SECTION 9. THE AGE OF EQUITY: LEGAL DEVELOPMENTS

A. THE IDEA OF LAW c. 1500: LITTLETON, FORTESCUE, ST. GERMAN

SIR THOMAS LITTLETON, *TENURES* (EXTRACTS)

(E. Wambaugh trans., Washington 1903), bk. 1, pp. 1–35

BOOK THE FIRST.

CHAPTER I.

FEE SIMPLE.

§ 1. TENANT in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin *feodum*[1] *simplex* for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words, his heirs, make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever, or by these words, To have and to hold to him and his assigns for ever; in these two cases he hath but an estate for term of life, for that there lack these words, his heirs, which words only make an estate of inheritance in all feoffments and grants.

§ 2. And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far so ever he be from him in degree, may inherit and have the land as heir to him.

§ 3. But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law that inheritance may [lineally][2] descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son, (as by law he ought,) and after[3] the uncle dieth without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to his son, for that he cometh to the land by collateral descent, and not by lineal ascent.

§ 4. And in case where the son purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the mother's side: but, if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother.[4] But, if a man marrieth an inheritrix of lands in fee simple, who hath issue a son, and die, and the son enter into the

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[1] In the earliest French edition, that of Lettou and Machlinia, this word is spelled "*feudum*."

[2] Throughout this edition brackets in the text indicate that according to the best French texts the inclosed words are spurious.

[3] *I. e.* afterwards.

[4] In some of the later French texts there is here inserted the following passage:—

"And this was the opinion of all the justices. M. 12 E. IV. But it was there held, if land descend to a man on the part of his father who dies without issue, that his next heir, on the part of his father, shall inherit to him, that is to wit, the next who is of the blood of the father on the part of the father of the father: and for default of such heir, those who are of the blood of the mother on the part of the mother of the father, viz. the grandmother, shall inherit. And if there is no such heir on the part of the father, then the lord shall have the land by escheat." [See next page]

[From preceding page:] Coke does not print this interpolation; and Hargrave and Butler's notes to Coke upon Littleton say of it: "But this passage is not in any edition prior to Redman's, and seems an addition to Littleton by another hand, and to be an opinion extracted from 12 E. IV. 14, pl. 12, which is indeed cited in the margin of Redman."

tenements, as son and heir to his mother, and after die without issue, the heirs of the part of his mother ought to inherit, and not the heirs of the part of the father. And, if he hath no heir on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheat. [In the same manner it is, if lands descend to the son of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother. And if there be no heir of the part of the father, the lord of whom the land is holden, shall have the land by escheat.] And so see the diversity, where the son purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

§ 5. Also if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent and not the middle, for that the eldest is most worthy of blood.

§ 6. Also, it is to be understood, that none shall have land of fee simple by descent as heir to any man, unless he be his heir of the whole blood. For if a man hath issue two sons by divers venters, and the elder purchase lands in fee simple, and die without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin shall have the same because the younger brother is but of half blood to the elder.

§ 7. And if a man hath issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heir [to her brother,] and not the younger brother, for that the sister is of the whole blood of her elder brother.

§ 8. And also, where a man is seised of lands in fee simple, and hath issue a son and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heir to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse haeredem.* But if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue, [and his uncle enter as next heir to him, who also dies without issue,] now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

§ 9. And it is to wit, that this word (*inheritance*) is not only intended where a man hath lands or tenements by descent of inheritance, but also every fee simple [or tail] which a man hath by his purchase may be said an inheritance, because his heirs may inherit him. For in a writ of right which a man bringeth of land that was of his own purchase, the writ shall say, *quam clamat esse jus et haereditatem suam.* And so shall it be said in divers other writs which a man or woman bringeth of his own purchase, as appears by the Register.

§ 10. And of such things, whereof a man may have a manual occupation, possession, or receipt, as of lands, tenements, rents, and such like, there a man shall say in his count countant, and plea pleadant, that such a one was seised in his demesne as of fee. But of such things, which do not lie in such manual occupation, &c., as of an advowson of a church and such like, there he shall say, that he was seised as of fee, and not in his demesne as of fee. And in Latin it is in one case, *qu•d talis seisitus fuit in dominico suo ut de feodo,* and in the other case, *qu•d talis seisitus fuit, &c., ut de feodo.*

§ 11. And note, that a man cannot have a more large or greater estate of[5] inheritance than fee simple.

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[5] Instead of “of,” the best French texts authorize “or.”

§ 12. Also, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed.

CHAPTER II.
FEE TAIL.

§ 13. Tenant in fee tail is by force of the statute of Westminster II.,[6] *cap*, 1; for before the said statute, all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute, tenant in tail is in two manners, that is to say, tenant in tail general, and tenant in tail special.

§ 14. Tenant in tail general, is where lands or tenements are given to a man, and to his heirs of his body begotten. In this case it is said general tail, because whatsoever woman, that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue,) yet every one of these issues by possibility may inherit the tenements by force of the gift, because that every such issue is of his body engendered.

§ 15. In the same manner it is, where lands or tenements are given to a woman, and to the heirs of her body; albeit that she hath divers husbands, yet the issue, which she may have by every husband, may inherit as issue in tail by force of this gift; and therefore such gifts are called general tails.

§ 16. Tenant in tail special, is where lands or tenements are given to a man and to his wife, and to the heirs of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendered between them two. And it is called especial tail, because if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die.

§ 17. In the same manner it is, where tenements are given by one man to another, with a wife (which is the daughter or cousin to the giver) in frankmarriage, the which gift hath an inheritance by these words (frankmarriage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heirs between them two begotten. And this is called especial tail, because the issue of the second wife may not inherit.

§ 18. And note, that this word (*talliare*) is the same as to set to some certainty, or to limit to some certain inheritance. And for that it is limited and put in certain, what issue shall inherit by force of such gifts, and how long the inheritance shall endure, it is called in Latin, *feodum talliatum, i.e. haereditas in quondam certitudinem limitata*. For if tenant in general tail dieth without issue, the donor or his heirs may enter as in their reversion.

§ 19. In the same manner it is of the tenant in especial tail, etc. For in every gift in tail without more saying, the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor, and to his heirs, the like services as the donor doth to his lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unless it be for fealty) until the fourth degree is past, and after the fourth degree is past, the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heirs as they hold over, as before is said.

§ 20. And the degrees in frankmarriage shall be accounted in this manner, viz. from the donor to the donees in frankmarriage the first degree, because the wife that is one of the donees ought to be daughter, sister, or other cousin to the donor; and from the donees unto their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is, because that after every such gift, the issues of the donor, and the issues of the donees after the fourth degree past of both parties in such form to be accounted, may, by the law of the holy church, intermarry. And that the donee in frankmarriage shall be said to be the first degree of the four trees, a man may see in a plea upon a writ of right of ward, P. 31 E. III., where the plaintiff pleadeth that his great grandfather was seised of certain lands,

[6] 13 E. I. (1285).

etc., and held the same of another by knight's service, etc., who gave the land to one Raphe Holland with his sister in frankmarriage, &c.

§ 21. And all these entails aforesaid be specified in the said statute of Westminster II. Also there be divers other estates in tail, though they be not by express words specified in the said statute, but they are taken by the equity of the same statute. As if lands be given to a man, and to his heirs males of his body begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entails aforesaid it is otherwise.

§ 22. In the same manner it is, if lands or tenements be given to a man and to his heirs females of his body begotten; in this case his issue female shall inherit by force and form of the said gift, and not his issue male. For in such cases of gifts in tail, the will of the donor ought to be observed, who ought to inherit, and who not.

§ 23. And in case where lands or tenements be given to a man, and to the heirs males of his body, and he hath issue two sons, and dieth, and the eldest son enter as heir male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heir male. But otherwise it is in the other entails, which are specified in the said statute.

§ 24. Also, if lands be given to a man and to the heirs males of his body, and he hath issue a daughter, who hath issue a son, and dieth, and after the donee die; in this case, the son of the daughter shall not inherit by force of the entail; because whosoever shall inherit by force of a gift in tail made to the heirs males, ought to convey his descent wholly by the heirs males. Also in this case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himself the descent by an heir male.

§ 25. In the same manner it is, where lands are given to a man and his wife, and to the heirs males of their two bodies begotten, &c.

§ 26. Also, if tenements be given to a man and to his wife, and to the heirs of the body of the man, in this case the husband hath an estate in general tail, and the wife but an estate for term of life.

§ 27. Also, if lands be given to the husband and wife, and to the heirs of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in especial tail, and the wife but an estate for life.

§ 28. And if the gift be made to the husband and to his wife, and to the heirs of the body of the wife by the husband begotten, there the wife hath an estate in special tail, and the husband but for term of life. But if lands be given to the husband and the wife, and to the heirs which the husband shall beget on the body of the wife in this case both of them have an estate tail, because this word (heirs) is not limited to the one more than to the other.[7]

§ 29. Also, if land be given to a man and to his heirs which he shall beget on the body of his wife, in this case the husband hath an estate in especial tail, and the wife hath nothing.

§ 30. Also, if a man hath issue a son and dieth, and land is given to the son, and to the heirs of the body of his father begotten, this is a good entail, and yet the father was dead at the time of the gift. And there be many other estates in the tail, by the equity of the said statute, which be not here specified.

§ 31. But if a man give lands or tenements to another, to have and to hold to him and to his heirs males, or to his heirs females, he, to whom such a gift is made, hath a fee simple, because it is not limited by the gift, of what body the issue male or female shall be, and so it cannot in any wise be taken by the equity of the said statute, and therefore he hath a fee simple.

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[7] In Lettou and Machlinia's edition, but not in other early editions, the following passage is added:—

"And they have, in such case, the same estate as where lands were given to them and the heirs of the two bodies begotten."

Chapter III.
Tenant in Tail After Possibility, Etc.

§ 32. Tenant in fee tail after possibility of issue extinct is, where tenements are given to a man and to his wife in especial tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct.

§ 33. Also, if tenements be given to a man and to his heirs which he shall beget on the body of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especial tail. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in tail after possibility of issue extinct.

§ 34. And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in especial tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life, he may by possibility have issue which may inherit by force of the same entail. And so in the same manner the issue, which is heir to the donees in especial tail, cannot be tenant in tail after possibility of issue extinct, for the reason abovesaid.

[And note, that tenant in tail after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him, 10 H. VI., 1. But he in the reversion may enter if he alien in fee, 45 E. III., 22.][8]

Chapter IV.
Curtesy of England.

§ 35. Tenant by the curtesy of England is where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female born alive; albeit the issue after[9] dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because this is used in no other realm but in England only.

And some have said, that he shall not be tenant by the curtesy, unless the child, which he hath by his wife, be heard cry; for by the cry it is proved that the child was born alive. Therefore *quaere*.

Chapter V.
Dower.

§ 36. Tenant in dower is where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth, the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty, by metes and bounds, for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, [for she must be above nine years old at the time of the decease of her husband,] otherwise she shall not be endowed.

§ 37. And note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custom of some county, she shall have the half, and by the custom in some town or borough, she shall have the whole; and in all these cases she shall be called tenant in dower.

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[8] Coke says: "Not in the edition (which I have). And therefore (that I may speak it once for all), it was wrong to the author to add anything (especially in one context) to his work."

[9] *I.e.* afterwards.

§ 38. Also, there be two other kinds of dower, viz. dower which is called dowment at the church door, and dower called dowment by the father's assent.

§ 39. Dowment at the church door is, where a man of full age seised in fee simple, who shall be married to a woman, and when he cometh to the church door to be married, there, after affiance and troth plighted between them, he endoweth the woman of his whole land, or of the half, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any.

§ 40. Dowment by assent of the father is, where the father is seised of tenements in fee, and his son and heir apparent, when he is married, endoweth his wife at the monastery or church door, of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcels. In this case, after the death of the son, the wife shall enter into the same parcel without the assignment of any. But it hath been said in this case, that it behoveth the wife to have a deed of the father to prove his assent and consent to this endowment. [M. 44 E. III. f. 45.][10]

§ 41. And if, after the death of her husband, she entereth, and agree to any such dower of the said dowers at the church door, &c., then she is concluded to claim any other dower by the common law of any the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church door, &c., and then she may be endowed after the course of the common law.

§ 42. And note, that no wife shall be endowed, *ex assensu patris* in form aforesaid, but where her husband is son and heir apparent to his father. *Quaere* of these two cases of dowment *ad ostium ecclesiae, &c.*, if the wife, at the time of the death of her husband, be not past the age of nine years, whether she shall have dower or no.

§ 43. And note, that in all cases where the certainty appeareth what lands or tenements the wife shall have for her dower, there the wife may enter, after the death of her husband, without assignment of any. But where the certainty appears not, as to be endowed of the third part, to have in severalty, or the moiety according to the custom, to hold in severalty, in such cases it behoveth that her dower be assigned unto her after the death of her husband; because it doth not appear before assignment what part of the lands or tenements she shall have for her dower.

§ 44. But if there be two joint tenants of certain land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, and after dieth; in this case the wife for her dower shall have the third part of the moiety which her husband purchased, to hold in common (as her part amounteth) with the heir of her husband, and with the other joint tenants which did not alien; for that in this case her dower cannot be assigned by metes and bounds.

§ 45. And it is to be understood, that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death; but where he holdeth in common, otherwise it is, as in the case next abovesaid.

§ 46. And it is to be understood, that if tenant in tail endoweth his wife at the church door, as is aforesaid, this shall little or nothing at all avail the wife; for that, that after the decease of her husband, the issue in tail may enter upon her possession; and so may he in the reversion, if there be no issue in tail then alive.

§ 47. Also, if a man seised in fee simple, being within age, endoweth his wife at the monastery or church door, and dieth, and his wife enter, in this case the heir of the husband may out her. But otherwise it is (as it

[10] Coke says: "And here it is not well done (of him that made the addition to our author) to vouch 44 E. III., fo. 45, because the author himself vouched it not; for if he meant to have vouched authorities, he would have vouched more than one in this case, and those that he vouched he would have cited truly: but this case is mistaken both in the year and in the leaf, for whereas it is cited in 44 E. III., it is in 40 E. III, and whereas he saith it is fo. 45, it is fo. 43."

seemeth) where the father is seised in fee, and the son within age endoweth his wife *ex assensu patris*, the father being then of full age.

§ 48. Also, there is another dower, which is called dowment *de la pluis beale*. And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of the said forty acres, of one, by knight's service, and the other twenty acres, of another, in socage, and taketh wife, and hath issue a son, and dieth, his son being within the age of fourteen years, and the lord of whom the land is holden by knight's service entereth into the twenty acres holden of him, and holdeth them a guardian in chivalry during the nonage of the infant, and the mother of the infant entereth into the residue, and occupieth it as guardian in socage; if in this case the wife bringeth a writ of dower against the guardian in chivalry, to be endowed of the tenements holden by knight's service, in the king's court, or other court, the guardian in chivalry may plead in such case all this matter, and shew how the wife is guardian in socage, as aforesaid; and pray that it may be adjudged by the court, that the wife may endow herself *de la pluis beale*, i.e. of the most fair of the tenements which she hath as guardian in socage, after the value of the third part which she claims by her writ of dower, to have the tenements holden by knight's service. And if the wife cannot gainsay this, then the judgment shall be given, that the guardian in chivalry shall hold the lands holden of him during the nonage of the infant, quit from the woman, &c.[11]

§ 49. And note, that after such a judgment given, the wife may take her neighbours, and in their presence endow herself by metes and bounds of the fairest part of the tenements which she hath as guardian in socage,[12] to have and to hold to her for term of her life: and this dower is called dower *de la pluis beale*.

§ 50. And note, that such dowment cannot be, but where a judgment is given in the king's court, or in some other court, &c.,[13] and this is for the preservation of the estate of the guardian in chivalry during the nonage of the infant.

§ 51. And so you may see five kinds of dower, viz. dower by the common law, dower by the custom, dower *ad ostium ecclesiae*, dower *ex assensu patris*, and dower *de la pluis beale*.

§ 52. And *memorandum*, that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heir to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England, but otherwise not.

§ 53. And also, in every case where a woman taketh a husband seized of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dieth, leaving her husband, and after the husband takes another wife, and dieth, his second wife shall not be endowed in this case, for the reason aforesaid.

§ 54. [Note, if a man be seised of certain lands and taketh wife, and after alieneth the same land with warranty, and after the feoffor and feoffee die, and the wife of the feoffor bring an action of dower against the issue of the feoffee, and he vouch the heir of the feoffor, and hanging the voucher and undetermined, the

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[11] Some of the earliest French tests add: "and that the wife may endow herself of the fairest part of the lands which she hath as guardian in socage, after the value, &c."

[12] {to the value of the third part of the tenements which the guardian in chivalry hath, &c.}

Throughout this edition braces in the foot-notes indicate that according to the best French texts the inclosed words ought to be inserted.

[13] {that the wife can do this;}

wife of the feoffee brings her action of dower against the heir of the feoffee, and demand the third part of that whereof her husband was seised, and will not demand the third part of these two parts of which her husband was seised; it was adjudged, that she should have no judgment until such time as the other plea were determined.][14]

§ 55. [And note, Vavisor saith, that if a man be seised of land and committeth felony, and after alieneth, and after is attaint, the wife shall have a good action of dower against the feoffee; but if it be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference, and inquire what the law is herein.][15]

CHAPTER VI.
TENANT FOR LIFE.

§ 56. Tenant for term of life, is where a man letteth lands or tenements to another for term of the life of the lessee, or for term of the life of another man. In this case the lessee is tenant for term of life. But by common speech, he which holdeth for term of his own life, is called tenant for term of his life; and he which holdeth for term of another's life, is called tenant for term of another man's life.

§ 57. And it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffs another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certain lands or tenements to another in tail, he which maketh the gift is called the donor, and he to whom the gift is made, is called the donee. And the lessor is properly where a man letteth to another lands or tenements for term of life, or for term of years, or to hold at will, he which maketh the lease is called lessor, and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in tail hath a freehold, &c.

CHAPTER VII.
TENANT FOR YEARS.

§ 58. Tenant for term of years is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth by force of the lease, then is he tenant for term of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the tenements let, or else he may have an action of debt for the arrearages against the lessee. But in such case it behoveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead.

§ 59. And it is to be understood, that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for term of life; in such cases where a freehold shall pass, if it be by deed or without deed, it behoveth to have livery of seisin.

§ 60; But if a man letteth lands or tenements by deed, or without deed, for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behoveth, that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold, and also the reversion, in the lessor. But if he maketh livery of seisin to the lessee, then is the

[14] Coke says: "You may easily perceive by the context that this shaft came never out of Littleton's quiver of choice arrows." Hargrave and Butler's notes say: "It appears to have been first added in the edition by Pynson."

[15] Coke says: "This is also of the new addition." Hargrave and Butler's notes say that it is in Pynson and the subsequent editions.

freehold, together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.

§ 61. And if a man will make a feoffment, by deed or without deed, of lands or tenements which he hath in divers towns in one county, the livery of seisin made in one parcel of the tenements in one town, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in all other the towns in the same county. But if a man maketh a deed of feoffment of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin.

§ 62. And in some case a man shall have by the grant of another, a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin; and such exchange, made by parol, of tenements within the same county, without writing, is good enough.

§ 63. And if the lands or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made between them of this exchange.

§ 64. And note, that in exchanges it behoveth, that the estates which both parties have in the lands so exchanged, be equal; for if the one willeth and grant that the other shall have his land in fee tail for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is void, because the estates be not equal.

§ 65. In the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general, and the other in the other land fee tail especial, &c. So always it behoveth that in exchange the estates of both parties be equal, viz. if the one hath a fee simple in the one land, that the other shall have like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land, &c., and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a far greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equal. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c., and in each of their grants mention shall be made of the exchange.

§ 66. Also, if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the form of the lease. But if a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had naught to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heir, or in some other.

§ 67. Also, if tenements be let to a man for term of half a year, or for a quarter of a year, &c. in this case, if the lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum*; but he shall have an especial declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.

CHAPTER VIII.
TENANT AT WILL.

§ 68. Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it

pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sown, and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress, and regress, to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, which knoweth the end of his term,[16] doth sow the land, and his term endeth before the corn is ripe. In this case the lessor, or he in the reversion, shall have the corn, because the lessee knew the certainty of his term and when it would end.

§ 69. Also, if a house be let to one to hold at will, by force whereof the lessee entereth into the house, and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entry, egress, and regress, into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mease in fee simple, fee tail, or for life, hath certain goods within the said house, and makes his executors, and dieth; whosoever after his decease hath the house, his executors shall have free entry, egress, and regress, to carry out of the same house the goods of their testator by reasonable time.

§ 70. Also, if a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupy it at the will of him, which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

§ 71. Also, if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is tied. But if tenant at will commit voluntary waste, as in pulling down of houses, or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee. As if I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending.

§ 72. Note, if the lessor upon a lease at will reserve to him a yearly rent, he may distrain for the rent behind, or have for this an action of debt at his own election.

Chapter IX.
Tenant by Copy.

§ 73. Tenant by copy of court roll, is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, or fee tail, or for term of life, &c., at the will of the lord according to the custom of the same manor.

§ 74. And such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custom to surrender the tenements in court, &c., into the hands of the lord, to the use of him that shall have the estate, in this form, or to this effect:

A. of B. cometh into this court, and surrendereth in the same court a mease, &c., into the hands of the lord, to the use of C. of D. and his heirs, or the heirs issuing of his body, or for term of life, &c. And upon that cometh the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heirs, or to him and to his heirs, issuing of his body, or to him for term of life, at the lord's will, after the custom of the manor, to do and yield therefore the rents, services, and customs thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

§ 75. And these tenants are called tenants by copy of court roll; because they have no other evidence concerning their tenements, but only the copies of court rolls.

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[16] Tomlins says: "Rastell's translation renders this passage, 'before the end of his term' which it is apprehended is the true reading."

§ 76. And such tenants shall neither implead nor be impleaded for their tenements by the king's writ. But if they will implead others for their tenements, they shall have a plaint entered in the lord's court in this form, or to this effect: A. of B. complains against C. of D. of a plea of land, viz. of one messuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assize of mordancester at the common law, or, of an assize of novel disseisin, or formed on in the discender at the common law, or in the nature of any other writ, &c. Pledges to prosecute F. G. &c.

§ 77. And although that some such tenants have an inheritance according to the custom of the manor, yet they have but an estate but at the will of the lord according to the course of the common law. For it is said, that if the lord do oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they should not be said to be tenants at will of the lord according to the custom of the manor. But the lord cannot break the custom which is reasonable is these cases.

[But Brian chief justice said, that his opinion hath always been, and ever shall be, that if such tenant by custom paying his services be ejected by the lord, he shall have an action of trespass against him. H. 21 E. IV. And so was the opinion of Danby chief justice in 7 E IV. For he saith, that, tenant by the custom is as well inheritor to have his land according to the custom, as he which hath freehold at the common law.]

SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE*

(S.B. Chrimes, ed., and trans. Cambridge 1942), chs. 9–10, 14–22, 27–28, 33–37 (pp. 25–27, 35, 37, 39, 41, 43, 45, 47, 65, 67, 79, 81, 83, 85, 87, 89, 91)

Fortescue's *De Laudibus* was written while the author and Henry VI's son Edward were in exile in France between 1468–71. It is in the form of a dialogue between the Chancellor (Fortescue) and the Prince (Edward). As we pick up the dialogue the Chancellor has convinced the Prince that he ought to study law and is replying to the Prince's question ("difficulty") whether he ought to study English law or civil (Roman) law.

CHAPTER IX.

A king ruling politically is not able to change the laws of his kingdom

'The second difficulty, prince, of which you are apprehensive, shall be removed with like ease. For you doubt whether you should apply yourself to the study of the laws of the English or of the civil laws, because the civil laws are celebrated with a glorious fame throughout the world above all other human laws. Do not, O king's son, let this consideration trouble you. For the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only regal but also political. If he were to preside over them with a power entirely regal, he would be able to change the laws of his realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state that *What pleased the prince has the force of law*. But the case is far otherwise with the king ruling his people politically, because he is not able himself to change the laws without the assent of his subjects nor to burden an unwilling people with strange imposts, so that, ruled by laws that they themselves desire, they freely enjoy their properties, and are despoiled neither by their own king nor any other. The people, forsooth, rejoice in the same way under a king ruling entirely regally, provided he does not degenerate into a tyrant. Of such a king, Aristotle said (*Politics* iii) that *It is better for a city to be ruled by the best man than by the best law*. But, because it does not always happen that the man presiding over a people is of this sort, St Thomas, in the book he wrote for the king of Cyprus, *De Regimine Principum*, is considered to have desired that a kingdom be constituted such that the king may not be free to govern his people tyrannically, which only comes to pass when the regal power is restrained by political law. Rejoice, therefore, good prince, that such is the law of the kingdom to which you are to succeed, because it will provide no small security and comfort for you and for the people. By such a law, as the aforementioned Saint said, The whole human race would have been ruled, if it had not transgressed in paradise the commands of God. By such a law the synagogue was ruled, when under God alone as king, who adopted it as a realm peculiarly His, and defended it; but at last, a human king having been constituted for it, on its own petition, it was continuously humiliated by kings ruling entirely regally. Under these, none the less, it rejoiced when the best kings ruled, but when an undisciplined sort ruled, it lamented inconsolably, as the

Books of Kings reveal more clearly. But as I think I have discussed this matter sufficiently in a small work Of the Nature of the Law of Nature which I wrote for your consideration, I desist from saying more about it now.'

Chapter x.

A question by the prince

Then the prince said forthwith, 'How comes it, chancellor, that one king is able to rule his people entirely regally, and the same power is denied to the other king? Of equal rank, since both are kings, I cannot help wondering why they are unequal in power.'

The Chancellor's answer is omitted, but it is summarized by the Prince as follows:

Chapter xiv.

Herein the prince briefly summarises what the chancellor has already said in general terms

To whom the prince, 'You have, chancellor, dispersed by the light of your discourse the darkness that dimmed the sight of my mind, so that I now very clearly perceive that no people ever formed themselves into a kingdom by their own agreement and thought unless in order to possess safer than before both themselves and their own, which they feared to lose an expectation that would be disappointed if their king were able to deprive them of their means, which was not permitted before to anyone among men. And such a people would suffer still more grievously if they were ruled by laws strange, and perhaps hateful, to them; especially if their substance was thereby diminished, to avoid the loss of which, as well as to protect their bodies, they submitted of their own will to the government of a king; truly such a power as this could not issue from the people, and if not from them, a king of this sort could obtain no power over them. On the other hand, I conceive it to be quite otherwise with a kingdom which is incorporated solely by the authority and power of the king, because such a people is subjected to him by no sort of agreement other than to obey and be ruled by his laws, which are the pleasure of him by the pleasure of whose will the people is made into a realm. Nor, chancellor, has it thus far slipped my memory that you have shown elsewhere, with learned argument, in your treatise *Concerning the Nature of the Law of Nature*, that the power of the two kings is equal, since the power by which one of them is free to do wrong does not increase his freedom, just as to be able to be ill or to die is not power, but is rather to be deemed impotency because of the deprivation involved. For, as Boethius said, *There is no power unless for good*, so that to be able to do evil, as the king reigning regally can more freely do than the king ruling his people politically, diminishes rather than increases his power.

'For the holy spirits who, already confirmed in glory, are unable to sin, are more powerful than us, who with a free rein take delight in any deed. Therefore, it only remains for me to enquire of you whether the law of England, to the study of which you invite me, is as good and effectual for the government of that kingdom as the civil law, by which the Holy Empire is ruled, is thought to be sufficient for the government of the whole world. If you satisfy me in this respect, with suitable proof, I shall at once apply myself to the study of the law, and shall not weary you any more with my queries in these matters.'

Chapter xv.

All laws are the law of nature, customs, or statutes

Chancellor: 'You have committed to memory, my good prince, what I have so far mentioned to you, so that you deserve my explanation of what you now ask. I want you, then, to know that all human laws are either law of nature, customs, or statutes, which are also called constitutions. But customs and the rules of the law of nature, after they have been reduced to writing, and promulgated by the sufficient authority of the prince, and commanded to be kept, are changed into a constitution or something of the nature of statutes; and thereupon oblige the prince's subjects to keep them under greater penalty than before, by reason of the strictness of that command. Such is no small part of the civil law, which is reduced to writing by the Roman princes in large volumes, and by their authority commanded to be observed. Hence that part has now obtained the name of civil law, like the other statutes of the Emperors. If, therefore, I shall prove that the law

of England excels pre-eminently in respect of these three fountains, so to speak, of all law, I shall have proven also that law to be good and effectual for the government of that realm. Furthermore, if I shall have clearly shown it to be adapted to the utility of that same realm as the civil law is to the good of the Empire, I shall have made manifest that the law is not only excellent, but also, like the civil law, is as fine as you could wish. Therefore, I proceed to show you sufficiently these two things.'

Chapter xvi.

The law of nature is the same in all regions

'The laws of England, in those points which they sanction by reason of the law of nature, are neither better nor worse in their judgements than are all laws of other nations in like cases. For, as Aristotle said, in the fifth book of the Ethics, Natural law is that which has the same force among all men. Wherefore there is no need to discuss it further. But from now on we must examine what are the customs, and also the statutes, of England, and we will first look at the characteristics of those customs.'

Chapter xvii.

The customs of England are very ancient, and have been used and accepted by five nations successively

'The kingdom of England was first inhabited by Britons; then ruled by Romans, again by Britons, then possessed by Saxons, who changed its name from Britain to England. Then for a short time the kingdom was conquered by Danes, and again by Saxons, but finally by Normans, whose posterity hold the realm at the present time. And throughout the period of these nations and their kings, the realm has been continuously ruled by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them, especially the Romans, who judged almost the whole of the rest of the world by their laws. Similarly, others of these aforesaid kings, who possessed the kingdom of England only by the sword, could, by that power, have destroyed its laws. Indeed, neither the civil laws of the Romans, so deeply rooted by the usage of so many ages, nor the laws of the Venetians, which are renowned above others for their antiquity—though their island was uninhabited, and Rome unbuilt at the time of the origin of the Britons—nor the laws of any Christian kingdom, are so rooted in antiquity. Hence there is no gainsaying nor legitimate doubt but that the customs of the English are not only good but the best.'

Chapter xviii.

Herein he shows with what solemnity statutes are promulgated in England

'It only remains, then, to examine whether or not the statutes of the English are good. These, indeed, do not emanate from the will of the prince alone, as do the laws in kingdoms which are governed entirely regally, where so often statutes secure the advantage of their maker only, thereby redounding to the loss and undoing of the subjects. Sometimes, also, by the negligence of such princes and the inertia of their counsellors, those statutes are made so ill-advisedly that they deserve the name of corruptions rather than of laws. But the statutes of England cannot so arise, since they are made not only by the prince's will, but also by the assent of the whole realm, so they cannot be injurious to the people nor fail to secure their advantage. Furthermore, it must be supposed that they are necessarily replete with prudence and wisdom, since they are promulgated by the prudence not of one counsellor nor of a hundred only, but of more than three hundred chosen men—of such a number as once the Senate of the Romans was ruled by—as those who know the form of the summons, the order, and the procedure of parliament can more clearly describe. And if statutes ordained with such solemnity and care happen not to give full effect to the intention of the makers, they can speedily be revised, and yet not without the assent of the commons and nobles of the realm, in the manner in which they first originated. Thus, prince, all the kinds of the law of England are now plain to you. You will be able to estimate their merits by your own wisdom, and by comparison with other laws; and when you find none in the world so excellent, you will be bound to confess that they are not only good, but as good as you could wish.'

Chapter xix.

Herein he lays down the manner in which the character of the civil and the English laws can be discerned

'Only one point of those that puzzled you now remains to be examined, namely, whether the laws of England deserve to be adjudged as fitting, effective, and convenient for this kingdom of England as the civil laws are for the Empire. Comparisons, indeed, prince, as I remember you said at one time, are reputed odious, and so I am not fond of making them, but you will be able to gather more effectively whether both of these laws are of equal merit, or whether one more richly deserves encomium than the other, not from my opinion, but from those points wherein their rules differ. For where both laws agree, they are equally praiseworthy, but in the cases wherein they differ, the superiorities of the more excellent law will appear after due reflection, therefore, bring forward some cases of this sort, so that you can weigh in a fair balance which of the laws shows its superiorities better and more justly. And first let us propound the most important of such cases.'

Chapter xx.

First case in which the civil and the English laws differ

'If parties before a judge come to joinder of issue on the matters of fact, which the learned in the laws of England call "the issue of the plea", the truth of such issue ought, by the civil laws, to be proved by the deposition of witnesses, and for that two suitable witnesses suffice. But by the laws of England, the truth cannot be settled for the judge, unless by the oath of twelve men of the neighbourhood where the fact is supposed to have been located. The question, therefore, is which of those two very different procedures should be held to be more reasonable and effective for the discovery of the truth thus in doubt. For the law that can reveal it better and more certainly is superior in this respect to the law that is of less effect and virtue. Hence let us proceed thus in the examination of this matter.'

Chapter xxi.

Herein the evils are mentioned that come of a law which admits proof only by witnesses

'By the civil law, the party who has taken the affirmative in the joinder of issue ought to produce the witnesses, whom he shall name at his pleasure. But a negative cannot be proven, that is, directly, though it may be indirectly. Feeble indeed in power, and of less diligence, may he be deemed, who cannot find, out of all the men he knows, two who are so lacking in conscience and truth that, for fear, love, or advantage, they will contradict every truth. These, then, the party can produce as witnesses in his cause. And if the other party wants to object to them or their evidence, it does not always happen that they, their conduct, and their habits are known to him who wishes to object, so that such witnesses could be rejected on account of their depravity and viciousness. And since their statements are in the affirmative, they are not easily disproved by circumstantial or other indirect evidence. Who, then, can live secure of himself or his own under such a law—a law that offers assistance to anyone hostile to him? And what two rogues are so heedless that they do not, before they are produced as witnesses, privately frame a likely story and account of the fact about which they are to be examined in court, and piece together all the details as they would have been if the story were true? For the children of this world, said the Lord, are wiser than the children of light. Thus the wicked Jezebel procured two witnesses, sons of Belial, against Naboth in proceedings by which he lost his life, and Ahab his king took possession of his vineyard. So Susanna, a most chaste wife, would have been put to death for adultery by the testimony of two old men, themselves judges, if the Lord had not miraculously freed her by means of an inconceivable wisdom unnatural to a youth not yet advanced in years. And if the boy Daniel proved them false because of the variance in their depositions, who but the Lord alone could have known that they would differ so in their statements, since there was no legal obligation for them to remember under what kind of tree the alleged deed was done? For the witnesses of a crime are not supposed to notice every bush and other circumstance concerning the fact, if they have very little effect in aggravating or detecting the crime. But when those judges differed as to the species of the tree, their depositions were good for nothing, and their own words showed that they had been prevaricators of the truth, so that they deservedly incurred the penalty they had intended for the accused.

'You know well, most gracious prince, how recently Master John Fringe, who, after he had acted in priest's orders for three years, was compelled to relinquish his holy orders and to marry a young woman to whom, according to the deposition of two rogues, he had previously been affianced. Being convicted of the crime of conspiracy of treason against your highness, after having lived with her for fourteen years and having raised seven children, he confessed, at the moment of his death and in front of all the people, that those witnesses had been suborned and had given false testimony. The perversion of judgements by false witness in this way, even under the best judges, is no news to you, nor is it unknown in the world, for this crime is, alas! very often committed.'

Chapter xxii.

See herein the inhumanity of tortures

'The law of France, therefore, is not content to convict the accused in capital cases by witnesses, lest innocent blood be condemned by the testimony of liars. But that law prefers the accused to be racked with tortures until they themselves confess their guilt, than to proceed by the deposition of witnesses who are often instigated to perjury by wicked passions and sometimes by the subornation of evil persons. By such precaution and disingenuousness, criminals and suspected criminals are afflicted with so many kinds of tortures in that kingdom that the pen scorns to put them into writing.

After attacking the civil law system of proof, the Chancellor proceeds to describe the English jury system and concludes (ch. 27):

. . . Who, then, in England can die unjustly for a crime, when he can have so many aids in favour of his life, and none save his neighbours, good and faithful men, against whom he has no manner of exception, can condemn him? I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly. Nevertheless, it cannot be supposed that a suspect accused in this form can escape punishment, when his life and habits would thereafter be a terror to them who acquitted him of his crime. In this process nothing is cruel, nothing inhuman; an innocent man cannot suffer in body or members. Hence he will not fear the calumny of his enemies because he will not be tortured at their pleasure. Under this law, therefore, life is quiet and secure. Judge, therefore, O excellent prince, which of these laws would be most preferable to you, if you hoped to live a private life.'

Chapter xxviii.

The prince concedes that the laws of England are more desirable to the subjects than the civil laws in the case already discussed

To whom the prince, 'I see no serious difficulty, chancellor, to make one hesitate or waver in the choice which you put to me. For who would not prefer to live under a law which makes it possible to live a secure life, rather than under a law such that it always renders him weak and defenceless against the savagery of all his enemies? Indeed that man cannot be safe in body or goods, whom his enemy can in every cause convict by two, even unknown, witnesses, chosen and brought forward by him. And even though he be not condemned to death by their evidence, yet he who escapes death is not much better off, considering the contraction of his nerves and limbs, and the chronic weakness of his body. Indeed, the cunning of an enemy can pursue with such danger a man who lives under the law which you have just described. But witnesses cannot work such evil when they make their deposition in the presence of twelve trustworthy men of the neighbourhood in which the fact in question occurred, knowing the circumstances and also the habits of the witnesses, especially if they are neighbours and cannot but know if they are worthy of credence. For whatever is done by or among their neighbours cannot be entirely hid from all those twelve jurors. For example, I myself know more certainly what is now done in England than what has been done here in Bar where I at present reside. Nor do I think it possible for what is done, near his home, even with some secrecy, to escape the notice of an honest man. But still I wonder very much why this law of England, so worthy and so excellent, is not common to all the world.'

Chapter xxxiii.

Why certain kings of England were not pleased with their laws

The prince, 'I do see', he says, 'and I consider they excel among all the other laws of the whole world in the case which you have now explained. But we have heard that some of my ancestors the kings of England were little pleased with their laws, and strove to introduce the civil laws into the government of England, and tried to repudiate the laws of the land. I am indeed extremely surprised at their counsel.'

Chapter xxxiv.

Herein the chancellor shows the reason for the matter which the prince queries

The chancellor: 'You would not wonder, prince, if you considered with an alert mind the cause of this attempt. For you have already heard how among the civil laws there is a famous sentence, maxim, or rule, which runs like this, What pleased the prince has the force of law. The laws of England do not sanction any such maxim, since the king of that land rules his people not only regally but also politically, and so he is bound by oath at his coronation to the observance of his law. This certain kings of England bore hardly, thinking themselves therefore not free to rule over their subjects as the kings ruling merely regally do, who rule their people by the civil law, and especially by the aforesaid maxim of that law, so that they change laws at their pleasure, make new ones, inflict punishments, and impose burdens on their subjects, and also determine suits of parties at their own will and when they wish. Hence those ancestors of yours endeavoured to throw off this political yoke, in order thus to rule merely regally over their subject people, or rather to rage unchecked, not heeding that the power of the two kings is equal, as is shown in the aforesaid Treatise on the Nature of the Law of Nature, nor heeding that it is not a yoke but a liberty to rule a people politically, and the greatest security not only to the people but also to the king himself, and no small alleviation of his care.

'In order that these things may appear more clearly to you, consult your experience of both governments; begin with the results of the merely regal government, such as that with which the king of France rules his subjects; then examine experience of the effect of the regal and political government, such as that with which the king of England rules over his subject people.'

Chapter xxxv.

Evils that come from government merely regal in the kingdom of France

'You remember, most admirable prince, you have seen how rich in fruits are the villages and towns of the kingdom of France, whilst you were travelling there, but so burdened by the men-at-arms, and their horses, of the king of that land, that you could be entertained in scarcely any of them except the great towns. There you learned from the inhabitants that these men, though they might be quartered in one village for a month or two, paid or wished to pay absolutely nothing for the expenses of themselves and their horses, and, what is worse, they compelled the inhabitants of the villages and towns on which they descended to supply them at their own charges with wines, meats, and other things that they required, and from neighbouring villages with more choice provender than they found there. And if any declined to do so, they were quickly compelled by cudgeling to do it at once; and then these men, having consumed the victuals, fuel, and fodder for their horses in one village, hastened to another, to devastate it in the same manner, paying not a penny for any of their own necessaries nor those of their concubines, whom they always carried with them in great numbers, nor for shoes, hose, or other items of the same sort, even to the smallest strap; on the contrary, they made the inhabitants of the villages where they stayed pay all their expenses of every kind. This is done in every village and town that is unwalled in the whole of that country, so that there is not one small town which is free from this calamity, and which is not plundered by this abominable extortion once or twice a year. Moreover, the king does not suffer anyone of his realm to eat salt, unless he buys it from the king himself at a price fixed by his pleasure alone. And if any poor man prefers to eat without salt rather than buy it at excessive price, he is soon compelled to buy as much salt at the king's price as is proportionate to the number of persons he supports in his home. Furthermore, all the inhabitants of that realm give to their king every year a fourth part of all the wines that accrue to them, and every innkeeper a fourth penny of the price

of the wines that he sells; and yet again all villages and towns pay to the king annually huge sums assessed on them for the wages of men-at-arms, so that the king's troops, which are always very numerous, are kept in wages every year by the poor of the villages, towns, and cities of the realm. In addition, each village always maintains at least two archers, and some more, sufficiently accoutred and equipped to serve the king in his wars as often as it pleases him to summon them, which he frequently does. Notwithstanding all these, other very heavy tallages are levied to the use of the king every year, on every village of the realm, from which they are relieved in not a single year.

'Exasperated by these and other calamities, the people live in no little misery. They drink water daily, and they taste no other liquor unless at solemn feasts. They wear frocks or tabards of canvas like sackcloth. They do not use woollens, except of the cheapest sort, and that only in their shirts under their frocks, and wear no hose, unless to the knees, exposing the rest of their shins. Their women are barefooted except on feast days; the men and women eat no flesh, except bacon lard, with which they fatten their pottage in the smallest quantity. They do not taste other meats, roast or boiled, except occasionally the offal and heads of animals killed for the nobles and merchants. On the contrary, the men-at-arms eat their poultry, so that they are left with scarcely their eggs for themselves to eat as a rare delicacy. And if anyone grows in wealth at any time, and is reputed rich among the others, he is at once assessed for the king's subsidy more than his neighbours, so that forthwith he is levelled to their poverty. This, unless I am mistaken, is the condition of the plebeian people's estate in that realm; yet the nobles are not thus oppressed with exactions.

'But if any one of them is accused of crime, even by his enemies, he is not always wont to be called before an ordinary judge. But it often appears that he is examined in the king's chamber or other private place, indeed sometimes only by messengers, and as soon as he is adjudged to be guilty, on the information of others and according to the king's conscience, he is thrust into a sack without any form of trial, and is thrown by the officers of the provost-marshal into the river at night and drowned. You have heard that a great many more men die in this way than stand convicted by due process of law.

'But still, what pleases the prince has the force of law according to the civil laws. You have heard of other similar enormities, and of others worse, whilst you have been resident in France and near that realm perpetrated in detestable and damnable fashion, by colour of no law but this. To detail these would be to expand our dialogue too much. Now let us consider what the effect of the political and regal law, which certain of your ancestors tried to change for the civil law, has brought about in the kingdom of England; so that, instructed by a knowledge of both laws, you will be able to decide which is preferable to you; for Aristotle says, as was mentioned above, Opposites placed in juxtaposition are more manifest.'

Chapter xxxvi.

Good that comes from the political and regal government in the kingdom of England

'In the realm of England, no one billets himself in another's house against its master's will, unless in public hostelries, where even so he will pay in full for all that he has expended there, before his departure thence; nor does anyone take with impunity the goods of another without the permission of the proprietor of them; nor, in that realm, is anyone hindered from providing himself with salt or any goods whatever, at his own pleasure and of any vendor. The king, indeed, may, by his officers, take necessaries for his household, at a reasonable price to be assessed at the discretion of the constables of the villages, without the owners' permission. But none the less he is obliged by his own laws to pay this price out of hand or at a day fixed by the greater officers of his household, because by those laws he cannot despoil any of his subjects of their goods without due satisfaction for them. Nor can the king there, by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, nor change their laws, nor make new ones, without the concession or assent of his whole realm expressed in his parliament.

'Hence every inhabitant of that realm uses at his own pleasure the fruits which his land yields, the increase of his flock, and all the emoluments which he gains, whether by his own industry or that of others, from land and sea, hindered by the injuries and rapine of none without obtaining at least due amends. Hence the inhabitants of that land are rich, abounding in gold and silver and all the necessaries of life. They do not

drink water, except those who sometimes abstain from other drinks by way of devotional or penitential zeal. They eat every kind of flesh and fish in abundance, with which their land is not meanly stocked. They are clothed with good woollens throughout their garments; they have abundant bedding, woollen like the rest of their furnishings, in all their houses, and are rich in all household goods and agricultural equipment, and in all that is requisite for a quiet and happy life, according to their estate. They are not brought to trial except before the ordinary judges, where they are treated justly according to the law of the land. Nor are they examined or impleaded in respect of their chattels, or possessions, nor arrested for crime of whatever magnitude and enormity, except according to the laws of that land and before the aforesaid judges. These are the fruits which the political and regal government yields. From these things an understanding of the effects of that law, which certain of your ancestors tried to abrogate, is clear to you. Above all, also, the effects of that other law appear to you, which they tried, with so much zeal, to introduce in place of that law, so that by their fruits you shall know them. Was it not ambition, lust, and licence, which your said ancestors preferred to the good of the realm, that incited them to this commerce? Consider, therefore, excellent prince, other matters that follow.'

CHAPTER XXXVII.
The combination of the merits of both governments

St. Thomas, in the book which he wrote for the king of Cyprus, Concerning the Government of Princes, says that the king is given for the sake of the kingdom and not the kingdom for the sake of the king. Hence, all the power of a king ought to be applied to the good of his realm, which in effect consists in the defence of it against invasions by foreigners, and in the protection of the inhabitants of the realm and their goods from injuries and rapine by natives. Therefore, a king who cannot achieve these things is necessarily to be adjudged impotent. But if he is so overcome by his own passions or poverty that he cannot keep his hands from despoiling his subjects, so that he impoverishes them, and does not allow them to live and be supported by their own goods, how much more impotent then is he to be judged than if he did not suffice to defend them against the injuries of others? Indeed, such a king ought to be called not only impotent, but also impotence itself, and he cannot be deemed free, being fettered with such heavy bonds of impotence. On the other hand, a king is free and powerful who is able to defend his own people against enemies alien and native, and also their goods and property, not only against the rapine of their neighbours and fellow-citizens, but against his own oppression and plunder, even though his own passions and necessities tempt him otherwise. For who can be more powerful and freer than he who is able to restrain not only others but also himself? The king ruling his people politically can and always does do this. Hence, prince, it is evident to you, from the effect of experience, that your ancestors, who tried to abolish political government, not only could not have obtained, as they wished, a greater power than they had, but would have exposed their own welfare, and the welfare of their realm, to greater risk and danger.

'Yet these things, which, as seen in the light of experience, seem to shame the power of the king ruling merely regally, do not spring from a defect in the law but from the carelessness and negligence of such governance. So that those powers are not inferior in dignity to that of the king ruling politically. Both are equal in power, as I have clearly shown in the Treatise Concerning the Nature of the Law of Nature before mentioned. But all these matters now discussed show very clearly that the power of the king ruling regally is more troublesome in practice, and less secure for himself and his people, so that it would be undesirable for a prudent king to change a political government for a merely regal one. Hence St Thomas aforementioned is deemed to wish that all realms of the earth were ruled politically.'

CHRISTOPHER ST. GERMAN,
DOCTOR AND STUDENT: DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT OF THE COMMON LAW

(W. Muchall, ed., Cincinnati, 1874), I. 12–25, II. 21–22 (pp. 37–68, 165–70).[1]

CHAPTER XII.

The first question of the doctor, of the law of England and conscience.

I have heard say that if a man that is bound in an obligation pay the money, but he taketh no acquittance, or if he take one, and it happeneth him to loose it, that, in that case, he shall be compelled by the laws of England to pay the money again. And how may it be said then that that law standeth with reason and conscience? For as it is grounded upon the law of reason that debts ought of right to be payed, so it is grounded upon the law of reason (as it seemeth) that when they be payed, that he that payed them should be discharged.

Stud. First, Thou shalt understand that it is not the law of England that if a man that is bound in an obligation pay the money without acquittance, or if he take acquittance and loose it, that therefore the law determineth that he ought of right to pay the money eftsoons, for that law were both against reason and conscience. But though it is so, that there is a general maxim in the law of England that in an action of debt sued upon an obligation the defendant shall not plead that he oweth not the money, he can in no wise discharge himself in that action, but he have acquittance, or some other writing sufficient in the law, or some other thing like, witnessing that he hath paid the money;[2] that is ordained by the law to avoid a great inconvenience that else might happen to come to many people; that is to say, that every man by a nude parole and by a bare averment should avoid an obligation.[3] Wherefore, to avoid that inconvenience, the law hath ordained that as the defendant is charged by a sufficient writing, that so he must be discharged by sufficient writing or by some other thing of as high authority as the obligation is. And though it may follow thereupon that, in some particular case, a man by occasion of that general maxim may be compelled to pay the money again that he payed before; yet, nevertheless, no default can be thereof assigned in the law. For like as makers of law take heed to such things as may oft fall, and do much hurt among the people, rather than to particular cases: so in likewise the general grounds of the law of England heed more what is good for many than what is good for one singular person only. And because it should be a hurt to many, if an obligation should be so lightly avoided by word; therefore the law especially preventeth that hurt under such manner as before appeareth; and yet intendeth not, nor commandeth not, that the money of right ought to be paid again, but setteth a general rule, which is good and necessary to all the people, and that every man may well keep, without it be through his own default. And if such default happen in any person, whereby he is without remedy at the common law, yet he may be holpen by a subpoena; and so he may in many other cases where conscience serveth for him, that were too long to rehearse now.[4]

Doct. But I pray thee shew me under what manner a man may be holpen by conscience; and whether he shall be holpen in the same court, or in another.

Stud. Because it cannot be well declared where a man shall be holpen by conscience, and where not, but it be first known what conscience is, therefore, because it pertaineth to thee most properly to treat of the nature and quality of conscience, therefore I pray thee that thou wilt make me some brief declaration of the nature and quality of conscience, and then I shall answer to thy question as well as I can.

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[1] I can find no trace of Muchall's work prior to 1787, and the material that he cites in his notes suggests that it dates from that time. I have included his notes because they show how later ages came to regard the work as a treatise on the practice of the equity court. Cross-references in the notes are to the edition cited. Our initial extracts come from the *First Dialogue*, first published in 1523 in Latin and in 1531 in English. CD

[2] Finch. 12.

[3] Fitzgib. 213; Finch. 11; Noy's Max. 4.

[4] Chanc. Cases, 78; 2 Comyn's Digest, 323.

Doct. I will with good-will do as thou sayest: and to the intent that thou mayest the better understand that I shall say of conscience, I shall first shew thee what *sinderesis* is, and then what reason is, and then what conscience is; and how these three differ among themselves, I shall somewhat touch.

CHAPTER XIII.
What sinderesis is.

Sinderesis is a natural power of the soul, set in the highest part thereof, moving and stirring it to good and abhorring evil. And therefore *sinderesis* never sinneth nor erreth. And this *sinderesis* our Lord put in man, to the intent that the order of things should be observed. For, after St. Dionyse, the wisdom of God joined the beginning of the second things to the last of the first things: for angel is of a nature to understand without searching of reason, and to that nature man is joined by *sinderesis*, the which *sinderesis* may not wholly be extincted neither in man ne yet in damned souls. But nevertheless, as to the use and exercise thereof, it may be let for a time, either through the darkness of ignorance, or for undiscreet delectation, or for the hardness of obstinacy. First by the darkness of ignorance, *sinderesis* may be let that it shall not murmur against evil, because he believeth evil to be good, as it is in heretics, the which, when they die for the wickedness of their error, believe they die for the very truth of their faith. And by undiscreet delectation *sinderesis* is sometime so overlaid, that remorse or grudge of conscience for that time can have no place. For the hardness of obstinacy *sinderesis* is also let, that it may not stir to goodness, as it is in damned souls, that be so obstinate in evil, that they may never be inclined to good. And though *sinderesis* may be said to that point extinct in damned souls, yet it may not be said that it is fully extinct to all intents. For they alway murmur against the evil of the pain that they suffer for sin, and so it may not be said that it is universally, and to all intents, and to all times extinct. And this *sinderesis* is the beginning of all things that may be learned by speculation or study, and ministreth the general grounds and principles thereof; and also of all things that are to be done by man. An example of such things as may be learned by speculation appeareth thus: *sinderesis* saith that every whole thing is more than any one part of the same thing, and that is a sure ground that never faileth. And an example of things that are to be done, or not to be done: as where *sinderesis* saith no evil is to be done, but that goodness is to be done and followed, and evil to be fled, and such other.

And therefore *sinderesis* is called by some men the law of reason, for it ministreth the principles of the law of reason, the which be in every man by nature, in that he is a reasonable creature.

CHAPTER XI.
Of reason.

When the first man Adam was created, he received of God a double eye, that is to say, an outward eye, whereby he might see visible things, and know his bodily enemies, and eschew them: and an inward eye, that is, the eye of reason, whereby he might see his spiritual enemies that fight against his soul, and beware of them. And among all gifts that God gave to men, this gift of reason is the most noblest, for thereby man precelleth all beasts, and is made like to the dignity of angels, discerning truth from falsehood, and evil from good; wherefore he goeth far from the effect that he was made to, when he taketh not heed to the truth, or when he preferreth evil before good.

And therefore, after doctors, reason is the power of the soul that discerneth between good and evil, and between good and better, comparing the one with the other: the which also sheweth virtues, loveth good, and flieth vices. And reason is called righteous and good, for it is conformable to the will of God; and that is the first thing, and the first rule that all things must be ruled by. And reason that is not righteous nor strait, but that is said culpable, is either because she is deceived with an error that might be overcome, or else through her pride or slothfulness she enquireth not for knowledge of the truth that ought to be enquired. Also reason is divided into two parts, that is to say, into the higher part, and into the lower part.

The higher part hideth heavenly things and eternal, and reasoneth by heavenly laws or by heavenly reason what is to be done, and what is not to be done, and what things God commandeth, and what he prohibiteth. And this higher part of reason hath no regard to transitory things or temporal things, but that sometime, as it were by manner of counsel, she bringeth forth heavenly reasons to order well temporal

things. The lower part of reason worketh most to govern well temporal things, and she groundeth her reasons much upon laws of man, and upon reason of man, whereby she concludeth that that is to be done that is honest and expedient to the commonwealth, or not to be done, that is not expedient to the commonwealth. And so that reason whereby I know God, and such things as pertain to God, belongeth to the highest part of reason; and the reason whereby I know creatures belongeth to the lower part of reason. And though these two parts, that is to say, the higher part and the lower part, be one in deed and essence, yet they differ by reason of their working, and of their office; as it is of one self eye, that sometime looketh upward, and sometime downward.

CHAPTER XV.
Of conscience.

This word *conscience*, which in Latin is called *conscientia*, is compounded of this preposition *cum*, that is to say in English, *with*; and of this noun *scientia*, that is to say in English, *knowledge*: and so conscience is as much to say knowledge of one thing with another thing: and conscience so taken, is nothing else but an applying of any science or knowledge to some particular act of man. And so conscience may sometime err, and sometime not err. And of conscience thus taken, doctors make many descriptions. Whereof one doctor saith, that conscience is the law of our understanding. Another, that conscience is an habit of the mind discerning between good and evil. Another, that conscience is the judgment of reason judging on the particular acts of man. All which sayings agree in one effect, that is to say, that conscience is an actual applying of any cunning of knowledge to such things as are to be done: whereupon it followeth, that upon the most perfect knowledge of any law or cunning, and of the most perfect and most true applying of the same to any particular act of man, followeth the most perfect, the most pure, and the most best conscience. And if there be default in knowing of the truth of such a law, or in the applying of the same to particular acts, then thereupon followeth an error or default in conscience. As it may appear by this example: *sinderesis* ministreth an universal principle that never erreth, that is to say, that an unlawful thing is not to be done. And then it might be taken by some men, that every oath is unlawful, because the Lord saith, Mat. v., *Ye shall in no wise swear*; and yet he that by reason of the said words will hold that it is not lawful in no case to swear, erreth in conscience; for he hath not the perfect knowledge and understanding of the truth of the said gospel, nor he reduceth not the saying of the scripture to other scriptures, in which it is granted that in some case an oath may be lawful. And the cause why conscience may so err in the said case, and in other like, is because conscience is formed of a certain proposition or question, grounded particularly upon universal rules ordained for such things as are to be done. And because a particular proposition is not known to himself, but must appear and be searched by a diligent search of reason, therefore in search and in the conscience that should be formed thereupon may happen to be error, and thereupon it is said that there is error in conscience: which error cometh either because he doth not assent to that he ought to assent unto, or else because his reason whereby he doth refer one thing to another is deceived. For farther declaration whereof it is to understand, that error in conscience cometh seven manner of ways. First, through ignorance; and that is, when man knoweth not what he ought to do: and then he ought to ask counsel of them that he thinks most expert in that science whereupon his doubt riseth. And if he can have no counsel, then he must wholly commit him to God, and he of his goodness will so order him, that he will save him from offence. The second is through negligence; as when a man is negligent to search his own conscience, or to enquire the truth of other. The third is through pride; as when he will not meeken himself, ne believe them that be better and wiser than he is. The fourth is through singularity; as when a man followeth his own wit, and will not conform himself to other, nor follow the good common ways of men. The fifth is through an inordinate affection to himself, whereby he maketh conscience to follow his desire, and so he causeth her to go out of her right course. The sixth is through pusillanimity, whereby some person dreadeth ofttimes such things as of reason he ought not to dread. The seventh is through perplexity; and this is when a man believeth himself to be so set betwixt two sins, that he thinketh it unpossible but that he shall fall into the one: but a man can never be so perplexed indeed, but through an error in conscience; and if he will put away that error, he shall be delivered. Therefore I pray thee that thou wilt always have a good conscience; and if thou have so, thou shalt always be merry; and if thine own heart reprove thee not, thou shalt always have inward peace. The

gladness of right wise men, is of God, and in God, and their joy is always in truth and goodness. There be many diversities of conscience, but there is none better than that whereby a man truly knoweth himself. Many men know many great and high cunning things, and yet know not themselves; and truly he that knoweth not himself, knoweth nothing well. Also he hath a good and clean conscience, that hath purity and cleanness in his heart, truth in his word, and right wiseness in his deed. And as a light is set in a lantern, that all that is in the house may be seen thereby; so Almighty God hath set conscience in the midst of every reasonable soul, as a light whereby he may discern and know what he ought to do, and what he ought not to do. Therefore forasmuch as it behoveth thee to be occupied in such things as pertain to the law; it is necessary that thou ever hold a pure and clean conscience, specially in such things as concern restitution: for the sin is not forgiven but if the thing that is wrongfully taken be restored. And I counsel thee also that thou love that is good, and fly that is evil; and that thou do to another, as thou wouldest should be done to thee, and that thou do nothing to other, that thou wouldest not should be done to thee, that thou do nothing against truth, that thou live peaceably with thy neighbour, and that thou do justice to every man as much as in thee is: and also that in every general rule of the law thou do observe and keep equity. And if thou do thus, I trust the light of the lantern, that is, thy conscience, shall never be extincted.

Stud. But, I pray thee, shew me what is that equity that thou hast spoken of before, and that thou wouldest that I should keep.

Doct. I will with good-will shew thee somewhat thereof.

CHAPTER XVI.
What is equity.

Equity is a right wiseness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercy. And such an equity must always be observed in every law of man, and in every general rule thereof: and that knew he well that said thus, *Laws covet to be ruled by equity*. And the wise man saith, *Be not overmuch right wise; for the extreme right wiseness is extreme wrong:* as who saith, If thou take all that the words of the law giveth thee thou shalt sometime do against the law. And for the plainer declaration what equity is, thou shalt understand, that sith the deeds and acts of men, for which laws have been ordained, happen in divers manners infinitely, it is not possible to make any general rule of the law, but that it shall fail in some case: and therefore makers of law take heed to such things as may often come, and not to every particular case, for they could not though they would. And therefore, to follow the words of the law were in some case both against justice and the commonwealth. Wherefore in some cases it is necessary to love the words of the law, and to follow that reason and justice requireth, and to that intent equity is ordained; that is to say, to temper and mitigate the rigour of the law. And it is called also by some men *epieikeia*; the which is no other thing but an exception of the law of God, or the law of reason, from the general rules of the law of men, when they by reason of their generality, would in any particular case judge against the law of God or the law of reason: the which exception is secretly understood in every general rule of every positive law. And so it appeareth, that equity taketh not away the very right, but only that that seemeth to be right by the general words of the law. Nor it is not ordained against the cruelness of the law, for the law in such case generally taken is good in himself; but equity followeth the law in all particular cases where right and justice requireth, notwithstanding the general rule of the law be to the contrary. Wherefore it appeareth, that if any law were made by man without any such exception expressed or implied, it were manifestly unreasonable, and were not to be suffered: for such causes might come, that he that would observe the law should break both the law of God and the law of reason. As if a man make a vow that he will never eat white-meat, and after it happeneth him to come there where he can get no other meat: in this case it behoveth him to break his avow, for the particular case is excepted secretly from his general avow by his equity or *epieikeia*, as it is said before. Also if a law were made in a city, that no man under the pain of death should open the gates of the city before the sun-rising; yet if the citizens before that hour flying from their enemies, come to the gates of the city, and one for saving of the citizens openeth the gates before the hour appointed by the law, he offendeth not the law, for that case is excepted from the said general law by equity, as is said before. And so it appeareth that equity rather followeth the intent of the law, than the words

of the law. And I suppose that there be in like wise some like equities grounded on the general rules of the law of the realm.

Stud. Yea verily; whereof one is this. There is a general prohibition in the laws of England, that it shall not be lawful to any man to enter into the freehold of another without authority of the owner or the law: but yet it is excepted from the said prohibition by the law of reason, that if a man drive beasts by the highway, and the beasts happen to escape into the corn of his neighbour, and he, to bring out his beasts, that they should do no hurt, goeth into the ground, and setteth out his beasts, there he shall justify that entry into the ground by the law.[5] Also notwithstanding the statute of Edw. 3, made in the 14h year of his reign, whereby it is ordained, that no man, upon pain of imprisonment, should give any alms to any valiant beggar, that is well able to labour;[6] yet if a man meet with a valiant beggar in so cold a weather, and so light apparel, that if he have no clothes, he shall not be able to come to any town for succour, but is likely rather to die by the way, and he therefore giveth him apparel to save his life, he shall be excused by the said statute, by such an exception of the law of reason as I have spoken of.

Doct. I know well that, as thou sayest, he shall be excepted of the said statute by censcience, and over that, that he shall have great reward of God for his good deeds: but I would wit whether the party shall be so discharged in the Common law by such an exception of the law of reason, or not? For though ignorance invincible of a statute excuse the party against God, yet (as I have heard) it excuseth not in the laws of the realm, ne yet *Chancery*, as some say, although the case be so that the party to whom the forfeiture is given may not with conscience leave it.

Stud. Verily, by thy question thou hast put me in a great doubt; wherefore I pray thee give me a respite therein to make thee an answer: but, as I suppose [or the time, (howbeit I will not fully affirm it to be as I say) it should seem that he should well plead it for his discharge at the Common law. because it shall be taken that it was the intent of the makers of the statute to except such cases.[7] And the judges may many times judge after the mind of the makers as far as the letter may suffer, and so it seemeth they may in this case. And divers other exceptions there be also from other general grounds of the law of the realm by such equity as thou hast remembered before, that were too long to rehearse now.

Doct. But yet I pray thee shew me shortly somewhat more of the mind, under what manner a man may be holpen in this realm by such equity.

Stud. I will with good-will shew thee somewhat therein.

CHAPTER XVII.

In what manner a man shall be holpen by equity in the laws of England.

First, It is to be understood, there be in many cases divers exceptions from the general grounds of the law of the realm by other reasonable grounds of the same law, whereby a man shall be holpen in the common law. As it is of this general ground, that it is not lawful for any man to enter upon a descent; yet the reasonableness of the law excepteth from that ground an infant that hath right, and hath suffered such a descent, and him also that maketh continual claim, and suffereth them to enter, notwithstanding the descent.[8] And of that exception they shall have advantage in the Common law. And so it is likewise of divers statutes; as of the statute whereby it is prohibited that certain particular tenants shall do no waste, yet if a lease for term of years be made to an infant that is within years of discretion, as of the age of five or six years, and a stranger do waste, in this case this infant shall not be punished for the waste, for he is excepted and excused by the law of reason.[9] And a woman covert, to whom such a lease is made after the coverture, shall be also

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[5] Viner's Abr., title Trespass, 466.

[6] Repealed by 1 Ed. 6, c. 13, and 21 Jac., 28; ante, 15.

[7] Noy's Max. 19.

[8] Litt, sec 402, 414; Noy's Max. 7.

[9] But in 2 Inst. 303, it is said, that if an infant is tenant by the curtesy or lessee for life or years, he shall answer for waste done by a stranger, and have his remedy over. See likewise 1 Inst. 54.

discharged of waste after her husband's death, by a reasonable maxim and custom of the realm.[10] And also for reparations to be made upon the same ground, it is lawful for such particular tenants to cut down trees upon the same ground to make reparations.[11] But the cause there, as I suppose, is, for that the mind of the makers of the said statute shall be taken to be, that that case should be excepted. And in all these cases the parties shall be holpen in the same court, and by the common law. And thus it appeareth, that sometime a man may be excepted from the rigor of a maxim of the law by another maxim of the law; and sometime from the rigor of a statute by the law of reason, and sometime by the intent of the makers of the statute.[12] But yet it is to be understood, that most commonly where any thing is excepted from the general customs or maxims of the laws of the realm by the law of reason, the party must have his remedy by a writ that is called *subpoena*, if a *subpoena* lie in the case.[13] But where a *subpoena* lieth, and where not, it is not our intent to treat of at this time. And in some cases there is no remedy for such an equity by way of compulsion, but all remedy therein must be committed to the conscience of the party.

Doct. But in case where a subpoena lieth, to whom shall it be directed, whether to the judge or the party?

Stud. It shall never be directed to the judge, but to the party plaintiff, or to his attorney; and thereupon an injunction commanding them by the same, under a certain pain therein to be contained that he proceed no farther at the common law till it be determined in the king's chancery, whether the plaintiff had title in conscience to recover, or not: and when the plaintiff, by reason of such an injunction, ceaseth to ask any farther process, the judges will in like wise cease to make any further process in that behalf.[14]

Doct. Is there any mention made in the law of England of any such equities?

Stud. Of this term equity, to the intent that is spoken of here, there is no mention made in the law of England: but of an equity derived upon certain statutes mention is made many times, and often in the law of England[15] but that equity is all of another effect than this. But of the effect of this equity that we now speak of, mention is made many times: for it is ofttimes argued in the law of England, where a *subpoena* lieth, and where not, and daily bills be made by men learned in the law of this realm to have *subpoenas*. And it is not prohibited by the law, but that they may well do it, so that the make them not but in case where they ought to be made, and not for vexation of the party, but according to the truth of the matter. And the law will in many cases, that there shall be such remedy in the *chancery* upon divers things grounded upon such equities, and then the lord chancellor must order his conscience after the rules and grounds of the law of the realm; insomuch that it had not been inconvenient to have assigned such remedy in the chancery upon such equities for the seventh ground of the law of England. But forasmuch as no record remaineth in the king's court of no such bill, ne of the writ of *subpoena* or *injunction* that is used thereupon; therefore it is not set as for a special ground of the law, but as a thing that is suffered by the law.

Doct. Then sith the parties ought of right in many cases to be holpen in the *chancery* upon such equities; it seemeth that if it were ordained by statute, that there should be no remedy upon such equities in the *chancery*, nor in none other place, but that every matter should be ordained only by the rules and grounds of the common law, that the statute were against right and conscience.

Stud. I think the same: but I suppose there is no such statute.

Doct. There is a statute of that effect, as I have heard say, wherein I would gladly hear thy opinion.

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[10] This doctrine is denied in the authorities mentioned in the preceding note, and it is there laid down, that the privilege of coverture shall not prevail in this case against the wrong and disherison done to him that has the inheritance, if the wife agrees to the estate, after the death of her husband, since she has a remedy over, and this seems to be the better law.

[11] Co. Litt 53.

[12] 4 Bac. Abr. 649; Noy's Max. 19.

[13] 1 Harr. Chan. Prac. 5.

[14] 1 Harr. Chan. Prac. 212, 213.

[15] 4 New Abr. 649.

Stud. Shew me that statute, and I shall with good-will say as me thinketh therein.

Chapter xviii.

Whether the statute hereafter rehearsed by the doctor be against conscience, or not.

There is a statute made the fourth year of king Henry IV, cap. 22, whereby it is enacted, That judgment given by the king's courts shall not be examined in the *chancery*, *parliament*, nor elsewhere; by which statute it appeareth, that if any judgment be given in the king's courts against an equity, or against any matter of conscience, that there can be had no remedy by that equity, for the judgment cannot be reformed without examination, and the examination is by the said statute prohibited: wherefore it seemeth that the said statute is against conscience. What is thine opinion therein?

Stud. If judgment given in the king's courts should be examined in the *chancery* before the king's council, or any other place, the plaintiffs or demandants should seldom come to the effect of their suit, ne the law should never have end. And therefore to eschew that inconvenience that statute was made. And though peradventure by reason of that statute some singular person may happen to have loss; nevertheless the said statute is very necessary, to eschew many great vexations and unjust expences that would else come to many plaintiffs that have right wisely recovered in the king's courts. And it is much more provided for in the law of England, that hurt nor damages should not come to many, than only to one. And also the said statute doth not prohibit equity,[16] but it prohibiteth only the examination of the judgment, for the eschewing of the inconvenience before rehearsed.[17] And it seemeth that the said statute standeth with good conscience. And in many other cases where a man doth wrong, yet he shall not be compelled by way of compulsion to reform it; for many times it must be left to the conscience of the party, whether he shall redress it or not. And in such case he is in conscience as well bound to redress it, if he will save his soul, as he were if he were compellable thereto by the law, as it may appear in divers cases, that may be put upon the same ground.

Doct. I pray thee put some of these cases for an example.

Stud. If the defendant wage his law in an action of debt brought upon a true debt, the plaintiff hath no means to come to his debt by way of compulsion, neither by *subpoena*, nor otherwise; and yet the defendant is bound in conscience to pay him. Also if the grand jury in attaint[18] affirm a false verdict given by the petty jury, there is no farther remedy but the conscience of the party. Also where there can be had no sufficient proof, there can be no remedy in the *chancery*, no more than there may be in the spiritual court. And because thou hast given an occasion to speak of conscience, I would gladly hear thy opinion, where conscience shall be ruled after the law, and where the law shall be ruled after conscience.

Doct. And of that matter I would likewise gladly hear thy opinion, specially in cases grounded upon the laws of England, for I have not heard but little thereof in time past: but before thou put any case thereof, I would that thou wouldest shew me how these two questions after thy opinion are to be understood.

Chapter xix.

Of what law this question is to be understood, that is to say where conscience shall be ruled after the law.

The law whereof mention is made in this question, that is to say, where conscience shall be ruled by the law, is not, as me seemeth, to be understood only of the law of reason, and of the law of God, but also of the law of man, that is not contrary to the law of reason, nor the law of God, but it is superadded unto them for the better ordering of the commonwealth: for such a law of man is always to be set as a rule in conscience,

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[16] That is, it does not extend to hinder the chancery from administering relief in cases where judgments at common law are obtained through fraud and false suggestions. That court, notwithstanding the statute, may prevent such judgments being put into execution. 3 P. Wms. 148. 'T is a power which seems necessarily inherent in the very constitution of a court of equity, and therefore one cannot help thinking Sir Edward Coke much to blame in the attempt he made in the time of Lord Ellesmere, to rob the chancery of this part of its jurisdiction. See 2 Whitlock of Parl. 390; 1 Chan. Rep. Append. 11.

[17] Hetley, 20; Hard. 23.

[18] For the nature of an attaint, and how far it is in use at this day, see 3 B. C [i.e., *Blackstone's Commentaries*]., cap. 25, p. 402.

so that it is not lawful for a man to frame it on the one side, ne on the other: for such a law of man hath not only the strength of man's law, but also the law of reason, or of the law of God, whereof it is derived. For laws made by men, which have received of God power to make laws, be made by God. And therefore conscience must be ordered by the law, as it must be upon the law of God and upon the law of reason. And furthermore, the law whereof mention is made in the latter end of the chapter next before, that is to say, in the question wherein it is asked where the law is to be left and forsaken for conscience, is not to be understood of the law of reason, nor of the law of God; for those two laws may not be left. Nor is it not to be understood of the law of man that is made in particular cases, and that is consonant to the law of reason, and to the law of God, that yet that law should be left for conscience: for of such a law made by man, conscience must be ruled, as it is said before. Nor it is not to be understood of a law made by man commanding or prohibiting any thing to be done that is against the law of reason or the law of God. For if any law made by him, bind any person to any thing that is against the said laws, it is no law, but a corruption, and manifest error. Therefore, after them that be learned in the laws of England, the said question, that is to say, where the law is to be left for conscience, and where not, is to be understood in divers manners, and after divers rules, as hereafter shall somewhat be touched.

First, Many unlearned persons believe that it is lawful for them to do with good conscience all things, which if they do them, they shall not be punished therefore by the law, though the law doth not warrant them to do that they do, but only, when it is done, doth not for some reasonable consideration punish them that do it, but leaveth it only to his conscience. And therefore many persons do ofttimes that they should not, and keep as their own that that in conscience they ought to restore. Wherefore there is the law of England in this case.

If two men have a wood jointly, and the one of them selleth the wood, and keepeth all the money wholly to himself;[19] in this case his fellow shall have no remedy against him by law:[20] for as they, when they took the wood jointly, put each other in trust, and were content to occupy together: so the law suffereth them to order the profits thereof according to the trust that each of them put the other in. And yet if one took all the profits, he is bound in conscience to restore the half to his fellow: for, as the law giveth him right only to half the land, so it giveth him right only in conscience to half the profits. And yet nevertheless, it cannot be said in that case, that the law is against conscience, for the law never willeth, ne commandeth that one should take all the profits, but leaveth it to their conscience; so that no default can be found in the law, but in him that taketh all the profits to himself may be assigned default, who is bound in conscience to reform it, if he will save his soul, though he cannot be compelled thereto by the law. And therefore in this case and other like, that opinion which some have, that they may do with conscience all that they shall not be punished for by the law if they do it, it is to be left for conscience; but the law is not to be left for conscience.

Also many men think, that if a man have land that another hath title to, if he that hath the right shall not, by the action that is given him by the law to recover his right by, recover damages, that then he that hath the land is also discharged of damages in conscience; and that is a great error in conscience; for though he cannot be compelled to yield the damages by no man's law, yet he is compelled thereto by the law of reason, and by the law of God, whereby we be bound to *do as we would be done to*, and that we should *not covet our neighbour's goods*. And therefore if tenant in tail be disseised, and the disseisor dieth seised, and then the heir in the tail bringeth a *formedon*,[21] and recovereth the land, and no damages, for the law giveth him no damage in that case;[22] yet the tenant by conscience is bound to yield damages to the heir in tail from the death of his ancestor. Also it is taken by some men, that the law must be left for conscience, where the law

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[19] Co. Litt. 187; 1 Cro. 803.

[20] This is now altered by stat. 4 and 5 Ann., c.16, by which it is provided, that joint tenants, and tenants in common, and their executors and administrators, shall have an account against the others, as bailiffs for receiving more than their proportion, and against their executors and administrators.

[21] The writ of formedon is now seldom brought, it being an easier method to try titles by *objectione firmae* [sic].

[22] 2 Danv. Abr. 455, 456.

doth not suffer a man to deny that he hath before affirmed in court of record, or for that he hath willfully excluded himself thereof for some other cause: as if the daughter that is only heir to her father will sue livery with her sister that is a bastard, in that case he shall not be received to say that her sister is a bastard;[23] insomuch that if her sister take half the land with her, there is no remedy against her by the law.[24] And no more there is of diversity in other estopples, which were too long to rehearse now. And yet the party that may take advantage by such an estopple, by the law, is bound in conscience to forsake that advantage especially if he were so estopped by ignorance, and not by his own knowledge and assent. For though the law in such cases giveth no remedy to him that is estopped, yet the law judgeth not that the other hath right unto the thing that is in variance betwixt them.

And it is to be understood, that the law is to be left for conscience, where a thing is tried and found by verdict against the truth; for in the common law the judgment must be given according as it is pleaded and tried, like as it is in other laws, that the judgment must be given according to that that is pleaded and proved. And it is to be understood, that the law is to be left for conscience, where the cause of the law doth cease: for when the cause of the law doth cease, the law also doth cease in conscience, as appeareth by this case hereafter following.[25]

A man maketh a lease for term of life, and after a stranger doth waste; wherefore the lessee bringeth an action of trespass, and hath judgment to recover damages, having regard to the treble damages that he shall yield to him in the reversion: and after he in the reversion, before action of waste sued, dieth, so that the action of waste is thereby extincted: then the tenant for term of life, though, he may sue execution of the said judgment by the law, yet he may do it by conscience; for in conscience he may take no more than he is hurted by the said trespass, because he is not charged over with treble damages to his lessor. Also it is to be understood, where a law is grounded upon a presumption, if the presumption be untrue, then the law is not to be holden in conscience. And now I have shewed thee somewhat of the question, that is to say, where the law shall be ruled after conscience, I pray thee shew me whether there be not like diversities in other laws, betwixt law and conscience.

Doct. Yes, verily, very many, whereof thou hast recited once before, where a thing that is untrue is pleaded and proved; in which case judgment must be given according, as well in the law civil as in the law canon. And another case is, that if the heir make not his inventory, he shall be bound after the law civil to all the debts, though the goods amount not to so much: and the law canon is not against that law, and yet in conscience, the heir, which in the laws of England is called an executor, is not in that case charged with the debts, but according to the value of the goods. And now I pray thee shew me some cases where conscience shall be ruled after law.

Stud. I will with good-will shew thee somewhat as me-thinketh therein.

CHAPTER XX.

Here follow divers cases where conscience is to be ordered after the law

The eldest son shall have and enjoy his father's lands at the common law in conscience, as he shall in the law.[26] And in Burgh-english[27] the younger son shall enjoy the inheritance, and that in conscience. And in Gavelkind[28] all the sons shall inherit the land together, as daughters, at the common law;[29] and that in

[23] Co. Litt. 170.

[24] But this kind of estoppel will not bind in chancery. Cary's Rep. 26; Pollexfen, 67.

[25] Noy's Max. 2.

[26] B. C. 214 [i.e., *Blackstone's Commentaries*].

[27] Ante, 35.

[28] Ante, 34.

[29] See statute 31 H. 8, c. 3, whereby divers lands in the county of Kent are disgavelled and directed to descend in future like other lands; and Mr. Robinson, in his book on Gavelkind, 79, mentions six other statutes for disgavelling particular lands in Kent, though the statute 31 H. 8, is the only one in print.

conscience. And there can be no other cause assigned why conscience in the first case is with the eldest brother, and in the second with the younger brother, and in the third case with all the brethren; but because the law of England, by reason of divers actions, doth sometime give the land wholly to the eldest son, sometime to the youngest, and sometime to all. Also if a man of his mere motion make a feoffment of two acres of land lying in two several shires, and maketh livery of seisin the one acre in the name of both; in this case the feoffee hath right but only in the acre whereof livery of seisin was made, because he hath no title by the law: but if both acres had been in one shire, he had had good right to both.[30] And in these cases the diversity of the law maketh the diversity of conscience.

Also, if a man of his mere motion make a feoffment of a manor, and saith not, *to have and to hold*, etc., with the appurtenances; in that case the feoffee hath right to the demesne lands, and to the rents, if there be atturnments, and to the common pertaining to the manor;[31] but he hath neither right to the advowsons, appendant, if any be, nor to the villeins regardant.[32] But if this term, with the appurtenances, had been in the deed, the feoffee had right in conscience, as well to the advowsons and villeins, as to the residue of the manor. But if the king, of his mere motion, give a manor with the appurtenances, yet the donee hath neither right in law nor conscience to the advowsons nor villeins.[33] And the diversity of the law, in these cases, makes the diversity of conscience.

Also, if a man make a lease for a term of years, yielding to him and to his heirs a certain rent, upon condition that if the rent be behind by forty days, etc., that then it shall be lawful to the lessor and his heirs to reenter;[34] and after the rent is behind the lessor asketh the rent according to the law and is not payed, the lessor dieth, his heir entereth; in this case his entry is lawful both in law and conscience. But if the lessor had died before he had demanded the rent, and his heir demand the rent, and because it is not payed, he re-entereth; in that case his reeentry is not lawful neither in law nor conscience.

Also, if the tenant in dower sow her land, and die before the corn is ripe[35] the corn in conscience belongeth to her executors, and not to him in reversion: but otherwise it is in conscience of grass and fruits. And the diversity of the law maketh there also the diversity in conscience.

Also, if a man seized of lands in his demesne as of fee bequeath the same by his last will to another, and to his heirs, and dieth;[36] in this case the heir, notwithstanding the will, hath a right to the land in conscience. And the reason is, because the law judgeth that will to be void;[37] and as it is void in the law, so it is void in conscience.

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[30] And yet if the scite of the manor of Dale is in the county of Essex, and parcel of the same manor extends into the county of Middlesex, and feoffment is made of the manor of Dale, and livery of seisin is made of the scite of the manor which lies in the county of Essex by this livery of seisin, the parcel of the manor which lies in Middlesex shall pass, because, says Perkins, it is parcel of the thing, viz: the manor of which the feoffment is made. Perk., sec. 227.

[31] 1 Co. 18.

[32] But by the better opinion it seems they pass as incidents without the words with the appurtenances. Co. Litt. 121; 2 B. C. 22, 23; Shep. Touch. 186.

[33] Wood's Inst. 153.

[34] Shep. Touch. 147.

[35] 2 Inst. 80, 81.

[36] Ante, 23.

[37] Before the conquest, it is generally thought lands and tenements were devisable; but at that period, or soon after, probably in the reign of H. 2, the power of disposition ceased by consequence of the feudal tenure, except of socage lands, which in some cities and boroughs remained devisable, it being of very small consequence into whose power such tenures fell. But though the general rule of law was, that a man could not make a will of his lands, yet he might dispose of the use and profits to whom he pleased, for there was a clear distinction between the one and the other. Wright's Tenures, 172. A man might have made a feoffment of his property to another person, properly called the feoffee, to the use of the feoffor and his heirs. By this conveyance the whole legal estate was vested in the feoffee, and the feoffor had nothing, and could dispose of nothing but the mere simple usufructuary interest arising from the confidence and trust reposed in the feoffee. 4 Burn's Ecc. Law, 57; ante, 23.

Also, if a man grant a rent for term of life, and make a lease of land to the same grantee for term of life, and the tenant alieneth both in fee; in this case he in the reversion hath good title to the land both in law and conscience, and not to the rent. And the reason is, because the land by the alienation is forfeited by the law to him in the reversion, and not the rent.[38]

Also, if lands be given to two men, and to a woman in fee, and after one of the men entereth, marrieth with the woman, and alieneth the land, and dieth; in this case the woman hath right but only to the third part: but if the man and the woman had been married together before the first feoffment, then the woman, notwithstanding the alienation of her husband, should have had right in law and conscience to the one half of the land.[39] And so in these two cases conscience doth follow the law of the realm. A man have two sons, one before espousals, and another after espousals, and after the father dieth seised of certain lands; in this case the younger son shall enjoy the lands in this realm, as heir to his father both in law and conscience. And the cause is, because that son born after espousals is by the law of this realm the very heir, and the elder son is a bastard.[40] And of these cases, and many other like in the laws of England, may be formed the *syllogism* of conscience, or the true judgment of conscience, in this manner. *Sinderesis* ministreth the major thus, Right wiseness is to be done to every man: upon which major the law of England ministereth the minor thus, The inheritance belongeth to the son born after espousals, and not to the son born before espousals: then conscience maketh the conclusion, and saith, Therefore the inheritance is in conscience to be given to the son born after espousals. And so in other cases infinite may be formed by the law, the syllogism or the right judgment of conscience, wherefore they that be learned in the law of the realm say, that in every case where any law is ordaiued for the disposition of lands and goods, which is not against the law of God, nor yet against the law of reason, that the law bindeth all them that be under the law in the court of conscience, that is to say, inwardly in his soul. And therefore it is somewhat to marvel, that spiritual men have not endeavored themselves in time past to have more knowledge of the king's laws than they have done, or than they yet do: for by the ignorance thereof they be ofttimes ignorant of that that should order them according to right and justice, as well concerning themselves, as other that come to them for counsel. And now, forasmuch as I have answered to thy questions as well as I can; I pray thee that thou wilt shew me thy opinion in divers cases formed upon the law of England, wherein I am in doubt what is to be holden therein in conscience.

Doct. Shew me thy questions, and I will say as me thinketh therein.

CHAPTER XXI.

The first question of the student.

Stud. If any infant that is of the age of twenty years, and hath reason and wisdom to govern himself, selleth his lands and with the money thereof buyeth other land of greater value than the first was and taketh the profits thereof; whether may the infant ask his first land again in conscience, as he may by the law.

Doct. What thinkest thou in that question?

Stud. Me seemeth, that, forasmuch as the law of England[41] in this article is grounded upon a presumption, that is to say, that infants commonly afore they be of the age of twenty-one years be not able to govern

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Thus the land and the use were distinct, and the feoffor being, as we have seen, hindered from devising the one, he continued to dispose of the other till the twenty-seventh year of the reign of H. 8, when a statute was made, commonly called the statute of uses, which put a stop to the practice of devising uses by joining the possession and the use together in the feoffor. Another statute was likewise made in the 34th and 35th of the same king's reign, which gave a testamentary power over lands subject only to certain conditions and restrictions with regard to the devising of lands holden by knight's service.

These restrictions were afterward taken away by statute 12 C. 2, c. 24, which abolished all tenures by knight's service; and now a man may dispose of his freehold lands at his free-will and pleasure. See stat. 29 Car. 2, c. 3.

[38] Wood's Con. S4; Roll. Abr. 854.

[39] Litt, sec. 291.

[40] 2 Inst. 96, 97; 2 B. C. 247.

[41] 3 New Abr. 128.

themselves, that yet, forasmuch as that presumption faileth in this infant, that he may not in this case with conscience ask the land again that he hath sold to his great advantage, as before appeareth.

Doct. Is not this sale of the infant, and the feoffment made thereupon, if any where, voidable in the law?

Stud. Yes, verily.

Doct. And if the feoffee have no right by the bargain,[42] nor by the feoffment made thereupon, whereby should he then have right thereto, as thou thinkest?

Stud. By conscience, as me thinketh, for the reason that I have made before.

Doct. And upon what law should that conscience be grounded that thou speakest of? for it cannot be grounded by the law of the realm, as thou hast said thyself. And methinketh, that it cannot be grounded upon the law of God nor upon the law of reason: for feoffments nor contracts be not grounded upon neither of those laws, but upon the law of man.

Stud. After the law of property was ordained, the people might not conveniently live together without contracts; and therefore it seemeth that contracts be grounded upon the law of reason, or at least upon the law that is called *Jus gentium*.

Doct. Though contracts be grounded upon the law that is called *Jus gentium*, because they be so necessary, and so general among all people; yet that proveth not that contracts be grounded upon the law of reason:[43] for though the law called *Jus gentium* be much necessary for the people, yet it may be changed. And therefore if it were ordained by statute, that there should be no sale of land, ne no contract of goods, and if there were, that it should be void, so that every man should continue still seized of his lands, and possessed of his goods; the statute were good.

And then if a man against that statute sold his land for a sum of money, yet the seller might lawfully retain his land according to the statute: and then he were bound to no more but to repay the money that he received, with reasonable expences in that behalf. And so in like wise me thinketh that in this case the infant may with good conscience re-enter into his first land; because the contract after the maxims of the law of the realm is void; for, as I have heard, the maxims of the law be of as great strength in the law as statutes. And some think that in this case the infant is bound to no more, but only to re-pay the money to him that he sold his land unto, with such reasonable cost and charges as he hath sustained by reason of the same. But if a man sell his land by a sufficient and lawful contract, though there lack livery of seisin or such other solemnities of the law, yet the seller is bound in conscience to perform the contract.[44] Put in this case the contract is sufficient, and so me thinketh great diversity betwixt the cases.

Stud. For this time I hold me contented with thy opinion.

CHAPTER XXII.

The second question of student.

If a man that hath lands for term of life be impanelled upon an inquest, and thereupon looseth issues and dieth;[45] whether may those issues be levied upon him in the reversion in conscience, as they may be by the law?

Doct. If they may be levied by the law, what is the cause why thou dost doubt whether they may be levied by conscience?

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[42] Litt., sec. 259; 2 Roll. Abr. 2.

[43] Post, 174

[44] See where, and in what cases, a court of equity will supply the want of livery and seisin in Vin. Abr., title Feoffment, 205.

[45] Noy's Max. 30.

Stud. For there is a maxim in the laws of England,[46] that where two titles run together, the eldest title shall be preferred. And in this case the title of him in the reversion is before the title of the forfeiture of the issues. And therefore I doubt somewhat whether they may be lawfully levied.

Doct. By that reason it seemeth thou art in doubt what the law is in this case, but that must necessarily be known, for else it were in vain to argue what conscience will therein.

Stud. It is certain that the law is such; and so it is like wise if the husband forfeit issues, and die, those issues shall be levied on the lands of the wife.[47]

Doct. And if the law be such, it seemeth that conscience is so in like wise: for sith it is the law, that for execution of justice every man shall be impanelled when need requireth; it seemeth reasonable, that if he will not appear, that he should have some punishment for his not appearance, for else the law should be clearly frustrate in that point. And the pain, as I have heard, is, that he shall lose issues to the king for his not appearance. Wherefore it seemeth not inconvenient, nor against conscience, though the law be, that those issues shall be levied of him in the reversion, for that the condition was secretly understood in the law to pass with the lease, when the lease was made. And therefore it is for the lessor to beware, and to prevent the danger at the making of the lease, or else it shall be adjudged his own default. And then this particular maxim, whereby such issues shall be levied upon him in the reversion, is a particular exception in the law of England, from the general maxim that thou hast remembered before, that is to say, that where two titles run together, that the eldest title shall be preferred[48] and so in this case the general maxim in the point shall hold no place, neither in law nor in conscience, for by this particular maxim the strength of the general maxim is restrained to every intent, that is to say, as well in law as in conscience.

CHAPTER XXIII.

The third question of the student.

Stud. If a tenant for term of life, or for term of years, do waste, whereby they be bound by the laws to yield to him in the reversion treble damages, and so shall forfeit the place wasted:[49] whether he is also bound in conscience to pay those damages, and to restore that place wasted immediately after the waste done, as he is in the single damages, or that he is not bound thereto till the treble damages and place wasted be recovered in the king's court.

Doct. Before judgment given in the treble damages, and of the place wasted, he is not bound in conscience to pay them, for it is uncertain what he should pay: but it sufficeth that he be ready till judgment be given to yield damages according to the value of the waste; but after the judgment given, he is bound in conscience to yield the treble damages, and also the place wasted. And the same law is in all statutes penal, that is to say, that no man is bound in conscience to pay the penalty till it be recovered by the law.[50]

Stud. Whether may he that hath offended against such a statute penal, defend the action, and hinder the judgment, to the intent he would not pay the penalty, but only single damages?

Doct. If the action be taken right wisely according to the statute, and upon a just cause, the defendant may in no wise defend the action, unless he have a true dilatory matter to plead, which should be hurtful to him if he pleaded not, though he be not bound to pay the penalty till it be recovered.

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[46] Ante, 32; Noy's Max. 25.

[47] Noy's Max. 30.

[48] Ante 32.

[49] 2 Inst. 146.

[50] Post. 71.

CHAPTER XXIV.

The fourth question of the student.

Stud. If a man enfeoff other in certain land upon condition, that if he enfeoff any other, that it may be lawful for the feoffor and his heirs to re-enter, etc., whether is this condition good in conscience, though it be void in the law?

Doct. What is the cause why this condition is void in law?

Stud. The cause is this, by the state of fee-simple, that he that hath the estate may lawfully by the law, and by the gift of the feoffor, make a feoffment thereof:[51] and then when the feoffor restraineth him after that he shall make no feoffment to no man against his own former grant, and also against the purity of the state of a fee-simple, the law judgeth the condition to be void:[52] but if the condition had been, that he should not have infeoffed such a man or such a man, that condition had been good, for yet he might infeoff other.[53]

Doct. Though the said condition be against the effect of the state of a fee-simple, and also against the law; nevertheless it is not against the intent that the parties agreed upon, and that at the time of the livery. And forasmuch as the intent of the parties was, that if the feoffee infeoffed any man of the land, that the feoffor should enter, and to that intent the feoffee took the state, and after brake the intent: it seemeth that the land in conscience should return to the feoffor.

Stud. The intent of the parties in the laws of England is void in many cases:[54] that is to say, if he be not ordered according to the law. And if a man of his mere motion, without any recompence, intending to give lands to another and to his heirs, make a deed unto him, whereby he giveth him those lands, to have and to hold to him for ever, intending that by the words *for ever* the feoffee should have the land to him and to his heirs;[55] in this case his intent is void, and the other shall have the land only for term of life. Also, if a man give lands to another, and to his heirs for term of twenty years, intending that if the lessee die within the term, that then his heirs should enjoy the land during the term;[56] in this case his intent is void, for by the law of the realm all chattels real and personal shall go to the executors and not to the heir. Also, if a man give lands to a man and to his wife, and to a third person, intending that every of them should take the third part of the land as three common persons should, his intent is void; for the husband and the wife, as one person in the law, shall take only the one half, and the third person the other half. But these cases be always to be understood where the said estates be made without any recompence. And forasmuch as in this principal case the intent of the feoffor is grounded against the law, and that there is no recompence appointed for the feoffment, methinketh that the feoffor hath neither right to the land by law nor conscience: for if he should have it by conscience, that conscience should be grounded upon the law of reason; and that it cannot, for conditions be not grounded upon the law of reason, but upon the maxims and customs of the realm; and therefore it might be ordained by statute, that all conditions made upon land should be void. And when a condition is void by the maxims of the law, it is as fully void to every intent, as if it were made void by statute: and so methinketh that in this case the feoffor hath no right to the land in law nor in conscience.

Doct. I am content thy opinion stand, till we shall have hereafter a better leisure to speak farther in this matter.

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[51] Shep. Touch. 126; post. 84; 2 B. C. 147.

[52] The law is the same in a devise in fee, upon condition that the devisee shall not alien. Co. Litt. 223.

[53] Vin. Abr., title Con. 103.

[54] 2 Vez. 248.

[55] Litt., sec. 1.

[56] Godolph. 120; Off. of Exor. 53; 1 Vent. 161; Bac. El. 43.

Chapter xxv.

The fifth question of the student.

Stud. If a fine with proclamation be levied according to the statute,[57] and no claim made within five years, etc.,[58] whether is the right of a stranger[59] extincted thereby in conscience, as it is in the law?

Doct. Upon what consideration was that statute made?

Stud. That the right of lands and tenements might be the more certainly known and not to be so uncertain as they were before that statute.

Doct. And when any law of man is made for a commonwealth, or for the good peace and quietness of the people, or for any inconvenience or hurt to be saved from them, that law is good, though percase it extinct the right of a stranger, and must be kept in the court of conscience:[60] for, as it is said before in chap. 4, by laws right wisely made by man, it appeareth who hath right to the lands and goods: for whatsoever a man hath; by such a law, he hath it right wisely; and whatsoever he holdeth against such a law, he holdeth unrightwisely. And furthermore it is said there, all the laws made by man, which be not contrary to the law of God, must be observed and kept, and that in conscience, and he that despiseth them despiseth God, and he that resisteth them resisteth God. Also it is to be understood, that possessions and the right thereof are subject to the laws, so that they therefore with a cause reasonable may be translated and altered from one man to another by act of the law. And of this consideration that law is grounded, that by a contract made in fairs and markets the property is altered, except the property be to the king, so that the buyer pay toll, or do such other things as is accustomed there to be done upon such contracts, and that the buyer knoweth not the former property.[61] And in the law civil there is a like law, that if a man have another man's goods with a title three years, thinking that he hath right to it, he hath the very right unto the thing; and that was made for a law, to the intent that the property and right of things should not be uncertain, and that variance and strife should not be among the people.[62] And forasmuch as the said statute was ordained to give a certainty of title in the lands and tenements comprised in the fine, it seemeth that that fine extincteth the title of all other, as well in conscience, as it doth in the law. And sith I have answered to thy question, I pray thee let me know thy mind in one question concerning tailed lands, and then I will trouble thee no farther at this time. . . .

Our next excerpt finds the student speaking of uses. This extract comes from *The Second Dialogue*, first published in 1531.

Chapter xxii.

How uses of land first began, and by what law; and the cause why so much land is put to use.

Uses were reserved by a secondary conclusion of the law of reason in this manner: When the general custom of property, whereby every man knew his own goods from his neighbours, was brought in among the people, it followeth of reason, that such lands and goods as a man had, ought not to be taken from him but by his assent, or by order of the law: and then sith it be so, that every man that hath lands hath hereby two things in him, that is to say, the possession of the land, which after the law of England is called the frank-

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[57] That is the statute 4 H. 7, c. 24, by which the common law, which gave only a year and a day to strangers, to make their claim, is altered. See likewise the statute 32 H. 8, c. 36, and 4 Ann., c. 16, s. 16. By the last mentioned act no claim or entry to avoid a fine with proclamation, shall be sufficient, unless an action is commenced within one year after such entry or claim, and prosecuted with effect; and this entry must, it seems, be an actual entry. 3 Burr. 1897; Doug. Rep. 468.

[58] Post 110, 143; Bac. El. 51.

[59] For the meaning and extent of the word "stranger," in this place, I must refer the reader to Shepherd's Touchstone of Assurances, 10 and 11, in which the different acceptations of the word as applied to fines are set down in regular order.

[60] Ante, 10.

[61] But there are many other exceptions to which the rule is liable, and as they are rather too numerous to fall conveniently within the compass of a note, I will direct the student to those authorities where he will find them enlarged upon. He may turn to 1 Black. Comm. 450, and 2 Inst. 713.

[62] Wood's Civil Law, 167.

tenement, or the freehold, and the other is authority to take thereby the profits of the land;[63] wherefore it followeth, that he that hath land, and intendeth to give only the possession and freehold thereof to another, and keep the profits to himself, ought in reason and conscience to have the profits, seeing there is no law made to prohibit, but that in conscience such reservation may be made.[64] And so when a man maketh a feoffment to another, and intendeth that he himself shall take the profits; then the feoffee is said seised to his use that so enfeoffed him, that is to say, to the use that he shall have the possession and freehold thereof, as in the law;[65] to the intent that the feoffor shall take the profits.[66] And under this manner, as I suppose, uses of land first began.

Doct. It seemeth that the reserving, of such use is prohibited by the law:[67] for if a man make a feoffment, and reserve the profits, or any part of the profit, as the grass, wood, or such other; that reservation is void in the law: and methinketh it is all one to say, that the law judgeth such a thing, if it be done, to be void, and that the law prohibiteth that the thing shall not be done.

Stud. Truth it is, that such reservation is void in the law, as thou sayest:[68] and that is by reason of a maxim in the law, that willeth that such reservation of part of the same thing shall be judged void in the law. But yet the law doth not prohibit that no such reservation shall be made, but if it be made it judgeth of what effect it shall be; that is to say, that it shall be void; and so he that maketh such reservation offendeth no law thereby, ne breaketh no law thereby, and therefore the reservation in conscience is good. But if it were prohibit by statute that no man should make such a reservation, ne that no feoffment of trust should be made, but that all the feoffments should be to the use of him to whom possession of the land is given; then the reservation of such uses against the statute should be void, because it were against the law: and yet such a statute should not be a statute against reason, because such uses were first grounded and reserved by the law of reason; but it should prevent the law of reason, and should put away the consideration whereupon the law of reason was grounded before the statute made. And then to the other question, that is to say, why so much land hath been put in use? It will be somewhat long, and peradventure to some tedious, to shew all the causes particularly: but the very cause why the use remained to the feoffor, notwithstanding his own feoffment or fine, and sometime notwithstanding a recovery against him, is all upon one consideration after the cause and intent of the gift, fine or recovery, as is aforesaid.

Doct. Though reason may serve that upon a feoffment a use may be reserved to the feoffor by the intent of the feoffor against the form of his gift, as thou hast said before; yet I marvel much how an use may be reserved against a fine, that is one of the highest records that is in the law, and is taken in the law of so high effect, that it should make an end of all strife;[69] or against a recovery, that is ordained in the law for them that be wronged to recover their right by. And methinkeeth, that great inconvenience and hurt may follow, when such records may so lightly be avoided by a secret intent or use of the parties, and by a nude and bare averment and matter in deed, and specially sith such a matter in deed may be alledged that is not true, whereby may rise great strife between the parties, and great confusion and uncertainty in the law. But nevertheless, sith our intent is not at this time to treat of that matter, I pray thee touch shortly some of the causes why there hath been so many persons put in estate of lands to the use of others as there have been; for, as I hear say, few men be sole seised of their own land.

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[63] 2 C. B. 104.

[64] Gilb. Law of Uses, 175.

[65] Gilb. Law of Uses, 178.

[66] As for example, if a feoffment was made to John at Stile and his heirs, to the use and behoof of William at Stile and his heirs, in this case heretofore John at Stile had the estate and property in the land; but William st Stile had and was to have the profits in equity. Shep. Touch. 477; ante, 58, 120.

[67] Co. Litt. 142.

[68] Shep. Touch. 78.

[69] Cruise on Fines, 4; ante, 89.

Stud. There have been many causes thereof, of the which some be put away by divers statutes, and some remain yet.[70] Wherefore thou shalt understand, that some have put their land in feoffment secretly, to the intent that they that have right to the land should not know against whom to bring their action, and that is somewhat remedied by divers statutes that give actions against pernors and takers of the profits.[71] And sometime such feoffments of trust have been made to have maintenance and bearing of their feoffees, which peradventure were great lords or rulers in the country:[72] and therefore to put away such maintenance, treble damages be given by statute against them that make such feoffments for maintenance.[73] And sometime they were made to the use of mortmain, which might then be made without forfeiture, though it were prohibited that the freehold might not be given in mortmain; but that is put away by the statute of R. 2.[74] And sometime they were made to defraud the lords of wards, reliefs, heriots,[75] and of the lands of their villeins: but those points be put away by divers statutes made in the time of king H. the 7th.[76] Sometime they were made to avoid executions upon a statute-staple, statute-merchant and recognisance:[77] and remedy is provided for that, that a man shall have execution of all such lands as any person is seised of to the use of him that is so bound at the time of execution sued, in the 19th year of H. 7.[78] And yet remain feoffments, fines, and recoveries in use for many other causes, in manner as many as there did before the said estatute. And one cause why they be yet thus used is, to put away tenancy by the courtesy and titles of dower.[79] Another cause is, for that the lands in use shall not be put in execution upon a statute-staple, statute- merchant, nor recognisance, but such as be in the hands of the recognisor at the time of the execution sued. And sometime lands be put in use, that they should not be put in execution upon a writ of *extendi facias ad valentiam*. And sometime such uses be made that he to whose use, etc., may declare his will thereon:[80] and sometime for surity of divers covenants in indentures of marriage and other bargains. And these two last articles be the chief and principal cause why so much land is put in use. Also lands in use be not assets neither in a *Formedon*, nor in an action of debt against the heir:[81] ne they shall not be put in execution by an *elegit* sued upon a recovery, as some men say.[82] And these be the very chief causes, as I now remember, why so much land standeth in use as there doth:[83] and all the said uses be reserved by the intent of the parties understood or agreed between them, and

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[70] 2 B. C. 331, 322; Gilb. Law of Uses, 72, 73; stat. 7 Ric. 2, c. 9; 4 H 4, c. 7; 11 H. 6, c. 31; stat. 27 H. 8, c. 10.

[71] [The statute being referred to may be 1 Ric. 2, c. 9, amended by 4 Hen. 4, c. 7. Anon. v. Windsor, Y.B. 6 Ric. 2, M. 11 (Ames Foundation, p. 72–73; cf. *id.*, p. *80–82*) suggests that the statute was read broadly. The statute of 1 Hen. 7, c. 1 is squarely on point, but it is limited to those who want to bring an action of formedon. CD]

[72] Gilb. Law of Uses, 72, 73.

[73] [Normally, the feoffees are social inferiors of the *cestui que use*; here, they are his superiors, and *cestui que use* receives "maintenance and bearing" (the latter referring to the heraldic device of the feoffee[s]) from the feoffee(s). The statute being referred to may be 1 Ric. 2, c. 9, amended by 4 Hen. 4, c. 7. The statute, however, refers to double, not treble, damages. CD.]

[74] [15 Ric. 2, c.5. CD] 2 B. C. 272; Wood's Inst. 255; Popham, 73; Bac. Use of the Law, 153; Gilb. Law of Uses, 38.

[75] [A type of inheritance tax, owed to the lord, on copyhold land. CD.]

[76] [4 Hen. 7, c. 17; 19 Hen. 7, c. 15. CD]

[77] [All of these devices allow the creditor to execute on the land of the debtor if the debtor does not pay his debts. CD]

[78] See statute 27 H. 8, c. 10. [19 Hen. 7, c. 17 is, however, squarely on point. CD]

[79] Perk., sec. 463; 3 Bac. Abr. 221; Shep. Touch 479; 1 Co. 131, Chudleigh's Case.

[80] 2 B. C. 328.

[81] 1 Chan. Rep. 148.

[82] Shep. Touch. 478; Gilb. Law of Uses, 37.

[83] It was evidently the intention of the legislature when they made the statute 27 H. 8, c. 10, to abolish uses by transferring the possession to the use; but the strict construction of that statute defeated the intent of it, and gave rise to trusts of land too tedious to be here enumerated, exactly of the same nature as uses were at Common law. Shep. Touch. 482; Allen, 15; Stile, 40. Of these uses, which may properly be called chancery trusts, intails may be made, fines levied, recoveries suffered, and husbands be tenants by the courtesy. In short, they are governed nearly by the same rules, and liable to every charge in equity which the legal ownership is subject to in law. 2 Wms. Rep, c. 49, in the case of Sutton against Sutton. They may be aliened, or liable to debts, to leases and other incumbrances. They have not yet indeed been held subject to dower, nor are they liable to escheat to the lord.

that many times directly against the words of the feoffment, fine, or recovery: and that is done by the law of reason, as is aforesaid.

Doct. May not a use be assigned to a stranger as well as to be reserved to the feoffor, if the feoffor so appointed it upon his feoffment?

Stud. Yes, as well, and in like wise to the feoffee, and upon that a free gift, without any bargain or recompence, if the feoffor so will.

Doct. What if no feoffment be made, but that a man grant to his feoffee, that from henceforth he shall stand seised to his own use? Is not that use changed, though there be no recompence?

Stud. I think yes, for there was an use *in esse* before the gift, which he might as lawfully give away, as he might the land if he had it in possession.[84]

Doct. And what if, a man being seised in fee grant to another of his mere motion, without bargain or recompence, that he from thenceforth shall be seised to the use of the other; is not that grant good?

Stud. I suppose that it is not good; for, as I take the law, a man cannot commence an use but by livery of seisin, or upon a bargain, or some other recompence.[85]

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[84] Post. 171.

[85] Shep. Touch. 485.

B. ECCLESIASTICAL JURISDICTION: 1250–1600

CHRONOLOGY

1163–1300 — Development of writs of prohibition
1286 — *Circumspecte agatis*
1316 — *Articuli Cleri*
1351, 1352 — First statutes of Provisors and *Praemunire*
1391, 1393 — Second statutes of Provisors and *Praemunire*
1401 — Statute *De heretico comburendo*
1533 — Ecclesiastical Appeals Act

DOCUMENTS

Writs of Prohibition

[See above, Section 4B; below pp. 48–49, 50–52.]

The Writ "Circumspecte Agatis" (1285)

in Gee and Hardy, pp. 83–5 [marginal summaries omitted]

The authorities for this writ are a Cotton and two Harleian MSS., 1285. Cott. Claud. D. ii. f. 249b, Harl. 395 and 667. The Cotton MS. is endorsed *Examinatur per rotulum*. All three differ in points of detail. The following translation is made from the collated texts as printed in the Statutes of the Realm, i. 101, with some use of the various readings there given. [The document in the statute books is, in fact, a pastiche of a writ sent by the king from Paris in the summer of 1286 and some of the replies that the king made to clerical *gravamina* (complaints) in November of 1280. The attribution to 1285 is apparently the result of the fact that the same issues were debated in connection with the Westminster parliament of that year. See Powicke and Cheney, *Councils and Synods II* 2:974–5. Language given in brackets below comes from the best copy we have of the original writ.

[Tr. Statutes of the Realm. i. 101.]

[Edward by king of England, etc., to Richard de Boylond and his companions, greeting.] The king to such and such judges, greeting. See that ye act circumspectly in the matter touching the Bishop of Norwich and his clergy, in not punishing them if they shall hold pleas in the Court Christian concerning those things which are merely spiritual, to wit:—concerning corrections which prelates inflict for deadly sin, to wit, for