or tenements shall be respectively situate."

(*a*) Ante, pp. 551, 552.

(*b*) Bradshaw *v.* Lawson, 4 T. R. 443; Doe *d.* Reay *v.* Huntington & others, 4 East, 271, 290; and see Griffith *v.* Clarke, Mo. 143, 144; Chetwode *v.* Crew & others, Willes, 614; 7 Taunt. 618, in Moore *v.* Lord Plymouth.

(*c*) Sup.

(*d*) Sup.; but see Doe *d.* Jackson, ante, pp. 553, 554.

A grant by the lord of the freehold interest in copyhold lands will be presumed in support of the title to a rent received for twenty years; Steward *v.* Bridger, 2 Vern. 517; ante, p. 366.

(*e*) The power of distress would be incident to the rent; but even the reservation of a power of entry and perception of the rents, or a condition of re-entry and ouster, would be good, although no reversion were left in the feoffor or releasor; see Co. Lit. 201 a & b; Doe *d.* Freeman *v.* Bateman, 2 Barn. & Ald. 168. An assignee of a rent may maintain debt; see Allen *v.* Bryan, 5 Barn. & Cress. 512, and the authorities there cited.

v. *Ireland* (*f*), where the question for the opinion of the court was, whether the judge ought not to have left it to the jury upon the evidence to have presumed an enfranchisement by the crown, although the manor was out on lease from 1636 to 1804: the last act on the rolls of the manor was in 1636; no mention appeared in the entries on the rolls of the rent, but there was evidence that 6*s.* 6*d.* was the old copyhold rent; and in a parliamentary survey in 1649, in the column of *freehold rents*, the churchwardens to whom the tenements were surrendered in 1636, were marked 6*d.*: and Lord Ellenborough, observing on the high estimation in which the survey stood for its accuracy, held that this was evidence to go to the jury, to prove that the estate was freehold, and expressed his inclination to presume any thing capable of being presumed, to support an enjoyment for so long a period.

(*f*) 11 East, 280. And see Lord Mansfield's judgment in the Mayor of Kingston-upon-Hull *v.* Horner, Cowp. 108, where a grant or charter was presumed against the crown, upon a possession of 350 years. Vide also Gibson *v.* Clark, 1 Jac. & Walk. 159, and the cases there cited, establishing that a grant from the crown of an advowson will be presumed after a long undisturbed possession, evidenced by conveyances and presentations.

END OF THE FIRST PART.

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