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CHAPTER V.

CONTRACT.

Late development of a law of contract.

THE law of contract holds anything but a conspicuous [p. 182] place among the institutions of English law before the Norman Conquest. In fact it is rudimentary. Many centuries must pass away before it wins that dominance which we at the present day concede to it. Even in the schemes of Hale and Blackstone it appears as a mere supplement to the law of property. The Anglo-Saxon dooms tell us but little about it; they tell us less the more carefully we examine them. For example, certain provisions which may seem at first sight to show a considerable development in this department turn out, on closer scrutiny, to have a wholly different bearing. There are many ordinances requiring men who traffic in cattle to make their purchases openly and before good witnesses[1]. But they really have nothing to do with enforcing a contract of sale between the parties. Their purpose is to protect an honest buyer against possible claims by some third person alleging that the beasts were stolen from him. If the Anglo-Saxon *teám* was an ancestor of the later law of warranty in one line, and of rules of proof, ultimately to be hardened into rules of the law of contract, in another, the results were undesigned and indirect. Anglo-Saxon society barely knew what credit was, and had no occasion for much regulation of contracts. We find the same state of things throughout northern and western Europe. Ideas assumed as fundamental by this branch of law in modern times and so familiar to modern lawyers as apparently to need no explanation had perished in the general breaking up of the

[1] Schmid, Gesetze, Glossar, s. v. *Marktrecht*.

[p. 183] Roman system, and had to be painfully reconstructed in the middle ages. Further, it is not free from doubt (though we have no need to dwell upon it here) how far the Romans themselves had attained to truly general conceptions. In any case the Germanic races, not only of the Karolingian period, but down to a much later time, had no general notion whatever of promise or agreement as a source of civil obligation. Early Germanic law recognized, if we speak in Roman terms, only Formal and Real Contracts. It had not gone so far as to admit a Consensual Contract in any case. Sale, for example, was a Real, not a Consensual transaction. All recent inquirers seem to concur in accepting this much as having been conclusively established[1].

The Real and the Formal Contract.

Beyond this there is much ground that is debatable, and we have no reason for believing that the order of events was exactly the same in all the countries of western Europe; indeed it is plain that at latest in the thirteenth century our English law was taking a course of its own. One main question is as to the derivation of the 'formal contract' of old Germanic law from the 'real contract.' Some 'real contracts,' or transactions that we should regard as such, must appear at a very early time. Sale and exchange, it may be, are as yet only known to the law as completed transactions, which leave no outstanding duty to be enforced; no credit has been given on either side; the money was paid when the ox was delivered and the parties have never been bound to deliver or to pay. But loans there must soon be, and the borrower ought to return what is lent him. Also a gage (*wed, vadium, gagium*), or as we should now call it a pledge, will sometimes be given[2]. Even in these cases, however, it is long before any idea of contractual obligation

[1] Sohm, Recht der Eheschliessung; Heusler, Institutionen, ii. 225; Schröder, D. R. G., p. 283; Franken, Französisches Pfandrecht, 43; Esmein, Études sur les contrats dans le très-ancien droit français; Viollet, Histoire du droit civil français, 599; Pertile, Storia del diritto italiano, iv. 465: Amira in Paul's Grundriss der Germanischen Philologie, vol. ii. pt. 2, p. 161.

[2] In modern times we use the word *pledge* when a thing is given by way of security. But throughout the middle ages such a thing is a gage, a *vadium*. On the other hand the word *pledge*, which answered to the A.-S. *borh*, was reserved for cases in which there was what we now call *suretyship*; the *plegius* was a surety. Thus the common formula *Pone per vadium et salvos plegios* would, according to our modern use of words, become 'Exact a pledge and safe sureties.' In this chapter we shall give to *gage* and *pledge* their old meanings: a gage is a thing, a pledge is a person.

emerges. The lender claims not what has been promised him [p. 184] but what belongs to him. He does so in the case of the loan for use (*commodatum*); but he does so also in the case of the loan for consumption (*mutuum*); we have already seen how slowly these two cases are distinguished[1]. Then in the case of the gage there probably was at first no outstanding duty on the side of the debtor when once the gage had been given. He had become indebted for a *wergild* or a *bót*; he handed over some thing of sufficient value to cover and more than cover the debt; the debt was satisfied; the only outstanding duty was that of the recipient of the gage, who was bound to hand it back if within due time its giver came to redeem it. But here again, if the gage was not restored, the claim for it would take the form, 'You unjustly detain what is mine[2].' Again, a pledge or surety was in the beginning but an animated gage, a hostage delivered over to slavery but subject to redemption. The *wed* or gage, however, was capable of becoming a symbol; an object which intrinsically was of trifling value might be given and might serve to bind the contract. Among the Franks, whom we must regard as being for many purposes our ancestors in law, it took the shape of the *festuca*.

Fides facta. The formal contract.

Whether this transition from the 'real' to the 'formal' can be accomplished without the intervention of sacral ceremonies seems doubtful. There are some who regard the *festuca* as a stout staff which has taken the place of a spear and is a symbol of physical power[3]. Others see in it a little bit of stick on which imprecatory runes have been cut[4]. It is hard to decide such questions, for, especially under the influence of a new religion, symbols lose their old meanings and are mixed up. Popular etymology confounds confusion. When a straw takes the place of a stick, this we are told is the outcome of speculations which derive the Roman *stipulatio* from *stipula*[5]. Our

[1] See above, vol. ii. p. 169.

[2] Wigmore, The Pledge Idea, Harv. L. R. x. 326 ff.

[3] Schröder, D. R. G., p. 60.

[4] Heusler, Institutionen, i. 76.

[5] Heusler, Institutionen, i. 77. It is not unknown in England that in the surrender of copyholds a straw will sometimes take the place of the rod. A straw is inserted in the top of the document which witnesses the surrender of a copyhold and is fixed in that place by seals. The person who is making the surrender holds one end of the straw when he hands the document to the steward. We owe this note to Dr Kenny.

English documents come from too late a time to throw much [p. 185] light upon these archaic problems. The Anglo-Saxon is constantly finding both *wed* and *borh*; but what his *wed* is we do not know. In later times 'the rod' plays a part in the conveyance of land, and is perhaps still more often used when there is a 'quit-claim,' a renunciation of rights[1]; but we sometimes hear of it also when 'faith' is 'made.' Hengham tells us that when an essoiner promises that his principal will appear and warrant the essoin, he makes his faith upon the crier's wand[2], and we find the free miner of the Forest of Dean making his faith upon a holly stick[3]. But at any rate the Franks and Lombards in yet early times came by a binding contractual ceremony, the *fides facta*. At first it seems to be usually performed in court. The duty of paying *wergild* or other *bót* seems to have been that which first led to a legal process of giving credit. Where the sum due was greater (as must have often happened) than the party buying off the feud could raise forthwith, or at any rate produce in a convenient form, he was allowed to pay by instalments on giving security. Originally he must give either gages or hostages which fully secure the sum; at a later time he makes faith 'with gage and pledge'; and among the Franks his gage is a *festuca*. He passes the *festuca* to the creditor who hands it to the pledge. The pledge is bound to the creditor; for a while he is still regarded as a hostage, a hostage who is at large but is bound to surrender himself if called upon to do so. He holds the debtor's *wed* and this gives him power to constrain the debtor to pay the debt. Here is a general form of contract which can be used for a great variety of purposes, and the forms can be abandoned one by one or take weaker shapes. A man may make himself his own pledge by passing the *festuca* from the one hand to

[1] See above, vol. ii. p. 91.

[2] Hengham Magna, cap. 6: 'affidatis in manibus vel super virgam clamatoris.' The *clamator* is the crier of the court.

[3] See the Book of Dennis, a custumal of the Forest, of which we have only an English version made in 1673 from an ancient original. It is printed by H. G. Nicholls, Iron Making in the Olden Times (1866), p. 71. 'And there the debtor before the Constable and his Clarke, the Gaveller and the Miners, and none other Folke to plead right but onely the Miners, shall be there and hold a stick of holly and then the said Myner demanding the debt shall putt his hand upon the sticke and none others with him and shall sweare upon his Faith that the said debt is due to him.'

the other[1]. The *festuca* with its runes may be rationalized into a tally stick[2]. If sticks and straws will do, why not any [p. 186] other trifle? A glove becomes the gage of battle. Even this trifle may disappear and leave nothing save an empty hand to be grasped; but this in turn becomes indistinguishable from the distinct and very ancient form of faith-plight by the right hand which we now must mention.

The hand-grasp.

In many countries of western Europe, and in other parts of the world also, we find the mutual grasp of hands (*palmata, paumée, Handschlag*) as a form which binds a bargain. It is possible to regard this as a relic of a more elaborate ceremony by which some material *wed* passed from hand to hand; but the mutuality of the hand-grip seems to make against this explanation. We think it more likely that the promisor proffered his hand in the name of himself and for the purpose of devoting himself to the god or the goddess if he broke faith. Expanded in words, the underlying idea would be of this kind: 'As I here deliver myself to you by my right hand, 'so I deliver myself to the wrath of Fides—or of Jupiter 'acting by the ministry of Fides, *Dius fidius*—if I break faith 'in this thing'[3]. Whether the Germans have borrowed this symbolic act from the Roman provincials and have thus taken over a Roman practice along with the Roman term *fides*, or whether it has an independent root in their own heathen religion, we will not dare to decide[4]. However, the grasp of

[1] This is the *Selbstbürgschaft* of German writers; Heusler, Institutionen, ii. 242; Schröder, D. R. G., p. 286.

[2] Heusler, Instit., i. 76, 92.

[3] For the special connexion of Fides with Jupiter, see Ennius, ap. Cic. Off. 3, 29, 104: 'O Fides alma apta pinnis et iusiurandum Iovis.' Cp. Leist, Altarisches Ius Civile, pp. 420 ff. Leist has no doubt (p. 449) that the hand itself was the gage. Promises by oath were said to have been put by Numa under the protection of all the gods, *ib.* 429. Cicero's comment, 'qui ius igitur iurandum violat, is fidem violat' *etc.*, deriving the force of a formal oath from the natural obligation of *fides* implied in it, is a reversal, perhaps a conscious reversal, of the process of archaic morality. Other passages in Cicero show that the cult of Fides was treated as deliberate ethical allegory by educated Romans of his time.

[4] There is abundant authority to show that the Roman custom was both ancient and popular. *Fides* is the special name of *iustitia* as applied *creditis in rebus*: Cic. Orat. Part. c. 22, § 78, cf. Dig. 12, 1, 1. '[Populus Romanus] omnium [virtutum] maxime et praecipue fidem coluit': Gell. 20, 1. See Muirhead, Private Law of Rome, 149, 163; Dion. H. 2, 75; Livy, 1, 21, § 4; and (as to the right hand) Plin. H. N. xi. 45, 103; Servius on Aen. 3. 607; Pacchioni,

hands appears among them at an early time as a mode of [p. 187] contracting solemn, if not as yet legally binding, obligations[1]. Probably we ought to keep the mutual grasp apart from another act of great legal efficacy, that of placing one's folded hands within the hands of another in token of subjection. This act, which as the act of homage is to transform the world, appears among our English forefathers in the days of Edward the Elder[2]. But at any rate the feudal, or rather the vassalic, contract is a formal contract and its very essence is *fides*, faith, fealty.

The Church and the *fides facta*.

We must, however, remember that agreements sanctioned by sacral forms are not of necessity enforced by law; indeed so long as men firmly believe that the gods interfere with human affairs there may be something akin to profanity in the attempt to take the vow out of their hands and to do for them what they are quite capable of doing for themselves. But the Christian church could not leave sinners to the wrath of God; it was her duty to bring them to repentance. Her action becomes of great importance, because she is beginning to hold courts, to distribute penances according to fixed rules, to evolve law. She transmutes the *fides facta* and makes it her own. She was glad to find a form which was not an oath, but which, even if it did not already involve an ancient sacral element, could be regarded as a transaction directly concerning the Christian faith. She was bound to express some disapprobation of oaths, that is, of unnecessary oaths; she could not blot out the 'Swear not at all' from her sacred books. True that she invented new oaths, the oath upon the relics, the oath upon the gospels. These new oaths took their place beside and then began to drive out the ancient German imprecations. This process was very slow; the heathen oaths

Actio ex sponsu (repr. from Archivio Giuridico) Bologna, 1888, on the distinct history of the Stipulation. Brunner, Röm. u. Germ. Urkunde, 222, holds that very possibly the Franks found the provincials using the phrase *fidem facere* to describe the ceremony of stipulation, and borrowed it (they borrowed the word *stipulatio* also) for the purpose of describing their own formal contract. Caesar, B. G., iv. 11, makes certain Germans employ the phrase *iureiurando fidem facere*; Esmein, Études sur les contrats, 73.

[1] See Ducange, s. v. *Dextrae*. Esmein, Études sur les contrats, 98.

[2] Laws of Edward, II. 6. If a thief forfeits his freedom 'and his hand on hand sylle (*et manum suam in manum mittat*),' he is to be treated as a slave. See Brunner, D. R. G. ii. 270.

on weapons and on rings lived on, though they now occupied a secondary place in the hierarchy of assertions; men would still swear upon a sword in Christian England[1]. True also [p. 188] that the church would enforce oaths by penance and did not nicely distinguish between the assertory and the promissory oath. Already in the seventh century Archbishop Theodore has a graduated scheme of penances for a graduated scheme of oaths. He was not prepared to define a censure for a breach of an oath that was sworn upon the hand of a mere layman; but an oath sworn upon a priest's hand was a different matter[2].

Oath and faith.

Still, as already said, the church was bound to express some disapprobation of unnecessary swearing. The clergy at all events ought to refrain from it. At times it is asserted that even in court a priest should not be compelled to swear; no more should be exacted of him than 'Veritatem in Christo dico, non mentior[3].' A new and a Christian tinge is therefore given to the old contract with *wed* and *borh*. It may look like an oath; we may think that it implicitly contains all the essentials of an oath; but no relic or book or other thing is sworn upon and no express words of imprecation are used[4]. A gage is given; that gage is *fides*; that *fides* is the giver's Christianity; he pawns his hope of salvation. If, on the one hand, the *wed* is spiritualized and becomes incorporeal, on the other hand a man's Christianity is 'realized'; it becomes a thing, an object to be given and returned[5]. An 'age of faith'

[1] Brunner, D. R. G. ii. 428; Schmid, Gesetze, App. vii. 1 § 4: when a blood feud is being compromised the peace is sworn 'on ánum wæpne.' The oath on the sword was itself invested with a Christian character by association with the cross of the guard. In the 16th century the oath of admission to the gild of Spanish fencing-masters was taken 'super signum sanctae crucis factum de pluribus ensibus'; Rev. archéol. vi. 589.

[2] Theodore's Penitential, i. 6 (Haddan and Stubbs, iii. 182): 'Quis periurium facit in aecclesia, xi. annos peniteat. Qui vero necessitate coactus sit, iii. quadragesimas. Qui autem in manu hominis iurat, apud Graecos nihil est. Si vero iuraverit in manu episcopi vel presbiteri aut diaconi seu in alteri [*corr.* altari] sive in cruce consecrata, et mentitus est, iii. annos peniteat.'

[3] Laws of Wihtræd, 18. So after several centuries, 'Clericus non debet iurare in iudicio coram iudicibus saecularibus'; Protest of Grosseteste, Ann. Burton, 426.

[4] The process whereby in England the word *affidavit* has come to imply an actual oath upon the gospels would be worthy of investigation. But it does not fall within our period.

[5] Rievaulx Cartulary, p. 164: Henry archbishop of York declares to his successors and to the cathedral chapter how in his presence Robert de Ros

[p. 189] uses daring phrases about these matters. When a man makes a vow to God he will place his faith upon an altar and will find sureties who are to have coercive power over him[1]. But more, when he makes a promise to another man, he will sometimes offer God as his surety[2]. We must remember that in very old times the surety or pledge had in truth been the principal debtor, the creditor's only debtor, while his possession of the *wed* gave him power over the person whose *plegius* he was. Hence it is that when we obtain details of the ceremony by which faith is 'made' or 'given' or 'pledged,' we often find that the manual act takes place, not between the promisor and the promisee, but between the promisor and a third person who is sometimes expressly called a *fideiussor*. He is generally one whose station gives him coercive power over the promisor; he is the bishop of the diocese or the sheriff of the county. He does not accept any legal liability for the promise; but he holds the promisor's faith in his hands and can constrain him to redeem it by ecclesiastical censure or temporal distress[3]. We are far from saying that whenever faith was pledged, even in the most ancient times, three persons took part in the transaction. It may well be that sometimes the promisor put his faith directly into the hands of the promisee, and in this form the ceremony would become

confirmed to Rievaulx Abbey the lands given by Walter Espec; 'et primum haec omnia sacramento firmavit, deinde Christianitatem in manu mea qua se obsidem dedit et me plegium constituit de his omnibus'; therefore if he infringes the pact, he is to be coerced by ecclesiastical censures. Another good instance will be found in Madox, Formulare, p. 3. See also Ducange, s. v. *Christianitas*. For some political pacts sanctioned by affidation, see Round, Geoffrey de Mandeville, p. 384.

[1] Eadmer. Hist. Nov. p. 31: Rufus in a moment of terrified repentance promises to restore the good laws; 'spondet in hoc fidem suam, et vades inter se et Deum facit episcopos suos, mittens qui hoc votum super altare sua vice promittant.'

[2] Letters of John of Salisbury, ed. Giles, ii. 224: Henry II. promises to forgive Becket; 'primo Deum et (ut dici solet) Christianitatem suam obsidem dabat; deinde patruum suum.....et omnes qui convenerant constituebat fideiussores.'

[3] Rievaulx Cartulary, 33: Roger de Mowbray says, 'Hanc donationem [a gift to Rievaulx] ego et Nigellus filius meus manu nostra affidavimus tenendam in manu Roberti Decani [Eboracensis]...et ipsam ecclesiam Eboracensem testem et fideiussorem inter nos et monachos constituimus, ita ut si aliquando ego vel heredes mei ab hac conventione deviaverimus ipsa ecclesia ad haec exequenda nos ecclesiastica revocet disciplina.' For other instances see ibid. pp. 37, 39, 159, 169.

fused with that mutual grasp of hands which, as already said, may have had a somewhat different origin. And like a man's religious faith, so his wordly honour can be regarded as an [p. 190] object that is pawned to a creditor. Of pledges of honour which have definite legal results much may be read in the German documents of the later middle ages[1]. To this day we speak as though we could pledge our faith, our honour, our word, while the term *borrow* tells us of a time when men rarely, if ever, lent without receiving sufficient *borh*. Here, however, we are concerned to notice that a form of contract has been devised which the ecclesiastical tribunals may fairly claim to enforce:—a man has pawned his religion; very often, he has placed it in the hand of the bishop[2].

The written document as a form.

Meanwhile the written document is beginning to present itself as a validating form for transactions. To the eye of the barbarians the Roman provincials seemed to be conveying land by means of documents and to be stipulating by means of documents[3]. It is broadly stated that according to the 'Lex Romana' any one who contravenes or will not perform a written agreement is infamous and to be punished[4]. The written document, which few have the art to manufacture, is regarded with mystical awe; it takes its place beside the *festuca*[5]. The act of setting one's hand to it is a *stipulatio*[6]; it is delivered over as a symbol along with twig and turf and glove[7]. For a long time, however, it is chiefly used as a means of creating or

[1] Kohler, Shakespeare vor dem Forum der Jurisprudenz, p. 62.

[2] See an article by Sir Edward Fry, Specific Performance and Laesio Fidei, L. Q. R. v. 235. The *godborh* should be compared with the practice of 'taking God to witness' and inscribing His name at the head of a list of witnesses who attest a charter. See the ancient Welsh documents written in the Book of St Chad and reproduced by Gwenogvryn Evans in his edition of the Liber Landavensis, p. xlv, where the first witness is 'Deus Omnipotens.'

[3] See Brunner, Röm. u. Germ. Urkunde.

[4] Rozière, Recueil des formules, i. 152: 'Romanamque legem ordinantem ut quicumque in aetate perfecta pactionem vel diffinitionem per scripturam fecerit, et hoc quod fecit implere neglexerit, aut contra eam ire praesumpserit, infames vocetur et ipsam causam agere non permittatur, atque poenam statutam cogetur exsolvere.' See Esmein, Études, 17.

[5] Heusler, Institutionen, i. 87–92.

[6] Brunner, Urkunde, 224. Kemble, Cod. Dip. vol. v. p. 54 (A.D. 791): 'cunctis astipulantibus et confirmantibus nominatis atque infra descriptis.' Charter of Henry I., Monasticon, iv. 18: 'Hanc donationem confirmo ego Henricus rex et astipulatione sanctae crucis et appositione sigilli mei.'

[7] See above, vol. ii. p. 86.

transferring rights in land by way of gift, sale, lease or gage; it is rarely used for the purpose of creating or attesting the [p. 191] creation of purely personal rights[1]. But it has a future before it. The belief that the Romans stipulated by writing, the argument *a fortiori* that if men can be bound by question and answer they must be bound by their charters, will not easily be dispelled[2]. The most carefully worded documents that will be sealed in the England of the thirteenth century, the bonds given to Lombard merchants, will speak of stipulation[3].

English law in cent. xii.

It would be idle to inquire what stage of development these various institutions had attained in the England or the Normandy of the year 1066. The *God-borh* flits before us in Alfred's laws[4], and we have other evidence that a 'wedded' promise was under the sanction of the church[5]. We may see the solemn contract of betrothal[6] and may read of promises secured by oath and *wed* and *borh*[7]. But, for example, we can not tell in what, if any, cases a merely symbolic gage will have the effect of binding a bargain. To all appearance writing has hardly been used for any legal purpose except when land is to be conveyed or a last will is to be made. There is no sure ground earlier than Glanvill's book. But that book reminds us that in the twelfth century two new forces are beginning to play upon the law of contract: the classical Roman law is being slowly disinterred and the canon law is taking shape. Glanvill knows a little, Bracton knows much more about both. For a moment we may glance at them, though the influence that they exercise over English law is but superficial and transient.

[1] See Rozière's collection of formulas *passim*.

[2] Bracton, f. 100 b; Bracton and Azo (Selden Soc.), 155. It should be remembered that Justinian (Inst. 3, 21) had done his very best to lead the medieval lawyers astray.

[3] Cart. Rievaulx, p. 410; a bond given in 1275 by the abbot to a Florentine firm: 'promittimus et tenemur per legitimam stipulationem.....tenemur per praedictam stipulationem.' Camb. Univ. Libr. MS. Ee. 5. 31, f. 12 b; the convent of Christ Church, Canterbury, gives a bond to the Frescobaldi: 'Nos vero dictas xxx. marcas vel consimiles praedictis Johanni, Coppo, Rutto et Tedaldo stipulantibus tam pro se ipsis quam pro praedictis Gyno et aliis sociis suis .....promittimus reddere.' In 1214 the Earl of Ferrers becomes a surety for a debt due by King John to the Pope; in his charter he says 'constitui me fideiussorem.....per solempnem stipulationem promittens quod.....satisfaciam'; Rot. Pat. Joh. p. 139.

[4] Alfred, 33.

[5] Alfred, 1. § 8.

[6] Schmid, Gesetze, App. VI.

[7] Schmid, Gesetze, Glossar, s. v. *Eid*, *wed*, *borh*.

Medieval Roman law.

In the twelfth century the revived study of Justinian's books, though it urged men to rediscover or to construct some general law about the validity of agreements, tended also to [p. 192] confirm the notion that something more than a formless expression of agreement must be required if an action is to be given[1]. *Nudum pactum non parit actionem*—so much at least was clear beyond a doubt, and the glossators set themselves to describe, sometimes in picturesque phrases, those various 'vestments' which will keep the pact from perishing of cold[2]. The Roman formal contract, the *stipulatio*, might be dead past resuscitation, yet they were neither prepared to put a new ceremony in its place nor to declare that ceremonies are needless. The mere *pactum* in their eyes derives its name from that mutual grasp of hands (*palmarum ictus*) whereby men were wont to bind a bargain[3]. Even in countries where 'the imperial laws' had a claim to rule because they were imperial, the civilian's doctrine of contract was too remote from traditional practice to sway the decisions of the courts, and the civilian was beginning to find in the canonist a rival who had a simpler doctrine and one less hampered by ancient history. Bracton makes a half-hearted attempt to engraft the theory of the legists upon the stock of English law. No part of his book has of late attracted more attention than the meagre chapters that he gives to contract; none is a worse specimen of his work[4]. It is a scholastic exercise poorly performed. Here and there half unwillingly he lets us see some valuable truth, as when, despite Justinian and Azo, he mixes up the *mutuum* and the *commodatum* and refuses to treat sale as 'consensual.' But there is no life in this part of his treatise because there is no practical experience behind it. The main lesson that we learn from it is that at the end of Henry III.'s reign our king's court has no general doctrine of contract[5].

[1] Seuffert, Geschichte der obligatorischen Verträge.

[2] Azo, Summa Cod. de pactis (2, 3), paints for us a shivering pact which nestles among the furs, the 'vair and grise,' of some well-dressed contract and becomes *pactum adiectum*. Bracton and Azo, 143.

[3] Azo, *l. c.*: 'vel dicitur [pactum] a percussione palmarum; veteres enim consentientes palmas ad invicem percutiebant in signum non violandae fidei.'

[4] Salmond, Essays in Jurisprudence, p. 174.

[5] As to the character of this part of Bracton's work, see Bracton and Azo (Selden Soc.), 142 ff. Britton, i. 156, and Fleta, p. 120, repeat the learning of vestments. Fleta, however, has some valuable passages about the action of debt. It is not unlikely that Bracton intended to give a chapter to that action.

[p. 193] The canon law.

We have seen that ecclesiastical law gained a foot-hold within the province of contract by giving a Christian colouring to the old formal agreement, the pledge of faith. This having been accomplished, the canonists began to speak slightingly of ceremonies. The sacred texts, which teach that the Christian's Yea or Nay should be enough, may have hastened the change, but we believe that the motive force had its origin elsewhere. The law of marriage had fallen into the canonist's hand, and in the middle of the twelfth century, after long hesitation, he was beginning to teach that a bare interchange of words was sufficient to constitute a marriage. This doctrine was not due to any contempt for ceremonies, but to quite other causes of which we must speak elsewhere[1]. Nevertheless, it could not but exercise a powerful influence outside the sphere of marriage law, and some small counterpoise to the enormous harm that it did within that sphere may be found in the effects that it produced in other quarters. If, not merely a binding contract to marry, but an indissoluble marriage can be constituted without any formalities, it would be ridiculous to demand more than consenting words in the case of other agreements. In the course of the thirteenth century the canonists were coming to this opinion, and could cite in its favour two sentences which had found a place in the Gregorian statute-book. Even the 'nude pact' should be enforced, at any rate by penitential discipline[2].

Evolution of a law of contract on the continent.

From this point onward the process of arriving at a general law of contract was different in England and on the continent, although some curious particular coincidences may be found. Both here and elsewhere the secular courts were put on their mettle, so to speak, by the competition of the spiritual forum. In Italy, where the power of the revived Roman law was at its strongest, the development of the new doctrine, which would cast aside the elaborate learning of 'vestments' and enforce the naked agreement, was to some extent checked by the difficulty

[1] See below, the section on Marriage.

[2] cc. 1. 3. X., de pactis, 1. 35; Seuffert, *op. cit.* 47. One of the first writers who proclaim this doctrine is that Hostiensis, who (see above, vol. i. pp. 122, 214) had made himself but too well known in England. Hostiensis, ad tit. *de pactis.* § *quid sit effectus*: 'Ut modis omnibus servetur, etiamsi sit nudum secundum canones.....quia inter simplicem loquelam et iuramentum non facit Deus differentiam.' See Seuffert, *op. cit.* p. 50.

of stating it in a Roman form of plausible appearance, even for [p. 194] the use of ecclesiastical judges, while, on the other side, the problem for the civilian was to find means of expanding or evading the classical Roman rules and of opening the door of the secular tribunal to formless agreements by practically abolishing the Roman conception of *nudum pactum*[1]. In Germany and in northern France the old Teutonic formalism was but slowly undermined by the new principle, and in one and the same book we may find the speculative *Pacta sunt servanda* lying side by side with the practical demand for formalities[2]. In England the Courts Christian were early in occupation of the ground and bold in magnifying their jurisdiction, and the king's judges were rather slow to discover how profitable a field their rivals were occupying. It is not a little remarkable that Bracton, in search for principles, preferred importing the system of the glossators, which at all events preached the sterility of the naked pact, to adopting the novel and ecclesiastical doctrine. His efforts ended in a sad failure. English law went on its way uninfluenced by Italian learning, but confirmed in its belief that pacts require vestments. The problem of constructing a general law of contract was not faced until a much later day, when the common-law system of pleading was mature, and what was then sought was a new cause and form of action which could find a place within limits that were already drawn.

Influence of Roman and canon law in England.

In Italy we find some jurists holding that an action *de dolo* will lie for damage caused by breach of an informal pact[3]. This offers a striking parallel to the influence of the action of deceit in forming that English action of *assumpsit* which was to become by slow degrees the ordinary means of enforcing an informal contract. But the method which found most favour among the Italians was to hold that an additional express promise (*pactum geminatum* or *duplex*) was a sufficient 'clothing' of the natural obligation of a *nudum pactum* to make it actionable. The opinion formerly current in our courts that an express promise, founded on an existing moral duty, is a sufficient cause of action in *assumpsit*, is not unlike this. But all this lies in the future. Gradually upon the continent the new principle [p. 195]

[1] Seuffert, *op. cit. passim.*

[2] Franken, Das französische Pfandrecht, pp. 43 ff.

[3] Seuffert, *op. cit.* 77, 80.

that had been proclaimed by the canonists gained ground; the French lawyers of the sixteenth century, going back as humanists to the original Roman authorities, held out latest of all. From the seventeenth century onwards German writers boldly appealed to the law of nature. The modern philosophic lawyers of Germany do not seem wholly satisfied with the results[1]. But, before the thirteenth century was out, both Roman and canon law had lost their power to control the development of English temporal law. The last effective words that they had spoken here were contradictory. About one point Bracton and his epitomators are clear—*Nudum pactum non parit actionem;* but the words sculptured on the tomb of 'the English Justinian' are the canonical *Pactum serva.*

English law in cent. xiii.

Our task now becomes that of tracing the fortunes of three different institutions, the germs of which we have already seen, namely (1) the pledge of faith, (2) the action of debt, and (3) the action of covenant. We shall be compelled to speak chiefly of the doctrines of the king's court. These were to be in the future the English law of contract; but we must remember that in the twelfth and even in the thirteenth century that court was not professing to administer the whole law. There were other courts for the recovery of debts, and both Glanvill and Bracton seem willing to admit that there may be many binding agreements which royal justice will not enforce or will only enforce as a matter of grace and favour[2].

(1) The pledge of faith.

(1) We have seen how 'an interposition of faith' accomplished by some manual act could be converted into a vestment for pacts, and how this vestment was sanctified by a doctrine which saw in the faith that was pledged the pledgor's Christianity. This interpretation brought the ceremony within the cognizance of the ecclesiastical tribunals, which in the twelfth [p. 196] century were seeking to enlarge their borders. The ceremony is often mentioned in deeds of that age, and it must frequently have taken that elaborate form which involved the action of

[1] Seuffert, *op. cit. ad fin.*

[2] Glanvill, x. 8: 'Curia domini Regis huiusmodi privatas conventiones de rebus dandis vel accipiendis in vadium vel alias huiusmodi, extra curiam, sive etiam in aliis curiis quam in curia domini Regis, factis, tueri non solet nec warantizare.' Ibid. x. 18: 'Praedictos vero contractus qui ex privatorum consensu fiunt breviter transigimus, quia, ut praedictum est, privatas conventiones non solet curia domini Regis tueri.' See also the passage from Bracton, cited below, p. 218, note 3.

three persons, the faith being deposited in the hands of some *mediator* or *fideiussor* who was often the bishop and judge ordinary, but often the sheriff of the county or the steward of a lord who kept a court[1]. The letters of John of Salisbury allow us to see that in the earliest years of Henry II.'s reign the ecclesiastical tribunals, even the Roman curia, were busy over agreements made by Englishmen with pledge of faith[2]. Then came the quarrel between Henry and Becket.

The church's jurisdiction in case of broken faith.

We hardly need explain, after all that we have elsewhere said, that there was no question of a war all along the line between the spiritual and the temporal power. The king never disputed that many questions belonged of right to the justice of the church, nor the bishop that many belonged to the justice of the king. But there was always a greater or less extent of border-land that might be more or less plausibly fought for. In this region the mastery was with the party which could establish the right to draw the boundary. This was as clearly perceived by Henry and Becket as by any modern theorist; and the controversy centred round the question: who in doubtful cases should decide where a cause should be tried. The Constitutions of Clarendon (1164) mark the king's determination that his justices, not the bishops, shall be the persons to say what matters are for the royal court and what are not. The fifteenth article, which alone concerns us here, is in these terms: 'Placita de debitis, quae fide interposita debentur, vel absque interpositione fidei, sint in iustitia regis.'

Struggle between ecclesiastical and temporal justice.

We can not be certain about the precise meaning that the king's advisers attributed to these words. Becket and his friends interpreted them to mean that the ecclesiastical tribunals were deprived of all jurisdiction of every kind over breaches of oath or breaches of faith[3]. This article was among those that [p. 197]

[1] Northumberland Assize Rolls (Surtees Soc.) 56: in 1253 a marriage settlement is secured by faith deposited in the hands of the abbot of Newminster and the prior of Hexham. Winchcombe Landboc, i. 204: A. W., on quit-claiming land to the abbot, pledges his faith in the hands of E. R. Rievaulx Cartulary, 39: S. and his wife, releasing land to their lord, pledge faith in the hands of the lord's steward in full court: they then go before the sheriff and pledge faith in his hands. See ibid., 69, 76, 77, 89, 100–1–2, 139.

[2] Letters of John of Salisbury, ed. Giles, vol. i. pp. 1, 3, 8, 21 etc.

[3] Hoveden, i. 238, and Materials for the Life of Becket, v. 294: 'Quod non liceat episcopo coercere aliquem de periurio vel fide laesa.' See also Materials, ii. 380, vi. 265. William Fitz Stephen (Mater. iii. 47) gives this version:—'Ne

the pope condemned[1]. After the murder Henry was compelled to renounce his 'innovations'; but here as in other cases we are left to guess how much he conceived to be covered by that term. A few years afterwards we have Glanvill's statement of the law[2]. He admits that *fidei laesio vel transgressio* is a proper subject of criminal cognizance in the ecclesiastical court; but is careful to add that by statute (*per assisam regni*, that is, by the Constitutions of Clarendon) the 'interposition of faith' must not be so used as to oust the king's jurisdiction over the debts of the laity or their tenements. Thenceforward there were two subjects of debate. We have seen that the spiritual courts claimed a civil, that is, a non-criminal jurisdiction over all personal actions in which a clerk was defendant. We have seen how this claim was resisted and slowly abandoned[3]; still there can be little doubt that during the thirteenth century clerks were often sued upon their contracts in the courts Christian[4].

The writs of prohibition.

But what concerns us here is the assertion of a criminal jurisdiction to be exercised *in foro externo* over all causes of broken oath or broken faith. Now the lay courts did not deny that this jurisdiction had a legitimate sphere. They defined that sphere by two writs of prohibition; the one forbad the ecclesiastical judges to meddle with 'lay fee,' the other forbad them to meddle with chattels or debts except in matrimonial and testamentary causes[5]. How wide a province was [p. 198] left to them is by no means clear. It is plain that a creditor who had a claim which the king's court would enforce was not to hale his opponent before the ordinary on a charge of

omnis controversia de fidei vel sacramenti trangressione sit in foro ecclesiastico; sed tantum de fide adacta pro nuptiis vel dote vel huiusmodi, quae non debent fieri nisi in facie ecclesiae. De aliter dato fidei sacramento, ut de debitis vel sic, statuit rex causam esse in foro laico.' Anonymus II. (Mater. iv. 102) says: 'Quod apud iudicem ecclesiae non conveniatur aliquis laicus super laesa fide vel periurio de pecunia.'

[1] Materials, v. 79. [2] Glanvill, x. 12. [3] See above, vol. i. p. 446.

[4] In John of Oxford's collection of precedents (circ. 1280) the example of an ecclesiastical libel (*littera editionis*) is one in which a plaintiff, who has transcribed a book for the defendant, claims an unliquidated sum, the amount of which is to be determined by the estimate of good men; Maitland, A Conveyancer in the Thirteenth Century, L. Q. R. vii. 67.

[5] Glanvill, xii. 21, 22; Select Civil Pleas (Selden Soc.), pl. 83. History of the Register, Harv. L. R. iii. 112, 114; Reg. Brev. Orig. f. 34. The ordinaries must not hold plea concerning chattels or debts 'quae non sunt de testamento vel matrimonio.'

violated faith. That a man might sometimes wish to do this is also evident; he might thus attain his end more speedily than by an action of debt[1]. In such cases a promise not to seek a prohibition, a renunciation of the *privilegium fori*, would not stay the issue of the writ, for no one could renounce the king's right to protect his own jurisdiction, though the man who thus went against his own act might be sent to gaol, and a certain validity was thus conceded to those renunciatory clauses which are not uncommon in the charters of this age[2]. But there were as yet numerous agreements which the king's court did not profess to enforce. Might the court Christian punish a breach of these when they involved a gage of faith? We doubt it. They must in almost every case have fallen within the words of the writ of prohibition. At any rate the clergy were profoundly dissatisfied with the law administered by the royal justices, and spoke as though the spiritual forum was prohibited from punishing a breach of faith in any pecuniary matter if it were not of a testamentary or matrimonial character[3]. Certainly these writs were always buzzing about the ears of the ecclesiastical judges[4]; they retaliated with excommunications, and we may see Northampton laid under an interdict because its mayor enforced a prohibition[5].

Circumspecte agatis.

A document attributed to the year 1285, which in after days was ranked among the statutes, the *Circumspecte agatis*, suggests that at some time or another some concession was made in this matter by the lay power[6]. This document may

[1] Note Book, pl. 351: 'quia ibi maturius iusticiam habere potuit.'

[2] Bracton, f. 401 b. In 1303 Bereford J. remarks that not long ago such clauses had been frequent in mercantile documents, but that they were against law; Y. B. 30–1 Edw. I. 493. Sometimes the promisor had expressly obliged himself 'sub poena anathematis'; Selby Coucher, ii. 140.

[3] Grosseteste's articles (1258), Ann. Burton, 423: 'Item sub colore prohibitionis placiti in curia Christianitatis de pecunia, nisi sit de testamento vel matrimonio, impedit et perturbat [Rex] processum in foro ecclesiastico super fidei laesione, periurio.....in magnum animarum detrimentum.'

[4] Note Book, pl. 50, 351, 670, 683, 1361, 1464, 1671, 1893.

[5] Note Book, pl. 351.

[6] Statutes of the Realm, i. 101. The editors of this volume seem to have failed to find any authentic text of this writ. It certainly ought to be enrolled somewhere. The author of the Mirror treats it as a statute. Possibly Britton, i. 28, alludes to it. A reason for giving it to the year 1285 is that it appears to be issued in consequence of a petition presented in that year by the bishops; Wilkins, Concilia, ii. 117. In this they complain in general terms that they are prohibited from entertaining causes *de fidei vel sacramenti laesione.*

[p. 199] be described as a royal circular sent to the judges; perhaps it was issued along with a set of commissions, or sent to the judges after they had already started on their circuits. The bishop's court is not to be interfered with in matters of spiritual discipline (*pro hiis quae sunt mere spiritualia*); and it is laid down as already settled that violent laying of hands upon a clerk, defamation, and (according to some, but by no means all copies) breach of faith, are good subjects of ecclesiastical jurisdiction, so long as, not the payment of money, but spiritual correction is the object of the suit. The words about breach of faith may possibly be authentic[1]; but there were lawyers in the fourteenth century who protested that this document was concocted by the prelates and of no authority[2]. In any case the quarrelling went on as before; no change was made in the writs of prohibition. Both parties were in their turn aggressors. In 1373 the commons in parliament complain that the courts Christian are encroaching to themselves pleas of debt even where there has been no lesion of faith[3], and it seems plain that the ecclesiastical judges did not care to inquire whether a complainant could have found a remedy in a lay court[4]. On the other hand, the king's justices would
[p. 200] concede but a small territory to the canonists; their doctrine is that the only promises that are subjects for spiritual jurisdiction are promises which concern spiritual matters[5]. That

[1] Such MSS. as we have consulted leave this very doubtful. Curiously enough Coke gives while Lyndwood, p. 97, omits the important words. The Articuli Cleri of 1315 (Statutes, i. 171) mention assaults on clerks and defamation as offences proper for ecclesiastical punishment, but say no word of breach of faith. See also Makower, Const. Hist., 434.

[2] Fitzherbert, Abr. *Jurisdiction*, pl. 28. See also Prynne, Records, iii. 336.

[3] Rot. Parl. ii. 319: 'eaux ont encroché plee de dette ov une addition q'est appellé fide-lesion la ou unqes nul ne fust.' This injures the lords who have courts.

[4] Thus in 1378 Richard vicar of Westley is cited in the bishop of Ely's court at the instance of a Cambridge tailor to answer for perjury and breach of faith which apparently consist in his not having paid a loan of eight shillings: Register of Bp. Arundel (in the Palace at Ely), f. 88 b. See the cases from Hale's Precedents and Proceedings collected in Harv. L. R., vi. 403. Also Depositions and other Ecclesiastical Proceedings in the Courts of Durham (Surtees Soc.), p. 50 (A.D. 1535); the agreement enforced is for the purchase of a horse.

[5] Lib. Ass. f. 101. ann. 22. pl. 70; Y. B. 2 Hen. IV. f. 10 (Mich. pl. 45); 11 Hen. IV. f. 38 (Trin. pl. 40); 36 Hen. VI. f. 29 (Pasch. pl. 11); 20 Edw. IV. f. 10 (Mich. pl. 9); 22 Edw. IV. f. 20 (Trin. pl. 47); Second Inst. 493.

one court, if it has received no prohibition, should have a right to do what another court can prohibit it from it doing, need not surprise us: this in the middle ages is no antinomy.

The formal pledge of faith in the ecclesiastical court.

Within the limits assigned to their civil or non-penal jurisdiction the English courts Christian were in all probability able and willing to enforce the doctrines of the Italian decretists, who, as already said, were slowly coming to the opinion that the 'nude pact' will support an action. These limits however were not very wide, though they included testamentary and matrimonial causes and other matters 'merely spiritual.' No English canonist, so far as we are aware, achieved anything for the law of contract. Outside the limits just mentioned the very most that the ecclesiastical judge could do was to punish by corporal penance a breach of promise which was also a breach of faith, and the king's courts would not have allowed him to whittle away the requirement of 'form.' To the end there must be at least a hand-shake in order to bring the case within his cognizance[1].

The king's court and the pledge of faith.

One curious result of this bickering over 'faith' seems to have been that already in Glanvill's day the king's justices had set their faces against what might otherwise have become the English formal contract. Glanvill gives us to understand that a plaintiff who claims a debt in the royal court must produce some proof other than an interposition of faith[2]. In other words, the grasp of hands will not serve as a sufficient vestment for a contract. The same may be said of the gage. If a thing be given by way of gage, the creditor can keep it and can call upon the debtor to 'acquit' it by paying the debt; but, if the debtor will not do this, then no worse will happen to him than [p. 201] the loss of the gage[3]. This prevents our treating the delivery of a rod or a glove as a validating ceremony. Within a sphere marked out for it by ancient law, the symbolic *wed* was still

[1] Depositions and other Ecclesiastical Proceedings in the Courts of Durham (Surtees Soc.), 50; in 1535 a deponent in a case of breach of faith says that he heard the oral agreement made; 'et desuper idem [reus] fidem fecit dicto actori —vidit dictum reum ponentem manum suam dextram in manu dextra ipsius actoris in supplementum promissi sui.'

[2] Glanvill, x. 12: 'creditor ipse si non habeat inde vadium neque plegium, neque aliam disrationationem nisi sola fide, nulla est haec probatio in curia domini Regis.'

[3] Glanvill, x. 6. 7.

used. This sphere we may call that of the 'procedural contract' made in the course of litigation, the contract to appear before the court, the contract to abide by and fulfil its award. By this time justice had grown so strong that these engagements were hardly regarded as contracts; but, at least in theory, men found gage as well as pledge for their appearance in court, and when they were there they 'waged' battle, or 'waged' their law, or 'waged' an amercement, by the delivery of a glove or some other symbol[1]. In the exchequer[2] and in other courts men were constantly pledging their faith (*affidare*) that essoins would be warranted, that pleas would be prosecuted and the like[3]; but they were ceasing to think that in such cases the court's power to punish a defaulter was given to it by agreement. We should be rash were we to assume that the local courts of the twelfth century paid no heed to these ceremonies. Blackstone has recorded how in his day men shook hands over a bargain[4]; they do it still; but already in Henry II.'s reign the decisive step has been taken; common as these manual acts may be, they are not to become the formal contract of English temporal law.

(2) The action of debt.

(2) We must now turn to the action of debt. But first we ought to notice that in the thirteenth century a prudent creditor was seldom compelled to bring an action for the recovery of money that he had lent. He had not trusted [p. 202] his debtor's bare word nor even his written bond, but had obtained either a judgment or a recognizance before the loan was made. We see numerous actions of debt brought merely in order that they may not be defended, and we may be pretty sure that in many cases no money has been advanced until a judgment has been given for its repayment. Still more often

The recognizance.

[1] *Pone per vadium et salvos plegios*—when the sheriff is bidden to do this, he, so far as we can see, merely exacts pledges (sureties). Of the wager of law we have this account in MS. Brit. Mus. Egerton, 656, f. 188 b: 'Il gagera la ley de sun gaunt plyee e le baylera en la meyn cely e puys reprendra arere sun gaunt, e dunke trovera il plegges de la ley.' When in later times we find that the glove is 'thrown down' as a gage of battle, we may perhaps suspect that some act of defiance has been confused with the act of wager.

[2] Dialogus, ii. 12, 19, 21, 28.

[3] See *e.g.* Hengham Magna, c. 6: Select Pleas in Manorial Courts (Selden Soc.), p. 6.

[4] Blackstone, Comm. ii. 448: 'Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts.'

there is upon the plea rolls what purports to be the compromise of an action of debt. The defendant confesses (*cognoscit, recognoscit*) that he owes a sum of money, promises to pay it upon a certain day and 'grants' that, if he does not pay it, the sheriff may levy it from his lands and goods; in return the plaintiff is sometimes said to remit the damages which are supposed to be already due to him from his debtor[1]. Still more often the parties go into the chancery or the exchequer and procure the making of an entry upon the close roll or some other roll. The borrower confesses (*recognoscit*) that he owes a certain sum which is to be paid upon a certain day, and grants that, if default be made, the money may be levied by the sheriff. This practice, which is of some importance in the history of the chancery, may have its origin in the fact (for fact it is) that some of its officers were money lenders on a great scale; but no doubt it has ancient roots; it is analogous to the practice of 'levying fines'; indeed we ought to notice that at this period the 'fine of lands' sometimes involves an agreement to pay money and one which can be enforced by summary processes. Now the recognizance is aptly called a 'contract of record'; we might also call it an 'executory' contract, if we used this adjective in an unfamiliar sense, but one that it will bear. The recognizance is equivalent to a judgment; nothing remains to be done but execution. Within a year from the date fixed for payment, a writ of execution will issue as a matter of course on the creditor's applying for it, unless the debtor, having discharged his duty, has procured the cancellation or 'vacation' of the entry which describes the confession. The legislation of Edward I. in favour of merchants instituted a new and popular 'contract of record,' the so-called 'statute merchant.' This we must not examine; but already before his accession the recognizance was in common use and large sums of money were being lent upon its security.

The action of debt in Glanvill.

Glanvill knows an action of debt in the king's court[2]. The [p. 203] original writ is a close copy of that form of the writ of right for land which is known as a *Praecipe in capite*. The sheriff is to bid the debtor render a hundred marks which he owes to the plaintiff 'and whereof the plaintiff complains that the

[1] Select Civil Pleas (Selden Soc.), pl. 102. This has begun as early as 1201.

[2] Glanvill, x. 2.

defendant unjustly deforces him'; if the debtor will not obey this order, then he is to be summoned before the king's court. The creditor is being 'deforced' of money just as the demandant who brings a writ of right is being 'deforced' of land. There may be trial by battle in the one case as in the other. The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods. To all appearance our ancestors could not conceive credit under any other form. The claimant of a debt asks for what is his own. After all, we may doubt whether the majority of fairly well-to-do people, even at this day, realize that what a man calls 'my money in the bank' is a mere personal obligation of the banker to him[1]. The gulf that we see between *mutuum* and *commodatum* is slurred over. If we would rethink the thoughts of our forefathers we must hold that the action of debt is proprietary, while at the same time we must hold, as we saw in the last chapter, that there is no action for the recovery of a chattel that would be called proprietary by a modern lawyer[2].

An action of debt in the king's court is rare.

Though Glanvill gives a writ of debt and though the action of debt occasionally appears on the very earliest plea rolls[3], it long remains a rare action in the king's court. In the case of debts any royal writ, whether it takes the form of a *Praecipe* or of a *Iusticies*[4], seems to be regarded as a luxury which the king is entitled to sell at a high price. Even in the earlier years of [p. 204] Henry III.'s reign the plaintiff must often promise the king a quarter or a third of all that he recovers before he will get his writ[5]. That men are willing to purchase the king's interference at this extravagant price seems to tell us that the justice of the

[1] See Langdell, Contracts, §§ 99, 100.

[2] The doctrine that we are here maintaining about old English law had, we believe, become the orthodox doctrine about old German law. Of late Dr Heusler (Institutionen, i. 377–396) has vigorously attacked it, declaring that the German at a very remote time saw a difference between real and personal rights and between real and personal actions. We wish that he had considered the English actions of debt and detinue. What we have here said is in accord with Holmes, Common Law, p. 252; Salmond, Essays on Jurisprudence, 175.

[3] Rolls of the King's Court, (Pipe Roll Soc.) pp. 24, 25; Rot. Cur. Reg. (ed. Palgrave), i. 5. See above, p. 173.

[4] A *Praecipe* brings the case to the royal court, a *Iusticies* commits it to the sheriff.

[5] Maitland, Register of Original Writs, Harv. L. R., iii. 112, 114; Excerpta e Rot. Fin. i. 29, 49, 62, 68; Glanvill Revised, Harv. L. R., vi. 15.

local courts is feeble and that credit is seldom given. All the entries relating to Staffordshire cases that appear upon the rolls of the king's court during this long reign of fifty-six years are in print; some eight actions of debt are all that we find among innumerable novel disseisins[1]. Staffordshire was a poor and backward county and our series of rolls is by no means perfect; but still this is a significant fact. In the last years of the reign, however, the action was becoming much commoner; fifty-three entries on the plea roll of one term speak of it, and some of the loans to which they testify are large[2]. First from the Jew, then from the Lombard, Englishmen were learning to lend money and to give credit for the price of goods.

Proprietary character of the action.

We may see the action gradually losing some of its proprietary traits; we may see the notion of personal obligation slowly emerging. The offer of battle in proof of debt vanishes so early that we are unable to give any instance in which it was made; thus one link between the writ of right for land and what we might well call the writ of right for money is broken. Then the eloquent 'deforces' of Glanvill's precedent disappears. In the king's courts one says 'detains' not 'deforces'; but late in the thirteenth century the old phrase was still being used in local courts and the deforcement was even said to be a breach of the peace[3]. But 'debt' was falling apart from 'detinue': in other words, lawyers were beginning to feel that there are certain cases in which the word *debet* ought, certain in which it ought not to be used[4]. They were beginning to feel that the two forms of 'loan,' the *commodatum* and the *mutuum*, are not all one, and this although the judgment in detinue gave the defendant a choice between returning the thing that he had borrowed and paying an equivalent in money[5]. One ought not to say *debet* when there is a *commodatum*. But further—and [p. 205] this is very curious—even when there is a money loan the word *debet* should only be used so long as both parties to the transaction are alive; if either dies, the money may be

[1] Staffordshire Historical Collections, vol. iv.

[2] Curia Regis Roll for Pasch. 55 Hen. III. (No. 202).

[3] Select Pleas in Manorial Courts, 140, 144, 150, 152.

[4] See above, vol. ii. p. 173.

[5] In the language which the royal chancery employs in describing the loans of money made to the king by Italian bankers a change occurs about the middle of Henry III.'s reign; *commodare* gives place to *mutuo tradere*, *mutuo liberare* and the like. See Archæologia, xxviii. 261.

'unlawfully detained' by the representative of the one or from the representative of the other, but there is no longer any 'owing' of the money. This looks like a clumsy struggle on the part of the idea of obligation to find its proper place in the legal system[1]. Centuries will pass away before it comes by its just rights. Well worthy of remark is the fate of the Roman term. It is useless for Bracton to talk of *obligationes ex contractu vel quasi, ex maleficio vel quasi*; an obligation, or in English a 'bond,' is a document written and sealed containing a confession of a debt; in later times 'contract' is the genus, 'obligation' the species[2].

Debts arising from sale.

By far the commonest origin of an action of debt is a loan of money. But soon we begin to see the same action used for the price of goods. The contract of sale as presented by Glanvill is thoroughly Germanic[3]. Scraps of Roman phraseology are brought in, only to be followed by qualification amounting to contradiction. To make a binding sale there must be either delivery of the thing, payment of the whole or part of the price, or giving of earnest[4]. The specially appointed witnesses, the 'transaction witnesses' of the Anglo-Saxon laws, have by this time disappeared or are fast disappearing, and we must think of them as having provided, not an alternative form or evidence of the contract, but a collateral precaution:—the man who bought [p. 206] cattle without their testimony was exposed to criminal charges. In substance the conditions mentioned by Glanvill are the very conditions which in the seventeenth century our Statute of Frauds will allow as alternatives in a case of sale to a note or memorandum in writing[5].

[1] Y. B. 21–2 Edw. I. p. 615; 30–1 Edw. I. p. 391; 33–5 Edw. I. p. 455. In the last of these cases it is said that the heir of the original creditor is not a creditor, and therefore he can not say *debes mihi*. In the early records of debt and detinue the active party does not complain (*queritur*) he demands (*petit*); in other words he is a 'demandant' rather than a 'plaintiff' and the action is 'petitory.' See Note Book, pl. 645, 732, 830.

[2] So in French customary law *obligation* has a similar narrow meaning: Esmein, Études sur les contrats, pp. 151, 177.

[3] Glanvill, x. 14; Bracton, f. 61 b. In this instance Bracton has worked into his book almost the whole of Glanvill's text.

[4] Glanvill, x. 14: 'Perficitur autem emptio et venditio cum effectu ex quo de pretio inter contrahentes convenit, *ita tamen* quod secuta fuerit rei emptae et venditae traditio, *vel quod* pretium fuerit solutum totum sive pars, *vel saltem quod* arrhae inde fuerint datae et receptae.'

[5] Stat. 29 Car. II. c. 3. sec. 17: 'except the buyer shall accept part of the

Earnest.

We must observe that the giving of earnest is treated as a quite different thing from part payment. Earnest, as modern German writers have shown[1], is not a partial or symbolic payment of the price, but a distinct payment for the seller's forbearance to sell or deliver a thing to any one else. In the Statute of Frauds, 'something in earnest to bind the bargain' and 'part payment' are distinguished indeed, but thrown into the same clause as if the distinction had ceased to be strongly felt. In Glanvill's time earnest was still, as it was by early Germanic law, less binding than delivery of the goods or part-payment of the price, for if the buyer did not choose to complete his bargain, he only lost the earnest he had given. The seller who had received earnest had no right to withdraw from the bargain, but Glanvill leaves it uncertain what penalty or compensation he was liable to pay. In the thirteenth century Bracton and Fleta state the rule that the defaulting seller must repay double the earnest[2]. In Fleta the law merchant is said to be much more stringent, in fact prohibitory, the forfeit being five shillings for every farthing of the earnest, in other words 'pound for penny[3].' It is among the merchants that the giving of earnest first loses its old character and becomes a form which binds both buyer and seller in a [p. 207] contract of sale. To all appearance this change was not accomplished without the intermediation of a religious idea. All over western Europe the earnest becomes known as the God's penny or Holy Ghost's penny (*denarius Dei*)[4]. Sometimes we

goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made' etc. These words appear almost unchanged in sec. 4 of our new Sale of Goods Act, 56–7 Vic. c. 71.

[1] Heusler, Institutionen, i. 76–86; ii. 253–7.

[2] Bracton, f. 61 b, 62; Fleta, pp. 126–7. Bracton here uses the words of Inst. 3. 23, and it is possible that this definition of the vendor's liability is due to Roman influence. Glanvill was uncertain as to the penalty that should be inflicted upon him. But the rule that the defaulting vendor shall lose the same sum that the buyer has risked is not unnatural. At any rate we can not think that the law of earnest as known to Glanvill and Bracton is derived from the Roman law books, though this is the opinion expressed by Sir Edward Fry in *Howe v. Smith*, 27 Chan. Div. 89, 102. The origin of the word *earnest* or *ernes* seems very obscure. The editors of the Oxford English Dictionary think that it may be traced to *arrula*, a diminutive of *arra*, through the forms *arles*, *erles*, *ernes*.

[3] A penalty of five *solidi* is denounced by French law books of this age in a somewhat similar case; Franken, Das französische Pfandrecht, 57.

[4] For England see Select Pleas in Manorial Courts, p. 151; for Germany,

find that it is to be expended in the purchase of tapers for the patron saint of the town or in works of mercy[1]. Thus the contract is put under divine protection. In the law merchant as stated by Fleta we seem to see the God's penny yet afraid, if we may so speak, to proclaim itself as what it really is, namely a sufficient vestment for a contract of sale. A few years later Edward I. took the step that remained to be taken, and by his *Carta Mercatoria*, in words which seem to have come from the south of Europe[2], proclaimed that among merchants the God's penny binds the contract of sale so that neither party may resile from it[3]. At a later day this new rule passed from the law merchant into the common law[4].

Law of sale continued.

Returning however to Glanvill's account of sale, we must notice that in case a third person claims the object as stolen from him, the seller must be prepared to warrant the buyer's [p. 208] right, or, if he refuses to do this, to be himself impleaded by the buyer, and in either case there may be a trial by battle[5]. We have seen above how the old rules which set a limit to the voucher of warrantors were still being maintained; the fourth, or perhaps the third, warrantor is not allowed to vouch[6]. That

Heusler, Institutionen, ii. 255; for France, Esmein, Études sur les contrats, 24; Franken, *op. cit.* 61; for Italy, Pertile, Storia del diritto, iv. 473.

[1] St Trophimus had the benefit of it at Arles; St Lawrence at Salon.

[2] Thus in the statutes of Avignon (quoted by Esmein, *op. cit.* 24): 'Item statuimus quod quaelibet mercadaria, cuiuscumque rei emptio, et in re locata, et in quolibet alio contractu, postquam pro eis contrahendis contrahentes inter se dederint vel alius pro eis denarium dei, firma et irrevocabilis habentur, et contrahentes teneantur precise solvere precium et rem tradere super quam celebratus est contractus ultro citroque adimplere.'

[3] Munimenta Gildhallae, ii. 206: 'Item quod quilibet contractus per ipsos mercatores cum quibuscunque personis undecunque fuerint, super quocunque genere mercandisae initis, firmus sit et stabilis, ita quod neuter praedictorum mercatorum ab illo contractu possit discedere vel resilire postquam denarius dei inter principales personas contrahentes datus fuerit et receptus.' See also the charter for the Gascon wine-merchants, Lib. Rub. Scac. iii. 1061.

[4] Noy, Maxims, c. 42: 'If the bargain be that you shall give me ten pounds for my horse, and you do give me one penny in earnest, which I do accept, this is a perfect bargain; you shall have the horse by an action on the case and I shall have the money by an action of debt.' In Madox, Form. Angl. No. 167, we find a payment of a penny *racione ernesii* mentioned in a deed relating to the sale of growing crops which are not to be carried away until the residue of the price is paid. This from 1322; the earnest is here spoken of as though it were part of the price. This happens in some earlier cases also; Select Pleas in Manorial Courts, p. 140.

[5] Glanvill, x. 15.

[6] See above, vol. ii. p. 164.

the ownership of the purchased goods did not pass to the buyer until they were delivered to him seems plain. We may gather from Bracton and Fleta that this was so even when the whole price had been paid[1]. Unless there was some special agreement to the contrary, the risk remained with the party who was in possession of the goods[2]. At the same time the question about the transfer of ownership has not as yet taken that sharp form with which we are familiar, because, as we endeavoured to show in an earlier chapter[3], it is but slowly that an owner of goods who is not also the possessor of them acquires legal remedies against thieves or trespassers who meddle with them. For this reason our law was able to reconsider this question about the effect of the contract of sale at a time when its notion of ownership had become more precise than it was in Bracton's day.

Scope of the action of debt.

Even in Edward I.'s time, whatever may have been the potential scope of the action of debt, it seems (if we may judge from the plea rolls, the Year Books and some manuscript precedents that have come to us) to have been used but rarely save for five purposes: it was used, namely, to obtain (1) money lent, (2) the price of goods sold, (3) arrears of rent due upon a lease for years, (4) money due from a surety (*plegius*), and (5) a debt confessed by a sealed document[4]. We can not say that any theory hemmed the action within these narrow limits. As anything that we should call a contract was not its essence, we soon find that it can be used whenever a fixed sum, 'a sum certain,' is due from one man to another. Statutory penalties, forfeitures under by-laws, amercements inflicted by inferior courts, money adjudged by any court, can be recovered by it. This was never forgotten in England so long as the old system of common law pleading was [p. 209] retained[5]. Already in 1293 the bailiff of one of the bishop of

[1] Bracton, f. 62; Fleta, p. 127: 'quia revera qui rem emptori nondum tradidit adhuc ipse dominus erit, quia traditionibus et usucapionibus etc.'

[2] Glanvill, x. 14. Bracton, f. 62, with Glanvill and the Institutes both open before him, deliberately contradicts the latter and copies the former.

[3] See above, vol. ii. pp. 170 ff.

[4] In a few cases it would perhaps be used to recover arrears of a freehold rent; but this was exceptional. See above, vol. ii. p. 127.

[5] In the sixteenth century, however, the word *contract* had acquired a special association with the action of debt. See Fitz. Abr. *Dett, passim.*

Ely's manors has paid a sum of money to the bishop's steward for him to pay over to the bishop; the steward has neglected or refused to do his duty; the bailiff seeks restitution by action of debt[1]. In the next year we are told that if the purchaser of land pays his money and the vendor will not enfeoff him, an action of debt will lie[2]. An action of debt against his father's executors is considered the appropriate remedy for the child who claims a *legitima portio* of his father's goods[3]. If however we look only at the cases in which the action is used for what modern lawyers would regard as the enforcement of a contract, and if we put aside for a while the promise under seal, we have the money loan, the sale of goods, the lease of land and the surety's undertaking, as the four main causes for an action of debt. The action against the surety has had its own separate history; the surety has been a hostage and in later days a formal ceremony with a *wed* or *festuca* has been the foundation of the claim against him[4]. In the three other cases the defendant has received something—nay, he has received *some thing*—from the plaintiff. To use the phrase which appears at a later day, he obviously has *quid pro quo*, and the *quid* is a material thing. We do not say that the doctrine rested here even for a moment. Probably the king's court would have put services rendered on an equality with goods sold and delivered. The fact that we can not give an instance of an action brought by a servant to recover his wages may well be due to the existence of local courts which were fully competent to deal with such matters. But we much doubt whether at the end of the thirteenth [p. 210] century the action extended beyond those cases in which the defendant had received some material thing or some service from the plaintiff[5].

[1] Y. B. 21–2 Edw. I. p. 39. This was a notable action. The count in it is preserved in a collection of precedents, MS. Lansdowne, 652, f. 223 b.

[2] Y. B. 21–2 Edw. I. p. 599.

[3] This is given as a precedent in MS. Lansdowne, 652, f. 223 b. We shall speak of this action in another chapter.

[4] So late as 1314 (Y. B. 7 Edw. II. f. 242) an action of debt is brought against a surety who has not bound himself by sealed instrument. See Holmes, Common Law, pp. 260, 264, 280; Salmond, Essays in Jurisprudence, 182.

[5] In 1292 (Y. B. 21–2 Edw. I. p. 111) we find an action which departs from the common precedents. The plaintiff let land to the defendant for fourteen years; the defendant was to build a house worth £14 and in default was to pay

The doctrine of *quid pro quo*.

Any formulated doctrine of *quid pro quo* was still in the future. Therefore we are not concerned to explore the history of the generalization which in after days is expressed by that curious term. The courts are proceeding outwards from a typical debt. In its earliest stage the action is thought of as an action whereby a man 'recovers' what belongs to him. It has its root in the money loan; for a very long time it is chiefly used for the recovery of money that has been lent. The case of the unpaid vendor is not—this is soon seen—essentially different from that of the lender: he has parted with property and demands a return. It enters no one's head that a promise is the ground of this action. No pleader propounding such an action will think of beginning his count with 'Whereas the defendant promised to pay'; he will begin with 'Whereas the plaintiff lent or (as the case may be) sold or leased to the defendant.' In short he will mention some *causa debendi* and that cause will not be a promise[1]. The Norman custumal which lies parallel to, but is much less romanized than, Bracton's book, puts this very neatly:—'Ex promisso autem nemo debitor constituitur, nisi causa precesserit legitima promittendi[2].' Our English writers give us nothing so succinct as this, because unfortunately the Italian glossators have led them astray with a theory of 'vestments' which will not fit the English facts; but we can not doubt that the Norman maxim would have commanded the assent of every English pleader. No one thinks of transgressing it. If you sue in debt you must rely on loan, or sale, or some other similar transaction. At a later time, various transactions have been [p. 211] pronounced to be similar to loan and sale, and an attempt is made to define them by one general phrase, or, in other words, to discover the common element in the *legitimae causae debendi*.

that sum, or (so it seems) such part of it as was not covered by the value of any house that he had built. He built a house worth £6. 10*s*. The plaintiff brings an action of debt for £7. 10*s*. The objection that this is a case of covenant, not debt, is overruled.

[1] Glanvill, x. 3: 'Is qui petit pluribus ex causis debitum petere potest, aut enim debetur ei quid ex causa mutui, aut ex causa venditionis, aut ex commodato, aut ex locato, aut ex deposito, aut ex alia iusta debendi causa.'

[2] Summa, p. 215; Ancienne coutume (ed. de Gruchy), c. 91 (90). The French text says—'Aulcun n'est estably debteur pour promesse qu'il face, se il ny eust droicte cause de promettre.' The whole of the chapters relating to debts and contracts is very instructive.

Gratuitous gifts and promises in early law:

That this should be found in *quid pro quo* is not unnatural. We may take it as a general principle of ancient German law that the courts will not undertake to uphold gratuitous gifts or to enforce gratuitous promises[1]. The existence of this principle is shown by the efforts that are made to evade it. We can trace back the manufacture of what an English lawyer would call 'nominal considerations' to the remotest period. In the very old Lombard laws we see that the giver of a gift always receives some valueless trifle in return, which just serves to make his gift not a gift but an exchange[2]. At a much later time both in France and in England we see the baby, who as expectant heir is brought in to take part in a sale of land, getting a penny or a toy. The buyer gives the seller a coin by way of earnest, otherwise the seller's promise would not bind him. The churches would not acquire their vast territories if they had nothing to offer in return; but they have the most 'valuable' of 'considerations' at their disposal. As regards the conveyance of land, the principle is concealed by feudalism, but only because it is so triumphant that a breach of it is hardly conceivable. Every alienation of land, a sale, an onerous lease in fee farm, is a 'gift' but no 'gift' of land is gratuitous; the donee will always become liable to render service, though it be but the service of prayers. Every fine levied in the king's court will expressly show a *quid pro quo*; often a sparrow-hawk is given in return for a wide tract of land; and this is so, though here the bargain takes the solemnest of solemn forms[3]. [p. 212] Perhaps we may doubt whether in the thirteenth century a purely gratuitous promise, though made in a sealed instrument,

[1] Heusler, Institutionen, i. 81; Schröder, D. R. G. 61. The statement current in English books of recent times that the solemnity of a deed 'imports consideration' is historically incorrect, but shows the persistence of this idea.

[2] This is the Lombard *launichild* (*Lohngeld*); see Heusler, Institutionen, i. 81; Val de Lièvre, Launegild und Wadia. Is the modern custom of nominally selling, not giving, a knife or other weapon or weapon-like thing to be regarded as a mere survival of this? Or has the *launichild* coalesced with some other and perhaps even older superstitious form? Dr Brunner, Pol. Sci. Quarterly, ix. 542, suggests that if the donee were cut by the knife, he might under ancient law hold the donor answerable for the wound.

[3] See Fines, ed. Hunter, *passim*. When a fine is levied in favour of a religious house, the 'consideration' stated in the chirograph is very often the admission of the benefactor into the benefit of the monks' prayers; see *e.g.* Selby Coucher, ii. 329, 333. The sparrow-hawk is a 'common form' in fines of Edward I.'s day.

would have been enforced if its gratuitous character had stood openly revealed[1]. We are not contending that the principle had as yet been formulated. It is long before men formulate general negations of this kind. They proceed outwards from a type such as the loan of money: they admit one *causa debendi* after another, until at last they have to face the task of generalization. Still we think that all along there is a strong feeling that, whatever promises the law may enforce, purely gratuitous promises are not and ought not to be enforceable[2].

Proof of debt.

In the action of debt, unless the plaintiff relied on a sealed document, the defendant might as a general rule wage his law: that is to say, he might undertake to deny the debt by an oath with oath-helpers[3]. A wager of battle there had seldom been in such cases, and in the thirteenth century it was no longer allowed. In the earlier years of that age a defendant would sometimes meet the charge by demanding that the 'suitors' [p. 213] who were produced by the plaintiff should be examined, and, if

[1] The ordinary bond of this period generally states that there has been a loan of money, and, even when both parties are Englishmen, it often contains a renunciation of the *exceptio non numeratae pecuniae*. See, *e.g.* Selby Coucher, ii. p. 243, where this occurs in a quit-claim. This probably was an unnecessary precaution learnt from the Italian bankers; for see Bracton, f. 100 b. But in any case the bond is no mere promise; it is the confession of a legal debt. It says, *Sciatis me teneri*. As Bracton puts it, the obligor *scripsit se debere* and is bound by his confession.

[2] We can not accept the ingenious theory advocated by Mr Justice Holmes, Common Law, pp. 255–9, which would connect the requirement of *quid pro quo* with the requirement of a *secta*, and this with the requirement of transaction witnesses. The demand for a *secta* is no peculiarity of the action of debt. The plaintiff who complains (*e.g.*) of an assault, must produce a *secta*, but his suitors will not be 'official witnesses.' Again, the action to recover money lent is for a long while the typical action of debt; but we have no reason to believe that money loans were contracted before official witnesses. Lastly, we have no proof that the official witnesses were ever called in by the plaintiff to establish a contract; they were called in by a defendant to protect him against a charge of theft. The history of 'consideration' lies outside the period with which we are dealing. Few points in English legal history have been more thoroughly discussed within recent times. See Holmes, Common Law, Lecture vi.; Salmond, Essays in Jurisprudence, iv.; Hare on Contracts, ch. vii.; Ames, History of Assumpsit, Harv. L. R. ii. 1, 53; Jenks, Doctrine of Consideration; Pollock, Principles of Contract, App. Note E; Esmein, Un chapitre de l'histoire des contrats en droit anglais, Nouvelle revue historique de droit français et étranger, 1893, p. 555. Mr Ames has put the subject, from the fifteenth century downwards, on a new footing.

[3] Even in debt for rent when there is no deed a wager of law is permitted; Y. B. 20–1 Edw. I. p. 304.

they failed to tell a consistent story, the action was dismissed; but the tender of 'suit' was, at least in the king's court, rapidly becoming a mere form[1]. Efforts were made from time to time to place the tally, at all events if it bore writing and a seal, on an equality with the sealed charter. In cases between merchants a royal ordinance decreed that, if the defendant denied the tally, the plaintiff might prove his case by witnesses and the country in the same way as that in which the execution of a charter could be proved[2]. The common law, however, allowed the defendant to meet a tally by wager of law. In mercantile cases, when a tally of acquittance was produced against a tally of debt, the defendant was allowed to make good his assertion by an oath sworn upon nine altars in nine churches[3]. In the city of London the 'foreigner' who could not find oath-helpers was allowed to swear away a debt by visiting the six churches that were nearest the gildhall[4]. The ease with which the defendant could escape was in the end the ruin of this old action.

Damages in debt.

In the action of debt the plaintiff demands a sum of money together with 'damages' for the unjust detention. The damages claimed by the plaintiff are often very high[5], and he has a chance of getting all that he claims, for if the defendant wages, [p. 214] but fails to make his law, there will be no mitigation or

[1] Note Book, pl. 1693; Fleta, p. 138, allows an examination. So late as 1324 a plaintiff fails because he has no 'suitors' ready; Y. B. 18 Edw. II. f. 582.

[2] Fleta, p. 138; this boon was conceded to merchants 'ex gratia principis.' Select Civil Pleas, pl. 146; Note Book, pl. 645; Y. B. 20–1 Edw. I. p. 305; 21–2 Edw. I. p. 457; 30–1 Edw. I. p. 235; 32–3 Edw. I. p. 185. A collection of cases, MS. Harley, 25. f. 179, 188, contains an interesting discussion about sealed tallies. Plaintiff produces a tally. Defendant wishes to wage his law. Plaintiff asks 'Is this your deed?' Defendant answers 'We need not say.' Then a judge says 'Coment qil seient taillés, vus les avez aforcé par le planter de vostre seel, et icy vostre fet.' To this it is replied that in the time of Sir John Metingham (temp. Edw. I.) a sealed tally was admitted but the judgment was reversed.

[3] Fleta, pl. 138.

[4] Munimenta Gildhallae, i. 203. In the Laws of Alfred, 33, we read of an oath in four churches outsworn by an oath in twelve.

[5] See *e.g.* Northumberland Assize Rolls, p. 169: the plaintiff claims seven marks, the price of a horse sold about four years ago, and ten marks damages. At a little later time the civic court in London by general rule allowed damages at the rate of 20 per cent. per annum unless the debt was confessed at the first summons. See Munim. Gildh. i. 471.

'taxation' of the amount that the plaintiff has mentioned[1]. In other cases the jurors under the control of the justices seem to be free to award what damages they please, provided that they do not give more than has been demanded. There is no usury here, for there has been no bargain that the creditor shall receive any certain sum for the use of his money, still, so far as we can see, the plaintiff gets damages though he has only proved that the debt was not paid when it was due.

Limit to the action.

One boundary of the action of debt is fixed from the first and can not be removed. The plaintiff must claim some fixed sum that is due to him. We must have a quite different action if 'unliquidated' sums are to be claimed by way of damages for breach of contract.

(3) Action of covenant.

(3) The writ of covenant (*breve de conventione*) is not mentioned by Glanvill; but it appears within a short time after the publication of his book[2] and already in the early years of Henry III. it can be had 'as of course,' at all events when the tenement that is in question is of small value[3]. Before Henry's death it has become a popular writ. On the roll for the Easter term for 1271 we found thirty-five actions of covenant pending[4]. But the popularity of the writ is due to the fact that men are by this time commonly employing it when they want to convey land by way of fine[5]. The great majority of actions of covenant are brought merely in order that they may be compromised. We doubt whether any principle was involved in the choice; but may infer that the procedure instituted by this writ was cheap and expeditious for those who wished to get to their

[1] Y. B. 33–5 Edw. I. p. 397. Hence a would-be verse found in MS. precedent books: 'Qui legem vadiat, nisi lex in tempore fiat, Mox condemnetur, taxatio non sibi detur.'

[2] Rolls of the King's Court (Pipe Roll Soc.), p. 53 (A.D. 1194, the earliest extant plea roll); an essoin is cast in a 'placitum convencionis per cirographum'; but this may be an action on a fine. Select Civil Pleas (Selden Soc.), pl. 89 (A.D. 1201) seems an indubitable specimen. Brevia Placitata, ed. Turner, 21.

[3] Maitland, Register of Writs, Harv. L. R. iii. 113–5. The writ first appears in the Registers as a *Iusticies*, which can be had as of course when the annual value of the land is worth less than 40 shillings. See also Excerpta e Rot. Fin. i. 31.

[4] Curia Regis Rolls (Rec. Off.), No. 202, Pasch. 55 Hen. III.

[5] See above, vol. ii. p. 98. The writ of *warantia cartae* is for this purpose its principal rival. Blackstone, Comm. ii. 350, mentions as alternatives the *warantia cartae* and the *de consuetudinibus et servitiis*.

[p. 215] final concord. In all the oldest specimens that we have seen, whether on the plea rolls or in the registers, the subject matter of the *conventio* is land or one of those incorporeal things that are likened to land.

Covenants and leases.

The specific want that this action has come to meet is that which is occasioned by the growing practice of letting lands for terms of years. The *placitum conventionis* is almost always what we should call an action on a lease. We have seen above how an unsuccessful attempt was made to treat the termor as having no rights in, no possession or seisin of, the land, but merely the benefit of an agreement. This attempt, as already said, we are inclined to regard as an outcome of misdirected Romanism; at any rate it failed. The termor, however, is protected by the writ of covenant and for a while this is his only protection; the action therefore becomes popular as leases for terms of years become common[1]. At a little later time it finds another employment. Family settlements are being made by way of feoffment and refeoffment; the settlor takes a covenant for refeoffment from his feoffee. Again, there is some evidence that in the course of the thirteenth century attempts were made to establish a kind of qualified tenure in villeinage by express agreements[2]. In all these cases, however, the writ mentions a certain piece of land, an advowson or the like, as the subject matter of the *conventio* and the judgment will often award this subject matter to the successful plaintiff[3]. As may well be supposed, in days when the typical *conventio* was a lease of land for a term of years and the lessee was gaining a 'real' right in the land, men were not very certain that other *conventiones* concerning land would not give real rights, that a covenant to enfeoff, or a covenant not to alienate might not bind the land and hold good against a subsequent

[p. 216] feoffee[4]. However, in 1284 the *Statutum Walliae* made it

[1] See above, vol. ii. p. 106.

[2] See above, vol. i. p. 405.

[3] Note book, pl. 1739; action by ejected termor: 'Et ideo consideratum est quod conventio teneatur et quod Hugo habeat seisinam suam usque ad terminum suum x. annorum.'

[4] See Note Book, pl. 36. Bracton, f. 46; if a feoffment be made upon condition that the feoffee is not to alienate, the lord can eject one who purchases from the feoffee 'propter modum et conventionem in donatione appositam.' Bracton does not here distinguish between condition and covenant. See also Y. B. 21–2 Edw. I. p. 183, where the objection is taken that one can not recover a freehold in a writ of covenant; and Note Book, pl. 1656, where the action is refused to one who could bring the novel disseisin. In Y. B. 30–1

clear that a feoffment can not thus be set aside in favour of an earlier *conventio*, and specified this case as one of those in which the freehold can not be recovered and judgment must be for damages[1].

Scope of the action.

The same great statute assures us that in an action of covenant sometimes movables, sometimes immovables are demanded, also that the enforceable covenants are infinite in number so that no list of them can be made[2]; and, though we believe that the covenants which had as yet been enforced by the king's court had for the more part belonged to a very few classes, still it is plain that the writ was flexible and that no one was prepared to set strict limits to its scope. Bracton speaks as though the royal justices had a free hand in the enforcement of 'private conventions' and might in this particular do more than they were actually doing[3]. We can produce a few examples in which the plaintiff is not claiming land or an incorporeal thing such as a rent or an advowson[4].

Edw. I. p. 145, we read how 'this action is personal and is given against the person who did the trespass and the tort.' Thus the conception of the writ has been fluctuating between opposite poles. The statement that a breach of covenant is 'tort' and 'trespass' is of some importance when connected with the later history of *assumpsit*.

[1] Statutes of the Realm, vol. i. p. 66.

[2] Ibid.: 'et quia infiniti sunt contractus conventionum difficile esset facere mentionem de quolibet in speciali.'

[3] Bracton, f. 34, 100; Bracton and Azo, p. 152: 'Iudicialis autem poterit esse stipulatio, vel conventionalis.....Conventionalis, quae ex conventione utriusque partis concipitur.....et quarum totidem sunt genera, quot paene rerum contrahendarum, de quibus omnino curia regis se non intromittit nisi aliquando de gratia.' It is not very plain whether by this last phrase, which is a reminiscence of Glanvill, x. 8, Bracton means to say that the court sometimes as a matter of grace enforces unwritten agreements, or that it only enforces written agreements occasionally and as a matter of grace. On the same page, following the general tendency of medieval Roman law, he explains that a *stipulatio* may well be made *per scripturam*. In the passage here quoted the printed book gives *poenae* instead of *paene*, which (though every MS. of this age would give *pene* even if the word was *poenae*) is indubitably the true reading; see Inst. 3. 18. § 3.

[4] Y. B. 21–2 Edw. I. p. 111: it is said that an action of covenant will lie for not building a house. Y. B. 21–2 Edw. I. p. 183: a Prioress has convenanted to provide a chaplain to sing service in the plaintiff's chapel. But even here there is 'a chantry' of which 'seisin' is alleged. Y. B. 20–1 Edw. I. p. 223: covenant to return a horse that has been lent or to pay £20. But for reasons given below (p. 220) some doubt hangs over this case. Note Book, pl. 1053 (A.D. 1225): covenant that the plaintiff and his wife may live with the defendant, and that, if they wish to depart, he will cause them to have certain lands.

[p. 217] However, in the Statute of Wales we have a sufficient declaration that, as regards the subject matter of the agreements that can be enforced by this action, no boundaries have been or can be drawn. One limitation however soon becomes apparent, and is curious. The action of covenant can not be employed for the recovery of a debt, even though the existence of the debt is attested by a sealed instrument. A debt can not have its origin in a promise or a *conventio*; it must arise from some transaction such as loan, or sale or the like; and the law is economical; the fact that a man has one action is a reason for not giving him another[1].

The covenant must be written.

But what of form? Before the end of Edward I.'s reign the king's court had established the rule that the only *conventio* that can be enforced by action is one that is expressed in a written document sealed 'by the party to be charged therewith.' Thenceforward the word *conventio* and the French and English *covenant*, at least in the mouths of Westminster lawyers, imply or even denote a sealed document. There had been some hesitation; nor is this to be wondered at. *Pacta sunt servanda* was in the air; *Pactum serva* was Edward's chosen motto. The most that the Romanist could do for the written agreement was to place it alongside the *stipulatio* or to say that it was a *stipulatio*, and he knew that according to the latest doctrine of mature Roman law a *stipulatio* could be made by a simple question and answer without the use of any magical or sacramental phrases. Again, the king's court had refused to attribute any special efficacy to what we may call the old Germanic forms, the symbolic *wed* and the grasp of hands; these had fallen under the patronage of the rival tribunals of the church. There was a special reason for hesitation and confusion, for it was chiefly for the protection of lessees of land that the writ of covenant had come into being; for some time

Note Book, pl. 1129: covenant that plaintiff may have a hundred pigs in a certain wood. But here the plaintiff seems to be claiming a 'profit.' Warranties or agreements of a similar kind seem to be occasionally enforced by writ of covenant; but usually they are enforced either by voucher or by the writ of *warantia cartae*. In Edward I.'s time it is thought that there are some cases in which a plaintiff can choose between debt and covenant; Y. B. 20–1 Edw. I. p. 141; 21–2 Edw. I. pp. 111, 601.

[1] Ames, Harv. L. R. ii. 56: 'The writer has discovered no case in which a plaintiff succeeded in an action of covenant, where the claim was for a sum certain, antecedent to the seventeenth century.'

it was the termor's only writ, and no one had yet said or would ever say that the 'term of years' could not (apart from statute) be created by word of mouth and delivery of possession. To [p. 218] require a charter for a lease would have been to require more than was demanded where there was to be a feoffment in fee simple. And so for a while we seem to see some unwritten agreements enforced as *conventiones*, and, even when it is plain that the unwritten agreement will bear no action, men think that it will bear an 'exception:' in other words, that it can be set up by way of defence. What is more, the lawyers do not think that they are laying down a rule of substantive law about the form that a covenant must take; they are talking about evidence. The man who relies upon a covenant must produce in proof some 'specialty' (*especialté, aliquid speciale*); the production of 'suit' is not enough. Thenceforward, however, it is only a short step to holding as a matter of law that a 'deed'—and by a deed (*fet, factum*) men are beginning to mean a sealed piece of parchment—has an operative force of its own which intentions expressed, never so plainly, in other ways have not. The sealing and delivering of the parchment is the contractual act. Further, what is done by 'deed' can only be undone by 'deed[1].'

[1] The period of hesitation is illustrated by Note Book, pl. 890, 1129, 1549. But as early as 1234–5 we have found (Record Office, Curia Regis Roll, No. 115, m. 7) a fairly clear case of an action of covenant dismissed because the plaintiff has no deed: 'et quia dictus H. non protulit cartam nec cyrographum de praedicta terra, consideratum est quod loquela illa vacua est.' On the roll for Pasch. 34 Hen. III. (Record Office, Curia Regis Roll, No. 140), m. 15 d, W. E. sues the Abbot of Evesham 'quod teneat ei conventionem'; the plaintiff counts that the abbot came before the justices in eyre, granted the plaintiff an elaborate corody, and further granted that he would execute a deed (*conficeret cartam*) embodying this concession; suit is tendered and no appeal is made to any record. The abbot confesses the *conventio*, denies the breach and wages his law. In Y. B. 20–1 Edw. I. p. 223—as late therefore as 1292—we seem to see that whether 'suit' will support an action of covenant is still doubtful, while it will support an action of debt. (See however, p. 487; we can not be quite certain that one of the reporters has not blundered.) In Y. B. 21–2 Edw. I. p. 621, a defendant sets up an agreement by way of defence; on being asked what he has to prove the covenant, he appeals to 'the country.' 'Nota' says the reporter 'ke la ou un covenant est aleggé cum chose incident en play yl put estre detrié par pays.' In Y. B. 32–3 Edw. I. p. 297, an action of covenant is brought against tenant *pur autre vie* for wasting the tenement; he demands judgment as the plaintiff has nothing to prove the covenant or the lease; but is told to find a better answer. This case shows the point of contact between the covenant and the lease. Ibid. p. 201, a writ of covenant is brought against a termor who is holding beyond his term; he promised to execute a written agreement, but has not; the defendant at first relies on the want of a 'specialty,' but is driven to claim a freehold. The rule that what is done by 'deed' can in general only be undone by 'deed' appears in Y. B. 33–5 Edw. I. pp. 127, 331, 547. See Bracton, f. 101: 'eisdem modis dissolvitur obligatio.....quibus contrahitur, ut si conscripserim me debere, scribat creditor se accepisse.' This is romanesque (see the passages collected by Moyle in his comment on Inst. 3. 29) but is quite in harmony with English thought, and was rigorously enforced. See Ames, Specialty Contracts and Equitable Defences, Harv. L. R. ix. 49. The technical use of the word *deed* seems the outcome of the very common plea *Non est factum meum, Nient mon fet*, i.e. I did not execute that document. As a word which will stand for the document itself, it slowly supplants *carta*; it is thus used in Y. B. 33–5 Edw. I. p. 331: 'nous avoms vostre fet.' As to specialty (*aliquid speciale*), this comes to the front in *quo waranto* proceedings; the claimant of a franchise must have something special to show for it. In relation to contract, the demand for specialty seems a demand for some proof other than a verdict of 'the country.'

[p. 219] One other action remains to be mentioned, namely, the action of account. Here, again, the writ was modelled upon the proprietary writs. The defendant must 'justly and without delay render to the plaintiff' something, namely, an account for the time during which he was the plaintiff's bailiff and receiver of the plaintiff's money. Even in the modern theory of our law 'the obligation to render an account is not founded upon contract, but is created by law independently of contract[1].' The earliest instance of this action known to us dates from 1232[2]: the writ seems to come upon the register late in Henry III.'s reign[3], and much of its efficacy in later times was due to the statutes of 1267 and 1285[4]. These statutes sanctioned a procedure against accountants which was in that age a procedure of exceptional rigour. We gather that the accountants in question were for the more part 'bailiffs' in the somewhat narrow sense that this word commonly bore, manorial bailiffs. In Edward I.'s day the action was being used in a few other cases; it had been given by statute against the guardian in socage[5], and we find that it can be used among traders who have joined in a commercial adventure: the trade of the Italian bankers was being carried on by large 'societies' and

The action of account

[1] Langdell, Survey of Equity Jurisdiction, Harv. L. R. ii. 243.

[2] Note Book, pl. 859.

[3] Maitland, Register of Original Writs, Harv. L. R. iii. 173. Brevia Placitata, ed. Turner, 23.

[4] Stat. Marlb. c. 23; Stat. West. II. c. 11.

[5] See above, vol. i. p. 322.

Englishmen were beginning to learn a little about partnership[1]. Throughout the fourteenth and fifteenth centuries the action was frequent enough, as the Year Books and Abridgements show. In after times the more powerful and convenient [p. 220] jurisdiction of equity superseded the process of account at common law, though the action lingered on in one application, as a remedy between tenants in common, late enough to furnish one or two modern examples. But on the whole it did very little for our law of contract.

Covenant in the local courts.

We have been speaking of actions in the king's court; but we imagine that in the thirteenth century the local courts were still very free to go their own way about such matters as contract. There is evidence that some of them enforced by action of 'covenant' agreements that were not in writing[2]. It is possible that these agreements had been fastened by a grasp of hands; as yet we know but too little of what was done by the municipal and manorial tribunals. *Pacta sunt servanda* was, as we have said, already in the air. The scheme of actions offered by the king's court had become rigid just too soon, and in later centuries the Westminster lawyers were put to strange and tortuous devices in their attempt to develop a comprehensive law of contract. They had to invent a new action for the enforcement of unwritten agreements, and its starting point was the semi-criminal action of trespass. Of their bold and ingenious inventions we must not here speak. At present we see them equipped with the actions of debt, covenant and account; each has its own narrow sphere and many an

[1] Y. B. 32–3 Edw. I. p. 377, where 'la manere de la companye des Lombars' is mentioned; 33–5 Edw. I. p. 295.

[2] Select Pleas in Manorial Courts, p. 157: action in the Fair of St Ives (A.D. 1275) by a master against a servant who has left his service; the breach of contract is admitted; the judgment is that John do serve Richard to the end of the term; no written document is mentioned. See also The Court Baron (Selden Soc.), p. 115; unwritten agreement enforced in a manorial court of the bishop of Ely. We have seen several such cases on the rolls of the court of Wisbech now preserved in the palace at Ely. In one case of Edward I.'s time the plaintiff alleges an agreement (*conventio*) for the sale of two acres of land for one mark. The plaintiff has paid the price but the defendant has refused to enfeoff him. No word is said of any writing. The defendant denies the agreement and asks for an inquest. The jurors find that the agreement was made, and the plaintiff has judgment for damages. For the civic courts in London, see Munimenta Gildhallae, i. 214; Fitz. Nat. Brev. 146 A. For Nottingham, see Records of Nottingham, i. 161, 167, 207. We may well believe that in the larger towns unwritten covenants were commonly enforced.

agreement though, as we should say, made for valuable consideration, finds no remedy in the king's court.

The seale document

The English formal contract, therefore, is no product of ancient folk-law. The 'act and deed' that is chosen is one that [p. 221] in the past has been possible only to men of the highest rank. The use of the seal comes to us from the court of Frankish kings. At the date of the Conquest the Norman duke has a seal and his cousin the late king of England had a seal; but in all probability very few of William's followers, only the counts and bishops, have seals[1]. Even in the chancery of our Norman kings the apposition of a seal had to struggle with older methods of perfecting a charter. A seal sufficed for writs, but a solemn 'land-book' would as of old bear the crosses of the king and the attesting magnates, ink crosses which they had drawn, or at least touched, with their own hands[2]. This old ceremony did not utterly disappear before Stephen's day; but men were beginning to look for a seal as an essential part of a charter. The unsealed 'books' of the Anglo-Saxon kings are called in question if they have not been confirmed by a sealed document[3]. Gilbert de Balliol called in question the charters granted by his ancestors to Battle Abbey; Richard de Lucy the justiciar replied that it was not the fashion of old time that every petty knightling should have a seal[4]. For some time to come we meet with cases in which a man who had land to give had no seal of his own and delivered a charter which had passed under the seal of the sheriff or of some nobleman. In the France of Bracton's day the privilege of using a seal was confined to 'gentixhomes'; a man of lower degree would execute his bond by carrying it before his lord and

[1] Bresslau, Urkundenlehre, i. 521 ff; Giry, Manuel de diplomatique, 636 ff.

[2] The Monasticon testifies to the existence of many charters granted by the Norman kings, including Stephen, which either bore no seals, or else were also signed with crosses in the old fashion. Maitland, Domesday Book, p. 265. The Exeter Charter of William I. (Facsimiles of Anglo-Saxon Charters, vol. i. no. 16) will serve as a specimen. Sometimes the cross is spoken of as more sacred than the seal; see Monast. ii. 385–6: 'non solum sigillo meo sed etiam sigillo Dei omnipotentis, id est, sanctae crucis.'

[3] Gesta Abbatum, i. 151. In Henry II.'s time the unsealed charters of St Albans are considered to be validated by the sealed confirmation obtained from Henry I.

[4] Bigelow, Placita, 177: 'Moris antiquitus non erat quemlibet militulum sigillum habere, quod regibus et praecipuis tantum competit personis.'

procuring the apposition of his lord's seal[1]. But in England, as we have often seen, the law for the great became the law for all, and before the end of the thirteenth century the free and [p. 222] lawful man usually had a seal. It is commonly assumed that jurors will as a matter of course have seals. We must not think of the act of sealing as a mere formality; the impressed wax was treated as a valuable piece of evidence. If a man denied a charter that was produced against him and the witnesses named in it were dead, the seal on it would be compared with the seals on instruments the genuineness of which he admitted, and thus he might be convicted of a false plea[2]. 'Nient mon fet' was a very common defence, and forgery, even the forgery of royal writs and papal bulls, was by no means rare.

Growth of written documents.

In the twelfth century charters of feoffment had become common; they sometimes contained clauses of warranty. In the next century leases for years and documents which dealt with easements, with rights of pasturage, with tithes and the like, were not unfrequent; they sometimes contained penal clauses which were destined to create money debts[3]. Occasionally there was an agreement for a penal sum which was to go to the king or to the sheriff, to the fabric fund of Westminster abbey or to the relief of the Holy Land[4]. In John's reign the Earl of Salisbury, becoming surety for the good behaviour of Peter de Maulay, declares that, if Peter offends, all the earl's hawks shall belong to the king; and so Gilbert Fitz Remfrey invokes perpetual disherison on himself should he adhere to

[1] Beaumanoir, c. 35. § 18: 'Trois manieres de lettres sunt: le premiere entre gentix homes de lor seaus, car il poent fere obligation contr'eus par le tesmognage de lor seaus; et le second, si est que tous gentil home et home de poeste poent fere reconnisances de lor convenances par devant lor seigneurs dessoz qui il sont couquant et levant, ou par devant le sovrain.'

[2] The trial by collation of seals is illustrated in Note Book, pl. 1, 51, 102, 234, 237 etc.

[3] Winchcombe Landboc, i. 239: if J. S. breaks the water pipe of the abbot of Winchcombe, which runs through his land, he will repair it, and in default of repair will pay half a mark for each day's neglect. Reg. Malmesb. ii. 83: if rent falls into arrear the lessee will pay an additional 10 shillings *pro misericordia*.

[4] Winchcombe Landboc, i. 239: the sheriff may distrain and take a half-mark for the king's use. Newminster Cartulary, 98: a penal sum to be paid *in subsidium terrae sanctae*. See also the precedents of John of Oxford, L. Q. R. vii. 65; Madox, Formulare, p. 359, and Archæologia, xxviii. p. 228.

Magna Carta which the pope has quashed[1]. But documents of a purely obligatory character were still rare. They seem to come hither with the Italian bankers. They generally took the form of the 'single bond[2]'; the bond with a clause of defeasance seems to be of later date. The creditor confesses himself to be bound (*se teneri*) in respect of money lent, and obliges himself and all his goods, movable and immovable, for its repayment on a fixed day or after the lapse of so many days [p. 223] from the presentation of the bond. Sometimes we may see (at all events when the lender is an Italian) a distinct promise to pay interest (*interesse*)[3]; more often there is a promise to pay all damages and costs which the creditor shall incur, and this is sometimes coupled with a promise that the creditor's sworn or unsworn assertion shall fix their amount[4]. When a rate of interest was fixed, it was high. With the pope's approval, Henry III. borrowed 540 marks from Florentine merchants, and, if repayment were not made after six months or thereabouts, the debt was to bear interest at sixty per cent.[5] Often the debtor had to renounce in advance every possible 'exception' that civil or canon or customary law might give him. The cautious Lombard meant to have an instrument that would be available in every court, English or foreign. But even an English lawyer might think it well to protect himself by such phrases. Thus when Mr Justice Roubury lent the Bishop of Durham £200, the bishop submitted himself to every sort of jurisdiction and renounced every sort of exception[6]. Often the

The single bond.

[1] Rot. Cart. Joh. pp. 191, 221.

[2] See Blackstone, Comm. ii. 340. Not one of the commentators, so far as we know, has rightly understood this term in the place where Shakespeare has made it classical (Merch. of Venice, Act i. Sc. 3). Shylock first offers to take a bond without a penalty, and then adds the fantastic penalty of the pound of flesh, ostensibly as a jesting afterthought.

[3] Cart. Riev. p. 410: the abbot is to pay one mark on every ten marks for every delay of two months, *i.e.* sixty per cent. per annum 'pro recompensatione, interesse, et expensis.' This pact is secured by recognizance in the king's court. See also Mat. Par. Chron. Maj. iii. 330.

[4] See *e.g.* Registr. Palatin. Dunelmense, i. 91: 'super quibus iuramento eorundem vel eorum unius socii, fidem volumus adhiberi.' Madox, Formulare, p. 359: 'damnis et expensis quae vel quas se simplici verbo suo dixerint sustinuisse.'

[5] Prynne, Records, ii. 1034; see also ibid. 845.

[6] Registr. Palatin. Dunelmense, i. 276 (A.D. 1311): 'Et ad haec omnia fideliter facienda obligamus nos et omnia bona nostra mobilia et immobilia, ecclesiastica et mundana, ubicunque locorum inventa, iurisdictioni et coercioni

debtor is bound to pay the money either to the creditor or to any attorney or mandatory of his who shall produce the bond.

Mercantile documents.

The clause which promises payment to the creditor 'or his attorney' is of great interest. Ancient German law, like ancient Roman law, sees great difficulties in the way of an assignment of a debt or other benefit of a contract[1]. The assignee who sued the debtor would be met by the plea 'I never bound myself to pay money to *you*.' But further, men do not see how there can be a transfer of a right unless that right is embodied in some corporeal thing. The history of [p. 224] the 'incorporeal things' has shown us this; they are not completely transferred until the transferee has obtained seisin, has turned his beasts onto the pasture, presented a clerk to the church or hanged a thief upon the gallows[2]. A covenant or a warranty of title may be so bound up with land that the assignee of the land will be able to sue the covenantor or warrantor. At an early time we may see the assignee of a lease bringing an action of covenant against the lessor[3]. But, even in the region of warranty, we find that much depends on the use of the word *assigns*; the feoffor will only be bound to warrant the feoffee's assigns if he has expressly promised to warrant them[4].

Assignment of debts.

In the case, however, of the mere debt there is nothing that can be pictured as a transfer of a thing; there can be no seisin or change of seisin. In course of time a way of escape was found in the appointment of an attorney. In the thirteenth century men often appear in the king's court by attorney; but they do not even yet enjoy, unless by virtue of some special favour purchased from the king, any right of appointing attorneys to conduct prospective litigation; when an action

cuiuscunque iudicis ecclesiastici vel civilis quem idem dominus Gilbertus adire vel eligere voluerit in hac parte: exceptioni non numeratae, non traditae, non solutae, nobis pecuniae, et in nostram et ecclesiae nostrae utilitatem non conversae, et omni iuri scripto canonico et civili, ac omni rationi et privilegio per quam vel quod contra praemissa, vel aliquod praemissorum, venire possemus, renunciantes penitus et expresse.' The finest specimen of a renunciatory clause that we have seen is in a bond given in 1293 by the abbot of Glastonbury to some merchants of Lucca for the enormous sum of £1750; Archaeologia, xxviii. 227; it must have been settled by a learned civilian. A good instance of a bond for the delivery of wool sold by the obligor is in Prynne, Records, iii. 185.

[1] Pollock, Principles of Contract, App. Note F; Brunner in Holtzendorff's Encyklopädie (5th ed.) p. 279.

[2] See above, vol. ii. p. 139. [3] Note Book, pl. 804. [4] See Bracton, f. 37 b.

has been begun, then and not until then, an attorney can be appointed[1]. The idea of representation is new[2]; it has spread outwards from a king who has so many affairs that he can not conduct them in person. However, it has by this time spread so far that the debtor who in express written words promises to pay money either to the creditor or to the mandatory (*nuntius*) or attorney of the creditor is bound by his promise; he has himself given the creditor power to appoint a representative for the exaction of the debt. Often in the bonds that are before us the debtor promises to pay the creditor or 'his certain attorney producing these letters.' The attorney will have to produce the bond and also evidence, probably in the form of a 'power of attorney,' that he is the attorney of the original creditor[3]. It seems probable that the process which in [p. 225] the end enables men to transfer mere personal rights has taken advantage, if we may so speak, of the appearance of the contract in a material form, the form of a document. That document, is it not itself the bond, the obligation? If so, a bond can be transferred. For a very long time past the Italians have been slowly elaborating a law of negotiable paper or negotiable parchment; they have learnt that they can make a binding promise in favour of any one who produces the letter in which the obligation is embodied. Englishmen are not yet doing this, but under Italian teaching they are already promising to pay the Florentine or Sienese capitalist or any attorney of his who produces the bond[4].

[1] See above, vol. i. p. 213. [2] Heusler, Institutionen, i. 203.

[3] On a roll of 1285 we read how the executors of the countess of Leicester have attorned Baruncino Gualteri of Lucca to receive certain moneys due to her; this in consideration of a loan from Baruncino. When he demands payment he will have to produce 'litteras praedictorum executorum dictam assignationem testificantes.' See Archaeologia, xxviii. 282. By this time the king is frequently 'assigning' the produce of taxes not yet collected.

[4] The clause 'vel suo certo attornato [*vel* nuntio] has litteras deferenti' is quite common. The only English instance that we have seen of a clause which differs from this is in Select Pleas in Manorial Courts, p. 152, where in 1275 a merchant of Bordeaux sues on a bond which contains a promise to pay to him 'vel cuicunque de suis scriptum obligatorium portanti.' But here the person who demands the debt can apparently be required to show that he is a partner or the like (*de suis*) of the creditor named in the bond. For the history of such clauses, see Brunner, Forschungen, p. 524 fol.; Heusler, Institutionen, i. 211; Jenks, Early History of Negotiable Instruments, L. Q. R. ix. 70. Apparently Bracton, f. 41 b, knew these mercantile documents under the name *missibilia*.

Agency in contract.

The whole law of agency is yet in its infancy. The king indeed ever since John's day has been issuing letters of credit empowering his agents to borrow money and to promise repayment in his name[1]. A great prelate will sometimes do the like[2]. It is by this time admitted that a man by his deed can appoint another to do many acts in his name, though he can not appoint an attorney to appear for him in court until litigation has been begun[3]. Attorneys were appointed to deliver and to receive seisin[4]. Among the clergy the idea of procuration was striking root; it was beginning to bear fruit in the domain of public law; the elected knights and burgesses must bring with them to parliament 'full powers' for the representation of the shires and boroughs. But of any informal agency, of any implied agency, we read very little[5]. We seem to see the beginning of it when an abbot is sued [p. 226] for the price of goods which were purchased by a monk and came to the use of the convent[6].

Agency and 'uses.'

The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.' In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus*, but from the Latin word *opus*, which in old French becomes *os* or *oes*[7]. True that the two words are in course of time confused, so that if by a Latin document land is to be conveyed to the use of John, the scribe of the charter will write *ad opus Johannis* or *ad usum*

[1] Archaeologia, xxviii. 217.

[2] Registr. Palatin. Dunelmense, i. 69 (A.D. 1311): appointment of an agent to contract a large loan.

[3] One can not do homage by attorney; Note Book, pl. 41.

[4] Bracton, f. 40. The passage in which Bracton, f. 100 b, tells us 'per quas personas acquiritur obligatio' is a piece of inept Romanism. See Bracton and Azo, p. 160.

[5] Note Book, pl. 873: a plaintiff claims a wardship sold to her by the defendant's steward: 'et quia ipsa nihil ostendit quod ipse Ricardus [*the defendant*] ei aliquid inde concesserit, consideratum est quod Ricardus inde sine die.'

[6] Y.B. 33–5 Edw. I. p. 567. Already in Leg. Henr. 23 § 4, we read that the abbot must answer for the acts of the obedientiaries (*i.e.* the cellarer, chamberlain, sacrist, etc.) of the house. The legal deadness of the monks favours the growth of a law of agency.

[7] L. Q. R. iii. 116.

Johannis indifferently, or will perhaps adopt the fuller formula *ad opus et ad usum*; nevertheless the earliest history of 'the use' is the early history of the phrase *ad opus*[1]. Now this both in France and in England we may find in very ancient days. A man will sometimes receive money to the use (*ad opus*) of another person; in particular, money is frequently being received for the king's use. A king must have many officers who are always receiving money, and we have to distinguish what they receive for their own proper use (*ad opus suum proprium*) from what they receive on behalf of the king. Further, long before the Norman Conquest we may find a man saying that he conveys land to a bishop to the use of a church, or conveys land to a church to the use of a dead saint. The difficulty of framing a satisfactory theory touching the whereabouts of the ownership of what we may loosely call 'the lands of the churches' gives rise to such phrases. In the thirteenth century we commonly find that where there [p. 227] is what to our eyes is an informal agency, this term *ad opus* is used to describe it. Outside the ecclesiastical sphere there is but little talk of 'procuration'; there is no current word that is equivalent to our *agent*; John does not receive money or chattels 'as agent for' Roger; he receives it to the use of Roger (*ad opus Rogeri*).

Chattels held to the use of another.

Now in the case of money and chattels that haziness in the conception of ownership to which we have often called attention[2] prevents us from making a satisfactory analysis of the notion that this *ad opus* implies. William delivers two marks or three oxen to John, who receives them to the use of Roger. In whom, we may ask, is the ownership of the coins or of the beasts? Is it already in Roger; or, on the other hand, is it in John, and is Roger's right a merely personal right against John? This question does not arise in a clear form, because possession is far more important than ownership. We will suppose that John, who is the bailiff of one of Roger's manors, has in the ordinary course of business gone to a market, sold Roger's corn, purchased cattle with the price of the corn and is now driving them home. We take it that if a thief or trespasser swoops down and drives off the

[1] See the note appended to the end of this chapter. Mr Justice Holmes, L. Q. R. i. 162, was the first to point to the right quarter for the origin of 'uses.'

[2] See above, vol. ii. pp. 153, 177.

oxen, John can bring an appeal or an action and call the beasts his own proper chattels. We take it that he himself can not steal the beasts; even in the modern common law he can not steal them until he has in some way put them in his employer's possession[1]. We are not very certain that, if he appropriates them to his own use, Roger has any remedy except an action of debt or of account, in which his claim can be satisfied by a money payment. And yet the notion that the beasts are Roger's, not John's, is growing and destined to grow. In course of time the relationship expressed by the vague *ad opus* will in this region develop into a law of agency. In this region the phrase will appear in our own day as expressing rights and duties which the common law can sanction without the help of any 'equity.' The common law will know the wrong that is committed when a man 'converts to his use' (*ad opus suum proprium*) the goods of another; and in course of time it will know the obligation which arises when money is 'had and received to the use' of some person other than the recipient.

Lands held to the use of another.

It is not so in the case of land, for there our old law had [p. 228] to deal with a clearer and intenser ownership. But first we must remark that at a very remote period one family at all events of our legal ancestors have known what we may call a trust, a temporary trust, of lands. The Frank of the *Lex Salica* is already employing it; by the intermediation of a third person, whom he puts in seisin of his lands and goods, he succeeds in appointing or adopting an heir[2]. Along one line of development we may see this third person, this 'saleman,' becoming the testamentary executor of whom we must speak hereafter; but our English law by forbidding testamentary dispositions of land has prevented us from obtaining many materials in this quarter. However, in the England of the twelfth century we sometimes see the lord intervening between the vendor and the purchaser of land. The vendor surrenders the land to the lord 'to the use' of the purchaser by a rod, and the lord by the same rod delivers the land to the purchaser[3]. Freeholders, it is true, have soon acquired so large a liberty of

[1] See Mr Justice Wright's statement and authorities, in Pollock and Wright, Possession, p. 191.

[2] Lex Salica, tit. 46, *De adfathamire*. Heusler, Institutionen, i. 215.

[3] See above, vol. i. p. 345.

alienation that we seldom read of their taking part in such surrenders; but their humbler neighbours (for instance, the king's sokemen) are often surrendering land 'to the use' of one who has bought it. What if the lord when the symbolic stick was in his hand refused to part with it? Perhaps the law had never been compelled to consider so rare an event; and in these cases the land ought to be in the lord's seisin for but a moment. However, we soon begin to see what we can not but call permanent 'uses.' A slight but unbroken thread of cases, beginning while the Conquest is yet recent, shows us that a man will from time to time convey his land to another 'to the use' of a third. For example, he is going on a crusade and wishes that his land shall be held to the use of his children, or he wishes that his wife or his sister shall enjoy the land, but doubts, it may be, whether a woman can hold a military fee or whether a husband can enfeoff his wife. Here there must be at the least an honourable understanding that the trust is to be observed, and there may be a formal 'interposition of faith.' Then, again, we see that some of the lands and revenues of a religious house have often been devoted to some special object; they have been given to the convent 'to [p. 229] the use' of the library or 'to the use' of the infirmary, and we can hardly doubt that a bishop will hold himself bound to provide that these dedications, which are sometimes guarded by the anathema, shall be maintained. Lastly, in the early years of the thirteenth century the Franciscan friars came hither. The law of their being forbad them to own anything; but they needed at least some poor dormitory, and the faithful were soon offering them houses in abundance. A remarkable plan was adopted. They had come as missionaries to the towns; the benefactor who was minded to give them a house, would convey that house to the borough community 'to the use of' or 'as an inhabitation for' the friars. Already, when Bracton was writing, plots of land in London had been thus conveyed to the city for the benefit of the Franciscans. The nascent corporation was becoming a trustee. It is an old doctrine that the inventors of 'the use' were 'the clergy' or 'the monks.' We should be nearer the truth if we said that, to all seeming, the first persons who in England employed 'the use' on a large scale were, not the clergy, nor the monks, but the friars of St Francis.

The 'use' of lands.

Now in few, if any, of these cases can the *ad opus* be regarded as expressing the relation which we conceive to exist between a principal and an agent. It is intended that the 'feoffee to uses' (we can employ no other term to describe him) shall be the owner or legal tenant of the land, that he shall be seised, that he shall bear the burdens incumbent on owners or tenants, but he is to hold his rights for the benefit of another. Such transactions seem to have been too uncommon to generate any definite legal theory. Some of them may have been enforced by the ecclesiastical courts. Assuredly the citizens of London would have known what an interdict meant, had they misappropriated the lands conveyed to them for the use of the friars, those darlings of popes and kings. Again, in some cases the feoffment might perhaps be regarded as a 'gift upon condition,' and in others a written agreement about the occupation of the land might be enforced as a covenant. But at the time when the system of original writs was taking its final form 'the use' had not become common enough to find a comfortable niche in the fabric. And so for a while it lives a precarious life until it obtains protection in the 'equitable' jurisdiction of the chancellors. If in the [p. 230] thirteenth century our courts of common law had already come to a comprehensive doctrine of contract, if they had been ready to draw an exact line of demarcation between 'real' and 'personal' rights, they might have reduced 'the use' to submission and assigned to it a place in their scheme of actions: in particular, they might have given the feoffor a personal, a contractual, action against the feoffee. But this was not quite what was wanted by those who took part in these transactions; it was not the feoffor, it was the person whom he desired to benefit (the *cestui que use* of later days) who required a remedy, and moreover a remedy that would secure him, not money compensation, but enjoyment of the land. 'The use' seems to be accomplishing its manifest destiny when at length after many adventures it appears as 'equitable ownership.'

Feudalism and contract.

We have been laying stress on the late growth of a law of contract, so for one moment we must glance at another side of the picture. The master who taught us that 'the movement of the progressive societies has hitherto been a movement from Status to Contract,' was quick to add that feudal society

was governed by the law of contract[1]. There is no paradox here. In the really feudal centuries men could do by a contract, by the formal contract of vassalage or commendation, many things that can not be done now-a-days. They could contract to stand by each other in warfare 'against all men who can live and die'; they could (as Domesday Book says) 'go with their land' to any lord whom they pleased; they could make the relation between king and subject look like the outcome of agreement; the law of contract threatened to swallow up all public law. Those were the golden days of 'free,' if 'formal,' contract. The idea that men can fix their rights and duties by agreement is in its early days an unruly, anarchical idea. If there is to be any law at all, contract must be taught to know its place.

Note on the phrase 'ad opus,' and the Early History of the Use.

[p. 231] I. The employment of the phrase *ad opus meum* (*tuum, suum*) as meaning on my (your, his) behalf, or for my (your, his) profit or advantage, can be traced back into very early Frankish formulas. See Zeumer's quarto edition of the Formulae Merovingici et Karolini Aevi (Monumenta Germaniae), index s. v. *opus*. Thus, *e.g.*:—

p. 115 'ut nobis aliquid de silva ad opus ecclesiae nostrae . . . dare iubeatis.' (But here *opus ecclesiae* may mean the fabric of the church.)

p. 234 'per quem accepit venerabilis vir ille abba ad opus monasterio suo [=monasterii sui] . . . . masas ad commanendum.'

p. 208 'ad ipsam iam dictam ecclesiam ad opus sancti illius . . . dono.'

p. 315 (An emperor is speaking) 'telonium vero, excepto ad opus nostrum inter Q et D vel ad C [*place names*] ubi ad opus nostrum decima exigitur, aliubi eis ne requiratur.'

II. So in Karolingian laws for the Lombards. Mon. Germ. Leges, IV. Liber Papiensis Pippini, 28 (p. 520): 'De compositionibus quae ad palatium pertinent: si comites ipsas causas convenerint ad requirendum, illi tertiam partem ad eorum percipiant opus, duos vero ad palatium.' (The *comes* gets 'the third penny of the county' for his own use.)

Lib. Pap. Ludovici Pii 40 (p. 538): 'Ut de debito quod ad opus nostrum fuerit wadiatum talis consideratio fiat.'

[1] Maine, Ancient Law, 6th ed. pp. 170, 305.

III. From Frankish models the phrase has passed into Anglo-Saxon land-books. Thus, *e.g.*:—

Cenwulf of Mercia, A.D. 809, Kemble, Cod. Dipl. v. 66: 'Item in alio loco dedi eidem venerabili viro ad opus praefatae Christi ecclesiae et monachorum ibidem deo servientium terram . . .'

Beornwulf of Mercia, A.D. 822, Kemble, Cod. Dipl. v. 69: 'Rex dedit ecclesiae Christi et Wulfredo episcopo ad opus monachorum . . . . villam Godmeresham.'

Werhard's testament, A.D. 832, Kemble, Cod. Dipl. i. 297: the archbishop acquired lands for the use of the cathedral convent: 'ad opus . . . familiae [Christi].'

IV. It is not uncommon in Domesday Book. Thus, *e.g.*:—

D. B. i. 209: 'Inter totum reddit per annum xxii. libras . . . . ad firmam regis . . . . Ad opus reginae duas uncias auri . . . et i. unciam auri ad opus vicecomitis per annum.'

D. B. i. 60 b: 'Duae hidae non geldabant quia de firma regis erant et ad opus regis calumniatae sunt.'

D. B. ii. 311: 'Soca et saca in Blideburh ad opus regis et comitis.'

V. A very early instance of the French *al os* occurs in Leges Willelmi, I. 2. § 3: 'E cil francs hom . . . . seit mis en forfeit el cunté, afert al os le vescunte en Denelahe xl. ores . . . . De ces xxxii. ores averad le vescunte al os le rei x. ores.' The sheriff takes certain sums for his own use, others for the king's use. This document can hardly be of later date than the early years of cent. xii.

VI. In order to show the identity of *opus* and *os* or *oes* we may pass to Britton, ii. 13: 'Villenage est tenement de demeynes de chescun seignur baillé a tenir a sa voluntè par vileins services de emprouwer al oes le [p. 232] seignur.'

VII. A few examples of the employment of this phrase in connexion with the receipt of money or chattels may now be given.

Liberate Roll 45 Hen. III. (Archaeologia, xxviii. 269): Order by the king for payment of 600 marks which two Florentine merchants lent him, to wit, 100 marks for the use (*ad opus*) of the king of Scotland and 500 for the use of John of Britanny.

Liberate Roll 53 Hen. III. (Archaeologia, xxviii. 271): Order by the king for payment to two Florentines of money lent to him for the purpose of paying off debts due in respect of cloth and other articles taken 'to our use (*ad opus nostrum*)' by the purveyors of our wardrobe.

Note Book, pl. 177 (A.D. 1222): A defendant in an action of debt confesses that he has received money from the plaintiff, but alleges that he was steward of Roger de C. and received it *ad opus eiusdem Rogeri.* He vouches Roger to warranty.

Selby Coucher Book, ii. 204 (A.D. 1285): 'Omnibus . . . R. de Y. ballivus domini Normanni de Arcy salutem. Noveritis me recepisse duodecim libras . . . de Abbate de Seleby ad opus dicti Normanni, in quibus idem Abbas ei tenebatur . . . Et ego . . . dictum abbatem . . . versus

dominum meum de supradicta pecunia indempnem conservabo et adquietabo.'

Y. B. 21–2 Edw. I. p. 23: 'Richard ly bayla les chateus a la oeus le Eveske de Ba.'

Y. B. 33–5 Edw. I. p. 239: 'Il ad conté qe eux nous livererent meyme largent al oes Alice la fille B.'

VIII. We now turn to cases in which land is concerned:—

Whitby Cartulary, i. 203–4 (middle of cent. xii.): Roger Mowbray has given land to the monks of Whitby; in his charter he says 'Reginaldus autem Puer vendidit ecclesiae praefatae de Wyteby totum ius quod habuit in praefata terra et reliquit michi ad opus illorum, et ego reddidi eis, et saisivi per idem lignum per quod et recepi illud.'

Burton Cartulary, p. 21, from an 'extent' which seems to come to us from the first years of cent. xii.: 'tenet Godfridus viii. bovatae [*corr.* bovatas] pro viii. sol. praeter illam terram quae ad ecclesiam iacet quam tenet cum ecclesia ad opus fratris sui parvuli, cum ad id etatis venerit ut possit et debeat servire ipsi ecclesiae.'

Ramsey Cartulary, ii. 257–8, from a charter dated by the editors in 1080–7: 'Hanc conventionem fecit Eudo scilicet Dapifer Regis cum Ailsio Abbate Rameseiae . . . . de Berkeforde ut Eudo habere deberet ad opus sororis suae Muriellae partem Sancti Benedicti quae adiacebat ecclesiae Rameseiae quamdiu Eudo et soror eius viverent, ad dimidium servitium unius militis, tali quidem pacto ut post Eudonis sororisque decessum tam partem propriam Eudonis quam in eadem villa habuit, quam partem ecclesiae Rameseiae, Deo et Sancto Benedicto ad usum fratrum eternaliter . . . possidendam . . . relinqueret.' In D. B. i. 210 b, we find 'In Bereforde tenet Eudo dapifer v. hidas de feodo Abbatis [de Ramesy].' So here we have a 'Domesday tenant' as 'feoffee to uses.'

[p. 233] Ancient Charters (Pipe Roll Soc.) p. 21 (*circ.* A.D. 1127): Richard fitz Pons announces that having with his wife's concurrence disposed of her marriage portion, he has given other lands to her; 'et inde saisivi Milonem fratrem eius loco ipsius ut ipse eam manuteneat et ab omni defendat iniuria.'

Curia Regis Roll No. 81, Trin. 6 Hen. III. m. 1 d. Assize of mort d'ancestor by Richard de Barre on the death of his father William against William's brother Richard de Roughal for a rent. Defendant alleges that William held it in *custodia*, having purchased it to the use of (*ad opus*) the defendant with the defendant's money. The jurors say that William bought it to the use of the defendant, so that William was seised not in fee but in wardship (*custodia*). An attempt is here made to bring the relationship that we are examining under the category of *custodia.*

Note Book, pl. 999 (A.D. 1224): *R*, who is going to the Holy Land, commits his land to his brother *W.* to keep to the use of his (*R*'s) sons (*commisit terram illam W. ad opus puerorum suorum*); on *R*'s death his eldest son demands the land from *W*, who refuses to surrender it; a suit between them in a seignorial court is compromised; each of them is to have half the land.

Note Book, pl. 1683 (A.D. 1225): *R* is said to have bought land from *G* to the use of the said *G*. Apparently *R* received the land from *G* on the understanding that he (*R*) was to convey it to *G* and the daughter of *R* (whom *G* was going to marry) by way of a marriage portion.

Note Book, pl. 1851 (A.D. 1226–7): A man who has married a second wife is said to have bought land to the use of this wife and the heirs of her body begotten by him.

Note Book, pl. 641 (A.D. 1231): It is asserted that *E* impleaded *R* for certain land, that *R* confessed that the land was *E*'s in consideration of 12 marks, which *M* paid on behalf of *E*, and that *M* then took the land to the use (*ad opus*) of *E*. Apparently *M* was to hold the land in gage as security for the 12 marks.

Note Book, pl. 754 (A.D. 1233): Jurors say that *R* desired to enfeoff his son *P*, an infant seven years old; he gave the land in the hundred court and took the child's homage; he went to the land and delivered seisin; he then committed the land to one *X* to keep to the use of *P* (*ad custodiendum ad opus ipsius Petri*) and afterwards he committed it to *Y* for the same purpose; *X* and *Y* held the land for five years to the use of *P*.

Note Book, pl. 1244 (A.D. 1238–9): A woman, mother of *H*, desires a house belonging to *R*; *H* procures from *R* a grant of the house to *H* to the use (*ad opus*) of his mother for her life.

Assize Roll No. 1182, m. 8 (one of Bracton's Devonshire rolls): 'Iuratores dicunt quod idem Robertus aliquando tenuit hundredum illud et quod inde cepit expleta. Et quaesiti ad opus cuius, utrum ad opus proprium vel ad opus ipsius Ricardi, dicunt quod expleta inde cepit, sed nesciunt utrum ad opus suum proprium vel ad opus ipsius Ricardi quia nesciunt quid inde fecit.'

Chronicon de Melsa, ii. 116 (an account of what happened in the middle of cent. xiii. compiled from charters): Robert confirmed to us monks the tenements that we held of his fee; 'et insuper duas bovatas [p. 234] cum uno tofto . . . ad opus Ceciliae sororis suae et heredum suorum de corpore suo procreatorum nobis concessit; ita quod ipsa Cecilia ipsa toftum et ii. bovatas terrae per forinsecum servitium et xiv. sol. et iv. den. annuos de nobis teneret. Unde eadem toftum et ii. bovatas concessimus dictae Ceciliae in forma praescripta.'

Historians of the Church of York, iii. 160: In 1240 Hubert de Burgh in effect creates a trust for sale. He gives certain houses to God for the defence of the Holy Land and delivers them to three persons 'ad disponendum et venditioni exponendum.' They sell to the archbishop of York.

IX. The lands and revenues of a religious house were often appropriated to various specific purposes, e.g. *ad victum monachorum, ad vestitum monachorum*, to the use of the sacrist, cellarer, almoner or the like, and sometimes this appropriation was designated by the donor. Thus, *e.g.* Winchcombe Landboc, i. 55, 'ad opus librorum'; i. 148, 'ad usus infirmorum monachorum'; i. 73, certain tithes are devoted 'in usum operationis ecclesiae,' and in 1206 this devotion of them is protected by

a ban pronounced by the abbot; only in case of famine or other urgent necessity may they be diverted from this use. So land may be given 'to God and the church of St German of Selby to buy eucharistic wine (*ad vinum missarum emendum*)'; Selby Coucher, ii. 34.

In the ecclesiastical context just mentioned *usus* is a commoner term than *opus*. But the two words are almost convertible. On Curia Regis Roll No. 115 (18–9 Hen. III.) m. 3 is an action against a royal purveyor. He took some fish *ad opus Regis* and converted it *in usus Regis*.

X. In the great dispute which raged between the archbishops of Canterbury and the monks of the cathedral monastery one of the questions at issue was whether certain revenues, which undoubtedly belonged to 'the church' of Canterbury, had been irrevocably devoted to certain specific uses, so that the archbishop, who was abbot of the house, could not divert them to other purposes. In 1185 Pope Urban III. pronounces against the archbishop. He must restore certain parochial churches to the use of the almonry. 'Ecclesiae de Estreia et de Munechetun . . . . ad usus pauperum provide deputatae fuissent, et a . . . praedecessoribus nostris eisdem usibus confirmatae . . . Monemus quatenus . . . praescriptas ecclesias usibus illis restituas.' Again, the prior and convent are to administer certain revenues which are set apart 'in perpetuos usus luminarium, sacrorum vestimentorum et restaurationis ipsius ecclesiae, et in usus hospitum et infirmorum.' At one stage in the quarrel certain representatives of the monks in the presence of Henry II. received from the archbishop's hand three manors 'ad opus trium obedientiariorum, cellerarii, camerarii et sacristae.' See Epistolae Cantuarienses, pp. 5, 38, 95.

XI. Historians of the Church of York, iii. 155: In 1241 we see an archbishop of York using somewhat complicated machinery for the creation of a trust. He conveys land to the chapter on condition that (*ita quod*) they will convey it to each successive archbishop to be held by him at a rent, which rent is to be paid to the treasurer of the cathedral and expended by him in the maintenance of a chantry. The event that an archbishop may not be willing to accept the land subject to this rent is provided for. This 'ordination' is protected by a sentence of excommunication.

XII. We now come to the very important case of the Franciscans.

Thomas of Eccleston, De adventu Fratrum Minorum (Monumenta Franciscana, i.), p. 16: 'Igitur Cantuariae contulit eis aream quandam et aedificavit capellam . . . Alexander magister Hospitalis Sacerdotum; et quia fratres nihil omnino appropriare sibi voluerunt, facta est communitati civitatis propria, fratribus vero pro civium libitu commodata . . . Londoniae autem hospitatus est fratres dominus Johannes Ywin, qui emptam pro fratribus aream communitati civium appropriavit, fratrum autem usumfructum eiusdem pro libitu dominorum devotissime designavit . . . Ricardus [p. 235] le Muliner contulit aream et domum communitati villae [Oxoniae] ad opus fratrum.' This account of what happened in or about 1225 is given by a contemporary.

Prima Fundatio Fratrum Minorum Londoniae (Monumenta Franciscana, i.), p. 494. This document gives an account of many donations of land made to the city of London in favour of the Franciscans. The first charter that it states is one of 1225, in which John Iwyn says that for the salvation of his soul he has given a piece of land to the *communitas* of the city of London in frankalmoin 'ad inhospitandum [*a word missing*] pauperes fratres minorum [minores?] quamdiu voluerint ibi esse.'

XIII. The attempt of the early Franciscans to live without property of any sort or kind led to subtle disputations and in the end to a world-shaking conflict. At one time the popes sought to distinguish between ownership and usufruct or use; the Franciscans might enjoy the use but could not have ownership; the *dominium* of all that was given to their use was deemed to be vested in the Roman church and any litigation about it was to be carried on by papal procurators. This doctrine was defined by Nicholas III. in 1279. In 1322 John XXII. did his best to overrule it, declaring that the distinction between use and property was fallacious and that the friars were not debarred from ownership (Extrav. Jo. XXII. 14. 3). Charges of heresy about this matter were freely flung about by and against him, and the question whether Christ and His Apostles had owned goods became a question between Pope and Emperor, between Guelph and Ghibelline. In the earlier stages of the debate there was an instructive discussion as to the position of the third person, who was sometimes introduced as an intermediary between the charitable donor and the friars who were to take the benefit of the gift. He could not be treated as agent or procurator for the friars unless the ownership were ascribed to them. Gregory IX. was for treating him as an agent for the donor. See Lea, History of the Inquisition, iii. 5–7, 29-31, 129–154.

XIV. It is very possible that the case of the Franciscans did much towards introducing among us both the word *usus* and the desire to discover some expedient which would give the practical benefits of ownership to those who could yet say that they owned nothing. In every large town in England there were Minorites who knew all about the stormy controversy, who had heard how some of their foreign brethren had gone to the stake rather than suffer that the testament of St Francis should be overlaid by the evasive glosses of lawyerly popes, and who were always being twitted with their impossible theories by their Dominican rivals. On the continent the battle was fought with weapons drawn from the armoury of the legist. Among these were *usus* and *usufructus*. It seems to have been thought at one time that the case could be met by allowing the friars a *usus* or *usufructus*, these terms being employed in a sense that would not be too remote from that which they had borne in the old Roman texts. Thus it is possible that there was a momentary contact between Roman law—medieval, not classical, Roman law—and the development of the English *use*. Englishmen became familiar with an employment of the word *usus* which would make it stand for something that just is not, though it looks exceedingly like, *dominium*. But we hardly need say that [p. 236] the *use* of our English law is not derived from the Roman 'personal

servitude'; the two have no feature in common. Nor can we believe that the Roman *fideicommissum* has anything to do with the evolution of the English *use*. In the first place, the English *use* in its earliest stage is seldom, if ever, the outcome of a last will, while the *fideicommissum* belongs essentially to the law of testaments. In the second place, if the English *use* were a *fideicommissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*. What we see is a vague idea, which developing in one direction becomes what we now know as agency, and developing in another direction becomes that *use* which the common law will not, but equity will, protect. It is only in the much later developments and refinements of modern family settlements that the English system of *uses* becomes capable of suggesting *Fideicommiss* to modern German inquirers as an approximate equivalent. Where Roman law has been 'received' the *fideicommissum* plays a part which is insignificant when compared with that played by the trust in our English system. Of course, again, our 'equitable ownership,' when it has reached its full stature, has enough in common with the praetorian *bonorum possessio* to make a comparison between the two instructive; but an attempt to derive the one from the other would be too wild for discussion.

CHAPTER VI.

INHERITANCE.

§ 1. *Antiquities.*

The history of the family: a controversial theme.

If before we speak of our law of inheritance as it was in [p. 237] the twelfth and thirteenth centuries, we devote some small space to the antiquities of family law, it will be filled rather by warnings than by theories. Our English documents contain little that can be brought to bear immediately or decisively on those interesting controversies about primitive tribes and savage families in which our archæologists and anthropologists are engaged, while the present state of those controversies is showing us more clearly every day that we are yet a long way off the establishment of any dogmas which can claim an universal validity, or be safely extended from one age or one country to another. And yet so long as it is doubtful whether the prehistoric time should be filled, for example, with agnatic *gentes* or with hordes which reckon by 'mother-right,' the interpretation of many a historic text must be uncertain.

The family as an unit.

It has become a common-place among English writers that the family rather than the individual was the 'unit' of ancient law. That there is truth in this saying we are very far from denying—the bond of blood was once a strong and sacred bond—but we ought not to be content with terms so vague as 'family' and 'unit.' It may be that in the history of every nation there was a time when the men and women of that nation were grouped together into mutually exclusive clans, when all the members of each clan were in fact or in fiction bound to each other by the tie of blood, and were accounted strangers in blood to the members of every other clan. But

[p. 238] let us see what this grouping implies. It seems to imply almost of necessity that kinship is transmitted either only by males or only by females. So soon as it is admitted that the bond of blood, the bond which groups men together for the purpose of blood-feud and of *wergild*, ties the child both to his father's brother and to his mother's brother, a system of mutually exclusive clans is impossible, unless indeed each clan is strictly endogamous. There is a foray; grandfather, father and son are slain; the *wer* must be paid. The *wer* of the grandfather must be paid to one set of persons; the *wer* of the father to a different set; the *wer* of the son to yet a third set. If kinship is traced only through males or only through females, then we may have permanent and mutually exclusive units; we may picture the nation as a tree, the clans as branches; if a twig grows out of one branch, it cannot grow out of another. In the other case each individual is himself the trunk of an *arbor consanguinitatis*.

No clans in England.

Now it is not contended that the Germans, even when they first come within the ken of history, recognize no bond of blood between father and son. They are for the more part monogamous, and their marriages are of a permanent kind. The most that can be said by ardent champions of 'mother-right' is that of 'mother-right' there are distinct though evanescent traces in the German laws of a later day. On the other hand, we seem absolutely debarred from the supposition that they disregarded the relationship between the child and its mother's brother[1]. So soon as we begin to get rules about inheritance and blood-feud, the dead man's kinsfolk, those who [p. 239] must bear the feud and who may share the *wergild*, consist in part of persons related to him through his father, and in part of persons related to him through his mother.

[1] Tacitus, Germania, c. 20: 'Sororum filiis idem apud avunculum qui apud patrem honor.' The other stronghold of the upholders of 'mother-right' is the famous tit. 59 of the Lex Salica (ed. Hessels, col. 379). This in its oldest form gives the following order of inheritance: (1) sons, (2) mother, (3) brothers and sisters, (4) mother's sister, thus passing by the father. The force of the passage is diminished by the omission of the mother's brother. One can not tell how much is taken for granted by so rude a text. Among modern Germanists 'mother-right' seems to be fast gaining ground; but the evidence that is adduced in favour of a period of exclusive 'mother-right' is sparse and slight. The word *matriarchy* should be avoided. A practice of tracing kinship only through women is perfectly compatible with a man's despotic power over his household. See Dargun, Mutterrecht und Vaterrecht, p. 3.

Spear-kin and spindle-kin.

It was so in the England of Alfred's day; the maternal kinsfolk paid a third of the *wer*. The *Leges Henrici*, which about such a matter will not be inventing new rules, tell us that the paternal kinsfolk pay and receive two-thirds, the maternal kinsfolk one-third of the *wer*; and this is borne out by other evidence[1]. Also it is clear that marriage did not sever the bond between a woman and her blood-kinsmen; they were responsible for her misdeeds; they received her *wer*, and we are expressly told that, if she committed homicide, vengeance was not to be taken on 'the innocent family' of her husband[2]. It would even seem that her husband could not remove her from the part of the country in which her kinsmen lived without giving them security that he would treat her well and that they should have an opportunity of condoning her misdeeds by money payments[3]. Now when we see that the wives of the members of one clan are themselves members of other clans, we ought not to talk of clans at all[4]. If the law were to treat the clan as an unit for any purpose whatever, this would surely be the purpose of *wer* and blood-feud; but just for that purpose our English law does not contemplate the existence of a number of mutually exclusive units which can be enumerated and named; there were as many 'blood-feud groups' as there were living persons; at all events each set of brothers and sisters was the centre of a different group.

No permanent organization of the blood-feud group.

From this it follows that the 'blood-feud group' cannot be a permanently organized unit. If there is a feud to be borne or *wer* to be paid or received, it may organize itself *ad hoc*; but the organization will be of a fleeting kind. The very next deed of violence that is done will call some other blood-feud group into existence. Along with his brothers and paternal uncles a man goes out to avenge his father's death and [p. 240] is slain. His maternal uncles and cousins, who stood outside the old feud, will claim a share in his *wer*.

[1] Alf. 27; Æthelst. II. 11; Leg. Henr. 75 § 8–10; Schmid, App. VII. 1, § 3. The passage in the Laws of Alfred is an exceedingly difficult one, because it introduces us to those *gegyldan* of whom no very satisfactory explanation has ever been given. But, especially if read along with the *Leges Henrici*, it seems to tell us that, if the slayer has both paternal and maternal kinsfolk, the paternal pay two-thirds, the maternal one-third. See Brunner, D. R. G. i. 218.

[2] Schmid, App. VI. § 7; Leg. Henr. 70 § 12, 13, 23.

[3] Schmid, App. VI. § 7.

[4] See Gierke, Genossenschaftsrecht, i. 27.

The blood-feud group is not a permanent legal unit.

This is what we see so soon as we see our ancestors. About what lies in the prehistoric time we can only make guesses. Some will surmise that the recognition of the kinship that is traced through women is a new thing, and that in the past there have been permanently coherent agnatic *gentes* which are already being dissolved by the action of a novel principle. Others will argue that the movement has been not from but towards agnation, and has now gone so far that the spear-cousins are deemed nearer and dearer than the spindle-cousins. Others, again, may think that the great 'folk-wandering' has made the family organization of the German race unusually indefinite and plastic, so that here it will take one, and there another form. What seems plain is that the exclusive domination of either 'father-right' or 'mother-right'—if such an exclusive domination we must needs postulate—should be placed for our race beyond the extreme limit of history. To this, however, we may add that the English evidence as to the wife's position is a grave difficulty to any theory that would start with the patriarchal family as a primitive datum. That position we certainly cannot ascribe to the influence of Christianity. The church's dogma is that the husband is the head of the wife, that the wife must forsake her own people and her father's house; and yet, despite all preaching and teaching, the English wife remains, for what has once been the most important of all purposes, a stranger to her husband's kin, and even to her husband.

The kindred as a local group.

It is quite possible that in England men as a matter of fact dwelt together in large groups tilling the land by co-operation, that the members of each group were, or deemed themselves to be, kinsmen in blood, and that as a force for keeping them in these local groups spear-sibship was stronger than spindle-sibship:—their relative strength could be expressed by the formula 2 : 1. We get a hint of such permanent cohesive groups when we find King Æthelstan legislating against the *mægð* that is so strong and so mickle that it denies the king's rights and harbours thieves. The whole power of the country is to be called out to ride against these offenders[1]. The law will, if possible, treat such a *mægð* as an 'unit' by crushing it [p. 241] into atoms. But in no other way, so far as we can see, will its unity be legally recognized. The rules of blood-feud that the

[1] Æthelst. VI. 8 § 2, 3.

law sanctions are a practical denial of its existence. Unless it be endogamous, it can have no claim to the whole *wer* of any one of its members; every one of its members may have to pay *wer* along with persons who stand outside it.

The kindred as land-owning unit.

Again, if we accept the common saying that the land-owning unit was not an individual but a *mægð*, a clan, or *gens*, we must meet the difficulty that at an early period land was being inherited through women. The rules of inheritance are very dark to us, but, so far as we can see, the tendency in the historic period is not towards an admission of the 'spindle-kin,' but towards a postponement of their claims to those of the 'spear-kin'[1]. Already in the eighth century the Anglo-Saxon thegn wishes to create something like the estate in tail male of later times[2]. And the law takes his side; it decrees that the form of the gift shall be respected[3]. Now if for a moment we suppose that a clan owns land, we shall see a share in this land passing through daughters to their children, and these children will be on their father's side members of another clan. Our land-owning clan, if it still continues to hold its old lands, will soon cease to be a clan in any tolerable sense of the term; it will be a mere group of co-proprietors, some of whom are bound by the sacred tie of blood-feud more closely to those who stand outside than to those who stand inside the proprietary group.

The kindred no corporation.

We must resist the temptation to speak of 'the *mægð*' as if it were a kind of corporation[4], otherwise we have as many corporations as there are men and women. The collective word *mægð* is interchangeable with the plural of the word *mæg*, which signifies a kinsman. When a man has been slain, those who are bound and entitled to avenge his death will, it is probable enough, meet together and take counsel over a plan of campaign; but so far as we can see, the law, when first it knows a *wergild*, knows the main outlines of a system which divides the *wergild* among individual men. There is in the first place a sum called the *healsfang*, which is due only to those who are [p. 243] very closely related to the dead man[5]; then there is the rule that gives two thirds to the spear and one to the spindle. Again, when the 'kindred' of a lordless man is ordered to find

[1] See the instances collected by Kemble, Cod. Dipl. i. p. xxxiii.

[2] Kemble, Cod. Dipl. 147 (i. 177); 299 (ii. 94).

[3] Alf. c. 41.

[4] See Heusler, Institutionen, i. 259.

[5] Brunner, D. R. G. i. 219.

him a lord, we need not think of this as of a command addressed to corporations, or even to permanently organized groups of men; it may well be addressed to each and all of those persons who would be entitled to share the *wergild* of this lordless man: every one of them will be liable to perform this duty if called upon to do so[1]. A fatherless child 'follows its mother'; apparently this means that, as a general rule, this child will be brought up among its maternal, not its paternal, kinsmen; the guardianship however of its paternal goods is given by ancient dooms to its paternal kinsmen[2]. But such texts do not authorize us to call up the vision of a *mægð* acting as guardian by means of some council of elders; the persons who would inherit if the child died may well be the custodians of the ancestral property. But even if in any given case a person's kinsmen act together and, for example, find a lord or appoint a guardian for him, it is only by reason of their relationship to him that they constitute an unit. There may be a great deal to show that in England and elsewhere strong family groups formed themselves and that the law had to reckon with them; but they were contending against a principle which, explain it how we will, seems to be incompatible with the existence of mutually exclusive *gentes* as legal entities[3].

The household as land-owner.

We turn to the popular theory that land was owned by families or households before it was owned by individuals. This seems to mean that at a time when a piece of land was never owned by one man, co-ownership was common. Now [p. 243] co-ownership may take various forms. In the later middle ages it took here in England at least four. There was the tenancy in common. In this case when one co-tenant died, his own undivided share descended to his heir[4]. There was the joint tenancy. In this case when one co-tenant died, his share did not descend to his heir, but 'accrued' to the surviving co-tenant or co-tenants. There was the co-parcenary occasioned by

[1] Æthelstan, II. 2.

[2] Hloth. and Ead. 6; Ine, 38.

[3] Heusler, Institutionen, i. 259, argues that the German sib does not show us even the germ of a juristic person. The contrary, and at one time more popular, opinion is stated with special reference to the Anglo-Saxon evidence by Gierke, Genossenschaftsrecht, i. 17 ff. When Bracton, f. 87 b, says that an infant sokeman is *sub custodia consanguineorum suorum propinquorum*, we do not see a family council; why should we see one when a similar phrase occurs in an Anglo-Saxon doom?

[4] We are speaking briefly, and are therefore supposing that the co-tenants hold in fee simple.

the descent of lands to co-heiresses. In this case there had been doubt whether on the death of one co-tenant without issue there would be inheritance or 'accruer by survivorship.' The intimate union between husband and wife gave rise to a fourth form, known as tenancy by entireties. We can not *a priori* exhaust the number of forms which co-ownership may take. Nor is it only on the death of one of the co-owners that the differences between these forms will manifest themselves. In a modern system of law, and in many a system that is by no means modern[1], every one of the co-owners may in general insist on a partition either of the land itself or, it may be, of the money that can be obtained by a sale of it; or again, without any partition being made, he can without the consent of his fellows transfer his aliquot share to one who has hitherto stood outside the co-owning group. Demonstrably in some cases, perhaps in many, these powers are of recent origin[2]. Let us [p. 244] for a moment put them out of account. Let us suppose that on a father's death his land descends to his three sons, that no son can force his brothers to a physical partition of the inheritance, and that no son can sell or give away his share. Let us make yet another supposition, for which there may be warrant in some ancient laws. Let us suppose that if one of the three sons dies leaving two sons, these two will not of necessity inherit just their father's share, no more, no less. Let us suppose that there will be a redistribution of the shares into which the land has hitherto been ideally divided, so (for example) that these four persons, namely the two uncles and their two nephews, will have equal shares. The land is still owned by four men[3]. Let the number of co-tenants increase

[1] Heusler, Institutionen, i. 240. In India there are traces of a period when partition could not be enforced, and 'in Malabar and Canara, at the present day, no right of partition exists': Mayne, Hindu Law, § 218.

[2] It is not until the reign of Henry VIII. (Stat. 31 Hen. VIII. c. 1) that one of several joint tenants can compel his fellows to make partition. But the co-parcener has had this power from a remote age. This is remarkable: the co-ownership created by inheritance can, the co-ownership created by the act of a feoffor can not, be destroyed against the wish of one of the co-owners.

[3] Some such plan of a repeated redistribution *per capita* among brothers, first-cousins and second-cousins seems to have prevailed in Wales; but the redistributions of which we read in Welsh law seem to be redistributions of physically divided shares. Apparently in ancient Germany the rule was that within the joint family the sons, however numerous, of a dead co-proprietor would upon partition get no larger share than their father would have taken had he lived. In

until there are forty of them; the state of the case is not altered. Individuals do not cease to be individuals when there are many of them. But if there are many of them, we shall often spare ourselves the trouble of enumerating them by the use of some collective name. If John Smith's land has descended to his seven daughters who are holding it as co-parceners, we shall in common discourse speak of it as the land of the Smiths or of the Smith family, or, if we prefer medieval Latin to modern English, we shall say that the land belongs to the *genealogia Johannis Fabri*. If these ladies quarrel with their neighbours about a boundary, there may be litigation between two families (*inter duas genealogias*), the Smiths, to wit, and the Browns; but it will be a quarrel between 'individuals'; this will be plain enough so soon as there is any pleading in the action.

[p. 245] Now no one is likely to maintain, even as a paradox, that the ownership of aliquot shares of things is older than the ownership of integral things. If nothing else will restrain him, he may at least be checked by the reflection that the more ancient institution will inevitably become the more modern within a few years. He distributes the land to families. So soon as by the changes and chances of this mortal life any one of those families has but a single member, 'individual ownership' will exist, unless to save his dogma he has recourse to an arbitrary act of confiscation.

Is co-ownership older than several ownership?

To deny that 'family ownership' is an ownership by individuals of aliquot shares is another expedient. But this in truth is a denial of the existence of any law about partition. If there is any law which decides how, if a partition be made, the physically distinct shares ought to be distributed, then there is already law which assigns to the members of the group ideal shares in the unpartitioned land[1]. But to seek to go

Co-ownership and aliquot shares.

other words, while the family is still 'joint' there is inheritance of ideal quotas. Heusler, Institutionen, i. 240. Maine, Early History of Institutions, p. 195, speaks of a distribution *per capita* occurring in the most archaic forms of the joint family.

[1] Heusler, Institutionen, i. 238. We read of two rival schools of Hindu lawyers, the one maintaining the theory of 'aggregate ownership,' the other that of 'fractional ownership.' The same two theories have divided the German antiquaries. But it seems reasonable to say with Heusler that if there is law which upon a partition will assign to each co-proprietor some definite aliquot share of the land, then there is law which gives him an ideal fraction of the land while it still remains undivided, though it assigns him no certain share in the profits.

behind a law for the partition of family estates without passing into a region in which there is no ownership and no law does not in Western Europe look like an endeavour that is destined to succeed. Such evidence as we have does not tend to prove that in ancient times the 'joint family' was large. Seldom did it comprise kinsmen who were not the descendants of a common grandfather: in other words, the undivided family rarely lived through three generations[1]. But supposing that there is no law about partition, we still have before us something which, if we agree to call it ownership, is ownership by individuals. We have land owned by four, or by forty individuals, and at any moment a war, a plague or a famine may reduce their number to one.

Birth-rights.

To our thinking then, the matter that has to be investigated is not well described as the non-existence of 'individual ownership.' It would be more correctly described as the existence [p. 246] and the origin of 'birth-rights.' Seemingly what we mean when we speak of 'family ownership,' is that a child acquires rights in the ancestral land, at birth or, it may be, at adolescence; at any rate he acquires rights in the ancestral land, and this not by gift, bequest, inheritance or any title known to our modern law.

History of birth-rights.

Now that such rights once existed in England and many other parts of Western Europe is not to be denied. When the dark age is over, they rarely went beyond this, that the landholder could not utterly disinherit his expectant heirs either by will or by conveyance; the father, for example, could not sell or give away the ancestral land without the consent of his sons, or could only dispose of some 'reasonable' part of it. If he attempted to do more, then when he was dead his sons could revoke the land. However, it was not unknown in some parts of Germany that, even while the father lived, the sons could enforce their rights and compel him to a partition[2].

Birth-rights and inheritance.

It is natural for us to assume without hesitation that those forms of birth-right which are least in accord with our own ideas are also the most archaic, that the weaker forms are degenerate relics of the stronger, that originally the child was

[1] Heusler, Institut. 229, says that in the oldest German documents even first-cousins are seldom 'joint.'

[2] In Germany within historic times the stronger forms of birth-right seem to have been peculiar to the South German (Alaman and Bavarian) nations.

born a landowner, that a law which only allows him to recall the alienated land after his father's death is transitional, and that his right has undergone a further and final degradation when it appears as a mere *droit de retrait*, a right to redeem the alienated land at the price that has been given for it. According to this theory, the law of intestate succession has its origin in 'family ownership.' It is an old and a popular doctrine[1]. Before however we allow to it the dignity of a proved and universal truth, we shall do well to reflect that it attributes to barbarous peoples a highly commendable care for the proprietary rights of the *filius familias*, and if for his proprietary rights then also for his life and liberty, for the state of things in which a father may lawfully reduce the number of his co-proprietors by killing them or selling them into slavery is not one that we can easily imagine as a normal or stable stage in the history of mankind.

[p. 247] Birth-rights begotten by a law of inheritance.

The suggestion therefore may be admissible that at least in some cases 'family ownership,' or the semblance of it, may really be, not the origin, but the outcome of intestate succession[2]. We have but to ask for a time when testamentary dispositions are unknown and land is rarely sold or given away. In such a time a law of intestate succession will take deep root in men's thoughts and habits. The son will know that if he lives long enough he will succeed his father; the father will know that in the ordinary course of events his land will pass from him to his sons. What else should happen to it? He does not want to sell, for there is none to buy; and whither could he go and what could he do if he sold his land? Perhaps the very idea of a sale of land has not yet been conceived. In course of time, as wealth is amassed, there are purchasers for land; also there are bishops and priests desirous of acquiring land by gift and willing to offer spiritual benefits in return. Then the struggle begins, and law must decide whether the claims of expectant heirs can be defeated. In the past those claims have been protected not so much by law as by economic conditions. There is no need of a law to prohibit men from doing what they do not want to do; and they have not wanted to

[1] Gaius, ii. 157; Paulus, Dig. 28. 2. 11.

[2] See Ficker, Untersuchungen zur Erbenfolge, i. 229. No student of 'family ownership' should neglect this book. See also Baden-Powell, Indian Village Community, 416.

sell or to give away their land. But now there must be law. The form that the law takes will be determined by the relative strength of conflicting forces. It will be a compromise, a series of compromises, and we have no warrant for the belief that there will be steady movement in one direction, or that the claims of the heirs must be always growing feebler. That this is so we shall see hereafter. The judges of Henry II.'s court condemned in the interest of the heir those testamentary or *quasi*-testamentary dispositions of land which Englishmen and Normans had been making for some time past, though the same judges or their immediate successors decided that the consent of expectant heirs should no longer be necessary when there was to be an alienation *inter vivos*. Thus they drew up the great compromise which ruled England for the rest of the middle ages. Other and different arrangements were made elsewhere, some more, some less favourable to the heirs, and we must not assume without proof that those which are most favourable to the heirs are in the normal order of events the most primitive. They imply, as already said, that a son can [p. 218] hale his father before a court of law and demand a partition; when this can be done there is no 'patriarchalism,' there is little paternal power[1].

Antiquity of inheritance.

In calling to our aid a law of intestate succession we are not invoking a modern force. As regards the German race we can not go behind that law; the time when no such law existed is in the strictest sense prehistoric. Tacitus told his Roman readers that the Germans knew nothing of the testament, but added that they had rules of intestate succession. These rules were individualistic: that is to say, they did not treat a man's death as simply reducing the number of those persons who formed a co-owning group. Again, they did not give the wealth that had been set free to a body consisting of persons who stood in different degrees of relationship to the dead man. The kinsmen were called to the inheritance class by class, first the children, then the brothers, then the uncles[2]. The *Lex Salica*

[1] A brief account of the various theories which have prevailed in modern Germany about the relation of 'family ownership' or 'birth-rights' to inheritance is given by Adler, Ueber das Erbenwartrecht nach den ältesten Bairischen Rechtsquellen (Gierke, Untersuchungen, No. xxxvii.).

[2] Germania, c. 20: 'heredes tamen successoresque sui cuique liberi et nullum testamentum. si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi.'

has a law of intestate succession; it calls the children, then the mother, then the brothers and sisters, then the mother's sister[1]. These rules, it may be said, apply only to movable goods and do not apply to land; but an admission that there is an individualistic law of succession for movable goods when as yet anything that can be called an ownership of land, if it exists at all, is new, will be quite sufficient to give us pause before we speak of 'family ownership' as a phenomenon that must necessarily appear in the history of every race. Our family when it obtains a permanent possession of land will be familiar with rules of intestate succession which imply that within the group that dwells together there is mine and thine. But the *Lex Salica* already knows the inheritance of land; the dead man's land descends to his sons, and an express statement that women can not inherit it is not deemed superfluous.

Family ownership in England.

Now as regards the Anglo-Saxons we can find no proof of the theory that among them there prevailed anything that ought to be called 'family ownership.' No law, no charter, no record [p. 249] of litigation has been discovered which speaks of land as being owned by a *mægð*, a family, a household, or any similar group of kinsmen. This is the more noticeable because we often read of *familiae* which have rights in land; these *familiae*, however, are not groups of kinsmen but convents of monks or clerks[2].

Birth-rights in England.

But, further, the dooms and the land-books are markedly free from those traits which are commonly regarded as the relics of family ownership[3]. If we take up a charter of feoffment sealed in the Norman period we shall probably find it saying that the donor's expectant heirs consent to the gift. If we take up an Anglo-Saxon land-book we shall not find this; nothing will be said of the heir's consent[4]. The denunciatory clause will perhaps mention the heirs, and will curse them if they dispute the gift; but it will usually curse all

[1] Lex Sal. 59.

[2] See *e.g.* Cod. Dipl. 156 (i. 187) where the 'senatores familiae' are mentioned.

[3] What can be said on the other side has been said by Mr Lodge, Essays on Anglo-Saxon Law, pp. 74–7.

[4] Cod. Dipl. 1017 (v. 55), Birch, i. 394, on which Mr Lodge relies, is a forgery. It is to be remembered that we have but very few land-books which do not come from kings or bishops, but we seem to have just enough to enable us to say with some certainty that a clause expressive of the heir's consent was not part of the 'common form,' and that the best forgers of a later time knew this.

and singular who attack the donee's title, and in any system of law a donee will have more to fear from the donor's heirs than from other persons, since they will be able to reclaim the land if for any cause the conveyance is defective[1]. Occasionally several co-proprietors join to make a gift; but when we consider that in all probability all the sons of a dead man were equally entitled to the land that their father left behind him, we shall say that such cases are marvellously rare. Co-ownership, co-parcenary, there will always be. We see it in the thirteenth century, we see it in the nineteenth; the wonder is that we do not see more of it in the ninth and tenth than our Anglo-Saxon land-books display.

In the days before the Conquest a dead man's heirs sometimes attempted to recover land which he had given away, or which some not impartial person said that he had given away. They often did so in the thirteenth century; they sometimes do so at the present day. At the present day a man's expectant heirs do not attempt to interfere with his gifts so long as he is alive; this was not done in the thirteenth century; we have no proof that it was done before the Conquest[2]. [p. 250]

Expectant heirs do not like to see property given away by will; they sometimes contest the validity of the will which contains such gifts; not unfrequently, as every practitioner in a court of probate will know, the legatees are compelled to compromise their claims. All this happened in the days

[1] In the middle of the eighth century Abbot Ceolfrith with the king's consent gives to the church at Worcester land which has descended to him as heir of his father. The charter ends with this clause: 'Si quis autem, quod absit, ex parentela mea vel externorum, malivola mente et maligno spiritu instigatus, huius donationis nostrae munificentiam infringere nititur et contraire, sciat se in die tremendo.....rationem redditurum.' Here is a man who has inherited land from his father, who gives it away though he has a *parentela*, and who is no more careful to protect the church against claims urged by his kinsmen than he is to protect it against the claims of *externi*. See Cod. Dipl. 127 (i. 154).

[2] Mr Lodge relies on Cod. Dipl. 195 (i. 238). King Egbert gave land to Aldhun, who gave it to the church of Canterbury. King Offa took it away, 'quasi non liceret Ecgberhto agros hereditario iure scribere.' Another and an earlier charter, Cod. Dipl. 1020 (v. 61), distinctly alleges that Offa's resumption was based, not on an infraction of family law, but on a royal or seignorial claim. Egbert had given the land to his *minister* Aldhun; Offa revoked it, 'dicens iniustum esse quod minister eius praesumpserit terram sibi a domino distributam absque eius testimonio in alterius potestatem dare.'

before the Conquest; but when we consider that the testamentary or *quasi*-testamentary gift was in that age a new thing, we can not say that such disputes about wills were common[1].

A doom of King Alfred speaks thus:—'If a man has book-land which his kinsmen left him, we decree that he is not to alienate it outside his kindred, if there is writing or witness that this was forbidden by those who first acquired it and by those who gave it to him; and let this be declared with the witness of the king and the bishop in the presence of his kinsfolk[2].' We may argue, if we will, that this is an attempt to impose upon the alienable book-land some of those fetters which have all along compressed the less alienable folk-land or 'family-land'; the *forma donationis* is to be observed and restrictive forms are not unknown[3]. Nevertheless, here, about the year 900, we see the current of legislation moving, at least for the moment, in favour of the expectant heirs. Either a new law is made for their benefit or a new precision is given to an old law. The restraint on alienation. [p. 251]

We may well suppose that often enough a man's co-heirs left his land unpartitioned for some time, and that for more than one generation his male descendants and such of his female descendants as were not married continued to live together under one roof or within one enclosure as a joint, undivided household. We may guess that when, to take one Partition of inheritances.

[1] The best cases are collected at the end of the Essays on Anglo-Saxon Law, Nos. 4, 8, 14, 16, 30. Mr Lodge's argument (p. 76) about Æthelric's will (Cod. Dipl. 186; Birch, i. 438, 440) we cannot adopt. 'The necessity of family consent is shown by the provision in Æthelric's will, that the land could be alienated *cum recto consilio propinquorum*.' There is no such provision. Æthelric gives land to his mother for life, and on her death it is to go to the church of Worcester. But he has reason to fear that a claim will be put in by the church of Berkeley. So he desires that the church of Worcester shall protect the mother, and adds 'et si aliquis homo in aliqua contentione iuramentum ei decreverit contra Berclingas, liberima erit ad reddendum cum recto consilio propinquorum meorum, qui mihi donabant hereditatem et meo quo ei dabo.' Whatever this may mean, it is not the land but an oath in defence of title that is to be given (*reddendum*). Apparently the *propinqui* who have given Æthelric his *hereditas* are already dead: the testator himself, by whose 'counsel' the oath is to be given, will be dead before it is given. The devisee is to be free to swear that she acquired the land by the gift of Æthelric, and that he came to it by the gift of ancestors who had it to give.

[2] Alf. 41; cf. Leg. Hen. 70, § 21; 88, § 14.

[3] Cod. Dipl. 147 (i. 177).

out of many examples, ten thegns hold three hides in parage, they are cousins[1]; but the partition of an inheritance among co-heirs, or rather as it happens co-heiresses, appears at an early time[2], and we have nothing to show that when an inherited estate remained undivided and one of the parceners died, his share did not pass to his own descendants according to the same rules of inheritance that would have governed it had it been physically partitioned and set out by metes and bounds. No one word is there to show that a son at birth was deemed to acquire a share of the land that his father held. Need we say that there is no one word to show that the law treated the father as a trustee for his children, or as the attorney or procurator of his family?

The appointment of heirs.

'Only God can make a *heres*, not man'—said Glanvill[3]. But far back in remote centuries Englishmen had seen no difficulty in giving the name *heres* to a person chosen by a land-holder to succeed him in his holding at his death. And so with the English word for which *heres* has been an equivalent. It was not inconceivable that a man should name an *yrfeweard* [p. 252] to succeed him. We are far from believing that this could be done of common right, or that this nominated *yrfeweard* was a *heres* in the Roman sense of that term; but, while in Glanvill's day it would have been a contradiction in terms to speak of an heir who was not of the blood of the dead man, this had not been so in the past[4].

The restraint on alienation before and after the Conquest.

We must admit that most of our evidence relates to book-land, and we have often argued that in all likelihood book-land is an exotic and a superficial institution, floating, as it were, on the surface of English law. Of what went on below the surface among those men who had no books we can learn little; it is very likely that a restraint in favour of the expectant heirs was established. But what we see happening

[1] D. B. i. 79. [2] Cod. Dipl. 232 (i. 300); Birch, i. 572; A.D. 833.

[3] Glanvill, vii. 1.

[4] Cod. Dipl. 675 (iii. 255). It is possible to contend that the clause in the land-books which enables the donee to bestow the land upon such *heres* as he pleases, gives him what modern lawyers would describe as a limited power of testamentary appointment among his kinsmen. But the history of the clause does not favour this interpretation. We start with forms that say nothing of heirs. See *e.g.* Cod. Dipl. 79, 80, 83, 90: 'et cuicumque voluerit tradere vel in vita illius vel post obitum eius [potestatem] habeat tradendi.' We do not think that the 'cuicumque ei karorum' (Cod. Dipl. 216) or 'cuicumque heredum' of later documents are restrictive phrases.

among the great folk is not unimportant, and it is this:—the Anglo-Saxon thegn who holds book-land does not profess to have his heir's consent when he gives part of that land to a church; his successor, the Norman baron, will rarely execute a charter of feoffment which does not express the consent of one heir or many heirs. Our record is miserably imperfect, but as it stands it tends to prove that among the rich and noble there was a period when the rights of the expectant heir were not waning but waxing. In the end, as we shall see hereafter, the heir succeeds in expelling from the common law the testamentary or *quasi*-testamentary gift of land.

Last words on family ownership.

We have not been arguing for any conclusion save this, that in the present state of our knowledge we should be rash were we to accept 'family ownership,' or in other words a strong form of 'birth-right,' as an institution which once prevailed among the English in England. That we shall ever be compelled to do this by the stress of English documents is improbable; nor at this moment does it seem likely that comparative jurisprudence will prove that dogma the universal validity of which we have ventured to doubt. To suppose that the family law of every nation must needs traverse the [p. 253] same route, this is an unwarrantable hypothesis. To construct some fated scheme of successive stages which shall comprise every arrangement that may yet be discovered among backward peoples, this is a hopeless task. A not unnatural inference from their backwardness would be that somehow or another they have wandered away from the road along which the more successful races have made their journey.

Nature of inheritance.

About the rules of intestate succession which prevailed here in the days before the Conquest we know little; they may have been different in the different folks, and at a later time they may have varied from shire to shire. We know much more of the rules that obtained among our near cousins upon the mainland, and by their aid we may arrive at a few cautious conclusions. But we are here met by a preliminary question as to the nature of inheritance. For a time we must disregard that canon of later English law which bids us use the words 'inheritance' and 'heir' only when we are describing the fate which awaits the lands, or to speak more nicely, the 'real estate,' of the dead. This canon we can not take back with us into the distant age that is now before us; but,

applying these terms to movables as well as to immovables, and assuming for a while that we know who the dead man's heirs must be, we have still to ask, What is the nature of inheritance?

Inheritance and representation of the dead.

It is the more necessary to ask this question because we might otherwise be misled by modern law and Roman law into giving it a tacit answer that would not be true. To us it must seem natural that when a man dies he should leave behind him some representative who will bear, or some few representatives who will jointly bear, his *persona*. Or again, we may be inclined to personify the group of rights and duties which are, as it were, left alive, though the man in whom they once inhered is dead: to personify the *hereditas*. We Englishmen do something of this kind when we speak of an executor owing money to or having claims against 'the estate' of his testator. To do something of this kind is so natural, that we can hardly imagine a time when it was not done.

Representation of the dead in modern law.

But our own modern law will remind us that even in the nineteenth century there is no absolute necessity compelling the whole *persona*, or whole estate, of the dead man to devolve upon one representative, or one set of representatives who will act in unison. In the case of intestacy the 'realty' will go one way and the 'personalty' another. This is not all: [p. 254] it is conceivable that the realty itself should fall into fragments, each of which will descend in a different course. Not only does our law respect local customs, but it also retains in an obscured form the old rule which gives *paterna paternis, materna maternis*. As an exercise for the imagination we might construct a case in which the intestate's realty would be broken into twelve portions, each of which would follow a different path[1]. Thus even in our own day we have not yet found it needful to decree that some one man or some set of conjoint persons shall succeed *in universum ius defuncti*[2].

Why must the dead be represented?

But why do we demand that the dead shall be represented? The law of inheritance seems to answer two purposes, which can be distinguished, though in practice they are blended.

[1] The *propositus* inherited land from his (1) paternal grandfather, (2) paternal grandmother, (3) maternal grandfather, (4) maternal grandmother, and in every case the land inherited contained acres subject to (*a*) the common law, (*b*) the gavelkind rule, (*c*) the Borough English custom.

[2] A long step in this direction has been taken by the Land Transfer Act, 1897.

The dead man has left behind him a mass of things, and we must decide what is to be done with them. But further, he has gone out of the world a creditor and a debtor, and we find it desirable that his departure should make as little difference as may be to his debtors and creditors. Upon this foundation we build up our elaborate system of credit. Death is to make as little difference as may be to those who have had dealings with him who has died, to those who have wronged him, to those whom he has wronged.

Representation not necessary in early times.

Now the first of these needs must be met at an early stage in legal history. If there is to be peace, a scramble for the dead man's goods can not be suffered; law must have some rule for them. On the other hand, we can not say with any certainty that the second purpose will become perceptible until there is a good deal of borrowing and lending. But it is only this second purpose that requires any representation of the dead. It may be allowed indeed that so soon as land is inherited the heir will in some sort fill the place of his ancestor. The land, when it becomes his, must still bear the same burdens that it has hitherto borne. But here there seems to be no representation of the ancestor; rather we have a personification of the plot of land; it has sustained burdens and enjoyed easements in the past, and must sustain and enjoy them still.

[p. 255] We have therefore grave doubts as to whether any widely general dogma about these matters will deserve a ready assent. So much will depend upon religion. In this province of law the sacral element has in various ages and various lands been strong. We have to think not only of what is natural but also of what is supernatural. Among one rude people the representation of the ancestor by the heir may appear at an early time, because the son must perform sacrificial duties which have been incumbent on his father. Among another and a less rude people there may be no representation until commerce and credit demand it. Of Germanic heathenry we know little, but the Christianity which the Germans have adopted when first they are writing down their laws is not a religion which finds its centre at the family hearth. Much might be done by a pious heir for the good of his ancestor's soul, and the duty of doing this was sedulously preached; but the heir could not offer the expiatory sacrifice, nor would

Representation and religion.

it be offered in his house; no priesthood had descended upon him. There is therefore no religious nucleus that will keep together the *universum ius defuncti*; the churches would prefer that the dead man's lands and goods should never reach the hands of the heir but be dissipated by pious gifts.

Inheritance of debts and credits.

In the old time the person or persons who succeeded to the lands and goods of the dead man had few, if any, debts to pay or to receive. Most of the pecuniary claims that could be made good in a court of law would perish at the death of the creditor and at the death of the debtor. We may perhaps gather from the so-called 'wills' of this age that there were some claims of which this was not true, for a testator sometimes says that his debtors are to be forgiven or that his creditors are to be paid[1]. In the former case, however, we can not be certain that there has not been an express promise that the creditor 'or his heir' shall have the money. In later days this phrase becomes part of the common form of a written bond for the payment of money; and there is much both in English and in continental documents to suggest that the mention of the heirs has not been idle verbiage[2]. A promise to pay money to Alfred is no promise to pay money to Alfred's heir, just as a gift of land to Alfred will hardly give him heritable rights unless something be said of his heirs. As [p. 256] to the hereditary transmission of a liability, this we take it was not easily conceived, and when an Anglo-Saxon testator directs that his debts be paid, this, so far from proving that debts can normally be demanded from those who succeed to the debtor's goods, may hint that law is lagging behind morality. If the heir paid the ancestor's debts, he did a pious and laudable act, perhaps an act as beneficial for the departed soul as would be the endowment of a chantry:—this is a feeling that grows stronger as time goes on. At any rate our law, when at the end of the thirteenth century it takes a definite form, seems to tell us that in the past many debts have died with the debtors. We have every reason to believe that claims *ex delicto* would seldom, if ever, survive the death of the wrong-doer or of the wronged. For one moment the blood-feud and the wergild may induce us to think otherwise; but in truth there is here no representation. The wergild was

[1] Thorpe, Diplomatarium, pp. 550–1, 558, 561, 567–8.
[2] Heusler, Institut. i. 60; ii. 541.

not due to the slain man and is not paid to one who represents him. At least in the common case it is not even paid only to those persons who are his heirs, for many persons are entitled to a share in the wergild who take no part of the inheritance. The slain man's brothers, uncles and cousins, as well as his children, have been wronged and atonement must be made with them. And when an attack is made upon the slayer's kinsmen or the wergild is demanded of them, they are not pursued as his representatives—he himself may be alive—they are treated rather as his belongings, and all that belongs to him is hateful to those who hate him. Gradually as the feud loses its original character, that of a war, the heirs of the slayer may perhaps free themselves from all liability by rejecting the inheritance; but this is an infringement of the old principle, and in the region of blood-feud there is not much room for the development of representation[1]. Lastly, as regards the wrongs which do not excite a lawful feud, such as insults, blows, wounds, damage to land or goods, we must think of them as dying with the active and dying with the passive party. Only by slow degrees has our law come to any other rule, and even now-a-days those causes of action which were the commonest in ancient times still die with the person.

[p. 257] If there is to be no representation of the dead man for the purpose of keeping obligations alive, then there is no great reason why the things that he leaves behind him should all go one way, and early Germanic law shows a tendency to allow them to go different ways. It sees no cause why some one person or some set of conjoint persons should succeed *in universum ius defuncti*. Thus the chattels may be separated from the land and one class of chattels from another. Among some tribes the dead man's armour, his 'heriot,' follows a course of its own and descends to his nearest kinsman on the sword side. Then it is said that in the *Lex Salica* we may see the last relics of a time when movable goods were inherited mainly or only by women; and all along through the middle ages there are German laws which know of certain classes of chattels, the clothes and ornaments of a woman's person, which descend from woman to woman to the neglect of males. At all events, already in the *Lex Salica* there is one set

The inheritance need not descend in one mass.

[1] As to the whole of this subject see Heusler, Instit. ii. 540.

of canons for chattels, another for land; a woman can not inherit land.

Transition. But the little more that can be said of these obscure matters will be better said hereafter. It is time that we should turn to an age which is less dark and speak of the shape that our law of inheritance takes when first it becomes plain in the pages of Glanvill and Bracton and the rolls of the king's court. And the first thing that we have to do is to leave off using the words 'inheritance' and 'heir' in that wide sense in which we have hitherto used them:—they point only to the fate of land and of those incorporeal things that are assimilated to land; they point to a succession which is never governed by testament.

§ 2. *The Law of Descent.*

Primary rules. At the end of Henry III.'s reign our common law of inheritance was rapidly assuming its final form. Its main outlines were those which are still familiar to us, and the more elementary of them may be thus stated:—The first class of persons called to the inheritance comprises the dead person's descendants; in other words, if he leaves an 'heir of his body,' no other person will inherit. Among his descendants, precedence [p. 258] is settled by six rules. (1) A living descendant excludes his or her own descendants. (2) A dead descendant is represented by his or her own descendants. (3) Males exclude females of equal degree. (4) Among males of equal degree only the eldest inherits. (5) Females of equal degree inherit together as co-heiresses. (6) The rule that a dead descendant is represented by his or her descendants overrides the preference for the male sex, so that a grand-daughter by a dead eldest son will exclude a younger son. Here for a while we must pause, in order to comment briefly upon these rules[1].

Preference of descendants. The preference of descendants before all other kinsfolk we may call natural: that is to say, we shall find it in every system

[1] This topic has been discussed at great length by Hale, History of the Common Law, ch. xi., and Blackstone, Comm. Bk. ii. ch. 14; also by Brunner, Das Anglo-Normannische Erbfolgesystem. The main fault to be found in Blackstone's classical exposition is the tendency to treat the Lombard *Libri Feudorum* as a model to which all feudal law ought to correspond.

that is comparable with our own. A phrase that is common in the thirteenth century makes it prominent. A man who dies without leaving a descendant, though he may have other kinsfolk who will be his heirs, is often said to die 'without an heir of (or from) himself' (*obiit sine herede de se*). It is only when a man has no heir *de se*, that his brother or any other kinsman can inherit from him.

Preference of males. A preference for males over females in the inheritance of land is strongly marked in several of the German folk-laws. The oldest form of the *Lex Salica* excludes women altogether. Some of the later codes postpone daughters to sons and admit them after sons, but a postponement of daughters even to remoter male kinsmen is not unknown. As to England, we may say with some certainty that, in the age which immediately preceded Harold's defeat, women, though they could inherit land, were postponed at least to their brothers. Domesday Book seems to prove this sufficiently. In every zone of the system of landholdership as it stood in the Confessor's day we may find a few, but only a few, women as tenants[1]. On the other hand, already at the beginning of the ninth century we see a clear case of a king's daughter [p. 259] inheriting his land[2], and other cases of female heirs are found at an early date[3].

Influence of feudalism. In later days the customs which diverge from the common law, for instance the gavelkind custom of Kent, agree with it about this matter:—males exclude females of equal degree[4].

[1] There are some three or four cases in which a sister seems to be holding in common with brothers, but these may be due to gifts or bequests.

[2] King Cenwulf of Mercia died leaving as his heiress his daughter Cwenthryth and was succeeded in the kingship by Ceolwulf, who seems to have been his brother. A legend gives Cenwulf a son (St Kenelm) whom Cwenthryth, aiming at the kingdom, treacherously slays. This is a late fable, but the fact that she inherited some of her father's land seems beyond doubt. See Kemble, Cod. Dipl. 220 (i. 280); Haddan and Stubbs, Councils, iii. 596.

[3] Kemble, Cod. Dipl. 232 (i. 300). The position of women in the systems of inheritance laid down by the 'folk laws' is the subject of a monograph by Opet, Erbrechtliche Stellung der Weiber (Gierke, Untersuchungen, xxv.). Sketches of these systems are given by Stobbe, Privatrecht, v. 84. Opet argues that the Anglo-Saxon law did not postpone women to men of equal degree. For reasons given in the first edition of this book we do not think that he has proved his case.

[4] Customs which put the daughters on a level with the sons seem to be uncommon. The instances alleged in modern books (*e.g.* Robinson, Gavelkind, 45) namely the customs of Wareham, Taunton and Exeter, are borough customs.

This precedence is far older than feudalism, but the feudal influence made for its retention or resuscitation[1]. At the same time, the feudalism with which we are concerned, that of [p. 260] northern France, seems to have somewhat easily admitted the daughter to inherit if there was no son. In England, so soon after the Norman invasion as any law becomes apparent, daughters, in default of sons, are capable of inheriting even military fees. In 1135 it is questionable—and this is the extreme case—whether a king's daughter can not inherit the kingdom of England[2].

Primogeniture.

A rule which gives the whole of a dead man's land to the eldest of several sons is not a natural part of the law of inheritance. In saying this we are not referring to any fanciful 'law of nature,' but mean that, at all events among the men of our own race, the law of inheritance does not come by this rule if and so long as it has merely to consider what, as between the various kinsmen of the dead man, justice bids us do. When it decides that the whole land shall go to one son—he may be the eldest, he may be the youngest—and that his brothers shall have nothing, it is not thinking merely of the dead man and his sons, and doing what would be fair among them, were there no other person with claims upon the land; it has in view one who is a stranger to the inheritance, some king or some lord, whose interests demand that the land shall not be partitioned. It is in the highest and the lowest of the social strata that 'impartible succession' first appears. The great fief which is both property and office must, if it be inherited at all, descend as an integral whole;

[1] The law of the Lombard *Libri Feudorum* excludes women as a general rule; but the original feoffment may make the *feudum* a *feudum femineum*. In Germany also women were excluded from the inheritance of fiefs for some time after fiefs had become heritable among males. Stobbe, Privatrecht, iv. 325-7.

[2] That in 1100 women could inherit knights' fees is sufficiently proved by a clause in the coronation charter:—'Et si mortuo barone vel alio homine meo filia heres remanserit, illam dabo consilio baronum meorum cum terra sua.' The Pipe Roll of 31 Hen. I. shows the sale of female wards. We must leave to genealogists the discussion of the few cases in which Domesday Book shows that already since the Conquest a great lady has acquired lands. A daughter of Ralph Tailbois and a daughter of Roger de Rames (Ellis, Introduction, i. 419) appear among the tenants in chief; but the father of the latter seems to be living. The English fief of William of Arques, a Domesday tenant, seems to have passed to his daughter and then to her daughters: Round, Geoffrey de Mandeville, 397.

the more or less precarious rights which the unfree peasant has in a tenement must, if they be transmissible at all, pass to one person[1]. But these tendencies have to struggle against [p. 261] the dictate of what seems to be natural justice, the obvious rule that would divide the inheritance among all the sons. Perhaps we see this best in the case of the kingship. So soon as the kingship became strictly hereditary it became partible. Over and over again the Frankish realm was partitioned; kings and the younger sons of kings were slow to learn that, at least in their case, natural justice must yield to political expediency[2]. Brothers are equals, they are in parage; one of them can not be called upon to do homage to his peer[3].

Primogeniture in England.

Happily for the England of the days before the Conquest, the kingship had never become so strictly hereditary as to become partible. On the other hand, we have every reason to believe that the landowner's land was divided among all his sons. We are here speaking of those persons who in the Norman classification became *libere tenentes*. It is not improbable that among those who were to be the *villani* and the *servi* of Domesday Book a system of impartible succession, which gave the land to the eldest or to the youngest son, was prevalent; but for a while we speak of their superiors. In the highest strata, among the thegns, though we do not see primogeniture, we do see causes at work which were favouring its growth. Causes were at work which were tying military service to the tenure of land, and it would be natural that the king, who had theretofore looked to one man for an unit of fighting power, should refuse to recognize an arrangement which would split that duty into fractional parts: he must have some one man whom he can hold responsible for the production of a duly armed warrior. It is to this that point the numerous entries in

[1] Stobbe, Privatrecht, iv. p. 104.

[2] It is possible, as argued by Maine (Ancient Law, c. 7) that 'the examples of succession by primogeniture which were found among the benefices may have been imitated from a system of family-government known to the invading races, though not in general use.' But the link has yet to be found, and had such a system of family-government been known to the Frankish nation, those ruinous partitions of the kingdom would hardly have taken place.

[3] Richard Cœur de Lion refused to do homage to his brother Henry, 'the young king,' saying, 'It is not meet that the son of the same father and the same mother should admit that he is in any way subject to his elder brother':—Viollet, Établissements, i. 125.

Domesday Book which tell us of two, three, four, nine, ten thegns holding land 'in parage.' They are, we take it, co-heirs holding an undivided inheritance, but one of them is answerable to the king for the military service due from the land. This is the meaning of 'tenure in parage' in later Norman law. The younger heirs hold of the eldest 'in parage'; they do him no [p. 262] homage; they swear to him no fealty; they are his peers, equally entitled with him to enjoy the inheritance; but he and he alone does homage to the lord and is responsible for the whole service of the fee[1]. As will be said below, this arrangement appears in the England of the twelfth and thirteenth centuries when an inheritance falls to co-heiresses. There are several texts in Domesday Book which seem to show that the Norman scribes, with this meaning of the term in their minds, were right in saying that some of the Anglo-Saxon thegns had been holding in parage. It is not unnatural that, if one of several brothers must be singled out to represent the land, this one should usually be the eldest. In Buckinghamshire eight thegns were holding a manor, but one of them was the *senior* of the others and was the man of King Edward[2]. Probably he was their *senior* in every sense of the word, both their elder and their superior; he and only he was the king's man for that manor. The king then is beginning to look upon one of several brothers and co-heirs, usually the eldest, as being for one very important purpose the only representative of the land, the sole bearer of those duties to the state which were incumbent on his father as a landholder. The younger sons are beginning to stand behind and below their elder brother. By a powerful king this somewhat intricate arrangement may be simplified. He and his court may hold that the land is adequately represented by the firstborn son, not merely for one, but for all purposes. This will make the collection of reliefs and aids and taxes the easier, and gradually the claims of the younger sons upon their eldest brother may become merely moral claims which the king's court does not enforce.

Primogeniture in Normandy.

It is by no means certain that in 1066 primogeniture had gone much further in Normandy than in England[3]. True that

[1] Somma, p. 97; Ancienne coutume, c. 30 (ed. de Gruchy, p. 95).

[2] D. B. i. 145 b: 'Hoc manerium tenuerunt octo teigni et unus eorum Alli homo Regis Edwardi senior aliorum fuit.'

[3] See Stapleton, Norman Exchequer Rolls, i. pp. lvi. lxxii.

in all probability a certain traditional precariousness hung about the inheritance of the military fiefs, a precariousness which might become a lively force if ever a conquering duke had a vast land to divide among his barons. But we can not argue [p. 263] directly from such precariousness to primogeniture. We may say, if we will, that primogeniture is a not unnatural outcome of feudalism, of the slow process which turns an uninheritable *beneficium* into a heritable *feodum*. It is as a general rule convenient for the lord that he should have but one heir to deal with; but as already said, the lord's convenience has here to encounter a powerful force, a very ancient and deep-seated sense of what is right and just, and even in the most feudal age of the most feudal country, the most feudal inheritances, the great fiefs that were almost sovereignties, were partitioned among sons, while as yet the king of the French would hardly have been brought to acknowledge that these *beneficia* were being inherited at all. It is the splendid peculiarity of the Norman duchy that it was never divided[1]. And, as this example will show, it was not always for the lord's advantage that he should have but one heir to deal with: the king at Paris would not have been sorry to see that great inheritance split among co-heirs. And so we can not believe that our Henry III. was sorry when his court, after prolonged debate, decided that the palatinate of Chester was divisible among co-heiresses[2]. A less honest man than Edward I. would have lent a ready ear to Bruce and Hastings when they pleaded for a partition of Scotland[3]. That absolute and uncompromising form of primogeniture which prevails in England belongs, not to feudalism in general, but to a highly centralized feudalism, in which the king has not much to fear from the power of his mightiest vassals, and is strong enough to impose a law that in his eyes has many merits, above all the great merit of simplicity.

Primogeniture under later Norman law.

In Normandy the primogenitary rule never went beyond securing the impartibility of every military tenement, and even this impartibility was regarded as the outcome of some positive ordinance[4]. If the inheritance consisted of one hauberk-fief, or of a barony, or of a serjeanty, the eldest son took the whole; he was bound to provide for his brothers to the best of his ability;

[1] Luchaire, Institutions monarchiques, i. 64–65. [2] Note Book, pl. 1273.

[3] Foedera, i. p. 779. [4] Très ancien coutumier, p. 9.

but this was only a moral duty, for an ordinance had forbidden the partition of a fief[1]. If there were two fiefs in the inheritance and more than one son, the two eldest sons would get a [p. 264] fief apiece. Other lands were equally divided; but the eldest son would have no share in them unless, as we should say, he would 'bring into account' the military fief that he was taking. It is put as a possible case that the value of a share in the other lands will exceed that of the fief; if so, the eldest son need not take the fief; he has first choice, and it is possible that the knightly land will be left to the youngest and least favoured son. In short, Norman law at the end of the twelfth century prescribes as equal a partition of the inheritance among sons as is compatible with the integrity of each barony, serjeanty or military fief, and leaves the sons to choose their portions in order of birth[2]. Indeed, subject to the rule about the impartibility of military fiefs, a rule imposed by the will of the duke, Norman law shows a strong desire for equality among sons. Any gift of land made by a father to one of his sons is revoked by the father's death; no one is to make one of his expectant heirs better off than the rest[3]. Not upon the Normans as Normans can we throw the burden of our amazing law of inheritance, nor can we accuse the Angevin as an Angevin[4].

Primogeniture in England under the Norman kings.

We may believe that the conquest of England gave William an opportunity of insisting that the honour, the knight's fee, the serjeanty, of the dead man, was not to be divided; but what William and his sons insisted on was rather 'impartible succession' than a strict application of the primogenitary rule. The Conquest had thrown into their hands a power of reviving that element of precariousness which was involved in the inheritance of a *beneficium* or *feodum*. There is hardly a strict right to inherit when there is no settled rule about reliefs, and the heir must make the best bargain that he can with the king[5]. What

[1] Both of the tracts of which the Très ancien coutumier consists (pp. 9, 92) lay stress on the duty of the eldest son to provide for his brothers.

[2] Très ancien coutumier, pp. 8, 91.

[3] Somma, p. 114; Ancienne coutume, c. 36 (ed. de Gruchy, p. 111).

[4] Viollet, Établissements, i. 122–5.

[5] See above, vol. i. pp. 308, 314. In Germany the old rule seems to have been that all the sons had equal claims upon the dead man's fief; the lord, however, was only bound to admit one of them, and, if they could not agree who that one should be, then the choice was in the lord's hand. At a later time the primogenitary rule was gradually adopted; but the eldest son, if he took the fief, had to 'collate' its value if he wished to share in the general inheritance. Stobbe, Privatrecht, iv. 322.

we see as a matter of fact in the case of the very great men is [p. 265] that one son gets the Norman, another the English, fief. On the death of William Fitz Osbern, for example, 'the king distributed his honour among his sons and gave Breteuil and the whole of the father's possessions in Normandy to William and the county of Hereford in England to Roger[1].' 'Roger of Montgomery died; his son Hugh of Montgomery was made earl in England, and Robert of Bellême acquired his whole honour in Normandy, while Roger of Poitou, Arnulf, Philip and Everard had no part of the paternal inheritance[2].' We may believe also that in the outer zones of the feudal system the mesne lords insisted on the impartibility of the knight's fee and of the serjeanty, and that these as a general rule passed to the eldest son; but we can not say with any certainty that, if the dead man held two different fees of different lords, his eldest son was entitled to both of them. Norman law, as already said, is in favour of as much equality as is compatible with the integrity of each military fee.

Inheritance in the Anglo-Norman *Leges*.

Two of the authors who have left us *Leges* for the Anglo-Norman period approached the topic of inheritance; neither of them knew what to make of it. The *Leis Williame* say, 'If a man dies without a devise, let his children divide the inheritance equally;' but this occurs among sentences of Roman origin, and, if its maker had any warrant for it, he may perhaps have been speaking only of movables[3]. The author of the *Leges Henrici* goes all the way to the ancient *Lex Ribuaria* for a canon of inheritance, and fetches thence a rule which we should be rash in applying to the England of the twelfth century, for it would exclude a daughter in favour of the remotest male kinsman, to say nothing of admitting father and mother[4]. He says this

[1] Ordericus Vitalis (ed. le Prevost), ii. 405.

[2] Ibid. iii. 425.

[3] Leg. Will. I. c. 34: 'Si home mort senz devise, si depertent les enfans lerité entre sei per uwel.' See above, vol. i. p. 103, as to the Romanesque character of the context. The Latin translation gives *pueri* for *enfans*; but *pueri* may stand for children of either sex (Calend. Genealog. i. 204: 'omnes alii pueri eius erant filiae'), and perhaps *enfans* may stand for *sons*. But we can allow hardly any weight to this part of the *Leis*.

[4] Leg. Henr. 70 § 20. The writer tampered with the end of the passage that he borrowed, and it is possible that what looks at first sight like an

however, and it is to the point:—In the first place the eldest [p. 266] son takes the father's *feodum*. What exactly he would have given to the eldest son, or what he would have done if the inheritance comprised two *feoda*, we do not know[1]. The conquest and the clash of national laws have thrown all into confusion, and the king will profit thereby.

Primogeniture under the Angevins.

It may well be that Henry II. spoke his mind in favour of primogeniture both in England and in Normandy; his son Geoffrey in 1187, just when Glanvill was writing, decreed that in Britanny the knight's fee should pass intact to the eldest son[2]. But already in Glanvill's day English law had left Norman law behind it. 'According to the law of the realm of England,' he says—and probably he is here contrasting the kingdom with the duchy—the eldest son of the knight or of one who holds by knight's service succeeds to all that was his father's[3]. With such a military tenant he contrasts the 'free sokeman.' The free sokeman's land is divided among all his sons, but only if it be 'socage and partible from of old.' If it has not been partible from of old, then by some customs the eldest, by others the youngest son will inherit it.

Primogeniture in Glanvill and Bracton.

In the many commentaries on this text it has hardly been sufficiently noticed that the sphere of primogeniture is already defined by very wide, and the sphere of equal division by very narrow words. Glanvill does not say that a knight's fee is impartible among sons; he says that land held by military service is impartible. Of the serjeanties he here says nothing; of them it were needless to speak, for a serjeanty is the most

exclusion of women is merely the rule 'paterna paternis.' 'Et dum virilis sexus extiterit, et hereditas ab inde sit, femina non hereditetur':—an inheritance which comes down the paternal line will not fall to the maternal line if there be any paternal kinsman living.

[1] Leg. Henr. 70 § 21: 'Primo patris feodum primogenitus filius habeat.' See Kenny, Primogeniture, p. 16. At present there seems to be no warrant for the reading *Primum* which some of our older writers have adopted. The rubric to c. 70, *Consuetudo Westsexae*, probably refers only to the first sentence of the chapter, and neither the rubrics nor the division into chapters can be treated as of high authority. Here the writer is thinking primarily, not of the order of inheritance, but of the law concerning alienation; the *feodum* is contrasted with the acquests and may mean the family land, the *hereditas aviatica*. On the other hand, it may mean a military fee.

[2] Brunner, Erbfolgesystem, p. 31.

[3] Glanv. vii. 3: 'Quia si miles fuerit vel per militiam tenens, tunc secundum ius regni Angliae primogenitus filius patri succedit in totum.'

impartible of all tenements, impartible (so men are saying) even among daughters[1]. But if we leave serjeanty and frankalmoin [p. 267] out of account, by far the greater number of the free tenures that exist in England at the end of the twelfth century fall within the sphere of primogeniture; they are in name and in law military tenures[2]. True that the tenant may be a mere peasant who will never go to the wars; but if he pays one penny by way of scutage his tenure is military[3], and usually when lords make feoffments they take care that the burden of scutage shall fall upon their tenants. By far the greater number of the countless new feoffments that are being made day by day are creating military tenures, for it is not usual for the feoffor to assume as between himself and his tenant the ultimate incidence of the uncertain war-tax. The greater number of those very numerous tenures in 'free and common socage' which exist in the last of the middle ages, have, we believe, their origin in the disappearance of scutage and the oblivion into which the old liability for scutage fell[4]. But then again, Glanvill does not say that socage land is partible among sons. For one thing, it is partible only if it has been treated as partible in time past. Every new tenure therefore that is created after Henry II.'s day, albeit a tenure in socage, adds to the number of estates which obey the primogenitary rule. But more; the estates which according to Glanvill are partible, are only the estates of the 'free sokemen.' Now while in his day the term 'socage' was just beginning to have that wide meaning which would ultimately make it cover whatever tenure was non-military, non-elemosinary, non-serviential, there was no similar extension of the term 'sokeman[5].' The free sokemen whom he has in view are a small class that is not increasing. They are to be found chiefly on the ancient demesne of the crown. A few may be found on other manors, for the more part in the eastern counties; but these are disappearing. On the one hand, many are lapsing into villeinage; on the other hand, some are obtaining charters, which perhaps make them in name and in law military tenants, but at any rate give them a new estate and one that has never been partitioned. Therefore after Glanvill's day there was no further

[1] See above, vol. i. p. 290. Select Civil Pleas, pl. 112.

[2] See above, vol. i. pp. 277, 356.

[3] Note Book, pl. 703, 795, 1663.

[4] See above, vol. i. p. 355.

[5] See above, vol. i. pp. 294, 394.

change in the law; Bracton uses almost the selfsame words [p. 268] that his predecessor used[1].

Partible lands.

Consequently there is very little litigation about this matter, and what there is comes from very few counties. We can refer to seventeen cases from the reign of John and the early years of Henry III. which make mention of partible land; of these seven come from Kent, five from Norfolk, three from Suffolk, one from Northamptonshire, one from Rutland[2]. Leaving Kent out of account, it is the land which the Domesday surveyors found well stocked with 'free men' and sokemen that supplies us with our instances. In later days it may be possible to find a few isolated examples of partible land in many shires of England; but, outside Kent, the true home of partibility is the home of that tenure which the lawyers of Edward I.'s day distinguished from 'socage' by the term 'sokemanry[3].'

[1] A comparison of the following passages will prove what we have said.

Glanvill, vii. 3.

Si vero fuerit liber sokemanus, tunc quidem dividetur hereditas inter omnes filios, quotquot sunt, per partes equales, *si fuerit socagium et id antiquitus divisum*, salvo tamen capitali mesuagio primogenito filio pro dignitate aesnesciae suae, ita tamen quod in aliis rebus satisfaciet aliis ad valentiam. Si vero non fuerit antiquitus divisum, tunc primogenitus secundum quorundam consuetudinem totam hereditatem obtinebit; secundum autem quorundam consuetudinem postnatus filius heres est.

Bracton, f. 76.

Si liber sokemanus moriatur, pluribus relictis heredibus et participibus, *si hereditas partibilis sit et ab antiquo divisa*, heredes, quotquot erunt, habeant partes suas equales, et si unicum fuerit mesuagium, illud integre remaneat primogenito, ita tamen quod alii habeant ad valentiam de communi. Si autem non fuerit hereditas divisa ab antiquo, tunc tota remaneat primogenito. Si autem fuerit socagium villanum, tunc consuetudo loci erit observanda. Est enim consuetudo in quibusdam partibus quod postnatus prefertur primogenito et e contrario.

It seems clear that Bracton had Glanvill's text before him, and we can not think that by shifting the words here printed in italics from one place to another he changed, or meant to change, the meaning of the passage. With Glanvill, as with Bracton, the only partible land is the socage land of a sokeman which has been divided from of old. Thus the common opinion that there was a change in the law after Glanvill's day, does not seem to us to be warranted. The judges in the early Year Books do not lean strongly against partibility. If the plaintiff asserts partibility he must prove partition; but if he proves partition he may perhaps succeed in making even a knight's fee partible:—Y. B. 30–1 Edw. I. 57; 33–5 Edw. I. 515. Glanvill's rule needs no extension; it is so very wide.

[2] Placit. Abbrev. 28 (Rutland); Select Civil Pleas (Seld. Soc.) pl. 6, 107, 128. 157; Note Book, 154, 499, 703, 704, 795, 1009, 1023, 1048, 1074, 1565, 1663, 1770.

[3] A great deal of Norfolk seems to have been partible, and partibility reigned in several of the great 'sokes' of the Danelaw, *e.g.* the soke of Rothley in Leicestershire and the soke of Oswaldsbeck in Nottinghamshire. See Robinson, Gavelkind (ed. 1822), pp. 42–6. For 'sokemanry,' see above, vol. i. p. 394.

[p. 269] The problem which is set before us by the gavelkind of Kent is not a problem in the history of the law of inheritance, but a difficult problem in the general history of English law, and one which is of an economic rather than of a purely legal character. It belongs to the twelfth century. It is this:—How does it come about that at the end of that period there is in Kent, and not elsewhere, a strong class of rent-paying tenants who stand well apart from the knights on the one side and the villeins on the other, a class strong enough to maintain a *lex Kantiae* which differs at many points from the general law of the land? We have already given such answer as we can give to this hard question[1]. On the one hand, it seems to us that the matter of the Kentish custom is in part very old. The law of inheritance shows a curious preference for the youngest son. When his father's house has to be divided, the hearth (*astre*) is reserved for him[2]. We may say with some certainty that a rule which had its origin in the twelfth century, if it gave a preferential share to any son, would give it to the eldest[3]. Again, some parts of the custom enshrined ancient English proverbs, which the scribes of the fourteenth century could not understand and which make reference to institutions that must have been obsolescent in the twelfth, obsolete in the thirteenth century[4]. On the other hand, we can not think that

Gavelkind.

[1] See above, vol. i. p. 186.

[2] Statutes of the Realm, i. p. 224.

[3] Glanvill, vii. 3; Bracton, f. 76: the free sokeman's house goes to the eldest son.

[4] We find a proverb about the wife who loses her free-bench by unchastity, another about the descent of the felon's land, a third about the process called gavellet. The last of these is obscure. The lord after a long forbearance has had the tenement adjudged to him, because of the tenant's failure to pay his rent. The tenant has however a *locus poenitentiae* allowed him. The proverb seems to say that, if he will get back his land, he must pay the arrears of rent nine times (or perhaps eighteen times) over, and, in addition to this, must pay a *wergild* of five pounds. In the Anglo-Norman reckoning five pounds will do well enough as a ceorl's *wer* (Leg. Will. I. c. 8), and the nine-fold payment is like the eleven-fold payment which we find in the account of the Bishop of Worcester's customs in Domesday Book, i. 174. According to old Kentish law a nine-fold geld was payable to the king in some cases (Schmid, App. IV. c. 6, 7). Seemingly the proverb means in truth that the tenant will lose the land for good and all. It is one of those humorous rules of folk-law which, instead of telling a man that he can not have what he wants, tell him that he may have it if he will

the Kent of 1065 was a county in which the tillers of the soil [p. 270] were peculiarly well off. Unless the terminology of the Domesday surveyors was far more perverse and deceptive than we can believe it to have been, Kent differed little from Sussex, widely from Norfolk, and in 1086, not Kent, but the shires of the Danelaw must have seemed the predestined home of a strong free yeomanry tenacious of ancient customs. Nor, again, can we think that Kent suffered less than other districts at the hands of the Norman invaders. The best theory that we can suggest is that in the twelfth century the unrivalled position of Kent as the highway of commerce induced a widespread prosperity which favoured the tillers of the soil. An old system of 'provender rents' may have passed into the modern system of money rents without passing through the stage in which the lord places his main reliance on the 'week work' of his tenants. A nucleus of old customs expanded and developed; even the lowest classes of tenants were gradually brought within their range, until at length it was said that every child born in Kent was born free[1].

Disgavelling.

It is only to modern eyes that the inheritance partible among sons is the main feature of gavelkind. In the thirteenth century a custom which allowed the sons of the hanged felon to inherit from their father may have seemed a more striking anomaly. Still the partible inheritance was beginning to attract attention. Archbishop Hubert Walter,

perform an impossible condition. As to the more famous proverb 'the father to the bough, the son to the plough,' the oldest form of this sends the father to the bowe, the son to the lowe, that is apparently, to the fireside, the *astre*, which is, if we may so say, the centre of the inheritance. See above, vol. i. p. 187.

[1] The printed custumal professes to be a record of the customs approved in the eyre of 1293; but no official or authoritative text of it has been found. See Robinson, Gavelkind (ed. 1822), p. 355. Almost all the customs mentioned in it are however evidenced by earlier records. Somner, Gavelkind, Appendix, gives several ancient charters conveying land to be held in gavelkind. In the earliest of our plea rolls we find brothers sharing land in Kent and the name 'gavelingude' appears: Rolls of King's Court (Pipe Roll Society), pp. 39, 43. Thenceforward we often find the name. Thus in John's reign, Select Civil Pleas (Selden Society), pl. 157; Placit. Abbrev. p. 56. The peculiarities of the widow's free-bench soon appear: Select Civil Pleas, pl. 128; Note Book, pl. 9, 1338. So the peculiarities of the widower's free-bench: Robinson, Gavelkind, p. 179. Bracton speaks of gavelkind on f. 276 b, 311, 313, 374. On the whole, most of the known peculiarities can be traced as far back as Bracton's time. The statement that there is no villeinage in Kent is made in 1302: Y. B. 30–1, Edw. I. p. 169, as well as in the custumal of 1293: Statutes, vol. i. p. 224.

[p. 271] who presided in the king's court during years critical in our legal history, obtained from King John a charter empowering him and his successors to convert into military fees the tenements that were holden of their church in gavelkind[1]. The archbishop's main object may have been to get money in the form of rents and scutages, instead of provender and boonworks, 'gavel-corn' and 'gavel-swine,' 'gavel-erth' and 'gavel-rip'; and we have here an illustration of those early commutations of which we have been speaking, and an important illustration, for a great part of Kent was under the archbishop and his example would find followers[2]. It is possible, however, that Glanvill's nephew and successor also intended to destroy, so far as he could, the partible inheritance. Such at any rate was the avowed object of Edward I. when in 1276 he 'disgavelled' the lands of John of Cobham. In the charter by which he did this we have perhaps the oldest argument in favour of primogeniture that has come down to us, for when Bracton tells us that the first-born son is 'first in the nature of things' this is hardly argument. 'It often happens,' says Edward, 'that tenements held in gavelkind, which so long as they remained whole were sufficient for the maintenance of the realm and provided a livelihood for many, are divided among co-heirs into so many parts and fragments that each one's part will hardly support him'; therefore as a special favour Cobham's gavelkind lands are to descend for ever as though they were held by knight's service[3].

Introduction of primogeniture.

We are far from saying that there were no sound reasons of state to be urged for the introduction and extension of the primogenitary rule. Englishmen in course of time began to

[1] This most interesting charter is given in Lambard, Perambulation of Kent (ed. 1596), p. 531. The charter roll for this year is not forthcoming.

[2] Robinson, Gavelkind (ed. 1822), p. 66: Hubert Walter grants that a certain tenant, who hitherto has held a yoke and ten acres in gavelkind, shall henceforth hold in frank fee by the service of a twentieth part of a knight's fee and an annual rent of 28 shillings. In after days the power of the king and of the archbishop to change the mode of descent was denied. See Elton, Tenures of Kent, chap. xvi.

[3] Robinson, p. 76. Already in 1231 we hear that one messuage is often divided into three or four messuages 'sicut gavelikinde': Note Book, pl. 666. Edward allowed the Welsh to retain the partible inheritance, insisting only that bastards must not be admitted, and that women must be admitted in default of males; but then, as has been well said (Kenny, Primogeniture, p. 32), 'Edward's power lay in the strength of Kentishmen and the weakness of Welshmen.'

glory in it, and under its sway the England of Edward I.'s day had become a strong, a free, and a wealthy state. But we miss one point in the history of our law unless we take account of its beautiful simplicity. Granted that each military fee should descend as an impartible whole, a hundred difficulties will be evaded if we give all the dead man's lands to his eldest son—difficulties about 'hotchpot,' difficulties about the contribution of co-heirs to common burdens, difficulties about wardships and marriages to which a 'parage' tenure must, as we shall see hereafter, give rise. We cut these knots. That when one man leaves the world one other should fill the vacant place, this is an ideally simple arrangement. The last years of Henry II. were the years that decided the matter for good and all, and they were years in which a newly fashioned court, unhampered by precedents, was with rude, youthful vigour laying down its first principles. Here as elsewhere its work is characterized by a bold, an almost reckless, simplicity. Nor must we fail to notice that here as elsewhere it generalized the law of the great folk and made it common law for all free and lawful men, except some ancient and dwindling classes which had hardly come within its ken. When we balance the account of our primogenitary law we must remember that it obliterated class distinctions[1]. [p. 272]

Inheritance by co-heiresses.

The manner in which our law deals with an inheritance which falls to the dead man's daughters may give us some valuable hints about the history of primogeniture. If we look merely at the daughters and isolate them from the rest of the world, their claims are equal and the law will show no preference for the first-born. This principle was well maintained, even though some of the things comprised in the

[1] It is fairly clear that in Henry II.'s day the primogenitary rule was not popular among those classes with which the royal court had to deal. Glanvill (vii. 1) has to regret that men are too fond of their younger sons. A French chronicler tells a curious story of a parliament held by Henry III. and Simon de Montfort in which there was debate as to the abolition of primogeniture and the adoption of the French rule. England, so it was said, was being depleted and agriculture was suffering since the younger sons of the English gentry were driven to seek their fortunes in France. This chronicler shows himself very ignorant of English history, and the story, as he tells it, must be false. What we learn from him is that a Frenchman of the fourteenth century thought the English rule unjust and impolitic. As to this passage, see Bémont, Simon de Montfort, p. 201.

[p. 273] inheritance were not such as could be easily divided, or were likely to become of less value in the process of division. For example, if there was but one house, the eldest daughter had no right to insist that this should fall to her share, even though she were willing to bring its value into account. No, unless the parceners could agree upon some other plan, the house itself was physically divided[1]. And so again, if there was but one advowson, the eldest sister could not claim the first presentation as her own; all the parceners must join in a presentation, otherwise it will lapse to the ordinary[2]. There were, however, certain indivisible things; a castle could not be partitioned, nor the messuage which was the head of a barony. This passed as a whole to the eldest of the sisters, but she accounted for its value in the division of the rest of the inheritance. To explain this a maxim of public law is introduced:—were partitions made of these things, earldoms and baronies would be brought to naught, and the realm itself is constituted of earldoms and baronies[3]. So again, Bracton's opinion is that a tenement held by serjeanty ought not to be divided, and this opinion seems to have been warranted at all events by the practice of an earlier age[4]. But the king's claim to prevent the partition of a great fee has in the past gone far. In 1218 a litigant pleads that ever since the conquest of England it has been the king's prerogative right that, if one of his barons dies leaving daughters as his heirs, and the elder-born daughters have been married in their father's lifetime, the king may give the youngest daughter to one of his knights with the whole of her father's land to the utter exclusion therefrom of the elder daughters[5]. There is a good deal in the history of the twelfth century to show that the king had held himself free to act upon some such rule. The law of later times about the abeyance of titles of honour is but a poor remnant of the right which he has thus assumed. When of old he 'determined an abeyance in favour of one of the

[1] Bracton, f. 76.

[2] Bracton, f. 76 b. But for later law see Co. Lit. 166 b.

[3] Bracton, f. 76 b.

[4] Bracton, f. 77. Placit. Abbrev. pp. 34, 39 (temp. Joh.). But in 1221 Henry III. permits co-heiresses to hold a serjeanty: Excerpt. e Rot. Fin. i. 67. See above, vol. i. p. 290.

[5] Note Book, pl. 12; but this contention seems to be overruled, and as a matter of fact a partition seems to have been made: Excerpt. e Rot. Fin. i. 141.

parceners,' he disposed not merely of a 'title of honour' and [p. 274] a 'seat in the House of Lords,' but of a great tract of land[1].

Co-heirs and parage.

But, though the division among the co-heiresses was in general a strictly equal division, we see the eldest daughter or her husband standing out as the representative of the whole inheritance for certain feudal purposes. The law about this matter underwent an instructive change. We will suppose that Henry, who holds of Roger, dies leaving three daughters, whom in order of birth we call Alice, Barbara and Clara, and that a partition of the land is made among them. Now two different feudal schemes may be applied to this case. On the one hand, we may decide that each of the three women holds her land of Roger; on the other, that Alice holds the whole inheritance of Roger, while her sisters hold their shares of her. Roger has apparently something to gain and something to lose by the adoption of either scheme. On the one hand, he may wish to treat Alice as his only tenant, for he will thus have one person to whom he can look for the whole service due from the whole land[2]; but then, if this theory is adopted, can he fairly claim any wardships or marriages in the lines of which Barbara and Clara are the starting points? This, however, seems to have been the old theory; Alice will hold of Roger; her husband, and no one else, will do homage to Roger for the whole land; her sisters will hold of her; they will 'achieve' (*accapitare*) to her, that is, will recognize her as their head. For three generations (of which they are the first) they and their descendants will do no homage, swear no fealty, and pay no reliefs; but the third heir of Barbara or Clara must pay relief to, and become the man of, Alice or her heir[3]. We have here the Norman tenure in parage[4].

[1] Round, Ancient Charters, 97–9: Geoffrey Fitz Peter, the chief justiciar, having married one of the co-heiresses of the last of the Mandeville earls of Essex, obtained the whole Mandeville fief.

[2] Bracton, f. 78: 'particularis enim solutio non minimum habet incommodi.'

[3] Glanvill, vii. 3.

[4] Somma, p. 97; Ancienne coutume, cap. 30. In Normandy the parage endures until the 'sixth degree of lineage' has been past. It seems possible that this means much the same as what Glanvill means, and that the discrepancy is caused by divers modes of reckoning. According to Glanvill the great-great-grandson of the dead man is the first person who does homage to a cousin. Six degrees of Roman computation divide the great-grandson in the one line from the great-grandson in the other line; thus in the normal case there would be seven (Roman) degrees at least between the person who first does and the person who first receives homage. According to Bracton, f. 78, the younger sisters swear fealty to the elder; according to Glanvill they do not. For the parage of Anjou, see Viollet, Établissements, i. 125.

[p. 275] The reason why no homage is done until a third heir has inherited we can not here discuss; but it soon becomes apparent that the king is dissatisfied with this arrangement and that the law is beginning to fluctuate. In 1236 the English in Ireland sent to Westminster for an exposition of the law. Of whom do the younger sisters hold? The answering writ, which has sometimes been dignified by the title *Statutum Hiberniae de Coheredibus*, said that if the dead man held in chief of the king, then all the co-heirs hold in chief of the king and must do him homage[1]. If the lands were held of a mesne lord, then that lord has the marriages and wardships of all the parceners, but only the eldest is to do homage, and her younger sisters are to do their services through her hands. The eldest daughter, the writ says, is not to have the marriage and wardship of her sisters, for this would be to commit the lambs to the wolf[2]. This last provision looks like new law, if it means that the wardships and marriages of Barbara's descendants are to belong to Roger, and not to Alice or her descendants. In 1223 we may find the daughter of an elder sister claiming the marriage of the son and heir of a younger sister[3]. A judge of Edward I.'s day tells us of a *cause célèbre* in which the wardships and marriages of the heirs in the younger line had in generation after generation gone to the representatives of the older line; but all this was held null and void at the suit of the lord[4]. Bracton gives the law as it was laid down by the writ of 1236, and in his day we still see the younger daughters holding of

Fluctuations in the law as to parage.

[1] For some time past the king had habitually taken the homage of all the parceners: Excerpta e Rot. Fin. i. 32, 48, 67, 72, 164 etc.

[2] Statutes of the Realm, i. p. 5; Praerogativa Regis, c. 5, 6; Britton, ii. 23.

[3] Note Book, pl. 1596. The law is also illustrated by pl. 667, 869, 1053, 1765.

[4] Y. B. 32–3 Edw. I. p. 301: Bereford, J. says, 'I have seen a case where the father, grandfather and great-grandfather have been seised of the homage, wardship and marriage of their parceners, and yet all this was set aside by reason of the parcenry, and the chief lord recovered his services. This I saw in the case of Sir Edmund the king's brother, for parceners ought not to 'murder' another's right of seignory among themselves.' The allusion can be explained by the pedigree of Avelina, wife of Edmund of Cornwall, which will be found in Calend. Genealog. i. p. lxvii.

their sister, holding without homage until the third heir has [p. 276] inherited[1]. Britton knows that the lord can not be compelled to take the homage of any but the eldest daughter, and that, when this has been done, he can and must look to that sister for the whole of his services; but Britton advises the lord to accept the homage of all, for should he not do so, he may find some difficulty in getting wardships and marriages in the younger lines[2]. The lords from this time forward had their choice between two courses. As a matter of fact they took Britton's advice, followed the king's example and exacted homage from all the sisters. Very soon, if we are not mistaken, the old law of parage began to fall into oblivion[3].

The lord's interest in primogeniture.

The lesson that we learn from this episode is that the lord's interest has been powerful to shape our law of inheritance. At one time it looks as if even among women there would be what we may call an external primogeniture, so that the eldest of the daughters would be the only representative of the fee in the eyes of the lord and of the feudal courts. Had this principle been consistently applied, the rights of the younger daughters might have become merely moral rights. But in the thirteenth century wardships and marriages were of greater importance than knight's service and scutage, and first the king and then the other lords perceived that they had most to gain by taking the homage of all the sisters.

Inheritance of villein land.

It is by no means impossible that the spread of primogeniture to tenements that were hardly military save in name, and then to tenements that were not military even in name, was made the easier by the prevalence of 'impartible succession' among the holders of villein tenements. We have already said that in the thirteenth century such tenements often pass from ancestor to heir[4]. There is a custom of inheritance which is known to the manorial court and maintained against all but the lord. That custom seems generally to point to one person and one only as entitled to succeed to the dead man's tenement. In a manorial extent it is rare to find the names of two brothers or even of two sisters entered as those of the tenants of a [p. 277]

[1] Bracton, f. 78 and the cases in the Note Book cited above.

[2] Britton, ii. 29, 40.

[3] So in France Philip Augustus tried to suppress parage tenure: Warnkönig, Französ. Geschichte, ii. 456.

[4] See above, vol. i. p. 379.

tenement[1]. On the other hand, it is very common to find that the tenant is a woman. Often she is a widow, and it is clear that she is holding the virgate of a dead husband. But putting the widow out of the case, then, if there were several sons, either the eldest or the youngest seems usually to have succeeded to his father to the exclusion of his brothers. In later days very many copyholds follow the primogenitary rules of the common law, and we can not think that those rules have been thrust upon them in recent days, though no doubt the courts have required strict proof of abnormal customs. We imagine therefore that from a remote time many villein tenements have descended in a primogenitary course. On the other hand, it is certain that a scheme which gave the land to the youngest son was common.

Ultimogeniture.

A mere accident—for we think that it was no better—has given the name 'borough English' to this custom of ultimogeniture. In the Norman days a new French borough grew up beside the old English borough of Nottingham. A famous case of 1327 drew the attention of lawyers to the fact that while the burgages of the 'burgh Francoys' descended to the eldest son, those of the 'burgh Engloys' descended to the youngest[2]. It was natural for the lawyers to find a name for the custom in the circumstances of this case, to call it the custom of the borough English, or the custom of borough English, for such a custom came before them but rarely[3]. Without saying that it never ruled the descent of tenements held by the free socage of the common law, we seem fully entitled to say that, if we put on one side what in the thirteenth century were distinguished from socage as being burgage tenures, and if we also put on one side the 'sokemanry' of the ancient demesne, then a freehold tenement descending to the youngest son was an exceedingly rare phenomenon; and in 1327 the Westminster courts had as yet had little to do with the inheritance of burgages and sokemanries. The true home of ultimo- [p. 278] geniture is the villein tenement; among villein tenements it has widely prevailed; in Bracton's day its appearance raised

[1] Among such manorial plea rolls as have been printed we have observed no instance even of two women claiming to be co-heirs of a villein tenement.

[2] Y. B. 1 Edw. III. f. 12 (Pasch. pl. 38). See Elton, Origins of English History, 179.

[3] Litt. sec. 165, 211.

a presumption that the tenements which it governed were not free[1].

Origin of ultimogeniture.

It is hardly to be explained without reference to the lord's interest and the lord's will. But what has thus to be explained is not really the preference of the youngest son, but the impartible inheritance. If once we grant that the tenement is not to be divided, because the lord will have but one tenant, then in truth the preference of the youngest is quite as natural as the preference of the eldest son. Perhaps if the lord had merely to pursue his own interest he would as a general rule choose the first-born, for the first-born is the most likely of all the sons to be of full age at the time of his father's death. Were there military service to be done, there would be good reason for selecting him. But if we look at the matter from the tenant's point of view, there is something to be said in favour of the youngest son. If the eldest son took the tenement, he might marry and beget a new family while his brothers were still unable to earn a livelihood. Give it to the youngest, and the brothers may all dwell together until all can labour. Add to this—and it will count for something—that the youngest is the son most likely to be found in the house at his father's death; he will be at the hearth; he is the fireside child. The ancient customs of free tenements will sometimes respect this idea: the land is to be equally divided among the sons, but the house, or, if not the house, at least the hearth, is given to the youngest. Perhaps we may see in this a trace of an ancient religion of which the hearth was the centre. If then

[1] Note Book, pl. 794, 1005, 1062. As a fair selection of copyhold customs, which have been reduced to writing in comparatively modern times, we may take those collected in Watkins, Copyholds (3rd ed.), ii. p. 228 fol. Dymock, Gloucestershire: no inheritance beyond heirs of the body. Yetminster, Dorset: widow has rights but there is no true inheritance. Weardale, Durham: eldest son, and failing sons, daughters jointly. Mayfield, Sussex: yard-lands to youngest son, and failing sons, youngest daughter; assart lands to eldest son, or failing sons, eldest daughter. Framfield, Sussex: the like; primogeniture or, as the case may be, ultimogeniture prevails even when the descent is to remote relations. Stepney, Middlesex: partible between sons and, failing sons, between daughters; partible between remoter kinsfolk of equal degree, whether male or female. Cheltenham, Gloucestershire: youngest son and, failing sons, youngest daughter. Taunton, Somerset: widow inherits in fee from her husband to the exclusion of children. Robinson, Gavelkind (last chapter), gives a list of places, mostly in the south-east of England, where 'borough English' has prevailed in modern times. That an eldest or youngest daughter should, in default of sons, take the whole land was not uncommon.

[p. 279] we suppose a lord insisting on the rule, 'One tenement, one tenant,' and yet willing to listen to old analogies or to the voice of what seems to be 'natural equity,' it is not at all improbable that, with the general approval of his tenantry, he will allow the inheritance to fall to the youngest son.

Impartible peasant holdings.

A good illustration of the conflicting principles which will shape a scheme of descent among peasant holders is afforded by a verdict given in 1224 about the custom which prevailed in the 'ancient demesne' manors of Bray and Cookham[1]:—The jurors have always seen this custom, 'that if any tenant has three or four daughters and all of them are married outside their father's tenement, save one, who remains at the hearth[2], she who remains at the hearth shall have the whole land of her father, and her sisters shall recover no part thereof; but if there are two or three or more daughters and all of them are married outside their father's tenement with his chattels, whether this be so before or after his death, the eldest daughter shall have the whole tenement and her sisters no part; and if the daughters are married after their father's death with his chattels, and this without protest, and one of them remains at the hearth, she at the hearth shall retain the whole tenement as aforesaid[3].' Subject to the rule that the tenement must not be partitioned, we seem to see here an attempt to do what is equitable. If really there is no difference between the daughters—no such difference as can be expressed in general terms by a rude rule of law—then we fall back upon primogeniture; but if the other daughters have been married off, the one who is left at the hearth is the natural

[1] Note Book, pl. 951, 988. See also Placit. Abbrev. p. 233 (Berk.).

[2] The words are *in atrio*; Bracton, f. 267 b, uses them as an equivalent for *in astro*: 'ambo reperiuntur in atrio sive in astro.'

[3] Co. Lit. 140 b: 'Within the manor of B. [Bray] in the county of Berks, there is such a custom, that if a man have divers daughters, and no son, and dieth, the eldest daughter shall only inherit; and if he have no daughters, but sisters, the eldest sister by the custom shall inherit and sometimes the youngest.' In two Sussex manors we find the yard-lands (the old original villein tenements) governed by ultimogeniture even among daughters, while the assart lands (lands brought into cultivation at a later time) are governed by an equally strict primogeniture; but (and this is very instructive) if a tenant has lands of both kinds, they must all go together either to the eldest or to the youngest; the tenement that he acquired first will carry with it the other tenement. Watkins, Copyholds (3rd ed.), ii. pp. 282, 297; Elton, Origins of English History, p. 187.

heir[1]. But already in the thirteenth century ultimogeniture [p. 280] was becoming unpopular: Simon de Montfort granting a charter of liberties to his burgesses at Leicester abolished it. The reason that he gave is curious:—the borough was being brought to naught by the default and debility of heirs[2]. By the common assent and will of all the burgesses he established primogeniture among them. We may believe that what moved the burgesses was not so much any ill effects occasioned by the old mode of inheritance as the bad repute into which it had fallen. It was the rule for villeins, explicable only by the will of the lord. The burgesses of Leicester mean to be free burgesses and to enjoy what is by this time regarded as the natural law for free men.

Causes of ultimogeniture.

We would not suggest that in no case can a custom of ultimogeniture have arisen save under the pressure of seignorial power. In a newly conquered country where land is very plentiful, the elder sons may be able to obtain homes of their own and, they being provided for, the father's lands may pass to the fireside child; and again there may conceivably have been a time when the pressure which made for impartible succession was rather communal than seignorial. But as a matter of fact, whether we look to England or to other European countries, we shall hardly find ultimogeniture save where some lord has been able to dictate a rule of inheritance to dependent peasants[3]. It seems to have been so in medieval Germany. The common [p. 281]

[1] The verdict is a good typical verdict about a customary mode of descent. It leaves many cases unprovided for. In the imperfection of all ancient statements of the rules of inheritance to copyholds our common law has found an opportunity for spreading abroad its own rules. Thus jurors state in the custumal that a youngest son excludes his fellows, but say nothing of a descent to brothers, uncles, cousins. Hence perhaps the not uncommon result that in modern times there is ultimogeniture among sons, primogeniture among brothers. But the reason for giving the land to a youngest son hardly extends to the case of a youngest brother. He is not so likely to be found at the dead man's fireside.

[2] Jeaffreson, Index to the Leicester MSS. p. 66: 'propter defectum heredum et debilitatem eorum iam multo tempore [villa] fere ad occasum declinavit et ruinam.' This of course can not refer to a 'default' of heirs in the ordinary sense of that term. What is suggested is that the heirs are weaklings.

[3] We here speak of a rule which gives the whole land to the youngest son. Rules which divide the land equally among the sons but reserve 'the hearth' or house for the eldest or youngest are quite a different matter and may perhaps have their origin in a religious cult of the hearth; see Elton, Origins of English History, ch. viii.

land law divides the land among all the sons, giving perhaps to the eldest, perhaps to the youngest a slight preference[1]; the noble fief will often pass undivided to the first-born; the tenement of the peasant will go as a whole either to his eldest or to his youngest son, and as a matter of geographical distribution the primogenitary will be intermingled with the ultimogenitary customs:—'the peasant,' says a proverb, 'has only one child[2].' For all this, however, we are not entitled to draw from ultimogeniture any sweeping conclusions as to the large number of slaves or serfs that there must have been in a remote past. The force which gives the peasant's tenement to his youngest or his eldest son is essentially the same force which, in one country with greater in another with less success, contends for the impartibility of the military fee. Somehow or another it has come about that there is a lord with power to say 'This land must not be divided.' The persons to whom he says this may be slaves, or the progeny of slaves, who are but just acquiring an inheritable hold upon the land; they may be mighty barons who have constrained him much against his will to grant them 'loans' of land; they may be free landowners over whom he has acquired jurisdictional powers, which he is slowly converting into proprietary rights.

Representation in inheritance.

The representative principle—the principle which allows the children or remoter descendants of a dead person to stand in that person's stead in a scheme of inheritance—is one which in England and elsewhere slowly comes to the front. Our fully developed common law adopts it in all its breadth and permits it to override the preference for the male sex. The daughters, grand-daughters and other female descendants of an eldest son who died in his father's lifetime will exclude that father's second son. In the twelfth century, however, this principle was still struggling for recognition. In all probability neither the old English nor the old Frankish law would have allowed [p. 282] grandsons to share an inheritance with sons[3]. The spread of primogeniture raised the problem in a somewhat new shape.

[1] A rule which gives the father's house to the youngest son seems to have been very common in Germany. See Stobbe, Privatrecht, iv. 40; he cites a Frisian rule which, like the Kentish rule, gives the youngest son the hearth, 'den Herd.'

[2] Stobbe, *op. cit.*, iv. 384. Ultimogeniture has been found in every quarter of Germany, from Switzerland to Holstein, and from Bohemia to the Rhine. See also Elton, *op. cit.*, 190.

[3] Stobbe, Privatrecht, iv. 94; Schröder, D. R. G., 323.

In Glanvill's day the king's court was hesitating about a case that must have been common, namely, a contest between the younger son and his nephew, the son of his dead elder brother[1]. In some cases the problem can be evaded. If, to use Glanvill's phrase, *A* who is tenant of the land 'forisfamiliates' his eldest son by providing him with a tenement for himself, this may prevent that son's son from claiming to inherit before *A*'s younger sons. On the other hand, the tenant by persuading his lord to take in advance the homage of his eldest son may secure the preference of that son's issue. If, however, there are in the case no such facts as these,—if the question between uncle and nephew is neatly raised,—then we must fall back upon the maxim *Melior est conditio possidentis*; he who is the first to get seisin can keep it.

Influence of John's accession.

Some ten years afterwards the realm of England together with duchies and counties in France was a vacant inheritance lying between John and Arthur. John's coronation and reign in England might have become a formidable precedent in favour of the uncle, had his reign been aught but a miserable failure. It might well seem, however, that a judgment of God had been given against him[2]. Had not Glanvill's nephew told him that he was not king by hereditary right[3]? The lesson that Englishmen were likely to learn from his loss of Normandy and Anjou was that hereditary right ought not to be disregarded, and that the representative principle was part of the scheme of hereditary right. Neglect of that principle had exposed England to a French invasion and had given a king of the French some plausible excuse for pretending that he ought to be king of England also[4].

[1] Glanvill, vii. 3.

[2] Très ancien coutumier, p. 13. The rule here laid down favours the son against the grandson. Then it is added that in the time of war, under our Richard I., the son of the dead son began to exclude the daughters. A later gloss treats the exclusion of the nephew by the uncle as an abuse introduced by John; but this of course is a perversion of the story. Brunner, Erbfolgesystem, p. 43.

[3] Mat. Par. Chron. Maj. ii. 454; Foedera, i. 140.

[4] The French claim was this:—Representation of dead parents is inadmissible. At Richard's death there were but two children of Henry II. still alive, (1) John, who has been adjudged to have forfeited his lands for treason, and (2) Eleanor, wife of Alfonso of Castile, whose rights have come to Louis (afterwards King Louis VIII.) either by a conveyance, or in right of his wife Blanche, daughter of Eleanor, since Eleanor's other children (the King of Castile and the Queen of Leon) have waived their claims. Foedera, i. 140; Mat. Par. Chron. Maj. ii. 660.

[p. 283] So the representative principle grew in favour. Bracton obviously thinks that as a general rule it is the just principle, though he shows some reluctance, which has deep and ancient roots, to apply it to a case in which the uncle is, and the nephew is not, found seated at the dead man's hearth. As to the law of the king's court it is still this, that if the uncle is, and the nephew is not, an *astrier*[1], a 'hearth-heir,' at the moment of the ancestor's death, or if, the tenement having been left vacant, the uncle is the first to obtain seisin of it, the nephew must not have recourse to self-help, nor has he any action by which he can obtain a judgment. The possessory *mort d'ancestor* will not lie between kinsmen who are so nearly related[2], while if the nephew brings a proprietary action, the king's court will keep judgment in suspense. It will give no judgment against the nephew; he really is the rightful heir; but a precedent stands in his way; it is the *casus Regis*; and 'so long as that case endures' no judgment can be given against the uncle[3]. The inference has been drawn[4] that Bracton wrote the passages which deal with this matter before the death of Arthur's sister, Eleanor of Britanny, which happened in 1241[5]. Henry III. kept that unfortunate lady in captivity, and took good care that she should never marry. This inference, however, does not seem necessary. For some years after Eleanor's death Henry may have been unwilling to admit that there ever had been any flaw in his hereditary title[6]. At any rate the records of the earlier years of his reign seem fully to bear out what Bracton says[7]. On the other hand,

Casus Regis.

[1] This term occurs as late as 1304: Y. B. 32-3 Edw. I. 271.

[2] There is no assize on the death of a grandfather. This is a strong proof of the novelty of the representative principle.

[3] Bracton, f. 64 b, 267 b, 268, 282, 327 b.

[4] Brinton Cox, Translation of Güterbock's Henricus de Bracton, p. 28.

[5] Mat. Par. Chron. Maj. iv. 163, 175.

[6] The compiler of the 'revised Glanvill' of the Cambridge Library notices the *casus Regis*: Harvard Law Review, vi. 19.

[7] Select Civil Pleas (Selden Soc.), pl. 194 (A.D. 1201): nephew out of possession sues uncle in possession; the case is adjourned *sine die* 'quia iudicium pendet ex voluntate domini Regis.' For Henry's reign see Note Book, pl. 90, 230, 892, 968, 982, 1185, 1830. So late as 1246 jurors refuse to give an opinion as to whether uncle or nephew is heir, but leave this to the king: Calend. Geneal. i. pp. 4, 10.

from the Edwardian law books the *casus Regis* has disappeared. [p. 284] The nephew can now recover the land from the uncle by writ of right although the uncle was the first to get seisin. After Bracton's day there was nothing that was regarded as a change in the law; but at some moment or another an impediment which had obstructed the due administration of the law was removed, and thus, at what must be called an early date, the principle of representation prevailed in England and dominated our whole law of inheritance. In the suit for the crown of Scotland we can see that Bruce, though he stood one step nearer to the common ancestor, was sadly at a loss for arguments which should win him precedence over Balliol, the representative of an older line. He had to go to a remote age and remote climes, to Spain and Savoy and the days of Kenneth MacAlpin; all the obvious analogies were by this time in favour of representation[1].

The exclusion of ascendants.

We must now turn to the rules which govern the inheritance when the dead man has left no descendants, and we at once come upon the curious doctrine that the ascendants are incapable of inheriting. Even though I leave no other kinsfolk, neither my father, nor my mother, nor any remoter ancestor can be my heir; my land will escheat to the lord. To find an explanation for this rule is by no means easy. Already Bracton seems to be puzzled by it, for he has recourse to a metaphor. An inheritance is said to 'descend'; it is a heavy body which falls downwards; it can not fall upwards. This is one of those would-be explanations which are mere apologies for an existing rule whose origin is obscure. Nor is the metaphor apt. We can not say that the inheritance always descends, for in the language of Bracton's time it is capable of 'resorting,' of bounding back. My land can not ascend to my father, but it can resort to my father's brother. Thus we are driven to say that, though the heavy body may rebound, it never rebounds along a perpendicular line. These legal physics however are but after-thoughts[2].

[1] Foedera, i. 778.

[2] Bracton, f. 62 b: 'Descendit itaque ius, quasi ponderosum quid cadens deorsum, recta linea vel transversali, et nunquam reascendit ea via qua descendit post mortem antecessorum.' When the inheritance went to a collateral, *e.g.* an uncle, it was usual to say in pleading that the right 'resorted,' sometimes 'reverted'; it did not 'descend.'

[p. 285] There can be little doubt that the phenomenon now before us is in some sort and in some measure the work of feudalism. This at all events seems plain, that we can not treat the exclusion of ascendants as primitive. Several of the folk-laws give the father and mother a prominent place in the scheme of inheritance[1]. The passage from the Ripuarian law which the author of our *Leges Henrici* appropriated says[2]:—'If a man dies without children, his father or mother succeeds to his inheritance'; the brother and the sister are postponed to the parents. On the other hand, there is much to show that in many parts of Europe the process which made *beneficia* hereditary stopped for a while at the point at which the vassal's descendants, but no other kinsfolk, could claim the precarious inheritance[3]. What we have now to discuss, however, is not an exclusion of ascendants and collaterals, it is the admission of collaterals and the exclusion of ascendants.

This exclusion not primitive.

An ingenious theory about this matter has been made popular by Blackstone[4]. It is said that the admission of collaterals took place in the following fashion. Originally the first feudatory, the man who has taken a *feodum novum*, could transmit an inheritance in it only to his descendants. When, however, it had passed to one of his issue, let us say a son, and that son died without issue, then there were some collaterals who might be admitted to the inheritance of this *feodum antiquum*. The restriction was that the fief was not to go to any one who was not a descendant of the original vassal, 'the first purchaser' of our English law; but among such descendants there might be collateral inheritance. Thus suppose that Adam is the first purchaser, that he leaves two sons, Bertram and Clement, that Bertram inherits the fief and dies without issue; then Clement can inherit; or, if we suppose that Bertram leaves issue, then on any future failure of his issue, Clement or Clement's issue can inherit. In such a scheme of course there is no place for inheritance by an ascendant. [p. 286] Then we are told that the next advance was to treat the *feodum novum*, the newly granted fief, as though it were a

Blackstone's explanation.

[1] Stobbe, Privatrecht, v. 84-5. It is observable that Tacitus (cap. 20) mentions the *fratres*, *patrui* and *avunculi* and not the parents; but we dare not see any direct connexion between this text and our English rule.

[2] Leg. Henr. c. 70, § 20.

[3] Stobbe, Privatrecht, v. 321-2, 326-7.

[4] Comm. ii. 208-212.

feodum antiquum, a fief that by fiction of law had descended to the dead man from some ancestor. Thus Adam is enfeoffed and dies without issue; any collateral kinsman of his can inherit from him, because every collateral kinsman of his must be the descendant of some person who can be regarded by fiction of law as the first purchaser of the fief. On the other hand, none of Adam's lineal ancestors can inherit. By fiction the land came to him down some line of ancestry; we can not tell down which line it descended; we must suppose (our fiction requires this) that the ancestors in that line must be dead; therefore we have to act as though all of Adam's ancestors were dead, and therefore we exclude them from the inheritance.

Failure of the explanation.

That something of this kind happened in some countries of Europe, in particular Lombardy, may be true[1]. That it happened in England or in Normandy we have no direct evidence, and indeed Norman law of the thirteenth century admitted the ascendants, though it postponed each ascendant to his or her own issue[2]. But at any rate we can not make this story explain the English law of Bracton's day. Adam is enfeoffed and dies without issue. His father can not inherit; but his elder brother can inherit, and yet the fiction that the *feodum novum* is a *feodum antiquum* would afford as good a reason for excluding an elder brother as for excluding a father. In our law it would be impossible for the younger of two brothers to acquire a *feodum antiquum* if his elder brother were still living[3]. We have not, however, for England, nor have we for Normandy, any proof that the process which converted the 'benefice' into a hereditary 'feud' made any distinct pause at the moment when it had admitted the descendants of the dead vassal. We have not for England, nor have we for Normandy, any proof that the collaterals gained their right to inherit under cover of a fiction. The terms which our modern feudists have employed, *feodum antiquum*, *feodum novum* are not technical terms of our [p. 287]

[1] 2 Feud. 50: 'Successionis feudi talis est natura, quod ascendentes non succedunt, verbi gratia pater filio.' In modern countries which have 'received' the Lombard law as a law for fiefs, ascendants have as a general rule been excluded; Stobbe, Privatrecht, v. 344.

[2] Somma, p. 77; Ancienne coutume, c. 25 (ed. de Gruchy, p. 79).

[3] This objection has often been urged against Blackstone's argument, for instance, by his editor Christian; Comm. ii. 212

English law; they were brought hither from a remote country[1]. We can not be certain that Norman law had ever excluded the ascendants; it did not exclude them in the thirteenth century. Dark as are the doings of the author of the *Leges Henrici*, we can hardly believe that he was at pains to copy from so distant a source as the law of the Ripuarian Franks a passage which flatly contradicted what already was a settled rule in this country, while it is impossible to suppose that in this instance he is maintaining an old English rule against Norman innovations[2]. On the whole, remembering that the Conquest must have thrown the law of inheritance into confusion, that the king had many a word to say about the inheritance of the great fees, that the court of Henry II. had many an opportunity of making rules for itself without much regard for ancient custom, we are inclined to look for some explanation of the exclusion of ascendants other than that which has been fashionable in England.

The rule as to lord and heir.

Another explanation has been suggested[3]. It introduces us to a curious rule which deserves discussion for its own sake, the rule, namely, that the same person can never at the same time be both lord and heir of the same tenement.

The question in Glanvill.

Glanvill tells us that certain difficult questions are often raised by gifts which fathers make to their sons[4]. We may well believe that this is so, for in England the primogenitary rule is just now taking its comprehensive and absolute shape, and a father must in his lifetime provide for his younger sons, if he wishes them to be provided for at all. Glanvill then supposes that a father, whom we will call *O*, has three sons whom in order of their birth we will call *A*, *B*, and *C*. With

[1] For a while in the last century the writings of Spelman, Wright, Gilbert and Blackstone had almost succeeded in bringing about what the Germans would call an academic 'reception' of the Lombard *Libri Feudorum*; and this process went much further in Scotland. The Lombard law of feuds was regarded at this time as the model and orthodox law of feuds. But Milan is a long way from Westminster and even from Rouen, and France rather than Italy is the feud's original home.

[2] Blackstone, Comm. ii. 211: 'Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line.' By borrowing a text of Frankish law?

[3] Brunner, Erbfolgesystem, p. 23. In some respects Brunner adopts more of Blackstone's explanation than we shall adopt in the following paragraphs.

[4] Glanvill, vii. 1.

the consent of *A* his apparent heir, *O* makes a feoffment to *B*[1]. [p. 288] Then *B* dies without issue, leaving *O*, *A* and *C* alive. Who is to inherit? This is a knotty problem which taxes the wisdom of our wisest lawyers[2]. Glanvill distinctly supposes that *O*, the father, will claim that the land is to come to him[3]. But *A* urges that *O* is already the lord of the land and can not be both lord and heir. Then *C* appears and argues that the same objection can be urged against *A*; for *A* is heir apparent of the seignory, and, if now he be allowed to inherit the land in demesne, then, on *O*'s death, he will be both lord and heir. Glanvill thinks that at any rate the claim of *O* must be rejected. He can not possibly hold the land, for he can not be both lord and heir; nor, when homage has been done, will land ever revert to the feoffor, if the feoffee has any heir however remote. Besides (says Glanvill, who brings in this physical or metaphysical consideration as an after-thought) in the course of nature an inheritance descends and never ascends[4]. Then the question between *A* and *C* must be argued. Glanvill is for allowing *A* to inherit at present; but if hereafter *O* dies and the seignory descends to *A*, he will not be able to retain both the seignory and the tenancy, for he must not be both lord and heir. Having become lord, he must give up the land to *C*.

Problems occasioned by the rule about lord and heir.

On our earliest plea rolls we may see this quaint doctrine giving rise to all manner of difficulties[5]. Obviously it is capable of doing this. For example, if in the case that has just been put we suppose that at *O*'s death *A* has a son *X*, then there will be the question whether *A*, now that he has become lord, must give up the land to his own son *X* or to his brother *C*. In the former event, if *A* leaves at his death two sons *X* and *Y*, we shall once more have a problem to solve. We have undertaken to prevent the seignory and the tenancy

[1] Glanvill, vii. 1: 'cum consensu heredis sui, ne super hoc fieret contentio.'

[2] Ibid.: 'Magna quidem iuris dubitatio et virorum iuris regni peritorum disceptatio et contentio super tali casu in curia domini Regis evenit vel evenire potest.'

[3] Ibid.: 'pater enim seisinam defuncti filii sui sibi retinere contendit.'

[4] Ibid.: 'Praeterea terra ista quae sic donata est sicut alia quaelibet hereditas naturaliter quidem ad heredes hereditabiliter descendit, nunquam autem naturaliter ascendit.'

[5] Curia Regis Rolls (Pipe Roll Soc.), i. 21; Select Civil Pleas (Selden Soc.), pl. 139; Note Book, pl. 61, 564, 637, 774, 949, 1244, 1694, 1857; Calend. Geneal. p. 146; Somersetshire Pleas, pl. 592.

[p. 289] remaining in one and the same hand, and yet the common rules of inheritance are always bringing them together[1].

Effect of homage.

Glanvill in his treatment of this theme supposes that the father (*O*) has taken the homage of his son (*B*). Bracton lays stress upon this condition[2]. Only when homage has been done are we to apply the rule which excludes the lord from the inheritance. This is at the bottom of one of the peculiarities of the 'estate in frankmarriage[3].' When a father makes a provision for a daughter, he intends that if the daughter has no issue or if her issue fails—at all events if this failure occurs in the course of a few generations—the land shall come back to him or to his heir. Therefore no homage is done for the estate in frankmarriage until the daughter's third heir has entered, for were homage once done, there would be a danger that the land would never come back to the father or to his heir[4]. Here again is a reason why in parage tenure a younger sister and her heirs do no homage to the elder sister until the younger sister's third heir has entered[5]. Were homage once done, the younger sister's share could never come to her elder sister[6]. Why either in the case of frankmarriage or in that of parage the entry of the third heir should make a difference it is not easy to see. Perhaps it is presumed that, if the land has thrice descended down the line of which the daughter is the starting point, there is no reason to fear that her issue will fail. Perhaps, however, we have here some relics of an old system of inheritance which, could we understand it, would show the connexion between several puzzling rules[7].

[1] Bracton, f. 65 b, 66.

[2] Bracton, f. 22 b, 23, 65 b, 277.

[3] See above, vol. ii. p. 17.

[4] Bracton, f. 22 b, 23; Note Book, pl. 61. This doctrine is made obscure by the haziness of the line which divides 'reversion' from 'escheat.' See above, vol. ii. p. 23.

[5] See above, vol. ii. p. 276.

[6] Stat. Hibern. de Coheredibus (Statutes, i. p. 5).

[7] There is a good deal of evidence which hints that in old times when a partible inheritance fell to several parceners and one of them died and his share passed to the others, this was regarded not as a case of inheritance, but as a case of accruer. (See Nichols, Britton, ii. 316.) So long as the land is held by very close kinsmen there is no 'inheriting' between them. Only when the parceners are beyond a certain distance (*e.g.* the third or fourth degree) from the common stock does any true inheriting begin. We may suspect that some such idea is the root of the 'third heir rules' about *paragia* and *maritagia*; but, if so, it lies deep down and has been hidden away beneath more modern law; it

Why can not the lord inherit?

But whence this rule that excludes the lord from the [p. 290] inheritance? Why can not the same man be both lord and heir, or (to put the question in a better shape) why should not the lord inherit and the seignory become extinct? Have we here to deal merely with one of those metaphysical difficulties which lawyers sometimes create for themselves, or have we to deal with a rule that has a purpose? On the one hand, it may be said that the kernel of the whole matter is this, that the seignory, the homage, is regarded as a thing and that lawyers can not readily conceive its annihilation[1]. Such an explanation would be more probable had we before us a doctrine of the fifteenth century; in the twelfth our law had hardly entered the metaphysical stage. On the whole we are inclined to see here a struggle against the effects of primogeniture. If under this novel principle the younger sons are to have anything, it must be given them by their father in his lifetime:—the law of the royal court has decreed it. But the voice of natural justice can be heard crying as of old for as much equality among the sons as the interests of the king and of the state will permit. At all events it is not fair that one son should take the whole of the land that his father has not given away, and also come in by some accident to the land that was given—and it could hardly have been given without his consent—to one of his younger brothers. He ought not to have it so long as there is any younger brother to claim it:—enough for him that he will get homage and service; he should not ask for more. The case is not like that in which a father provides a marriage portion for a daughter. That is an old case. In the days when the inheritance was divisible among sons that case had to be met. Without the concurrence of his sons a father might give his daughter a reasonable *maritagium*[2]; but if the daughter's issue failed, then the land was to come back to her father or her brothers. The primogenitary rule which is now being enforced in all its simplicity has raised a new case. The father who enfeoffs a younger son in return for homage is (probably with his [p. 291]

can only be natural in a time when it is common that two generations will pass away before an ancestral estate undergoes a physical partition.

[1] Hale, Common Law (6th ed.), pp. 314–5, seems to treat the rule as purely irrational.

[2] Glanvill, vii. 1; see above, vol. ii. p. 15.

eldest son's consent) contending against the primogenitary rule. He is 'forisfamiliating' the younger son; he is in a possible case depriving that younger son's sons of their chance of inheriting from their grandfather[1]. We ought not to allow the eldest son to get back the land of which he has, with his own consent, been deprived by his father[2].

The leaning towards equality.

It is difficult for us to express this vague feeling in precise terms; but the difficulty is not of our making. In Glanvill's day it was puzzling the wisest heads in the king's court[3]. In Bracton's day there had been a great change. Men had been accommodating themselves to primogeniture. The father now freely disposes of his land without the consent of his eldest son. Often when he enfeoffs a younger son he does not take homage, and does not take it just because he desires that on failure of that son's issue his eldest son shall have the land[4]. The rule that, if homage has intervened, a lord can not inherit from his man is still in force; but it now looks like a capricious, inexplicable rule, and the judges seem to be showing it little favour[5]. The statute of 1290 which put a stop to subinfeudation soon made the whole doctrine obsolete. Thenceforward if a father enfeoffed a son in fee simple, there would be no homage, no tenure, between the feoffor and the feoffee[6].

The exclusion of the lord and the exclusion of the ascendant

We may seem to have digressed far from our original theme, the exclusion of ascendants from the inheritance; but it is a serious question whether that exclusion is not the outcome of the rule about lord and heir. Glanvill supposes a father to come forward and claim the tenement of which he enfeoffed a son who has died without issue. The father is sent empty away and is told that he must not be both lord

[1] Glanvill, vii. 3. My younger son will be preferred to the children of my 'forisfamiliated' elder son.

[2] When Henry II.'s son Geoffrey introduced primogeniture into Britanny, he introduced along with it the rule that the elder brother is not to inherit from the younger land for which the younger has done homage to the elder; Warnkönig, Französ. Geschichte, i. Urkund. p. 27. We have here an equitable temperament of primogeniture.

[3] Glanvill, vii. 1.

[4] Bracton, f. 277.

[5] Bracton, f. 277; Note Book, pl. 564, 1857.

[6] Stat. 18 Edw. I., *Quia emptores*. The rule appears in 13 Edw. I. Fitz. Abr. *Avowre*, pl. 235, and in Fleta, p. 371. After this it dies of inanition. It has never been repealed.

and heir. Would it not have been simpler to tell him that [p. 292] an elementary rule of the law of inheritance excludes all direct ancestors of the dead man? A remark about the course of nature, which does not permit inheritances to ascend, is thrown in, but it fills a secondary place; it may express a generalization which is gradually taking shape.

Exclusion of the lord leads to exclusion of the father.

On the whole there are not many cases in which a man can put in any plausible claim to inherit from a dead son. If the son acquired the land by inheritance from any paternal ancestor, there can be no talk of the father inheriting from the son, for the father must be already dead. If the son acquired the land by inheritance from his mother or any maternal ancestor, there can be no talk of the father inheriting, for, as we shall see hereafter, a strict rule prevents maternal lands from falling to the paternal kinsfolk. And now we have decided that if the son comes to the land by the gift of his father, his father is not to be heir as well as lord. We have thus exhausted all the common cases in which a boy is likely to acquire land. The case in which a man dies without issue in his father's lifetime leaving land which he did not acquire by inheritance, nor yet by the gift of his father, nor yet by the gift of any one whose heir the father is,—this in the twelfth century is a rare case. It is one which the king's judges engaged in their task of rapid simplification will be apt to neglect, especially as they find the rule about lord and heir an unmanageable rule. And so we come to the principle that excludes the direct ancestors, and the only apology that can be offered for it is that heavy bodies never bound upwards in a perpendicular line.

Suggested explanation of the exclusion of ascendants.

This explanation, it must be frankly owned, has in it some guesswork; but before it is rejected we must call attention to two facts. In the year 1195, unless a plea roll misleads us, a man did bring an assize of mort d'ancestor on the death of his son, and the defendant answered, not that fathers do not inherit from sons, but that the plaintiff was his villein[1]. We know of no other case of the same kind and should be much surprised to find one during the next hundred years. On the other hand, after just a hundred years we should not be

[1] Curia Regis Rolls (Pipe Roll Soc.), i. 133. It is possible that the scribe of this record wrote *filius* by mistake for *pater*, and, if so, the case is deprived of all its curiosity.

[p. 293] surprised to find in some solitary instance a father putting in a claim. Britton, with Bracton's text before him, deliberately and more than once asserted that the father can inherit from the son[1]. He would postpone the father to all his own descendants but would admit him after them. What apology have we to offer for Britton? Perhaps this:—He was writing when the statute of 1290 had just been made; he shows himself uncertain as to its precise effect; but he knows that it will make great changes[2]. One of these changes will be that it will deprive the old rule about lord and heir of any material to work upon. Henceforward if a father enfeoffs a son in fee simple, the son will not be the father's tenant. Why then should not the father inherit? Has not the only rational impediment to his succession been removed? But by this time the rule was too well rooted to be blown down by a side wind. The father was excluded until 1833[3].

The ascendants in Scottish law.

Lastly, before our suggestion is condemned, we would ask that a law of inheritance very closely akin to our own should be examined. Scottish law, like Norman law, did not exclude the lineal ancestor; it admitted him so soon as his own issue was exhausted. But Scottish law had some rules very strange in the eyes of a Southron which had the effect, if not the object, of tempering the universal dominion of primogeniture. The youngest of three brothers purchases land and dies without issue; it is the middle, not the eldest, brother who inherits from him. It is not fair that the eldest should have everything[4].

Inheritance of collaterals

The canons which regulate the course of inheritance among the collateral kinsfolk of the dead man are worthy of observation. Our English law has been brought to bear upon a brisk controversy that has been carried on in Germany. What was the main principle of the old Germanic scheme of in- [p. 294] heritance? Was it a 'gradual' or a 'parentelic' scheme?

[1] Britton, ii. 319, 325. [2] Nichols, Britton, i. p. xxv.

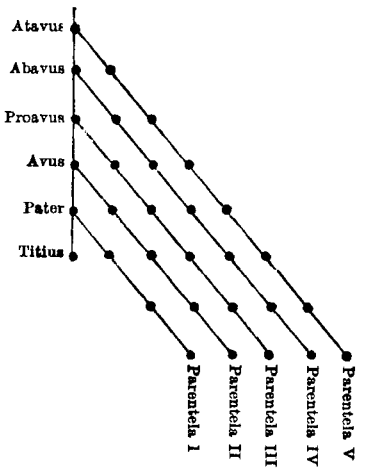
[3] Stat. 3–4 Will. IV. c. 106, sec. 6.

[4] Stat. Robert III. Acts of Parliament, i. p. 575; Ibid. pp. 639, 730; Mc Douall, Institutes, ii. 297; Bell, Principles of the Law of Scotland, § 1662–72. The *immediate* younger brother was heir of line and the *immediate* elder (not the eldest) brother was heir of conquest. The exclusion of ascendants was by no means unknown outside England; on the contrary it seems to have prevailed until quite recent times in large parts of Austria, Tyrol and neighbouring lands: Wasserschleben, Prinzip der Erbenfolge (1870), p. 35 ff. We do not profess to explain this phenomenon wherever it is found; we have spoken only of England.

Proximity of kinship may be reckoned in divers ways. The calculus which will seem the most natural to us in modern time is a 'gradual' calculus. Each act of generation makes a degree, and we count the number of degrees that lie between the *propositus* and the various claimants. It is probable that any system of inheritance with which we have to deal will prefer the descendants of the dead man to all other claimants; we will therefore leave them out of account. This done, we find in the first degree the dead man's parents; in the second his grandparents, brothers and sisters; in the third his great-grandparents, uncles, aunts, nephews, nieces; in the fourth his great-great-grandparents, great uncles, great aunts, first cousins, great-nephews, great-nieces; and so forth. Our English law of inheritance has a very different scheme. In order to explain it we had better make use of a term to which modern disputants have given a technical meaning, the term *parentela*. By a person's *parentela* is meant the sum of those persons who trace their blood from him. My issue are my *parentela*, my father's issue are his *parentela*. Now in our English scheme the various *parentelae* are successively called to the inheritance in the order of their proximity to the dead man. My father's *parentela* is nearer to me than my grandfather's. Every person who is in my father's *parentela* is nearer to me than any person who can only claim kinship through some ancestor remoter from me than my father. For a moment and for the sake of simplicity we may speak as if there were but one ascendant line, as if the dead man had but one parent, one grandparent and so forth, and we will call these progenitors father, grandfather and the like. The rule then becomes this: Exhaust the dead man's *parentela*; next exhaust his father's *parentela*; next his grandfather's; next his great-grandfather's. We see the family tree in some such shape as that pictured on the next page.

The remotest kinsman who stands in Parentela I. is a nearer heir than the nearest kinsman of Parentela II. Between persons who stand in different *parentelae* there can be no competition. In a purely gradual scheme my great-great-grandfather, my great uncle, my first cousin and my great-nephew are equally close to me. In a parentelic scheme my great-nephew, since he springs from my father, is nearer to me
[p. 295] than my first cousin. We have here, it is said, not a 'gradual'

but a 'lineal-gradual' scheme. Within each *parentela* or line of issue the 'grade' is of importance; but no computation of



grades must induce us to jump from a nearer to a remoter line so long as the nearer line has any representative[1].

The parentelic scheme.

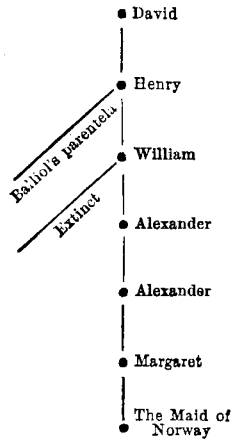
We have preferred to state the matter in this abstract, and in England unfamiliar, fashion rather than to repeat the rules that have been admirably expounded by Hale and Blackstone. English, Scottish and Norman law seem to afford the best specimens of the parentelic scheme. Whether this scheme is of extremely ancient date, or whether it is the outcome of feudalism, is a controverted question which cannot be decided by our English books and records. We can only say that in the thirteenth century it seems to be among Englishmen the only conceivable scheme. Our text-writers accept it as obvious, and this although they will copy from the civilians an elaborate *Arbor Consanguinitatis* and hardly know that the English law is radically different from the Roman[2].

[1] A sketch of the controversy to which we have referred will be found in Stobbe, Privatrecht, v. 79. Modern opinion seems to be inclining to the belief that the parentelic scheme was ancient and general; see Heusler, Institutionen, ii. 586, and Brunner, Erbfolgesystem.

[2] The works of both Bracton and Fleta ought to have in them *arbores* borrowed from the civilians; such trees are found in several MSS. of Bracton's book. The *arbor* is given in Nichols's edition of Britton, ii. 321. The use of these trees is apt to perplex the writer's exposition of English law. Still the parentelic scheme comes out clearly enough in Bracton, f. 64 b; Fleta, p. 373;

The Scottish inheritance.

A good illustration is afforded by the careful pleadings of [p. 296] John Balliol in the great suit for the crown of Scotland. He traced the downward descent of the crown from David to the Maid of Norway. He himself had to go back to Henry, earl of Huntingdon, in order to find an ancestor common to him and the *proposita*. But he had to face the fact that William the Lion left daughters, and he could not get so far back as Henry without alleging that the lines of these daughters had become extinct. On the Maiden's death 'the right resorted' to William's *parentela*, but it found that *parentela* empty and so had to go back further[1].



Rules for collaterals of the same parentela.

We have said that the *parentelae* or stocks are to be exhausted one by one. The method of exhausting them is that in accordance with which the descendants of the dead man are first exhausted. We must apply our six rules:— (1) A living descendant excludes his or her own descendants. (2) A dead descendant is represented by his or her own descendants[2]. (3) Males exclude females of equal degree. (4) Among males of equal degree only the eldest inherits. (5) Females of equal degree inherit together. (6) The rule that a dead descendant is represented by his or her descendants overrides the preference for the male sex.

Choice among the ascending lines.

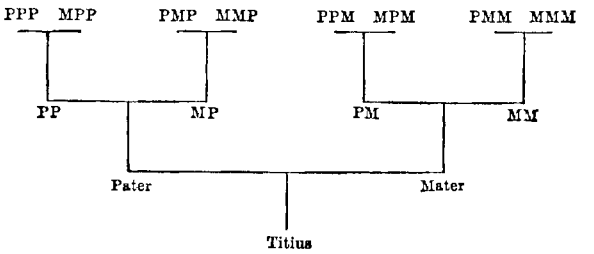
But we have as yet been treating the problem as though it were much simpler than really it is. The dead man does not stand at the end of a single line of ancestors. He must have had two parents, four grandparents, and so forth. Along which of the lines which met in him are we to move in search of those *parentelae* which are to be called to the inheritance? [p. 297] Our medieval lawyers, copying the pictures drawn by canonists

Britton, ii. 325. For examples, see Y. B. 21-2 Edw. I. p. 37; 32-3 Edw. I. p. 17.

[1] Foedera, i. 776-8. Several of the competitors professed that they stood in a lower *parentela* than that represented by Balliol, Bruce and Hastings; but their claims seem to have been stained by illegitimacy and were withdrawn.

[2] The application of this principle gave Balliol the victory over Bruce.

and civilians, are guilty of the same unjustifiable simplification with which we can be charged. They represent 'the ascending line' as a single line. In the first 'cell' in it they write 'pater, mater,' in the second 'avus, avia,' in the third 'proavus, proavia' and so on, apparently forgetting that every person has four grandparents, and that the English system is not one which can treat these four as sharing a single 'cell.' More instructive would it have been had they drawn their picture thus:—



Had they done this, they might have left us some clear principle for directing our choice between the various ascendant lines and have solved some problems which were still open in the nineteenth century.

Paterna paternis. Materna maternis.

As it is, we can see the rule that the heir must be one who is related by blood kinship not only to the *propositus* but to the purchaser. By 'purchaser' is here meant the person who last acquired the estate otherwise than by inheritance. Now if the person whose heir we are seeking was himself the purchaser, our rule will admit every blood kinsman or kinswoman of his. But if he was not the purchaser, then our choice will be restricted. Suppose that his father was the purchaser, no one can be admitted who is not related by blood to that father. Suppose that his mother was the purchaser, any one who takes the inheritance must be related by blood to her. Suppose that his father's mother was the purchaser, a successful claimant must be her blood kinsman. We have here the rule which in foreign books is expressed by the proverb *Paterna* [p. 298] *paternis, materna maternis*[1]. Our English law does not merely postpone the *materni* or, as the case may be, the *paterni*; it absolutely excludes them. My father's brother can not inherit

[1] Abroad this return of the inheritance to the side whence it came was known as *ius revolutionis*, *ius recadentiae*, *Fallrecht*; Stobbe, Privatrecht, v. p. 105; Heusler, Institutionen, ii. 527. It is a widely distributed phenomenon.

from me land that descended to me from my mother; my father's father's brother can not inherit from me land that descended to me from my father's mother. So far as we can see, this rule was in force in the thirteenth century. Attempts have been made to represent it as a specifically feudal rule, one which takes us back to a time when only the descendants of the original vassal could inherit; but such attempts seem to be unnecessary; a rule whose main effect is that of keeping a woman's land in her own family is not unnatural and may well be very ancient[1]. We see its naturalness when we apply it to the descent of a kingdom. When the Maid of Norway died, her father, king Eric, put in a claim to the throne of Scotland and sent learned Italian lawyers to argue his case in Edward's court; but no one seems to have taken him or his claim very seriously[2]. The ascending line along which the inheritance must return should obviously be the line of the Scottish kings; it is not to be tolerated that one who has no drop of their blood in his veins should fill their place. In the thirteenth century no wide gulf could be fixed between the inheritance of a kingdom and other impartible inheritances. John Balliol argued on the expressed assumption that the rules applicable to baronies were applicable to his case. If therefore at a later day we find the law of Scotland not merely rejecting the rule *Materna maternis*, but absolutely excluding all *materni* even when the inheritance has come from their side[3], we may suspect that it is no true witness to the ideas of the thirteenth century, and take to heart the lesson that a system that looks exceedingly 'agnatic' and that refuses to trace inheritable blood through a female, except in the descending line, is not of necessity very old. Those rules of inheritance which deal with unusual cases are often the outcome of no recondite causes, but of some superficial whim.

Choice among the admissible stocks.

The rule *Paterna paternis, materna maternis* may exclude [p. 299] from our view certain of those ascending lines which go upwards from our *propositus*; it will not enable us to make a choice

[1] The common form which prevails now-a-days when a bride's personal property is to be settled, bears witness to this desire that, if there be no children of the marriage, the wife's property shall in certain events come back to her own kinsfolk.

[2] Rishanger, Chronicle (Rolls Ser.), pp. 132, 269, 358.

[3] Bell, Principles of the Law of Scotland, 9th ed. p. 1021, § 1665.

between the lines that are not thus excluded. Thus suppose that the person whose heir is wanted was himself the purchaser of the land, none of his kinsmen are excluded and we have to choose between many ascending lines. We think it certain that in the thirteenth century, as in later times, the line first chosen was that which we may call agnatic, the line, that is, in which there is an unbroken succession of male ancestors, and that, so long as there was any one who could trace his blood from a member of that line, no other person could inherit. Such a rule is a natural part of a system which postpones females to males. Just as the inheritance will go down from father to son so long as the male line is unbroken, so when we look upwards we first look along the male line. The remotest person in the remotest *parentela* which comes down from an ancestor who stands in that line is preferable to the nearest person in the nearest *parentela* which has some other starting point[1].

No clear principles are found.

Beyond this all is dark. We gravely doubt whether during the middle ages any clear canons were established to regulate the order of succession between those *parentelae* which could trace their kinship to the *propositus* only through some female ancestor of his. That 'the male blood is more worthy than the female' was indubitable; Adam was created before Eve; but a definite calculus which should balance worthiness of blood against proximity of degree was wanting. Our lawyers were not at pains to draw pictures of their own; they transplanted the trees of the Romanists, and those trees could not take firm root in English soil. In Elizabeth's day an exceedingly simple problem was treated as an open question for which the Year Books provided no obvious solution. A man purchases land and dies without issue; who shall inherit from him, his mother's brother or a cousin who is his father's mother's [p. 300] father's son's son[2]? When this question had been decided in favour of the claimant who was of kin to the father of the

[1] It is difficult to prove even this from the text-books. Glanvill, vii. 3, 4, Bracton, ff. 67–9, Fleta, pp. 372–5, Britton, ii. p. 324, are apt to speak as though in ascending we might cross from line to line in order to find the nearest ancestor, so that, *e.g.* we might prefer the father's mother's *parentela* to the father's father's *parentela*. But this we think due to the inadequate *arbores* that they had in their minds.

[2] *Clere* v. *Brooke*, Plowden, 442. The principal Year Book cases are 39 Edw. III. f. 29; 49 Edw. III. f. 11; 49 Ass. f. 316; 12 Edw. IV. f. 14.

propositus, it still left open a question about the order of precedence among the female ancestors upon the father's side, a question which was warmly debated and never really settled until a statute of 1833 rounded off our law of inheritance by declaring that the mother of the more remote male paternal ancestor is preferable to the mother of a less remote male paternal ancestor[1]. That in an age which allowed no testamentary disposition of freehold lands cases never happened which raised such problems as these is hardly to be believed; but, to all seeming, they did not happen with sufficient frequency to generate a body of established doctrine[2].

Place of the half-blood in the classical common law.

Our law's treatment of 'the half-blood' has been a favourite theme for historical speculators. We have been sent for its origin back to a time when 'feuds' were not yet hereditary; we have been sent to 'the agnatic family[3].' As a matter of fact we do not believe that the phenomenon which has to be explained is very ancient. It is this:—Our common law utterly excludes 'the half-blood.' No one who is connected with the *propositus* only by the half-blood can inherit from him. A man buys land and dies without issue; his half-brother, whether consanguineous or uterine, can not inherit from him. If there is no kinsman or kinswoman of the whole blood forthcoming, the land will escheat to the lord. Of course all the descendants of a man or a woman are of kin to him or to her by the whole blood. A man leaves a daughter by his first wife, a son by his second wife; his son inherits from him. A man leaves no sons and no issue of sons, but five daughters, two by his first wife and three by his second wife; they will all inherit from him together and take equal shares. Any question about the half-blood can only arise when this man [p. 301] has ceased to be and one of his descendants has become the *propositus*, and no one of them, according to our law, will become the *propositus* until he obtains an actual seisin of the

[1] Stat. 3-4 Will. IV. c. 106. sec. 8. Hale, Common Law, 6th ed. p. 328, had taken one side in the dispute, Blackstone, Comm. ii. 238, the other. Blackstone's departure from Hale's rule gave rise to controversy of a kind that has been very rare in England, the academic discussion of a point of law that is of no practical importance.

[2] After looking through a large number of records of the thirteenth century we are much struck by the extreme rarity of cases in which any of the more recondite rules of inheritance are called into play.

[3] Blackstone, Comm. ii. 288; Maine, Ancient Law, ch. v.

land. A man leaves a son and a daughter by a first wife, and a son by a second wife. His eldest son inherits and is entitled to seisin. If however he dies without issue before he has obtained seisin, then his father is still the *propositus*. That father has a daughter and a son. The son inherits before the daughter. He is not inheriting from his half-brother; he is inheriting from his father. On the other hand, if the elder son acquires seisin, all is altered. When he dies without issue he is the *propositus*. We have now to choose between a sister by the whole blood and a half-brother, and we hold, not merely that the sister is to be preferred, but that the land shall sooner escheat to the lord than go to the half-brother. *Possessio fratris de feodo simplici facit sororem esse heredem*; the entry of the eldest son has made his sister heir[1].

The half-blood in earlier times.

Now it seems clear that the law of Bracton's day had not yet taken this puzzling shape. Bracton holds that the half-blood can inherit, though it is postponed to the whole blood. First we take the case in which a man purchases land and dies without issue, leaving a sister of the whole blood and a brother of the half-blood. The sister will inherit to the exclusion of her brother; but after her death and the failure of her heirs the brother will inherit; he is merely postponed, not excluded for good and all[2]. Next we take the case in which a man inherits land from his father and then dies without issue, leaving a sister of the whole blood and a consanguineous half-brother. Now some were for holding that the half-brother should in this case be preferred to the sister, and Bracton, though his mind may have fluctuated, probably shared this opinion. The distinction which turns on the question whether the eldest son has acquired seisin seems to be only just coming to the front[3]. Fleta and Britton agree that if a man purchases land and dies without issue, his sister by the whole blood will [p. 302] be preferred to the half-brother[4]. They do not affirm, as Bracton does, that in this case if there is no brother or sister of the whole blood, a brother or sister of the half-blood will be

[1] Litt. sec. 7, 8. The law was altered in 1833.

[2] Bracton, f. 66 b.

[3] Bracton, f. 65, 65 b. The text in its present condition looks as if Bracton had changed his mind and added a note contradicting what he had already written.

[4] Fleta, p. 371; Britton, ii. 318.

admitted; but neither do they deny this. As to the case in which the *propositus* has inherited land from his father, Fleta is for preferring the consanguineous half-brother to the sister of the whole blood, and this without reference to seisin[1]; Britton is for preferring the sister by the whole blood, and this without reference to seisin[2]. What is more, Britton holds that if a man has two wives and a son by each, one of those sons can inherit from his half-brother land that had descended to that half-brother from his mother; in other words, that I may on the death of my half-brother inherit land which belonged to my stepmother, though here of course I am not of the blood of the purchaser[3].

Fluctuations in practice.

These are not speculative fancies. If we turn to the records of the time, we shall see much uncertainty; we shall see claims brought into court which the common law of a later day would not have tolerated for an instant, and juries declining to solve the simplest problems[4]. Even Britton's doctrine that through my half-brother I can acquire the land of my stepfather or stepmother, does not seem ridiculous[5]. In Edward I.'s reign the law seems to be setting its face against the claims of the half-blood; but even in Edward II.'s there is a great deal more doubt and disputation than we might have expected[6]. It is clear that a sister will inherit from her brother of the whole blood a tenement that he purchased, and exclude a brother by the half-blood; but that the brother of the half-blood is utterly incapable of taking such a tenement is not plain. When the tenement has descended from father or mother to the eldest son, the lawyers are beginning to make every thing turn on [p. 303] seisin; but they have not yet fully established the dogma that, if once that eldest son is seised, his half-brother will be incapable of inheriting from him.

[1] Fleta, p. 371.

[2] Britton, ii. 316.

[3] Britton, ii. 319. See also Scots Acts of Parl. i. 731–2, 638.

[4] Select Civil Pleas (Selden Soc.), pl. 1; Note Book, pl. 32, 44, 833–4, 855, 1128; Placit. Abbrev. p. 153; Calend. Geneal. pp. 31, 282; Y. B. 21–2 Edw. I. p. 552; Y. B. 32–3 Edw. I. p. 445.

[5] Note Book, pl. 1128; Y. B. 21–2 Edw. I. p. 552; Y. B. 32–3 Edw. I. p. 445. In this last case it seems to be thought that a uterine half-sister can inherit land which descended to the *propositus* from his father.

[6] Y. B. Mich. 5 Edw. II. f. 147; Mich. 12 Edw. II. f. 380; Mich. 19 Edw. II. f. 628.

Exclusion of the half-blood is modern.

Our persuasion is that the absolute exclusion of the half-blood, to which our law was in course of time committed, is neither a very ancient nor a very deep-seated phenomenon, that it tells us nothing of the original constitution of feuds nor of the agnatic family. In truth the problem that is put before us when there is talk of admitting the half-blood is difficult and our solution of it is likely to be capricious. We can not say now-a-days that there is any obviously proper place for the half-blood in a scheme of inheritance, especially in our 'parentelic' scheme[1]. The lawyers of the thirteenth and fourteenth centuries had no ready solution, and we strongly suspect that the rule that was ultimately established had its origin in a few precedents. About such a matter it is desirable that there shall be a clear rule; the import of the rule is of no great moment. Our rule was one eminently favourable to the king; it gave him escheats; we are not sure that any profounder explanation of it would be true[2].

[1] Stobbe, Privatrecht, v. 116. German and French customs afford a rich variety of rules. That the half-blood should be on an equality with the whole blood was rare; sometimes it took a smaller share; sometimes it was postponed; but the manner of postponing it varied from custom to custom. See also Heusler, Institutionen, ii. 612. In 1279 it is alleged as a custom of Newcastle that the mother's inheritance will go to daughters by a first marriage in preference to a son by a second marriage: Northumberland Assize Rolls, p. 295. Such a custom, which has its parallel in Germany (Stobbe, p. 101), should warn us that the rules of the common law were not the only rules that seemed natural to Englishmen. See also Scots Acts of Parl. i. 337.

[2] Maine, Ancient Law, ch. v.: 'In Agnation too is to be sought the explanation of that extraordinary rule of English Law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another's lands. In the Customs of Normandy, the rule applies to *uterine* brothers only, that is to brothers by the same mother but not by the same father; and limited in this way, it is a strict deduction from the system of Agnation, under which uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clue to its principle, interpreted it as a general prohibition against the succession of the half-blood.' We have not been able to find any text of Norman Law which excludes the uterine but admits the consanguineous brother. The Grand Coutumier, c. 25 s, admits the consanguineous brother when the inheritance has descended from the father and the uterine brother when the inheritance has descended from the mother. As to land purchased by the *propositus*, we can see no words which declare the uterine brother incapable of inheriting. See Brunner, Erbfolgesystem, p. 44. In the later custom (Art. 312) the uterine and consanguineous brothers can claim a share with the brothers of the whole blood. The strongholds of the distinction between the consanguineous and the uterine half-blood seem to be the Lombard law of feuds and the Scottish law. In the Libri

Co-parcenery.

When an inheritance falls to the daughters of the dead man, [p. 304] each of these 'parceners' (*participes*) is conceived as having a certain aliquot share in the as yet undivided land[1]. This share is her 'purparty' (*propars*); it will obey the ordinary rules of inheritance; it will descend to her issue, and, on failure of her issue, it will resort to her sisters or their descendants. We may, as already noticed[2], see traces of an older scheme which would admit a right of accruer between sisters and the near descendants of sisters; but this was fast disappearing[3]. Once more we see the representative principle brought into play; the distribution of shares between the descendants of dead daughters is *per stirpes* not *per capita*. If we suppose the only issue of the *propositus* living at his death to be the two granddaughters that have sprung from one of his daughters and the three that have sprung from another, the inheritance must first be halved, and then one half of it will be halved again, while the other half will be divided into thirds. It would be a great mistake to suppose that our male-preferring and primogenitary system succeeded in keeping almost all of the great inheritances as unbroken wholes. Glanvill's own lands passed to three [p. 305] daughters. Twice within a few years the inheritance of an Earl of Chester 'fell among the spindles.' The inheritance of William Marshall the regent was soon split into thirty-fifths.

Feudorum such a distinction is in its proper place and this without any reference to agnatic families. Except as an anomaly, no fief can descend to a woman or through a woman, for fiefs are the estates of a military class; and since it can not descend through a woman, it can not pass to an uterine brother. Scottish law postponed the consanguineous half-brother, and it utterly excluded the uterine half-brother, even when the land had descended from his mother. But we should like to see a proof that this is not due to the powerful influence which the Libri Feudorum exercised over the Scottish lawyers of the sixteenth and later centuries. Here in England and in the year 1234 it was argued that a uterine brother should exclude a sister of the whole blood from land which had descended to the *propositus* from his mother (Note Book, pl. 855). When this was possible men were very far from 'agnation.' Again, for some time before 1855, Scottish law utterly excluded the mother and maternal kinsfolk even from the succession to movables; but it seems to be very doubtful whether this exclusion was ancient: Robertson, Law of Personal Succession, p. 380.

[1] Bracton, f. 373 b.

[2] See above, vol. ii. p. 291, note 7.

[3] So late as 1325 it is said that if a man dies leaving several daughters by different wives, and these daughters divide the inheritance, and one of them dies without issue, her share will go to her sisters of the half-blood as well as to her sisters of the whole blood: Y. B. 19 Edw. II. f. 628. See Britton, ii. 73 *note*.

for one of his five daughters was represented by seven daughters[1]. For a male to get a share 'by distaff right[2]' was by no means uncommon. But generally when an estate, at all events when a great estate, became partible, it was soon physically partitioned. Any one of the parceners could demand a partition, and the days were past when a family would keep together after the death of its head. The young heiress did not long remain unespoused; her marriage was disposed of at the earliest possible moment; the rich widow generally found another husband, though the church would not bless her second union; it is rare therefore to find that any large mass of land long remains in the hands of a *feme sole*.

Limits of inheritance.

Germanic law seems to have set a limit to blood relationship, or 'sib-ship.' An inheritance can not be claimed by one who does not stand within a certain degree, or rather, a certain 'joint' or generation, the fifth, the sixth or the seventh. The family was pictured not as a scale with degrees, nor as a tree with branches, but as a human body with joints. The parents, according to one scheme, stand in the head, brothers in the neck, first cousins at the shoulders, second cousins at the elbows, third cousins at the wrists, fourth, fifth and sixth cousins at the finger-joints; here the sib ends; seventh cousins would be 'nail cousins' and there would be no legal relationship between them[3]. We may see traces of this idea in England and in Normandy[4]. The Norman custom held that the line [p. 306] of consanguinity did not extend beyond the seventh degree[5]. Bracton refuses to draw the ascending line beyond the *tritavus*, the sixth ancestor of the *propositus*; beyond this point memory will not go[6]. However, the rules for the limitation of actions

[1] Stapleton, Liber de Antiquis Legibus (Camden Soc.), p. xix. The annual value of a thirty-fifth share was reckoned at £217.

[2] Winchcombe Landboc, i. 131–3: 'iure coli.'

[3] Heusler, Institutionen, ii. 591–3; Stobbe, Privatrecht, v. 67–9; Schröder, D.R.G., 324. The whole 'family' which consists of parents and children stands 'within the first joint,' so that the reckoning by joints begins with first cousins. But a great deal is very obscure.

[4] An allusion to some such idea occurs in the Anglo-Saxon tract on Wergild: Schmid, App. VII. A certain payment is made only to those near relations of the slain who are within the joint (*binnan cneówe; infra genu*). In Leg. Hen. 70, § 20, the inheritance descends to males *in quintum geniculum*; but this is old Ripuarian law.

[5] Somma, p. 77; Ancienne coutume, c. 25; Brunner, Erbfolgesystem, p. 44.

[6] Bracton, f. 67; Brunner, *op. cit.*, p. 18.

that were in force in Bracton's day would in any ordinary case have made it impossible for even a fifth cousin to bring an action for an inheritance, for a demandant was obliged to allege that the common ancestor who connected him with the *propositus* had been seised since the coronation of Henry II.[1] The rule therefore against ascending beyond the *tritavus* fell into oblivion[2], and then, owing to the spasmodic nature of our statutes of limitation, it becomes theoretically possible for a man to claim an inheritance from any kinsman however remote.

Restriction of alienation in favour of the expectant heir.

We turn to speak of an important episode which is intimately connected with the spread of primogeniture. In the thirteenth century the tenant in fee simple has a perfect right to disappoint his expectant heirs by conveying away the whole of his land by act *inter vivos*. Our law is grasping the maxim *Nemo est heres viventis*. Glanvill wrote just in time, though only just in time, to describe an older state of things[3].

Glanvill's rules.

Several distinctions must be taken. We must distinguish between military tenure and free socage; between land that has come to the dead man by descent ('heritage') and land that he has otherwise acquired ('conquest'); between the various purposes for which an alienation is made[4]. Without his expectant heir's consent the tenant may give reasonable marriage portions to his daughters, may bestow something on retainers by way of reward, and give something to the church. His power over his conquest is greater than his power over his heritage; but if he has only conquest he must not give the whole away; he must not utterly disinherit the expectant heir. Curiously enough, as it may seem to us, he has a much greater [p. 307] power of providing for daughters, churches and strangers than of providing for his own sons. Without the consent of his eldest son he can 'hardly' give any part of his heritage to a younger son[5]. The bastard therefore is better off than the legitimate

[1] Bracton, f. 372 b. Not only must you take as your *propositus* one who died seised within the appointed period, but you may not 'resort' to one who died beyond that period.

[2] Britton, ii. 324.

[3] Glanvill, vii. 1.

[4] Glanvill contrasts *hereditas* with *quaestus*. In borrowing from beyond the Tweed the words *heritage* and *conquest* we show that in England the distinction soon became unimportant. To express it we have no terms of our own less cumbrous than 'lands which have come to a person by inheritance,' 'lands that have come to him by purchase.'

[5] Glanvill, vii. 1: 'non poterit *de facili*.....donare.'

younger son. Glanvill confesses that this is a paradox; but it is law. As to the man who holds partible socage, he can give nothing, be it heritage, be it conquest, to any son, beyond the share that would fall to that son by inheritance. Glanvill, however, is far from defining an exact rule for every possible case; he nowhere tells us in terms of arithmetic what is that reasonable portion which the father may freely alienate. We can see however that one main restraint has been the deeply rooted sentiment that a father ought not to give one of his sons a preference over the others; they are equals and should be treated as equals[1]. In the case of partible socage land this sentiment still governs; but the introduction of primogeniture has raised a new problem. When Glanvill is writing, the court is endeavouring to put the eldest son in the advantageous position that is occupied by each of the sokeman's expectant heirs; without his consent he should not be deprived by any gift made to his brothers of that which was to come to him upon his father's death. But under the new law what was to have come to him at his father's death was the whole of his father's land. Are we then to secure all this for him, and that too in the name of a rule which has heretofore made for equality among sons? If so, then we come to the paradox that it is better to be a bastard than a legitimate younger son. This could not long be tolerated. Free alienation without the heir's consent will come in the wake of primogeniture. These two characteristics which distinguish our English law from her nearest of kin, the French customs, are closely connected.

The heir's consent.

The charters of the twelfth century afford numerous examples of expectant heirs joining in the gifts of their ancestors. Occasionally the giver may explain that he has not obtained his heir's concurrence, because he is disposing not of heritage but of conquest[2]; but very often one heir or several [p. 308] heirs are said to take part in the gift. To all seeming the necessity for the heir's concurrence was not confined to the common case in which the donor had a son. Walter Espec's foundation of Kirkham Abbey was confirmed by his nine

[1] Somma, p. 114; Ancienne coutume, c. 36: 'Cum pater plures habeat filios, unum meliorem altero de hereditate sua non potest facere.'

[2] Somner, Gavelkind, p. 40: Charter of 1204: 'et quia praedicta terra de libero catallo et proprio perquisito meo fuit, et non de aliqua hereditate parentum meorum.'

nephews, the sons of his three sisters[1]; and the consent of the donor's daughters is sometimes mentioned[2]. It would seem too that it was not enough that the heir apparent, the donor's eldest son, should give his consent. If he consented, he could not afterwards complain; but if he died before his father, his consent would not bar his brothers, perhaps not his sons. Therefore the prudent donee procures the concurrence of as many of the donor's near kinsfolk as can be induced to approve the gift[3]. Daughters consent though the donor has sons who also consent[4]. In a gift to Winchcombe three of the donor's sons give a sworn consent, and further swear that they will if possible obtain the consent of a fourth son, should he return to the king's peace[5]. The Abbey of Meaux could not get the consent of the donor's eldest brother, but it took the consents of his other brothers and 'all his other kinsfolk'; the eldest brother died in the donor's lifetime and his sons brought a suit for the land, which the monks were glad to compromise[6]. Well worthy of notice are the cases, not very uncommon, in which little children are made to approve their father's pious gifts; worthy of notice, because an attempt seems made to bind them by receipt of a *quid pro quo*. At Abingdon the monks, fearing that the heir might afterwards dispute the donation, gave him twelve pence and a handsome leather belt[7]. At Ramsey two *infantes* receive five shillings apiece, an *infantulus* a shilling, and a baby held in its mother's arms twenty pence[8]; so at Chartres four pence are put into the hands of a [p. 309] child who is too young to speak[9]; and so, to return to England, the monks of Winchcombe who are taking a conveyance from a woman before the king's justices at Gloucester, besides making a substantial payment to her, give six pence to her

[1] Monasticon, vi. 209; see also the foundation charter of Rievaulx: Cart. Riev. p. 21.

[2] Cart. Glouc. i. 367.

[3] It is quite common to find several sons or brothers joining in the gift. See *e.g.* Madox, Formulare, p. 4, the donor's wife, two sons, two brothers and one grandson or nephew (*nepos*) declare their consent.

[4] Cart. Rams. i. 132, 139.

[5] Winchcombe Landboc, i. 35.

[6] Chron. de Melsa, i. 313.

[7] Hist. Abingd. ii. 202: 'zonam ei cervinam optimam dedit et nummos xii.'

[8] Cart. Rams. i. 137, 139, 145.

[9] Cart. de S. Père de Chartres (Documents inédits), ii. p. 576.

son and six pence to each of her three daughters[1]. In some charters the heirs are put before us not merely as assenting to, but as joining in the gift; it is a gift by a man and his heirs; in other cases the heirs are named among the witnesses of the deed. What ceremony was observed upon these occasions we cannot tell, but when the heirs are spoken of as giving the land, it is by no means impossible that the symbolic turf, twig or charter was delivered to the donee by the 'joint hands' of all the givers[2].

Disappearance of the restriction.

Unfortunately when in 1194 the rolls of the king's court begin their tale, it is too late for them to tell us much about this matter[3]. However in 1200 Elyas Croc gave the king thirty marks and a palfrey to have a judgment of the court as to whether a gift made by his father Matthew was valid. Matthew had given to his own younger brother, the uncle of Elyas, a knight's fee which, so Elyas asserted, was the head of the honour and barony[4]. Whether Elyas got a judgment or no we can not say; but this looks like an extreme case; the father had been giving away the ancestral mansion. So late as 1225 a son vainly tries to get back a tenement which his father has alienated, and plaintively asks whether his father could give away all the land that he held by military tenure without retaining any service for himself and his heirs: —but it is unavailing[5]. Bracton knows nothing of—or rather, having Glanvill's book before him, deliberately ignores—the old restraint: it is too obsolete to be worth a word. The phrase 'and his heirs' in a charter of feoffment gives nothing to an heir apparent[6].

[p. 310] Causes of the change

The change, if we consider its great importance, seems to have been effected rapidly, even suddenly. The earliest plea rolls have hardly anything to say of rules which, however indefinite, were law in 1188. We seem to see here, as already

[1] Winchcombe Landboc, i. 180.

[2] Cart. Glouc. i. 205, 235, 296; Cart. Riev. p. 52. See the cross on the charter made by the heir in Brinkburn Cart. pp. 1, 2.

[3] A few pertinent stories are found in chronicles. Hist. Abingd. ii. 205-6 (early Henry II.): apparent heirs try ineffectually to stop a gift being made to the church; this gives rise to proceedings in the hallmoot, where they fail. Chron. de Melsa, i. 103, 231-2, 289-90-91 (temp. John): an heiress recovers land given by her ancestor; the monks complain of favouritism.

[4] Oblate Rolls (ed. Hardy), p. 87.

[5] Note Book, pl. 1054.

[6] Bracton, f. 17.

suggested, the complement of that new and stringent primogeniture which the king's court had begun to enforce. The object of the restraint in time past had not been solely, perhaps not mainly, the retention of land 'in a family'; it had secured an equal division of land among sons, or as equal a division as the impartibility of the knight's fee would permit. It became useless, inappropriate, unbearable, when the eldest son was to have the whole inheritance. No great harm would be done to the feudal lords, at all events to the king, by abolishing it. They had, or they meant to have, some control over the alienations made by their tenants[1], more control than they could have had under a law which partitioned the inheritance.

Rebutting effect of a warranty.

The material cause of the great change we may find in such considerations as these; but it must have been effected by some machinery of legal reasoning, and we may suspect that the engine which did the work was one that was often to show its potency in after centuries—'the rebutting effect of a warranty.' Alan alienates land to William; Alan declares that he and his heirs will warrant that land to William and his heirs. Alan being dead, Baldwin, who is his son and heir, brings suit against William, urging that Alan was not the owner of the land, but that it really belonged to Alan's wife and Baldwin's mother, or urging that Alan was a mere tenant for life and that Baldwin was the remainderman. William meets the claim thus:—'See here the charter of Alan your father, whose heir you are. He undertook that he and his heirs would warrant this land to me and mine. If a stranger impleaded me, you would be the very person whom I should vouch to warrant me. With what face then can you claim the land?' Baldwin is rebutted from the claim by his ancestor's warranty. It is a curious and a troublesome doctrine which hereafter will give rise to many a nice distinction. A man is debarred, rebutted, from claiming land because the burden of a warranty given by one of his ancestors has fallen upon him. In later days, already when Bracton was writing, this doctrine no longer came into play when a tenant in fee simple had alienated his land; for in such a case the heir had no right to [p. 311] the land, no claim which must be rebutted. It only came into play when the alienator and warrantor had been doing something that he had no business to do, when a husband had been

[1] See above, vol. i. p. 332.

alienating his wife's land, or a tenant for life had made a feoffment in fee. But we may suspect that this doctrine performed its first exploit when it enabled the tenant in fee simple to disappoint his expectant heirs by giving a warranty which would rebut and cancel their claims upon the alienated land[1].

A great and sudden change.

Be this as it may, our law about the year 1200 performed very swiftly an operation that elsewhere was but slowly accomplished. Abroad, as a general rule, the right of the expectant heir gradually assumed the shape of the *retrait lignager*. A landowner must not alienate his land without the consent of his expectant heirs unless it be a case of necessity, and even in a case of necessity the heirs must have an opportunity of purchasing. If this be not given them, then within some fixed period—often it is year and day—they can claim the land from the purchaser on tendering him the price that he paid[2]. The conception of a case of necessity may be widened indefinitely; but for centuries the seller's kinsmen enjoy this *ius retractus*. Norman law[3] and Angevin law[4] took this turn, and we can see from our own borough customs that it was a turn which our own law might easily have taken[5]. But above our law at the critical moment stood a high-handed court of professional justices who were all for extreme simplicity and who could abolish a whole chapter of ancient jurisprudence by two or three bold decisions.

[1] See *e.g.* Note Book, pl. 224: *A* claims land from *X*; *X* pleads a feoffment made to him by an ancestor of *A*, and says that *A* is bound to warrant that gift. See also pl. 1685. Were it fully established that a tenant in fee simple could alienate without his heir's consent, a reliance on warranty would be needless. Blackstone, Comment. ii. 301, says that express warranties were introduced 'in order to evade the strictness of the feodal doctrine of non-alienation without the consent of the heir.' This, though the word 'feodal' is out of place, we believe to be true. The clause of warranty becomes a normal part of the charter of feoffment about the year 1200.

[2] For Germany, see Heusler, Institutionen, ii. 60.

[3] Somma, p. 300; Ancienne coutume, c. 118 (ed. de Gruchy, p. 295).

[4] Viollet, Établissements, i. 120.

[5] See above in our section on The Boroughs. A right of pre-emption, so archaic as to be a tribal rather than a family right, still exists in Montenegro: Code Général des Biens, tr. Dareste et Rivière, Paris 1892, art. 47–56.

§ 3. *The Last Will.*

The germs of the last will.

We may believe that, even in the first days of English [p. 312] Christianity, the church was teaching that the dying man was in duty bound to make such atonement as was possible for the wrongs that he had done and to devote to the relief of the poor and other pious works a portion of the wealth that he was leaving behind him. There is a curious story in Bede's history which may prove somewhat more than this. A certain householder in the realm of Northumbria died one evening but returned to life the next morning. He arose and went into the village church, and, after remaining for a while in prayer, he divided all his substance into three parts; one of these he gave to his wife, another to his sons, the third he reserved to himself, and forthwith he distributed it among the poor. Shortly afterwards he entered the abbey of Melrose[1]. Now certainly this man behaved as though he conceived his property to consist of 'wife's part,' 'bairns' part' and 'dead's part,' and it is a remarkable coincidence that this tale should be told of a Northumbrian, for in after days it was in Scotland and the northern shires of England that the custom which secured an aliquot share to the wife, an aliquot share to the children, and left the dying man free to dispose of the residue of his goods, struck its deepest roots. We might be wrong however in drawing any wide inference from this isolated story, the only tale of the kind that comes to us from these very ancient times, and at all events we are not entitled to say that this man made a testament. To all seeming his pious gift was irrevocable and took effect immediately.

What is a will?

From the middle of the ninth century we begin to get documents which are often spoken of as Anglo-Saxon wills or testaments[2]. Before using these terms, it will be well for us to say a few words about their meaning, and, though we allow

[1] Beda, Hist. Eccl., lib. v. cap. 12. See Baedae Opera, ed. Plummer, ii. 295. The English translation describes his act thus: 'and sona æfter ðon ealle his æhto on ðreo todælde, ænne dæl he his wife sealde, oþerne his bearnum, ðone ðriddan ðe *him gelamp* he instæpe ðearfum gedælde.'

[2] These documents are conveniently collected by Thorpe, Diplomatarium, pp. 459-601. Their nature is discussed by Brunner, Geschichte der Urkunde, i. 199; Hübner, Donationes post obitum (Gierke's Untersuchungen, No. xxvi.).

[p. 313] to them their largest scope, we ought, it would seem, to insist that a will or testament should have at least one of three qualities. In the first place, it should be a revocable instrument. Secondly, it should be an ambulatory instrument. By this we mean that it should be capable of bestowing (though in any given instance it need not necessarily bestow) property which does not belong to the testator when he makes his will, but which does belong to him at the moment of his death. For the third quality that we would describe we have no technical term; but perhaps we may be suffered to call it the 'hereditative' quality of the testament; it can make an heir, or (since our own history forbids us to use the term *heir* in this context) it can make a representative of the testator.

Ambulatory quality of a will.

This matter may be made the clearer by a short digression through a later age. In the twelfth century it became plain that the Englishman had no power to give freehold land by his will, unless some local custom authorized him to do so. A statute of 1540[1], which was explained and extended by later statutes[2], enabled any person who should 'have' any lands as tenant in fee simple to 'give, dispose, will and devise' the same 'by his last will and testament in writing.' Nevertheless, we find the courts holding—and apparently they were but following a rule which had long been applied to those wills of land that were sanctioned by local custom[3]—that a will of freehold lands is no ambulatory instrument. The statute, they hold, does but empower a man to give by will what he 'has' when he makes the will. And such was our law until 1837[4]. Now this piece of history will dispose us to believe that our ancestors, in times not very remote from our own, found great difficulty in conceiving that a man can give by his will what does not belong to him when he makes that will. Our common lawyers would not allow that a statute had surmounted this difficulty, and this although for a long time past the will of chattels, which was under the care of the canonists, had been [p. 314] an ambulatory instrument. Still the statutory will of freehold land was a revocable instrument; it did nothing at all until

[1] Stat. 32 Hen. VIII. c. 1.

[2] Stat. 34-5 Henry VIII. c. 5; 12 Car. II. c. 24. In this context we need not speak of the partial restriction on a will of land held by knight's service which prevailed between 1540 and 1660.

[3] Y. B. 39 Hen. VI. f. 18 (Mich. pl. 23).

[4] Stat. 7 Will. IV. and 1 Vic. c. 26, sec. 3.

its maker died; it did not impede him from selling or giving away the lands that were mentioned in it; and it was always called 'a last will and testament.'

Hereditative wills.

Then again the 'hereditative' quality of the will comes to the front but very slowly. We are not here speaking about the use of words. In England it is as true to-day as it was in the time of Glanvill that only God, not man, can make an heir, for the term *heir* we still reserve as of old for the person who succeeds to land *ab intestato*. But, to come to a more important matter, though at the present day it is possible for the Englishman by his will to transmit the whole of his *persona*, the whole of his fortune 'active and passive,' to a single person—as when he writes 'I give all my real and personal estate to my wife and appoint her my sole executrix'—he can make a complete will without doing this. He may leave Blackacre to John, Whiteacre to Thomas, Greenacre to William, and so forth; there will then be no one person representing the whole of his fortune, the whole mass of those rights and duties which were once his and continue to exist though he is dead, nor will there be any group of persons who jointly represent him or his fortune. John, William, and Thomas do not jointly represent him even as regards the rights that he had in his land. John, for example, has nothing whatever to do with Whiteacre or Greenacre. We find this a tolerable state of things even in the nineteenth century[1]. For a long time past the executor, or the group of executors, has represented the testator as regards that part of his fortune which is called his 'personalty'; but of this representation also we shall see the beginnings in the thirteenth century. What of the ninth?

The Anglo-Saxon will.

Nothing is plainer than that the so-called Anglo-Saxon will is not the Roman testament. The use of writing is Roman, and a vague idea that in some way or another a man can by written or spoken words determine what shall be done after his death with the goods that he leaves behind, comes as a legacy from the old world to the new; but the connexion between the Anglo-Saxon will and the Roman testament is exceedingly remote. We have no one instance of an Englishman endeavouring to institute a *heres* in the Roman sense of that term. That term was in use among the clerks, but it [p. 315]

[1] A great change is being made by the Land Transfer Act, 1897.

could be applied to one who in no sense bore the whole *persona* of a dead man, it could be applied to a devisee, as we should call him, who became entitled to a single piece of the testator's land[1]. The word *testamentum* was laxly used; almost any instrument might be called a testament; the ordinary land-book which witnessed a conveyance by one living man to another living man was a testament[2]. The Anglo-Saxon 'will,' or *cwiðe* as it calls itself, seems to have grown up on English soil, and the Roman testament has had little to do with its development.

The post obit gift.

The most important of its ingredients we shall call 'the post obit gift.' A man wishes to give land to a church, but at the same time he wishes to enjoy that land so long as he lives. A 'book' is drawn up in which he says, 'I give (or, I deliver) the land after my death[3].' Now this book can not fairly be called a will. To all seeming it is neither revocable, nor ambulatory, nor yet is it hereditative. At this moment the testator gives a specific plot of land to a church; he makes the gift for good and all; but the church is not to have possession until after he is dead. Men do not seem to see the ambiguity of this phrase, 'Dono post obitum meum,' or to apply the dilemma, 'Either you give at this moment, in which case you cease to have any right in the land, or else you only promise to give, in which case the promisee acquires at most the benefit of an obligation.' Occasionally, but rarely, the donor says something that we may construe as a reservation of an usufruct or life estate[4]; but generally this seems to be thought quite unnecessary; 'I give after my death,' is plain enough[5].

[1] The royal land-book often says that the donee may at his death leave or give the land to anyone, or to any *heres*, whom he chooses. It seems plain that the person whom he chooses will be his *heres* for that particular piece of land. Apparently the English word which *heres* represented had this same meaning. Thus if Bishop Oswald gives land to Æthelmær for three lives, so that he shall have it for his day, 'and æfter his dæge twam erfeweardan ðam ðe him leofest sy,' any person to whom the donee leaves the land is his *yrfeweard* so far as that plot of ground is concerned. See Cod. Dipl. 675 (iii. 255).

[2] See *e.g.* Cod. Dipl. 90 (i. 108). So also on the continent almost any legal instrument may be called a *testamentum*. Thus a deed of sale is *testamentum venditionis*. Ducange, s.v. *testamentum*.

[3] See *e.g.* Cod. Dipl. i. pp. 133, 216-7, 290.

[4] See *e.g.* Thorpe, Diplomatarium, p. 518.

[5] Thorpe, p. 492: 'Ceolwin makes known by this writing that she gives the land at Alton.....she gives it after her day to the convent at Winchester.'

The post obit gift and the royal land-book.

At a later time such a gift has become impossible, because [p. 316] the courts insist that there can not be a gift without a livery of seisin. You can not give and keep. The desired transaction, if it is to be effected at all, must involve two feoffments. You must enfeoff the church in fee and be re-enfeoffed as its tenant for life. That laxer notions about seisin should have prevailed in earlier times may seem strange, but is a well-attested fact[1]. In part we ascribe it to the influence of those royal land-books which bear the crosses of the bishops and the anathema of the church. The book that the lay holder of bookland possesses authorizes him in express terms to give that land in his lifetime or after his death to whomsoever he pleases, or to whatsoever 'heir' he pleases. The pious recitals in the book tell us that one of the objects of these words is that the donee may have wherewithal to redeem his soul and benefit the churches. The holder of bookland when he makes his post obit gift is, to use a modern but not inappropriate phrase, 'executing a power of appointment' given to him by an authoritative privilege, he is doing what he is empowered to do by the *forma doni*. And as he can give his land after his death, so he can burden his land with the payment of a rent which is only to become current at his death. He can combine these forms. He may give the land to his wife for her life, she paying a rent to the monks at Winchester, and declare that on her death the land itself is to go to the New Minster[2]. He may declare that one thing is to happen if he dies without a son and another thing if he has a son[3]. He can make contingent and conditional gifts[4]. All this he can do, at all events with the king's consent, for a full liberty of alienation *post obitum suum* is secured to him by his land-book.

The death-bed distribution.

But there is a second ingredient in the will, namely, the death-bed confession with its accompanying effort to wipe out past sin. Already in the eighth century the dying man's last words, his *verba novissima*, are to be respected. In the dialogue ascribed to Egbert, Archbishop of York, the question is put, 'Can a priest or deacon be witness of the *verba novissima* which dying men utter about their property?' The answer

[1] See above, p. 92.

[2] Thorpe, p. 495 (Wulfgar).

[3] Thorpe, p. 483 (Ælfred the ealdorman); p. 506 (Ælfgar).

[4] Ibid., p. 470 (Abba).

is, 'Let him take with him one or two, so that in the mouth [p. 317] of two or three witnesses every word may be established, for perchance the avarice of the kinsfolk of the dead would contradict what was said by the clergy, were there but one priest or deacon present[1].' We have here something different from those post obit gifts of which we have already spoken. A man may make a post obit gift though he expects to live many years; but those last words which we find the church protecting are essentially words spoken by one who knows himself to be passing away. And we seem to see that they are as a rule spoken, not written, words; they form part (we may almost say this) of the religious service that is being performed at the death-bed. How much power they have we know not. Some portion of his chattels, no doubt, the dying man may give to pious uses, and perhaps his last words may convey the title to his bookland:—his 'avaricious' kinsfolk (so they are called by the clergy) are watching him narrowly[2]. But further, there is much in future history, much in continental history, to suggest that even here we have to deal with gifts which are thought of as gifts *inter vivos*. The sick man distributes, divides, 'devises,' a portion of his chattels[3]. He makes that portion over to his confessor for the good of his soul; he makes what—regard being had to the imminence of death—is a sufficient delivery of them to the man who is to execute his last will. The questions that we wish to ask—Are his words revocable and are they ambulatory?—are not practical questions. Not in one case in a thousand does a man live many hours after he has received the last sacrament. The germ of executorship seems to be here. The dying man hands over some of his goods to one who is to distribute them for the good of his soul.

The written *cwiðe*.

Then these two institutions 'the post obit gift' and 'the last words' seem to coalesce in the written *cwiðe* of the ninth, tenth and eleventh centuries. At first sight it seems to have many of the characteristics of a true will. For one thing, it is an exceedingly formless instrument; it is almost always

[1] Dialogus Ecgberti, Haddan and Stubbs, Councils, iii. 404.

[2] The case of Eanwene, Cod. Dipl. iv. p. 54, Thorpe, p. 336, is sometimes cited as involving a nuncupatory will of land. But apparently the *quasi* testatrix is still living when the shire moot establishes the gift that she has made.

[3] The *devisare* of later records slowly branches off from *dividere*.

written in the vulgar tongue, not in Latin, even though it comes from a bishop. It calls itself a *cwiðe*, that is a saying, a *dictum*; it is its maker's *nihsta cwiðe*[1]; it contains in advance (if we may so speak) his *verba novissima*. He gives his various lands specifically, providing for his kinsfolk, remembering his dependants, freeing some of his slaves and bestowing lands and rents upon various churches. He also makes gifts of specific chattels, his precious swords, cups and vestments are distributed. He says how many swine are to go with this piece of land and how many with that. He sometimes gives what we should describe as pecuniary legacies. Distinct traces of those qualities which we have called ambulatoriness and revocability are very rare. Occasionally however we see residuary gifts of chattels and of lands[2]. King Alfred tells us that in the past when he had more money and more kinsmen, he had executed divers writings and entrusted them to divers men. He adds that he has burned as many of the old writings as he could find, and declares that if any of them still exist they are to be deemed void[3]. But it is never safe for us to assume that every man can do what a king does with the counsel of his wise men. Lastly, the testator—though this is not very common—says something about debts that are owed to him or by him, and which are not to perish at his death[4]. [p. 318]

The right to bequeath.

But, though all this be so, we can not think that an instrument bearing a truly testamentary character had obtained a well-recognized place in the Anglo-Saxon folk-law. With hardly an exception these wills are the wills of very great people, kings, queens, king's sons, bishops, ealdormen, king's thegns. In the second place, it is plain that in many cases the king's consent must be obtained if the will is to be valid, if the *cwiðe* is to 'stand.' That consent is purchased by a handsome heriot. Sometimes the *cwiðe* takes the form of a

[1] Thorpe, p. 500 = Cod. Dipl. no. 492.

[2] Thorpe, p. 527 = Cod. Dipl. no. 593: Ælfheah, after disposing specifically of various lands, gives to his wife, if she survives him, 'all the other lands which I leave.' See also pp. 554, 585 (Wulf). It must be remembered however that (as the history of our law between 1540 and 1837 proves) we can not argue from a residuary gift to the ambulatory character of the instrument.

[3] Thorpe, p. 490.

[4] Thorpe, p. 550–1 (Archbishop Ælfric); p. 561 (Æthelstan the ætheling); p. 568 (Bishop Ælfric) = Cod. Dipl. nos. 716, 722, 759.

supplicatory letter addressed to the king. In the third place, an appeal is made to ecclesiastical sanctions; a bishop sets his cross to the will; the torments of hell are denounced against those who infringe it. Then again, even in the eleventh century, it seems to be quite common that the *cwiðe* should be executed in duplicate or triplicate, and that one copy of it should be at once handed over to that monastery which is the principal donee, and this may make us doubt whether it is a revocable instrument[1]. In some cases the will shades off into a family settlement[2]. Often it is clear enough that the testator is not disposing of all his property. He merely tries to impose charges in favour of the churches on those unnamed men who will succeed to his land. [p. 319]

Wills and death-bed gifts.

On the whole it seems to us that we have here to deal with a practice which has sprung up among the great, a practice which is ill-defined because it is the outcome of *privilegia*. As to the common folk, we may perhaps believe that the landholder, if and when he can give away his land at all, may make a post obit gift of it which will reduce him to the position of a tenant for life, and that every man, even when his last hour has come, may distribute some part of his goods for the effacement of his sins and the repose of his soul. This distribution we strongly suspect of being in theory a gift *inter vivos*. The goods are handed over to those who are to divide them. In the written *cwiðe* of the great man, it is true, we do not at first sight see anything that looks like either a delivery *inter vivos* or the appointment of an executor. At first sight the dead man's estate seems expected to divide itself. Then, however, we observe that the will begins with a prayer that the king will uphold it. May we not say that the king is the executor of these wills? In a few instances we find something more definite. 'Now I pray Bishop Ælfstan that he protect my widow and the things that I leave to her.....and that he aid that all the things may stand which I have bequeathed[3]'—'And be Bishop Ælfric and Tofig the Proud and Thrunni guardians of this *cwiðe*[4].' When among the great the practice

[1] Some specimens of these 'chirographed' wills are given in Brit. Mus. Facsimiles, vol. IV. Apparently they are not signed either by the testator or by any witnesses.

[2] Thorpe, pp. 468, 479, 500.

[3] Thorpe, p. 517.

[4] Thorpe, p. 566 = Cod. Dipl. no. 970: 'And be Alfric biscop and Tofi Prude and Ðrunni ðese quides mundes hureðinge ðat it no man awende.'

of uttering one's last words in advance while one is still whole [p. 320] and strong becomes established, the goods are no longer handed over when the words are uttered and the *cwiðe* is becoming an ambulatory instrument; but still some person is named who is to effect that distribution which is to be made at the testator's death. A well-known text in the Epistle to the Hebrews, a text far better known than anything in the Institutes, says that a testament is of no effect until the testator's death; but even at the call of an inspired writer men were not able to accept this doctrine all at once[1].

Intestacy in Cnut's day.

Already in Cnut's day it was unusual for a man to die without 'last words,' and it was necessary for the king to combat, or perhaps to renounce, the notion that the man who has said no last words has proved himself a sinner. 'If any one leaves this world without a *cwiðe*, be this due to his negligence or to sudden death, then let the lord take naught from the property, save his right heriot; and let the property be distributed according to his (the lord's) direction and according to law among the wife and children and nearest kinsfolk, to each the proper share[2].' Some lords, we may suspect, perhaps some episcopal and abbatial lords, had already been saying that if a man leaves the world without taking care of his soul, his lord, or the church, ought to do for him what he should have done for himself. But the time had not come when this doctrine would prevail.

The lord and the *cwiðe*.

The law that we have just cited seems to assume, not only that every man will have a lord, but that every man will have a lord with a court, and that by this lord's hand his goods, perhaps also his lands, will be divided among his kinsfolk, the 'right heriot' having been first taken. The heriot gives an occasion for what we may call a magisterial, though it is also a seignorial, intervention between the dead man and his heirs. Another such occasion is afforded by the soul-scot or mortuary. The dead man's parish church has a legal claim to a payment when he is buried[3]. At least in later days, it generally claims

[1] Paulus ad Hebraeos, ix. 16, 17: 'Ubi enim testamentum est, mors necesse est intercedat testatoris. Testamentum enim in mortuis confirmatum est. Alioquin nondum valet, dum vivit qui testatus est.' See Hist. Rames. c. 26 (Gale, p. 406).

[2] Cnut, II. 70.

[3] See the passages collected in Schmid, Glossar, s. v. *sáwl sceat*.

[p. 321] the best, or the second best, beast or other chattel; very commonly the testator provides for his mortuary in his will. Not unfrequently it happens that a monastery can demand both soul-scot and heriot. But though the lord is thus tempted to intervene, it does not seem likely that Anglo-Saxon law knew anything either of the probate of wills or of any legal proceeding that must of necessity take place when there has been an intestacy, anything like the 'grant of administration.'

Norman law.

We may doubt whether the Normans brought with them to England any new ideas about these matters. They knew the post obit gift of land. It was possible for a man to say in a charter, 'I have given this land after my death,' or 'I have given it after the deaths of myself and my wife,' or 'I have given the whole of it after my death if I leave no issue of my body, but half of it if I leave issue[1].' In all probability they knew the death-bed distribution of chattels. But that they had either accepted or rejected anything that could be accurately called a testament we do not know.

The will under the Norman kings.

In England after the Conquest there was no sudden change. A man could still make a post obit gift of land and sometimes made it with impressive solemnity. Thus in a charter which comes from the early years of the twelfth century we read—'And thereupon in the same chapter the said Wulfgeat after his death for the weal of his soul gave to the church of Ramsey ten acres of his own land. And after the chapter was at an end the monks together with the said Wulfgeat came together into the new church, and there when, as the custom was after a chapter, the prayers for the dead had been finished, the said Wulfgeat made a gift of the said land upon the portable altar dedicated to the Holy Trinity by a rod which we still have in our keeping[2].' Occasionally in such cases it was thought well that the donor should put himself under the obligation of paying a small rent to the abbey while he lived[3], but there was no necessity for a duplex process of feoffment and refeoffment, which would imply an analysis of the post obit gift such as men had not yet made.

[1] Cartulaire de l'abbaye de la S. Trinité du Mont de Rouen (Documents inédits), i. 429.

[2] Cart. Rams. ii. 262. The mention of the prayers for the dead suggests that by way of fiction Wulfgeat is supposed to he making the gift 'post obitum suum.'

[3] Ibid. i. 133.

Post obit gifts of chattels.

The vague conception that prevailed as to the nature of [p. 322] these transactions can be illustrated by certain dealings which are characteristic of the Norman age. We hardly know how to describe them. The result of them is to be that after a certain person's death a church will take the whole, or some aliquot share, of his chattels. If we call them testaments, we say too much; if we call them present gifts, we say too much; if we call them covenants to give, again we say too much. Occasionally the language of contract may be employed. For example, a *conventio* is made between the Abbot of Burton and Orm of Darlaston; the Abbot gives land to Orm, and Orm and his son agree that upon their deaths their bodies shall be carried to Burton, and with their bodies is to go thither the whole of their *pecunia* whatsoever and wheresoever it may be[1]. Or land may be given by the monks 'upon this convention,' that when the feoffee is dead he shall cause himself to be carried to the monastery for burial with his whole *pecunia*[2]. Or one who holds land of a convent may endeavour to bind his heirs for all time to leave the third part of their chattels 'by way of relief' to the house of Stanlaw[3]. So we are told that Earl Hugh and his barons, when they founded the abbey at Chester, ordained that all the barons and knights should give to God and St Werburgh their bodies after death and the third part of their whole substance; and they ordained this not only for the barons and knights, but also for their burgesses and other free men[4]. Such a transaction as this, in which the gift shades off into a law for the palatinate, is of great importance when we trace the growing claims of the church to distribute for pious uses the chattels of dead persons; but for the moment we are discussing the post obit gift, and, though words of covenant may sometimes be used, we seem to see that the transaction is conceived to be a present gift. 'He gave himself to the church so that, should he wish to become a monk, he

[1] Cart. Burton, p. 35: 'Debet autem cum eis afferri et tota pars eorum pecuniae quantacunque habuerint et in omnibus rebus et in omnibus locis.'

[2] Cart. Burton, p. 30: 'cum autem mortuus fuerit, deferre ad nos se faciet cum tota pecunia sua ad sepeliendum.'

[3] Whalley Coucher, i. 155.

[4] Monasticon, ii. 386. 'Insuper constituerunt ut singuli barones et milites darent Deo et S. Werburgae post obitum suum sua corpora et tertiam partem totius substantiae suae. Et non solum haec constituerunt de baronibus et militibus sed etiam de burgensibus et aliis hominibus liberis suis.'

[p. 323] would enter religion in no other place, and, in case he should die a layman in England, he should be buried here with a third of the whole *pecunia* which he should have in England[1].' When Earl Gilbert of Lincoln says in a charter, 'Know ye that for the redemption of my sins, and for the special love that I have for the church of St Mary of Bridlington, I have delivered myself (*mancipavi me ipsum*) to the said church, to the intent that wherever I may bring my life to a close I may receive a place of burial in the said church[2],' if we were to translate his curious words into modern terms, we might perhaps say that he is making an irrevocable will of his personalty for the behoof of his favourite church; still he thinks that he is making a present gift. Even in 1240 a man will say, 'Know that I have given and confirmed by this charter to God and St German of Selby all the lands that I now have or shall hereafter acquire, and one half of the chattels that I shall acquire during my life, to be received by the monks after my death[3].'

Evolution of definite law.

We have now to watch a complicated set of interdependent changes, which took place during the twelfth and thirteenth centuries, and which gradually established a definite law. In the first place we will describe in a summary fashion the various movements.

(1) The king's court condemns the post obit gift of land and every dealing with land that is of a testamentary character; but it spares the customs of the boroughs and allows certain novel interests in land to be treated as chattels.

(2) By evolving a rigorously primogenitary scheme for the inheritance of land, it destroys all such unity as there has ever been in the law of succession. Henceforth the 'heir' as such will have nothing to do with the chattels of the dead man, and these become a prey for the ecclesiastical tribunals.

(3) The church asserts a right to protect and execute the last will of the dead man. In her hands this last will (which now can only deal with chattels) gradually assumes

[1] Hist. Abingd. ii. 124. Similar arrangements, Ibid. 130, 168.

[2] Monasticon, vi. (1) 288: 'mancipavi me ipsum eidem ecclesiae, ea videlicet ratione ut ubicunque vivendi finem fecero in monasterio Bridlintonensi locum sepulturae accipiam.'

[3] Selby Coucher Book, i. 204. As to these post obit gifts of the whole or an aliquot share of the goods that the giver will leave at his death, see Heusler, Institutionen, ii. 630–642.

under foreign influence a truly testamentary character, and [p. 324] the executor of it gradually becomes the 'personal representative' of the dead man, but has nothing to do with freehold estates.

(4) The horror of intestacy increases. The church asserts a right (it is also a duty) of administering the dead man's goods for the repose of his soul. The old law which would have given the intestate's goods to his kinsfolk, being now weakened by the development of the rule which gives all the land to the eldest son, disappears, or holds but a precarious position at the will of the church.

Of these four movements we must speak in turn, though they affect each other.

Feudalism and wills of land.

The common belief that before the Conquest the landholder could give his land by will, and that this power was taken from him at a blow by the 'feudalism' which came from France, we can not accept. The post obit gift of land—and this we believe to have been all that had been sanctioned by the ordinary law of unconquered England—did not disappear until late in the twelfth century; it had been well enough known in Normandy; and the force that destroyed it in England can not properly be called feudal.

Post obit gifts of land.

From the point of view of the feudal lord a post obit gift is not much more objectionable than an out and out gift. We can not in mere feudalism find any reason why the landholder should not make a post obit gift with the consent of his lord, and without the consent of his lord it is very doubtful whether he can make a gift at all[1]. And so there need be nothing to surprise us in the following story. That great man Eudo the Dapifer was lying on his death-bed in Normandy, and, having received absolution, he made a division, or 'devise' as we say, of all his property in the presence and with the advice and consent of King Henry I. And he commanded his folk, appealing to the fealty which they owed him, to carry his body to the abbey which he had built at Colchester. And with his body he bequeathed to that house the manor of Brightlingsea and a hundred pounds of money and his gold ring. He also gave a cup and his horse and his mule; but these the abbot had to surrender to the king in order that he might obtain a concession

[1] See above, vol. i. p. 343.

[p. 325] of the said manor: in order (to use the old phrase) that the *cwiðe* might stand[1].

Condemnation of the post obit gift.

We are told by a plaintive monk that a few years after Glanvill's book was written, some new rule was put in force at the instance of Geoffrey Fitz Peter, one of Glanvill's successors in the justiciarship, so as to invalidate a gift which William de Mandeville, Earl of Essex, had made on his death-bed to Walden Abbey. The ministers of the devil had of late years established a law which until then had never been heard of, to the effect that 'no one, even though he be one of the great, when he is confined to his bed by sickness, can bequeath by his last will any of the lands or tenements that he has possessed, or grant them to those men of religion whom he loves above all others[2].' We may well believe that there is some truth in this story, and that just at the time when Glanvill was writing and the last of the Mandeville earls was dying, the newly reformed king's court was for the first time setting its face sternly against the ancient post obit gift of land.

The law in Glanvill.

The reasons for this determination are not far to seek, for Glanvill was at pains to explain them at some length. In one place he says that only God can make an heir, not man[3]. This remark takes us back to the 'nullum testamentum' of Tacitus; but it is thrown out by the way, for of any institution of an

[1] Monast. iv. 608: 'Ipse vero...rerum omnium suarum fecit divisionem, praesente et adhortante atque concedente rege Henrico. Praecepit etiam suis omnibus, contestans fidem quam ei debebant, ut suum corpus ad abbatiam suam quam Colecestriae construxerat deferrent. Delegavit etiam cum suo corpore ad illum locum manerium Bryhtlyngeseie et centum libras denariorum, anulum etiam suum aureum...Praeterea cyphum suum.....equum etiam suum et mulum; quae tamen omnia Gilebertus Abbas.....regi Henrico remisit ut impetraret ab eo concessionem praedicti manerii; et beneficium regium in hoc impetratum est.' The source from which this story comes is not first-rate, but had a writer of a later time wished to forge a title for the house, he would have told some lie more probable than one which makes land pass by a last will. Whether Eudo had kinsfolk or no, seems uncertain; see Round, Geoffrey de Mandeville, p. 173.

[2] Monast. iv. 147: 'Novi igitur recentesque venerunt qui hanc inauditam a saeculo legem a ministris Zabuli noviter inventam statuere decreverunt. Ne aliquis quamvis magnus lecto prae infirmitate receptus in extrema voluntate quicquam de terris vel tenementis iam ante possessis alicui liceat legare, nec etiam viris religiosis prae aliis dilectis conferre.' Earl William died in 1189: had he lived a little longer, he also would have been justiciar along with Hugh de Puiset; see Round, Geoffrey de Mandeville, p. 243.

[3] Glanvill, vii. 1.

heir in the Roman sense there never had been any talk in [p. 326] England, unless some new ideas had of late flown hither from Bologna and threatened to convert the old post obit gift into a true testament[1]. But in another passage we have earnest argument. 'As a general rule, every one in his life-time may freely give away to whomsoever he pleases a reasonable part of his land. But hitherto this has not been allowed to any one who is at death's door, for there might be an immoderate dissipation of the inheritance if this were permitted to one who in the agony of approaching death has, as is not unfrequently the case, lost both his memory and his reason; and thus it may be presumed that one who when sick unto death has begun to do, what he never did while in sound health, namely, to distribute his land, is moved to this rather by his agony than by a deliberate mind. However, such a gift will hold good if made with the heir's consent and confirmed by him[2].'

Testamentary gifts abolished in the interest of the heir.

And so the gift of land by a last will stood condemned; not because it infringes any feudal rule, for in this context Glanvill says no word of the lord's interests, but because it is a death-bed gift, wrung from a man in his agony. In the interest of honesty, in the interest of the lay state, a boundary must be maintained against ecclesiastical greed and the other-worldliness of dying men. And that famous text was by this time ringing in the ears of all lawyers—'Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur[3].' Rejecting the laxer practices of an earlier time, rejecting the symbolic delivery of land by glove or rod or charter[4], they were demanding a real

[1] In a very vague sense there has sometimes been in the Norman time some talk about making an heir. Hist. Abingd. ii. 130 (temp. Hen. I.): a tenant of the abbey covenants that he will make no heir to his land and will endow no wife thereof, but that after his death he will demise it to the abbey. This seems a confession that he is but tenant for life. Cart. Whitby, ii. 680 (early twelfth century): Nigel de Albini writes to his brother William—I have instituted you heir of my honour and all my property, in order that you may confirm the restorations of lands that I have made to divers churches and to men whom I had disinherited.

[2] Glanvill, vii. 1: 'In extremis tamen agenti non est hoc cuiquam hactenus permissum.' The *hactenus*, which we translate as *hitherto*, seems to tell us that the doctrine is not as yet very firmly established, nor utterly beyond argument. On the other hand, it does not tell us that an old, strict rule against death-bed gifts is being now called in question for the first time. Glanvill is speaking of the practice of the king's court, and the king's court of his day was but just beginning to be an ordinary tribunal with definite doctrines.

[3] Cod. 2. 3. 20; Bracton, f. 38 b, 41.

[4] See above, p. 89.

[p. 327] delivery of a real seisin. They were all for publicity; their new instrument for eliciting the truth, the jury, would tell them only of public acts. And so the old post obit gift perished. It was a gift without a transfer of possession. Henceforth if a tenant in fee would become tenant for life, there must be feoffment and refeoffment, two distinct transactions, two real transfers of a real seisin. The justices were fighting, not so much against a Roman testament, as against the post obit gift. They had the heir's interest at heart, not the lord's. Even the lord's licence would not enable the tenant to disinherit his heir by a 'devise' or a post obit gift. And these justices owed the heir something. They were on the point of holding that he had no right in the land so long as his ancestor lived. In their bold, rapid way they made a compromise.

Attempts to devise land.

As a matter of fact, during the thirteenth century men not unfrequently professed to dispose of their lands by their last wills or by charters executed on their death-beds. It is a common story in monastic annals that so and so bequeathed (*legavit*) land to our church and that his heir confirmed the bequest[1]. The monks hurried off from the side of the dying man to take seisin of some piece of his land; they trusted, and not in vain, that they would be able to get a confirmation out of the heir; 'a father's curse' was a potent argument[2]. But as a matter of law no validity was ascribed to these legacies or imperfect gifts. What had happened, when analyzed by the lawyer, was either that the heir had made a feoffment, or that the monks having already taken seisin, he had released his right to them, and such a release would have been just as effectual if there had been no will in their favour, and if they had been—as in strictness of law they really were—mere interlopers. We have seen that for a short while in the middle of the thirteenth century it seemed very likely that a power to leave land by will would be introduced by that effective engine

[1] See *e.g.* Winchcomb Landboc, i. 156–9: Liana of Hatherley at her death bequeathed (*legavit*) all her land at Hatherley to our infirmary; her brother and heir granted and confirmed (*concessit et confirmavit*) what she had previously given (*dedit*).

[2] Damnatory clauses are occasionally found in charters of this age; *e.g.* Monasticon, v. 662, Bertram de Verdon: 'et prohibeo ex parte Dei et mea ne quis heredum meorum huic donationi meae contraire vel eam in aliquo perturbare praesumat.'

the *forma doni*. The court hesitated for a while and then once [p. 328] more it hardened its heart: land was not, and even the *forma doni* could not make it, bequeathable[1].

Devisable burgages.

Already in Glanvill's day the burgage tenement was a recognised exception from the general rule. We are told that the assize of mort d'ancestor will not lie for such a tenement because there is another assize which has been established for the profit of the realm[2]. These words apparently refer us to some ordinance of Henry II. which we have not yet recovered, but which may still be lurking in the archives of our boroughs. In the thirteenth century it was well-known law that under custom a burgage might be given by testament; but apparently the limits of this rule varied from town to town. Bracton seems to have been at one time inclined to hold that the burgage could be given by will when, but only when, it was comparable to a chattel, having been purchased by the testator and therefore being an article of commerce. However, while Bracton was writing the citizens of London and of Oxford came to the opinion that, even if the testator had inherited his burgage, he might bequeath it[3]. In course of time this doctrine prevailed in very many boroughs, and if we may judge from wills of the fourteenth century, the term 'borough' must in this context have borne its widest meaning. We may believe, however, that in the past a line had been drawn between the purchased and the inherited tenement; it is just in the boroughs that we find what foreign lawyers know as the *retrait lignager*, the right of the expectant heir to redeem the family land that his ancestor has alienated[4].

Probate of burgage wills.

If, as Bracton thought, the burgage could be bequeathed because it was a '*quasi* chattel,' the inference might be drawn that such a bequest would fall, like other bequests, within the domain of the ecclesiastical courts. This inference Bracton drew[5]; but the boroughs resisted it and at length succeeded in establishing the principle that the bishop had nothing to do

[1] See above, p. 26.

[2] Glanvill, xiii. 11.

[3] Bracton, f. 407 b, 409 b, 272 (a passage distorted by interpolation); Note Book, pl. 11. See also the note to Britton, i. 174.

[4] See above in our section on The Boroughs.

[5] Bracton, f. 407 b, 409 b; Note Book, pl. 11; Plac. Abbrev. (19 Ed. I.) pp. 284–5; O. W. Holmes, L. Q. R. i. 165.

[p. 329] with the will, in so far as it was a gift of a burgage tenement[1]. In course of time some at least of the larger boroughs established registers of the wills that dealt with such tenements. The will had to be produced before the borough court and enrolled[2]; some towns were also requiring the enrolment of conveyances. Occasionally in the fourteenth century the burgher would execute two documents, a formal 'testament' dealing with his movables, and a less formal 'last will' which bestowed his tenements; but we see no more than a slight tendency to contrast these two terms[3]. It is before the borough court, not before the king's court, that the man must go who desires to claim a tenement that has been bequeathed to him but is being withheld. However, to meet his case writs are devised which enjoin the officers of the borough to do him justice; from their first words they are known as writs *Ex gravi querela*[4]; but they seem hardly to belong to the period which is now before us.

The chattel real.

That the 'marriage,' the 'wardship' and the 'term of years,' are *quasi* chattels for testamentary purposes is a doctrine which seems to have grown up rapidly in the first half of the thirteenth century. We have already endeavoured to explain it by saying that these things are regarded as investments of money[5]. In this instance free play was given to the doctrine which likened them to movables; the legacy of a term of years, like the legacy of a horse or of ten pounds, was a matter for the spiritual tribunal, and it became settled law that the testator's 'chattels real' pass to his executors.

The church and the testament.

In the course of the twelfth century our primogenitary scheme for the descent of land was established in all its rigour. It then became absolutely impossible that one system of succession should serve both for land and for chattels. We have indeed argued before now that in all probability our old law had never known the unity of the Roman *hereditas*, but

[1] Liber de Antiq. Legib. pp. 41, 106. Already in 1268 the London citizens asserted that the burgage will should be proved in the hustings, and the king took their side in a dispute with the representative of the bishop. See also Letters from Northern Registers, pp. 71–2.

[2] In London this goes back at least as far as 1258: Sharpe, Calendar of Hustings Wills.

[3] Sharpe, Calendar of Hustings Wills, pp. xxv, xxxi; Furnivall, Fifty English Wills, pp. 22, 24, 37, 43, 55, 68.

[4] Reg. Brev. Orig. f. 244 b.

[5] See above, p. 116.

may from the first have had one rule for land, another for [p. 330] chattels, one for a man's armour, another for a woman's trinkets. But in the twelfth century, just when there seems a chance that at the call of Roman law our lawyers will begin to treat the inheritance as a single mass, they raise an insuperable barrier between land and chattels by giving all the land to the eldest son. Henceforward that good word *heir* has a very definite and narrow meaning. What is to become of the chattels? They do not pass to the heir; they are not inherited. While the temporal law is hesitating, ecclesiastical law steps in.

Progress of ecclesiastical claims.

For ages past the church had been asserting a right, which was recognized by imperial constitutions, to supervise those legacies that are devoted to pious uses. The bishop, or, failing him, the metropolitan, was bound to see that the legacy was paid and properly applied, and might have to appoint the persons who were to administer the funds that were thus devoted to the service of God and works of mercy[1]. Among the barbarians, where in the past there had been *nullum testamentum*, the pious gifts were apt to be the very essence of the testament. The testator was not dissatisfied with the law of intestate succession, but he wished in his last hour to do some good and to save his soul. Thus the right and duty of looking after the pious gifts tended to become a jurisdiction in all testamentary causes. The last will as such was to be protected by the anathema[2].

Jurisdiction over testaments.

We may believe that for some time after the Conqueror had made his concession to the church, the clergy would have been satisfied if testamentary causes had been regarded as 'mixed,' that is, as causes which might come indifferently before the lay or the spiritual tribunal. Elsewhere they had to be content with this. Our Norman kings did not renounce any such testamentary jurisdiction as was then existing. The king was prepared as of old to enforce the *cwiðe*. Henry I. in his coronation charter says[3]—'If any of my barons or men falls ill, I concede the disposition that he makes of his fortune (*pecunia*);

[1] Cod. Iust. 1. 3. 45.

[2] On the whole of this subject see Selden's learned tract on the Original of Ecclesiastical Jurisdiction of Testaments (Collected Works, ed. 1726, vol. iii. p. 1665).

[3] Carta Hen. I. c. 7.

[p. 331] and if he meets a sudden death by arms or sickness and makes no disposition, his wife, children or liege men[1] may divide his fortune (*pecunia*) for the good of his soul, as they shall think best.' The king, and now in general terms, grants that his baron's *cwiðe* shall 'stand,' and in dealing with a case of intestacy says nothing of the bishop, though we notice that already the intestate's goods are no longer inherited; they are distributed for the good of the dead man's soul[2].

Victory of the church courts.

It is well worthy of remark that Henry II. and Becket, though they sought for causes of dispute, did not quarrel about the testament. Quietly the judges of the royal court, many of whom were bishops or archdeacons, allowed the testament to fall to the share of the ecclesiastical forum. They were arranging a *concordat*; the ablest among them were churchmen. About many matters, and those perhaps which seemed the most important, they showed themselves to be strong royalists; in particular they asserted, to the peril of their souls, that the church courts had nothing to do with the advowson. But as regards the testament, they were willing to make a compromise. The spiritual courts might take it as their own, provided always that there were to be no testamentary gifts of land. This concession might well seem wise. Under the influence of Roman law men were beginning to have new ideas about the testament; it was becoming a true testament, no mere post obit donation or death-bed distribution. The canonist, being also a Romanist, had a doctrine of testaments; the English law had nothing that deserved so grand a name.

The lay courts and the last will.

The concession was gradually made. Glanvill knows an action begun by royal writ by which a legatee can demand the execution of a dead man's will. The sheriff is commanded to uphold, for example, the 'reasonable devise' which the dead man made to the Hospitallers, if they can prove that such a devise was made. However, if in this action the defendant denied that the testament was duly executed, or that it contained the legacy in question, then the plea went to the court Christian, [p. 332] for a plea of testament belonged to the ecclesiastical judge.

[1] *Aut legitimi homines.* Even if the original has *legitimi* not *ligii*, we seem to be justified in rendering the phrase by *liege men*.

[2] Also it is to be noted that the king makes no promise as to what will happen if a man, who has had fair warning of approaching death, refuses to make a will and so dies desperate.

For a short time therefore it seems as if the function of the spiritual forum would be merely that of certifying the royal court that the dead man made a valid will in such and such words, or that his supposed will was invalid in whole or in part. But this was only a transitional scheme. The writs to the sheriff bidding him uphold a testament or devise have dropped out of the chancery register at the beginning of Henry III.'s reign. Thenceforth the legatee's action for his legacy was an action in the court Christian and the will was sanctioned only by spiritual censures, though of course there was imprisonment in the background[1].

The will with executors.

Meanwhile the type of will that had begun to prevail in England was the will with executors. One of the earliest documents of this kind that have come down to us is the will of Henry II.[2]. It takes the form of a letter patent addressed to all his subjects on both sides of the sea. It announces that at Waltham in the year 1182 in the presence of ten witnesses (among whom we see Ranulf Glanvill) the king made, not indeed his testament, but his division or devise (*divisam suam*) of a certain part of his fortune. He gives sums of money to the Templars and Hospitallers, he gives 5000 marks to be divided among the religious houses of England 'by the hand and view' of six English bishops and Glanvill his justiciar; he gives 3000 marks to be divided among the religious houses of Normandy by the hand and view of the five Norman bishops, 1000 marks to be divided by the hand and view of the bishops of le Mans and Angers among the religious houses of Maine and Anjou; he gives other sums to be expended in providing marriages for poor free women in his various dominions; he charges his sons to observe this distribution; he invokes God's curse upon all who infringe it; he announces that the pope has confirmed this 'devise' and has sanctioned it with the anathema. We notice that this exceedingly solemn document, which no doubt was the very best that the English chancery could produce, did not call itself [p. 333]

[1] Glanvill, vii. 6, 7; xii. 17, 20. As to the Register, see Harv. L. R. iii. 168. Already the ancient Irish Register contains a writ prohibiting the ecclesiastical court from entertaining a plea of chattels, 'quae non sunt de testamento vel matrimonio': Ibid. 114. Such writs are common on early rolls of Henry III.; they imply that the legatee can go to the court Christian.

[2] Foedera, i. 47.

a testament, did not use the terms *do, lego*, did not even use the term *executor*. It contained no residuary gift, no single legacy that was not given to pious uses[1]. Still here indubitably we see executors, one set of executors for England, another for Normandy, another for Maine and Anjou; all of them, save Glanvill, are of episcopal rank. Then in Glanvill's book we find the *testamentum* and the *executor*. 'A testament should be made in the presence of two or three lawful men, clerks or laymen, who are such that they can be competent witnesses (*testes idonei*). The executors of the testament should be those whom the testator has chosen and charged with this business; but, if he has named no one, then his kinsmen and relations may assume the duty[2].'

Origin of the executor

Who is the executor and whence does he come? This is not a question that can be answered out of English documents, though, as already said, we may strongly suspect that, under some name or another (perhaps as *mund* of a *cwiðe*) he has been known in England for several centuries. That he does not come out of the classical Roman law is patent; it is only late in the day, and only perhaps in England and Scotland, that he begins to look at all like an instituted *heres*; yet under one name or another (*executor* gradually prevails) he has been known in many, if not all, parts of Western Europe, notably in France. There seems to be now but little doubt that we can pursue his history back to a time when, despite Roman influence, the transaction in which he takes a part is not in our eyes a testamentary act. The dying man made over some portion of his lands or goods to some friend who would carry out his last wishes. The gift took effect at once and was accompanied by what was at first in fact, afterwards in theory, a delivery of possession. The church developed this rude institution. It compelled the trustee, who very often was of the clergy, to perform the trust, which almost always was a trust for the religious or the poor. Then under the influence of renascent Roman law the 'last division' or 'devise' began to bear a testamentary character. The devise might be made [p. 334] by one who hoped that he had many years to live (in 1182

[1] Abp Theobald appoints four executors, though he does not call them by this name; they are to divide his goods among the poor according to instructions that they have received: Jo. Sarisb. epist. 57 (ed. Giles, i. 60).

[2] Glanvill, vii. 6.

Henry II. was going abroad, but he did not mean to die); it was revocable, it was ambulatory; there was no longer, even in fiction, a present transfer of possession. But the executor kept a place in the scheme; he was very useful; he was the church's lever[1].

The executor in England and elsewhere.

On the mainland and in the common law of the cosmopolitan church, as testamentary freedom grows, the executor's main duty becomes that of compelling the *heres* or *heredes* to pay the legacies. The testator's *persona* will be represented by the heir. This representation will become more and more complete as Roman law has its way, and old differences between the destiny of lands and the destiny of goods disappear. But the executor is an useful person who may intervene between the heir and the legatees; he is bound to see that the legacies are paid. If the heir is negligent, the executor steps in, collects the debts and so forth. Some canonists hold that he can sue the testator's debtors. While the heir has an *actio directa*, they will concede to the executor an *actio utilis*. He is a favourite with them; he is their instrument, for a *heres* is but too plainly the creature of temporal law, and the church can not claim as her own the whole province of inheritance[2]. But here in England a somewhat different division of labour was made in the course of time; the executor had nothing to do with the dead man's land, the heir had nothing to do with the chattels, and gradually the executor became the 'personal representative' of the testator. The whole of the testator's fortune passed to his executor, except the freeholds, and, for the purpose of a general theory of representation, this exception ceased to be of any cardinal importance as time went on, since the ordinary creditors of the dead man would have no claim against his freeholds. Finally, [p. 335]

[1] Holmes, L. Q. R. i. 164; Palumbo, Testamento Romano e Testamento Langobardo, ch. x.; Heusler, Institutionen, ii. 652; Le Fort, Les exécuteurs testamentaires, Geneva, 1878; Pertile, Storia del Diritto Italiano, iv. 31. There seems no doubt that the testamentary executor is in origin a Germanic *Salmann*. The term *executores* slowly prevails over many rivals such as *gardiatores*, *erogatores*, *testamentarii*, *procuratores*, *dispensatores*, and so forth. Simon de Montfort appointed, not an executor, but an attorney.

[2] As to the position of the continental executor in the thirteenth century, see Durantis, Speculum, Lib. ii. Partic. ii. § 13 (ed. Basiliae, 1624, vol. i. p. 690). He keeps a place in some of the modern codes; but it is never that prominent place which English law awards him.

at the end of the middle ages the civilian in his converse with the English lawyer will say that the *heres* of Roman law is called in England the executor[1].

The medieval will.

Postponing for a while the few words that must be said about this process, we may look at the medieval will and may regret that but too few specimens of the wills made in the thirteenth century have been published; from the fourteenth we have an ampler supply[2]. It is plain that the church has succeeded in reducing the testamentary formalities to a minimum. This has happened all the world over. The dread of intestacy induces us to hear a nuncupative testament in a few hardly audible words uttered in the last agony, to see a testament in the feeble gesture which responds to the skilful question of the confessor, and that happy text about 'two or three witnesses' enables us to neglect the Institutes of Justinian[3]. At the other end of the scale we see the solemn notarial instrument which contains the last will of some rich and provident prelate or magnate who desires the utmost 'authenticity' for a document which will perhaps be produced in foreign courts[4]. Between these poles lies the common form, the written will sealed by the testator in the presence of several witnesses[5].

Its phrases.

In the thirteenth century it is usually in Latin; but Simon de Montfort made his will in French—it is in the handwriting of his son Henry[6]. French wills became commoner and in the second half of the fourteenth century English wills begin to appear[7]. If in Latin, the document usually calls itself a

[1] Doctor and Student (ed. 1668), i. c. 19: 'the heir which in the Laws of England is called an executor.'

[2] Testamenta Eboracensia (Surtees Soc.); Durham Wills (Surtees Soc.); Sharpe, Calendar of London Wills; Furnivall, Fifty English Wills. An effort should be made to collect the wills of the thirteenth century. A cautious use will here be made of the wills of a somewhat later age.

[3] Test. Ebor. i. 21: a knight before going to the war makes a nuncupative will in church (1346). Peckham's Register, i. 256; Test. Ebor. i. 74. But the nuncupative will was not very common in the fourteenth century.

[4] Test. Ebor. i. 13, 24, 31, 235 (John of Gaunt).

[5] The general rule of the canon law seems to have been that a will could be sufficiently attested by the parish priest and two other witnesses, but that two witnesses without the parish priest would suffice if the testator was leaving his goods to pious uses. See c. 10. 11. X. 3. 26; Durantis, Speculum (ed. 1624), p. 679.

[6] Bémont, Simon de Montfort, 328.

[7] Test. Ebor. i. 185 (1383); Furnivall, Fifty English Wills.

testament—*Ego A. B. condo testamentum meum* is a common [p. 336] phrase—in French or English it will call itself a testament or a devise or a last will; one may still occasionally speak of it as a 'book[1],' or a 'wytword[2].' Sometimes we see side by side the Latin testament which constitutes executors, and a last will which in the vulgar tongue disposes of burgage tenements; but no strict usage distinguishes between these terms. Sometimes a testator is made by his legal adviser to express a wish that if his testament can not take effect as a testament, it may be deemed a codicil; but this is a trait of unusual and unpractical erudition. Of course there is no institution of an heir and there is no disheriting clause. In Latin 'do, lego' are the proper words of gift; in French 'jeo devis'; in English 'I bequeath,' or 'I wyte.' The modern convention which sets apart 'devise' for 'realty' and 'bequeath' for 'personalty' is modern; in the middle ages the English word, which takes us back to the old *cwiðe*, is the equivalent of the French word.

Its substance.

Though damnatory or minatory clauses are now less common than they were, the will is still a religious instrument made in the name of the Father, Son and Holy Ghost. The testator's first thought is not of the transmission of an *hereditas*, but of the future welfare of his immortal soul and his mortal body. His soul he bequeaths to God, the Virgin and the saints; his body to a certain church. Along with his body he gives his mortuary, or his 'principal' (*principale*), or corspresent[3]; one of the best chattels that he has; often, if he is a knight, it will be his war-horse[4]. Both Glanvill and Bracton have protested that neither heriot nor corspresent is demanded by general law, though custom may exact it[5]. Elaborate instructions will sometimes be given for the burial; about the tapers that are to burn around the bier, and the funeral feast. For a while testators desire splendid ceremonies; later on they begin to set their faces against idle pomp. Then will come the pecuniary and specific legacies. Many will be given to pious uses; the four orders of friars are rarely forgotten by a well-to-do testator; a bequest for the repair of bridges is

[1] Furnivall, p. 27. [2] Test. Ebor. i. 186.

[3] Test. Ebor. i. 185.

[4] Test. Ebor. i. 264: 'pro mortuario suo meliorem equum suum cum armatura secundum consuetudinem patriae.'

[5] Glanvill, vii. 5; Bracton, f. 60.

[p. 337] deemed a pious and laudable bequest; rarely are villeins freed[1], but sometimes their arrears of rent are forgiven or their chattels are restored to them[2]. The medieval will is characterized by the large number of its specific bequests. The horses are given away one by one; so are the jewels; so are the beds and quilts, the pots and pans. The civilian or canonist names his precious books[3]; the treasured manuscript of the statutes, or of Bracton, or of Britton[4], the French romance, the English poem[5] is handed on to one who will love it. Attempts are even made to 'settle' specific chattels[6]; the Corpus Iuris finds itself entailed or subjected to a series of fidei-commissary substitutions[7]. On the other hand, the testator has no 'stocks, funds and securities' to dispose of; he says nothing, or very little, of the debts that are owed to him, while of the debts that he owes he says nothing or merely desires that they be paid.

Pro salute animae.

The earliest wills rarely contain residuary or universal gifts[8]. In part this may be due to the fact that the testator has exhausted his whole estate by the specific and pecuniary legacies. But often he seems to be trusting that whatever he has not given away will be used by his executors for the good of his soul. When he does make a residuary gift, he frequently makes it in favour of his executors and bids them expend it for his benefit. This we must remember when we speak of the treatment of intestates. As time goes on we find

[1] Test. Ebor. i. 245: 'item lego W. B. pro suo bono servicio 13*s.* 4*d.* et facio eum liberum ab omni bondagio seu servicio bondagii' (1401). Such a devise would seldom be binding on the heir.

[2] Ibid. 350: 'item volo quod bona, sive catalla, aliquorum nativorum meorum, quos (*sic*) recepi in custodiam post decessionem eorundem, in commodum filiorum suorum nondum soluta, solvantur eisdem filiis sine aliqua diminucione' (1407).

[3] Ibid. 69, 168, 364-371.

[4] Ibid. 12: 'librum de statutis et omnes alios meos libros de lege terrae' (1345). Ibid. 101-2: Thomas Farnylaw, chancellor of York, leaves to Merton College 'Brakton de iuribus Angliae' (1378). Ibid. 209: 'unum Britonem' (1396); but this *Brito* may be the grammarian.

[5] Ibid. 209: 'unum librum vocatum Pers plewman' (1396).

[6] Ibid. 251: a bed given to testator's son and the heirs of his body; when they fail it is to be sold.

[7] Ibid. 168: the book is never to be alienated so long as any of the testator's issue desire to study law (1393).

[8] See the earliest specimens in Madox, Formulare. Some of the oldest precedents for wills have no residuary gifts; L. Q. R. vii. 66.

many wills which bestow the greater part of the dead man's [p. 338] fortune upon his wife and children; the wife in particular is well provided for; but the earlier the will, the more prominent is the testator's other-worldliness. His wife and children, as we shall hereafter see, have portions secured to them by law; what remains is, to use an expressive term, 'the dead's part'; it still belongs to the dead, who may be in sore need of those pardons for past wrongs and those prayers for repose which can be secured by a judicious expenditure of money.

Some usual clauses.

We see a trace of a past history when the executors are also the witnesses of the will and set their seals to it in the testator's presence[1]. Also we observe that a will is usually proved within a few days after its execution. Very often a man makes no will until he feels that death is near. A common form tells us that he is 'sick in body' though 'whole in mind.' The old connexion between the last will and the last confession has not been severed. But by this time the will is revocable and ambulatory, and occasionally a man will provide for some of the various chances that may happen between the act of testation and the hour of death. Codicils are uncommon, but at the beginning of the fifteenth century a bishop of Durham made nine[2]. It is not unknown that a man will appoint his wife to be his sole executor. Simon de Montfort does this; his wife is to be his attorney, and, if she dies before his will is performed, his son is to take her place[3]. Usually there are several, sometimes many, executors; John of Gaunt appointed seventeen[4]. Not unfrequently the testator, besides appointing executors, names certain 'supervisors' or 'coadjutors'; sometimes they will be learned or powerful friends; they are requested to aid and advise the executors. The bishop of Lincoln and Friar Adam Marsh are to give their counsel to Earl Simon's widow[5]. Now and again the executors are relieved from the duty of rendering accounts[6]. Elaborate clauses are rare; the funeral ceremonies are more carefully prescribed than is any other matter; but skilled forethought is sometimes shown by a direction for the 'defalcation' or abatement of legacies if the estate be insufficient to pay them

[1] L. Q. R. vii. 66.
[2] Test. Ebor. i. 306.
[3] Bémont, Simon de Montfort, 328.
[4] Test. Ebor. i. 234.
[5] Bémont, l. c.
[6] Test. Ebor. i. 95, 126, 178.

[p. 339] in full, and by provisions as to 'lapsed' legacies[1]. A well-to-do gentleman may often have a town house to leave by his will. Before the end of the fourteenth century he will have land held for him by 'feoffees to uses,' and a new period in the history of English land law will be opening[2].

Probate.

Among the common lawyers of a later day it was a pious opinion that in some indefinitely remote age wills were proved in the lay courts[3]. Now, as already said, it seems probable that not until the age of Glanvill did the courts Christian succeed in establishing an exclusive right to pronounce on the validity of the will, and (as the canonists of a later time had to admit) this right as an exclusive right was not given to them by any of those broad principles of ecclesiastical law for which a catholic validity could be claimed[4]. On the other hand, we may well doubt whether any such procedure as that which we call the probate of a will was known in England before the time when the jurisdiction over testaments had been conceded to the church. We have here two distinct things: (i) competence to decide whether a will is valid, whenever litigants raise that question; (ii) a procedure, often a non-contentious procedure, for establishing once and for all the validity of a will, which is implicated with a procedure for protecting the dead man's estate and compelling his executors to do their duty. The early history of probate lies outside England, and it is not for us to say whether some slender thread of texts traversing the dark ages connects it directly with the Roman process of insinuation, aperture and publication. In England we do not see it until the thirteenth century has dawned, and by that time testamentary jurisdiction belongs, and belongs exclusively, to the spiritual courts[5]. In much later days it has been known that the lord of a manor will assert that the wills of his tenants can be proved in his court; but in these cases we

[1] Test. Ebor. i. 170 'abatement'; 171 'lapse'; 312, the opinion of a majority of the executors is to prevail.
[2] Ibid. 115: William Lord Latimer in 1381 devises land held by feoffees.
[3] Fitz. Abr. *Testament*, pl. 4; Y. B. 11 Hen. VII. f. 12; *Hensloe's Case*, 9 Coke's Rep. 37 b; and (*e.g.*) *Marriot* v. *Marriot*, 1 Strange, 666.
[4] Selden, *op. cit.* p. 1672. Lyndwood knew of no authoritative act that gave the right. Selden surmises that it was granted 'by parliament' in John's time. We gravely doubt whether such a grant was ever made.
[5] Selden, *op. cit.* p. 1671: 'I could never see an express probate in any particular case elder than about Henry III.'

ought to demand some proof that the manors in question have never been in the hands of any of those religious orders which [p. 340] enjoyed peculiar privileges. Pope Alexander IV. bestowed on the Cistercians in England the right to grant probate of the wills of their tenants and farmers, and thus exempted their manors from the 'ordinary' jurisdiction[1]. Therefore what at first sight looks like a relic of a lay jurisdiction may easily turn out to be the outcome of papal power.

Prerogative probate.

To this we may add that, even at the end of the thirteenth century, some elementary questions in the law of probate were as yet unanswered. Granted that the bishop in whose diocese the goods of the dead man lie is normally the judge who should grant probate of his will,—what of the case in which the dead man has goods in divers dioceses? Does this case fall within the cognizance of the archbishop? And what if that archbishop be no mere metropolitan, but a primate with legatine powers? About this matter there were constant disputes between the archbishop of Canterbury and his suffragans. We sometimes speak of the feudal pyramid of lords and vassals as a 'hierarchy'; it is equally true that the ecclesiastical hierarchy is a seignorial pyramid. The question whether the overlord has any direct power over the vassals of his vassals has its counterpart in the question whether the metropolitan has any direct power over the 'subjects' of his suffragans, and as the king has often to insist that he is no mere overlord but a crowned and anointed king, so the archbishop of Canterbury has often to insist that he is no mere metropolitan but primate and legate. Archbishop Peckham asserted, and excommunicated a bishop of Hereford for denying, that the testamentary jurisdiction of Canterbury extended to all cases in which the dead man had goods in more than one of the dioceses of the province[2]. The compromise which compelled an executor to seek a 'prerogative' probate in the archbishop's court only if the testator had goods worth more than five pounds in each of two dioceses, is not very ancient[3].

Control over executors.

In the thirteenth century it was settled law that the executors, unless they were going to renounce the duties which the testator had endeavoured to cast upon them, ought to

[1] Chron. de Melsa, ii. 121–2. [2] Peckham's Register, i. 335, 382; ii. 566.
[3] Lyndwood, p. 174, de testam. c. *statutum bonae*, gl. ad v. *laicis*, is very uncertain as to the minimum of *bona notabilia*.

prove his will in the proper court. That court was the court [p. 341] of the judge ordinary, who was in the normal case the bishop of the diocese. Having established the will, they swore that they would duly administer the estate of the dead man and they became bound to exhibit an inventory of his goods and to account for their dealings. Before the beginning of Edward I.'s reign the ecclesiastical court seems to have evolved a regular procedure for the control of executors. If they were guilty of negligence or misconduct, the ordinary could set them aside and commit the administration of the estate to others[1]. On the other hand, if an executor was acting properly, the ordinary could not set him aside. Archbishop Peckham apologized to that great common lawyer Ralph Hengham, who was executor of the bishop of Ely:—'I understood that you had renounced the executorship; if that was a mistake, I pray you to resume your duties, for there is no one in England who will make a better executor than you[2].' In a mandate which has a curiously modern look the same archbishop orders that advertisements shall be issued calling on all the creditors of the late bishop of Exeter to appear within a certain period, about six weeks, and telling them that if they do not send in their claims within that time, they will have to show a reasonable cause for their delay or go unpaid[3].

The executor in temporal courts.

It is a long time before the executor becomes a prominent figure in the lay courts. There is little to be read of him in Bracton's treatise or in the great collection of cases upon which that treatise is founded. Still it was the action of the lay courts which in the end made him the 'personal representative' of the testator. The question—'What debts owed by, or to, the testator continue to be due after his death and who can sue or be sued in respect of them?' became (though there was some quarrelling over this matter) a question for the temporal, not for the ecclesiastical, forum. In approaching it we have to remember that for a long time such debts were few. Pecuniary claims which have their origin in damage done by or to the testator would not be available after his death. It is very probable that claims which we should consider to be of a purely contractual nature were only available against the dead man's successor if the dead man had expressly bound his successor to pay them, and were only available for the dead man's successor

[1] Peckham's Register, i. 110. [2] Ibid. ii. 655. [3] Ibid. i. 305.

if the debtor had bound himself to pay to the successor in case the creditor died while the debt was still outstanding. In the [p. 342] foregoing sentence we have used the vague word *successor* so as to leave open the question whether that successor would be the heir or the executor. But clearly in the past it had been for the heir to pay and to receive debts. Probably our law, as it gradually felt the need of some successor who would sue and be sued in the dead man's stead, was on the point of deciding for good and all that this successor was to be found in the dead man's heir or heirs, when the formulation and extension of its primogenitary system of inheritance and the concession to the church of an exclusive jurisdiction over the testament arrested the process which would have given to inheritance the character of an universal succession. For a while all was uncertain. Clearly if the heir is to have no benefit out of the dead man's chattels, he can not long remain the person, or the one person, bound to pay his ancestor's debts, nor will it be his place to sue for money due to his ancestor, for this money should form part of the wealth that is governed by the testament. And yet it is not easy to deny that the heir is the natural representative of the dead man. Whatever influence Roman law could exercise tended to make him a full and complete representative of his ancestor, and the catholic canon law had not attempted to put the executor in the heir's place. English law therefore had to solve without assistance from abroad the difficult problem that it had raised.

Executor and heir in Glanvill.

In Glanvill's book it is the heir who must pay the dead man's debts. A man, he says, who is burdened with debts can not dispose of his property (except by devoting it to the payment of debts) unless this be with the consent of his heir, and, if his property is insufficient for the payment of his debts, then the heir is bound to make good the deficiency out of his own property[1]. The scheme that for the moment is prevailing or likely to prevail is this:—the heir takes possession of lands [p. 343]

[1] Glanvill, vii. 8: 'Si vero fuerit debitis oneratus is qui testamentum facere proponit, nihil de rebus suis (extra debitorum acquietationem) praeter sui heredis consensum disponere potest. Verum si post debitorum acquietationem aliquid residuum fuerit, tunc id quidem in tres partes dividetur modo praedicto, et de tertia parte suum, ut dictum est, faciat testamentum. Si vero non sufficiunt res defuncti ad debita persolvenda, tunc quidem heres ipse defectum ipsum de suo tenetur adimplere: ita dico si habuerit etatem heres ipse.' Dialog. de Scac. ii. 18: 'legitimus heres pro debito patris conveniendus est.'

and chattels; he pays the debts, using the chattels as the first fund for this purpose; if they are not exhausted in the process, he makes over the residue to the executors; if all the chattels are swallowed up by debts and there are debts still due, the heir must pay them, and his liability is not limited by the value of the inheritance that has descended to him. This last trait should not surprise us. If ancient law finds great difficulty in holding that one man is bound to pay the debt incurred by another, it finds an equal difficulty in setting any bounds to such a liability when it exists.

Executor and heir in Bracton.

According to Bracton it is the heir, not the executor, whom the creditor ought to sue[1]. By this time the heir's legal liability is limited to the amount of the dead man's property; but even in Bracton's eyes his moral liability is unlimited[2]. No doubt the dead man's chattels are the primary fund for the payment of debts. The Great Charter has striven to restrain the king's high-handed power of seizing the lands of his living and dead creditors; even the prerogative processes of the exchequer should spare the land while chattels can be found[3]. Still it is the heir's duty to pay debts; when debts have been paid, then the executor will claim and distribute the remaining chattels. And so in actual practice we see the heir sued for debts which are in no way connected with land; he sometimes seems to be sued even when there is no written covenant that expressly binds him to pay[4]. But from time to time we hear it doubted whether the creditor can not attack the executor. The opinion gains ground that he may do so, if, but only if, the testator has enjoined his executor to pay the debt. In such

[1] Bracton, f. 407 b: 'Et sicut dantur [actiones] heredibus contra debitores et non executoribus, ita dantur actiones creditoribus contra heredes et non contra executores.'

[2] Bracton, f. 61: 'inhumanum esset si debita parentum insoluta remanerent.' See O. W. Holmes, Executors, Harv. L. R. ix. 42. Mr Justice Holmes is probably right in holding that when it had been decided that the dead man's chattels pass to his executor, the law conceived that the property in those goods was simply in the executor. His liability to the dead man's creditors may be limited by the value of those goods, but the goods are his. In other words, the law did not distinguish what he held as executor from what he held in his own right.

[3] Charter, 1215, cc. 9, 26.

[4] Note Book, pl. 1543: Debt against the heir of a surety (*plegius*); no written instrument mentioned. Ibid. pl. 1693: Debt against the heir for cloth sold to the ancestor; no written instrument or tally; suit tendered; the suitors know nothing of the matter and the action is dismissed.

a case the debt can be regarded as a legacy bequeathed to the creditor; the creditor can sue for it in the ecclesiastical court, and the king's justices should not prevent him from going there; [p. 344] his action may fairly be called a testamentary cause[1]. But the jealousy of the justices was aroused, and it was becoming plain that, if the creditor is to sue the executor at all, he must have an action in the temporal court.

The collection of debts.

Turning from the passive to the active side of representation, we find that in Bracton's day it is the heir, not the executor, who sues for the debts that were due to the dead man. There is here a difficulty to be surmounted. A man can not assign or give to another a mere right of action; how then can he bequeath a right of action, and, unless he can bequeath it, how can it pass to his executor? 'Actions,' says Bracton, 'can not be bequeathed[2].' But both theory and practice were beginning to allow that if the testator had recovered judgment against the debtor in his lifetime, or if (for this was really the same thing) the debtor had by way of recognizance confessed the debt in court—we see here one of the reasons why recognizances became fashionable—then the debt could be bequeathed. It was no longer a mere action; it already formed part of the creditor's property, of his goods and chattels[3]. The courts were yielding to the pressure of necessity. For one thing, it is a roundabout scheme that would compel the heir to collect money in order that he might pay it to an executor who would divide it among the legatees. For another thing, if the secular courts will not give the executor an action against debtors, the ecclesiastical courts will do this and will have plausible reasons for doing it. In the early years of Edward I. it was still very doubtful whether they would not succeed in their endeavour. The clergy complained that the spiritual tribunals were prevented from entertaining the executor's suit against

[1] Note Book, pl. 162: Writ of prohibition obtained by executors who have been sued by a creditor in the court Christian; the creditor pleads that the testament bade the executors pay this debt; the executors reply that this is not true and prove their assertion by producing the testament; the prohibition is upheld and the creditor is amerced. The annotator (see Bracton, f. 407 b) thinks that the decision would have been otherwise if the testator had mentioned this debt in his will or if judgment had been obtained against him in his lifetime.

[2] Bracton, f. 407 b.

[3] Bracton, f. 407 b: 'quia huiusmodi pecunia inter bona testatoris connumeratur et pertinet ad executores.' Note Book, pl. 550, 810.

the debtor, even when the debt was required for the payment [p. 345] of legacies. The king's advisers replied that this matter was not yet finally decided; they remarked however that the executor should be in no better position than that which his testator had occupied, and hinted that the task of proving a debt before ecclesiastical judges was all too easy[1].

The executor as 'personal representative.'

A change as momentous as any that a statute could make was made without statute and very quietly. Early in Edward I.'s reign the chancery had framed and the king's court had upheld a writ of debt for executors and a writ of debt against executors[2]. In the Year Books of that reign the executor is coming to the front, though many an elementary question about his powers is still open. Much remains to be done. Our English lawyers are not starting with the general proposition that the executor represents the testator and thence deducing now one consequence and now another; rather they are being driven towards this general proposition by the stress of particular cases. In Edward's reign the executor had the action of debt; a statute gave him the action of account[3]; but a statute of 1330 was required in order that he might have an action of trespass against one who in the testator's lifetime carried off the testator's goods[4]. And so as regards the passive side of the representation:—before the end of the thirteenth century the executor could be sued by a creditor of the testator who had sealed writing to show for the debt; and the heir could only be sued when there was a sealed writing which expressly purported to bind him; but every bond or covenant did, as a matter of fact, unless it were very badly drawn, purport to bind the heir, and very often an action against the heir would be more

[1] Raine, Letters from Northern Registers, p. 71: undated Articuli Cleri; it is feared by the laity that in the court Christian a debt can be proved 'per duos testes minus idoneos,' whereas in a temporal court a defendant can wage his law.

[2] Debt by executors: Y. B. 20–1 Edw. I. 375; 21–2 Edw. I. 258, 598; 33–5 Edw. I. 62, 294. Debt against executors: 30–1 Edw. I. 238. Fleta, p. 126, who seems to be troubled by Bracton's text, ends his discussion with this sentence:—'*permissum* est tamen quod executores agant ad solutionem in foro saeculari *aliquando*.'

[3] Stat. West. II. c. 23. A Register of Writs from the early years of Edward I. tells us that the heir can not have a writ of account, that some say that the executor can have it, but more properly the suit, being testamentary, belongs to the court Christian. See Harv. L. R. iii. 214.

[4] Stat. 4 Edw. III. c. 5.

profitable than an action against the executor. It is not until the fifteenth century discovers a new action which will enforce [p. 346] contractual claims, the action of *assumpsit*, that the executor begins to represent the testator in a more general sense than that in which the heir represents him. Until our own time the executor has nothing to do with the testator's freehold. Even when statutes enable the tenant in fee simple to give his land by will, the executor will have nothing to do with the land, which will pass straight from testator to devisee as it passes straight from ancestor to heir. Still in the early years of Edward I. the king's justices had taken the great step; they had thrown open the doors of their court to the executor. He could there sue the debtors, he could there be sued by the creditors. Such suits were not 'testamentary causes.' As of old, it was for the spiritual judge to pronounce for or against a will, and the legatee who wanted his legacy went to the ecclesiastical court; but the relation between the executors on the one hand and the debtors or creditors on the other had become a matter for the temporal lawyers, and every change in the law which extended the number of pecuniary claims that were not extinguished by death made the executor more and more completely the representative of the testator.

Restraints on testamentary power.

We have been speaking as though a man might by his will dispose of all his chattels. But in all probability it was only the man who left neither wife nor child who could do this. We have every reason to believe that the general law of the thirteenth century sanctioned some such scheme as that which obtained in the province of York until the year 1692 and which obtains in Scotland at this present time. If a testator leaves neither wife nor child, he can give away the whole of his movable goods. If he leaves wife but no child, or child but no wife, his goods must, after his debts have been paid, be divided into two halves; one of these can be disposed of by his will, it is 'the dead's part,' the other belongs to the widow, or (as the case may be) to the child or children. If he leaves both wife and child, then the division is tripartite; the wife takes a share, the child or children a share, while the remaining third is governed by the will; we have 'wife's part,' 'bairns' part,' and 'dead's part.' Among themselves children take equal shares; the son is not preferred to the daughter; but the heir gets no share unless he will collate the inheritance that has

descended to him, and every child who has been 'advanced' by [p. 347] the testator must bring back the advancement into hotchpot before claiming a bairn's right.

History of legitim.

In the seventeenth century this scheme prevailed throughout the northern province; a similar scheme prevailed in the city of London and, it may be, in some other towns; but by this time the general rule throughout the province of Canterbury denied to the wife and children any 'legitimate part' or 'legitim' and allowed the testator to dispose of his whole fortune.

Legitim in cent. xii. xiii.

Now it is fairly certain that in the twelfth and thirteenth centuries some such scheme as that which we have here described was in force all England over. How much further back we can carry it is very doubtful. It at once brings to our mind Bede's story of the Northumbrian who rose from the dead and divided his property into three shares, reserving one for himself, while one was made over to his wife and another to his children. But four dark centuries divide Bede from Glanvill. No Anglo-Saxon testator whose *cwiðe* has come down to us takes any notice of the restrictions which this scheme would impose upon him were it in force; but he does not always endeavour to dispose of his whole fortune, and the earnestness with which he prays that his will may stand seems to show that he is relying on privilege rather than on common law. The substantial agreement between the law of Scotland and the custom of the province of York goes to prove that this plan of dealing with the dead man's goods has very ancient roots, while we have seen no proof that it ever prevailed in Normandy[1]. It is intimately connected, as we shall see in another chapter, with a law of husband and wife which is apt to issue in the doctrine that husband and wife have their goods in common. All Europe over, the new power of testation had to come to terms with the ancient rights of the wife, the children and the other kinsfolk. The compromises were many and intricate and one of these compromises is the scheme that is now before us. We must remember that the great solvent of ancient rules, Roman law, even in the shape that it wore in the Institutes, did not claim for the testator that unlimited

[1] However, Dr Brunner, Zeitschrift der Savigny-Stiftung, Germ. Abt. xvii. 134, thinks that it came to us from Normandy.

power of doing what he likes with his own which Englishmen have now enjoyed for several centuries.

Legitim in Glanvill.

Our first definite tidings come from Glanvill. 'If a man in his infirmity desires to make a testament, then, if he is not burdened with debts, all his movables are to be divided into [p. 348] three shares, whereof one belongs to his heir, another to his wife, while a third is reserved to himself, and over this he has free power; but if he dies without leaving a wife, then one-half is reserved for him[1].' We notice that one share is reserved, not to the children, but to the heir. This we take to be a relic of the law as it stood before primogeniture had assumed its acute English form. If for a while the king's court endeavoured to secure for the heir not only all the land but also a third of the chattels, it must have soon abandoned the attempt. The charter of 1215 recognized that the wife and children could claim shares in the dead man's goods. It does this incidentally; it is dealing with the king's power of exacting a debt due from a dead tenant in chief:—'If nothing be due to us, then all the chattels fall to the dead man, saving to his wife and children (*pueris*) their reasonable shares[2].' This clause appears in all the later versions of the charter[3].

Legitim in Bracton.

Bracton speaks at some length:—When the debts have been paid, the residue is to be divided into three parts, whereof one is to be left to the children (*pueris*), another to the wife if she be living, while over the third the testator has free power. If he has no children (*liberos*) then a half is reserved for the dead, a half for the wife. If he leaves children but no wife, then half for the dead, half for the children. If there are neither wife nor children, the whole will remain to the dead. These, says Bracton, are the general rules which hold good unless overridden by the custom of some city, borough or town. He then tells us that in London the widow will get no more than her dower, while the children are dependent on their father's bounty. And this, he argues, ought to be so in a city, for a citizen will hardly amass wealth if he is bound to leave it to an ill-deserving wife or to idle and uninstructed children[4]. Curiously enough, however, it was just among the citizens of

[1] Glanvill, vii. 5. [2] Charter, 1215, c. 26. [3] Bémont, Chartes, p. 53.

[4] Bracton, f. 60 b, 61. Fleta, pp. 124–5, copies. It is fairly certain that by *pueri* both the charter and Bracton mean, not sons, but children. See above, p. 267 note 3.

London that the old rules took deep root. They prevailed there until long after they had ceased to be the general law [p. 349] of the southern province; they prevailed there until 1724, a standing caution to all who would write history *a priori*[1].

As to the law of the thirteenth century there can therefore be little doubt, though some of its details may be obscure. A few words however must be said of its subsequent fate.

Later history of legitim.

A meagre stream of cases running through the Year Books enables us to say that throughout the fourteenth and fifteenth centuries actions were occasionally brought by the widow and by the children claiming their legitim, their reasonable part of goods, against the executors of the dead man. We can see also that throughout this period the origin of their right was a disputed matter. Some held that the action was given by the Great Charter, and that the writ should make mention of its statutory origin. Others held that, as the Charter mentioned this right but incidentally and by exceptive words, the action could not be statutory:—'an exception out of a statute is no statute[2].' Sometimes the writ rehearsed a 'common custom of the realm.' To this exception was taken on the ground that a common custom of the realm must be common law, and that matter of law should not be stated in such a way as to invite the plea 'No such custom.' Often the writ spoke of the custom of a county or of a vill; but at times there were those who denied that such a custom would be good. In 1366 it is said that the lords in parliament will not allow that this action can be maintained by any common custom or law of this realm[3]. At the end of the period we find Fitzherbert opining that the legitim was given by the common law of the realm; but the writs on which he comments refer to the customs of particular counties[4].

[1] Stat. 11 Geo. I. c. 18. sec. 17: 'And to the intent that persons of wealth and ability, who exercise the business of merchandize, and other laudable employments within the said city, may not be discouraged from becoming members of the same, by reason of the custom restraining the citizens and freemen thereof from disposing of their personal estates by their last wills and testaments.....'

[2] Reg. Brev. Orig. 142 b. [3] Y. B. 40 Edw. III. f. 38 (Mich. pl. 12).

[4] The main authorities are Fitz. Abr. *Detinue*, pl. 60 (34 Edw. I. *not* Edw. II. as is plain from the judges' names), 'usage del pais'; Y. B. 1 Edw. II. f. 9, 'usage de pais'; Y. B. 7 Edw. II. f. 215, writ on the Great Charter; Y. B. 17 Edw. II. f. 536, 'per consuetudinem regni'; the writ is abated; the justices altogether deny the custom and suggest a different interpretation of the charter;

The king's court and legitim.

Now there is one conclusion to which we must be brought [p. 350] by this tenuous line of discrepant authorities. The matter before us is no rarity. It is no uncommon thing for a man to leave a wife or a child living at his death. The distribution of his goods will not always be a straightforward affair if a legitim is claimed. There are abundant possibilities of litigation. The question whether a child has been 'advanced,' the question whether the widow or a child is put to election between benefits given by the will and rights arising outside the will, such questions will often emerge and will sometimes be difficult. Why do not our Year Books teem with them? How is it that, after some search, we can not produce from the records of the thirteenth century one case of a wife or child claiming legitim in the king's court? How does it happen that at one moment the justices at Westminster raise no objection to the writ and at the next assert that it is contrary to law? The answer probably is that the question whether the widow or child has an action in the king's court is of but little moment. The ecclesiastical courts are seised of this matter and know all about it. On a testator's death his executor takes possession of the whole of his goods. He is bound to do this, for he has to pay the debts. The claim for legitim is therefore a claim against the executor, against one who is held accountable in the ecclesiastical court for a due administration of the dead man's goods and chattels. It is therefore in the ecclesiastical courts that the demand for legitim should be urged and all questions about it should be settled. An action in the temporal court would, at least in the ordinary case, be a luxury.

Legitim in the ecclesiastical courts.

Therefore this somewhat important piece of English history will not be understood until whatever records there may be of the ecclesiastical courts have been published. The local customs which regulated the distribution of movable goods must, so it seems to us, have been for the more part the

Fitz. Abr. *Dette*, pl. 156 (3 Edw. III., It. North.), custom of county of Northampton; Y. B. 17 Edw. III. f. 9 (Hil. pl. 29), custom of the realm; Y. B. 30 Edw. III. f. 25, consuetudo totius regni; Y. B. 39 Edw. III. f. 6; Y. B. 40 Edw. III. f. 38 (Mich. pl. 13), custom of a vill; Y. B. 21 Hen. VI. f. 1; Y. B. 28 Hen. VI. f. 4 (Mich. pl. 20), custom of a county; Fitz. Abr. *Respond.* pl. 95 (Mich. 30 Hen. VI.), 'par lusage'; Y. B. 7 Edw. IV. f. 21 (Mich. pl. 23); Reg. Brev. Orig. f. 142 b, custom of Berkshire; Fitz. Nat. Brev. f. 122. See also Co. Lit. 176 b; Somner, Gavelkind, 91; Blackstone, Comm. ii. 492.

customs of provinces, dioceses and peculiars, rather than the [p. 351] customs of counties or of vills. When we are told in a Year Book or in the Register of Writs that the custom of Berkshire secures the children a legitim, this must, we take it, be the temporal side of an ecclesiastical fact. Our interest, therefore, will be centered in the two metropolitical courts, which by virtue of their doctrine about *bona notabilia* were drawing to themselves the wills of all wealthy persons and attracting all the famous advocates. We know that until 1692 the old rule was maintained throughout the province of York[1]; and we may read in the pages of Henry Swinburne, 'sometime judge of the prerogative court of York,' a great deal about its application; for example, we may see some settled rules of the court as to what is to be deemed an advancement of a child[2]. Long before this, however, the court of the southern province must have chosen a different path and refused a legitim save when a local custom demanded it. How and when this happened we can not at present say. In 1342 the provincial constitutions of Archbishop Stratford condemn those who on their death-beds make gifts *inter vivos* for the purpose of defrauding the church of mortuaries, the creditors of debts, or their wives and children of the portions that belong to them 'by custom and law[3].' A century later Lyndwood, official of the court of Canterbury, having to comment on the words 'the portion belonging to the deceased,' sends us to the custom of the place to learn what that portion is. He mentions but one custom by way of example:—it is the well-known scheme of which we have been speaking[4].

Legitim in wills.

Allusions to this method of division are not uncommonly

[1] Stat. 4 Will. and Mar. c. 2.

[2] Swinburne, Testaments (ed. 1640), p. 191 ff. Some use seems to have been made of a treatise on Legitim by the civilian Claude Battandier; but in the main Swinburne appears to be stating the practice of his own court.

[3] Wilkins, Concilia, ii. p. 706, cc. 8, 9: 'liberorum et suarum uxorum, qui et quae tam de iure quam de consuetudine certam quotam dictorum bonorum habere deberent.' And again—'uxoresque et liberi coniugatorum suis portionibus de consuetudine vel de iure ipsis debitis irrecuperabiliter defraudantur.'

[4] Lyndwood, Prov. lib. iii. tit. 13. gl. ad v. *defunctum* (ed. 1679, p. 178). It may be inferred from Smith, Repub. Angl. lib. 3, c. 7; Co. Lit. 176 b; Somner, Gavelkind (1660), p. 99, that in Elizabeth's day the courts of the southern province were no longer enforcing the old rule, except as a very exceptional local custom. The tripartite division had prevailed at Sandwich: Lyon, Dover, ii. 308.

found in wills. A few examples may be given. 'All the residue of all the goods that pertain to my share (*partem meam contingencium*) I leave to Margery my wife[1].' 'I desire to make my testament of my proper goods, and that Elizabeth my wife [p. 352] shall have the share of goods that belongs to her by law or laudable custom[2].' 'I give to my wife Joan in respect of her share of all our goods, all the utensils of our house, and all the bed furniture and the horses.... And I will that all the legacies given to my wife shall be valid if she after my death in no wise impedes my testament[3].' 'I bequeath to my two children John and Thomas in respect of the rateable portion of goods falling to them, to each of them seven marks sterling[4].' 'And all the residue of my goods not hereinbefore bequeathed which belong to my share, I will to be expended in masses for my soul,...and I give to my wife Alice the whole of my share of our six spoons for her own use[5].' 'Also I well that Antone my sonne and Betress my dowghter have their barne parts of my goodes after the lawe and custome of the cuntre[6]'..... 'which I well that she have besyde her barne parte of goodes[7].' Such allusions, however, are not so common as we might expect them to be, did we not remember, first that when a man disposes of 'all the residue of his goods' he may well be speaking only of that share which he can effectually bequeath, secondly that the testator is often making an ampler provision for his wife and children than the law would give them if they disputed his testament, and thirdly that children may lose all claim to a reasonable part if their father 'advances' them during his lifetime. Sometimes the testator will profess to bequeath his own 'dead's part' to himself:—'Also y bequethe my goodes in twey partyes, that ys for [to] seie, half to me, and the tother haluyndel to Watkin my sone and to Kateryne my dowter[8].' In 1313 a bishop spoke of the scheme that we have been discussing, as 'the custom of the realm of England,' and 'the custom of the English church'; but he was bishop of Durham[9].

[1] Testamenta Eboracensia, vol. i. p. 3.
[2] Ibid. p. 97.
[3] Ibid. p. 139.
[4] Ibid. p. 191.
[5] Ibid. p. 197. See also pp. 213, 250, 287.
[6] Durham Wills and Inventories, i. 113.
[7] Ibid. 124.
[8] Furnivall, Fifty English Wills, p. 1.
[9] Regist. Palat. Dunelm. i. 369, 385.

Review of the history of legitim.

We may doubt whether there was at any time among lawyers, among ecclesiastics, or among Englishmen in general, any strong feeling for or against the old rule. At one moment [p. 353] in Edward II.'s reign some of the judges seem to dislike it. One of them, after giving a sophistical explanation of the words of the Charter, said that there is nothing either in that document or in the common law which restrains a father from devising his own goods as he pleases[1]. Again, in Edward III.'s day 'the lords in parliament' will not, we are told, allow this custom[2]. But at times during the fourteenth century the mere fact that the ecclesiastical courts were doing something was sufficient to convince royal justices and lay lords that something wrong was being done. Then, on the other hand, the canonist himself was not deeply interested in the maintenance of the old restraints. He could not regard them as outlines of the church's *ius commune*; at best they could be but customs of English dioceses or provinces. His training in Roman law might indeed teach him that the claims of children should set limits to a father's testamentary power; but 'wife's part,' 'bairns' part' and 'dead's part' can not be found in the Institutes; besides, the church had legacies to gain by ignoring the old rules. Our English law seems to slip unconsciously into the decision of a very important and debatable question. Curiously enough the Act of 1692, which enables the inhabitant of the northern province to bequeath all his goods away from his family, was professedly passed in the interest of his younger children[3]. To the modern Englishman our modern law, which allows the father to leave his children penniless, may seem so obvious that he will be apt to think it deep-rooted in our national character. But national character and national law react upon each other, and law is sometimes the outcome of what we must call accidents. Had our temporal lawyers of the thirteenth century cared more than they

[1] Y. B. 7 Edw. II. f. 536. It is suggested that the words of the Charter refer to the goods of a child which have come into the father's hands, not to the father's own goods (!).
[2] Y. B. 40 Edw. III. f. 38.
[3] Stat. 4 & 5 Will. and Mary, c. 2: 'whereby many persons are disabled from making sufficient provision for their younger children.' The complaint seems to be that the provincial custom secures for a widow more than she ought to have. A jointure does not prevent her from claiming her wife's part; enough therefore is not left for the younger children.

did about the law of chattels, wife's part, bairns' part and dead's part might at this day be known south of the Tweed.

§ 4. *Intestacy*[1].

Horror of intestacy.

During the two centuries which followed the Norman [p. 354] Conquest an intense and holy horror of intestacy took possession of men's minds. We have already seen how Cnut was compelled to say that if a man dies intestate, the lord is to take no more than his rightful heriot and is to divide the dead man's property between his wife, children and near kinsmen[2]. We have also seen how Henry I. promised that if one of his barons died without a will, the wife, children and liege men of the intestate might divide his property for the good of his soul as they should think best[3]. There has already been a change. The goods of the intestate are no longer—we may almost say it—inherited by his nearest of kin; they are to be distributed for the good of his soul, though this distribution is to be effected by the hands of those who are allied to him by blood or homage. If the *Leis Williame* say that the goods of the intestate are to be divided among his children, we may suspect them of struggling against the spirit of the age; perhaps they are appealing to Roman law[4]. According to a doctrine that was rapidly gaining ground, the man who dies intestate dies unconfessed, and the man who dies unconfessed—it were better not to end the sentence; God's mercy is infinite; but we can not bury the intestate in consecrated soil. It would seem that in Glanvill's day the lords were pressing their claim to seize the goods of such of their men as died intestate[5]. In the Charter of 1215 there is a clause which says: 'If any free man dies intestate, his chattels shall be distributed by the hands of his next kinsfolk and friends under the supervision of the church, saving to every one the debts owed to him by the dead

[1] Once for all we must refer our readers to Selden's tract on The Disposition of Intestates' Goods (Collected Works, vol. iii. p. 1677).

[2] Cnut, II. 70. [3] Coronation Charter, c. 7.

[4] Leg. Will. I. 34; see above, vol. i. p. 103; vol. ii. p. 267.

[5] Glanvill, vii. 16. Pipe Roll, 18 Hen. II. 133: the custodians of the abbey of Battle account at the exchequer for the goods of the abbot's bailiff, who died intestate.

man[1].' The church now asserts a right to supervise the process of distribution. But this clause was omitted from the Charter of 1216 and was never again enacted. Why was it omitted? Having regard to the character of the other omissions, we may guess that it was withdrawn by Henry's counsellors in the interest of their infant king. The thought may have crossed their minds (and John may at times have put this thought into [p. 355] practice) that intestacy is a cause of forfeiture. But this clause, though it was deliberately withdrawn, seems to have settled the law.

Bracton on intestacy.

Bracton in words which recall those of Cnut and of Henry I. says: 'If a free man dies intestate and suddenly, his lord should in no wise meddle with his goods, save in so far as this is necessary in order that he may get what is his, namely, his heriot, but the administration of the dead man's goods belongs to his friends and to the church, for the man who dies intestate does not deserve a punishment[2].' No, intestacy—at all events if occasioned by sudden death—is not an offence or a cause of forfeiture, still it is a cause for grave alarm, and a reason why all should be done that can be done for a soul that is in jeopardy. And who so fit to decide what can be done as the bishop of the diocese?

Stories of intestacy.

Many points are illustrated by a story which Jocelin of Brakeland has told in his spirited way. In the year 1197 Hamo Blund, one of the richest men of the town of Bury St Edmunds, was at the point of death, and would hardly be persuaded to make any testament. At length, when nobody but his brother, his wife and the chaplain could hear, he made a testament to the paltry amount of three marks. And when after his death the abbot heard this, he summoned those three persons before him and sharply reproved them, because the brother, who was heir, and the wife, wishing to have all, would not allow any one to have access to the sick man. And then in their presence the abbot said: 'I was his bishop and had the cure of his soul, and, lest his ignorance should imperil me, his priest and confessor,—for not being present I could not counsel him—I will now do my duty, albeit at the eleventh hour. I order that all his chattels and the debts due to him, which it is said are worth two hundred marks, be set down in writing and that one share be given to the heir, and another to the wife, and

[1] Charter, 1215, c. 27. [2] Bracton, f. 60 b.

a third to his poor cousins and other poor folk. As to his horse which was led before the bier and offered to St Edmund, I order that it be remitted and returned, for it is not fit that our church be polluted by the gift of one who died intestate, and who is commonly accused of having habitually lent his money at usury. By the face of God! if anything of this sort happens again in my days, the delinquent shall not be buried in the [p. 356] churchyard.' When they heard this they retired in confusion.—Thus did abbot Samson, to the delight of Jocelin[1].

Soon after this there were malicious men who did not scruple to assert that Archbishop Hubert, who had been chief justiciar, had died intestate. A friendly chronicler has warmly rebutted this hideous accusation[2]. In Henry III.'s reign the monks of St Alban's believed that an enemy of theirs, Adam Fitzwilliam, a justice of the Bench, had died intestate. True that his friend and colleague, William of Culworth, had gone before the bishop of London and affirmed that Adam made a will of which he, William, was the 'procurator and executor'; but this, said the monks, was a pious lie[3]. A pious lie—for William was striving to defend his companion's fair fame against the damning charge of intestacy. Of another enemy of St Alban, the terrible Fawkes of Breauté, it is written that he was poisoned; that having gone to bed after supper, he was found dead, black, stinking and intestate[4].

In Edward I.'s time a man was attacked by robbers and he was found by the neighbours at the point of death; he died before a priest could be brought to him; he was buried in the high road. Archbishop Peckham took a merciful view of the case:—It is said that the poor wretch asked for a priest; if this can be proved, let his body be exhumed and buried in Christian fashion, for he did what he could towards making a testament[5]. Then the rector of Ightham died suddenly. Peckham, with a hope that all might yet be well, bade his official, his commissary, and the rector of another parish take possession of the dead

[1] Jocelin (Camd. Soc.), p. 67.

[2] Ralph of Coggeshall, p. 159: 'Sed absit, absit procul hoc, et in orbe remoto abscondat fortuna malum, ut qui testamentorum ab aliis conditorum fidelis extitit executor, intestatus decessisset!'

[3] Gesta Abbatum, i. 329. The important phrase is *pie mentiens*.

[4] Mat. Par. Chron. Maj. iii. 121.

[5] Peckham's Register, i. 39: 'cum sacerdotem cui confiteretur petierit, et sicut poterit in tali articulo, condiderit testamentum.'

man's goods. His debts were to be paid, and then the residue was to be disposed of according to the archbishop's orders for the benefit of the departed[1].

[p. 357] The pope would have liked to take the goods of all intestate clerks. In 1246 there had been some scandalous cases. Three English archdeacons, rich men, had died intestate. Thereupon the bishop of Rome decreed that the goods of all intestate clerks should be converted to his use. He did more than this, for he declared that the mere appointment of an 'expressor and executor' would not save the clerk's goods from being swallowed in what Matthew Paris calls 'the papal Charybdis'—a testator must express his own will, and not leave it to be expressed by an expressor and executor. But this was going too far; the king protested and the edict was withdrawn[2]. This same pope, that great canonist Innocent IV., had stated that in Britain the custom was that one-third—this means the dead's part—of the goods of the intestate, belonged to the church and the poor[3]. In 1284 Edward I. begged a grant of the goods of intestates from Pope Martin IV., and met with a refusal[4].

Desperation in Normandy

These stories may be enough to illustrate the prevailing opinion about intestacy. It was not confined to England. What is more peculiar to England is that the prelates firmly established, as against the king and the lay lords, their right to distribute the goods of the intestate for the weal of his soul. It was otherwise in some parts of France, notably in Normandy. The man who had fair warning that death was approaching, the man who lay in bed for several days, and yet made no will and confession, was deemed to die 'desperate,' and the goods of the desperate, like the goods of the suicide, were forfeited to the duke. The church was entitled to nothing, as it had done nothing for his soul[5]. The bishop of Llandaff complained to Edward I. that the magnates in his diocese would not permit

[1] Peckham's Register, iii. 874 (A.D. 1285): 'Sed de bonis huiusmodi quae reliquit, ipsius si quae sint debita persolvantur, et residuum dispositioni et ordinationi nostrae pro anima eiusdem integraliter reservetur.'

[2] Mat. Par. Chron. Maj. iv. 552, 604.

[3] Innocentius, Commentaria, X. 5. 3. 42: 'ut sicut Venetiis solvitur in morte decima mobilium, in Britannia tertia, in opus ecclesiae et pauperum dispensanda.'

[4] Calendar of Papal Registers, i. 473.

[5] Somma, p. 56; Ancienne coutume, c. 21. See Ducange, s. v. *intestatus*, where a great store of illustrations is collected.

him to administer the goods of intestates, and the king replied that he would not interfere with the custom of the country[1].

The bishop and the kinsfolk.

However, in the thirteenth century it became well settled law in England that the goods of the intestate are at the disposal of the judge ordinary, though in Bracton's text we may [p. 358] still hear the claim of the kinsfolk or 'friends' of the dead to take some part in the work of administration[2]. No doubt in practice this claim was often respected. The bishop would not make the division with his own hands, and in many cases those who were near and dear to the intestate might be trusted to do what was best for him. Again, the list of those works of piety and mercy which might benefit his soul was long and liberal, and, if it comprised the purchase of prayers, it comprised also the relief of the poor, and more especially of poor relations. But still the claim of his kinsfolk is no longer a claim to inherit. In 1268 it was necessary for a legatine council to remind the prelates that they were but trustees in this matter and were not to treat the goods of intestates as their own[3].

Intestate succession.

When we look at this strange law we ought to remember two things. In the first place, intestacy was rare. It was easy to make a will; easy to make some sign of assent when the confessor asked you to trust him as your expressor and executor[4].

[1] Memor. de Parl. 33 Edw. I. (ed. Maitland), p. 73. Selden, *op. cit.*, p. 1681, resists, and as we think rightly, the opinion that the King of England was at one time entitled to the goods of intestates; but the clauses in the charters of 1100 and 1215, to say nothing of Cnut's law and the texts of Glanvill and Bracton, seem to show that there had (to say the least) been a grave danger of 'desperate' death being treated as a cause of forfeiture. Prynne, Records, vol. iii. *passim*, regards the action of the prelates as a shameless usurpation.

[2] Bracton, f. 60 b. There were towns, *e.g.* Sandwich, in which the municipal authorities claimed the right to administer the intestate's goods. See Lyon, Dover, ii. 308.

[3] Constit. Ottoboni, *Cum mortis incerta*. This constitution, after reciting that a sudden death often deprives a man of the power of making a testament, and that in such a case humanity distributes his goods for pious uses, so that they may intercede for him on high, proceeds to say that in past time a provision about this matter was made by the English prelates with the king's consent, and to declare that the prelates are not to occupy the goods of the dead contrary to that provision. What was that provision? John de Athona did not know and plunged into a marvellous anachronism. Selden thinks that the clause in the charter of 1215 was intended. We can offer no better explanation.

[4] Selden, p. 1682, speaks as though intestacy were common; but the chroniclers treat it as a scandal.

In the second place, it was only 'the dead's part' that fell to the ordinary, though the wife and children (if any there were) had by this time to take their shares from his hand.

The administrator.

In 1285 a statute declared that thenceforth the ordinary should be bound to pay the debts of the intestate in the same manner as that in which executors were bound to pay the debts [p. 359] of the testator[1]. The king's court was just beginning to give the creditor of a testator an action against the executor, and the purpose of the statute seems to be that the creditor of an intestate shall have a similar action against the ordinary. The executor is beginning to appear as the personal representative of the testator; the ordinary—or some administrator to whom he has delegated his duties—must appear as the personal representative of the intestate. In 1357 another statute will bid the ordinary commit the work of administration to 'the next and most lawful friends' of the dead, and will give actions of debt to and against these 'administrators[2].'

The next of kin.

How far the bishops in their dealings with the kinsfolk of the dead man were guided by the table of consanguinity we can not say. In the end there was what a foreigner might describe as a partial 'reception' of Roman law as defined in the Novels of Justinian. But this seems to have taken place in much later days than those of which we are speaking. We must remember that the canonist, though his training in Roman law might incline him to treat it as written reason and to give it the benefit of every doubt, had no law of intestate succession that was his own. The catholic church had never presumed to dictate a scheme of inheritance to the world at large. Such rules as we can recover concerning the bairns' part tend to show that during the middle ages the Roman system was not observed in England. The bairns' part was strictly confined to children; no right of representation was admitted; no child of a dead child could claim a share in it[3].

[1] Stat. West. II. c. 19.

[2] Stat. 31 Edw. III. Stat. 1, c. 11. English lawyers appropriate the term *administrator* to the representative of an intestate, reserving *executor* for the representative of a testator. In the works of the canonists our administrator appears as an *executor dative*, our executor as an *executor testamentary*. The Statute of Edward III. had the effect of introducing *administrator* as a technical term; in Y. B. 38 Edward III. f. 21, it is said that formerly the administrator when sued had been called *executor*. See Selden, *op. cit.* p. 1685.

[3] Swinburne, Testaments (ed. 1640), p. 194. So in Scotland in the

Letters of administration.

But, to return to the law of intestate succession as it was in earlier days, we shall see it well illustrated by a document issued by a bishop of Durham in 1313, the earliest specimen of 'letters of administration' that has come under our notice. He addresses Margaret the widow of Robert Haunsard, knight, and William and John Walworth. Confiding in their fidelity, he commits to them the administration of the goods of Robert Haunsard, who has died intestate. They are to exhibit a true inventory, to satisfy creditors, and to certify the bishop's official as to the names of the creditors and the amount of the [p. 360] debts. The residue, if any, of the goods they are to divide into three parts, assigning one to the dead man, one to his widow Margaret, and one to the children 'according to the custom of the realm of England.' The dead's part they are to distribute for the good of his soul in such pious works as they shall think best according to God and good conscience, and of their administration they are to render account to the bishop or his commissaries. The bairns' part they are to retain as curators and guardians until the children are of full age. If any one impleads the bishop concerning the goods, they are to defend the action and keep the bishop indemnified[1]. Such were 'letters of administration' in the first years of the fourteenth century.

Separation of chattels from lands.

To a student of economic history a system of inheritance which studiously separates the chattels from the land may seem but little suited to an age in which agriculture was almost the only process productive of wealth. The heir, it may seem, is destined to inherit bare acres, while the capital which has made them fertile goes to others. Nor in the generality of medieval wills do we find the testator favouring his heir; if he has several sons he will probably bestow equal benefits upon them. Again, at least in later law, the heir could claim no bairn's part of the chattels[2]. But when we look into the

nineteenth century: Fraser, Husband and Wife, ii. 994. Indeed the Scottish law of intestate succession to movables has been marvellously unlike that settled by Nov. 118. It has been at once agnatic (refusing to trace through a female ancestor) and parentelic: Fraser, ii. 1072.

[1] Regist. Palat. Dunelm. i. 369. In 1343 the Commons pray that the person to whom the ordinary commits the affairs of the intestate may have an action against creditors. The king answers that the bishop must have it, as he is responsible to others; Rot. Parl. ii. 142. See Selden, *op. cit.*, p. 1685.

[2] Swinburne, Testaments (ed. 1640), p. 196.

matter we see that a great deal of the agricultural capital is 'realty' and descends to the heir. For this purpose the villeins are annexed to the soil; they can not be severed from it by testament[1]; their ploughs, oxen and other chattels are at the heir's service. Even if there is no personal unfreedom in the case, what descends to the heir of a well-to-do gentleman is no bare tract of land, but that complex known as a manor, which includes the right to exact labour services from numerous tenants. The stock on the demesne land the heir will not inherit; he will often purchase it from the executors; still he will not inherit a mere tract of soil.

Heir-looms

[p. 361] Again, there are many traces of local customs which under the name of 'principals' or 'heir-looms' will give him various chattels, not merely his ancestor's sword and hauberk, but the best chattels of every different kind, the best horse (if the church does not take it) and the best ox, the best chair and the best table, the best pan and the best pot. The local customs which secure him these things may well be of ancient date, and their origin deserves investigation[2].

Review

It is in the province of inheritance that our medieval law made its worst mistakes. They were natural mistakes. There was much to be said for the simple plan of giving all the land to the eldest son. There was much to be said for allowing the courts of the church to assume a jurisdiction, even an exclusive jurisdiction, in testamentary causes. We can hardly blame our ancestors for their dread of intestacy without attacking their religious beliefs. But the consequences have been evil. We rue them at the present day, and shall rue them so long as there is talk of real and personal property.

[1] Britton, i. 197–8.

[2] Test. Ebor. i. 287: 'Item volo et firmiter praecipio H. B. filio meo super benedictione mea quod non vendicet nec calumpnietur aliqua principalia infra manerium meum de A., nec alibi, quia ego nulla habui de parentibus meis.' See also Durham Wills (Surtees Soc.), i. 59. In Edward III.'s reign the custom of an Oxfordshire hundred is declared to be that the heir shall have as *principalia* or heir-looms the best cart, the best plough, the best cup and so on of every kind of chattels: Co. Lit. 18 b; Elton, Origins of English History (2nd ed.), pp. 197–8.