tion of an estate for life, is not immediate assets during the continuance of the life estate, and the creditor takes judgment for assets *in futuro*.

7. *Is the reversioner entitled to his action for an injury done to the inheritance?*—355.

He is, because he has a vested interest.

8. *What are the usual incidents to the reversion under the English law?*—355, 356.

Fealty and rent. Fealty, in its feudal sense, does not now exist in this country; but rent is a very important incident, and passes with a grant or assignment of the reversion. It is not inseparable, and may be severed from the reversion, and excepted out of the grant by special words.

LECTURE LXIV.

OF A JOINT INTEREST IN ESTATES.

1. *In what two ways may a joint interest in land be had?*—357.

Either in the title or in the possession.

2. *What are joint tenants?*—357.

Joint tenants are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase.

3. *How are they seised?*—359.

Joint tenants are said to be seised *per my et per tout*, and each has the entire possession, as well of every parcel as of the whole. They have each (if there be two of them, for instance) an undivided moiety of the whole.

4. *What is the doctrine of survivorship, or* jus accrescendi?—360.

It is the distinguishing incident of title by joint tenancy;

and, therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance.

5. *Did the common law favor the title by joint tenancy?*—361.

It did, by reason of the right of survivorship.

6. *When were estates in joint tenancy abolished in New York?*—361.

As early as February, 1786, estates in joint tenancy were abolished, except in executors and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. The New York Revised Statutes have reënacted the provision, and with the further declaration that every estate vested in executors and trustees, as such, shall be held in joint tenancy.

7. *Can husband and wife take by moieties?*—362.

They can not. But they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. If an estate be conveyed expressly in joint tenancy to a husband and wife, and to a stranger, the latter takes a moiety, and the husband and wife, as one person, the other moiety.

8. *How would it be if the husband and wife had been seised of the lands, as joint tenants, before their marriage?*—363.

They would continue joint tenants afterward, as to that land, and the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture.

9. *How may joint tenancy be destroyed?*—363.

It may be destroyed by destroying any of its constituent unities, except that of time.

10. *What is the proper conveyance between joint tenants?*—364.

A release; and each has the power of alienation over his *aliquot* share.

11. *How may joint tenants sever the tenancy?*—364.

Either voluntarily by deed, or they may compel a partition by writ of partition, or by bill in equity.

It is to be presumed that the English statutes of 31 and 32 Henry VIII. have been generally reënacted or adopted in this country, and, probably, with increased facilities for partition. They were reënacted in New Jersey, in 1797, and in Virginia in their Revised Code, and in New York, 6th of February, 1788; and the New York Revised Statutes have made further and more specific and detailed provisions for the partition of lands, held either in joint tenancy, or in common, and they have given equal jurisdiction over the subject to the courts of law and of equity. In Massachusetts and Maine, the writ of partition at common law is not only given, but partition may be effected by petition without writ.

12. *When only does a court of equity interfere?*—364, 365.

Only when the title is clear, and never where the title is denied, or suspicious, until the party seeking a partition has had an opportunity to try his title at law. The same principle has been acted upon in the courts of equity in this country.

13. *What have the New York Revised Statutes prescribed to the courts of law and equity, in respect to partition?*—365.

That wherever there shall be a denial of co-tenancy, an issue shall be formed and submitted to a jury to try the fact; and the respective rights of the parties are to be ascertained and settled before partition be made, or a sale directed.

14. *Whom does a final judgment or decree, upon partition at law, under the Revised Statutes, bind?*—365, 366.

It binds all parties named in the proceedings, and having, at the time, any interest in the premises divided, as owners in fee, or as tenants for years; or as entitled to the reversion, remainder or inheritance, after the termination of any particular

estate; or as having a contingent interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower.

But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or for life, in the whole of the premises subject to the partition. It is likewise provided, in respect to the exercise of equity jurisdiction, in the case of partition, that if it should appear that equal partition can not be made without prejudice to the rights and interests of some of the parties, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case. This is the rule in equity, independent of any statute provision, when equality of partition can not otherwise be made.

15. *From what does an estate in coparcenary always arise?*—366.

It always arises from descent. At common law it took place when a man died seised of an estate of inheritance, and left no male issue, but two or more daughters, or other female representatives in a remoter degree. In this case they all inherited equally as co-heirs in the same degree, or in unequal proportions, as co-heirs in different degrees.

16. *In what three unities do coparceners resemble joint tenants?*—366.

Unity of title, interest, and possession.

17. *But do not coparceners differ from joint tenants in other respects in a most material degree?*—366.

They do. They are said to be seised like joint tenants, *per my et per tout*, and yet each parcener has a divisible interest; and the doctrine of survivorship does not apply to them. The shares of the partners descend severally to their respective heirs. They may sever their possession, and dissolve the estate in coparcenary, by consent, or by writ of partition at common law.

18. *Who are tenants in common?*—367, 368.

They are persons who hold by unity of possession; and

they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. The American law differs from the English common law in this respect, that with us a tenancy in common may be created by descent, as well as by deed or will; and whether the estate be created by act of the party or by descent, in either cases tenants in common are deemed to have several and distinct freeholds; for that circumstance is a leading characteristic of tenancy in common.

19. *How are tenants in common seised?*—368.

Each tenant is considered to be solely or severally seised of his share. They are deemed to be seised *per my* but not *per tout.*

20. *What are the incidents of tenancy in common?*—369, 370.

They are similar to those applicable to joint estates. The owners can compel each other, by the like process of law, to a partition, and they are liable to each other for waste, and they are bound to account to each other for due share of the profits of the estate in common. The possession of one tenant in common is the possession of the others, and the taking of the whole profits by one does not amount to an ouster of his companions. One joint tenant, or tenant in common, can compel the others to unite in the expense of necessary reparations to a house or mill belonging to them; though the rule is limited to those parts of common property, and does not apply to the case of fences inclosing wood or arable lands.

21. *What provision has been made in Massachusetts regarding the repair of mills or dams?*—370, *n.* (*a.*)

By the Massachusetts Revised Statutes of 1836, the greater part of the proprietors in interest of mills or dams, which need reparation, may cause the same to be done at the expense of all, in proportion to their respective interests, after a call, on due notice, of a meeting of all of them.

LECTURE LXV.

OF TITLE BY DESCENT.

1. *What must there be to constitute a perfect title?*—373.

There must be the union of actual possession, the right of possession, and right of property. These several constituent parts of title may be divided and distributed among several persons, so that one of them may have the possession, another the right of possession, and the third the right of property. Unless they all be united in one and the same party, there can not be that consolidated right, that *jus duplicatum*, or *droit droit*, or the *jus proprietatis et possessionis*, which, according to the ancient English law, formed a complete title.

2. *By what two modes may title to land be acquired?*—373.

By descent and by purchase; the one is acquired by operation of law, and the other by the act or agreement of the parties.

3. *What is a descent or hereditary possession?*—374.

It is the title whereby a person, on the death of his ancestor, acquires his estate by right of representation as his heir. In the United States, the English common law of descents, in its most essential features, has been universally rejected, and each State has established a law of descents for itself.

4. *What is the first rule of inheritance?*—375.

It is, that if a person owning real estate dies seised, or as owner, without devising the same, the estate shall descend to his lawful descendants in the direct line of lineal descent; and if there be but one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be.

5. *Is not this rule in favor of the equal claims of the descending line, in the same degree?*—375.

Yes. Without distinction of sex, and to the exclusion of

all other claimants. Thus, if A dies, owning real estate, and leaves, for instance, two sons and a daughter, or, instead of children, leaves only two or more grandchildren, or two or more great-grandchildren, these persons being his lineal descendants, and all of equal degree of consanguinity to the common ancestor, that is, being all of them either his children, or grandchildren, or great-grandchildren, they will partake equally of the inheritance as tenants in common.

6. *When was this rule of descent prescribed by the statute of New York?*—375.

On the 23d of February, 1786 ; and it has been adopted by the New York Revised Statutes.

7. *To what extent does this rule prevail in the United States?*—375.

It prevails in all the United States, with this variation, that, in South Carolina, the widow takes one third of the estate in fee, and in Georgia, she takes a child's share in fee, if there be any children, and if none, she then takes a moiety of the estate. In Massachusetts, the statute law of descents applies only to estates whereof the ancestor died seised in fee simple or for the life of another, and the descent of estates tail (which are left as they stood at common law) is limited to the eldest male heir. In Rhode Island, New Jersey, North and South Carolina, Tennessee and Louisiana, the claimants take, in all cases, *per stirpes*, though standing in the same degree. In Alabama, the descendants of children also take *per stirpes*, and in Tennessee the male issue is preferred to the female in the descent of real property.

8. *Did not the rule of common law, under the statute of descents, that* seisina facit stipitem, *formerly exist in New York?*—388, 389.

Yes, until 1786 ; and the heir was to deduce his title from the person dying seised. But the New York Revised Statutes have wisely altered the preëxisting law on this subject ; and they have extended the title by descent generally to all the real estate owned by the ancestor at his death ; and they include in the descent every interest, legal and equitable, in lands, tenements, and hereditaments, either seised or possessed by the intestate, or to which he was in any manner entitled, with the exception of leases for years, and estates for the life of another person. The Massachusetts, Virginia, North Carolina, and the Tennessee law of descent reaches equally to every interest in fee in real estate. The Massachusetts statute extends to every such interest for the life of another, and the North Carolina and Tennessee statutes to every right, title or interest in the estate. This completely abolishes the English maxim, that *seisina facit stipitem.* So, likewise, in Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, South Carolina, Georgia, and Ohio, and probably in other States, the real and personal estates of intestates are distributed among the heirs, without any reference or regard to the actual seisin of the ancestor. Reversions and remainders, vested by descent in an intestate, pass to his heirs in like manner as if he had been seised in possession ; and no distinction is admitted in descents between estates in possession, and in reversion. In the States of Maryland and North Carolina, the doctrine of *possessio fratris* would seem still to exist.

9. *In case of posthumous descendants, to whom does the inheritance in the meantime descend, at the death of the intestate?*—389.

To the heir *in esse.* It was declared, by Lord Chief Justice De Grey, in the case of *Goodtitle* v. *Newman*, on the authority of a case in the Year Books, of 9 Hen. VI. 25, a., that the posthumous heir was not entitled to the profits of the estate before his birth, because the entry of the presumptive heir was lawful. This rule does not apply to posthumous children who take remainders, under the statute of 10 and 11 William III. They must take the intermediate profits, says Lord Hardwicke ; for they are to take in the same manner as if born in the lifetime of the father. This construction of Lord Hardwicke applies to the New York Revised Statutes ; for it is declared, that posthumous descendants shall, in all cases, inherit in the same manner as if born in the lifetime of the intestate. The provision in the laws of some of the other States, such as Rhode Island, New Jersey, Pennsylvania and Missouri, would seem to be to the same effect, and to admit of the same construction.

10. *What is the second rule of descents?*—390.

That if a person dying seised, or as owner of land, leaves

lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren, and their descendants, shall inherit only such share as their parents respectively would have inherited if living.

11. *Does this rule prevail in New York?*—390.

Yes; it is so declared in the Revised Statutes, and it is probably to be found in the laws of every State in the Union.

12. *What is the third canon of inheritance?*—393.

That if the owner of lands dies without lawful descendants, leaving parents, the inheritance shall ascend to them, either first to the father and next to the mother, or jointly, under certain qualifications.

13. *What is the fourth rule of inheritance?*—400, 401.

That if the intestate dies without issue, or parents, the estate goes to his brothers and sisters, and their representatives. If there be several such relatives, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. If they all be brothers and sisters, or nephews and nieces, they inherit equally; but if some be dead leaving issue, and others living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their parents would have received if living. The rule applies to other direct lineal descendants of brothers and sisters, and the taking *per capita* when they stand in equal degree, and taking *per stirpes* when they stand in different degrees of consanguinity to the common ancestor, prevails as to collaterals, to the remotest degree, equally as in the descent to lineal heirs.

14. *What is the fifth?*—407.

That in default of lineal descendants, and parents, and brothers and sisters, and their descendants, the inheritance ascends to the grandparents of the intestate, or to the survivor of them. This is not the rule that has recently been declared in New York, for that excludes, in all cases, the grandparents from the succession, and the direct lineal ascending line stops with the father.

15. *What is the sixth?*—408, 409.

That, in default of lineal descendants, and parents, and brothers and sisters, and their descendants, and grandparents, the inheritance goes to the brothers and sisters, equally, of both the parents of the intestate, and to their descendants. If all stand in equal degree of consanguinity to the intestate, they take *per capita;* and if in unequal degree, they take *per stirpes.*

This is the rule declared in New York, with the exception of the grandparents; and it is presumed it may be considered with some slight variations in particular instances, as a general rule throughout the United States. It is confined, in New York, to cases in which the inheritance had not come to the intestate on the part of either of his parents. The rule is controlled in that, and in some other States, by the seventh rule.

16. *What is the seventh?*—409.

That, if the inheritance came to the intestate on the part of his father, then the brothers and sisters of the father, and their descendants, shall have preference, and, in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants. But if the inheritance came to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have the preference; and, in default of them, the brothers and sisters on the father's side, and their descendants, take. This rule is so declared in the New York Revised Statutes.

17. *What is the eighth rule?*—409.

That on failure of heirs, under the preceding rules, the inheritance descends to the remaining next of kin to the intestate, according to the rules in the English statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different States, as to the half blood, and as to the ancestral estates, and as to the equality of distribution. This rule is

of very prevalent application in the several States, but there are some peculiarities in the local laws of descent which modify it in some of the States.

18. *Does this last rule prevail in New York?*—410.

No; for in New York, in all cases not within the seven preceding rules, the inheritance descends according to the course of common law.

LECTURE LXVI.

OF TITLE BY ESCHEAT, BY FORFEITURE, AND BY EXECUTION.

1. *Under what heads is title to land usually distributed?*—423.

Under the heads of descent and purchase, the one title being acquired by operation of law, and the other by the act or agreement of the party. But titles by escheat and forfeiture are also acquired by the mere act of the law; and Mr. Hargrave thinks that the proper general division of title to estates would have been by purchase, and by act of law, the latter including equally descent, escheat, and forfeiture.

2. *What additional title, unknown to the English common law, is added by American authors?*—423.

Title by execution.

3. *How was title by escheat created in the English law?*—423, 424.

It was one of the fruits and consequences of feudal tenure. When the blood of the last person seised became extinct, and the title of the tenant in fee failed, from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or lord of the fee, from whom it proceeded, or to his descendants or successors. All escheats, under the English law, are declared to be strictly feudal, and to import the extinction of tenure. But, as feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat; and the State steps in in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

4. *To what, under the New York Revised Statutes, are lands, escheated to the State, held subject?*—425.

To the same trusts, incumbrances, charges, rents and services to which they would have been subject had they descended.

5. *Is not forfeiture, at common law, of the estate for crimes very much reduced in this country?*—426, 427.

Yes; and the corruption of blood is universally abolished. In New York, forfeiture of property for crimes is confined to the case of a conviction for treason; and, by a law of the colony of Massachusetts, as early as 1641, escheats and forfeitures, upon the death of the ancestor, "natural, unnatural, casual, or judicial," were abolished for ever.

6. *What is the rule of law as to the title which the State takes by escheat or forfeiture?*—427.

It takes the title which the party had, and none other. It is taken in the plight and extent by which he held it; and the estate of a remainderman is not destroyed or divested by the forfeiture of the particular estate.

7. *Was title by execution known to the common law?*—428.

It was not; it owes its introduction to modern statutes.

8. *When, as a general rule, is land to be sold on execution?*—430.

The general regulation, and one prevalent in most of the States, is to require the creditor to resort, in the first instance, to the personal estate, as the proper and primary fund, and to look only to the real estate after the personal estate shall have been exhausted and found insufficient.

9. *How, under the New York Revised Statutes, is the sale to be made?*—431.

It is now provided by the New York Revised Statutes that

the real estate of the debtor may be sold on execution, either at law or in chancery, in default of goods and chattels, on six weeks' notice, and in separate parcels, if required by the owner. A certificate of the sale is to be delivered by the officer to the purchaser, and another certificate filed in the clerk's office of the county within ten days.

10. *Is a sale so made conditional or absolute?*—431, 432.

Conditional; redemption of the lands sold may be made by the debtor, or his representative, within one year, on paying the amount of the bid, with ten per cent. interest. Any joint tenant, or tenant in common, may redeem his ratable share of the land by paying a due proportion of the purchase money. On default of the debtor, any creditor, by judgment at law, or decree in equity, and in his own right, or as a trustee, within three months after the expiration of the year, may redeem the land, on paying the purchase money, with seven per cent. interest. So, any other judgment creditor may redeem from such prior creditor. The redemption is allowed to be carried further, and is given to any other creditor, who may redeem from the creditor standing prior to him. But all these subsequent redemptions must be made within fifteen months from the time of the sale; for the officer is then to execute a deed to the person entitled, and the title then acquired becomes absolute in law.

LECTURE LXVII.

OF TITLE BY DEED.

1. *What is a purchase, in the ordinary and popular acceptation of the term?*—440.

It is the transmission of property from one person to another, by their voluntary act and agreement founded on a valuable consideration.

2. *What is it in judgment of law?*—440.

It is the acquisition of land by any lawful act of the party,

in contradistinction to acquisition by operation of law; and it includes title by deed, title by matter of record, and title by devise.

3. *Were lands alienable in the time of the Anglo-Saxons?*—441.

They were; either by deed or by will, according to some authorities.

4. *How were they called when conveyed by charter or deed?*—441, 442.

Boc, or bookland, and the other kind of land, called folcland, was held and conveyed without writing. But this notion of the free disposition of land among the Saxons must be understood in a very qualified sense; and the *jus disponendi*, even at that day, was subject, as it is and ought to be in every country and in every stage of society, to the restraints and modifications suggested by convenience, and dictated by civil institutions. It was reserved, however, to the feudal policy, to impose restraints upon the enjoyment and circulation of landed property to an extent then unprecedented in the annals of Europe.

5. *In whose favor did these restraints arise?*—442.

They arose partly in favor of the heir of the tenant; but principally from favor to the lord of the fee. It was repugnant to the genius of the feudal system to allow the land which the chieftain had given to one family, to pass without his consent into the possession of another, and perhaps to an enemy. The restrictions accorded with the doctrine of feuds; but were proper for that system only. As a part of the feudal fabric, they fell before the influence of freedom, commerce, and the arts.

6. *When were the earliest innovations upon feudal restraints made?*—443.

In the reign of Henry I.; the first step taken in mitigation of the rigor of the law of feuds, and in favor of voluntary alienations, was the countenance given to the practice of subinfeudations.

7. *Did not a law of Henry I. relax the restraints as to purchased lands?*—444, 445.

Yes, but retained them as to those which were ancestral.