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;

such as, for instance, the royal franchises of deodands, felons' goods, and the like.

**9.** *What distinction must be made with regard to the manner of prescribing?*—265, 266.

If a man prescribe in a *que estate*, nothing is claimable but such things as are incident, appendant, or appurtenant to lands. But, if he prescribe in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant.

**10.** *How are estates gained by prescription descendible?*—266.

Not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule.

## CHAPTER XVIII.

## OF TITLE BY FORFEITURE.

**1.** *What is forfeiture?*—267.

It is a punishment annexed by law to some illegal act, or negligence in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong, which either he alone, or the public together with himself, hath sustained.

**2.** *For what causes may lands, tenements, and hereditaments, be forfeited?*—267.

They may be forfeited in various degrees, and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-presentation to the benefice, when the forfeiture is denominated a lapse. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

**3.** *What are the offences which induce a forfeiture of lands and tenements to the crown?*—267, 268.

They are: 1. Treason. 2. Felony. 3. Misprision of treason. 4. Præmunire. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy.



**4.** *Of what kinds is the alienation, contrary to law, which induces a forfeiture?*—268.

1. Alienation in mortmain. 2. Alienation to an alien. 3. Alienation by particular tenants.

**5.** *What is alienation in mortmain?*—268.

Alienation in mortmain, in *mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal.

**6.** *Can corporations purchase lands without a license?*—269.

They cannot without a license in mortmain from the crown

**7.** *By whom, and why, were common recoveries invented?*—270.

By the religious houses, to evade the statute *De Religiosis*, 7 Edw. I.

**8.** *How are these recoveries obtained?*—271.

The religious houses set up a fictitious title to the land, which it was intended they should have, and brought an action to recover it against the tenant; who, by fraud and collusion, made no defence; and thereby judgment was given for the religious house, which then recovered the land by sentence of law upon a supposed prior title. Thus they had the honor of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of common recoveries.

**9.** *What was the origin of uses and trusts?*—272.

They originated in ecclesiastical ingenuity, to evade the statutes in mortmain.

**10.** *How were uses created?*—271, 272.

By granting the lands, not to themselves directly, but to nominal feoffees, to the use of the religious houses; thus distinguishing between the possession and the use, and receiving

the actual profits, while the seizin of the lands remained in the nominal feoffee, who was held, by the courts of equity, to be bound, in conscience, to account to his *cestuy que use* for the rents and emoluments of the estate.

**11.** *What arose out of these inventions?*—272.

To them we are indebted for uses and trusts, the foundation of modern conveyancing.

**12.** *What is the consequence of alienations by particular tenants, when they are greater than the law entitles them to make, and divest the remainder or reversion?*—274.

They are forfeitures to him whose right is attacked thereby.

**13.** *What is disclaimer, in its nature and consequences?*—275, 276.

Equivalent to an illegal alienation by the particular tenant is the civil crime of disclaimer; as, where a tenant who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord; which disclaimer of tenure, in any court of record, is a forfeiture of the lands to the lord, upon reasons most apparently feodal.

**14.** *What is forfeiture by lapse?*—276.

Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan.

**15.** *When can no right of lapse accrue?*—276.

In two cases: 1st. Where there is no right of institution. 2d. Where the original presentation is in the crown.

**16.** *What is simony?*—278.

It is the corrupt presentation of any one to an ecclesiastical benefice, for money, gifts, or reward.

**17.** *Of what kinds are conditions, the breach, or non-performance of which, induces a forfeiture?*—281.

There are two kinds: a condition annexed to the estate,



either expressly by deed, at its original creation; or a condition implied by law, from a principle of natural reason.

**18.** *What is waste?*—281.

Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail. It is either voluntary or permissive.

**19.** *What will amount to waste in houses, in timber, and in lands?*—281, 282.

Whatever does a lasting damage to the freehold or inheritance is waste. Therefore, removing wainscot, floors, or other things once fixed to the freehold of a house, is waste. Timber, also, is part of the inheritance; such as oak, ash, and elm, in all places; and in some particular counties, by local custom; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste. The conversion of land from one species to another, is waste; to convert wood, meadow, or pasture into arable; to turn arable into meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste. To open lands to search for mines is waste.

**20.** *Who are liable to be punished for waste, and who are not?*—282, 283.

By the feodal law, we find that the rule was general for all vassals or feudatories: "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*" But in the ancient common law the rule was by no means so large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in the three persons: guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years.

**21.** *What is the punishment for committing waste?*—283, 284.

By common law and statute only single damages, except in the case of a guardian, who also forfeited his wardship by the provisions of the great charter: but the statute of Gloucester

directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that hath the inheritance.

**22.** *How may copyhold estates be forfeited?*—284.

By breach of the customs of the manor.

**23.** *Define a bankrupt?*—285.

He is a trader who secretes himself, or does certain other acts, tending to defraud his creditors.

**24.** *What becomes of a bankrupt's lands and tenements?*—285, 286.

By statute 13 Eliz. c. 7, the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements; and to cause them to be appraised to their full value, and to sell the same by deed indented and enrolled, or divide them proportionably among the creditors. The statute 21 Jac. I. c. 19, enacts that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be seized of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown. And, also, by this and the former act, all fraudulent conveyances, to defeat the intent of these statutes, are declared void.*

## CHAPTER XIX.

### OF TITLE BY ALIENATION.

**1.** *What is alienation, conveyance, or purchase, in its limited sense?*—287.

Under it may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage settlement,

* The provisions of the English bankrupt law have been simplified in some respects, and otherwise modified, by more modern statutes.



devise, or other transmission of property by the mutual consent of the parties.

**2.** *Who are capable of conveying, and who of purchasing?*—290.

All persons in possession are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities.

**3.** *Must the alienor have an estate?*—290.

Yes; if a man has only in him the right of either possession or property, he cannot convey it to any other. Yet reversions and vested remainders may be granted.

**4.** *May contingencies and mere possibilities be assigned to a stranger?*—290.

They cannot, unless coupled with some present interest.

**5.** *What descriptions of persons are incapable of conveying?*—290–293.

Persons attainted of treason, felony, præmunire; idiots, and persons of nonsane memory; infants and femes covert; papists.

**6.** *Are conveyances and purchases by idiots and persons of nonsane memory, infants, and persons under duress, void?*—291.

They are voidable, but not actually void.

**7.** *May a non compos himself, afterward brought to a right mind, be permitted to allege his own insanity, in order to avoid his grants, or other acts?*—291, 292.

He may not. The king, on behalf of an idiot, may do so

**8.** *May his next heir, or other person interested, plead it?*—292.

The next heir, or other person interested, may, after the death of the idiot or non compos, take advantage of his incapacity and avoid the grant.

**9.** *May an infant waive his purchase, or conveyance, when he comes of full age?*—292.

He may; or, if he does not then actually agree to it, his heirs may waive it after him.

**10.** *May a feme covert purchase an estate without the consent of her husband?*—293.

She may purchase an estate without his consent, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent. And, though he does nothing to avoid it, or even if he actually consents, the feme covert herself may, after the death of her husband, waive or disagree to the same; nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement.

**11.** *What only can an alien purchase and hold?*—293.

He may purchase anything; but after purchase he can hold nothing, except a lease for years of a house for convenience of merchandise.

**12.** *What are the legal evidences of alienation, or transfer of property, styled?*—294.

The common assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

**13.** *Of what kinds are these common assurances?*—294.

They are of four kinds: 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is, according to the old common law, upon the very spot to be transferred.

2. By matter of record, or an assurance transacted only in the king's public courts of record.

3. By special custom, obtaining in some particular places, and relating only to some particular species of property.

4. By devise, contained in a last will and testament.



# CHAPTER XX.

## OF ALIENATION BY DEED.

**1.** *What is a deed?*—295.

A deed is a writing sealed, and delivered, by the parties.

**2.** *What is an indenture?*—295.

Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some words or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part, and half on the other. But at length indenting only has come into use; without cutting through any letters at all; and it seems at present to serve for little other purpose than to give name to the species of deed.

**3.** *Which is the original, and which the counterpart, of a deed?*—296.

When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original; and the rest are counterparts.

**4.** *What is a deed-poll?*—296.

It is a plain deed, made by one party only, not indented, but polled or shaved quite even; and, therefore, called a deed-poll, or a single deed.

**5.** *What are the requisites of a deed?*—296–308.

They are eight: 1st. There must be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject matter, to be contracted for; all which must be expressed by sufficient names.

2d. The deed must be founded upon good and sufficient consideration.