CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL.

1. *What is a title?*—195.

A title is the means whereby the owner of lands hath the just possession of his property.

2. *What are the several stages or degrees necessary to form a complete title to lands and tenements?*—195–199.

They are, progressively: 1st. Naked possession; 2d. Right of possession; 3d. Right of property; 4th. A complete title.

3. *What is the lowest and most imperfect degree of title?*—195.

The mere naked possession, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession.

4. *Does actual possession confer title?*—196.

No; it is only *prima facie* evidence of a legal title in the possessor.

5. *When may naked possession of lands happen?*—195.

When, for instance, one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *dis-seizin.*

6. *May actual possession ripen into title?*—196.

It may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title.

7. *Of what sorts is the right of possession?*—196.

An apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents.

8. *What is the right of property?*—197.

The mere right of property, *jus proprietatis,* without either possession, or even the right of possession, is frequently spoken of under the name of the mere right, *jus merum.* A person with this mere right, may have the true ultimate property of the lands in himself; but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist, who has thereby obtained the absolute right of possession. By proving such better right, he may at length recover the lands.

9. *When is title complete?*—199.

No title is completely good, unless the right of possession be joined with the right of property. When to this double right the actual possession also is united, then is the title completely legal.

CHAPTER XIV.

OF TITLE BY DESCENT.

1. *What are the methods of acquiring on the one hand, and of losing on the other, the title to estates in things real?*—201.

They may be acquired by descent, where the title is vested in a man by the single operation of the law; and by purchase, where the title is vested in him by his own act or agreement.

2. *What is title by descent?*—201.

Title by descent, or hereditary succession, is where a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate, so descending to the heir, is in law called the inheritance.

3. *What is to be said as to the importance of the doctrine of descents?*—201.

That it is the principal object of the laws of real property, in England.

4. *Upon what does descent at common law depend?*—202.

It depends, not a little, on the nature of the kindred, and the several degrees of consanguinity.

5. *What is consanguinity?*—202.

It is the connection or relation of persons descended from the same stock, or common ancestor. This consanguinity is either lineal or collateral.

6. *What is lineal consanguinity?*—206, 207.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other; as between John Stiles and his father, grandfather, great-grandfather, and so upward in the direct ascending line; or between Stiles and his son, grandson, great-grandson, and so downward in the direct descending line. Collateral relations agree with the lineal in this, that they descend from the same stock or ancestor; but differ in this, that they do not descend one from the other.

7. *In what does the very being of collateral consanguinity consist?*—205.

In this descent from one and the same common ancestor.

8. *What is the method of computing the degrees of collateral consanguinity?*—205–207.

We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree; for from the father of each of them is counted only one. Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, viz., his own grandfather, the father of Titius. Collateral kinsmen are such, then, as lineally spring from one and the same ancestor, who is the *stirps*, or root, the trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanguineous.

9. *What is the first rule, or canon of descent?*—208–210.

The first rule is that inheritances shall lineally descend to the issue of the person who last died actually seized, *in infinitum*, but shall never lineally ascend.

10. *What is the difference between heirs apparent and heirs presumptive?*—208.

Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must be heir to the father whenever he happens to die.

Heirs presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose hopes may be cut off by the birth of a son.

11. *Who cannot properly be an ancestor?*—209.

No person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seizin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold; or unless he hath had what is equivalent to corporeal seizin in hereditaments that are incorporeal.

12. *Is the lineal ascent excluded?*—210.

Yes; the land shall never ascend, but shall rather escheat.

13. *What is the second rule, or canon of descents?*—212, 213.

It is, that the male issue shall be admitted before the female.

14. *What is the third rule, or canon of descents?*—214–216.

It is, that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together.

15. *As to what does succession by primogeniture take place among females?*—216.

As to the inheritance of the crown.

16. *As to what does the right of sole succession take place among females?*—216.

Female dignities and titles of honor.

17. *What is the fourth rule, or canon of descents?*—217.

It is, that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

18. *What is this taking by representation called?*—217.

It is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done.

19. *What is understood by sharing* per capita?—217, 218.

Among collaterals, if any person, of equal degree with the persons represented, were still subsisting (as, if the deceased left one brother, and two nephews, the sons of another brother), the succession was still guided by the roots; but if both the brethren were dead, leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation.

20. *What is the fifth rule, or canon of descents?*—220.

That on failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules or canons. This is a rule almost peculiar to our own laws, and those of a similar origin.

21. *What is the great and general principle upon which the law of collateral inheritance depends?*—223.

That upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have, originally descended.

22. *What is the sixth rule, or canon of descents?*—224.

That the collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

23. *How must he be his next collateral kinsman?*—224.

Either personally, or *jure representationis*. On failure of issue of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor.

24. *Are lineal ancestors the common stocks of collateral inheritance?*—226.

Yes; the lineal ancestors, though incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring.

25. *Must the heir be the nearest kinsman absolutely?*—227.

No; only *sub modo*; that is, he must be the nearest kinsman of the whole blood.

26. *Who is a kinsman of the whole blood?*—227.

He that is derived, not only from the same ancestor, but from the same couple of ancestors.

27. *Why is the half blood excluded?*—228–230.

The total exclusion of the half-blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship, by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule to carry a former into execution. The universal principle of

collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from this first purchaser, without some proof of which there can be no inheritance allowed of; and this purpose it answers, for the most part, effectually enough. It is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before.

28. *What may descend to the half blood?*—233.

The Crown may descend to the half blood of the preceding sovereign. For the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock.

29. *In what kind of estates is half blood no impediment to the descent?*—233.

In estates tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent; because, when the lineage is clearly made out, there is no need of this auxiliary proof.

30. *What is the seventh and last rule, or canon of descents?*—234.

That in collateral inheritances the male stock shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have, in fact, descended from a female.

31. *What is probably the origin of this rule?*—235.

It was established in order to effectuate and carry into execution the fifth rule, or practical canon, of collateral inheritance; that every heir must be of the blood of the first purchaser

32. *When is this rule totally reversed?*—236.

Where lands have notoriously descended to a man from his mother's side. Then no relation of his by the father's side, as such, can ever be admitted to them; because he cannot be of the blood of the first purchaser.

CHAPTER XV.

OF TITLE BY PURCHASE—AND, FIRST, BY ESCHEAT.

1. *How is purchase defined?*—241.

Purchase, *perquisitio*, taken in its largest and most extensive sense, is defined by Littleton: the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred.

2. *What does it include?*—241.

Every other method of coming to an estate but merely that by inheritance.

3. *What is meant by "conquest" of the feudists?*—242, 243.

What we call purchase, *perquisitio*, the feudists called conquest, conquæstus or *conquisitio*; both denoting any means of acquiring an estate out of the common course of inheritance. The Norman jurists styled the first purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur*. Which seems to be all that was meant by the appellation given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquæstus*, and himself *conquæstor*, or *conquisitor*; signifying that he was the first of his family who acquired the crown of England.

4. *In what consists the difference, in effect, between the acquisition of an estate by descent, and by purchase?*—243.

It consists principally in these two points: 1. That by pur-

chase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor.

2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will.

5. *What are the five methods of acquiring title to estates by purchase?*—244.

1. Escheat; 2. Occupancy; 3. Prescription; 4. Forfeiture; 5. Alienation.

6. *What is escheat?*—244.

It denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee.

7. *Upon what principle is the law of escheats founded?*—245.

It is founded upon this single principle, that the blood of the person last seized in fee-simple, is, by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows, as a regular consequence, that when such blood is extinct the inheritance must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

8. *How are escheats divided?*—245.

Frequently, into those *propter defectum sanguinis*, and those *propter delictum tenentis;* the one sort, if the tenant dies without heirs; the other, if the blood be attainted.

9. *What are the modes of failure of heritable blood?*—246, 247.

They are: 1. When the tenant dies without any relations on the part of any of his ancestors.

2. When he dies without any relations on the part of those ancestors from whom his estate is descended.

3. When he dies without any relations of the whole blood

4. A monster, which hath not the shape of mankind, but in any part bears the resemblance of the brute creation, hath no heritable blood.

5. Bastards are incapable of being heirs.

6. Aliens, also, are incapable of taking by descent, or inheriting.

7. By attainder, also, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer heritable.

The first three of these cases, wherein heritable blood is wanting, may be collected from the rules of descent.

10. *Is there an exception in case of bastards?*—248.

Yes; in one instance the law has shewn them some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*.

11. *Can aliens hold by purchase?*—249.

No; they cannot.

12. *How does denization affect the rights of inheritance?*—249.

If an alien be made a denizen by the king's letter patent, and then purchase lands, (which the law allows such a one to do,) his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterward may, even though his elder brother be living. Yet if he had been naturalized by act of parliament, such eldest son might then have inherited.

13. *If an alien cometh into England, and there hath issue two sons, who are thereby natural born subjects, and one of them purchase land, and dies, can these brethren be heirs one to the other?*—250.

Formerly they could not, but now they can.

14. *Why is this so?*—250.

Reasonably enough, upon the whole; for as, (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor, as suppose the requisite descent.

15. *What is the difference between forfeiture of lands to the king and this species of escheat to the lord?*—251.

Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of the punishment for the offence; and does not at all relate to the feodal system. Escheat operates in subordination to this more ancient and superior law of forfeiture.

16. *Does corruption of blood obstruct the descent?*—254.

Yes; the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent to his posterity, in all cases where they are obliged to derive their title through him from any remote ancestor.

17. *How only can corruption of blood be absolutely removed?*—254.

By authority of parliament.

18. *If a man attainted be afterward pardoned by the king, can his son inherit?*—254.

He can never, if born before the pardon, inherit to his father, or father's ancestors; but if born after the pardon, he might inherit.

19. *If a man hath issue a son, and be attainted, and afterward be pardoned, and then have issue a second son, and die; why cannot either of these sons be his heir?*—255.

Because the corruption of blood is not removed from the eldest son, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had the possibility of being heir; and, therefore, the youngest shall not inherit, but the land shall escheat.

20. *If the ancestor be attainted, may his sons be heirs to each other?*—255.

Sons born before the attainder may be heirs to each other, because the blood was inheritable when imparted to them from the father.

21. *In what instance are lands held in fee-simple not liable to escheat, even when their owner is no more, and has left no heirs to inherit them?*—256.

In the case of a corporation. For if that comes by accident to be dissolved, the donor, or his heirs, shall have the land again in reversion, and not the lord by escheat; which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute.

CHAPTER XVI.

OF TITLE BY OCCUPANCY.

1. *What is occupancy?*—258.

Occupancy is the taking possession of those things which before belonged to nobody.

2. *To what single instance have the laws of England confined the right of occupancy?*—258.

Where a man was tenant *pour autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie*, or him by whose life it was holden; in this case, he that could first enter on the land might lawfully retain possession, so long as *cestuy que vie* lived, by right of occupancy.

3. *Why was no right of occupancy allowed where the king had the reversion?*—259.

Because the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi.*

4. *What if the estate* pur autre vie *had been granted to a man and his heirs, during the life of* cestuy que vie?—259.

There the heir might, and still may, enter and hold posses-

sion, and is called in law a special occupant: as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens* during the residue of the estate granted.

5. *Is the title of common occupancy abolished?*—260.

Almost by statute. Where there is no special occupant in whom the estate may vest, the tenant *pour autre vie* may devise it by will, or it shall go to the executors or administrators.

6. *Does the title of special occupancy continue?*—260.

The title of special occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, but as an occupant specially marked out and appointed by the original grant.

7. *What is the law as to islands rising in rivers?*—261.

Bracton tells us, that if an island arise in the middle of a river, it belongs in common to those that have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law.

8. *If an island rise in the sea, to whom does the law give it?*—261.

The civil law gives it to the first occupant, the common law gives it to the king.

9. *What is the law, as to ownership, as to lands gained from the sea, either by* alluvion, *by the washing up of sand and earth, so as in time to make* terra firma; *or by dereliction, as when the sea shrinks back below the usual watermark?*—262.

In these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.

CHAPTER XVII.

OF TITLE BY PRESCRIPTION

1. *What is title by prescription?*—264.

Title by prescription is when a man can show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it.

2. *What is the distinction between prescription and custom?*—263.

Custom is properly a local usage, and not annexed to any person; prescription is merely a personal usage.

3. *What is prescribing in a* que estate?—264.

All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate.*

4. *What may be prescribed for?*—264.

Nothing but incorporeal hereditaments can be claimed by prescription.

5. *Why cannot prescription give a title to lands?*—264.

Because this is clearly another sort of title; a title by corporeal seizin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription.

6. *In whom must a prescription be laid?*—265.

In him that is a tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe.

7. *Can prescription be for a thing which cannot be raised by grant?*—265.

No; it cannot.

8. *Can what is to arise by matter of record be prescribed for?*—265.

It cannot; but must be claimed by grant, entered on record;