4. *Upon what basis did the people of the New England colonies settle their towns?*—391–399, *n.* (*a.*)

They settled all their towns upon the basis of a title procured by fair purchase from the Indians, with the consent of government, except in a few instances of lands acquired by conquest, after a war deemed to have been just and necessary. Most of the other colonies proceeded on a like principle, and prohibition of individual purchases of lands has since been made a constitutional provision in the States of New York, Virginia, and North Carolina. And the government of the United States until the year 1830, pursued a system of pacific, just and paternal policy towards the Indians, never insisting upon any other claim to their lands than the right of preëmption upon fair terms. Since then the federal government seems to have adopted a different policy, in one instance expelling Indians by military force from their lands, and, in what is now known as the *Indian Country*, introducing the criminal laws of the United States.

LECTURE LII.

OF INCORPOREAL HEREDITAMENTS.

1. *Of what do things real consist?*—401.

Of lands, tenements, and hereditaments.

2. *What is an hereditament?*—401.

Any thing capable of being inherited, be it corporeal, incorporeal, real, personal, or mixed.

3. *What does the term "real estate" mean?*—401.

An estate in fee or for life in land, and it does not comprehend terms for years, or any interest short of a freehold.

4. *What is a tenement?*—401.

A tenement comprises every thing which may be holden so as to create a tenancy, in the feudal sense of the term, and, no doubt, it includes things incorporate, though they do not lie in tenure

5. *What are corporeal hereditaments?*—401.

They are confined to land, which, according to Lord Coke, includes not only the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses, and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include every thing terrestrial under or over it.

6. *What are incorporeal hereditaments?*—402.

Certain inheritable rights which are not, strictly speaking, of a corporeal nature, or land, although they are by their own nature, or by use, annexed to corporeal inheritances, and are rights issuing out of them, or which concern them. They pass by deed, without livery, because they are not tangible rights.

7. *What are the principal incorporeal rights which subsist in our law?*—403.

1. Commons. 2. Ways, easements, and aquatic rights. 3. Offices. 4. Franchises. 5. Annuities. 6. Rents.

8. *What is a right of common?*—403, 404.

It is a right which one man has in the lands of another, the object of which is to pasture his cattle, or provide necessary fuel for his family, or for repairing his necessary implements of husbandry. Common of pasture is known as common of pasture *appendant*, and common of pasture *appurtenant*. Common *appendant* is founded on prescription, and is regularly annexed to arable land. It authorized the owner or occupier of the arable land to put commonable beasts upon the waste grounds of the manor. Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well as prescription. It allowed the owner to put in other beasts than such as plow or manure the land. Common of *estovers* may be equally appendant or appurtenant.

9. *What is a general rule as to right of common?*—408.

A right of common shall not be so changed or modified, by the act of the parties, as to increase, or even create the temptation to increase, the charge upon the land out of which common is to be taken. An extinguishment of the right as to a portion of the land charged, is an extinguishment of the whole.

10. *What is a right of piscary?*—409–412, *n.* (*a.*)

It is said to be a liberty or right of fishery in the water covering the soil of another person, or in a river running through another man's land. In the leading case* on the question of fisheries, the doctrine laid down was, that a subject might have a several freehold interest in a navigable river or tide-water, by special grant from the crown, but not otherwise; and that without such grant, or prescription which is evidence of a grant, the right of fishing was common. On the other hand, it was held that in rivers not navigable (and, in the common-law sense of the term, those only were deemed navigable in which the tide ebbed and flowed) the owners of the soil, on each side, had the interest and the right of fishing; and it was an exclusive right, and extended to the center of the stream opposite their respective lands.

The regulation of fisheries, within the jurisdiction of the several States, is now, generally, provided for by statute.

11. *To what is the right of fishing in streams, not navigable, held subject?*—418.

It is held subject to the public use of the water as a highway, and to the free passage of the fish, and in subordination to the regulations to be prescribed by the Legislature for the general good.

12. *What is the remedy for the disturbance of these incorporeal rights?*—419.

An action of ejectment, or a special action on the case, according to the nature of the right and injury.

* See Davies' Rep., 149.

13. *What is a right of way?*—419, 420.

It is a right of private passage over another man's ground, and may arise either by grant or prescription. If it be a right of way in gross, or a mere personal right, it can not be assigned, nor descend. But if it be appended or annexed to an estate, it may pass by assignment when the land is sold to which it was appurtenant. It may arise from necessity in several respects. Thus, if a man sells land to another which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his land. This principle was carried so far as to be applied to a trustee selling land he held in trust, and to which there was no access but over the trustee's own land.

14. *What is the rule if a highway be impassable?*—424.

There is a temporary right of way over the adjoining land; but this right applies to public and not to private ways.

15. *What is the law as to riparian rights?*—427.

It is a settled principle of the English law, that the right of the soil of owners of land bounded by the sea, or on navigable rivers where the tide ebbs and flows, extends to high-water mark; and the shore, below the common high-water mark, belongs to the State as trustee for the public; and in England the crown, and in this country the people, have the absolute proprietary interest in the same, though it may, by grant or prescription, become private property. The shores of navigable waters, and the soil under them, belong to the State in which they are situated, as sovereign. But grants of land, bounded on rivers, or upon the margins of the same, above tide water, carry the exclusive right and title of the grantee to the center of the stream; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, as a public highway.

16. *What is the general doctrine as to alluvions?*—428.

If a fresh water river insensibly gains on one side or the other, the title of the owner, at each side, continues to go *ad filum medium aquæ*, but if the alteration be sensibly and sud-

denly made, the ownership remains according to the former bounds; and if the river should then forsake its channel, and make an entirely new one in the lands of the owner on one side, he will become owner of the whole river, so far as it is inclosed by his land.

17. *Has the common law, with regard to riparian rights, been rejected or deemed inapplicable in some of the States?*—429–431.

Yes; in Maine, Massachusetts, Pennsylvania, and North and South Carolina, it has undergone some modifications.

18. *What is the law in respect to public highways?*—432.

It is the same as that of fresh water rivers, and the analogy is perfect as respects the right of soil. The presumption is, that the owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Being owners of the soil, they have a right to all ordinary remedies for the freehold.

19. *What are servitudes?*—434.

Easements, or real rights existing in the property of another. Like incorporeal hereditaments, they have been held not to pass without grant. By virtue of such a right, the proprietor of the estates charged is bound to permit, or not to do, certain acts in relation to his estate, for the utility or accommodation of a third person, or of the possessor of an adjoining estate.

20. *What is the general rule as to party walls?*—437.

If the owner of one house pulls it down in order to build a new one, and at the same time pulls down the party wall, he is bound to pull down and reinstate the wall in a reasonable time and with the least inconvenience; and if the old wall require repairing, the neighbor is bound to contribute ratably, but he is not bound to contribute toward building the new wall higher than the old one, or with more costly materials.

21. *What is the rule in respect to running waters?*—439.

That no proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment

He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*, is the language of the law.

22. *May a right to easements be acquired by prescription?*—442.

Yes; the general and established doctrine is, that an exclusive enjoyment of water, light or any other easement, in any particular way, for twenty years, or for such period less than twenty years as in any particular State is the established period of limitation, and enjoyed continuously and without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title, as against a right in any other person, which might have been but was not asserted.

23. *Has the common law in regard to "ancient lights" been adopted with us?*–448, *n.*

The Supreme Court of New York has rejected it as being inapplicable to this country, and in Connecticut and Massachusetts it has been declared, by statute, that a right to light can not be acquired by prescription. But in Illinois, an action will lie for obstructing the air and light of a house, and lights are deemed ancient after an enjoyment of them for twenty years.

24. *May easements be lost by non-user?*—448–450.

A right acquired by use may be lost by non-user, and an absolute discontinuance of the use affords a presumption of the extinguishment of the right in favor of some other adverse right. As an enjoyment for twenty years is necessary to found presumption of a grant, the general rule is, that there must be similar non-user to raise the presumption of a release; but the discontinuance should be absolute and decisive, and unaccompanied with any intention to resume it within a reasonable time.

25. *What is the distinction between an easement and a license?*—452.

A claim for an easement must be founded upon grant by deed or writing, or upon prescription which supposes one; for it is a permanent interest in another's land, with a right at all times to enter and enjoy it. But a license is an authority to do a particular act, or series of acts, upon another's land, without

possessing any estate therein. It is founded on personal confidence, and is not assignable.

26. *What of offices?*—454.

Offices, in England, may be granted to a man in fee, or for life, as well as for years, and at will. In the United States no public office can properly be termed an hereditament, or a thing capable of being inherited.

27. *What are franchises?*—458.

They are certain privileges conferred by grant from government, and vested in individuals, such as the privilege of making a road, or establishing a ferry, and taking tolls for the use of the same. In England they are understood to be royal privileges in the hands of a subject.

28. *What are annuities?*—460.

An annuity, says Lord Coke, is a yearly sum stipulated to be paid to another, in fee, or for life, or for years, and chargeable only on the person of the grantor. If it be agreed to be paid to the annuitant and his heirs, it is a personal fee, and transmissible by descent, like a personal fee. It is chargeable upon the person of the grantor, for if the annuity was made chargeable upon land, it would be a rent-charge.

29. *What are rents?*—460.

Rent is a certain profit in money, provisions, chattels, or labor, issuing out of lands and tenements, in return for the use, and it can not issue out of a mere privilege or easement. There were, at common law, according to Littleton, three kinds of rents, viz.: rent-service, rent-charge, and rent-seck.

30. *What was rent-service?*—461.

Where the tenant held his land by fealty, or other corporeal service, and a certain rent. A right of distress was inseparably incident to this rent.

31. *What is a rent-charge, or fee-farm rent?*—461.

Where the rent is created by deed, and the fee granted;

and as there is no fealty annexed to such a grant of the whole estate, rent charge was not favored at common law. The right of distress is not an incident, and it requires an express power of distress to be annexed to the grant, which gives it the name of a rent-charge.

32. *What was rent-*seck, siccus, *or barren rent?*—461.

It was rent reserved by deed without any clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land.

33. *What is the rule as to whom rent must be reserved?*—463.

That it must be reserved to him from whom the land proceeded, or his lawful representatives, and it can not be reserved to a stranger.

34. *What will discharge the tenant from paying the rent?*—464.

If the tenant be evicted by title paramount before the rent falls due, he will be discharged from the payment. But if the lawful eviction by paramount title be of part only of the demised premises, the rent is apportionable, and the eviction a bar *pro tanto*. So, if there be an actual expulsion of the tenant from the whole, or part, by the lessor before the rent becomes due, the entire rent is suspended.

35. *What is the rule in cases where the premises are destroyed, as by fire?*—466.

That upon an express contract to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the party from paying the rent.

36. *Where and when is rent to be paid?*—468.

When rent is due, a tender upon the land is good, and prevents forfeiture, when the contract is silent as to the place of payment; and a personal tender to the landlord, off the land, is also good.

In the absence of any special agreement, rent would be payable yearly, half yearly or quarterly, according to usage and the presumed intention to conform to it; if no usage, the rent is

due at the end of the year. In the city of New York, it is provided by statute, that, in the absence of special agreement, rent is payable quarterly, and the hiring terminates on the first of May thereafter.

37. *May rent be apportioned?*—469.

Yes: either by granting the reversion of part of the land out of which the rent issues, or by granting part of the rent to one person and part to another.

38. *What is the remedy for the non-payment of rent?*—471, 472.

An action of covenant, or debt, or assumpsit for use and occupation, according to the nature of the instrument or contract by which payment is secured. Or the landlord may reenter, or recover possession by ejectment, or he may distrain the goods and chattels found upon the land in those States in which the right of distress has not been abolished.

39. *In what cases are articles not distrainable at common law?*—477, et seq.

Articles temporarily placed upon land, by way of trade, and belonging to third persons. A horse at a public inn, or sent to a livery stable to be taken care of, or corn at a mill, or cloth at a tailor shop, or grazier's cattle put upon the land for the night, on the way to market, or goods deposited in a warehouse for sale or on storage, in the way of trade, or goods of a principal in the hands of a factor are not distrainable for rent. Nor can beasts of the plow, sheep, or implements of a man's trade be taken for rent, so long as other property can be found.

Various other articles are exempted in some of the States by special statutes from distress, and in New York and other States the right of distress has been altogether abolished.

LECTURE LIII.

OF THE HISTORY OF FEUDAL TENURE.

1. *To what source do we trace the origin of the feudal system?*—491, et seq.

To the Gothic or northern nations. Some authors have supposed that the sources of feuds were not confined to those nations. And Niebuhr, in his History of Rome, volume I., 99, declares the relation of patron and client to have been the feudal system in its noblest form. The better and prevailing opinion, however, is, that the origin of the feudal system is essentially to be attributed to the northern Gothic conquerors of the Roman empire. It was part of their military policy, and devised by them as the most effectual means to secure their conquests. The chieftain, as head or representative of his nation, allotted portions of the conquered lands, in parcels, to his principal followers, and they, in their turn, gave smaller parcels to their subtenants or vassals, and all were granted on the same conditions of fealty and military service. The rudiments of the feudal law have been supposed, by many modern feudists, to have existed in the usages of the ancient Germans, as they were studied and described by Cæsar and Tacitus. The traces of the feudal policy were first distinctly perceived among the Franks, Burgundians and Lombards, after they had invaded the Roman provinces. They generally permitted the Roman institutions to remain in the cities and towns, but they claimed a proportion of the land and slaves of the provincials, and brought their own laws and usages with them. The conquered lands, which were appropriated by military chiefs to their faithful followers, had the condition of future military service annexed, and this was the origin of *fiefs* and *feudal* tenures. The same class of persons, who had been characterized as volunteers or companions in Germany, became loyal vassals under the feudal grants. These grants, which were at first called benefices, were, in their origin, for life, or perhaps only for a term of years. The vassal had a right to use the land, and take the profits, and was bound to render in return such feudal duties and services as belonged to military

tenure. The property of the soil remained in the lord from whom the grant was received. The king or lord had the *dominium rectum*, and the vassal or feudatory the *dominium utile*. Prior to the introduction of the feudal system, lands were allodial, and held in free and absolute ownership in like manner as personal property was held. Allodial land was not suddenly but very gradually supplanted by the law of tenures. They were never so entirely introduced as to abolish all vestiges of allodial estates. The precise time when benefices became hereditary is uncertain. They began to be hereditary in the age of Charlemagne, who facilitated the conversion of allodial into feudal estates. The perpetuity of fiefs was established earlier in France than in Germany ; but throughout the continent it appears they had become hereditary, and accompanied with the right of primogeniture and all the other incidents peculiar to feudal governments, long before the era of the Norman conquest.

England was distinguished above every part of Europe for the universal establishment of feudal tenures. There is no presumption or admission in the English law of allodial lands. They are all held by some feudal tenure. There were traces of feudal grants, and of the relation of lord and vassal in the time of the Anglo-Saxons, but the formal and regular establishment of feudal tenures in their genuine character, and with all their fruits and services, was in the reign of William the Conqueror. The tenures which were authoritatively established in England in the time of the Conqueror were principally of two kinds, according to the services annexed. They were either tenures by *knight service*, in which the services, though occasionally uncertain, were altogether of a military nature ; or tenures by *socage*, in which the services were defined and certain, and generally of a predial or pacific nature.

Most of the feudal incidents and consequences of socage tenure were expressly abolished in New York by the act of 1787 ; and they were wholly and entirely annihilated by the New York Revised Statutes. They were also abolished by statute in Connecticut in 1793 ; and they have never existed, or they have ceased to exist in all essential respects, in every other State. The only feudal fictions and services which can be presumed to exist in the United States, consist of the feudal principle, that the lands are held of some superior or lord, to whom the obligations of fealty, and to pay a determinate rent, are due. But this doctrine of feudal fealty has never been practically applied, or assumed to apply to any other superior than the chief lord of the fee, or, in other words, the people of the State, and then it resolved itself into the oath of allegiance which every citizen, on a proper occasion, may be required to take.

LECTURE LIV.

OF ESTATES IN FEE.

The perusal of the former volumes has prepared the student to enter upon the doctrine of real estates, which is by far the most artificial and complex branch of our municipal law.

In treating of the doctrine of real estates, it will be most convenient, as well as most intelligible, to employ the established technical language to which we are accustomed, and which appertains to the science. Though the law in some of the United States discriminates between an estate in pure *allodium*, and an estate in fee simple absolute, these estates mean essentially the same thing ; and the terms may be used indiscriminately to describe the most ample and perfect interest which can be owned in land.—2.

1. *Have not the words* seisin *and* fee *been always used in New York?*—2, 3.

They have, whether the subject was lands granted before or since the Revolution ; though by the act of 1787, the former were declared to be held by the tenure of free and common socage, and the latter in free and pure allodium, but this was an unnecessary distinction in legal phraseology as applied to estates ; and the distinction lay dormant in the statute, and was utterly lost and confounded in practice. The technical language of the common law is too deeply rooted in our usages and institutions, to be materially affected by legislative enactments.