to a divorce; a wife can obtain a divorce only if she proves, in addition, cruelty, desertion, bigamy, or certain other aggravating circumstances. Where there has been misconduct on both sides, the court will usually refuse to grant a divorce, though it has in exceptional circumstances granted one to the less guilty party. Either adultery, cruelty, or desertion alone is sufficient to entitle the petitioner to a judicial separation. This does not, like a divorce, enable the parties to marry again, but it releases them in other respects from the duties of married life, and puts the wife, for the purposes of property and contract, in the position of an unmarried woman. Upon a decree for dissolution of a marriage or judicial separation, the court may make orders for the custody, maintenance, and education of the children, for alimony to be paid by the husband to the wife, even if she is the guilty party, and for varying marriage settlements.

The fact that divorce, while it is in theory a punishment for the guilty party, is in many cases equally desired by both parties, makes it probable that there will often be collusion between them. For this reason an interval of six months elapses between the decree *nisi*, which is made upon the hearing of the case, and the decree absolute, which finally dis-

solves the marriage and enables them to marry again. During this interval any person may intervene to show cause, on the ground of collusion or the suppression of material facts, why the decree should not be made absolute, and a public officer, the King's Proctor, is specially charged with the duty of intervening.

7. Insanity.—The nature and degree of insanity which will afford a defence to a criminal charge has from time to time been a matter of considerable discussion. What is still in theory the accepted legal view regards insanity as a matter of delusion rather than impulse or absence of self-control. According to this view, an insane person is criminally liable unless he was so insane as either "not to know the nature and quality of the act he was doing," or "not to know that what he was doing was wrong." But there is high authority for holding that uncontrollable impulse may be a sufficient reason for treating acts done under it as exempt from criminal liability, and in practice it is believed that this view is largely acted upon. When a jury is satisfied that the act was committed, but that at the time the accused was so insane as not to be legally responsible, it brings in a special verdict to that effect, and the accused is ordered to be detained during

the King's pleasure. The effect of this sentence is a detention at Broadmoor, which is usually lifelong, and for this reason insanity is not often pleaded, except as a defence to a prosecution for murder.

As regards civil rights and liabilities, insanity has a much more retricted operation. A marriage contracted by a person so insane at the time as not to appreciate the nature of the obligations of the married state may be set aside at the suit of either party. The marriage of a person who has been judicially declared insane is totally void, and the same is said to be true of any disposition of property made by such a person. In general, however, the contract of a lunatic is fully binding on him unless the other party was aware that he was so insane as not to understand the nature of the transaction. If these conditions are satisfied, the lunatic, on recovering his sanity, or those entitled to act on his behalf, may repudiate or confirm and enforce the contract. For wrongs a lunatic appears to be liable, unless the lunacy excludes some specific state of mind which forms an essential part of the wrong.

Drunkenness due to one's own fault is in itself no defence to a criminal charge; it may, however, be material as showing that the accused had not an intention—*e.g.* an

intention to murder—which forms part of the essence of the crime charged. Involuntary drunkenness and mental disease caused by drunkenness is in criminal law treated as on the same footing with insanity. In the matter of contract, drunkenness is regarded as having the same effect as insanity.

8. THE CROWN AND ITS SERVANTS.—The King, whether in his public or private capacity, is incapable of incurring liability, and no proceedings by way of action or prosecution can be taken against him. Nevertheless, a proceeding known as a "petition of right" is allowed, nominally as a matter of grace, in practice as a matter of course in all proper cases, by which property and compensation for breach of contract (but not for tort) may be recovered from the Crown. The scope of this proceeding (which in its later stages takes place before the ordinary courts and resembles an ordinary action) is limited by the fact that employment in the service of the Crown is (with certain exceptions) terminable at the pleasure of the Crown. On the other hand, servants of the Crown, from the highest executive, administrative, or military officers downwards, enjoy no general immunity for their public acts from either civil or criminal proceedings, and the command of a superior, even the command

of the King, is no defence to any such proceedings. It is, of course, true that such officers in many cases have powers which enable them to do lawfully what a private person might not do, but the question whether their acts are justified by their powers must be decided in proceedings before the ordinary courts. A servant of the Crown is not himself liable for contracts made by him on behalf of the Crown, nor is he liable as a principal for the acts or defaults of his subordinates unless expressly authorised by him.

Judges enjoy an almost complete immunity in respect of acts—even corrupt and malicious acts, happily rare in our history—done by them in their judicial capacity. A judge of an inferior court, in order to entitle himself to this immunity, must, however, show that in reality, or at any rate upon the facts disclosed to him, he had jurisdiction in the matter in question.

Foreign sovereigns and the ambassadors of foreign states are exempt from the jurisdiction of the English courts unless they voluntarily submit themselves to it.

9. Nationality and Domicile.—Aliens, *i.e.* those who are not British subjects, are excluded from public office and public functions such as the parliamentary franchise. They have no enforceable right to enter

British territory, and recent legislation in some cases authorises the Government to take steps to exclude and even to expel them from the United Kingdom. In other respects, if we except certain provisions of the criminal law which are applicable only to British subjects, and the rule that an alien cannot own a British ship or a share in one, the legal position of an alien does not differ substantially from that of a British subject. The rule that an alien could not hold land in England was abrogated in 1870.

British nationality is acquired at birth by those born on British territory, irrespective of parentage, as well as by those born elsewhere, who are the issue of a father or grandfather (in the male line) who was born on British territory. A person who acquires British nationality at birth is a "natural born" British subject. A naturalised British subject is one who acquired British nationality by naturalisation, which can be granted by a Secretary of State. An alien who asks to be naturalised must have resided in the United Kingdom or have been in the service of the Crown for not less than five years, and must take the oath of allegiance.

A woman acquires by marriage the nationality of her husband.

British nationality may be lost by naturalisa-

tion in a foreign country, or in the case, which sometimes occurs, of double nationality, by making a declaration of alienage: the child born in England of a French father, for instance, is both a British subject and a French citizen.

More important for most purposes of private law than nationality is domicile. The question, for instance, whether the goods of a person who dies intestate ought to be divided among his relations according to the rules of English or of some foreign law, will be decided by an English court, not according to the nationality but according to the domicile of the deceased at the time of his death. A person's domicile is the country which is in fact or in the eye of the law his permanent home for the time being. Seeing that our law refuses to contemplate the possibility of any person either being without a domicile or having more than one domicile, the rules on this subject are not only intricate but highly artificial. We may note that every person is considered to start life with a "domicile of origin," which will be, as a rule, the domicile of his father at the time of his birth: that this domicile of origin continues until it is shown that some other domicile has been acquired, and is restored whenever an acquired domicile is lost without

the acquisition of another, and that the domicile of a wife is necessarily the same as that of her husband. The substitution of nationality for domicile in cases like that mentioned, which has been made in the law of some foreign countries, even if desirable on general grounds, would not solve the questions which arise when the laws of different parts of the same national territory, *e.g.* of England and Scotland, or of two of the United States of America, come into competition. On the other hand, it will be seen that a pretty problem arises when the test of domicile refers the English courts to the law of a country which applies the test of nationality, and it happens that the nationality of the person in question was British.

10. CORPORATIONS. — Bodies or groups of human beings may have legally recognised rights and duties, which cannot be treated as the rights and duties of the members. Such bodies are known as corporations, or (to distinguish them from the corporations sole, to be mentioned later) corporations aggregate. The marks of a corporation are: perpetual succession, *i.e.* the death or withdrawal of members, the addition of new members from time to time, does not impair the continuity and identity of the body, "in like manner," as Blackstone says, "as the

river Thames is still the same river, though the parts which comprise it are changing every instant"; the use of a common seal as evidence of at least the more formal acts of the corporation, and the capacity to sue and be sued by its corporate name. The legal recognition of corporate character may be obtained either by a charter from the Crown, as in the case of most of our older corporations, like municipal corporations, universities and their colleges, as well as of some more recent ones; or directly by means of an incorporating Act of Parliament, as in the case of Railway Companies; or indirectly through an Act of Parliament like the Companies Act, 1908, which offers corporate character to any number of persons (usually not less than seven) associated for a lawful object, who are willing to comply with the statutory requirements as to registration and otherwise.

As a being capable of having legal rights and liabilities, a corporation is a person in the eye of the law. So far as English lawyers have theorised about the nature of corporate personality at all, they have till recently for the most part accepted the doctrine of the Canon Law, that such personality is a mere fiction of the law with no basis in fact. But during the last ten years a belief has steadily

been gaining ground that such personality is real and is analogous to the personality of individuals. It is impossible here to enter into the details of this controversy, but it may be noticed that—(1) the "fiction" theory must remain unsatisfactory unless it can explain what are the real facts in terms of individual rights and duties which underlie the fiction, and this it seems unable to do. It does not seem possible to explain away the legal rights and duties of a body as being merely the rights and duties of the individuals composing it; and (2) the notion of a corporate personality is not confined to law. We habitually think of the actions of nations and of societies as distinct from the actions of the individuals composing them, and we attribute moral qualities to such actions, and moral rights and duties to nations and societies.

The legal capacity of corporations differs in some respects from that of individuals, partly from the nature of the case, partly as a consequence of the theory that their personality is a fictitious one. It is obvious, for instance, that they cannot enter into family relations. For the most part the criminal law has no application to them, if we except some proceedings which are at least in form criminal, like the indictment of a public body for failing to repair a highway. On the other

hand, a corporation can own property; it can acquire rights and make itself liable under a contract; it can be a trustee; it can incur civil liability for wrongful acts, and even for those which involve a definite state of mind like fraud or malice.

For the making of contracts by a corporation the Common Law required a document under the corporation's common seal, except in matters of trifling importance or daily necessary occurrence. Even apart from such exceptions, however, a contract not made in the required form, but completely performed on one side, might be enforced. The Common Law rule has been practically destroyed in the case of Companies formed under the Companies Act, 1908, and similar earlier Acts, by a provision which enables them to contract through an agent in the same form in which an individual might contract.

Of greater importance is the doctrine of *ultra vires*, which limits in point of substance the transactions into which a corporation may enter. A Common Law corporation (*i.e.* one created by Charter from the Crown), it is true, is presumed to have the contractual capacity of an individual. *Prima facie* such a corporation has the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts

as an ordinary person can bind himself to. Even if the charter should contain restrictions on its freedom of action, acts transgressing such restrictions are probably not void, though they may be a ground for revoking the Charter. On the other hand, a corporation created by or in pursuance of an Act of Parliament is subject to the rule that it has only such powers as are expressly conferred or are necessarily or reasonably incident to the fulfilment of the purposes for which it is established. Acts done in excess of such powers are legally void, and will if necessary be restrained by the courts. Thus a company directly created by special Act of Parliament will be restricted to acts necessary or reasonably incident to the objects specified in the Act. A company formed under the Companies Act, 1908, is similarly confined to the pursuit of the objects stated in the memorandum of association which is signed by its first members at the formation of the company, and which cannot be altered except with the sanction of the court. This rule may serve a number of purposes. It may prevent extraordinary powers like that of compulsorily acquiring land from being abused for unauthorised purposes; it may prevent a corporation constituted for purposes of public utility from endangering those purposes by engaging in

other activities; it may protect the creditors of a company from the dissipation of the company's capital, to which alone, in the case of a limited company, they can look for payment, and the members from seeing their contributions applied to purposes for which they did not bargain.

In addition to corporations aggregate, English law attributes a continuous legal personality under the name of "corporations sole" to the successive holders of certain offices, especially the holders of ecclesiastical offices, such as bishops and rectors and vicars of parishes. The conception has, however, not been thoroughly worked out; it seems to have produced little or no result, and it is doubtful if it is capable of serving any useful purpose. For want of any better theory of State rights it has been applied to the Crown, and some public officers, like the Postmaster-General and the Public Trustee, have been declared to be corporations sole by statute.

Corporations are still subject to the rule of mortmain—a rule introduced in the thirteenth century to prevent feudal claims which arose at the death or during the infancy of a tenant from being prejudiced by the accumulation of land in the hands of bodies which never die and are never under age. A conveyance of land "into mortmain" is not void, but

involves a forfeiture to the lord, who, in the great majority of cases, will be the Crown. But a "licence in mortmain" from the Crown exempts a corporation from the rule, and in the case of statutory bodies a power to hold land is expressly conferred by, or may be obtained under, the incorporating statute.

11. Societies and Institutions.—If we except two statutes which may be treated for all practical purposes as obsolete, there are no prohibitions against the formation of associations or societies for any lawful object —religious, social, political, philanthropic, or the like. The law does not, however, regard such societies (unless formally incorporated) as having any corporate personality; it sees only individuals, owning property, it may be, in common, with rights and duties towards each other flowing from the contract, or rather series of contracts, to be found in the society's rules; for on every change in the membership a new contract must be implied. Such contract or contracts may be varied if, and only if, the rules so provide, by a majority of the members or by a specified majority. The common property, if it is more than mere cash in hand or at the bank, will be vested in trustees, who must deal with it in accordance with the rules or with any trust expressly declared, and it can be made liable for obliga-

tions incurred by, or on behalf of, the society, except that a Trade Union enjoys since 1906 the extraordinary privilege of incurring no liability for any tort. The rule of mortmain has no application to unincorporated societies. On the other hand, if the objects of the society are charitable in the wide sense, which includes not only the relief of poor persons, but the promotion of religion, learning, and education, gifts of land made during life are void if special formalities are not complied with, and land given by will must, except under special circumstances, be sold within a year from the testator's death. If the objects of the society are not charitable, the rule against perpetuities will make void any gift of property by way of permanent endowment, whether made by will or otherwise; but there seems to be nothing to prevent gifts or bequests from being made to a non-charitable society in such terms that it can, at any time, dispose of the capital at its pleasure. The rules of a society and the trusts which bind its property will, in many cases, fetter its freedom of action and the application of its property in a way very similar to the restrictions which the doctrine of *ultra vires* imposes on a corporation; and in the case of some unincorporated societies, such as registered Trade Unions and Friendly Societies, which have

received a peculiar status by statute, the rule of *ultra vires* has been held directly applicable. But, subject to considerable restrictions on the furtherance of political objects, a Trade Union is empowered by Statute since 1913 to devote its funds to any lawful objects authorised by its rules for the time being.

Some systems of law recognise as legal persons, not only corporations, but institutions, such as hospitals or places of education; but this conception is unknown to our law. We either treat as a corporation a group of persons—usually the governing body of the institution, though it may include individuals who are beneficiaries and have no share in the government (for instance, the scholars of a college)—or else the property of the institution must be vested in a number of individual trustees, who are bound to apply and deal with it for the purposes of the institution.

12. AGENCY AND PARTNERSHIP.—Agency may be regarded as an extension of legal personality. Not only in law, but in ordinary life, we look upon an act done by one man in pursuance of another's orders as done by the person who gives the order. Moreover, there seems to be nothing artificial in principle in holding the acts of an employee done in the course of his employment as equivalent to

the acts of the employer. These principles are, however, applied in different degrees in the respective spheres of Criminal and Civil Law.

As regards the more serious crimes, a man is not punishable for a crime committed by another unless he has actually instigated the commission of a crime, though he may be punishable for a crime differing in some degree from that which he has instigated.[1] Yet in the case of some minor offences (*e.g.* sale of beer to a drunken person) a man may be punished even for the unauthorised act or default of those in his employment.

In the case of wrongful acts, which involve civil liability apart from breach of contract or trust, a distinction is drawn between a servant and an independent contractor. A servant is one over whom the employer reserves the control and direction of the mode in which the work is to be done. The master is liable for wrongful acts and defaults of his servant —though they may be unauthorised or even forbidden by him—so long as they are done within the scope of the employment. An

[1] It should be noted that in Criminal Law the actual doer is called the principal in the first degree ; one who instigates is a principal in the second degree or an accessory before the fact. In Civil Law the employer is the principal, the person employed an agent or servant.

omnibus company was held liable for the act of one of its drivers, who overturned a rival omnibus while racing with it and obstructing it, although directions had been issued to the driver forbidding such conduct. The independent contractor is one who has agreed to do a piece of work, but is to be left free to choose his own method of doing it. In such cases the employer is not liable in general for any wrong, which consists in the improper carrying out of such work, though he will, of course, be liable if unlawful acts are done which he has actually authorised.

Contracts made by any agent in pursuance of the principal's instructions are binding on, and operate for, the benefit of the latter. Further, the employment of an agent may be such as to give him an authority to contract on behalf of his principal generally with regard to a wider or narrower class of affairs; and as between the principal and third parties such authority cannot be limited by restrictions imposed by the principal, but not known to third parties.

The fact that a person is acting under the instructions or on behalf of another is no defence to civil or criminal proceedings brought against the agent for tort or crime. On the other hand, an agent acquires no rights under contracts made by him on behalf of

his principal; and where the existence of the principal is known to those contracting with the agent, the latter, as a rule, incurs no liability for such contracts. Where the principal's existence is undisclosed, the other contracting party, on discovering it, has an option whether he will hold agent or principal liable.

When a person purports to act on behalf of another, but without his authority, the latter may subsequently ratify the act of the former, and thereby draw to himself both the benefit of, and the liability for, the act. But if there is no such ratification, the agent will be liable to those who contract on the faith of the authority which he professes to have.

No special form is necessary for the appointment of an agent, except that an agent who is to execute documents under seal in the name of his principal must be appointed by a "power of attorney," which is itself a document under seal. Revocation by the principal, his death, and in some cases his insanity, put an end to the agent's authority, though in general a revocation will be inoperative as against those to whom the principal has held out the agent as having authority, and who have no notice of the revocation. Moreover, modern legislation has made possible (within limits) the creation of

an irrevocable power of attorney, such that even knowledge of the principal's death or insanity will not affect the validity of acts done under it.

An agent must not, without his principal's knowledge and consent, receive any reward or commission from those with whom he deals on his principal's behalf, or derive any profit from transactions entered into on the principal's behalf beyond the remuneration agreed upon. Both civil and criminal liability are incurred by the corrupt giving or receiving of such commission.

In partnership, which is "the relation which subsists between persons carrying on a business in common with a view of profit," every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership. A firm is not a legal personality distinct from its members. In an ordinary partnership each of the partners is liable without limit for all the debts and obligations of the firm. The severity of this rule has been the more acutely felt because the existence of a partnership, which needs no special form for its creation, has been often inferred—less often, it is true, in recent years than formerly—from the fact of the receipt by a person of a share of the profits of a business. Since 1907 the law has per-

mitted the formation of "limited partnerships," which must be registered and must consist of at least one general partner, who is liable without limit, and of one or more limited partners, each of whom is not liable beyond the amount contributed by him on entering into the partnership. A limited partner is forbidden, on pain of rendering his liability unlimited, to take any part in the management of the business, and has no power to bind the firm.

No partnership, whether limited or unlimited, may consist, in the case of a banking business, of more than ten or, in other cases, of more than twenty persons.

CHAPTER V

PROPERTY

1. The Conception of Property.—There is, perhaps, nothing more difficult than to give a precise and consistent meaning to the word "property."[1] When we speak of a man of property, we think, perhaps, in the first instance, of tangible material things which belong to him—land and houses, horses and cattle, furniture and jewellery and pictures—things which he may use or destroy (so far as that is physically possible); from which he may exclude others; which he may sell or give away or bequeath; which, if he has made no disposition of them, will pass on his death to persons related to him. Here, at the outset, we may find it difficult to say whether by "property" we mean the things themselves or the aggregate of rights which

[1] The word "estate" is often used to denote the whole of a man's proprietary rights, more especially after his death. This sense of the word "estate" must not be confused with the special meaning which it has in regard to interests in land (see p. 125).

are exercised over them. To confine the word to either sense would hardly be possible without pedantry, though, on the one hand, we may agree that a thing which has no owner—a rare event in a civilised country, except in the case of some things, like wild animals at large—is not property, and, on the other, we may often avoid confusion by using the word "ownership" for the most extensive right which a man can have over material things. But, further, we shall find that our conception of property relates to many things which are not tangible or material. Our man of property may be an author or a patentee, and we shall hardly be able to say that his copyright or patent-right is not part of his property, or even to avoid speaking of his ownership of the copy-right or patent. He will have debtors: his bank is a debtor to him for the amount standing to his credit; his investments of money are claims to receive payment from the State or from corporations or individuals. Such debts and claims are not rights over any specific tangible objects; they are mere rights against the State or the corporation or the person liable to pay. Yet these rights are transferable, and will pass on his death to his representatives. We cannot exclude them from our notion of property or deny

that in a sense, at any rate, he is the owner of them. On the other hand, his "property" clearly does not include all his rights. To say nothing of his general right of liberty or reputation, his rights as a husband or a parent are not proprietary rights, nor is his right to recover damages for personal injury or defamation; but we may include among proprietary rights the right to recover damages though unliquidated (*i.e.* of uncertain amount until settled by a judge or jury) for breach of contract, or, probably, even for injury to his property. Generally speaking, we shall include under the notion of a man's property in its widest sense all rights which are capable of being transferred to others, of being made available for payment of his debts, or of passing to his representatives on his death.

2. Ownership and Possession.—Turning to rights over tangible things, we must notice the distinction between ownership and possession. The owner of a thing is the person who has, in the fullest degree, those rights of use and enjoyment, of destruction, and of disposition, which have been mentioned above—subject, of course, to the general rules of law which protect the rights of others, and subject to certain limited rights which he or his predecessors may have created in

favour of others. The owner of a pistol is none the less owner because the law prohibits him from discharging it in a public highway; the owner of a field does not cease to be owner because the public or a neighbour has the right to use a footpath across it.

The essence of ownership, then, is that it is a right or an aggregate of rights. Possession, on the other hand, is primarily a matter of fact. If the owner of a watch is robbed of it by a thief, the owner's rights as rights remain intact; the thief acquires no right to the watch as against the owner. But the owner's possession, and with it his actual power to exercise his rights, is for the time being gone; he must recover the watch—as he may even lawfully do by his own act—before he can be said to be again in possession of it. So, too, the owner of land may be out of possession, and another without right may be in possession. In this case the forcible retaking of possession is prohibited under penalties by statute; but the retaking, though punishable, is none the less effective to restore the possession.

The cases of the thief and squatter have been taken as the clearest instances of possession acquired without any right whatever. But possession may be lawfully acquired, and yet be unaccompanied by ownership. An owner who delivers a horse or a bicycle by

way of loan or hire to another parts with the possession to him, but does not cease to be owner. The same is true of one who delivers articles to another in order that the latter may bestow his labour upon them. Such voluntary transfers of possession are called bailments, and the person who so acquires possession is a bailee of the goods. In none of these cases do we think of the owner as having parted with the right of ownership, though it may be that the contract between the parties creates rights in favour of the bailee which the owner cannot use his right of ownership to override.

If we try to analyse the conception of possession, we find two elements. In the first place, it involves some actual power of control over the thing possessed. In the second place, it involves some intention to maintain that control on the part of the possessor. The nature and extent of the control and intention necessary to constitute possession will vary with the circumstances, and particularly with the character of the thing of which the possession is in question. Possession of a house, for instance, will be evidenced by acts different from those which would suffice for possession of a strip of waste land. The occupier of a private house would probably be considered to be in possession of anything placed or left in it—at any rate unless it was

concealed—while the occupier of a shop has been held not to be in possession of a thing dropped in a part of the shop to which the public had access. By a somewhat artificial rule, a servant who receives a thing from his master for the master's use is deemed not to be in possession of it, though the contrary is true where he receives it from a stranger for the master's use.

So far we have thought of ownership and possession as sharply distinguished—the one a matter of right, the other of fact. Nevertheless, possession is a fact which has an enormous legal significance, a fact to which legal rights are attached. In the first place, actual possession is evidence of ownership, and, except in cases where ownership is based on a system of public registration, it is hard to see how any ownership can be proved, otherwise than by going back to some prior possession. If A claims the ownership of land by reason of B's bequest or sale to him, this only raises the question, On what is B's ownership based? and ultimately we shall have to rest content with saying that the root of A's title is the possession of some predecessor, X. Such evidence, however, is not conclusive. The presumption of ownership which follows from A's or X's possession may, for instance, be rebutted by a rival claimant, Y, who can show

that he or his predecessor was in possession, and that A or X wrongfully dispossessed him.

In the second place, possession is not merely evidence of ownership, but (subject to the rights of the owner) is itself and for its own sake entitled to legal protection. If A has been disturbed in his possession by a trespass committed by B, or even if B has deprived A of possession, A's claim to legal protection or redress against B cannot be met by B's plea that C and not A is the true owner. The finder of goods is entitled — except only against one who can show himself to be the owner—to legal protection against all the world. Nor is this right of the possessor based on any responsibility on his part to the owner. The Postmaster-General was held entitled to recover damages for the loss of the mails destroyed by the fault of a colliding ship, though he was not the owner and disclaimed all responsibility to the owners for the loss. This right to redress which the law confers on the possessor is independent of, and at least as old as, if not older than, the legal protection given to the owner. The possessor's right is even spoken of as a "special property," in contradistinction to the "general property" of the owner. It is a right which he may transfer, and which on his death will

pass under his will or according to the rules of intestacy.

Lastly, we may notice that even a wrongful possession, if continued for a certain length of time, matures into what, for practical purposes, is indistinguishable from ownership. A wrongful possession of land for twelve years, of goods for six years, destroys the owner's right to recover his property by action and, at least in the case of land, his right to retake possession.

3. Tenure of Land.—Between ownership of land and of goods every system of law must needs draw distinctions, which are founded on the nature of the subject-matter; but English law has gone further than any other system in this direction, and the line of cleavage is due largely to considerations other than those of natural necessity. It is a commonplace of English law that full ownership of land is possible for no person save the King. In strict legal theory, the place of ownership of land is taken by the two notions of tenure and estate. Those who are commonly called landowners are regarded as "holding" their land mediately or immediately of the King. At the Norman Conquest every acre of land in the country was held to have been forfeited to the King. Large portions he granted to his followers, others he allowed to remain in the possession

of those to whom it had belonged, but by way of re-grant. Every such tenant held upon terms of doing service for his land. A tenant of the King might in turn grant to others to hold of him upon terms of service. The services, whether due from an immediate tenant (tenant in chief) to the King, or from an inferior tenant to his lord, might be military (the finding of a certain number of knights), or religious (the saying of masses for the soul of the donor and his heirs), or labour services (mainly agricultural). Payments in money or in kind were also incidents of tenure from the beginning, and in the course of the Middle Ages all services tended to be commuted into money payments. The personal relation between lord and tenant was emphasised by the requirements of homage and fealty, and in the case of the military tenures the lord had rights valuable to himself and burdensome to the tenant, such as the right of wardship, which entitled him to the custody (without liability to account) of an infant heir's lands, and the right of marriage which enabled him to make a profit out of the marriage of his wards.

A tenure by services military or religious was in any case held to be a free tenure or a freehold. On the other hand, where land was held by labour services, a sharp line came to be drawn between "free" services, which

were certain in amount and comparatively light, and those which were uncertain and more burdensome. This distinction was closely related to the distinction between persons of free condition, and the villeins who were personally unfree, and could not quit the service of their lord. Unfree tenure and status usually coincided, though it was possible for a freeman to hold by the unfree services which were appropriate to a villein without necessarily losing his free status. The tenant in villeinage, whether personally a villein or not, was (as regards his land) without protection in the King's Courts: he was said to hold at the will of the lord; his rights could be asserted in this lord's court only, and were governed by the custom of the manor, a unit of land and jurisdiction comprising lands in the lord's own occupation, and lands held by freeholders and tenants in villeinage. Those who held by free tenure neither military nor religious were said to hold in free socage, and were from the first entitled to the protection of the King's Courts.

The conversion of the military tenures into free socage in the seventeenth century was one of the results of the Civil War; the religious services disappeared at the time of the Reformation; and the fall in the value of money made merely nominal the payments

for which the services of socage tenants had been commuted. Moreover, the creation of new relations of freehold tenure was made practically impossible by the Statute of Quia Emptores in 1290. Since that time a tenant may transfer land to another to hold of the transferor's lord, but cannot grant a freehold in fee-simple to be held to himself. The only substantial incident of freehold tenure which now remains is the lord's right of escheat, *i.e.* his right to resume the land upon the death of a tenant who has died without heirs and without making any disposition of his land. The evidence of any freehold tenure, except between the King and a subject, has thus become obscured, and it is only in rare instances that any private person can successfully assert the right to an escheat It follows that as regards freeholds the notion of tenure has ceased to have much practical importance, and freehold tenure has become, if we put aside the question of estate, something very like ownership.

Personal villeinage had disappeared by the beginning of the seventeenth century, and before that time the protection of the King's Courts had been extended to the holders of land in villeinage. Though such tenants were still said to hold "at the will of the lord, according to the custom of the manor,"

as their successors are said to do, the first part of this phrase ceased to have any practical meaning when once the King's Courts were prepared to ascertain and enforce the manorial custom. Lands so held were transferred not directly by the act of the parties, but by a surrender to the lord, who then admitted the intended transferee, and all such surrenders and admittances were recorded on the rolls of the Manor Court. A copy of an extract from these rolls formed the evidence of the tenant's title, and this gave rise to the name of copyholder, by which the modern successor of the villein tenant is known. This method of transfer is still the most notable characteristic of the copyholder; but his holding is also subject to payments, certain or at any rate assessable, by way of rent, and upon death and alienation, and in some manors the lord's right to take the best beast or chattel of a deceased tenant as a 'heriot' still exists. As a rule the copyholder is not entitled either to the timber upon, or to the minerals under, his land. In spite of modern statutes, which have provided for the conversion of copyholds into freeholds upon payment of compensation at the application of either lord or tenant, copyhold tenure is still common.

4. ESTATES IN LAND.—Of far greater importance than tenure at the present day is

the notion of "estate." We may think of an estate as a portion of ownership more or less limited in time. This limitation in time is most clearly seen in the case of a life estate, whether it be an estate held for the life of the tenant, or what is called an estate *pur auter vie*, one held for the life or lives of some other person or persons. The holder of such an estate in land is, like an owner, entitled to the possession, use, and enjoyment of the land, and he can dispose of his interest; but at the death of the person by whose life the extent of his estate is measured, the estate comes to an end, and nothing passes from the holder. Even the holder's enjoyment is restricted (unless he be declared "unimpeachable for waste") by consideration for the rights of those who have subsequent estates in the land. He must not diminish the capital value of the land by the commission of acts called "waste," such as cutting timber or opening mines.

At the other end of the scale we have the estate in "fee-simple." Such an estate is practically equivalent to ownership. It confers full rights of possession and enjoyment (unrestricted by any rules as to waste) and full rights of disposition whether during the tenant's lifetime or by his will. If he dies intestate, the land will pass to his heir, if any can be traced. Only in the event of

his death intestate and without ascertainable heirs, will the estate come to an end, and the land pass by escheat to the lord, who, as we have seen, will in the great majority of cases be the Crown. The limit in time is here practically non-existent.

Intermediate between the life-estate and the estate in fee-simple is the estate tail. Like the fee-simple, it is an estate of inheritance. The tenant in tail has full rights of possession and enjoyment without regard to waste. Nor does the estate come to an end with the tenant's death: it passes to his heirs, but only to a limited class of heirs, "the heirs of his body," that is, his descendants. The line of descent may be further restricted by making the estate an estate in tail-male, *i.e.* one descendible only to males and only in the male line, or conceivably (though in practice this appears never to be done) in tail female, descendible only to and through females. There is even an estate known as an estate in "special tail," inheritable only by the issue of the tenant by a certain wife or husband. In the latter case, if the wife or husband die without issue the tenant is said to be tenant in tail, "after possibility of issue extinct," and his rights are substantially no greater than those of a tenant for life. In any case a tenant in tail has no power to dispose

of his estate by will, and unless he resorts to the special procedure which will be described later, he cannot convey any interest in the land which will last beyond his own death.

Estates in fee-simple, in tail, or for life, may exist not only in land held by freehold tenure, in which case they are called freehold estates, but also in copyhold land, except that for the creation of an estate tail in copyholds the existence of a special custom permitting such estate must be shown.

5. Reversions and Remainders. — An estate for life is less than an estate tail, and both are smaller than a fee-simple. Suppose now that a tenant in fee-simple grants the land to another to hold for life or in tail. If he does nothing more he will still retain his fee-simple, but he will have deprived himself of the right to present possession and enjoyment of the land; his estate has become a future estate, which will again become a present estate, an "estate in possession," only when the smaller estate, the "particular estate" which has been carved out of it, comes to an end. For the time being, what is left to him is called a reversion. Further, he may by the same instrument grant a present estate, say for life, to A, followed by an estate for life or in tail to B, and if he wishes as many further particular estates

(for life or in tail) to other persons successively as he pleases, ending up, if he thinks fit, with an estate in fee-simple to some person named. Each of these future estates is called a remainder. No reversion or remainder, however, can be placed after a fee-simple. Each of these future estates, though it gives no present right to possession or enjoyment, is treated as something already in existence, which can be disposed of and will descend (so far as it is inheritable) just like a present estate. If, for instance, A is tenant for life and B tenant in fee-simple in reversion or remainder, B's death before A will not destroy the estate in fee-simple, but B's heir, or the person to whom B has conveyed it by deed, or left it by will, is entitled to come in on A's death. So again, if A is tenant in tail, and B tenant in fee-simple in reversion, the failure of A's issue at his death, or at any later time, will vest the fee-simple in possession in whatever person then represents B. In such cases, ownership, we may say, is cut up into lengths called estates. None of the holders of an estate, except the tenant in fee-simple when in possession, is fully owner, but each as he comes into possession is a "limited" owner.

Besides reversions and remainders, another class of future estates in land, known as "executory interests" in land, may be

created by deed or will. But it would take us too far into the technicalities of real property law to attempt a description of these.

6. Strict Settlements.—The custom of "entailing" land, as it is called, is well known, though its mechanism is little understood. As a matter of fact, the estate tail by itself would do little to carry out the wishes of a landowner who desires to secure that his land shall continue as long as possible in his family in a certain course of devolution, and indeed it is possible, without employing the estate tail, to create a settlement of land which would produce about the same results as the ordinary "entail." But in the strict settlement, as usually drawn, the estate tail forms an essential element.

The Statute of De Donis, 1290, was designed to secure, and apparently at first succeeded in securing, that a tenant in tail should make no disposition of his land which would defeat the rights of his issue or of those who were to take in remainder or reversion. But by the middle of the fifteenth century the courts had developed a collusive procedure which defeated the obvious intention of the statute. The effects of this procedure, stripped of its machinery of fictions, are preserved by an Act of 1833, which enables any tenant in tail in possession to "bar" the estate-tail and

thereby to confer on himself or another the fee-simple of the land, by means of a deed enrolled in the High Court, and so to destroy the rights of his issue and all who would take on failure of his issue. A tenant in tail who is not in possession can do the same, with the consent of the Protector of the settlement, who is usually the tenant for life in possession ; without such consent he can only defeat the rights of his own issue, and so create what is called a "base-fee," an estate which can be dealt with and which will descend like an ordinary fee-simple, but which will last so long only as he and his own issue survive.

The strict settlement of land, and the means by which such a settlement is put an end to —the method of "breaking the entail"— can now be explained. Imagine that A, entitled in fee-simple to landed property, desires upon his marriage to make the usual settlement. He will convey his estate so as to confer on himself an estate for life, with remainder in tail-male to each of his unborn sons successively, in order of seniority. In default of sons, an estate in tail-general (*i.e.* not limited in descent to males) will be given to his daughters, not, as a rule, successively, but as tenants in common ; there will be an ultimate reversion to himself in fee-simple, and provision will be made for securing a

jointure rent-charge out of the land to his widow, and sums of money ("portions") charged upon the land for younger children. For the time being the settlor is merely tenant for life and has lost all power of controlling the devolution of the property after his death. When, however, his eldest son comes of age, the entail can be "broken." The son by himself could create a base fee, subject to his father's life estate; but since this estate would disappear altogether if he died without issue before his father, such a course would do little to enable the son to raise any money which would free him from dependence on his father. He is thus likely to come to terms with the latter. With his father's consent the eldest son can dispose of the fee-simple, and destroy all estates subsequent to his own (the charges for jointure and portions have priority over the estate tail). The property is resettled so that the son is given an annual sum or other provision out of the land during his father's lifetime. An estate for life expectant on the father's death is given to the son, with successive remainders in tail to his children: similar estates for life and in tail are given to his brothers and sisters and their issue. In this way the land is tied up for another generation, and in each generation the process will probably be repeated, unless

it should happen that a tenant for life should die before there has been a resettlement.[1]

The great majority of the large landed properties of this country are thus perpetually kept in settlement, and few of the persons whom we find in possession of land are more than tenants for life. The evils of this system, which put land in the hands of persons who had no power to dispose of it, and who might, for want of ready money, be unable to use it to the best advantage, have led to the passing of the Settled Land Acts (beginning in 1882), under which tenants for life and other limited owners are given powers of sale and leasing, and otherwise dealing with settled land. There are now, with few exceptions,[2] no lands in this country of which the limited owner cannot dispose almost as completely as if he was full owner, though in the case of a "principal mansion house" the consent of the court or of trustees is necessary. But a

[1] A perpetual settlement by giving an indefinite series of estates for life is made impossible by the rule which prevents an estate in land from being given to the unborn child of an unborn person who himself takes an estate, as well as by the rule against perpetuities (see p. 75).

[2] There are some tenants in tail under settlements made by Acts of Parliament, of land, purchased with money voted by Parliament as a reward for public services, the ultimate reversion being in the Crown. Such tenants in tail cannot "bar" the estate tail, nor avail themselves of the Settled Land Acts.

sale under the Settled Land Acts does not put an end to the settlement. The land is set free, but the purchase-money becomes settled. It is put into the hands of trustees and invested in the purchase of other land, which becomes subject to the settlement; or in trustee securities which will be dealt with and devolve as if they were settled land; or the purchase-money can be made available for the discharge of incumbrances or for effecting improvements on the settled land.

7. LEASEHOLDS. — There is an important class of interests in land to which the name of estate can hardly be denied, which are neither freehold nor copyhold, namely, leaseholds. A leasehold estate is one, the duration of which is measured by a fixed period of time; it is often called a term of years, though a tenancy for weeks or months is equally a leasehold. There is no superior limit; a term of 1000 or 10,000 years (such terms actually occur) is still a leasehold. Nor does a term cease to be a leasehold because it is determinable by an event which may happen, or which is certain to happen, within the term—*e.g.* if A holds land for 99 years or for 999 years, "if he shall so long live," he is still a leaseholder, though it is nearly or quite certain that he will not outlive the term. A freeholder may grant a lease of any duration, though unless

he is a tenant in fee-simple, or the lease is made under the powers given by the Settled Land Acts, the lease will fail when the lessor dies; a copyholder as a rule can grant no more than a term of one year. A leaseholder (unless prohibited by his own lease) can himself grant a lease for any term less than that which he holds; a grant for an equal or greater term would be merely a transfer of his own interest.

Historical reasons have made a great gulf between freehold and copyhold estates on the one hand and leaseholds on the other. The latter were for long regarded not so much as estates or interests in the land, but rather as merely contractual rights. The freeholder in the King's Court and the villein tenant in the Lord's Court was originally protected by a *real* action, an action in which he could recover the thing (*res*), the land itself. The leaseholder (except as against his landlord or persons claiming under him) had no such remedy; he could bring only a *personal* action, in which he could not recover his land, but merely money compensation. In this way his rights resembled those of an owner of money or goods, and indeed there is evidence to show that leaseholds were often acquired as investments for money. Thus it comes that while freeholds and copyholds were classed as *real* property, leaseholds,

like goods, are *personal* property and are classed as chattels, though in virtue of their close relation to real property they are distinguished as "chattels real." Although leaseholders have long since obtained full remedies for the recovery of land, remedies which are indeed far superior to the old real actions, this classification still subsists and its chief effect survives in the law of succession. As we shall see, the destination of a man's lands, on intestacy, will be widely different according as they are freeholds or leaseholds.

Between the grantor of a leasehold and the tenant (lessor and lessee) there is a relation of tenure, and while the lease subsists the lessor has a reversion. The most important incident of the reversion is the lessor's right to the rent reserved by the lease, generally substantial and often equal to the full annual value of the property. This right he can enforce not only by action, but also by a form of self-help known as distress, the seizure of any goods, whether belonging to the tenant or a stranger, which may be found on the premises. Originally this was merely a method of putting pressure upon the tenant, but the distrainer has had, since the end of the seventeenth century, a power to sell the goods and so pay himself, the surplus (if any) going to the owner. Recent legislation has largely re-

stricted the right to distrain goods found upon the premises but not belonging to the tenant.

The rights and duties of the leasehold tenant are, as a rule, explicitly provided for by the terms of the lease, which will contain covenants such as those relating to payment of rent, repair, cultivation, and building, or forbidding the carrying on of certain trades. Such covenants, so far as they relate to the premises leased, are binding on and enforceable by assignees both of lessor and lessee. The lessor is usually further protected by a proviso allowing him to re-enter and put an end to the lease in the event of the tenant's failure to pay rent or observe the other covenants. A proviso for re-entry in the event of the tenant's assigning or underletting the premises without the lessor's consent can still be, and sometimes is, literally enforced in the most oppressive way, but except in this and one or two other cases the courts have power to give relief to the tenant, and in the majority of cases the right to re-enter cannot be exercised until the tenant has been given an opportunity of making good the breach of covenant. At the end of the lease the tenant must yield up the premises, together with all buildings, fixtures, trees, and plants thereon, including even what he has himself added; but to some extent this rule is relaxed in

favour of trade and agricultural fixtures, and a right to remove tenants' fixtures may be given by the terms of the lease. Under the Agricultural Holdings Act, 1908, the tenant of agricultural land is entitled to claim compensation from his landlord for numerous classes of improvements made by him.

A special form of leasehold is the tenancy from year to year which continues until notice to put an end to it is given by either party. In ordinary cases the notice must be a six months' notice, ending with a completed year, but in the case of agricultural tenancies the Agricultural Holdings Act, 1908, requires a full year's notice.

Closely akin to leaseholds, and like them classed as personal interests in land, are tenancies at will and at sufferance. The former is a tenancy made by the agreement of the parties on the terms that either may put an end to it at any moment at the shortest notice; the latter arises where a tenant whose interest has expired continues in possession without the landlord either assenting or dissenting.

8. Co-ownership.—Co-ownership, which entitles two or more persons concurrently to the possession and enjoyment of the same property, can exist in relation both to land and goods. When it takes the form of ownership or tenancy in common, the share of each is treated as a separate item of

property which he can not only transfer in his lifetime, but which will pass on his death to his representatives. In the case of joint tenancy or ownership, on the other hand, the rights of each (except the last survivor) are extinguished by his death so as to increase the interest of the survivor or survivors. A joint owner or tenant may, however, transfer his interest in his lifetime (though not by will); and such a transfer will have the effect of making the transferee an owner or tenant in common with the other or others, though the others will continue as between themselves to be joint tenants. Any one of a number of co-owners is entitled to have the property "partitioned," *i.e.* divided, or at any rate to have the property sold and his share paid out to him. Where a number of trustees are appointed they are always made joint tenants, in order that in case of death of one the whole property may be vested in the survivors; but in other cases joint tenancy is inconvenient and rarely occurs.

9. Other Interests in Land.—Besides the interests in land which are known as estates, and which when they are present estates give a right to possession of the land, English law like other systems recognises rights of a more restricted kind. Among these we may notice *easements* such as rights

of way, rights of light, rights to take water or to discharge water over the land of another. A true easement must always be "appurtenant" to a piece of land. An individual cannot, for instance, as such have a right of way over my land, but only as owner of some adjacent piece of land Rights similar to easements may, however, exist in favour of the public (*e.g.* a public highway) or in favour of a limited class—*e.g.* the fishermen of a village may by custom have the right to dry their nets on a piece of land; the inhabitants of a village may have a right to use the village green for purposes of recreation. *Profits à prendre* are rights to take things of value (other than water) from land, such as the right of common of pasture, or rights of fishery (Commoners, it should be noticed, are not owners of the common). Such rights, though commonly appendant or appurtenant to land,—there is little practical difference between the two phrases,—are not necessarily so. They may exist in favour of individuals, and in some cases in favour of a limited class, but, with the exception of the public right of fishing in tidal water, they cannot exist in favour of the public at large.

A rent-charge is the right to receive an annual sum out of the income of land, usually in perpetuity, and to distrain if the payments

are in arrear; the owner of the land is also personally liable to pay, and further remedies against the land have been given by statute. In some parts of the country it is the practice to sell freehold land for building and to take the price in the form of a perpetual rent-charge created by the purchaser; this practice takes the place of the more common building lease. The right to take tithes, *i.e.* a share of the produce of the land in kind, originally vested only in ecclesiastical persons and bodies, was at the Reformation transferred in many cases to laymen, though tithes continued to form the most important kind of ecclesiastical endowment. Under the legislation of the nineteenth century tithes have been commuted into tithe rent-charge, an annual sum varying with the price of corn. Unlike other rent-charges, tithe rent-charge can now be recovered only by the appointment of a receiver of the income of land, or where the owner is himself in occupation by distress. The rights of presentation to livings in the Church of England, known as advowsons, which are often in the hands of laymen, are also regarded as interests in land. Recent legislation has done much to restrict dealings in advowsons.

10. Conveyances of Land.—The creation and transfer of estates and interests in land have had a long and complicated history, but

are now governed by a comparatively simple rule. Generally speaking, one may say that apart from dispositions by will, a deed, *i.e.* a sealed writing, is necessary, though leases for not more than three years at a rent equal to at least two-thirds of the full value may still be made without a deed or even by word of mouth. But an agreement made in writing and for value, to confer an interest in land, is specifically enforceable in Equity, and an attempted disposition for value by unsealed writing will be treated as equivalent to such an agreement. Moreover, even at Common Law a lease which ought to be made by deed but is not, will not completely fail of effect, if possession is taken and rent paid under it; the tenant will be treated as tenant from year to year upon the terms of the lease so far as they are applicable to such a tenancy.

The effect of long-continued possession of land in extinguishing adverse rights, and so converting the possession into what is indistinguishable from ownership, has already been referred to. Different in theory, but similar in effect, are the provisions of the Prescription Act, 1832, under which rights to easements and *profits à prendre* may be established by reason of enjoyment for a period of not less than twenty years in the one case, and not less than thirty years in the other

The trouble and expense involved in all dealings with land is still very great in the absence of any general provision for preserving any public record of title. Upon a sale of land the purchaser is normally entitled to have produced to him and to investigate the deeds recording previous transactions in the land going back for forty years; and though this period is commonly reduced by agreement, the shortening of the period throws a risk on the purchaser, who is not only bound by all legal interests in the land which actually exist whether he discovers them or not, but also by all equitable interests which he would have discovered if he had insisted on .an investigation for the longer period. Obviously no purchaser can, without expert assistance, make the investigation, of which the result will depend on the effect of numerous technical documents, such as settlements and mortgages. Supposing that the result of the investigation is satisfactory, and the purchase is completed, a subsequent purchaser must again go through the whole process; the results of each investigation are practically thrown away for the future. To do away with the evils of this system, as well as to guard against dangers of fraud and forgery, a Land Registry has been established, and since 1897 registration has been made compulsory upon the first

sale of every piece of land in the County of London. The ideal of land registration is that a government office, after investigating the title, enters the applicant upon the register as owner, and furnishes him with a certificate in accordance with the entry; the entry is conclusive as to his right, and no further investigation of the previous title can subsequently be necessary. At every subsequent dealing with the land a new entry and a new certificate supersedes the old one. One may compare such a public certification of the title with the stamp on a coin, which attests the genuineness of the metal, whereas the system of private investigation of title is as if a man was obliged to employ an expert analyst to test the genuineness of the coins which might be tendered to him. Such a system of registration has been found to work well in other countries, and there can be no doubt that it can, and ought to be, made universal with us. It cannot, however, be said that the ideal aimed at has as yet been attained. Under the Land Transfer Acts the Registry has not so far in the great majority of cases been able to register owners with more than a "possessory" title, which does not do away with the necessity of investigating the title prior to registration, though provision is made for ultimately converting

such possessory title into an absolute one. The provisions for giving compensation to persons who suffer loss in consequence of fraud have proved to be unsatisfactory, and a loophole has been found by which unregistered dealings in registered land are still possible. Moreover, it would seem that solicitors have some ground of complaint that insufficient remuneration is allowed for the work of putting land on the register, which is in some ways more troublesome than ordinary conveyancing. Finally, it may be doubted whether a completely satisfactory system of registration is possible so long as we continue to recognise limited interests in land as legal estates.

11. PERSONAL PROPERTY.—The terms "personal property" and "chattels" include not only leaseholds, which are "chattels real," but also "goods" in the sense of tangible, moveable property, and intangible things known as "choses in action," such as patents and copyrights and claims to money or goods. As opposed to leaseholds, all such property is classed as "chattels personal" or "pure personalty." We may notice in the first instance that at law (as opposed to equity) no limited interests in personal property can be created. The notion of estates has no application. At law a man can only be owner of a horse or a picture or a sum of stock; he cannot be tenant

for life or for years. Settlements of personal property may, however, be made under which trustees will hold the property upon trust for various persons for limited interests. In the case of a marriage settlement of personalty, it is usual, after providing life-interests for husband and wife, to direct equal division of the capital among the children, and even land may be put into the hands of trustees upon trust to sell and to deal with the proceeds in the same way. On the other hand, leaseholds, jewellery, furniture, and pictures are sometimes settled (as "heirlooms") so as to devolve as nearly as possible with real estate strictly settled in the way previously described; but this result cannot be completely attained, since even in equity no interest in personal property analogous to an estate tail is recognised; the person who would have been tenant in tail, if the nature of the property had allowed, will become absolute owner.

12. Goods.—The transfer of goods is most commonly made by merely handing them over, and such a transfer is equally effectual whether the transfer is for value or by way of gift. An unconditional contract of sale of goods which are specific and ready for delivery is sufficient to transfer the ownership without any delivery. When goods are on board ship, the indorsement and delivery of the bill of

lading (which is an acknowledgment of receipt of the goods given by the master of the ship) transfers the ownership. Further, goods may be transferred without delivery by deed, and where the transaction is for value even by writing without seal. Such deeds or instruments as a rule require for their validity to be registered under the Bills of Sale Acts, which have been passed to prevent persons from obtaining credit by continuing to remain in possession of goods when they have secretly transferred their interest in them to others. A bill of sale is commonly used as a means of mortgaging goods, but it may equally be used as an out-and-out conveyance. The property in British ships can only be transferred by means of a bill of sale which is registered in the shipping register.

There are a few exceptions to the general rule that no one can make a transfer of goods who is not the owner. A person who receives current coins for value and in good faith, a purchaser of goods in open market ("market overt") in good faith, acquires a good right even from a thief. So too the Factors Act, 1889, protects persons who receive goods in good faith and for value from a mercantile agent to whom goods have been entrusted by the owner for the purpose of being sold or pledged.

13. INTANGIBLE PERSONAL PROPERTY.—A

patent is the exclusive right granted by the Crown of "using, exercising, and vending" an invention. Such grants are based on the Statute of Monopolies, 1621, which while in general prohibiting the grant of monopolies, made an exception in favour of patents "for the term of fourteen years or under for the sole working or making of any manner of new manufactures within the realm to the true and first inventor or inventors of such manufactures, which others at the time of making such letters patent and grants shall not use." The validity of a patent still turns mainly upon the question whether it complies with the enactment. The grant is now always made for the term of fourteen years, but where it appears that a patentee has been insufficiently remunerated, the Court may extend the term for a further period of seven or, in exceptional cases, fourteen years. As a condition of obtaining the patent, the applicant must furnish a specification (which in all ordinary cases is open to public inspection), showing the nature of his invention and the method of carrying it into effect. A register of patents is kept at the Patent Office, and assignments and licences to use patents must be entered upon it. In some cases a patentee can be compelled to grant a licence to use his patent on reasonable terms.

Copyright, which under the Copyright Act,

1911, extends to every original literary, dramatic, musical, and artistic work, including photographs, sculpture, and architecture, means the sole right of producing or reproducing the work in any material form, and of performing, or in the case of a lecture, delivering, it in public; it includes the sole right of translation and of converting a dramatic into a non-dramatic work, and *vice versa*, and of making gramophone records and cinematograph films and similar devices for the mechanical performance of the work. As a rule the right is first vested in the author, and continues for fifty years after his death; but in the case of photographs and gramophone records the original owner of the negative or plate is treated as the author, and the right lasts for fifty years from the time when the negative or plate was made. The right is personal property, and passes upon the death of the owner to the persons named in his will or entitled upon his intestacy. It is assignable in writing by the owner during his lifetime; but in spite of any assignment or agreement made by the author, it will revert to his representatives twenty-five years after his death.

The right to registered Trade Marks grew out of the rules of Common Law and Equity, under which a trader who passed off his

goods upon the public as those of another was held liable to damages and an injunction at the suit of the latter. These rules[1] still exist, but they have been supplemented by statutory provisions which enable a trader to acquire by registration at the Patent Office the exclusive right to use a distinctive trade mark in connection with his goods. Words (other than invented words, *e.g.* "tabloid") which directly refer to the character or quality of the goods, and names of places, cannot be so appropriated. The right to a trade mark can only be assigned in connection with the goodwill of the business concerned in the goods for which it has been registered, and comes to an end with that goodwill.

The transfer of interests in the national debt and public funds and in the debts of municipal and other public authorities, and of debentures, stocks, and shares, in companies, is governed by numerous statutes. Such interests cannot be transferred without writing, and in most cases a deed is required; in any case the transfer is not complete except by entry in the books of the Bank of England or the body or company concerned.

Something has already been said as to the assignment of ordinary debts and "choses in action";[2] and the law relating to negoti-

[1] See p. 223. [2] See p. 51.

able instruments—bills of exchange, cheques, and promissory-notes—will be dealt with in the next chapter.

14. TRUSTS.—The reader who has followed what was said in the second chapter will already have appreciated the nature of the trust, one of the most characteristic institutions of English Law, and its enormous importance as a part of our law of property.

Except that trusts of land must be created by writing, a trust may be created by any sufficient expression of intention to create it, whether the legal ownership [1] is transferred to another to hold as trustee or remains with the creator of the trust, who in that case will himself be the trustee. If, however, an attempt is made to create a trust by transfer to a trustee, but the transfer itself fails from a defect in form—where land, for instance, is transferred by unsealed writing, or the transfer of shares in a company is not registered in the company's books—the trust also will fail, unless the transaction is one made for value, a term which includes settlements or agreements for settlement in consideration of a contemplated marriage, but not of one

[1] Note that equitable rights may themselves form the subject of a trust. A, who has an interest in property held by B upon trust for him, may hold that interest upon trust for D, or transfer it to C upon trust for D.

already celebrated. So too an attempt to make a direct gift which fails because the proper method of transfer is not employed, will not take effect as a trust. On the other hand, a trust will not fail because the intended trustee refuses to undertake it, or, in the case of a trust created by will, dies before the testator.

Trusts arise not only by a direct expression of intention but by an inference or implication which may or may not correspond to any actual intention. Thus an agreement for the sale of land makes the vendor a trustee, subject to the payment of the purchase money, for the purchaser. Upon a bequest to a trustee upon trust for a beneficiary who predeceases the testator, the trustee will hold the property for the benefit of the testator's representatives. A gratuitous transfer of property (other than land) to another will be presumed to be made upon trust for the person transferring, unless there is something to show that a benefit to the transferee was intended; such intention will be presumed where the transfer is made by a father to his child. Again, a person who acquires property for his own benefit by taking advantage of his position as trustee, will be treated as holding it for the benefit of those entitled under the trust.

When all the possible beneficiaries are of full age and under no disability (such as that

of a married woman who is restrained from anticipation), they may put an end to the trust by requiring the trustee to transfer the property to them or to dispose of it according to their directions, and this is so in spite of any direction to the contrary in the settlement, such as a direction that payment is not to be made to a beneficiary till he reaches the age of twenty-five.

The duties of a trustee may be indefinitely varied by the terms of the instrument which creates the trust, and may range from a mere duty to make a legal conveyance to the beneficiary at his request, and in the meantime to permit him to possess and enjoy the property, to extensive and onerous duties of management, sale, investment, and application of capital and income. The trustee is entitled to no remuneration for his trouble, unless the terms of the trust so direct, and is liable not only for dishonest dealing with the trust property, but for all loss due either to non-observance of the directions in the settlement and the general rules of law, or to failure on his part to act up to the high standard of care which the law requires of him. The range of permissible investments, for instance, is defined by statute in so far as the settlement makes no provision; but even within the limits of investment allowed by

statute or settlement a trustee may incur liability by want of due care in exercising his discretion. Nor may the trustee entrust the exercise of his discretion in this or other matters to others, or leave the trust property in the hands of others or even of a co-trustee, though he is entitled to obtain and pay for the advice and assistance of professional persons, such as solicitors and bankers. Any failure of duty in a trustee, however innocent morally, is a breach of trust.

In cases of doubt, a trustee may protect himself by obtaining, at the cost of the trust property, the direction of the court, and the Judicial Trustees Act, 1896, has enabled the court to relieve a trustee who has acted honestly and reasonably from liability for breach of trust and for omitting to obtain such direction.

Upon the death or retirement of a trustee, the surviving trustees have, in the absence of any provision in the settlement, the power of appointing another in his place. Most family settlements confer such a power on the person who, for the time being, is entitled to the income of the property. The court also has a power to appoint new trustees and to remove a trustee for unfitness or misconduct.

The rights of the beneficiaries under a trust, as has already been seen, are interests

in property closely analogous to legal interests, and but little inferior to them in security. Not only do they hold good against the trustee himself, and against his creditors during his lifetime and his representatives after his death, but also against all to whom he may have transferred the property, and who cannot show that they acquired it for value and without notice of the trust. Even where a trustee has misappropriated trust property the fund may still preserve its identity, and so long as it can be identified the rights of the beneficiaries will attach to the fund into whatever form it may have been converted by him. If he has used it to swell his bank balance, it will be presumed that, in drawing on that balance, he has drawn out his own money before touching trust money; if he has made an investment with trust money—even an investment which is itself a breach of trust—that investment is still trust property, to which the trustee's creditors have no claim.

Still, in the case, at any rate, of a sole trustee, the risk of loss through his dishonest dealing is not inconsiderable. Moreover, the severity which the courts visit even the honest mistakes of trustees has made it difficult to get the gratuitous services of suitable persons, while the provision sometimes inserted in a settlement for giving remuneration to a

professional man who is one of the trustees is open to considerable objection, since it may give him an interest in incurring expense, and will, in any case, tend to make the other trustees leave the management mainly in his hands. The Judicial Trustees Act, 1896, enabled the court to appoint a judicial trustee, who should be bound to render periodical accounts to the court, and to whom remuneration might be assigned; but this provision seems to have been little acted upon. A new departure was made in 1906 by the institution of the Public Trustee. This officer may be appointed trustee under any will or settlement, either as a mere "custodian" trustee, in whom the ownership of the trust property is vested, leaving the active duties to other trustees, or as an ordinary trustee, with powers and duties of management. There are provisions making the employment of the Public Trustee specially available and useful for small properties. Fees in proportion to the value are payable in respect of all property in the hands of the Public Trustee; but his remuneration, like that of other Government servants, is a fixed salary. The consolidated fund of the United Kingdom is liable to the beneficiaries for the acts and defaults of the Public Trustee and his subordinates.

15. MORTGAGE AND PLEDGE.—The ordinary

form of mortgage of freehold land has already been described, in which the legal ownership of land is conveyed to the creditor with a proviso that he shall reconvey upon payment at a specified time; and we have seen that Equity long ago laid down the rule that, in spite of the plain words of such a proviso, the mortgagor continued to have for an indefinite time an "equity of redemption," by virtue of which he was still in a sense—"in equity"—owner of the property.

Other forms of property, real or personal, may be mortgaged with similar effect by a transfer in the appropriate form with a proviso for redemption. There are also less formal kinds of mortgage, in which the mortgagor gives the mortgagee a merely equitable interest in property together with a right to call for a legal mortgage, and among these the mortgage by deposit of documents, such as title-deeds or share certificates, may be mentioned. In the case of such deposits the rule that writing is required for the creation of interests in land is dispensed with.

Whether a mortgage is legal or equitable, the mortgagee can enforce his security by applying to the court for an order for foreclosure. Upon proof of the mortgage the court will make an order for foreclosure *nisi*, under which an officer of the court is directed

to find what is due for principal, interest, and costs, and the mortgagor is ordered to pay within six months from the time when the amount is certified. If he fails to do so, the mortgagee will be entitled to an order of foreclosure absolute, the effect of which will be to vest the mortgaged property in him absolutely, but at the same time to prevent him—even if the property should prove insufficient—from claiming payment from the mortgagor, except upon terms of giving him a fresh right to redeem. As an alternative to foreclosure, the court may direct a sale of the property, and this may be fairer to both parties, since any surplus upon such sale will belong to the mortgagor, while the mortgagee may still sue for any deficiency.

In order to redeem, the mortgagor must give six months' notice or pay six months' interest. He may apply to the court if his right to redeem is disputed.

Without any application to the court, the mortgagee, if his mortgage is a conveyance of the legal estate or ownership, may take possession; but this course is undesirable, since he may be called upon in a redemption action to account strictly not only for profits actually received by him, but also for those which he might but for his default have received, and all such profits, so far as they exceed the interest

due for the time being, must be set off against the principal. A mortgage may contain a clause giving the mortgagee a power of sale, and such a power (subject to certain conditions) is now implied in every mortgage made by deed. If the power is exercised, the proceeds are applicable in the same way as the proceeds of a sale ordered by the court, and the mortgagor will remain liable to pay any deficiency. A power for the mortgagee to appoint a receiver who will collect the rents and profits is also now implied in mortgages by deed. To appoint a receiver is more convenient for the mortgagee than taking possession, since he is not responsible for the receiver's acts and defaults; any surplus beyond the outgoings (including the receiver's remuneration) and the interest due, must be paid over to the mortgagor, and will not go in reduction of the principal.

Mortgagor and mortgagee have each, while in possession, considerable powers of leasing land mortgaged by deed.

Successive mortgages of the same property to different persons are easily possible, since an equity of redemption may be again mortgaged, and it may well happen that the total amount advanced exceeds the value of the property. In the case of mortgages of land, the priorities will normally depend on

the application of two rules: (1) A person having the legal estate will take priority over those whose interests are merely equitable, and this rule goes so far as to permit a third or subsequent mortgagee, who acquires the legal estate from a first mortgagee, to claim priority over an intermediate mortgagee, of whose rights he was ignorant when he advanced his money. (2) If neither of two competing claimants has the legal estate, the priorities will be in order of time. But these rules both assume that the "equities" of the competing mortgagees are equal, and it may happen that a prior, and sometimes even a legal, mortgagee has by his negligence—for instance, by allowing the title-deeds of property to be in the hands of the mortgagor—enabled the latter to commit a fraud upon a later mortgagee; in such cases the prior mortgagee has made his equity "worse" than that of the later, and will accordingly be postponed. In the case of mortgages of debts and of the interests of a beneficiary in personal property (other than leaseholds) in the hands of a trustee, priority depends on the order in which notice of the assignment or charge was given to the debtor or trustee; in the case of bills of sale, upon the order in which successive bills of sale were registered.

A pledge is a security upon goods created

by the actual transfer of the possession of the goods themselves or of such documents of title to goods as bills of lading, but without the conveyance of any legal ownership. A pledge carries with it a power of sale, but there is nothing corresponding to foreclosure. The business of pawnbrokers, which consists in lending money upon pledges of goods, is the subject of special statutory regulation.

The term *lien* is used in different senses. A common law or possessory lien is the right to retain goods, money, or documents which are in one's possession until payment of some claim due from the owner. It commonly arises in respect of services rendered in relation to the property, as in the case of the carriage of goods; but in some cases, like those of a solicitor and banker, the lien may be asserted in respect of the general balance due from the customer. An innkeeper has a lien for his charges upon the traveller's goods brought to the inn, and, contrary to the usual rule, has by statute been given a power of sale over such goods. Liens of this kind, being mere rights of retention, are lost as soon as possession is given up.

The equitable lien of the vendor of land, who has conveyed the property without receiving payment of the purchase money, is quite independent of possession, and gives

a right to have the property sold under an order of the Court.

Maritime liens upon ships and cargoes are also in the nature of mortgages or charges independent of possession. They arise in respect of damage done by collision and upon advances of money or the rendering of services, such as salvage, in times of emergency. In as much as the later advance or service is beneficial to the holder of an earlier lien, it will, as a rule, rank in priority to it.

16. Execution and Bankruptcy.—When judgment has been obtained against a man in respect of any debt or liability, it will be enforced, if need be, by execution, *i.e.* the court will make an order, under which a sufficient part of the debtor's property is seized and sold or otherwise made available for payment. At one time execution might be made against the debtor's person, and he could be kept in prison indefinitely in default of payment. Since 1869 imprisonment for debt has been abolished, except in certain cases; in particular, failure to comply with an order for payment made by a County Court may be punished by a period of imprisonment.

When a person's property is insufficient for payment of his debts, it would obviously be unfair that the creditors who first obtain judgment and execution should be paid in

full, leaving nothing to those who may try to enforce their claims later ; nor is it desirable that a man should indefinitely remain under a load of debts which (it may be through no fault of his own) he is unable to meet. This is the justification of the law of bankruptcy, originally applicable only to traders, but now with few exceptions to all insolvent persons.[1]

The debtor or a creditor presents his petition to the Bankruptcy Court of the district in which the debtor resides or carries on business—in London, the High Court; elsewhere, one of the County Courts. An act of bankruptcy must be proved, and under this term are included various acts, which show the debtor's insolvency or his intention to delay or defraud his creditors. If this is proved, the court makes a preliminary order, called a "receiving order," which protects the debtor's property and prevents creditors from suing him without the leave of the court. The debtor may then (with the Court's approval) make a composition or scheme of arrangement with his creditors; but if this is not done, he will

[1] A wife can only be made bankrupt if she carries on business, whether alone or with her husband. A corporation cannot be made bankrupt, but a company formed under the Companies Act 1908 or similar earlier Acts can be wound up and its property distributed according to rules similar to those applicable in bankruptcy.

be adjudicated bankrupt, and the whole of his property (not including property of which he is himself a trustee, or—up to the value of £20—the tools of his trade and the necessary clothing and bedding of himself and his family) will vest in the "official receiver" (a public officer) or some other trustee, and become divisible among his creditors who prove their debts. Rates and taxes, wages of clerks and servants, and some other claims are, within limits, paid in preference to others, and the rights of secured creditors, such as mortgagees, are not prejudiced by the bankruptcy; but in general the distribution will be made rateably. Voluntary settlements (in particular family settlements made after marriage) are set aside by a bankruptcy if made within two years before; and even if made within ten years before, unless it is shown that at the time the bankrupt was able to meet his liabilities without the settled property.

At any time after adjudication a bankrupt may apply to the court for his discharge, which, if granted, will enable him to start again, stripped of his property, but (with certain exceptions) free from any claim which might have been proved against him in the bankruptcy. But the discharge may be refused or postponed if he has been guilty of certain offences or misconduct in connexion with the bankruptcy,

or if his assets are insufficient for the payment of 10s. in the £, unless this is shown not to be due to the debtor's fault.

17. Wills.—Our modern law gives an unlimited power of disposition by will over all a man's proprietary rights which survive him, excepting only estates tail. Neither husband, wife, nor child have now any rights of succession which may not be defeated by will. This power is, however, in practice kept within limits by the custom of settling property in such a way that the person who is in the actual enjoyment of it commonly has no more than an interest for his own life.

For the making of a will compliance with the following formalities is now necessary: (1) The will must be in writing. (2) It must be signed at the foot or end by the testator or by some person in his presence and by his express direction. (3) The signature must be made or acknowledged by the testator in the presence of two or more witnesses, both present at the same time. (4) The witnesses must attest and subscribe the will in the testator's presence.

Soldiers on active service and mariners at sea can still make wills of personal property without compliance with these formalities, and even by word of mouth.

Any legacy or benefit given by the will

to a witness or to a witness's wife or husband is void, but the will as a whole is unaffected.

A will once made holds good until revoked. The revocability of a will is one of its essential characteristics, and a man cannot deprive himself of the power of making or revoking a will, though the breach of a contract to make or not to make, to revoke or not to revoke, a will subjects his estate to a claim for damages.

A will is revoked (1) by the marriage of the testator, whether a man or a woman. It is useless, therefore, to make a will in favour of an intended wife or husband or the issue of an intended marriage. (2) By the making of a new will or of a codicil [1] or other writing executed with the same formalities as a will, so far as such later document is inconsistent with the will. (3) By burning, tearing, or otherwise destroying a will, if this is done by the testator or any person in his presence and by his direction, with the intention of revoking it. (4) A complete and intentional obliteration of a will or any part of it, so that what was written can no longer be seen, amounts to a revocation of what is obliterated; but merely striking words through with a pen or altering them has no effect, unless the can-

[1] A codicil is really a supplementary will, and is generally used for making some alteration in a will without revoking it as a whole.

cellation or alteration is signed by the testator and attested by two witnesses like a new will.

The accidental loss or destruction of a will has no effect upon its validity, and its contents may be proved by the production of copies or drafts, or even by the recollection of persons who have seen it or heard it read.

Bequests of real estate are technically known as devises, bequests of personalty as legacies. A bequest of a definite sum of money is called a pecuniary legacy; a bequest of things specifically described (*e.g.* "my best gold watch," "my house in London," "half my L.N.W.R. stock") is a specific devise or legacy; a bequest of the surplus after providing pecuniary and specific bequests is a residuary devise or legacy. A specific bequest will hold good even though there is not enough to pay the pecuniary legatees; but it will fail altogether if the testator in his lifetime parts with the thing named. Residuary bequests, though, of course, postponed to those which are pecuniary or specific, will be increased by the failure of either of the latter. The interests of all persons who take under a will can, of course, take effect only after payment of the debts of the deceased; but (in the absence of contrary expression of intention by the testator) personalty is still in general primarily liable, so that it may

happen that those to whom real estate has been left will take the whole benefit, while legacies of personalty are diminished or extinguished to meet the testator's debts.

A devise or legacy will fail if the person for whom it was intended dies before the testator, except where a devise is made to a tenant in tail who leaves inheritable issue, or where a bequest of real or personal estate is made to the testator's child or descendant who leaves issue which survives the testator; in either case the devise or legacy takes effect as if the devisee or legatee had died immediately after the testator. In the latter case the issue of the person dying will not necessarily take any benefit, for he may have made a will, under which the property may pass to others; and if the testator's child is a married woman who dies intestate, the whole of her personal property will pass to her husband.

When a bequest fails through the death of the person for whom it was intended, and does not pass under a residuary bequest, as must necessarily be the case if the bequest which fails is itself residuary, the property will be dealt with as upon an intestacy.

18. INTESTACY. — Where a person dies wholly or partly intestate, the distribution of the property will differ widely according as it is real or personal estate, if we except one

modern enactment. Under the Intestate Estates Act, 1890, where a man dies wholly intestate leaving no issue, his widow is entitled to a sum of £500, payable rateably out of his real and personal estates in proportion to their respective values, in addition to her other rights of succession to either class of property. If the whole of his property at the time of his death is not worth more than £500, she will in the like circumstances take the whole.

Real Estate.—On the death intestate of a freeholder of land in fee-simple the widow is entitled to "dower," *i.e.* an interest for her life in one-third of the land. On the other hand, a husband is entitled on his wife's death to an interest for his life (known as "curtesy") in the whole of her land, provided that issue of the marriage has been born, though it is immaterial whether such issue survives. Under some customs—notably the Kentish custom of gavelkind—the life-interests of husband and wife are interests in one-half of the land; the husband's interest is not conditional on the birth of issue, and the wife's interest continues only so long as she remains a widow and chaste.

Subject to the rights of the surviving husband or wife, the fee-simple land descends to the heir; it should be noted that the term "heir" is properly applied only to those who take real estate by descent, not to those who

succeed under a will nor to those who succeed to personal property. The most important rules for ascertaining the heir are as follows :—

1. In the first place, the land descends in the direct line to the issue, however remote, of the person from whom the descent is traced.

2. Males are always preferred to females.

3. When two or more persons equally nearly related are males, the eldest only inherits ; but where they are females they take equally as "co-parceners"—a form of co-ownership which bears some resemblance to joint tenancy, but without the right of survivorship.

4. A descendant who survives excludes his own issue, but the issue of a deceased person will represent him. Thus, if A leaves an elder son B who has issue, and a younger son C, B will be heir to the exclusion of his own issue ; but if B has died before A, B's issue will be preferred to C.

5. If no issue of the deceased can be traced, the heir must be found in, or traced through, some ancestor. Here also males are preferred to females, the elder male excludes a younger male of the same degree, while females equally nearly related take equally, and a deceased ancestor is represented by his issue. Thus a brother of the deceased will only take if the father is dead.

6. The father, his issue and his ancestors

(however remote), are preferred to the mother and her issue and ancestors.

7. A more remote male ancestor and his issue are *excluded* by a nearer male ancestor and his issue, but the mother of a more remote male ancestor and her issue are *preferred* to the mother of a nearer male ancestor and her issue.

8. Persons related in the half-blood are admitted next after those of the whole blood, if the common ancestor is a male, and next after the common ancestor who is a female.

It will be seen that in addition to the preference which these rules give to males over females, and to the elder brother over the younger, these rules provide that land shall go to the most remote relations on the father's side before it can go to the mother or to the half-brothers and half-sisters of the deceased on the mother's side. It would be hard to justify the continuance of such rules in a modern civilised country, and it is only the complete freedom of will-making which has prevented them from being found intolerable.

Another rule which, to say the least, serves no useful purpose, is that which prescribes that, in a case where the intestate himself acquired the land upon intestacy, the descent is to be traced not from the deceased owner, but from the last "purchaser,"

i.e. the last person who did not acquire the land upon intestacy. Thus, if A purchased land which on his intestacy descended to his son B, and B dies intestate, the descent must be traced not from B, but from A. The law on this point has, however, been modified by a statute which provides that if no heir can be traced from the last purchaser, descent shall be traced from the person last entitled.

In the absence of ascertainable heirs the land will escheat to the lord, *i.e.* in most cases to the Crown.

These rules are subject to the Kentish custom of gavelkind, under which males take equally but are preferred to females; and to other local customs, such as the custom of Borough-English, by which the youngest son is preferred, but as a rule this custom does not give any preference to the youngest among brothers or other collateral relations.

The descent of copyhold land is in the absence of any special custom similar to that of freehold land.

The descent of an estate tail is like that of a fee-simple, except that only issue of the original grantee of the estate can take, and that the descent may be expressly limited to males (or, it is said, to females), or to the issue of the first grantee by a particular wife or husband.

An estate *pur auter vie* will descend, so long as it lasts, like a fee-simple, if it is given "to A and his heirs during B's life"; if it is given simply "to A during the life of B," it will descend like personal property of A.

Personal Property including Leaseholds.—A husband takes absolutely the whole of his deceased wife's personal property on her death intestate whether or not she leaves any issue. A wife, on the other hand, takes absolutely one-third of her intestate husband's personal property, if he leaves issue, and a half if he leaves no issue. Even if there are no ascertainable relatives of the husband, the wife can take no more (except under the provision mentioned at the beginning of this section); the rest will go to the Crown.

Subject to these rights of husband and wife, other relatives of the deceased take in the following order:—

(1) The children of the deceased, sharing equally whether male or female. If a child of the deceased died before him, leaving issue, such issue take the share of the deceased child.

(2) In default of issue, the father of the deceased takes the whole.

(3) If the father is dead, the brothers, sisters, and mother of the deceased share equally; children of deceased brothers and sisters take the share which their parent

would have taken if living;[1] and brothers and sisters of the half-blood share equally with those of the whole blood.

(4) Other blood relations, nearer relations excluding those more remote. If several are equally nearly related, whether through the father or the mother, and whether of the whole or the half-blood, they share equally. No relation more remote than brother or sister is represented by his children. Thus, if the deceased leaves an uncle, and also first cousins, the children of a deceased uncle or aunt, the uncle will take to the exclusion of the cousins.

It will be seen that these rules are not only simpler, but, in spite of the excessive rights given to the husband and the father, far more equitable, than those under which real estate descends. For this and other reasons, the assimilation of the law of inheritance to that which governs the succession to personal estate is a reform which has long been called for, and ought to be undertaken in the near future.

19. EXECUTORS AND ADMINISTRATORS.—Even if a will does not give property to trustees, the property, whether real or personal, does not (except in the case of copyholds)

[1] But brothers and sisters are not represented by their grandchildren or more remote issue. And by a curious anomaly, if neither the mother nor any brother or sister survives, the children of brothers or sisters do not represent their parents, but are postponed to the grandparents of the deceased.

now go directly to those for whose benefit it is given, nor does property passing on intestacy go directly to those entitled under the rules above stated. It vests in the first instance in the executor appointed by the will, or where there is no will or no executor appointed under the will, in the administrator — usually a person interested in the property—appointed by the Court. The Public Trustee may now be appointed as executor or administrator.

The executor or administrator, whose duties in many ways resemble those of a trustee, must in the first instance discharge the funeral expenses, the costs (including the payment of death duties) of obtaining probate of the will or "letters of administration," and the debts of the deceased. It is only after these claims are discharged that the executor or administrator will transfer the property to those entitled, or, if the property is settled by will and the executor is not himself trustee, to trustees for them. In many cases, as where the persons entitled are not of age, or not yet in existence, or not to be found, an executor or administrator will have to retain the property in his hands for a considerable time, though he may sometimes relieve himself by a payment or transfer into court, and in any case he can obtain the direction of the court when doubts arise as to the proper course which he should take.

CHAPTER VI

CONTRACTS

1. Acts in the Law.—To a large class of acts, conveniently comprised in the term "acts in the law," the law gives an effect which corresponds more or less completely with the intention of the person who acts. A purchaser of goods, for instance, desires to become the owner, or to have the right to become the owner of them, and is willing to be bound to pay for them, and this is precisely the legal consequence which the law attaches to his agreement to purchase.

For the most part, an act in the law will require for its full effect the concurrence of more persons than one, since a man can hardly alter his own legal position without affecting that of another or others. A man cannot be compelled against his will to accept even a benefit. Thus a gift or a legacy will fail if the intended recipient refuses to take it. Yet there is a special sense in which we may properly distinguish one-sided or "unilateral" transactions from those which are two-sided

or "bilateral." If a man should make a gratuitous promise to pay £100 to another, his promise, though made without the knowledge of the other, will, if made in the proper form, be so far binding on him that he cannot revoke it, though it is true that the other may repudiate the benefit and thus release him. But the promisor in the meantime is bound. Such a transaction is unilateral. On the other hand, where a transaction would impose on each party both a benefit and a burden, as in the case of a sale, neither will be bound until both are bound: until that moment is reached, either can withdraw. Such transactions are bilateral.

2. Conveyance and Contract.—Among acts in the law we must sharply distinguish in principle the two types of conveyance and contract. In the case of a conveyance, the effect of the transaction is, so to say, exhausted as soon as the transaction is complete, and no special relation remains outstanding between the parties. A gift makes the recipient owner of the thing given as fully as the giver was previously. The giver must respect his proprietary rights; but this duty is no more than what is owed by every one else. The new owner has no rights against him which he has not against all the world. Such a transaction is purely a conveyance. On the other

hand, an agreement by which one man agrees to serve another who undertakes to pay him wages, creates between them special duties of the kind technically known as obligations, duties which at least in the first instance can be enforced only by and against the parties to the transaction. Such a transaction is the purest type of what in English law is called a contract.

Clear as is the distinction in principle between these two types, we shall find that many, if not most, ordinary transactions contain elements belonging to both, and the assignment of a transaction to one class or the other is sometimes a matter of difficulty, and cannot always be made in accordance with strict logic. An agreement for the purchase of land seems at first sight to be purely a contract; it gives the purchaser not the ownership of the land, but a right to be made owner, while it imposes on him the duty of paying the purchase-money. Yet, under the doctrines of equity, from the moment of the purchase, he acquires a proprietary interest in the land which he can enforce, not indeed against all the world, but against every one who has not taken a conveyance from the owner, for value and without notice of the purchase. Again, when the purchase is completed by a formal conveyance,

some special duties may remain incumbent on the seller to make good any defects in the title. A lease is mainly a conveyance and is classed as such in that it gives the tenant a right to the land, which, during the tenancy, is good against all the world; yet the tenant's covenants for payment of rent, or to keep the premises in repair, are essentially contractual obligations. A sale of goods is mainly a contract; yet many sales of goods immediately transfer the ownership to the buyer and give him rights against the world at large.

For practical purposes of classification, however, it is as a rule not difficult to place a transaction in one class or the other according as it corresponds more or less completely with one type or the other. Of conveyances something has been said in connexion with the law of property; they are different for different classes of property, and in many cases subject to special requirements of form. Contracts, on the other hand, while infinitely various in their subject-matter, have much in common as regards their formation and the conditions of their validity. It must be remembered that much that will here be said of contracts, especially when we come to speak of the effects of mistake, fraud, misrepresentation or illegality, is equally true, or true with variations, of conveyances in so far

as their force, like that of contracts, depends on agreement.

3. Formal Contracts.—A contract may be described as a transaction which consists wholly or mainly of a legally binding promise or set of promises. No promise is binding in our law unless it either satisfies certain requirements of form, or is given for valuable consideration. Though classed among formal contracts, the so-called "contracts of record" which owe their force to an entry in the records of a Court of Justice, are for the most part not contracts at all. A person who has had a judgment given against him has not really contracted or promised, though he is bound, to satisfy the judgment. Yet occasionally, as where a judgment is entered by consent as the result of a compromise, the judgment does embody a real agreement, and we may in such cases see a genuine contract deriving force from its judicial form. So, too, in the case of a recognisance, which is a promise made to the Crown to pay a sum of money in the event, for instance, of an accused person failing to surrender for trial.

But the commonest kind of formal contract is the contract by deed or sealed writing, sometimes known as a specialty. The promises contained in such a document are known as covenants. The formality of sealing

(now much attenuated in practice), which served as a test of genuineness in former days when illiteracy was common in all classes and handwritings hard to distinguish, still serves to call attention to the solemnity of the transaction, and affords evidence that the person who executes the deed seriously intends to bind himself. But to become operative, a deed, in addition to sealing, needs to be "delivered." Delivery is formally made by using some such words as, "I deliver this as my act and deed," in the presence of another, and handing the document to him; but any acts or words which sufficiently show an intention that the document should take effect are sufficient. A delivery may be made conditionally, *i.e.* it may be accompanied by a declaration that the deed shall take effect only when some condition is fulfilled, and a deed so delivered is called an escrow. A written signature is in practice always added, and though it would seem to be not essential to the validity of a deed, its absence would afford strong grounds for suspecting that it had not been duly executed.

4. Consideration.—Apart from the requirement of a deed for the contracts of corporations, the main use of a deed for purposes of contract is to enable a man to

bind himself by a gratuitous promise. A promise to pay money, or to perform a service, or confer any benefit, unless made by record or by deed, has no binding force if the promisor gets no "consideration" for the promise. The consideration is an act or forbearance of the other party, or the promise of some act or forbearance, accepted by the promisor in return for his promise. Thus, in a sale of goods, the supply of the goods, or the promise to supply them, will be a consideration for the promise to pay; and the promise to pay, or a cash payment, will be the consideration for the promise to supply them. Whether the consideration is of any actual value, or actually benefits the promisor, is immaterial. The delivery of the most trivial object by A to B, or the doing of a trivial act at B's request, may be a consideration for B's promise to pay A a large sum of money. The makers of a remedy for influenza offered by advertisement £1000 to any one who should use it for a specified period and contract the disease. A lady who so used it, and caught influenza, was held to have furnished the consideration for the promise. It is enough, but it is essential, that the promisor has got something which he had not got before, and which he had no legal right to require. A promise made in return for a previous service

is not binding; "a past consideration" is no consideration, for the promisor gets nothing for his promise which he had not got already. So, again, the doing, or the promise to do something which one is already bound to another to do, is no consideration for any promise of the latter. If I owe a man £10 to-day, and he undertakes, if I will pay him £5 now, to let me off the rest of the debt, his undertaking is of no effect, for he was already entitled to the £5. It would be otherwise if the money was not due till to-morrow, and he agreed to take less in consideration of a present payment. So, too. when a person is under a public duty, his performance of the duty is no consideration, as where a policeman in discharge of his duty furnishes information for which a reward has been offered. Nor is the abstention, or promise to abstain, from unlawful conduct, consideration for any promise. An act, or the promise of an act, which is unlawful, or even immoral in a sense recognised by law, not only is no consideration, but will even vitiate a transaction in which some other sufficient consideration is present.

5. Offer and Acceptance.—The formation of a contract commonly proceeds by way of offer and acceptance. One man will propose to another to make a promise to him, asking in return for the doing of some act,

or the making of a counter-promise. Such a proposal is called an offer. In itself it has no binding effect on either side, and may be withdrawn at any moment before it has been accepted. It will fail if more than a reasonable time elapses before it is accepted, or if either party dies before acceptance. Even an express declaration that the offer shall remain open till a certain time will not be binding unless it was made by deed, or something was given as a consideration for it, as in the case of Stock Exchange options. The most that such a declaration can do is to make sure that unless revoked the offer shall not fail from mere lapse of time before the time specified, nor continue open afterwards. If the offer is accepted it is converted into a binding promise. The acceptance may be made by words written or spoken, or by conduct showing an intention to accept. If a counter-promise is proposed as the consideration, the acceptance amounts to a giving of the counter-promise; if the consideration proposed consists of an act, the acceptance will consist of the doing of the act—*e.g.* A offers a reward for the furnishing of information; B supplies the information, and thereby at the same moment supplies the consideration asked for by A and converts A's offer into a promise.

Neither an offer nor its revocation can be made without communication to the other party. If one man should offer by advertisement to pay £5 for a rare book, and another, not knowing of the offer, should happen to send him a copy of the book at that price, there would be no contract, for the offer was never made to him. Similarly, one to whom an offer has been made, so long as it has not lapsed, is entitled to treat it as open till he has actually received notice that it is revoked. On the other hand, communication is not necessary for the acceptance of an offer. The offer may, of course, prescribe communication as essential to a valid acceptance. But it may often be inferred from the nature of the offer and the circumstances under which it is made, that actual communication is not required. This is commonly the case where acceptance is to be made by doing an act. An automatic machine placed in a public place is a standing offer on the part of the company which puts it there of promises to supply articles in return for the act of placing a coin in the machine. Every person who puts in a coin accepts the offer, and imposes on the company the duty of supplying the promised article. So, too, the lady who unsuccessfully used the influenza remedy was held to have thereby converted the makers' offer