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CHAPTER VII.

FAMILY LAW.

§ 1. *Marriage.*

Antiquities of marriage law.

THE nature of the ancient Germanic marriage has in our [p. 362] own day been the theme of lively debates[1]. The want of any first-rate evidence as to what went on in the days of heathenry leaves a large field open for the construction of ingenious theories. We can not find any fixed starting point for our speculations, so completely has the old text, whatever it was, been glossed and distorted by Christianity. It is said with some show of truth that in the earliest Teutonic laws we may see many traces of 'marriage by capture[2].' The 'rape-marriage,' if such we may call it, is a punishable offence; but still it is a marriage, as we find it also in the Hindu law-books. The usual and lawful marriage, however, is a 'sale-marriage'; in consideration of money paid down, the bride is handed over to the bridegroom. The 'bride-sale' of which Tacitus tells us[3] was no sale of a chattel. It was different from the sale of a slave girl; it was a sale of the *mund*, the protectorship, over the woman. An honourable position as her husband's consort and yoke-fellow was assured to her by solemn contract. This need not imply that the woman herself had any choice in the matter. Even Cnut had to forbid that a woman should be sold to a man

[1] The controversy began with Sohm's Recht der Eheschliessung, which called forth many replies. Friedberg's Recht der Eheschliessung contains much curious matter concerning English marriages. In the Essays on Anglo-Saxon Law, p. 163, Mr E. Young applied Sohm's theory to England, but not without some modifications.

[2] Dargun, Mutterrecht und Raubehe; Heusler, Institutionen, ii. 277.

[3] Germania, c. 18. But unfortunately Tacitus has an eye to edification.

[p. 363] whom she disliked[1]. But, as already said, we can not be very certain that in England the wife had ever passed completely into the hand of her husband. He became her 'elder[2]'—her *senior*, her *seigneur*, we may say,—and her lord; but the bond between her and her blood kinsmen was not broken; they, not he, had to pay for her misdeeds and received her *wergild*[3]. It seems by no means impossible that for a while the husband's power over his wife increased rather than diminished. And when light begins to fall upon the Anglo-Saxon betrothal, it is not a cash transaction by which the bride's kinsmen receive a price in return for rights over their kinswoman; rather we must say that the bridegroom covenants with them that he will make a settlement upon his future wife. He declares, and he gives security for, the morning-gift which she shall receive if she 'chooses his will' and the dower that she shall enjoy if she outlives him[4]. Though no doubt her kinsmen may make a profit out of the bargain, as fathers and feudal lords will in much later times, the more essential matter is that they should stipulate on her behalf for an honourable treatment as wife and widow. Phrases and ceremonies which belong to this old time will long be preserved in that curious cabinet of antiquities, the marriage ritual of the English church.

What is the act of marriage?

Whether the marriage begins with the betrothal, or with the delivery of the bride to the bridegroom, or with their physical union, is one of the many doubtful questions. For one thing, we can not be certain that a betrothal, a transaction between the bridegroom and the woman's father or other protector was essential to a valid marriage; we have to reckon with the possibility—and it is somewhat more than a possibility—of marriage by capture[5]. If the woman consented to the abduction, then, according to the theory which the Christian church was gradually formulating, there would be all the essentials of a valid marriage, the consent to be husband and wife and the sexual union. When there had been a solemn betrothal it is likely that the bridegroom thereby acquired

[1] Cnut, II. 74. [2] Ine, 57. [3] See above, vol. ii. p. 243.

[4] Schmid, App. VI. For an earlier time see Æthelb. 77; Ine, 31.

[5] Æthelb. 82 (according to Liebermann's translation): 'If a man forcibly abducts a maiden, let him pay 50 shillings to him to whom she belongs and then buy the consent of him to whom she belongs.' There is no talk of giving her back, but a *bót* must be paid and the *mund* must be purchased.

some rights over the bride which were good against third persons, and that any one who carried her off would have had to pay a *bót* to him[1]. On the other hand, it seems too much to say that the betrothal was the marriage. If either party refused to perform his contract, he could only be compelled to pay money; in the one case the bridegroom lost what he had paid by way of bride-price; in the other he received back that price augmented by one-third:—such was the rule enforced by the church, and the church held that the parents of the espoused girl might give her to another man, if she obstinately refused the man to whom she had been betrothed[2]. [p. 364]

Growth of the ecclesiastical jurisdiction.

Already in the seventh century and here in England the church was making her voice heard about these matters. Her warfare against the sins of the flesh gave her an interest in marriage and all that concerned marriage. Especially earnest was she in her attempt to define the 'prohibited degrees' and prevent incestuous unions. This was a matter about which the first missionaries had consulted the pope, who told them not to be too severe with their new converts. A little later Archbishop Theodore was able to lay down numerous rules touching marriage and divorce[3]. Many of these are rules which could only be enforced by penances, but some are rules which go to the legitimacy or illegitimacy of an union, and we have every reason to suppose that the state accepted them. In some cases, more especially when they deal with divorce, they seem to be temporizing rules; they make concessions to old Germanic custom and do not maintain the indissolubility of marriage with that rigour which the teaching of the Christian fathers might have led us to expect[4]. Fresh incursions of heathen Danes must have retarded the evolution of a marriage law such as the church could approve. At all events in Normandy the great men contract with their *uxores Danicae* unions of an equivocal kind which the church condemns. The wife is not of equal rank with her husband; there has been no solemn betrothal; the children will not inherit their father's land; the wife will have to be content with the morning-gift [p. 365]

[1] Æthelb. 83.

[2] Theodore's Penitential, II. xii. 33, 34 (Haddan and Stubbs, iii. 201). This passes into the Pseudo-Theodore printed by the Record Commission, Ancient Laws, ii. 11.

[3] Haddan and Stubbs, iii. 21.

[4] Ibid. 201.

which her husband makes after the bridal night; but, for all this, there is a marriage: something that we dare not call mere concubinage[1]. That eminently Christian king Cnut legislated about marriage in an ecclesiastical spirit. The adulterous wife, unless her offence be public, is to be handed over to the bishop for judgment. The adulterous husband is to be denied every Christian right until he satisfies the bishop[2]. The bishop is becoming the judge of these sinners, and the judge who punishes adultery must take cognizance of marriage.

Matrimonial jurisdiction in England.

When the Conqueror had paid the debt that he owed to Rome by a definite separation of the spiritual from the lay tribunals, it can not have remained long in doubt that the former would claim the whole province of marriage law as their own. In all probability this claim was not suddenly pressed; the *Leges Henrici* endeavour to state the old law about adultery; the man's fine goes to the king, the woman's to the bishop[3]; but everywhere the church was beginning to urge that claim, and the canonists were constructing an elaborate jurisprudence of marriage. By the middle of the twelfth century, by the time when Gratian was compiling his concordance of discordant canons, it was law in England that marriage appertained to the spiritual forum. Richard de Anesty's memorable law-suit was the outcome of a divorce pronounced in or about 1143 under the authority of a papal rescript, and seemingly one which illustrated what was to be a characteristic doctrine of the canon law: a marriage solemnly celebrated in church, a marriage of which a child had been born, was set aside as null in favour of an earlier marriage constituted by a mere exchange of consenting words[4]. Soon after this Glanvill acknowledged that the ecclesiastical court had an exclusive cognizance of the question whether or no there had been a marriage, and the king's court, with a profession of its own inability to deal with that question, was habitually asking the bishops to decide whether or no a litigant [p. 366] was legitimate[5]. Thenceforth the marriage law of England was

[1] As to these Danish marriages, see Freeman, Norman Conquest, 2nd ed. i. 612; Brunner, Die uneheliche Vaterschaft, Zeitschrift der Savigny-Stiftung, Germ. Abt. xvii. 1. 19.

[2] Cnut, II. 53, 54.

[3] Leg. Hen. 11, § 5; cf. D. B. i. 1.

[4] See above, vol. i. p. 158, Letters of John of Salisbury (ed. Giles), i. 124.

[5] Glanvill, vii. 13, 14; Select Civil Pleas (Selden Soc.), pl. 15, 92, 109.

the canon law. A few words about its main rules must be said, though we cannot pretend to expound them at length.

Canonical theory of marriage.

According to the doctrine that prevailed for a while, there was no marriage until man and woman had become one flesh. In strictness of law all that was essential was this physical union accompanied by the intent to be thenceforth husband and wife. All that preceded this could be no more than an espousal (*desponsatio*) and the relationship between the spouses was one which was dissoluble; in particular it was dissolved if either of them contracted a perfected marriage with a third person. However, in the course of the twelfth century, when the classical canon law was taking shape, a new distinction came to the front. Espousals were of two kinds: *sponsalia per verba de futuro*, which take place if man and woman promise each other that they will hereafter become husband and wife; *sponsalia per verba de praesenti*, which take place if they declare that they take each other as husband and wife now, at this very moment. It is thenceforth the established doctrine that a transaction of the latter kind (*sponsalia per verba de praesenti*) creates a bond which is hardly to be dissolved; in particular, it is not dissolved though one of the spouses goes through the ceremony of marriage and is physically united with another person. The espousal 'by words of the present tense' constitutes a marriage (*matrimonium*), at all events an initiate marriage; the spouses are *coniuges*; the relationship between them is almost as indisseverable as if it had already become a consummate marriage. Not quite so indisseverable however; a spouse may free himself or herself from the unconsummated marriage by entering religion[1], and such a marriage is within the papal power of dispensation. Even at the present day the technical terms that are in use among us recall the older doctrine, for a marriage that is not yet 'consummated' should, were we nice in our use of words, be no marriage at all. As to *sponsalia per verba de futuro*, the doctrine of the canonists was that sexual intercourse if preceded by such espousals was a marriage; a presumption of law explained the *carnalis copula* by the foregoing promise to marry. The scheme at which they thus arrived was certainly [p. 367] no masterpiece of human wisdom. Of all people in the world

[1] See the English case, c. 16. X. 4. 1. The Council of Trent pronounced the anathema against those who deny this. Conc. Trident. de Sacr. Matr. c. 6.

lovers are the least likely to distinguish precisely between the present and the future tenses. In the middle ages marriages, or what looked like marriages, were exceedingly insecure. The union which had existed for many years between man and woman might with fatal ease be proved adulterous, and there would be hard swearing on both sides about 'I will' and 'I do.' It is interesting to notice that a powerful protest against this doctrine was made by the legist Vacarius. He argued that there could be no marriage without a *traditio*, the self-delivery of man to woman and woman to man. But he could not prevail[1].

No ceremony requisite.

The one contract which, to our thinking, should certainly be formal, had been made the most formless of all contracts. It is true that from a very early time the church had insisted that Christian spouses should seek a blessing for their union, should acknowledge their contract publicly and in face of the church. The ceremonies required by temporal law, Jewish, Roman or Germanic, were to be observed, and a new religious colour was given to those rites; the veil and the ring were sanctified. In the little Anglo-Saxon tract which describes a betrothal—without any good warrant it has been treated as belonging to the laws of King Edmund—we see the mass priest present; but the part that is assigned to him is subordinate. After we have read how a solemn treaty is made between the bridegroom and the kinsmen of the bride, we read how at the delivery, the tradition, of the woman, a mass priest should be present, and confirm the union with God's blessing[2]. But the variety of the

[1] The story told in this paragraph is that which is told at great length by Freisen, Geschichte des canonischen Eherechts. See also, Esmein, Le mariage en droit canonique, i. 95–137. How it came about that the church laid so much stress on the physical union is a grave question. Freisen sees here the influence of Jewish tradition. It now seems fairly clear that even Gratian saw no marriage, no indissoluble bond, no *matrimonium perfectum*, where there had been no *carnalis copula*. The change seems in a great measure due to the influence of Peter Lombard and represents a victory of Parisian theology over Bolognese jurisprudence. For the tract of Vacarius, see L. Q. R. xiii. 133, 270. A desire to prove that the union between St Mary and St Joseph was a perfect marriage helped the newer doctrine. One of the epoch-making decretals relates to an English case and will be given below, p. 371. The English canonist John de Athona in his gloss on Ottobon's constitution *Coniugale foedus* says, 'Matrimonii consummatio ad matrimonium multos addit effectus'; it makes the marriage indissoluble by profession and by dispensation; also it is of sacramental importance.

[2] Be wifmannes beweddunge, Schmid, Gesetze, App. VI.

marriage customs current among the Christian nations prevented the church from singling out any one rite as essential. From drastic legislation she was withstrained by the fear that [p. 368] she would thereby multiply sins. It was not well that there should be marriages contracted in secret and unblessed by God; still, better these than concubinage and unions dissoluble at will. And so, though at times she seemed to be on the point of decreeing that the marriage contracted without a due observance of religious ceremonies is no marriage at all, she held her hand[1]. For example, soon after the Norman Conquest Lanfranc issued a constitution condemning in strong words him who gives away his daughter or kinswoman without a priestly benediction. He says that the parties to such an union are fornicators; but it is very doubtful whether he says or means that the union is no indissoluble marriage[2]. At all events in the twelfth century, though the various churches have by this time evolved marriage rituals—rituals which have borrowed many a phrase and symbol from ancient Germanic custom—it becomes clear that the formless, the unblessed, marriage, is a marriage. In 1200 Archbishop Hubert Walter, with a salvo for the honour and privilege of the Roman church, published in a council at Lambeth a constitution which declared that no marriage was to be celebrated until after a triple publication of the church's ban. No persons were to be married save publicly in the face of the church and in the presence of a priest. Persons who married in other fashion were not to be admitted into a church without the bishop's licence[3]. At the Lateran council of 1215 Innocent III. extended over the whole of western Christendom the custom that had hitherto obtained in some countries of 'publishing the banns of marriage,' that is, of calling upon all and singular to declare any cause or just

[1] Freisen, *op. cit.* 120–151; Esmein, *op. cit.* i. 178–187.

[2] Parker printed this canon from a MS. belonging to the church of Worcester in Antiquitates Britannicae Ecclesiae (ed. Hanoviae, 1605), p. 114; it was copied from Parker's book by Spelman and Wilkins. Lanfranc is made to decree 'ut nullus filiam suam vel cognatam det alicui absque benedictione sacerdotali; si aliter fecerit, non ut legitimum coniugium sed ut fornicatorium iudicabitur.' He does not say that the union will be mere fornication; he says that it will be *coniugium fornicatorium*, an unlawful and fornicatory marriage. Lanfranc's words recall those of the Pseudo-Isidorian Evaristus, which appear in c. 1. C. 30. q. 5; as to this see Freisen, *op. cit.* p. 139.

[3] Hoveden, iv. 135.

impediment that could be urged against the proposed union. From that time forward a marriage with banns had certain [p. 369] legal advantages over a marriage without banns, which can only be explained below when we speak of 'putative' marriages. But still the formless, the unblessed, marriage is a marriage[1].

Decretal of Alexander III.

It is thus that Alexander III. writes to the Bishop of Norwich[2]:—'We understand from your letter that a certain man and woman at the command of their lord mutually received each other, no priest being present, and no such ceremony being performed as the English church is wont to employ, and then that before any physical union, another man solemnly married the said woman and knew her. We answer that if the first man and the woman received each other by mutual consent directed to time present, saying the one to the other, 'I receive you as mine (*meum*),' and 'I receive you as mine (*meam*),' then, albeit there was no such ceremony as aforesaid, and albeit there was no carnal knowledge, the woman ought to be restored to the first man, for after such a consent she could not and ought not to marry another. If however there was no such consent by such words as aforesaid, and no sexual union preceded by a consent *de futuro*, then the woman must be left to the second man who subsequently received her and knew her, and she must be absolved from the suit of the first man; and if he has given faith or sworn an oath [to marry the woman], then a penance must be set him for the breach of his faith or of his oath. But in case either of the parties shall have appealed, then, unless an appeal is excluded by the terms of the commission, you are to defer to that appeal[3].'

We have given this decretal at length, for it shows how complete was the sway that the catholic canon law wielded in the England of Henry II.'s time, and it also briefly sums

[1] c. 3. X. 4. 3. This seems the origin of the belief that Innocent III. 'was the first who ordained the celebration of marriage in the church.' This belief is stated by Blackstone, Comment. i. 439, and was in his time traditional among English lawyers. Apparently it can be traced to Dr Goldingham, a civilian who was consulted in the case of *Bunting* v. *Lepingwell* (Moore's Reports, 169). See Friedberg, Recht der Eheschliessung, 314.

[2] Compilatio Prima, lib. 4, tit. 4, c. 6 (Friedberg, Quinque Compilationes, p. 47).

[3] Another decretal which Alexander III. sent to England contains an elaborate statement of general doctrine; c. 2. X. 4. 16.

up that law's doctrine of marriage. A strong case is put. On the one hand stands the bare consent *per verba de praesenti*, unhallowed and unconsummated, on the other a solemn and a [p. 370] consummated union. The formless interchange of words prevails over the combined force of ecclesiastical ceremony and sexual intercourse.

Law of marriage in England.

And now we have to say that in the year 1843 in our highest court of law three learned lords maintained the thesis that by the ecclesiastical and the common law of England the presence of an ordained clergyman was from the remotest period onward essential to the formation of a valid marriage. An accident gave their opinion the victory over that of three other equally learned lords, and every English court may now-a-days be bound to adopt the doctrine that thus prevailed. It is hardly likely that the question will ever again be of any practical importance, and we are therefore the freer to say that if the victorious cause pleased the lords, it is the vanquished cause that will please the historian of the middle ages[1].

Law of English ecclesiastical courts.

But we must distinguish between the ecclesiastical and the temporal law. As regards the former, no one doubts what, at all events from the middle years of the twelfth century until the Council of Trent, was the law of the catholic church:—for the formation of a valid marriage no religious ceremony, no presence of a priest or 'ordained clergyman,' is necessary. Clandestine unions, unblessed unions, are prohibited; *fieri non debent*; the husband and wife who have intercourse with each other before the church has blessed their marriage, sin and should be put to penance; they will be compelled by spiritual

[1] We refer to the famous case of *The Queen* v. *Millis*, 10 Clark and Finelly, 534, which was followed by *Beamish* v. *Beamish*, 9 House of Lords Cases, 274. The Irish Court of King's Bench was equally divided. In the House of Lords, after the opinion of the English judges had been given against the validity of a marriage at which no clergyman had been present, Lords Lyndhurst, Cottenham and Abinger were for holding the marriage void, while Lords Brougham, Denman and Campbell were in favour of its validity. Owing to the form in which the question came before the House, the result of the division was that the marriage was held to be void. Among the pamphlets evoked by this case two tracts by Sir John Stoddart deserve special mention. He argues with great force against the historical theory to which our law seems to be committed. In this he has been followed by Dr Emil Friedberg, whose Recht der Eheschliessung contains a minute discussion of English law. See also a paper by Sir H. W. Elphinstone in L. Q. R. v. 44. But the very learned opinion given by Willes J. in *Beamish* v. *Beamish* is the best criticism of the victorious doctrine.

censures to celebrate their marriage before the face of the church; but they were married already when they exchanged a consent *per verba de praesenti*, or became one flesh after ex- [p. 371] changing a consent *per verba de futuro*. It was contended, however, that in this matter the English church had held aloof from the church catholic and Roman. No proof of this improbable contention was forthcoming, save such as was to be found in what was called a law of King Edmund and in that constitution of Archbishop Lanfranc which we have already mentioned[1]. Of these it is enough to say, first, that the so-called law of Edmund, which however is not a law, is far from declaring that there can be no marriage without a mass priest; secondly, that in all probability Lanfranc's canon neither says this nor means this; and thirdly, that both documents come from too remote a date to be of any importance when the question is as to the ecclesiastical law which prevailed in England from the middle of the twelfth century onwards. On the other hand, we have the clearest proof that at that time the law of the catholic and Roman church was being enforced in England. We have this not only in the decretal of Alexander III. which has been set forth above[2], but also in the many appeals about matrimonial matters that were being taken from England to Rome. It would have been as impossible for the courts Christian of this country to maintain about this vital point a schismatical law of their own as it would now be for a judge of the High Court to persistently disregard the decisions of the House of Lords: there would have been an appeal from every sentence, and reversal would have been a matter of course. And then, had this state of things existed even for a few years, surely some English prelate or canonist would have been at pains to state our insular law. No one did anything of the kind. To say that the English church received or adopted the catholic law of marriage would be untrue; her rulers never conceived that they were free to pick and choose their law. We have been asked to suppose that for several centuries our church was infected with heretical

[1] See above, pp. 369, 370.

[2] This decretal was cited by Willes J. in *Beamish* v. *Beamish*, 9 H. L. C. 308; it was known to him through Pothier. Unfortunately it came too late. Willes J. further remarked (p. 310) that Lanfranc's canon is but the epitome of an old decretal.

pravity about the essence of one of the Christian sacraments, and that no one thought this worthy of notice. And an odd form of pravity it was. She did not require a sacerdotal benediction; she did not require (as the Council of Trent very wisely did) the testimony of the parish priest; she did not [p. 372] require a ceremony in church; she required the 'presence' of an 'ordained clergyman[1].'

The temporal law and marriage.

As to our temporal law, from the middle of the twelfth century onwards it had no doctrine of marriage, for it never had to say in so many words whether a valid marriage had been contracted. Adultery was not, bigamy was not, incest was not, a temporal crime. On the other hand, it had often to say whether a woman was entitled to dower, whether a child was entitled to inherit. About these matters it was free to make what rules it pleased. It was in no wise bound to hold that every widow was entitled to dower, or that every child whom the law of the church pronounced legitimate was capable of inheriting. The question, 'Was this a marriage or no?' might come before it incidentally. When this happened, that question was sent for decision to an ecclesiastical court, and the answer would be one of the premisses on which the lay court would found some judgment about dower, inheritance or the like; but only one of the premisses.

Marriage and the law of dower.

Now the king's justices, though many of them were ecclesiastics, seem to have felt instinctively that the canonists were going astray and with formlessness were bringing in a mischievous uncertainty[2]. The result is curious, for at first sight the lay tribunal seems to be rigidly requiring a religious ceremony which in the eyes of the church is unessential. No woman can claim dower unless she has been endowed at the church door. That is Bracton's rule, and it is well borne out by the case-law of his time[3]. The woman's marriage may be indisputable, but she is to have no dower if she was not endowed at the church door. We soon see, however, that

[1] John de Athona in his gloss on Otho's constitution *Innotuit*, says 'petens restitutionem uxoris non auditur de iure ubi matrimonium est contractum clandestine, scilicet, bannis non editis.' Here, however, he is referring to the possessory restitution, the *actio spolii*, of which hereafter. He knew well enough that there may be a valid marriage without any solemnities; see the gloss on Ottobon's constitution *Coniugale*.

[2] See Friedberg, Recht der Eheschliessung, p. 56.

[3] Bracton, f. 302–4; Note Book, pl. 891, 1669, 1718, 1875.

what our justices are demanding is, not a religious rite, nor 'the presence of an ordained clergyman,' but publicity. We see this very plainly when Bracton tells us that the endowment can and must be made at the church door even during an [p. 373] interdict when the bridal mass can not be celebrated[1]. It is usual to go to church when one is to be married; all decent persons do this and all persons are required to do it by ecclesiastical law. The temporal law seizes hold of this fact. Marriages contracted elsewhere may be valid enough, but only at the church door can a bride be endowed. There is a special reason for this requirement. The common contrast to the church-door marriage is the death-bed marriage[2]. At the instance of the priest and with the fear of death before him, the sinner 'makes an honest woman' of his mistress. This may do well enough for the church and may, one hopes, profit his soul in another world, but it must give no rights in English soil[3]. The justices who demanded an endowment at the church door were the justices who set their faces against testamentary gifts of land, and strenuously endeavoured to make livery of seisin mean a real change of possession. The acts which give rights in land should be public, notorious acts. It is easy, however, to slip from the proposition that no woman can claim dower unless she has been endowed at the church door, into the proposition that, so far as concerns the exaction of dower, no marriage is valid unless it is contracted before the face of the church. Both propositions mean the same thing, and Bracton adopts now the one and now the other[4].

Marriage and the law of inheritance.

If, however, we can not argue that a woman was not married because she can not claim dower, still less can we argue that an union is a marriage because the issue of it will,—or is not a marriage because the issue of it will not,—be capable of inheriting English land. The canon law itself admits that this may well be the case. It holds many children to be legitimate who are not the offspring of a lawful wedlock. To say nothing here of its doctrine about the retroactive force of marriage, about legitimation *per subsequens matrimonium*, it knows the so-called 'putative marriage.' Certain of the impediments to marriage that were maintained by the canon law did not prevent

[1] Bracton, f. 305, 419 b.

[2] Bracton, f. 92; Note Book, pl. 891, 1669, 1718, 1875.

[3] Note Book, pl. 1669, 1875.

[4] Bracton, f. 304.

the children of the union from being legitimate, if that union had been solemnized with the rites of the church, and if at the time when the children were begotten both or one of their parents were ignorant of the fact which constituted the impediment. Among such impediments was consanguinity. A man [p. 374] goes through the ceremony of marriage with his cousin. So long as either of them is ignorant of the kinship between them, the children that are born to them are legitimate. There is here no real marriage; but there is a putative marriage. The disabilities annexed to bastardy are regarded by the canonists as a punishment inflicted on offending parents, and in a case in which there has been a marriage ceremony duly solemnized with all the rites of the church, including the publication of banns[1], and one at least of the parties has been acting *bona fide*, that is, has been ignorant of the impediment, their unlawful intercourse, for such in strictness it has been, is not to be punished by the bastardy of their children. It was long before the canonists worked out to the full their theory about these putative marriages. Some would have held that if there was good faith in the one consort and guilty knowledge in the other, the child might be legitimate as regards one of his parents, illegitimate as regards the other. Others held that such lopsided legitimacy was impossible[2].

Putative marriages.

Bracton knew this learning and wrote it down as an indubitable part of English law. In a passage which he borrowed from the canonist Tancred, he holds that there can be a putative marriage and legitimate offspring even when the union is invalid owing to the existence of a previous marriage. 'If a woman in good faith marries a man who is already married, believing him to be unmarried, and has children by him, such children will be adjudged legitimate and capable of inheriting[3].' The canon law, however, may in this instance have been somewhat too subtle for our temporal tribunals; they were not given to troubling themselves much about so invisible an element as *bona fides*[4]. A contemporary of Bracton lays

[1] c. 3. X. 4. 3.

[2] Freisen, *op. cit.* pp. 857–862; Esmein, *op. cit.* ii. 33–7.

[3] Bracton, f. 63. Bracton begins by copying a passage from Tancred (ed. Wunderlich, p. 104). He then adopts c. 3. X. 4. 3 (a canon of the Lateran council of 1215) and then c. 2. X. 4. 17, a decretal of Alexander III. See Bracton and Azo, p. 221, where the texts are compared.

[4] See Bliss, Calendar of Papal Registers, i. 254. In 1248 Innocent IV. decides an English case on this point of good faith. This is one of the many instances which shows how impossible it would have been for the English church to have dissented from the Roman about matrimonial causes.

down the law in much ruder shape. 'If a woman is divorced for kinship, or fornication, or blasphemy (as says Augustine the [p. 375] Great) she can not claim dower, but her children can inherit both from their father and from their mother according to the law of the realm. But if the wife is separated from her husband on the ground that he previously contracted marriage with some other woman by words of present time, then her children can not be legitimate, nor can they succeed to their father, nor to their mother, according to the law of the realm[1].' So late as 1337 English lawyers still maintained that the issue of a *de facto* marriage, which was invalid because of the consanguinity of the parties, were not bastards if born before divorce[2]. At a little later time, having lost touch with the canon law, they developed a theory of their own which was far less favourable to the issue of putative marriages than the law of the church had been[3]. This, however, lies in the future. Here we are only concerned to notice that in the thirteenth century, according to the law of the church and the law of the land, we can not argue that because a child is legitimate and can inherit, therefore his parents were husband and wife.

Acceptance of canonical rules.

However, we believe that at this time our temporal courts were at one with our spiritual courts about legitimacy and the capacity to inherit; that if the church said, 'This child is legitimate,' the state said, 'It is capable of inheriting'; and that if the church said, 'This child is illegitimate,' the state said, 'It is incapable of inheriting.' To this agreement between church and state there was the one well-known exception:—our temporal courts would not allow to marriage any retroactive power; the bastard remained incapable of inheriting land even though his parents had become husband and wife and thereby made him capable of receiving holy orders and, in all probability,

[1] From a Cambridge MS. of Glanvill; see Harv. L. R. vi. 11. Glanvill's doctrine (vi. 17) was that a divorce for consanguinity deprives the wife of dower, but leaves the issue legitimate.

[2] Y. B. 11–12 Edw. III. ed. Pike, p. 481.

[3] Pike, Year Book, 11–12 Edw. III. pp. xx–xxii. The ultimate theory of English lawyers took no heed of good or bad faith and made the legitimacy of the children depend on the fact that their parents while living were never divorced.

of taking a share in the movable goods of his parents[1]. The general rule, to which this was the exception, was implied [p. 376] in the procedure of the temporal courts. If a question about the existence of a marriage was raised in such a court, that question was sent for trial to the spiritual court, and the writ that sent it thither expressly said that such questions were not within the cognizance of the temporal forum[2]. If, on the other hand, the existence of a marriage was admitted, but one of the parties relied on the fact that his adversary was born before that marriage, then there was no question for the spiritual court, and, at least after the celebrated dispute in the Merton parliament, no opportunity was given to it of enforcing its rule about the force of the *subsequens matrimonium* :—the question 'Born before marriage or no' went to a jury as a question of fact[3]. But about all other matters the church could have, and apparently had, her way. She could maintain all her *impedimenta dirimentia*, the impediment of holy orders, the impediments of consanguinity and affinity. 'You are a bastard, for your father was a deacon':—that was a good plea in the king's court[4], and the king's court did nothing to narrow the mischievous latitude of the prohibited degrees. The bishop's certificate was conclusive. It was treated as a judgment *in rem*. If at any future time the same question about the existence of the marriage is raised, the certificate will answer it, and answer it indisputably, unless some charge of fraud or collusion can be made[5]. As to the particular point that has

[1] We know of no text that proves that the bastard legitimated by the marriage of his parents could succeed to a 'bairn's part' of the father's goods. But it seems quite certain that the church courts must have tried to enforce their own theory within a sphere that was their own, and we doubt very much whether the king's court would have prohibited them from so doing. Of the 'bairn's part,' we spoke above; see vol. ii. pp. 348–356.

[2] Glanvill, vii. 14: 'ad curiam meam non spectat agnoscere de bastardia.' In and after Bracton's day (f. 419 b) the language of the writ is rather more guarded, owing to the emergence of the controversy about the *subsequens matrimonium*.

[3] Before the day at Merton the issue of special bastardy was sometimes sent to the bishop: Note Book, pl. 293. Bracton argues at length, f. 416–20, that the king still has the right to compel the bishop to answer the obnoxious question. His argument seems to be founded on a perversion of history; see Note Book, vol. i. p. 104.

[4] Select Civil Pleas (Selden Soc.), pl. 205.

[5] Bracton, f. 420: Y. B. 34–5 Edw. I. p. 64. It would seem as if cases were sometimes sent even to foreign prelates: ibid. p. 184.

been disputed, we have Bracton's word that a marriage which was not contracted *in facie ecclesiae*, though it can not give the wife a claim to dower, may well be a good enough marriage so [p. 377] far as regards the legitimacy of the children[1]. A case which had occurred shortly before he wrote his treatise shows us that he had good warrant for his assertion.

No ceremony necessary.

In or about 1254 died one William de Cardunville, a tenant in chief of the crown. In the usual course an *inquisitio post mortem* was held for the purpose of finding his heir. The jurors told the following story:—William solemnly and at the church door espoused one Alice and they lived together as husband and wife for sixteen years. He had several sons and daughters by her; one of them is still alive; his name is Richard and he is four years old. After this there came a woman called Joan, whom William had carnally known a long time ago, and on whom he had begotten a son called Richard, and she demanded William as her husband in the court Christian, relying on an affidation that had taken place between them; and she, having proved her case, was adjudged to him by the sentence of the court and a divorce was solemnly celebrated between him and Alice. And so William and Joan lived together for a year and more. But, said the jurors,—sensible laymen that they were—we doubt which of the two Richards is heir, whether Richard son of Joan, who is twenty-four years old, or Richard son of Alice, who is four years old, for Joan was never solemnly married at the door of the church, and we say that, if neither of them is heir, then William's brother will inherit. When this verdict came into the chancery, the attention of the royal officers must have been pointedly drawn to the question that we have been discussing, and, had they thought only of their master's interests, they would have decided in favour of Alice's son and so secured a long wardship for the king; but, true to the law of the church and the law of the land, they ordered that Joan's son should have seisin of his

[1] Bracton, f. 304: 'Et ita poterit esse matrimonium legitimum, quoad hereditatis successionem, ubicunque contractum fuerit, dum tamen probatum, et illegitimum quoad dotis exactionem, nisi fuerit in facie ecclesiae contractum. On f. 92 he speaks with less certain sound about the capacity to inherit of the issue of a clandestine marriage; but the word *clandestine* had several distinct meanings; see below, p. 385, note 1. See also Fleta, 340, 353; Britton, ii. 236, 266.

father's land: in other words, they preferred the unsolemnized to the solemnized marriage[1].

Recognition of *de facto* marriages.

At the same time we must notice that occasionally the [p. 378] temporal court gives something which at first sight looks like a judgment touching the validity of a marriage without sending any question to the court Christian. It is very possible that in a possessory action the jurors will give some special verdict about the birth of one of the parties or of a third person, and by so doing will throw upon the justices the duty of deciding whether, the facts being as stated by the jurors, that person is to be treated as heir for possessory purposes. In such a case the justices' decision seems to be provisional. The action itself is possessory; it can not, as the phrase goes, 'bind the right'; the defeated litigant will have another opportunity of urging his proprietary claims and, it may be, of proving that, though he has been treated as a bastard by jurors and justices, he really is legitimate. Now, when a question about a marriage arises in a possessory action, it must be dealt with in what we may call a possessory spirit, and, as we have to get our facts from juries, it is necessary that we should lay stress on those things, and those only, which are done formally and in public. If man and woman have gone through the ceremony of marriage at the church door, we may say that we have here a *de facto* marriage, an union which stands to a valid marriage in somewhat the same relation as that in which possession stands to ownership. On the other hand, if there has been no ceremony, we can not in the thirteenth century say that there is a *de facto* marriage; mere concubinage is far too common to allow us to presume a marriage wherever there is a long-continued cohabitation. But a religious ceremony is a different thing; it is definite and public; we can trust the jurors to know all about it; we can make it the basis of our judgments whenever the validity of the union has not been put in issue in such a fashion that the decision of an ecclesiastical court must be awaited. A strong objection is felt to the admission of a plea of bastardy in a possessory action, at all events when the

[1] Calendarium Genealogicum, i. 57: Excerpta e Rot. Fin. ii. 182. Both sons were named Richard. The writ of livery is in favour of Richard 'the first-begotten son and heir' of William. It is clear that this Richard is Joan's son, for the other Richard was but four years old and would not have been entitled to a livery even if he had been the heir.

question lies between those who as a matter of fact are brothers or cousins. Such a plea is in some sort petitory or droiturel; it goes beyond matter of fact; 'it touches the right[1].'

[p. 379] The canonists themselves, having made marriages all too easy, and valid marriages all too difficult, had been driven into a doctrine of possessory marriage. In the canon law each spouse has an action against the other spouse in which he or she can demand the prestation of conjugal duties. Such an action may be petitory, or, as our English lawyers would have said, 'droiturel'; the canonists will even call it *vindicatio rei*. But in such an action the plaintiff must be prepared to prove that there is a valid marriage, and the defendant may rely on any of those 'diriment impediments,' of which there are but too many ready to the hand of any one who would escape from the marital bond. So a possessory action (*actio spolii*) also is given, and in this the defendant will not be allowed to set up pleas which dispute, not the existence of a *de facto* marriage, but its validity. On the other hand, in this possessory action the plaintiff must prove a marriage celebrated in face of the church. The *de facto* marriage on which the canon law will bestow a possessory protection is a marriage which has been duly solemnized and which therefore appears to the church as valid until it has been proved to be void[2]. Our English lawyers accept this doctrine and apply it to disputes about inheritance. Those marriages and only those which have been celebrated at the church door are marriages for the purpose of possessory actions. Hereafter in a droiturel action, when the bishop's certificate is demanded, such a marriage may be stigmatized as void, and on the other hand an unsolemnized

The marital *possessorium*.

[1] Bracton, f. 418 b; Y. B. 32–3 Edw. I. pp. 62, 74; 33–5 Edw. I. p. 118. The phrase '*de facto* marriage' is none of our making; it is used by Bracton, f. 303, and Coke, Lit. 33 a, b. The French parlement seems to have behaved in the same manner as our own royal court. 'Le Parlement, tout en reconnaissant bien que les officiers royaux ne pourraient pas apprécier la validité des mariages, déclara qu'ils pourraient constater la possession d'état et s'informer si en fait il y avait eu union régulière; d'où l'on déduisit qu'ils étaient compétents pour trancher au possessoire les questions matrimoniales, et même au pétitoire, si les parties ne proposaient pas d'exception.' Langlois, Philippe le Hardi, 272.

[2] Esmein, *op. cit.* ii. 16. See above, vol. ii. p. 147, as to the application of the notion of possession to marital relationships. An interesting letter by Abp Peckham (Register, iii. 940) insists on the difference between the *possessorium* and the *petitorium*.

marriage may be established; but meanwhile we are dealing only with externals, and the ceremony at the church door assures us that the man and woman regarded their union, or desired that it should be regarded, as no mere concubinage but as marriage.

Reluctance to bastardize the dead.

Again, if a question is raised about the legitimacy of one who is already dead, this question is not sent to the bishop, but goes to a jury. The charge of bastardy imports some disgrace, and it can not be made in a direct way against one who is not alive to answer it; still of course some inquiry about [p. 380] his birth may be necessary in order that we may settle the rights of other persons[1]. That inquiry will be made of a jury; but it will be made by those who openly express themselves unwilling 'to bastardize the dead.' This unwillingness at length hardened into a positive rule of law. If a bastard enters on his father's land as his father's heir and remains in untroubled seisin all his life, and then the heir of this bastard's body enters, this heir will have a title unimpeachable by the right heir of the original tenant. Such at all events will be the case between the *bastard eigné* and the *mulier puisné*: that is to say, if Alan has a bastard son Baldwin by Maud, and then marries Maud and has by her a legitimate son Clement, and if on Alan's death Baldwin enters as heir and remains seised for the rest of his life and then his son Bernard enters, Bernard will have an unimpeachable title; Clement will have lost the land for good and all[2]. It must be remembered that our medieval law did not consistently regard the bastard as *filius nullius*, though such phrases as 'You are a son of the people' might be thrown about in court[3]. The bastards with whom the land law had to deal were for the more part the issue of

[1] Bracton, f. 420 b; Y. B. 20-1 Edw. I. p. 193.

[2] Lit. sec. 399, 400; Co. Lit. 244; Bl. Comm. ii. 248. The oldest form of the rule seems to be very broad. Placit. Abbrev. p. 195 (6 Edw. I.): 'et inauditum est et ius [*corr.* iuri] dissonum quod aliquis qui per successionem hereditariam pacifice tenuit hereditatem toto tempore suo bastardetur post mortem suam.' Fitzherbert, Abr. *Bastardy*, pl. 28: 'nec iustum est aliquando [*corr.* aliquem] mortuum facere bastardum qui toto tempore suo tenebatur pro legitimo.' Littleton is in favour of applying the rule only where bastard and mulier have the same mother as well as the same father; but this was not quite certain even in his day. Our lawyers seem to have come to the odd word *mulier* by calling a legitimate son a *filius mulieratus*.

[3] Y. B. 32-3 Edw. I. 251: 'Jeo le face fiz al poelple.'

permanent unions. And so the bastard who enters as his father's heir must be distinguished from the mere interloper. After all, he is his father's 'natural' son, and we hardly go too far in saying that he has a 'natural' right to inherit: the rules that exclude him from the inheritance are rules of positive institution. And so, if he enters and continues seised until he can no longer answer the charge of bastardy, we must treat him as one who inherited rightfully.

Temporal courts and possessory marriage.

For these reasons the decisions of lay tribunals which seem to establish or assume the validity or invalidity of a marriage should be examined with extreme caution. Just because there [p. 381] is another tribunal which can go to the heart of the matter, the king's justices are and must be content to look only at the outside, and thus they lay great stress on the performance or non-performance of the public marriage rite. Sometimes they expressly say that they are looking only at the outside, and that what concerns them is not marriage but the reputation of marriage. They ask the jurors not whether a dead man was a bastard, but whether he was reputed a bastard in his lifetime[1]. When a woman confronted by her deed, pleads that she was *coverte* when she sealed it, they hold that 'No one knew of your coverture' is a good reply[2]. It is with *de facto* marriages that they are concerned; questions *de iure* they leave to the church.

Del Heith's case.

It was, we believe, a neglect of this distinction which in 1843 led some of our greatest lawyers astray,—a very natural neglect, for the doctrine of possessory marriages looks strange in the nineteenth century. They had before them some old cases in which to a first glance the court seems to have denied the validity of a marriage that had not been celebrated in church. By far the strongest of these came from the year 1306. William brought an assize of novel disseisin against Peter. Peter pleaded that one John died seised in fee and that he (Peter) entered as brother and heir without disseisin. William replied that on John's death, he (William) entered as son and heir and was seised until he was ejected by Peter. The jurors gave a special verdict. John being ill in bed espoused (at the instance of the vicar of Plumstead) his concubine Katharine; the usual words were said but no mass was celebrated. John and Katharine thenceforth lived as husband and wife and

[1] Y. B. 30-1 Edw. I. p. 291.

[2] Y. B. 21-2 Edw. I. p. 426.

Katharine bore to John a child, namely, William. The jurors were asked whether after John's recovery any espousals were celebrated; they answered, No. They further found that on John's death his brother Peter entered as heir and was seised for fifteen days, that William then ejected Peter and was seised for five weeks, and that Peter then ejected William. The judgment follows:—And because it is found that John never espoused Katharine *in facie ecclesiae*, whence it follows that William can claim no right in the said tenement by hereditary descent from John, therefore it is considered that Peter may go without day and that William do take nothing by this assize, [p. 382] but be in mercy for his false claim[1].

Ceremony required for establishment of a possessory marriage.

Now for a moment this may seem to decide that a marriage which has not been solemnized in church is no valid marriage. We believe that it merely decides that such a marriage is no marriage for purely possessory purposes. William, after failing in the assize, was quite free to bring a writ of right against Peter. If he had done so, the question whether the marriage was valid or no would have been sent to the bishop, and we have no doubt that he would have certified in favour of its validity. The application to marital relationships of the doctrine of possession, and the requirement of a public ecclesiastical ceremony for the constitution of a marriage which shall deserve possessory protection, though no such ceremony is required for a true and 'droiturel' marriage—all this is so very quaint that no wonder it has deceived some learned judges; but all the world over it was part of medieval law and a natural outcome of a system that made the form of marriage fatally simple, while it heaped up impediments in the way of valid unions.

[1] This is *Del Heith's Case*, which was known to the lords only through a note in a Harleian MS. of no authority. We have found the record; De Banco Roll, Trin. 34 Edw. I. (No. 161), m. 203. The reference usually given is false. *Foxcroft's* [corr. *Foxcote's*] *Case*, which stands on De Banco Roll, Pasch. 10 Edw. I. (No. 45), m. 23, is not even in appearance so decisive, since there the party who failed had committed himself to proving a marriage in church. As to this case see Revised Reports, vol. ix. p. vii. It was an action of cosinage against a lord claiming by escheat, a purely possessory cause. The bedside marriage was contracted, not merely in 'the presence of an ordained clergyman,' but in that of a consecrated bishop; but this was insufficient for possessory purposes according to English law and canon law. We must thank Mr Baildon for helping us to find these records.

Unprovable marriages.

From what has been already said it follows that a marriage might easily exist and yet be unprovable. We can not here speak of the canonical theory of proof, but it was somewhat rigorous, requiring in general two unexceptionable witnesses. If *A* and *B* contracted an absolutely secret marriage—and this they could do by the exchange of a few words—that marriage was for practical purposes dissoluble at will. If, while *B* was living, *A* went through the form of contracting a public marriage with *C*, this second marriage was treated as valid, and neither *A*, nor *B*, nor both together could prove the validity of their clandestine union: *Clandestinum manifesto non prae-* [p. 383] *iudicat.* Thus the ecclesiastical judge *in foro externo* might have to compel a man and woman to live together in what their confessors would describe as a continuous adultery[1].

The idea of marriage

'It is better to marry than to burn':—few texts have done more harm than this. In the eyes of the medieval church marriage was a sacrament; still it was only a remedy for concupiscence. The generality of men and women must marry or they will do worse; therefore marriage must be made easy; but the very pure hold aloof from it as from a defilement. The law that springs from this source is not pleasant to read[2].

Impediments to marriage.

Reckless of mundane consequences, the church, while she treated marriage as a formless contract, multiplied impediments which made the formation of a valid marriage a matter of

[1] Esmein, *op. cit.* i. 189–191, ii. 128: Hostiensis says 'Nam in iudicio animae consuletur eis ut non reddant debitum contra conscientiam: in foro autem iudiciali excommunicabuntur nisi reddant; tolerent ergo excommunicationem.' The maxim 'Clandestinum manifesto non praeiudicat' might lead us astray. There are various degrees of clandestinity which must be distinguished. The marriage may be (1) absolutely secret and unprovable: this is the case to which our rule refers. But a marriage may also be called clandestine (2) because, though valid and provable, it has not been solemnized *in facie ecclesiae*, or even (3) because, though thus solemnized, it was not preceded by the publication of banns. Clandestinity of the second and third kinds might have certain evil consequences, for after 1215 there can be no 'putative marriage' which is clandestine in the second, or perhaps—but this was disputable—in the third sense. See Esmein, *op. cit.* i. 182–3.

[2] Esmein, *op. cit.* i. 84: 'Enfin, le mariage étant conçu comme un remède à la concupiscence, le droit canonique sanctionnait, avec une énergie toute particulière, l'obligation du devoir conjugal, non seulement dans le *forum internum*, mais encore devant le *forum externum*. De là toute une série de règles que les canonistes du moyen âge exposaient avec une précision minutieuse et une innocente impudeur, et qu'il est parfois assez difficile de rappeler, aujourd'hui que les mœurs ont changé et que l'on n'écrit plus en latin.'

chance. The most important of these obstacles were those which consisted of some consanguinity or affinity between the parties. The exuberant learning which enveloped the table of prohibited degrees we must not explore, still a little should be said about its main rules.

Consanguinity.

The blood-relationship which exists between two persons may be computed in several different fashions. To us the simplest will be the Roman:—In order to discover the degree of consanguinity which exists between two persons, *A* and *X*, we must count the acts of generation which divide the one from the other. If the one is the other's ancestor in blood the task is easy:—I am in the first degree from my father and mother, the second from my grandparents. But suppose that [p. 384] *A* and *X* are collateral relations, then our rule is this—Count the steps, the acts of generation, which lie between each of them and their nearest common ancestor, and then add together these two numbers. Father and son are in the first degree, brother and brother in the second, uncle and nephew in the third, first cousins in the fourth. But, though this mode of computation may seem the most natural to us, it was not the most natural to our remote ancestors. If we look at the case from the standpoint of the common ancestor, we can say that all his children are in the first generation or degree, all his grandchildren in the second, all his great-grandchildren in the third; and, if we hold to this mode of speech, then we shall say that a marriage between first cousins is a marriage between persons who are in the second, not the fourth, degree. It is also probable that the ancient Germans knew yet another calculus of kinship, which was bound up with their law of inheritance. Within the household composed of a father and children there was no degree; this household was regarded for this purpose as an unit, and only when, in default of children, the inheritance fell to remoter kinsmen, was there any need to count the grades of 'sibship.' Thus first cousins are in the first degree of sibship; second cousins in the second. Now what with the Roman method and the German method, what with now an exclusion and now an inclusion of one or of both of the related persons, it was long before the church established an uniform fashion of interpreting her own prohibitions, the so-called 'canonical computation.' In order to explain this, we will suppose for a moment that the prohibitive law reaches

its utmost limit when it forbids a marriage in the fourth degree. We count downwards from the common ancestor, so that brothers are in the first degree, first cousins in the second, third cousins in the fourth. If then the two persons who are before us stand at an equal distance from their common ancestor, we have no difficulty in applying this method. We have two equal lines, and it matters not whether we count the number of grades in the one or in the other. To meet the more difficult case in which the two lines are unequal, another rule was slowly evolved:—Measure the longer line[1]. A prohi- [p. 385] bition of marriages within x degrees will not prevent a marriage between two persons one of whom stands more than x degrees away from the common ancestor. A prohibition of marriage in the first degree would not, but a prohibition of marriage within the second degree would, condemn a marriage between uncle and niece[2].

Prohibi degrees

The rule to which the church ultimately came was that defined by Innocent III. at the Lateran council of 1215, namely that marriages within the fourth degree of consanguinity are null[3]. Before that decree, the received doctrine was—and it was received in England as well as elsewhere[4]—that marriage within the seventh degree of the canonical computation was forbidden, but that kinship in the sixth or seventh degree was only *impedimentum impediens*, a cause which would render a marriage sinful, not *impedimentum dirimens*, a cause which would render a marriage null. Laxer rules had for a while been accepted; but to this result the canonists had slowly come. The seventh degree seems to have been chosen by rigorous theorists who would have forbidden a marriage between kinsfolk however remote, for it seems to have been a common rule among the German nations that for the purposes of inheritance kinship could not be traced beyond the seventh (it may also be called the sixth and even the fifth[5]) generation; and so to prohibit marriage within seven degrees was to prohibit it

[1] c. 9. X. 4. 14.

[2] For the history of this matter, see Freisen, *op. cit.* pp. 371–439. The various modes of counting kinship are elaborately discussed by Ficker, Untersuchungen zur Erbenfolge, vol. i. The German scheme is described by Heusler, Institutionen, ii. 587.

[3] c. 8. X. 4. 14.

[4] Canons of 1075, 1102, 1127; Johnson, Canons, ii. pp. 14, 27, 36.

[5] Heusler, *op. cit.* ii. 591.

among all persons who for any legal purpose could claim blood-relationship with each other. All manner of fanciful analogies, however, could be found for the choice of this holy number. Were there not seven days of the week and seven ages of the world, seven gifts of the spirit and seven deadly sins? Ultimately the allegorical mind of the ecclesiastical lawyer had to be content with the reflection that, though all this might be so, there were but four elements and but four humours[1].

Affinity.

Then with relentless logic the church had been pressing home the axiom that the sexual union makes man and woman one flesh. All my wife's or my mistress's blood kinswomen are connected with me by way of affinity. I am related to her [p. 386] sister in the first degree, to her first cousin in the second, to her second cousin in the third, and the doctrine of the twelfth century is that I may not marry in the seventh degree of this affinity. This is affinity of the first genus. But if I and my wife are really one, it follows that I must be related by way of affinity to the wives of her kinsmen. This is the second genus of affinity. To the wife of my wife's brother I am related in the first degree of this second genus of affinity; to the wife of my wife's first cousin in the second degree of this second genus, and so forth. But we can not stop here; for we can apply our axiom over and over again. My wife's blood relations are *affines* to me in the first genus; my wife's *affines* of the first genus are *affines* to me in the second genus; my wife's *affines* of the second genus are my *affines* of the third. I may not marry my wife's sister's husband's wife, for we stand to each other in the first degree of this third genus of affinity. The general opinion of the twelfth century seems to have been that while the prohibition of marriage extended to the seventh degree of the first genus, it extended only to the fourth degree of the second genus, and only to the second degree of the third genus[2]. But the law was often a dead letter. The council of 1215, which confined the impediment of consanguinity within the first four degrees, put the same boundary to the impediment of affinity of the first genus, while it decreed that affinity of the second or third genus might for the future

[1] Freisen, *op. cit.* p. 401.

[2] Freisen, *op. cit.* pp. 474–489; Esmein, *op. cit.* i. 374–383; Friedberg, Lehrbuch des Kirchenrechts, ed. 4, p. 386, where some diagrams will be found.

be disregarded[1]. Even when confined within this compass, the doctrine of affinity could do a great deal of harm, for we have to remember that the efficient cause of affinity is not marriage but sexual intercourse[2]. Then a 'quasi affinity' was established by a mere espousal *per verba de futuro*, and another and a very secret cause for the dissolution of *de facto* marriages was thus invented[3]. Then again, regard must be had to spiritual kinship, [p. 387] to 'godsib[4].' Baptism is a new birth; the godson may marry neither his godmother nor his godmother's daughter. Behind these intricate rules there is no deep policy, there is no strong religious feeling; they are the idle ingenuities of men who are amusing themselves by inventing a game of skill which is to be played with neatly drawn tables of affinity and doggerel hexameters. The men and women who are the pawns in this game may, if they be rich enough, evade some of the forfeits by obtaining papal dispensations; but then there must be another set of rules marking off the dispensable from the indispensable impediments[5]. When we weigh the merits of the medieval church and have remembered all her good deeds, we have to put into the other scale as a weighty counterpoise the incalculable harm done by a marriage law which was a maze of flighty fancies and misapplied logic.

Marriage of infants.

After some hesitation the church ruled that, however young the bridegroom and bride might be, the consent of their parents or guardians was not necessary to make the marriage valid. If the parties had not reached the age at which they were deemed capable of a rational consent, they could not marry; if on the other hand they had reached that age, their marriage would be valid though the consent of their parents or guardians had not been asked or had been refused. Our English temporal law, though it regarded 'wardship and marriage' as a valuable piece of property, seems to have acquiesced in this doctrine. A case

[1] c. 8. X. 4. 14.

[2] Coke, 2nd Inst. 684, tells of one Roger Donington whose marriage was null because before it he had committed fornication with the third cousin of his future wife.

[3] Freisen, *op. cit.* pp. 497–507.

[4] Ibid. pp. 507–555. At a very early time we find even the temporal law of wergild taking note of godsib; Leg. Ine, c. 76 (Liebermann, Gesetze, p. 123), where a 'bishop's-son' means a 'confirmation son'; see Haddan and Stubbs, Councils, iii. p. 219.

[5] For papal dispensations sent to England, see Bliss, Calendar of Papal Registers, vol. i., Index.

from 1224 suggests that a woman who married an infant ward without his guardian's consent would not be entitled to dower[1]: but a denial of dower would be no denial of the marriage, and our law discovered other means of punishing the ward who married without the consent of the guardian in chivalry or rejected a 'convenable marriage' which he tendered[2]. A statute of 1267 forbad the guardian in socage to make a profit for himself out of the marriage of his ward[3].

Age of the parties.

At the age of seven years a child was capable of consent, but the marriage remained voidable so long as either of the parties to it was below the age at which it could be consummated. A presumption fixed this age at fourteen years for boys and twelve [p. 388] for girls. In case only one of the parties was below that age, the marriage could be avoided by that party but was binding on the other. So far as we can see, this doctrine was accepted by our temporal courts. Thomas of Bayeux had espoused Elena de Morville *per verba de praesenti* with the consent of her father, and shortly afterwards a marriage was celebrated in church between them. Then her father died and this left her in ward to the king. 'And' said the king's court 'whereas the said Elena is under age, and, when she comes of age, she will be able to consent to or dissent from the marriage, and whereas the marriage does not bind her while she is under age, although it is binding on Thomas, who is of full age, therefore the said Elena remains in ward to the king until she is of age, that she may then consent or dissent[4].' So the daughter of Ralph of Killingthorpe is taken away from the man who has espoused her and handed over to her guardian in order that she may have an opportunity of dissenting from the marriage when she is twelve years old[5]. Ultimately our common lawyers held that a wife could claim dower if at her husband's death she was nine years old, though the marriage in such a case was one that she could have avoided if she had lived to the age of twelve[6]; but we seem to see this rule growing out of an earlier practice which, in accordance with the canon law, would have made all turn on the question of fact, whether or no she had attained an age at which it was possible for her to consummate the

[1] Note Book, pl. 965, 1098.
[2] Stat. Merton, c. 6, 7; Stat. Westm. I. c. 22. [3] Stat. Marlb. c. 17.
[4] Note Book, pl. 1267.
[5] Excerpta e Rot. Fin. i. 228. [6] Littleton, sec. 36; Co. Lit. 33 a.

marriage[1]:—*car au coucher ensemble gaigne femme sa douaire selon la coustume de Normendie*[2]. It is possible, however, that the temporal courts did not pay much attention to the canonical doctrine that the espousals of children under the age of seven years were merely void. Coke tells us that the nine years old widow shall have her dower 'of what age soever her husband be, albeit he were but four years old[3],' and certain it is that [p. 389] the betrothal of babies was not consistently treated as a nullity. In Henry III.'s day a marriage between a boy of four or five years and a girl who was no older seems capable of ratification[4], and as a matter of fact parents and guardians often betrothed, or attempted to betroth, children who were less than seven years old[5]. Even the church could say no more than that babies in the cradle were not to be given in marriage, except under the pressure of some urgent need, such as the desire for peace[6]. A treaty of peace often involved an attempt to bind the will of a very small child, and such treaties were made, not only among princes, but among men of humbler degree, who thus patched up their quarrels or compromised their law-suits. The rigour of our feudal law afforded another reason for such transactions; a father took the earliest opportunity of marrying his child in order that the right of marriage might not fall to the lord.

Marriage of young children.

The biographer of St Hugh of Lincoln has told a story which should be here retold. In Lincolnshire there lived a knight, Thomas of Saleby. He was aged and childless and it seemed that on his death his land must pass to his brother

[1] Bracton, f. 92: 'dummodo possit dotem promereri et virum sustinere'; Fitzherbert, Abr. tit. *Dower* pl. 172; Y. B. Edw. II. f. 78, 221, 378. The question takes this shape—At what age can a woman earn or 'deserve' her dower? In place of the presumption of the canonist that the marriage will not be consummated until she is twelve years old, our common lawyers gradually adopt the rule that she can deserve dower when nine years old. The canonical presumption was rebuttable: Freisen, *op. cit.* p. 328.
[2] Ancienne coutume, c. 101, ed. de Gruchy, p. 250; Somma, p. 255.
[3] Co. Litt. 33 a.
[4] See the curious but mutilated record in Calend. Genealog. i. 184.
[5] See *e.g.* Note Book, pl. 349, 696.
[6] c. un. C. 30. q. 2; c. 2. X. 4. 2. This canon, which Gratian ascribes to Pope Nicholas, appears in the English canons of 1175 and 1236; Johnson, Canons, pp. 64, 141; it passes thence into Lyndwood's Provinciale. The saving clause is 'nisi forte aliqua urgentissima necessitate interveniente, utpote pro bono pacis, talis coniunctio toleretur.'

William. But his wife thought otherwise, took to her bed and gave out that she had borne a daughter. In truth this child, Grace, was the child of a villager's wife. The neighbours did not believe the tale and it came to the ears of Bishop Hugh, who sent for the husband and threatened him with excommunication if he kept the child as his own. But the knight, who feared his wife more than he feared God, would not obey the bishop's command and therefore died a sudden death. The wife persisted in her wickedness, and the king gave the supposititious heiress to Adam Neville, the chief forester's brother. When she was but four years old, Adam proposed to marry her. The bishop forbad the marriage, but, whilst the bishop was in Normandy, the marriage was solemnized by a priest. On his return the bishop suspended the priest from office and benefice, and excommunicated all who had taken part in the ceremony. Then, first the hand-maid of the widow, and then [p. 390] the widow herself, confessed the fraud. The bishop used all his power to prevent it from taking effect. But Adam Neville would not give way and made confident appeal to English law. Thomas of Saleby had received Grace as legitimate, therefore she was legitimate. The bishop while in England was strong enough to prevent a judgment being given in Adam's favour. But once more he had to go to Normandy. Adam then pressed forward his suit and seemed on the eve of winning, when once more a sudden death prevented this triumph of villainy. But neither Grace nor the rightful heir profited by his death. King John sold Grace to his chamberlain Norman for two hundred marks, and, when Norman died, the king sold the poor girl once more for three hundred marks to the third and worst of all her husbands, Brian de Lisle. In the end she died childless and the inheritance at length fell to the rightful heir[1].

Divorce.

A valid marriage when once contracted could rarely be dissolved. It is highly probable that among the German nations, so long as they were heathen, the husband and wife could dissolve the marriage by mutual consent, also that the husband could put away his wife if she was sterile or guilty of conjugal infidelity or some other offences and could marry

[1] Magna Vita S. Hugonis, 170–7. The main facts seem to be fully borne out by records.

another woman[1]. The dooms of our own Æthelbert, Christian though they be, suggest that the marriage might be dissolved at the will of both, or even at the will of one of the parties to it[2]. And though the churches, especially the Roman church, had from an early time been maintaining the indissolubility of marriage, they were compelled to temporize[3]. The Anglo-Saxon and Frankish penitentials allow a divorce *a vinculo matrimonii* in various cases:—if the wife is guilty of adultery, the husband may divorce her and marry another and even she may marry after five years of penance; if the wife deserts her husband, he may after five years and with the bishop's consent marry another; if the wife is carried into captivity, the husband may marry another, 'it is better to do so than to fornicate[4].' [p. 391] But stricter doctrines have prevailed before the church obtains her control over the whole law of marriage and divorce.

Divor from l and b

We must set on one side the numerous causes—we have mentioned a few—which prevent the contraction of a valid marriage, the so-called *impedimenta dirimentia*[5]. Where one of these exists there is no marriage. A court pronouncing that no marriage has ever existed is sometimes said to pronounce a divorce *a vinculo matrimonii*; it declares that the union, if continued, will be what it has been in the past, an unlawful union. But, putting aside these cases in which the court proclaims the nullity of an apparent marriage, we find that a valid marriage is almost indissoluble. There seems to be but one exception and one that would not be of great importance in England. We have to suppose a marriage between two infidels and that one of them is converted to

[1] Freisen, *op. cit.* pp. 778–780; Heusler, Institutionen, ii. 291; Brunner, Zeitschrift der Savigny-Stiftung, Germ. Abt., xvi. 105.

[2] Æthelb. 79, 80, 81; Liebermann, Gesetze, p. 8.

[3] Freisen, *op. cit.* pp. 785–790.

[4] Theodore's Penitential (Haddan and Stubbs, Councils, iii. 199-201).

[5] Owing to the fact that the church had but slowly made up her mind to know no such thing as a divorce in our acceptation of that term (*i.e.* the dissolution of a valid marriage) the term *divortium* is currently used to signify two very different things, namely (1) the *divortium quoad torum*, which is the equivalent of our 'judicial separation,' and (2) what is very often called the *divortium quoad vinculum* but is really a declaration of nullity. The persistence of the word *divortium* in the latter case is a trace of an older state of affairs (Esmein, *op. cit.* ii. 85), but in medieval practice the decree of nullity often served the purpose of a true divorce; spouses who had quarrelled began to investigate their pedigrees and were unlucky if they could discover no *impedimentum dirimens*.

Christianity. In such a case the Christian is not bound to cohabit with the infidel consort, and if the infidel chooses to go off, the marriage can be dissolved and the Christian will be free to marry again. Out of the words of St Paul the church had defined a *privilegium Paulinum* for the Christian who found himself mated to an infidel[1]. It is probable that in their dealings with Jews the English courts accorded this privilege to the faithful. In 1234 a Jewish widow was refused her dower on the ground that her husband had been converted and that she had refused to adhere to him and be converted with him[2]. An Essex jury even doubted whether if two Jews married under the *Lex Judaica* but afterwards turned to the *Lex Christiana* and then had a son, that son could be legiti- [I 392] mate[3]. This, however, was a rare exception to a general rule, and for the rest the only divorce known to the church was that *a mensa et toro* which, while it discharged the husband and wife from the duty of living together, left them husband and wife. Such a divorce could be granted only 'for the cause of fornication,' but this term had a somewhat wider meaning than it now conveys to us[4].

Divorce and the temporal law.

Our temporal law had little to say about these matters. Ultimately the common lawyers came to the doctrine that while the divorce *a vinculo matrimonii* did, the divorce *a mensa et toro* did not deprive the widow of her dower, even though she were the guilty person[5]. But we have good cause to doubt the antiquity of the last part of this doctrine. Glanvill distinctly says that the woman divorced for her misconduct can claim no dower[6]. Bracton does not speak so plainly, but says that she can have no dower if the marriage be dissolved for any cause[7]. However, in Edward III.'s day we hear the

[1] Freisen, *op. cit.* § 69, 70. A generation ago very similar difficulties became pressing in British India. See Sir H. Maine's speech on the Re-marriage of Native Converts (Memoir and Speeches and Minutes, Lond. 1892, p. 130).

[2] Tovey, Anglia Judaica, p. 84; Co. Lit. 31 b, 32 a.

[3] Calend. Geneal. ii. 563.

[4] Freisen, *op. cit.* p. 836; Esmein, *op. cit.* ii. 92. Some writers were for admitting a spiritual fornication, an elastic crime which might include heresy and many other offences.

[5] Co. Lit. 32 a, 33 b, 235 a.

[6] Glanvill, vi. 17; and so in the revised Glanvill of the Cambridge MS.: Harv. L. R., vi. 11; Somma, p. 254.

[7] Bracton, f. 92, 304. Britton, ii. 264, seems to think that a separation from bed and board would deprive the woman of dower. In the recorded cases

opinion that in an action for dower the widow's opponent must say, not 'You have been divorced,' but 'You were never joined in lawful matrimony.' This plea would not be competent to one who was relying on a divorce for adultery; it would be competent however to one who desired to prove that the *de facto* marriage had been set aside on the score of precontract, affinity or other diriment impediment, since in such a case the bishop would certify that there never had been a lawful marriage[1]. Meanwhile, however, a statute of Edward I. expressly punished with loss of dower the woman who eloped and abode with her adulterer, unless her husband, without being coerced thereto by the church, took her back again and 'reconciled [p. 393] her[2].' This made adultery when coupled with elopement a matter about which temporal courts and juries had to inquire. It gave rise to a case[3] which we will cite at length, not only because it illustrates the marital morality of the time and the relation between the lay and the spiritual tribunals, but also because we can thus set forth the most elaborately reasoned judgment of the king's court that has come to us from Edward I.'s day.

A wife conveye

In 1302 William Paynel and Margaret his wife petitioned the king for the dower that was due to her as widow of her first husband John de Camoys. The king's advocate pleaded according to the statute that Margaret had eloped and committed adultery with William Paynel. In answer William and Margaret relied on a solemn charter whereby John had 'given, granted, released and quit-claimed' the said Margaret his wife to the said William. They also produced certificates from the Archbishop of Canterbury and the Bishop of Chichester attesting that they, William and Margaret, had been charged with adultery in the court Christian and that they had successfully met this charge by compurgation, Margaret's oath-helpers being married and unmarried ladies, including a prioress. They also professed themselves ready to submit to a jury the question whether or no they had committed adultery. But the king's court delivered this judgment:—'Whereas William and

it is often difficult to see whether the divorce that is pleaded is a dissolution of marriage; *e.g.* Note Book, pl. 690. It is believed however that *divortium*, standing by itself, generally points to a divorce *a vinculo*, *e.g.* in Lit. sec. 380.

[1] Y. B. 10 Edw. III. f. 35 (Trin. pl. 24).

[2] Stat. West. II. c. 34; Second Inst. 433.

[3] Rot. Parl. i. 140 (A.D. 1302).

Margaret can not deny that Margaret in the life-time of her husband John went off and abode with William, altogether relinquishing her husband John, as plainly appears because she never in the life-time of her said husband raised any objection, and raises none now, either in her own person or by another in any manner whatsoever, but by way of making plain her original and spontaneous intention and continuing the affection which in her husband's life-time she conceived for the said William, she has since John's death allowed herself to be married to the said William; And whereas William and Margaret say and show nothing to prove that the said John in his life-time ever received her back as reconciled; And whereas it appears by the said writing which they have produced that the said Margaret was granted to the said William by the demise and delivery of the said John to remain with William for ever; And whereas it is not needful for the king's court to [p. 394] betake itself to an inquest by the country about such matters as the parties can not deny and which manifestly appear to the court, or about such matters as the parties have urged or admitted in pleading; And whereas it is more probable and to be more readily presumed in the king's court and in every other that, if a man's wife in the life-time of her husband, of her own free will without objection or refusal, abides with another man, she is lying in adultery rather than in any due or lawful fashion, and this more especially when there follows so clear a declaration of her original intent as this, namely, that when her husband is dead she marries that other man:—Therefore it seems to the court that in the face of so many and such manifest evidences, presumptions and proofs, and the admissions of William and Margaret, there is no need to proceed to an inquest by the country in the form offered by them, and that for the reasons aforesaid Margaret by the form of the said statute ought not to be admitted or heard to demand her dower: And therefore it is considered that William and Margaret do take nothing by their petition but be in mercy for their false claim.' After reading this judgment it is difficult to believe that the ecclesiastical courts were preeminently fit to administer the law of marriage and divorce.

Bastardy. Having been compelled to speak of bastardy, we must say a little more about it. In our English law bastardy can not be called a status or condition. The bastard can not inherit from

his parents or from any one else, but this seems to be the only temporal consequence of his illegitimate birth. He is a free and lawful man; indeed, as we have said above, our law is coming to the odd conclusion that the bastard must always be a free man even though both of his parents are bond[1]. In all respects he is the equal of any other free and lawful man, so far as the temporal law is concerned. This is well worthy of notice, for in French and German customs of the thirteenth century bastardy is often a source of many disabilities, and sometimes the bastard is reckoned among the 'rightless[2].' It is said, how- [p. 395] ever, that this harsh treatment of him is not of very ancient date[3]; under the influence of the church, which excludes him from office and honour, his lot has changed for the worse; and it well may be that the divergence of English from continental law is due to no deeper cause than the subjection of England to kings who proudly traced their descent from a mighty bastard.

Our law therefore has no need to distinguish between various sorts of illegitimate children. A child is either a legitimate child or a bastard. The child who is born of an unmarried woman is a bastard and nothing can make him legitimate. In the sharp controversy over this principle which preceded the famous scene at Merton[4], the champion of what we may call the high-church party alleged that old English custom was in accord with the law of the church as defined by Alexander III. Probably there was some truth in this assertion. It is not unlikely that old custom, though it would not have held that the marriage in itself had any retroactive effect, allowed the parents on the occasion of their marriage to legitimate the already existing offspring of their union. The children were placed under the cloak which was spread over their parents during the marriage ceremony, and became 'mantle children[5].' We hear of this practice in Germany and

Mantl childr

[1] See above, vol. i. p. 423.

[2] Thus in Beaumanoir, c. 63, § 2, the bastard is not a *franc home* and can not do battle with a *franc home*; nor can he be a witness in a criminal cause against a *franc home*: c. 39, § 32; c. 40, § 37. In some parts of Germany the bastard was *rechtlos*: Heusler, Institutionen, i. 193.

[3] Heusler, *op. cit.* ii. 434; Brunner, Zeitschrift der Savigny-Stiftung, Germ. Abt. xvii. 1 ff.

[4] Note Book, vol. i. p. 104.

[5] This is what Grosseteste says in his letter to Raleigh: Epistolae, p. 89:

France and Normandy; but we have here rather an act of adoption than a true legitimation *per subsequens matrimonium*, and it would not have fully satisfied the church[1]. This practice the king's court of Henry II.'s day had rejected, and in Henry III.'s it refused to retreat from its precedents.

Presumptive paternity.

On the other hand, we may almost say that every child born to a married woman is in law the legitimate child of her husband. Our law shows a strong repugnance to any inquiry into the paternity of such a child. The presumption of the [p. 396] husband's paternity is not absolute, but it is hardly to be rebutted[2]. In Edward I.'s reign Hengham J. tells this story: 'I remember a case in which a damsel brought an assize of *mort d'ancestor* on the death of her father. The tenant said that she was not next heir. The assize came and said that the [alleged] father after that he had married the mother went beyond seas and abode there three years; and then, when he came home, he found the plaintiff who had not been born more than a month before his return. And so the men of the assize said openly that she was not his heir, for she was not his daughter. All the same, the justices awarded that she should recover the land, for the privities of husband and wife are not to be known, and he might have come by night and engendered the plaintiff[3].' In this case even the rule that the presumption might be rebutted by a proof of absence beyond the four seas seems to have been disregarded. But further, we may see a strong inclination to treat as legitimate any child whom the husband has down to his death accepted as his own and his wife's child, even though proof be forthcoming that it is neither the one nor the other. This inclination of the courts is illustrated by that story about St Hugh of Lincoln which we have told above. Grace was treated as the legitimate daughter of Thomas of Saleby, even though it was demonstrable that she

'unde in signum legitimationis, nati ante matrimonium consueverunt poni sub pallio super parentes eorum extento in matrimonii solemnizatione.'

[1] For the *Mantel-Kinder* of Germany see Schröder, D. R. G., 712. Beaumanoir, c. 18, § 24: 'et est li fix mis desoz le drap avec le pere et avec la mere.' For Normandy, Will. Gemet. lib. 8, cap. 36 (Duchesne, Scriptores, 311–12): Duke Richard espouses Gunnora 'in Christian fâshion' and the children are covered with the mantle. Selden, Diss. ad Fletam, p. 538, says that this ceremony was observed when the children of John of Gaunt and Catherine Swinford were legitimated by parliament.

[2] Bracton, f. 63 b, 278, 278 b.

[3] Y. B. 32–3 Edw. I. p. 63.

was neither his daughter nor his wife's daughter[1]. Indeed, as Bracton sees, our law in such a case went far towards permitting something that was very like adoption[2]. However, this really is no more than the result of a very strong presumption—a presumption which absolves the court from difficult inquiries—and from the time when it rejects the claims of the 'mantle-children' onwards to our own day, we have no adoption in England. Then, on the other hand, when the husband was dead, our law was quick to suspect a fraud on the part of the widow who gave herself out to be with child. At the instance of the apparent heir or of the lord it would send good and lawful matrons to examine her[3].

§ 2. *Husband and Wife.*

[p. 397] A first glance at the province of law which English lawyers know as that of Husband and Wife, and which their predecessors called that of 'Baron et Feme' will, if we do not confine our view within the limits of our own system, amaze and bewilder us[4]. At the end of the middle ages we see a perplexed variety of incongruous customs for which it is very difficult to account. Their original elements should, so we may think, be simple and uniform. For the more part we should be able to trace them back to ancient Germanic usages, since the Roman law of husband and wife with its 'dotal system,' though it has all along maintained its hold over certain districts, notably the south of France, and has occasionally conquered or reconquered other territories, has kept itself aloof and refused to mix with alien customs. However, the number of schemes of marital property law seems almost infinite, and we can not explain the prevalence of a particular scheme by the operation of any of those great events of which our historians tell us. There would be two neighbouring villages

Varie in the law of husba and w

[1] See above, p. 391.

[2] Bracton, f. 63 b. See the curious cases in the Note Book, pl. 247, 303, 1229.

[3] Bracton, f. 69–71; Note Book, pl. 137, 198, 1503, 1605.

[4] Stobbe, Privatrecht, vol. iv.; Schröder, Eheliche Güterrecht; Schröder, D. R. G., 299, 700; Olivecrona, La communauté des biens entre époux, Revue historique de droit français et étranger, vol. xi. (1865), 169, 248, 354.

in Germany; they would be inhabited by men of the same race, religion and language, who for centuries past had been subject to the same economic conditions, and yet they would have very different rules for the governance of the commonest of all human relationships[1]. Even within our own island we find a curious problem. English law has gone one way, Scottish law another, and in this instance it is no Romanism that has made the difference. Scottish law has believed, or tried to believe, in a 'community of goods' between husband and wife, which English law has decisively rejected.

Explanation of varieties.

Probably upon further examination we should find that, underneath all this superficial variety, there was during the middle ages a substantial uniformity about some main matters of practical importance, especially about those things that a husband and wife respectively can and can not do while the [p. 398] marriage between them exists. A man marries a woman; we may postpone as academic such questions as whether each of them remains the owner of what he or she has heretofore owned, whether each remains capable of acquiring ownership, whether (on the other hand) the property or some part of the property of each of them becomes the property of both of them. Such questions will become important so soon as the marriage is at an end; but in the meanwhile the husband has everywhere a very large power of dealing as he pleases with the whole mass of property, a power however which is commonly limited by rules which forbid him to alienate without his wife's consent the immovables which are his or hers or theirs. When the marriage is at an end, we must be prepared with some scheme for the distribution of this mass. The question 'His, hers or theirs?' then becomes an interesting, practical question. Many different answers may be given to it; but history seems to show that even here the practical rules are less various than the theoretical explanations that are given of them.

Community of goods.

In the middle ages the idea of a 'community of goods' between husband and wife springs up in many parts of Europe from Iceland to Portugal, though only the first rudiments of it have been discovered in the age of the 'folk laws.' Sometimes the whole property of husband and wife, whether acquired

[1] It is said that in Würtemberg the number of the systems of succession between husband and wife might by a neglect of the minor differences be reduced to sixteen. Stobbe, *op. cit.* p. 75.

before or after the marriage, falls into this community; sometimes it is only the 'conquests' of husband and wife—that is to say, the property which has been acquired during the marriage—which forms the common stock; sometimes that common stock comprises the movables acquired before the marriage as well as the movable and immovable 'conquests.' But granted that there is this common stock, jurists have often found difficulty in deciding who, when analysis has been carried to the uttermost, is really the owner of it. Some—and they are likely to have the sympathies of English lawyers with them—have maintained that during the marriage the ownership of it is in truth with the husband, so large are his powers while the marriage lasts of doing what he pleases[1]. Others will make the husband and wife co-owners, each of them being entitled to an aliquot share of the undivided mass[2]. [p. 399] Others again will postulate a juristic person to bear the ownership, some kind of corporation of which the husband and wife are the two members[3]. An idea very like our own 'tenancy by entireties' has occurred to one school of expositors[4]. Another deems the relation between husband and wife so unique that it condemns as useless all attempts to employ any of the ordinary categories of the law, such as 'partnership' or 'co-ownership.' But then it would be a mistake to think that these conflicting opinions remain fruitless. Called in to explain the large rules, they generate the small rules, especially those rules of comparatively modern origin which deal with the claims of creditors; and so the customs go on diverging from each other. The history of Scottish law in the nineteenth century shows us an instructive phenomenon. The actual rules were well settled, as we should expect them to be in a prosperous and peaceful country, and yet it has been possible for learned lawyers to debate the apparently elementary question whether the law of Scotland knows, or has ever known, a community of goods between husband and wife[5].

[1] Stobbe, p. 217.

[2] Stobbe, p. 219.

[3] Stobbe, p. 222.

[4] Stobbe, p. 226. An old writer holds that each of the two spouses can say 'Totum patrimonium meum est.'

[5] Fraser, Law of Husband and Wife (ed. 1876), pp. 648–678, maintains that the idea of a *communio bonorum* does not appear in Scotland until late in the seventeenth century, that it is imported from France by lawyers educated in the French universities, and that it has never really fitted the Scottish law.

No community in England.

Our own law at an early time took a decisive step. It rejected the idea of community. So did its sister the law of Normandy, differing in this respect from almost every custom of the northern half of France[1]. To explain this by any ethnical theory would be difficult. We can not put it down to the Norsemen, for Scandinavian law in its own home often came to a doctrine of community. We can not say that in this instance a Saxon element successfully resisted the invasion of Norse and Frankish ideas, for thus we should not account for the law of Normandy. Besides, though the classical law of Saxony, the law of the *Sachsenspiegel*, rejects the community of goods, it is not very near to our common law. It is also to be noted that the author of the *Leges Henrici* stole from the *Lex Ribuaria* a passage which is generally regarded as one of the oldest testimonies that we have to the growth of a community of conquests among the Franks: apparently he knew of nothing [p. 400] English to set against this[2]. Lastly, it can be shown that for a while our English law hesitated over some important questions, and was at one time very near to a system which a little lawyerly ingenuity might have represented as a system of community.

English peculiarities.

Misdoubting the possibility of ethnical explanations, we must, if we would discuss the leading peculiarities of our insular law, keep a few great facts before our minds. In the first place, we have to remember that about the year 1200 our property law was cut in twain. The whole province of succession to movables was made over to the tribunals of the church. In the second place, we are told that in France the system of community first became definite in the lower strata of society: there was community of goods between the *roturier* and his wife while as yet there was none among the gentry[3]. We have often had occasion to remark that here in England the law for the great becomes the law for all. As we shall see below, the one great middle-class custom that our common law spared, the custom of the Kentish gavelkinders, might with some ease have been pictured as a system of community. But in England, with its centralized justice, the habits of the great folk are more important than the habits of the small. This has been so even

[1] Olivecrona, *op. cit.* p. 287.

[2] Leg. Hen. 70, § 22. This is a modified version of Lex Rib. c. 37.

[3] Olivecrona, *op. cit.* p. 286.

in recent days. Modern statutes have now given to every married woman a power of dealing freely with her property, and this was first evolved among the rich by means of marriage settlements.

Community and equality.

Another preliminary remark should be made. A system of community need not be a system of equality. We do not mean merely that during the marriage the husband may and, at least in the middle ages, will have an almost unlimited power of dealing with the common fund; we mean also that there is no reason why the fund when it has to be divided should be divided in equal shares. Many schemes of division are found. In particular, it is common that the husband should take two-thirds, the wife one-third.

Law and progress.

Lastly, we ought not to enter upon our investigation until we have protested against the common assumption that in this [p. 401] region a great generalization must needs be possible, and that from the age of savagery until the present age every change in marital law has been favourable to the wife. As yet we know far too little to justify an adoption of this commodious theory. We can not be certain that for long centuries the presiding tendency was not one which was separating the wife from her blood kinsmen, teaching her to 'forget her own people and her father's house' and bringing her and her goods more completely under her husband's dominion. On the extreme verge of our legal history we seem to see the wife of Æthelbert's day leaving her husband of her own free will and carrying off her children and half the goods[1]. In the thirteenth century we shall see that the law when it changes does not always change in favour of the wife.

Final form of the common law.

The final shape that our common law took may be roughly described in a few sentences—this is not the place for an elaborate account of it:—

Wife's land.

1. In the lands of which the wife is tenant in fee, whether they belonged to her at the date of the marriage or came to her during the marriage, the husband has an estate which will

[1] Æthelb. 78–81. There is a remarkable entry in D. B. i. 373 which seems to show something like a separate estate. The jurors say of a certain Asa 'ipsa habuit terram suam separatam et liberam a dominatu et potestate Bernulfi mariti sui, etiam cum simul essent, ita ut ipse de ea nec donationem, nec venditionem facere, nec foris-facere posset. Post eorum vero separationem, ipsa cum omni terra sua recessit, et eam ut domina possedit.'

endure during the marriage, and this he can alienate without her concurrence. If a child is born of the marriage, thenceforth the husband as 'tenant by the curtesy' has an estate which will endure for the whole of his life, and this he can alienate without the wife's concurrence. The husband by himself has no greater power of alienation than is here stated; he can not confer an estate which will endure after the end of the marriage or (as the case may be) after his own death. The wife has during the marriage no power to alienate her land without her husband's concurrence. The only process whereby the fee can be alienated is a 'fine' to which both husband and wife are parties and to which she gives her assent after a separate examination.

Husband's land.

2. A widow is entitled to enjoy for her life under the name of dower one-third of any land of which the husband was seised in fee at any time during the marriage. The result of this is that during the marriage the husband can not alienate his own land so as to bar his wife's right of dower, unless this is done with her concurrence, and her concurrence is ineffectual unless the conveyance is made by 'fine[1].'

Wife's chattels.

3. Our law institutes no community even of movables [p. 402] between husband and wife. Whatever movables the wife has at the date of the marriage, become the husband's, and the husband is entitled to take possession of and thereby to make his own whatever movables she becomes entitled to during the marriage, and without her concurrence he can sue for all debts that are due to her. On his death, however, she becomes entitled to all movables and debts that are outstanding, or (as the phrase goes) have not been 'reduced into possession.' What the husband gets possession of is simply his; he can freely dispose of it *inter vivos* or by will. In the main for this purpose, as for other purposes, a 'term of years' is treated as a chattel, but under an exceptional rule the husband, though he can alienate his wife's 'chattel real' *inter vivos*, can not dispose of it by his will. If he has not alienated it *inter vivos*, it will be hers if she survives him. If he survives her, he is entitled to her 'chattels real' and is also entitled to be made the administrator of her estate. In that capacity he has a right to whatever movables or debts have not yet been 'reduced into possession' and, when debts have been paid, he keeps these goods as his own. If she dies in his lifetime, she can have no other intestate successor. Without his consent she can make no will, and any consent that he may have given is revocable at any time before the will is proved.

[1] This inconvenience was evaded in modern conveyancing by a device of extreme ingenuity, finally perfected only in the eighteenth century.

Husb chat

4. Our common law—but we have seen that this rule is not very old—assured no share of the husband's personalty to the widow. He can, even by his will, give all of it away from her except her necessary clothes, and with that exception his creditors can take all of it. A further exception, of which there is not much to be read, is made of jewels, trinkets and ornaments of the person, under the name of *paraphernalia*. The husband may sell or give these away in his lifetime, and even after his death they may be taken for his debts; but he can not give them away by will. If the husband dies during the wife's life and dies intestate, she is entitled to a third, or if there be no living descendant of the husband, to one-half of his personalty. But this is a case of pure intestate succession; she only has a share of what is left after payment of her husband's debts.

Husb liabil

5. During the marriage the husband is in effect liable to the whole extent of his property for debts incurred or wrongs committed by his wife before the marriage, also for wrongs [p. 403] committed during the marriage. The action is against him and her as co-defendants. If the marriage is dissolved by his death, she is liable, his estate is not. If the marriage is dissolved by her death, he is liable as her administrator, but only to the extent of the property that he takes in that character.

Wife' contr

6. During the marriage the wife can not contract on her own behalf. She can contract as her husband's agent, and has a certain power of pledging his credit in the purchase of necessaries. At the end of the middle ages it is very doubtful how far this power is to be explained by an 'implied agency.' The tendency of more recent times has been to allow her no power that can not be thus explained, except in the exceptional case of desertion.

Law i cent. Its ge idea.

Having thus indicated the goal, we may now turn back to the twelfth and thirteenth centuries. If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard

against the common belief that the ruling principle is that which sees an 'unity of person' between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it can not be. We do not treat the wife as a thing or as somewhat that is neither thing nor person; we treat her as a person. Thus Bracton tells us that if either the husband without the wife, or the wife without the husband, brings an action for the wife's land, the defendant can take exception to this 'for they are *quasi* one person, for they are one flesh and one blood.' But this impracticable proposition is followed by a real working principle:—'for the thing is the wife's own and the husband is guardian as being the head of the wife[1].' The husband is the wife's guardian:—that we believe to be the fundamental principle; and it explains a great deal, when we remember that guardianship is a profitable right. As we shall see below, the husband's rights in the wife's lands can be regarded as an exaggerated guardianship. The wife's subjection to her husband is often insisted on; she is 'wholly within his power,' she is bound to obey him in all that is not contrary to the law of God[2]; she and all her property ought to be at his disposal; she is 'under the [p. 404] rod[3].' The habit into which our lawyers fall of speaking of every husband and wife as 'baron et feme[4]' is probably due to the fact that the king's court has for the more part been conversant with the affairs of gentle-folk. The wife of a magnate, perhaps the wife of a knight, would naturally speak of her husband as 'mon baron.' The wife of a man of humbler station would hardly have done this; but still it is likely that she would call him her lord, perhaps in English her elder[5].

[1] Bracton, f. 429 b. [2] Glanvill, vi. 3.

[3] Bracton, f. 414: Husband and wife produce a forged charter; he is hanged, she, whether a partner in his crime or no, is set free 'quia fuit sub virga viri sui.' Note Book, pl. 1685: The deed of a married woman is of no avail, 'quia hoc fecit tempore *A* de *B* viri sui dum fuit sub virga.' Sharpe's Calendar of London Wills, i. 105: feme coverte can not devise land, for she is 'sub virga.'

[4] See *e.g.* Britton, i. 223, 227.

[5] Ine, 57. The etymological connexion between *baron* and *vir* we are not disputing, but that was in the twelfth century a very remote fact, and we can not easily believe that the ordinary Englishman, even when he spoke French, called himself his wife's *baron*. In the law Latin of that time *baro* is rarely, if ever, used in the sense of husband.

The disabilities of the woman who is *coverte de baron*—a curious phrase which we find in use so soon as we get documents written in French[1]—are often contrasted in the charters with the liege power, the mere, unconditional power, the 'liege poustie' as the Scots say, of the widow or the maid to do what she likes with her own[2]. The formula of a common writ tells us that during her husband's lifetime the wife can not oppose his will (*cui ipsa in vita sua contradicere non potuit*). But for all this, we can not, even within the sphere of property law, explain the marital relationship as being simply the subjection of the wife to her husband's will. He constantly needs her concurrence, and the law takes care that she shall have an opportunity of freely refusing her assent to his acts. To this [p. 405] we must add that, as we shall see hereafter, there is a latent idea of a community between husband and wife which can not easily be suppressed.

Divorce personæ from realty

The lamentable acquisition by the ecclesiastical courts of the whole law of succession to movables prevents our common lawyers from having any one consistent theory of the relation between husband and wife. The law falls into two segments. We must attend in the first place to that portion of it which is fully illustrated by records of the king's court.

The wife's land.

We will suppose the wife to be at the time of the marriage entitled to land in fee simple or to become so entitled by inheritance, gift or otherwise during the marriage. Her husband thereupon becomes entitled to take the fruits and profits of the land during the marriage, and this right he can alienate to another. If a child is born of the marriage this enlarges the husband's right. He forthwith becomes entitled to enjoy the land during the whole of his life, and this right he

[1] Y. B. 21–2 Edw. I. 151: 'ele fut covert de baron.' Y. B. 30–1 Edw. I. 133: 'ele fut coverte.' This term, rarely found in the law Latin but common in the law French of this age, seems to point, at least primarily, to the sexual union, and does not imply protection. See Ducange, s. v. *cooperire*.

[2] Note Book, pl. 671: 'in ligia potestate sua cartam fecit':—pl. 679: 'in legitima viduitate sua':—pl. 1277: 'in ligia potestate et viduitate sua':—pl. 1929: 'in ligia viduitate sua.' Cart. Glouc. i. 299: 'Ego Margeria..... tempore quo fui mei iuris et domina mei.' Northumberland Assize Rolls, p. 290: 'in propria et pura virginitate sua.' In course of time in this as in other contexts the word *ligius* is misunderstood and confused with *legalis*, *legitimus*, etc. In German *ledig* is still used in this context, *e.g.* Schröder, D. R. G. 312: 'die überlebende Frau so lange sie ledig blieb'='in ligia viduitate sua.'

can alienate to another. For all this, neither before nor after the birth of a child, is he conceived as being solely seised, or as having a right to be solely seised, of that land so long as the marriage endures. Unless the seisin is with some third person, then 'husband and wife are seised in right of the wife.' If the seisin is being wrongfully withheld, then the action for the recovery of the land is given to the husband and the wife; neither of them can sue without the other[1]. And so it is against the husband and the wife that an action must be brought to recover land which they are holding in the right of the wife. An instructive little doubt has occurred as to what a husband should do in such a case if he is sued without his wife. Some hold that he should plead in abatement of the writ, and this opinion wins the day; but others hold, and the common practice has been, that he should vouch his wife as a warrantor, thus treating her as an independent person whose voice should be heard[2]. When we read that a husband vouches his wife to warranty, and that she comes and warrants him and pleads her title, we must take our record to mean what it says:—the married woman appears in court and speaks there (though perhaps through the mouth of a professional pleader) words which are fateful for herself, her husband and her land. [p. 406] When the wife does not appear in person she appears by attorney. She is at liberty to appoint her husband to be her attorney; but she is at liberty to appoint a third person, and, as the appointment is made in court, she has a chance of acting freely. But further—amazing though this may seem to us—the husband sometimes appoints his wife to be his attorney[3].

Husband and wife in court.

In litigation concerning the wife's land it was essential that both husband and wife should be before the court in person or by attorney, and the default of one of them was equivalent to the default of both[4]. A statute of 1285 enabled a wife whose husband was making default, to raise her voice in court and plead in defence of her title[5]. At a much earlier time we see

[1] Bracton, f. 429 b.

[2] Bracton, f. 381, 416; Fleta, p. 408; Select Civil Pleas, pl. 233; Note Book, pl. 124, 1302, 1466, 1508, 1510.

[3] Select Civil Pleas, pl. 155; Note Book, pl. 342, 1361, 1507.

[4] Bracton, f. 370; Fleta, p. 399.

[5] Stat. West. II. c. 3; Second Institute, 341.

that royal equity, at least when stimulated by money, is capable of protecting a woman against the fraudulent default of her husband. In 1210 Henry brings an action for land against Nicholas and his wife Hawise. Nicholas does not appear; but Hawise does and explains Nicholas's default by saying that he is colluding with, and has received money from, Henry, and that she is thus being cheated out of her inheritance. King John moved by pity and by the advice of his council allowed her to put herself upon a grand assize, and it is but fair to the memory of that prince to add that the sums offered to him by both sides were equal[1]. In 1210 therefore it was a fraud for a husband to alienate his wife's lands under cover of litigation, and, if there was to be a collusive use of litigious processes, the husband might meet his match, for he would lose possession of her land if in an action against him and her for its recovery she would neither appear nor appoint an attorney[2].

Husband's rights in wife's land.

That the husband has a right to exclude the wife from the enjoyment of her land would not have been admitted. If he does this, she has no action in the lay court. None is necessary; she will have recourse to the ecclesiastical court, which is only too ready to regulate the most intimate relations between [p. 407] married people. When she has obtained a sentence directing her husband to receive and treat her as his wife, the king's court, says Bracton, will know how to provide that she shall share the benefit of her tenement[3]. It will keep the husband in gaol until he obeys the sentence of the church; in John's day a man is in gaol for 'contemning' his wife[4]. In this respect there seems to be equality before the law. If the wife drives the husband out of her tenement, or even out of his tenement, it seems very doubtful whether he has an action in the lay court, unless the wife has eloped with an adulterer[5].

Alienation of wife's land.

But it may be said that the husband can deprive his wife of the enjoyment of her land by alienating it, and that his alienation of it will be valid, at least so long as the marriage

[1] Placit. Abbrev. 63, 66 (Staff.).

[2] Y. B. 20-21 Edw. I. p. 99.

[3] Bracton, f. 166 b: 'et si opus fuerit dominus Rex ad supplicationem ordinarii in tenemento communicando quod suum fuerit exequatur.'

[4] Placit. Abbrev. p. 67: 'captus pro contumacia sua eo quod contempsit uxorem suam.'

[5] Fleta, p. 217, § 10; Britton, i. 280, 297, 315, 328. Britton supposes a writ brought by the husband and wife against the wife, in which John and Peronel are said to complain that the said Peronel has disseised the said Peronel.

lasts. That is so, but we doubt whether during the earlier part of the thirteenth century such an alienation by the husband was regarded as rightful. During the marriage she could not complain of it. From this, however, it does not follow that he was conceived as conveying to a purchaser or donee rights which belonged to him. As a matter of fact transactions in which a husband purports to convey rights which will endure only so long as the marriage endures, or only so long as he is alive, are rare. What a husband attempts to do often enough is to make a feoffment in fee simple. A writ specially designed to enable the widow to recover the land thus alienated is both in England and in Normandy one of the oldest writs, and is in constant use[1].

Conveyance by husband and wife.

But we must look at this matter of alienation more closely. The common law of a later day holds (1) that the husband by himself can give an estate which will endure during the marriage, or (if a child has been born) during the whole of his life; (2) that the wife without her husband can not alienate at all; (3) that husband and wife together can make no alienation which the husband could not have made without the wife, unless indeed they have recourse to a fine; (4) that the one effectual [p. 408] means by which the fee simple can be alienated is a fine to which both husband and wife are parties, and to which the wife has in court given her assent. If, however, we go back a little way, we shall see married women professing to convey land by feoffment with their husbands' consent; they have seals and they set their seals to charters of donation; the feoffees are religious houses and will have been careful that all legal forms were duly observed. A good and a late instance is this:—In 1223 Isabella wife of Geoffrey de Longchamp in the full county court of Gloucester executes a deed stating how with the consent of her husband, who does not execute this deed, she has given certain lands to Winchcombe Abbey. Then 'for the greater security of our house' Geoffrey at the same session of the shire-moot executes another deed. He has confirmed his wife's gift and, so far as in him lies, he grants and quit-claims (but does not give) the land to the abbey[2]. Very often when we have before us a twelfth century charter it is

[1] What is practically the writ of entry *cui in vita* appears at an early date. Rot. Cur. Reg. (Palgrave) i. 359; ii. 65, 168, 196.

[2] Winchcombe Landboc, i. 161–3.

difficult to say whether the land that is being given is the land of the husband or of the wife. Sometimes the husband gives with the consent of the wife; sometimes both husband and wife make the gift. Perhaps when the husband is put before us as the donor, the land is generally his, and his wife's consent is obtained in order that she may not hereafter claim dower in that land. Perhaps when the deed puts both the parties on an equality and represents both as giving or quit-claiming, the land is generally the wife's. But to both these rules there seem to be exceptions. At any rate throughout the twelfth century and into the thirteenth we habitually find married women professing to do what according to the law of a later time they could not have done effectually. Without any fine, the wife joins in or consents to her husband's disposition of her lands and of his lands. Often the price, if price there be, is said to be paid to the husband and wife jointly; sometimes a large payment is made to the husband, a small payment to the wife[1].

[p. 409] Then we seem to see the growth of a fear that the participation of a married woman in a conveyance by her husband may be of no avail, and that should she become a widow she will dispute its validity on the ground that while her husband lived she had no will of her own. We perhaps see this when a purchaser, besides paying a substantial sum to the husband, pays a trifling sum to the wife, gives her a new gown, a brooch, a ring or the like[2]. We see it yet more clearly when she is made to pledge her faith that, should she outlive her husband, she will not dispute the deed, or when she subjects

The w fine.

[1] Examples are abundant. A few references must suffice. (1) Conveyances by husband with wife's consent: Cart. Glouc. i. 156, 167, 175, 185 (she seals), 187 (she seals), 192 (she seals), 233, 246, 319, 335 (wife's inheritance), 353, 367, 375; ii. 28, 83, 118, 162, 163, 195, 243, 252, 291 (wife's land; she seals): Cart. Riev. pp. 44, 45, 48, 53, 55, 60, 79, 84, 123 (wife's marriage portion): Cart. Rams. i. 139, 159, 160 (she seals). (2) Conveyances by husband and wife: Cart. Glouc. i. 307, 344, 378 (wife's land); ii. 48 (wife's land), 82 (wife's land), 113: Cart. Riev. pp. 62, 78, 82, 83, 93 (wife's land), 99, 114 (wife's land), 131, 235, 236, 240 (she seals), 251: Madox, Formulare, pp. 190 (joint purchase), 260, 279 (land purchased by husband).

[2] See *e.g.* Cart. Glouc. i. 378, where the husband has seven marks and the wife a cloak worth five shillings; Cart. Riev. p. 56, fifteen marks to husband and wife and a gold ring to wife; Madox, Formulare, p. 276, a mark to the husband and a buckle worth twelve pence to the wife; Reg. Malm. ii. 48, the like.

herself to the coercion of the church in case she shall strive to undo the conveyance[1]. We see it also when a charter declares that money has been paid to the husband or the husband and wife 'in their urgent necessity[2].' There is much to suggest that the law in time past has upheld dispositions by the husband of the wife's land if he was driven to them by want. Even in Bracton's day the court will not be inclined to inquire into the reality of the wife's assent if proofs be given that the needs of the common household demanded the conveyance[3]. Another expedient has been to obtain in open court the wife's confession that she has conveyed her land or has assented to her husband's act, for by what she says in open court she will be bound. Late in Henry II.'s reign a wife sold a house to the Abbot of Winchcombe; two marks and two loads of wheat were paid to her and six pence were paid to each of her four children; with the consent of her husband she abjured the land in the full county court of Gloucester, and then when the king's justices [p. 410] came round in their eyre she went before them and once more abjured the land; her deed was witnessed by all the justices and the whole county[4]. That a married woman when she is conveying away her land may need some protection against the dominance of her husband's will is by no means a merely modern idea. Lombard law of the eighth century had required that the wife who was alienating her land should declare before two or three of her own kinsmen or before a judge that she had suffered no coercion, and her declaration was to be attested by a notary[5]. In Italy a regular practice of 'separate examination' had been established long before the time of which we are speaking[6]. We need not suppose that this Italian practice was

[1] Cart. Riev. p. 96; Reg. Malmesb. ii. 148, 240; Cart. Glouc. i. 304; Madox, Formul. pp. 85, 87.

[2] Cart. Glouc. i. 335–6; ii. 252; Cart. Burt. 48.

[3] Bracton, f. 331 b, 332. Note Book, pl. 294: action by widow for a shop in Winchester; plea, that she and her husband sold it in their great necessity and therefore that by the custom of the city she can not upset the sale. The *urgens necessitas* of our deeds seems to be the *echte Not* of German law. In some districts on the continent if the wife would not give her assent to a necessary sale of her land, the consent of the court would do as well.

[4] Winchcombe Landboc, i. 180. The date is fixed by the names of the justices. See Eyton, Itinerary of Henry II. p. 298.

[5] Leg. Luitprandi, c. 22 (M. G., Leges, vol. iv. pp. 117–8).

[6] This is the subject of a monograph: Rosin, Die Formvorschriften für die Veräusserungsgeschäfte der Frauen (Gierke, Untersuchungen, viii.).

transplanted into England; similar securities for the freedom of the wife are not unknown elsewhere, and the idea that the husband's guardianship of his wife is subject to and controlled by a superior guardianship exercised by her own kinsmen or by that guardian of all guardians, the king, may have come very naturally to our ancestors: it is not a very recondite idea. At any rate soon after Glanvill's day, so soon as the king's court was habitually sanctioning 'final concords,' it slowly became law that the fine levied in the king's court by husband and wife is the one process whereby the wife's land can be conveyed or her right to dower barred. The development of this rule seems to have been the outcome of judicial decisions rather than of statute or ordinance. In opposition to older and looser notions, Bracton held that a deed acknowledged before the court and enrolled on the plea roll was not fully effectual; nothing but the chirograph of a fine was safe[1].

[1] It has been usual to attribute the efficiency of the fine in these cases to the fictitious litigation of which it is the outcome, and to regard the 'separate examination' of the married woman as an afterthought. We do not think that this correctly represents the historical order of ideas. The married woman can with her husband's concurrence convey her land; but, except perhaps in case of urgent necessity, it is requisite that there should be some proof of her free action. This is secured by requiring that she shall acknowledge her gift in court. Meanwhile for other reasons the conveyance in court which purchasers wish to have in order that they may enjoy the king's preclusive ban (see above, p. 101) has taken the form of a 'fine.' Therefore the proper conveyance for a wife is a fine. Bracton, f. 321 b, 322, hesitates as to the efficiency of an enrolled deed, attributes no mysterious influence to a fine, introduces no fiction, and will not say dogmatically that by a fine and only by a fine can the conveyance be effected. Thus it came about that in London and 'many other cities, boroughs and towns' (see Stat. 34–5 Hen. VIII. c. 22) a custom arose that the wife, with the husband's concurrence, could convey land without any fictitious litigation, by a deed enrolled, she having been 'separately examined' by the mayor or some other officer. For an early record of the London custom, see Liber Albus, i. 71. See also the Cinque Ports' Custumals: Lyon, Dover, ii. 307, 354. It is also to be remembered that the two systems of marital property law which are most closely related to the English, namely, the Scottish and the Norman, do not, to all seeming, know the 'fine' as the proper conveyance for the married woman. It is by no means unrecorded that the English wife when she has come into court will refuse her consent to the fine: Note Book, pl. 419; Northumberland Assize Rolls, p. 49. Nor is it unknown that a husband who has fraudulently levied a fine of his wife's land, by producing in court another woman who personated his wife, will have to answer his wife in an action of deceit and will be sent to gaol. See a remarkable record, Coram Rege Roll, Mich. 9–10 Edw. I. (No. 64) m. 46 d, *Adam de Clothale's case.* Adam is attached to answer the king and his (Adam's) wife for this deceit; the wife claims damages.

The husband as guardian.

The doctrine that the husband has for his own behoof a definite 'estate' in the land is one which loses its sharp outlines as we trace it into our earliest records. His right begins to look like a guardianship, though of course a guardianship profitable to the guardian, as all guardianships are. Thus in pleadings we read—'He died seised of that land not in fee but as of the wardship which he had for his whole life by reason that he had a son by his wife[1]':—'And Alan confesses that the land was the inheritance of his wife and he had nothing in that land save by reason of the guardianship of his sons and the heirs of his wife[2]':—'He held that land with Isabel his wife, whose inheritance it was, so that he has nothing in the land save a guardianship of the daughters and heirs of Isabel who are under age[3].' The husband's right is brought under the category which covers the right of the feudal lord who is enjoying the land of a tenant's infant heir. The one right is vendible; so is the other. In England every right is apt to become vendible. [p. 411] [p. 412]

Tenancy by the curtesy.

We have said that so soon as a child is born of the marriage, which child would, if it lived long enough, be its mother's heir, the husband gains the right to hold the wife's land during the whole of his life. This right endures even though the wife dies leaving no issue and the inheritance falls to one of her collateral kinsmen; it endures even though the husband marries a second time. This right bears two curious names. The husband becomes tenant 'by the law of England' and tenant 'by the curtesy of England.' The latter phrase seems to be much the newer of the two. We do not read it in Latin records; it seems to make its first appearance in the French Year Books of Edward I.'s age[4]. An ingenious modern theory would teach us that curtesy or *curialitas* 'was understood to signify rather an attendance upon the lord's *court* or *curtis* (that is, being his vassal or tenant,) than to denote any

[1] Rot. Cur. Regis (Palgrave), ii. 65: 'utrum obiit saisitus ut de feodo an ut de warda quam habuit in tota vita sua occasione quod de ea habuit fil[ium] ut dicitur.' Ibid. 196: 'utrum idem L. obiit saisitus ut de feodo an ut de warda quam inde habuit occasione quod de ea habuit fil[ium].' Placit. Abbrev. p. 30 (Salop).

[2] Note Book, pl. 1771.

[3] Note Book, pl. 1774.

[4] Y. B. 20–1 Edw. I. 39: 'le baron tendra le heritage sa femme par la corteyse dengleterre.' Ibid. 55.

peculiar favour belonging to this island. And therefore it is laid down[1] that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together[2].' This explanation seems more ingenious than satisfactory. The rule about homage that is here laid down flatly contradicts Glanvill's text, and it is with Glanvill, as the oldest representative of English feudal theory, that we have here to reckon. He says that a woman never does homage; he says that when an heiress is married—not when she has issue—her husband is bound to do homage[3]; he says that no homage is done for the wife's marriage portion (*maritagium*)[4], and yet of this marriage portion the husband on the birth of issue becomes tenant by the law of England[5]. Again, we have never seen in any record any suggestion that before issue had been born of the marriage the husband was not entitled and bound to do suit to the lord's court; nor can we easily suppose that the lord went without a suitor where there was a childless marriage. Lastly, we have never seen the word *curialitas* or *courtesie* used to signify a right or a duty of going to court, unless it is so used in the phrase that is before us. It is a common enough word, and means 'civility,' 'good-breeding,' 'a favour,' 'a concession.' [p. 413]

Tenan by the 'law o Engla

For some reason or another from Glanvill's day onwards our lawyers are always laying stress upon the Englishness (if we may use that term) of this right. They are always saying that the husband holds 'according to the custom of the kingdom'; and in Bracton's day 'tenant by the law of England' (*tenens per legem Angliae*) has become a well-established phrase with a technical meaning[6]. Now if we ask what other law the lawyers of 1200 can have had in their minds by way of contrast to the law of England, we must answer—The law of Normandy. It was still common that a rich heiress should have lands on both sides the sea. We look then to Norman law, and we see that it does know a right very like the curtesy of England; the two are so much alike that it is worth a lawyer's while to contrast them. The Norman husband if a child has been born is entitled to a veufeté (*viduitas*); but he loses it if he marries

[1] Lit. sec. 90; Co. Lit. 30, 67. [2] Blackstone, Comment. ii. 126.

[3] Glanvill, ix. 1. [4] Glanvill, ix. 2; vii. 18. [5] Glanvill, vii. 18.

[6] Note Book, pl. 266, 291, 319, 487, 917, 1182, 1686; Bracton, f. 438.

again[1]. It is we believe just to this difference that the English lawyers are pointing when they speak with emphasis of the law of England:—'He had children by reason of whom he claims to hold the land for his whole life according to the law and custom of the kingdom':—'According to the custom of the kingdom he ought to hold that land during his whole life[2].' Over and over again the words which restrict this law or custom to the kingdom are brought into close proximity with the words 'for his whole life.' A *viduitas* which endures beyond viduity—that is the specifically English peculiarity. Britton, who writes in French, does not yet speak of the curtesy of England, but he uses an almost equivalent phrase:—the husband, when issue has been born, holds by 'a specialty granted as law in England and Ireland[3].' It is a privilege, an exceptional rule of positive institution which can not be explained by general principles. Then, not many years after the first recorded appearance of the term 'curtesy,' the author of the Mirror asserts that this privilege was granted to husbands [p. 414] by the curtesy of Henry I.[4] No one will now trust the unsupported word of this apocryphal book, and the assertion about Henry I. may be idle enough; but we seem to be entitled to the inference that, very soon after it had become the fashion to call the husband 'tenant by the curtesy of England,' it was possible to explain this phrase by reference to some royal concession. And in truth an explanation of that kind may seem to us reasonable enough.

The law of England a courteous law.

In the first place, the right given to the husband by English law is a large, a liberal right. It comprehends the wife's lands by whatever title she may have acquired them, whether by way of inheritance or by way of marriage portion, or by any other way; it endures though there is no longer any issue of the marriage in existence; it endures though the husband has married another wife; it is given to a second husband, who can thereby keep out a son of the first marriage from his inheritance. About these points there has been

[1] Somma, p. 307; Ancienne coutume, c. 119 (ed. de Gruchy, p. 301). In later days the husband continues to enjoy a third of the land after a second marriage: Reformed Custom, c. 382 (Coutume de Normandie, ed. 1779, vol. i. p. 435). Brunner, Zeitschrift der Savigny-Stiftung, Germ. Abt. xvi. 98, thinks that the English rule is older than the Norman.

[2] Note Book, pl. 291, 487, 917, 1686.

[3] Britton, i. 220.

[4] Mirror (Seld. Soc.), p. 14.

controversy, but at every point the husband has been victorious. For example, in 1226 it was necessary to send a rescript to the Irish courts telling them that the second husband was to enjoy the land during his life, although there was in existence a child of full age by the first husband[1]. Some judges thought this an unreasonable extension of the right; but the king refused to legislate against it[2]. If we compare our law with its nearest of kin, we see a peculiar favour shown to the husband. Norman law deprives him of his right when he marries again; at any rate he must then give up two-thirds of the land. Scottish law gives him his 'curtesy' only in lands which his wife has inherited, not in lands which have been given to her[3]. The English lawyers know that their law is peculiar, believe that it has its origin in some 'specialty.' This being so, it is by no means unnatural that they should call it 'courteous,' or as we might say 'liberal,' law. They look at the matter from the husband's point of view; this is the popular point of view. [p. 415] They see the curtesy of England setting a limit to the most oppressive of the feudal rights, the right of wardship. This seems the core of the matter:—the husband keeps out the feudal lord though there is an infant heir. Here in England the husband keeps out the feudal lord even though the infant heir is not the husband's child. The lawyers can not explain this, and, to be frank, we can not explain it. In a country where the seignorial right of wardship has assumed its harshest form, it is an anomaly that the husband should keep out the lord from all the wife's lands. So long as the husband lives, the lord will enjoy neither wardship nor escheat. Surely we may call such a rule as this a gracious rule.

Origi curte

So much as to the name. As to the substance of the right, we have as much difficulty in accounting for its wide ambit as had the lawyers of the thirteenth century. Perhaps several ancient elements have been fused together. One of these, as already said, seems to be a profitable guardianship over wife and children. In our first plea rolls the husband is still spoken

[1] Rot. Pat. 11 Hen. III. pt. 1, m. 12 (Calendar of Irish Documents, i. p. 220).

[2] Bracton, f. 438; Note Book, pl. 487, 917, 1182, 1425, 1921, especially pl. 1182: 'Dominus Rex non vult mutare consuetudinem Angliae usitatam et optentam a multis retrotemporibus.'

[3] Fraser, Law of Husband and Wife (2nd ed.), p. 1123.

of as having but a *custodia* or a *warda* of the land. To this, so we think, points the requirement that a child capable of inheriting from the wife shall be born—born and heard to cry within the four walls. This quaint demand for a cry within the four walls is explained to us in Edward I.'s day as a demand for the testimony of males—the males who are not permitted to enter the chamber where the wife lies, but stand outside listening for the wail which will give the husband his curtesy[1]. In many systems of marital law the birth of a child, even though its speedy death follows, has important consequences for husband and wife; sometimes, for example, the 'community of goods' between husband and wife begins, not with the marriage, but with the birth of the firstborn. These rules will send back our thoughts to a time when the sterile wife may be divorced, and no marriage is stable until a child is born[2].

The widower's free bench.

In this context we must take into account a system which [p. 416] is in all probability at least as ancient as that of the common law. The gavelkind custom of Kent makes hardly any difference in this respect between husband and wife. The surviving spouse enjoys, so long as he or she remains single, one-half of the land of the dead spouse. This right, whether enjoyed by the widow or the widower, bears the name of 'free bench.' For that name also a feudal explanation has been found. The freehold suitors of the seignorial court are its free 'benchers,' and the surviving spouse is supposed to enjoy the right of representing in that court the land of the dead spouse. Granting that the suitors of a court are sometimes called its 'benchers,' we can not easily accept the proposed explanation. Outside Kent the term 'free bench' is far more commonly given to the right of the widow than to the right of the widower, and yet we can not believe that the widow sat as a bencher in the lord's court.

[1] Placit. Abbrev. p. 267: 'quia femina non admittitur ad aliquam inquisitionem faciendam in curia Regis, nec constare potest curiae utrum natus fuit vivus puer vel non, nisi visus esset a masculis vel auditurus [*corr.* auditus] clamare ab eisdem . . . . . eo quod non est permissum quod masculi intersint huiusmodi secretis.' It is just possible that the talk about the four walls is a relic of a different test of the infant's vitality. According to the ancient Alaman or Swabian law, a child is not reckoned to be born alive unless it can open its eyes and see the roof and the four walls. M. G., Leges, iii. 78, 115, 166.

[2] Brunner, Die Geburt eines lebenden Kindes, Zeitschrift der Savigny-Stiftung, Germ. Abt. xvi. 63 ff.

The bench in question was, we may guess, not a bench in court but a bench at the fireside[1]. The surviving spouse has in time past been allowed to remain in the house along with the children. In the days when families kept together, the right of the widower or widow to remain at the fireside may have borne a somewhat indefinite character. Especially in the case of the widower, there might be an element of guardianship in his [p. 417] right. A later age unravels the right. By way of 'free bench' the surviving spouse now has the enjoyment of one-half of the land until death or second marriage, whether there has ever been a child of the marriage or no. But in addition to this, he or she will very possibly be entitled to enjoy a profitable guardianship over the other half of the land. The law of socage land gives the wardship of the infant heirs of the dead spouse to the surviving spouse. In Kent it must have been common enough to see a widower or a widow enjoying the whole of the land left behind by the dead wife or husband[2].

Feuds and curtesy

Probably it is upon some such scheme as this that feudalism has played. Here in England it destroys the equality between husband and wife. On the husband's death, the widow is allowed by way of dower one-third of his land at the utmost. This she may enjoy even though she marries again, for it is not given to her as to a mother who will keep a home for her husband's heirs. The guardianship is taken from her and falls to the lord. But it is hard to take from a man the guardianship of his own children. Even the law of England is too 'courteous' for that. The widow can not do military service, the widower can. The law of military fees gives him more, much more, than ancient custom would give him. Even in the first years of the thirteenth century it is still hesitating as to how far his rights are a guardianship, and the fact that to the last he will lose the land on his wife's death unless a child has been born

[1] Observe how Bracton, f. 97 b, introduces the term. He has been saying that, if there is more than one house, the wife is not to be endowed of the capital messuage. Even if there is but one house, another should be erected for her on the demesne land. If however this cannot be done 'tunc de necessitate recurrendum erit ad capitale messuagium, sicut in burgagiis ad liberum bancum.' Our 'free bench' seems to have its origin in what German writers call the *Beisitz* of the widow (see Schröder, D. R. G. 312), her right to remain in the house along with the heirs, a right which in course of time generally develops into a right to the exclusive enjoyment of some share of her husband's property.

[2] Valuable materials are collected in Robinson, Gavelkind, Bk. II. ch. i.

seems to show that at one time the element of guardianship had been prominent. But the right is soon extended beyond any limits that can be easily explained. The forces which extend it seem to be the same as those which introduce our rigorous primogeniture. If possible, the fee must remain undivided. We can not, as the Kentish gavelkinders do, give the widower a half of the wife's land. If he has the half, he must have the whole. What our law is striving for at the end of the twelfth century is the utmost simplicity. When once it has established—this is the main point—that the husband can successfully oppose the lord's claim to a wardship of the wife's infant heir, it makes a short cut through many difficulties and gives the husband, so soon as a child is born, an estate for life in the wife's land, an estate for his whole life in the whole land. The lawyers themselves can not defend this exaggeration of the right; it is an anomalous 'specialty,' a concession to husbands [p. 418] made by the courteous, but hasty, law of England[1].

Dower.

The wife's right of dower is attributed by the lawyers to a gift made by the bridegroom to the bride at the church door; but, says Glanvill, every man is bound both by ecclesiastical and by temporal law to endow his spouse at the time of the espousals[2]. He may endow her with certain specific lands, and thus constitute a *dos nominata*; but this *dos nominata* must not exceed one-third of his lands. If he names no particular lands, he is understood to endow her with one-third of the lands of which he is seised at the time of the espousals; this is a reasonable dower (*dos rationabilis*); of lands which come to him

[1] Glanvill, vii. 18, mentions the husband's right only in connexion with the wife's marriage portion. The so-called Statute *de tenentibus per legem Angliae* (Statutes, vol. i. p. 220), which is merely a bit of Glanvill's text and has no claim to statutory authority, does the like. We can not argue from this that the widower of Glanvill's day had no right in the lands which his wife had inherited. Rather, so it seems, Glanvill takes this for granted and puts a more extreme case. What he is concerned to say is that a husband has a right to hold *even* his wife's marriage portion if once a child of the marriage has been born, and to hold it for his whole life. The second husband (this is a climax) can hold the *maritagium* given at the first marriage even though a child of the first marriage is living. In this matter we may argue *a fortiori* from the case of the marriage portion, which has been destined to revert on a failure of the issue of the wife, to the case of the wife's inherited land. This part of Glanvill's text passed into the Regiam Maiestatem (ii. 53). Nevertheless in recent times it is only of lands inherited by the wife, not of lands given to her, that the Scottish law concedes curtesy.

[2] Glanvill, vi. 1; Bracton, f. 92.

during the marriage she can claim nothing, unless he used (as it was lawful for him to use) words which would comprise them. If the bride accepts a *dos nominata*, she can when widowed claim that and no more. Sometimes a dower of chattels or money will be constituted, and, if the bride is content to be married with a dower of this kind, she will have no right to any share of her husband's land[1].

The maxi dowe

During the thirteenth century the widow's right was extended in one direction. Some words interpolated in 1217 into the Great Charter say that there shall be assigned as her dower the third part of all the land of her husband which was his [not at the time of the marriage, but] in his lifetime, [p. 419] unless she was endowed of less at the church door[2]. Bracton's text and decisions of Bracton's time suggest that this phrase was loosely used and without any intention of changing the law laid down by Glanvill[3]. A little later, perhaps in consequence of attention directed to the words of the charter, the law was that, unless she had accepted less at the church door, the widow was entitled to a third of the lands of which the husband was seised at any time during the marriage[4]. At a yet later time it became law that she might be entitled to more, but could not be entitled to less, than this her 'common law dower.' The husband at the church door might even declare that she was to hold the whole of his lands for her dower, while the wife on the other hand, so soon as she had become a widow, might reject the *dos nominata* and claim those rights which the common law gave her[5]. This change however did not take place in the age that is before us. In the thirteenth century a third of the husband's land is the maximum dower that can be claimed in lands held by military service, and from the frequency with which a *dos nominata* is mentioned, we should gather that many widows of high station had to be content with less. On the other hand, it is common to find that the socager's widow claims a half, and this without relying on any peculiar local

[1] Glanvill, vi. 1, 2.

[2] Charter, 1217, c. 7. The way in which this clause was modified is best seen in Bémont, Chartes, p. 50. See also Blackstone, Comm. ii. 134.

[3] Bracton, f. 92, 93; Note Book, pl. 970, 1531.

[4] Nichols, Britton, i. p. xli; ii. 242.

[5] Littleton, secs. 39, 41. See the interesting note from a MS. of Britton, in Nichols, Britton, ii. 236.

custom[1]; indeed it would seem that at one time it was almost common law that the widow is to enjoy a moiety of the land that her husband held in socage[2]. But in this case as in other cases the aristocratic usage prevails; uniformity is secured, and dower of a moiety can only be claimed by virtue of a custom alleged and proved[3].

Assignment of dower

The common law allows the widow to enjoy the land during [p. 420] her whole life, and this right she can alienate to another. On the other hand, the gavelkind custom takes, and it is believed that many socage and burgage customs took, her dower from her if she married again or if she was guilty of unchastity, at all events if a bastard child was born[4]. On the death of her husband, if she had a *dos nominata*, she could at once enter on the lands that it comprised; otherwise she had to wait until her dower was 'assigned' and set out for her by metes and bounds. To 'assign' the widow's dower was the duty of the heir or of his guardian: a duty to be performed within forty days after the husband's death. During these forty days the widow had a right, sanctioned by the Great Charter, to remain in the principal house and to be maintained at the cost of the as yet undivided property; this right was known as her quarantine[5]. A fair third of the land was to be assigned to her, and she was entitled to 'a dower house' but not to the capital messuage, though if her husband held but a town house she had a right to one-third, or by custom one-half, of it, as representing her 'free bench[6].'

Wife's rights during the marriage.

The nature of the wife's right while the marriage endures is not very easily described, for we seem to see the law hesitating. We must distinguish between the 'named' and the 'unnamed'

[1] Note Book, pl. 7 (Hereford), 124 (Norfolk), 253 (Kent), 459 (town of Nottingham), 475 (Hertford), 500 (Norfolk), 577 (town of Oxford), 591 (Norfolk), 622 (Kent), 623 (Cambridge), 642 (Norfolk, Suffolk), 721 (Norfolk), 758 (Essex), 767 (Kent), 1080 (town of Worcester), 1668 (Suffolk), 1843 (Norfolk). If we exclude the boroughs and Kent, it is chiefly from the old home of the *sokemanni* that our instances come.

[2] Bracton, f. 93. Note Book, pl. 758: 'Dicit eciam quod uxores hominum tenencium de eodem manerio recuperant et habent nomine dotis semper terciam partem sicut de libero feodo et non medietatem sicut de soccagio.'

[3] Littleton, sec. 37.

[4] The early cases are collected in Robinson, Gavelkind, Bk. II. ch. ii.

[5] Charter, 1215–6–7, c. 7; Bracton, f. 96. Our 'quarantine' corresponds to the German *Dreissigste*, the widow's month.

[6] Bracton, f. 97 b.

dower. In Bracton's day if a named dower has been constituted at the church door, the woman's rights from that moment forward seem to be true proprietary rights. If her husband alienates the land without her consent, or even with her consent if she has not joined in a final concord levied before the king's justices, then (though so long as the marriage endures she can make no complaint) she can when her husband is dead recover that land from any one into whose hands it has come. The tenant whom she sues will immediately or mediately vouch her husband's heir, and he in all probability will be bound to warrant his ancestor's gift, and, failing to satisfy this duty, will have to make compensation [p. 421] to the evicted tenant out of the ancestor's other lands[1]. But this is a matter between the evicted tenant and the heir; the dowager can evict the tenant; she is entitled to the very lands that were set apart for her at the church door. If, however, she has to rely, not upon a specific, but upon a general endowment, the case stands otherwise. She demands from her husband's feoffee one-third of the land (we will call it Blackacre) that he holds under the feoffment. The feoffee vouches the heir, and the widow is bound to bring the heir before the court, for the heir is the warrantor of the widow's dower. The heir, we will suppose, has no defence to set up against the widow's claim; he can not say, for example, that she is already sufficiently endowed. Now the widow is not precisely entitled to a third of Blackacre; she is entitled to a third of her husband's lands. If therefore the heir confesses that other lands have come to him out of which he can sufficiently endow her, the feoffee will keep Blackacre and she will have judgment against the heir[2]. On the other hand, if the heir has no other lands, the widow will recover a third of Blackacre from the feoffee, and the feoffee will have judgment against the heir; when the widow dies, the feoffee will once more get back her third of Blackacre[3]. The unspecified dower is therefore treated as a charge on all the husband's lands, a charge that ought to be satisfied primarily out of those lands which descend to the heir, but yet one that can be enforced, if need be, against the husband's feoffees. If, however, we go back to Glanvill, we

[1] Bracton, f. 299 b; Fleta, p. 350-1; Note Book, pl. 156, 944, 1525, 1964.

[2] Bracton, f. 300; Note Book, pl. 1102, 1413.

[3] Note Book, pl. 571, 633, 1683.

shall apparently find him doubting whether, even in the case of a specified dower, a widow ought ever to attack her husband's feoffees, at all events if the heir has land out of which her claim can be satisfied[1].

Alienation by husband of his land.

Some hesitation about this matter was not unnatural, for our law was but slowly coming to a decision of the question whether and how the land burdened with dower can be effectually alienated during the marriage. The abundant charters of the twelfth century seem to show that, according to common opinion, the husband could not, as a general rule, bar the wife's right without her consent, that he could bar it with her consent, and that (though this may be less certain) her consent might be valid though not given in court[2]. Just in Glanvill's day the king's court was beginning to make a regular [p. 422] practice of receiving and sanctioning 'final concords,' and in the course of the thirteenth century the fine levied by husband and wife after a separate examination of the wife became the one conveyance by which dower could be barred. But, as already said, there had very possibly been in the past, some rule which dispensed with the wife's consent in cases of 'urgent necessity[3],' and when Glanvill was writing there may have been in the royal court, which was all for simplicity, some justices who, unable to define this 'urgent necessity,' were for increasing the husband's power and giving the wife no more than a right to a third of what descended to the heir. These same justices were beginning to refuse to the heir his ancient right of recalling the land alienated by his ancestor. Why should a wife be better treated than a son? It seems possible that the charter of 1217 when it secured to the widow a third part of those lands that the husband held 'in his lifetime,' was a protest against a doctrine which was in advance of the age. The common law of dower remained for centuries an impediment to the free alienation of land; but to make land alienable at the cost of old family rights was the endeavour of the justices who sat in the king's court at the end of the twelfth century. In some boroughs, notably in Lincoln, it was law in Bracton's day that the widow could only claim dower out of lands of which her husband died seised. In York her claim for dower was

[1] Glanvill, vi. 3.

[2] References to a few of these charters are given above on p. 411.

[3] See above, p. 412.

barred by the lapse of year and day from her husband's death[1].

The husband completely represents all his lands in court, even though a 'named dower' has been constituted in them. He sues and is sued without his wife. This enables him at times to defeat his wife's claims by means of collusive actions; but the court in Bracton's day was doing what it could to suppress this fraud, for fraud it was[2], and a statute of 1285 seconded its efforts[3].

The husban litigati

Dower is set before us by our text writers, not as a provision which the law makes for the widow, but as a provision made by [p. 423] the husband or bridegroom at the time of the marriage[4]. This treatment of it is inevitable. For one thing, there will be no dower unless the marriage is solemnized at the church door, and, as we have seen above, there well may be a valid marriage that has not been solemnized at all. For another thing, the amount of the dower is not fixed immediately by the law; the law only fixes a maximum; the husband says what dower the wife shall have, and this may be a matter of bargain between the spouses, their parents and guardians. Nevertheless we should probably go wrong if we drew the inference that dower is a new thing or that men have as a general rule been free to marry without constituting a dower. The feudal movement and the extension of feudal language have given an air of novelty to an old institution. We can not here enter on vexed questions of remote history about the various provisions made for wives and widows under the sway of Germanic law, about the perplexing words of Tacitus[5], about the relation of the dower of later times to the bride price on the one hand, and on the other to that ancient 'morning gift' which appears in every country where the German sets foot. It must be enough that very generally the widow obtains in course of time a right to

Dower a gift.

[1] Bracton, f. 309; Note Book, pl. 1889. In Scotland it became law that the husband by conveyance *inter vivos* could deprive the wife of her terce; also the Scottish wife, without any proceeding similar to a fine, might during the marriage renounce her terce: Fraser, Husband and Wife (1878), p. 1110.

[2] Bracton, f. 310.

[3] Stat. Westm. II. c. 4; Second Institute, 347.

[4] The contrary opinion had begun to prevail early in Edward II.'s day; see Nichols, Britton, ii. 236: 'and because usage of dower is become law, a wife is sufficiently endowed though her husband say nothing.'

[5] Germania, c. 18.

enjoy for her life some aliquot share, a fourth, a third, a half, of her husband's property, and this right very often becomes during the marriage a charge on the husband's land, of which he can not get rid without her consent. A less determinate right to remain at the fireside and enjoy a 'free bench' gives way to a more definite and, if the word be allowed, more individualistic provision[1]. The church, in her endeavour to bring marriages under her sway, took over from ancient custom the formula by which a dower was constituted and made it part of her ritual. Thus even our *dos rationabilis* or 'common law dower' can easily be represented as the result of the bridegroom's bounty. The wife is endowed, because the husband has said at the church door that he endows her.

Dower and the church.

There seems, however, to be no sufficient reason for supposing that the right is of ecclesiastical origin[2]. At all events in some [p. 424] lands, the law of a remote age was compelled to repress, rather than to stimulate, the bridegroom's liberality[3]. This it did, partly perhaps in the interest of expectant heirs, partly in the interest of a militant state, which regarded the land as a fund for the support of warriors. But feudalism made against dower. If it is a concession that the dead man's *beneficium* should descend to his heir, it is a larger concession that a third of it should come to the hand of the widow. Here in England we have constantly to remember that the widow's right in a very common case comes into conflict with the claim of a lord who is entitled to a wardship. The widow of the sokeman or the Kentish gavelkinder is more liberally endowed than is the countess or the baron's lady, but her 'free bench' shows its ancient origin when she has to abandon it on a second marriage. Difficult as it is to construct a law of husband and wife for the days before the Conquest, we can hardly doubt that during a considerable space of time, the truly feudal age, the rights of wives and widows in the lands of their husbands were waning rather than waxing[4].

[1] Schröder, D. R. G. 312; Heusler, Institutionen, ii. 298, 326, 342.

[2] Maine, Ancient Law, ch. vii., ascribes the provision for widows to the exertions of the church.

[3] So among the Lombards and West Goths, Schröder, D. R. G. 305.

[4] Essays in A.-S. Law, 172–9. Beaumanoir, vol. i. p. 216, says that the general French law that a widow should enjoy as dower half the land that her husband had at the time of the marriage, had its origin in an ordinance of 'the good King Philip who reigned in the year 1214.' Before that time the widow only took what had been named at the time of the marriage. He adds the formula which in old times the priest had put into the bridegroom's mouth.—'Du doaire qui est devisés entre mes amis et les tiens, te deu.' It is probable that a similar form had been used in England. We must leave it to students of English liturgies to say at what time the vague words 'with all my worldly chattel,' or the like, made their way into our marriage service; but so far as we have observed they only appear in an age which has settled that 'common law dower' is independent of the wills of the parties and springs from the mere fact of marriage. Cf. Blackstone, Comment. ii. 134.

In manorial extents it is common to find a widow as the tenant of a complete villein tenement, and there seems to be much evidence of a general usage which allowed her to enjoy the whole of her husband's lands[1]. Where the lords are [p. 425] insisting on impartible succession, such a usage is by no means unnatural. In what is regarded as the normal case, the man who leaves a widow leaves infant children, and the widow is the member of the family most competent to become the lord's tenant. In a few of our copyhold customs this right of the widow has become a regular right of inheritance; she appears as her husband's heir, an exception to the very general rule that there is no inheritance between husband and wife[2].

The villein's widow.

It is only when we turn from lands to chattels that we come upon the most distinctive feature of our marital law. The marriage transfers the ownership of the bride's chattels to the husband, and whatever chattels come to the wife during the marriage belong to the husband:—these are the main rules of our fully developed common law, and at first sight we may be disposed to believe that more special rules about 'choses in action,' 'chattels real' and 'paraphernalia' are exceptional and of an origin which must in this context be called modern. However, if we patiently examine the records of the thirteenth century, we may be persuaded that there was an age in which our law had not decisively made up its mind against a community of chattels between husband and wife. We see rules which, had our lawyers so pleased, might have been represented as the outcome of this community.

The chattels husband and wif

We must begin by looking at what happens on the dissolution of the marriage by the death of one of the parties, for

The ger of a con munity.

[1] Thus in Cart. Rams. it is the widow who pays the heriot: 'relicta eius si ipsum supervixerit, dabit pro herieto quinque solidos, et erit ab omni opere quieta per triginta dies' (i. 312). Select Pleas in Manorial Courts (Selden Soc.), pp. 44, 173.

[2] The vast manor of Taunton is the classical example; Elton, Origins of English History (2nd ed.), p. 189.

experience seems to show that the fate of the chattels at that moment is apt to exercise a retroactive influence on the theory that the law will have as to the state of things that has existed during the marriage. How much is secured for a widow, how much for a widower?—such questions as these are of practical importance to thousands of men and women. These answered, it remains for the lawyer to explain the answers; and he often has a choice between more than one explanation.

Husband's death. The husband dies first. We have seen that in the thirteenth century a very general usage, if it is not the common law of England, assures to the wife a half, or if there is a child alive, a third of the chattels. By his will the husband can only give away his share, 'the dead's part.' Of this enough has been said[1]. [p. 426]

Wife's death. The wife dies first. Has she been able to make a will? Bracton says that a woman who is under the power of a husband can not make a will without the consent of her husband. This is so for the sake of seemliness (*propter honestatem*). Nevertheless, he adds, it is sometimes received as law that she can make a will of that reasonable part which would have been hers if she had survived her husband, and more especially can she dispose of things that are given to her as ornaments, which things may be called her very own (*sua propria*), as for instance clothes and jewels[2]. From this we might gather that in Bracton's day it was by no means unknown that a husband would suffer a wife to dispose by will, not merely of the ornaments of her person, but of an aliquot share, a third or a half, of that mass of chattels which they had been enjoying in common. We believe that such wills were frequently made. So soon as we begin to get any large number of testamentary documents, we find among them wills of married women such as Bracton has described[3]. Four, for example, are proved at York in the year 1346[4]. Thus, Emma, who describes herself as the wife of William Paynot, makes her will and gives many specific and pecuniary legacies. Then she says, 'And the residue not bequeathed of my portion of goods I give to my husband William.' Her two sons and the vicar of the parish, not her husband, are her executors[5].

[1] See above, p. 348.

[2] Bracton, f. 60 b.

[3] Early instances: Nicolas, Testamenta Vetusta, 45; Note Book, pl. 550.

[4] Testamenta Eborac. i. pp. 21, 33, 36.

[5] Ibid. p. 36. Later instances, ibid. pp. 70, 142, 146, 240, 258, 280, 281, 282, 288, 290, 291, 338, 353.

The v will.

Now when we see a husband permitting his wife to give him by her will specific and pecuniary legacies and an aliquot share of his own goods, we can not but feel that, in his opinion and in common opinion, those goods are hardly his own. In the middle of the fourteenth century, however, the power of a married woman to make a will is set before us as a matter in dispute between the clergy and the laity. A provincial council held at London in 1342 denounced the sentence of excommunication against those who should impede the free testation 'of villeins and other persons of servile condition or of women, [p. 427] married or unmarried, or of their own wives[1].' Two years later the commons complained in parliament that the prelates had made a constitution sanctioning the testaments of wives and villeins, and that this was against reason[2]. No more was obtained from the king by way of response than that law and reason should be done[3]. The struggle was not yet ended; but about this matter the lay courts could have the last word. They could maintain the widower against the wife's executor unless the widower had consented to probate of the will, and slowly the spiritual tribunals were brought to a reluctant admission that the wife has only such testamentary power as her husband is pleased to allow her, and that his consent can be revoked at any time before he has suffered the will to be proved[4].

The ci law.

The ecclesiastical lawyers themselves had not been able to formulate a clear theory about this matter; they could find no 'community' in the Roman texts, and from those texts they

[1] Wilkins, Concilia, ii. 705. This reinforces a constitution of Abp. Boniface (A.D. 1261): 'Item statuimus ne quis alicuius solutae mulieris vel coniugatae, alienae vel propriae, impediat vel perturbet, seu impediri aut perturbari faciat seu procuret, iustam et consuetam testamenti liberam factionem.' See Appendix to Lyndwood, p. 20.

[2] Rot. Parl. ii. 149: 'et que neifs et femmes poent faire testament, quest contre reson.'

[3] Ibid. 150: 'le Roi voet qe ley et reson ent soient faites.'

[4] In the fifteenth century Lyndwood writes thus;—'Mirum est quod nostris diebus mariti nituntur uxores suas a testamenti factione impedire' (Provinciale, p. 173; c. *Statutum bonae*, gl. ad. v. *propriarum uxorum*). Also Broke (Abr. tit. *Devise*, pl. 34) cites a decision from so late a reign as Henry VIII.'s to prove that the husband can withdraw his consent at any time before probate is granted. But Lyndwood does not stand at the old point of view. He seems hardly to know whether the true doctrine would be that the wife can bequeath an aliquot share of goods that are held in common, or that she can bequeath paraphernalia.

began to borrow the inappropriate term *paraphernalia* to describe those goods which the wife can bequeath by her testament[1]. Even this word, however, was taken from them by the lay courts and turned to another purpose. It is not improbable that from of old the wife's clothes and ornaments had stood in a separate category apart from the general mass of chattels; that on the dissolution of the marriage she or her representatives had been able to subtract these from the [p. 428] general mass before it was divided into aliquot shares; and that similarly the husband or his representatives had been able to subtract his armour and other articles appropriate to males. Very ancient Germanic law knows special rules for the transmission of female attire; it passes from female to female[2]. This idea that the ornaments of the wife's person are specially her own seems to struggle for recognition in England[3]. In the end a small, but a very small, room is found for it. If the wife survives the husband, these things will not pass under his testament; the wife's claim upon them will prevail against his legatees, though it will not—except as regards her necessary clothing—prevail against his creditors. If she dies before him, they are his. Such are the 'paraphernalia' of our fully developed common law[4].

The husband's intestacy.

We have seen our old law securing to the widow an aliquot share of chattels of which her husband can not deprive her by testamentary disposition, and we have seen it hesitating from century to century as to whether the wife can not dispose of her share by will if she dies in her husband's lifetime. One other point remains to be considered. What if the wife dies intestate? Will not the idea of a community compel us to hold that her share ought to pass, not to her husband, but to her children or other kinsmen by blood? That even this rule was not at one time very strange to our law we may infer from its appearance in the law of Scotland which was closely akin to

[1] Lyndwood, *loc. cit.*: 'Et sic patet quod licet in rebus dotalibus maritus sit dominus, non tamen sic in rebus paraphernalibus. Nam res paraphernales sunt propriae ipsius mulieris, etiam stante matrimonio, ut legitur et notatur C. *de pact. conven.* l. fi. et l. *hac. l.* [Cod. 5, 14, l. 8. 11] de quibus uxor libere testari potest, ut ibi innuitur.'

[2] Schröder, D. R. G. 300, 702.

[3] In the wills of married women it is common to find specific bequests of clothes and jewels.

[4] Blackstone, Comm. ii. 435.

the custom of the province of York. In Scotland until recent times the wife's third or half has, on her death intestate in her husband's lifetime, gone, not to him, but to her own kindred[1]. In the England of the thirteenth century, however, the question would have taken this shape: When the wife dies intestate, ought one-third, or perhaps one-half, of the chattels [p. 429] to be distributed for the good of her soul? It seems probable, though we can not prove, that the church answered this question in the affirmative; but in this instance she would have had to play an unpopular part. In her own interest and the interest of souls she had destroyed the old rules of intestate succession. The struggle on the wife's death would not be in England, as it might be elsewhere, a struggle between the husband and the blood kinsmen; it would be a struggle between the husband and the ordinary, in which the latter would have to demand a share of the goods that the husband had been enjoying, and this on the ground that the husband could not be trusted to do what was right for his wife's soul[2]. This is a point of some importance:—the clerical theory of intestacy was an impediment to the free development of a doctrine of 'community' between husband and wife; that theory could be pressed to a conclusion which husbands would feel to be a cruel absurdity. We can not, however, say that a doctrine of community rigorously requires that the surviving husband must give up to some third person the share of his intestate wife. The law of intestate succession may make the husband the one and only successor of his wife. Our English system might have taken the form, not unknown upon the continent, of a 'community of movables' with the husband as the wife's only intestate successor[3].

[1] Down to 1855 Scottish law held that on the wife's death a share of the chattels, 'the wife's share of the goods in communion' (which was one-third if there was a child, one-half if there was no child of the marriage) passed under the wife's will, or in case of intestacy, passed to her children, or, failing children, to her brothers, sisters and other next of kin. This was altered by Stat. 18–9 Vic. c. 23, sec. 6. Fraser, Husband and Wife (ed. 1878), p. 1528.

[2] This might be well illustrated by the law about mortuaries. In the thirteenth century the church on the death of the wife often claimed a beast from the surviving husband. See *e.g.* Cart. Rams. i. 294: 'maritus eliget primum, et persona secundum.' Abp. Langham, with a saving for local customs, had to withdraw this demand: 'si mulier viro superstite obierit, ad solutionem mortuarii minime coerceatur.' See Lyndwood, Provinciale, p. 19; c. *Statutum.* Lyndwood thought this concession unreasonable.

[3] Systems of community in which the surviving spouse is the sole heir of the

Rejection of community.

We are not contending that the law of England ever definitely recognized a community of goods between husband and wife. We have, however, seen many rules as to what takes place on the dissolution of the marriage which might easily have been explained as the outcome of such a community, had our temporal lawyers been free to consider and administer them. Unfortunately about the year 1200 they suffered the ecclesiastical courts to drive a wedge into the law of husband [p. 430] and wife which split it in twain. The lay lawyer had thenceforth no immediate concern with what would happen on the dissolution of the marriage. He had merely to look at the state of things that existed during the marriage. Looking at this, he saw only the husband's absolute power to deal with the chattels *inter vivos*. Had he been compelled to meditate upon the fate which would befall this mass of goods so soon as one of the spouses died, he might have come to a conclusion which his foreign brethren accepted, namely, that the existence of a community is by no means disproved by the absolute power of the husband, who is so long as the marriage endures 'the head of the community.' As it was, he saw only the present, not the future, the present unity of the mass, not its future division into shares. And so he said boldly that the whole mass belonged to the husband. 'It is adjudged that the wife has nothing of her own while her husband lives, and can make no purchase with money of her own[1].' 'She had and could have no chattel of her own while her husband lived[2].' 'Whatsoever is the wife's is the husband's, and the converse is not true[3].' 'The wife has no property in chattels during the life of her husband[4].' 'This demand supposes that the property in a chattel may be in the wife during the life of her husband, which the law does not allow[5].'

The rejection of a community and the separation of goods.

Once more we see the lawyers of the thirteenth century making a short cut. A short cut it is, as all will allow who have glanced at the many difficulties which the idea of a 'community' has to meet. When they gave to the husband

dead spouse (*Alleinerbrecht des überlebenden Ehegatten*) are sometimes found; and there are, or have been systems, in which the husband inherits the wife's share, but the wife does not inherit the husband's. See Stobbe, Privatrecht, iv. 243.

[1] Placit. Abbrev. p. 41, Northampton (4 John).
[2] Ibid. p. 96, Norf.
[3] Britton, i. 227.
[4] Y. B. 32–3 Edw. I. p. 186.
[5] Y. B. 33–5 Edw. I. p 313.

the ownership of the wife's chattels, they took an important step. Having taken it, they naturally set themselves against the wife's testamentary power (for how can Jane have a right to bequeath things that belong to John?) and they set themselves against every restraint of the husband's testamentary power (for why should not a man bequeath things that belong to him?), they secured for the widow nothing but the clothes upon her back. On the other hand, by basing the incapacities of the married woman rather upon the fact that she has no chattels of her own than upon the principle that she ought to [p. 431] be subject to her husband, they were leaving open the possibility that a third person should hold property upon trust for her and yet in no sort upon trust for him. In course of time this possibility became a reality, and by means of marriage settlements and courts of equity the English wife, if she belonged to the richer class, became singularly free from marital control. Modern statutes have extended this freedom to all wives. A law which was preeminently favourable to the husband has become a law that is preeminently favourable to the wife, and we do not adequately explain this result by saying that a harsh or unjust law is like to excite reaction; we ought also to say that if our modern law was to be produced, it was necessary that our medieval lawyers should reject that idea of community which came very naturally to the men of their race and of their age. We may affirm with some certainty that, had they set themselves to develop that idea, the resulting system would have taken a deep root and would have been a far stronger impediment to the 'emancipation of the married woman' than our own common law has been. Elsewhere we may see the community between husband and wife growing and thriving, resisting all the assaults of Romanism and triumphing in the modern codes. Long ago we chose our individualistic path; what its end will be we none of us know.

Payme to husb and wi

A few minor points have yet to be noted. It is long before our lawyers have it firmly in their minds that a payment of money to husband and wife must be exactly the same as a payment to the husband. When the husband and wife are disposing of her land by fine, it is common to record that money is paid, not to him, but to them[1]. Nor is it uncommon to record that a husband and wife pay money for a conveyance to

[1] Fines (ed. Hunter), i. pp. 37, 60, 82, 92, 95, etc.

them and their heirs, or to them and the heirs of the wife[1]. In early wills legacies to married women are often found; sometimes one legacy is given to the husband, another to the wife.

Conveyances to husband and wife.

Conveyances to husband and wife 'and their heirs' are plenteous[2]. According to the interpretation which would have been set upon such words at a later day, the husband and wife are thereby made 'tenants by entireties' in fee simple. A tenancy by entireties has been called 'the most intimate union of ownership known to the law[3].' It has been said that while [p. 432] two joint tenants are seised *per my et per tout*, the husband and wife in such a case are seised *per tout et non per my*. The one means by which the land can be alienated during the marriage is the fine levied by husband and wife; if no such alienation be made, the survivor will become sole tenant of the whole. During the marriage the husband has in the land no share of which he can dispose. Neither of the spouses has anything; both of them have all. Some of the numerous conveyances that are made in this form at an early time may not have been intended to have this effect[4], but the doctrine of the tenancy by entireties serves to show that an intimate 'community of marital conquests' was not very far from the minds of our lawyers[5].

The wife's contracts.

Another rule that grows dimmer as we trace it backwards is that which denies to the married woman all power of contracting a debt. In 1231 a woman was adjudged to pay a debt for goods bought and money borrowed by her while she was *coverte*; but stress was laid on the fact that she had quarrelled with her husband and was living apart from him[6]. In 1234 a divorced woman was sued for a debt contracted while the *de facto* marriage endured[7]. We may suspect that the treatment

[1] Fines (ed. Hunter), i. pp. 1, 2, 18, 23, 26, etc.

[2] Ibid. pp. 3, 18, 20, 23, 26, etc.

[3] Challis, Real Property (1892), p. 344.

[4] It may be doubted, for example, whether the scribe always saw the difference between 'to John and Joan his wife and their heirs' and 'to John and Joan his wife and the heirs of their two bodies begotten.' He might argue that the former gift is confined to those persons who are heirs of both John and Joan.

[5] Stobbe, Privatrecht, iv. p. 226. Some commentators have attempted to explain the continental community as a *condominium plurium in solidum*. One old writer says: 'sic utriusque coniugis bona confunduntur, ut quivis eorum totius patrimonii in solidum dominus sit.'

[6] Note Book, pl. 568.

[7] Note Book, pl. 830.

of the wife's promise as a mere nullity belongs to the age which has become quite certain that in no sense has the wife any chattels[1]. In some towns[2] the married woman who carried on a trade could be sued for a debt that she had contracted as a trader, and this custom may well be very ancient[3]. What, [p. 433] had our law taken a different turn, might have appeared as a carefully limited power of the wife to incur on behalf of the community small debts for household goods[4], appears here as her power to 'pledge her husband's credit' for necessaries. The little that we can read about this in our oldest reports suggests that the lawyers were already regarding it as a matter of agency[5]. If the husband starved or otherwise maltreated his wife, she could go to the spiritual court, and if he was obstinate the temporal arm would interfere. In 1224 a wife obtained a writ directing the sheriff to provide her with a sufficient maintenance out of the lands of a husband who had refused to behave as a husband should and been excommunicated[6].

The influence of seisin.

In order that the main import of our old law of husband and wife might be more plainly visible, we have as yet kept in the background an element which is constantly thrust upon our notice by our old books. All depends upon seisin or possession. The husband must obtain seisin of the wife's land during the coverture, otherwise when left a widower he will go without his curtesy. The wife is entitled to dower only out of the lands of which the husband is seised at some moment during the coverture. Even so the husband becomes the owner only of those chattels of the wife of which he obtains possession during the coverture. He can collect the debts due to his wife and give a good receipt for them; but, should he die before his

[1] Foreign systems, which agreed with the English as to the general outlines of the law which holds good while the marriage lasts, generally allowed that the wife could incur a debt which could be enforced against her so soon as she was a widow. Stobbe, *op. cit.* iv. 87.

[2] See *e.g.* Lyon, Dover, ii. 295. [3] Stobbe, iv. 89.

[4] Abroad there was sometimes a fixed pecuniary limit to this power; Stobbe iv. 88.

[5] Fitz. *Dette*, pl. 163 (Mich. 34 Edw. I.). This may possibly be the same case as Y. B. 33–5 Edw. I. p. 312. It is commented on in the famous *Manby v. Scott* (2 Smith's Leading Cases), a case which shows that the middle ages left behind them little law about this matter.

[6] Rot. Cl. 8 Hen. III. m. 8 (p. 592): 'qui excommunicatus est, ut dicitur, eo quod non vult ipsam lege maritali tractare.'

wife, any debt that he has not recovered will belong to her, not to his executors. Our lawyers seem hardly able to imagine that any right can come into being or be transferred unless there is a change of seisin or possession.

The personal relationship.

The relationship between husband and wife, in so far as it was merely personal, was more than sufficiently regulated by the ecclesiastical tribunals. To the canonist there was nothing so sacred that it might not be expressed in definite rules. The king's court would protect the life and limb of the married woman against her husband's savagery by punishing him if he [p. 434] killed or maimed her. If she went in fear of any violence exceeding a reasonable chastisement, he could be bound with sureties to keep the peace[1]; but she had no action against him, nor had he against her. If she killed him, that was petty treason.

Civil death of husband.

Of exceptional cases in which the 'disabilities of coverture' are wholly or partially removed though there is still a marriage, we as yet read very little. The church will not, at least as a general rule, permit a husband or wife to enter religion unless both of them are desirous of leaving the world; but occasionally we may see a woman suing for her land or for her dower and alleging that her husband is a monk[2]. In 1291 a case, which was treated as of great importance, decided that a wife whose husband had abjured the realm might sue for her land; after an elaborate search for precedents only one could be found[3].

§ 3. *Infancy and Guardianship.*

Paternal power in ancient times.

In the seventh century even the church was compelled to allow that in a case of necessity an English father might sell into slavery a son who was not yet seven years old. An older boy could not be sold without his consent. When he was

[1] Reg. Brev. Orig. f. 89. The husband's duty is thus expressed, 'quod ipse praefatam *A* bene et honeste tractabit et gubernabit, ac damnum vel malum aliquod eidem *A* de corpore suo, aliter quam ad virum suum ex causa regiminis et castigationis uxoris suae licite et rationabiliter pertinet, non faciet nec fieri procurabit.' The Norman Somma, p. 246, says that a husband may not put out his wife's eye nor break her arm, for that would not be correction.

[2] Note Book, pl. 455, 1139, 1594. Later law would not allow the wife her dower in this case: Co. Lit. 33 b; and this seems to go back as far as 32 Edw. I. Fitz. *Dowere*, 176.

[3] Rot. Parl. i. 66-7; Co. Lit. 133 a.

thirteen or fourteen years old he might sell himself[1]. From this we may gather that over his young children a father's power had been large; perhaps it had extended to the killing of a child who had not yet tasted food. It is by no means certain however that we ought to endow the English father with an enduring *patria potestas* over his full-grown sons, even when we are speaking of the days before the Conquest. On this point there have been many differences of opinion among [p. 435] those who have the best right to speak about early Germanic law[2].

The tutela wome

That women were subject to anything that ought to be called a perpetual tutelage we do not know. Young girls might be given in marriage—or even in a case of necessity sold as slaves—against their will; but for the female as well as for the male child there came a period of majority, and the Anglo-Saxon land-books show us women receiving and making gifts, making wills, bearing witness, and coming before the courts without the intervention of any guardians[3]. The maxim of our later law that a woman can never be outlawed—a maxim that can be found also in some Scandinavian codes—may point to a time when every woman was legally subjected to the *mund* of some man, but we can not say for certain that it was a part of the old English system[4]. It is probable that the woman's life was protected by a *wergild* at least as high as that of the man of equal rank; some of the folk-laws allow her a double *wergild*, provided that she does not fight—a possibility that is not to be ignored[5]. But both as regards offences committed by, and offences committed against women, there is no perfect harmony among the ancient laws of the various Germanic tribes, and we can not safely transplant a rule from one system to another. After the Norman Conquest the woman of full age who has no husband is in England a fully competent person for all the purposes of private law; she sues and is sued, makes feoffments, seals bonds, and all this without any guardian; yet many relics

[1] Theodore's Penitential (Haddan and Stubbs, iii. 202).

[2] Stobbe, Privatrecht, iv. 386; Schröder, D. R. G. 313; Heusler, Instit. ii. 435; Essays in A.-S. Law, 152-162.

[3] See *e.g.* Cod. Dipl. 82 (i. 98); 1019 (v. 58); 220 (i. 280); 323 (ii. 127); 328 (ii. 133); 499 (ii. 387 = Essays in A.-S. Law, p. 342) a woman's claim is asserted in court by a kinsman, but she does the swearing; 693 (iii. 292).

[4] Brunner, D. R. G. i. 172; Wilda, Strafrecht, 649.

[5] Brunner, D. R. G. ii. 614; Wilda, *op. cit.* 571, 648.

of a 'perpetual tutelage of women' were to be found on the continent in times near to our own[1].

Paternal power in cent. xiii.

If our English law at any time knew an enduring *patria potestas* which could be likened to the Roman, that time had passed away long before the days of Bracton. The law of the thirteenth century knew, as the law of the nineteenth knows, infancy or non-age as a condition which has many legal [p. 436] consequences; the infant is subject to special disabilities and enjoys special privileges; but the legal capacity of the infant is hardly, if at all, affected by the life or death of his father, and the man or woman who is of full age is in no sort subject to paternal power. Bracton, it is true, has copied about this matter some sentences from the Institutes which he ought not to have copied; but he soon forgets them, and we easily see that they belong to an alien system[2]. Our law knows no such thing as 'emancipation,' it merely knows an attainment of full age[3].

Infancy and majority.

There is more than one 'full age.' The young burgess is of full age when he can count money and measure cloth; the young sokeman when he is fifteen, the tenant by knight's service when he is twenty-one years old[4]. In past times boys and girls had soon attained full age; life was rude and there was not much to learn. That prolongation of the disabilities and privileges of infancy, which must have taken place sooner or later, has been hastened by the introduction of heavy armour. But here again we have a good instance of the manner in which the law for the gentry becomes English common law. The military tenant is kept in ward until he is twenty-one years old; the tenant in socage is out of ward six or seven years earlier. Gradually however the knightly majority is becoming the majority of the common law. We see this in Bracton's text: the tenant in socage has no guardian after he is fifteen

[1] Stobbe, Privatrecht, iv. 427; Viollet, Histoire du droit civil, 290.

[2] Bracton, f. 6. Bracton and Azo, p. 73.

[3] Bracton, f. 6 b: 'Item per emancipationem solvitur patria potestas; ut si quis filium suum forisfamiliaverit cum aliqua parte hereditatis suae, secundum quod antiquitus fieri solet.' This seems to be an allusion to Glanvill, vii. 3. In old times a forisfamiliated son, that is, one whom his father had enfeoffed, was excluded from the inheritance. This is already antiquated, yet Bracton can find nothing else to serve instead of an *emancipatio*.

[4] Glanvill, vii. 9; Bracton, f. 86 b; Fleta, p. 6; Britton, ii. 9. As to the phrase *cove et keye*, see Oxford Engl. Dict.

years old, but he still is for many purposes a minor; in particular, he need not answer to a writ of right[1], and it is doubtful whether, if he makes a feoffment, he may not be able to revoke it when he has attained what is by this time regarded as the normal full age, namely one and twenty years[2]. In later [p. 437] days our law drew various lines at various stages in a child's life; Coke tells us of the seven ages of a woman; but the only line of general importance is drawn at the age of one and twenty; and *infant*—the one technical word that we have as a contrast for the person of full age—stands equally well for the new-born babe and the youth who is in his twenty-first year[3].

Proprietary rights of infants

An infant may well have proprietary rights even though his father is still alive. Boys and girls often inherit land from their mothers or maternal kinsfolk. In such case the father will usually be holding the land for his life as 'tenant by the law of England,' but the fee will belong to the child. If an adverse claimant appears, the father ought not to represent the land in the consequent litigation; he will 'pray aid' of his child, or vouch his child to warranty, and the child will come before the court as an independent person[4]. What is more, there are cases in which the father will have no right at all in the land that his infant son has inherited; the wardship of that land will belong to some lord[5].

Infants seisin.

An infant may be enfeoffed, and this though his father is living; he may even be enfeoffed by his father. If the child is

[1] Bracton, f. 274 b.

[2] Bracton, f. 275 b. Apparently a local custom is required to validate such a feoffment. See the note on Britton, i. 9.

[3] Co. Lit. 78 b: 'A woman hath seven ages for severall purposes appointed to her by law: as, seven yeares for the lord to have aid *pur file marier*; nine yeares to deserve dower; twelve yeares to consent to marriage; until fourteene yeares to be in ward; fourteene yeares to be out of ward if she attained thereunto in the life of her ancestor; sixteene yeares for to tender her marriage if she were under the age of fourteene at the death of her ancestor; and one and twenty yeares to alienate her lands, goods and chattells.'

[4] Note Book, pl. 413, 1182; Placit. Abbrev. 267 (Westmoreland). In the earliest records an 'aid prayer' is hardly distinguished from a voucher.

[5] Bracton, f. 438. Husband and wife have a son; the wife dies; the son inherits from his maternal uncle lands held by knight's service. Here the husband will have no curtesy, for he obtained no seisin in his wife's lifetime. The feudal lord takes the land. But, at all events in later days, the father, not the lord, will have the wardship of the son's body and his marriage; Lit. sec. 114.

very young there may be some difficulty about enfeoffing him; for how can he take seisin? Bracton says that in such a case the donor must appoint a *curator* for the infant; he is troubled by the Roman doctrine that children of tender years can not acquire possession[1]. In 1233 we may see a father bent on enfeoffing a younger son who is but seven years old. He receives the child's homage in the hundred court, he takes the child to the land and makes the tenants do homage to their [p. 438] new lord, and then he commits the land to one Master Ralph who is to keep it 'to the use' of the boy. This is a good feoffment, and after the father's death is upheld against his heir[2]. In such transactions Bracton might find some warrant for his talk about curators and tutors; it is difficult, unless some third person intervenes, for a father to cease to possess in favour of a small boy who is living in his house; but infants occasionally acquire land by feoffment, and we hear nothing of curators or tutors. Any speculative objection that there may be against the attribution to infants of an *animus possidendi*, runs counter to English habits. Indubitably an infant can acquire seisin and be seised. When all goes well the infant heir acquires seisin and is seised; the guardian is not seised of the land; the ward is seised. Indubitably also an infant can acquire seisin wrongfully; an infant disseisor is a well-known person and must answer for his wrongful act. If an infant can acquire seisin by entry on a vacant tenement or by an ejectment, why should he not acquire it by delivery?

Infants as plaintiffs.

An infant can sue; he sues in his own proper person, for he can not appoint an attorney. He is not in any strict sense of the word 'represented' before the court by his guardian, even if he has one. Suppose, for example, that *A*, who held his land by knight's service of *M*, dies seised in fee leaving *B* an infant heir, and that *X* who has adverse claims takes possession of the vacant tenement; it is for *B*, not for *M*, to bring an action (assize of mort d'ancestor) against *X*. If *M* had been in possession as *B*'s guardian and had been ejected by *X* who claimed a better right to the guardianship, this would have been a different case; *M* would have had an action (*quare eiecit de custodia*) against *X*. The guardian has rights of his own which he can make good; the infant has rights of his own

[1] Bracton, f. 43 b; also ff. 12, 14 b. Compare Note Book, pl. 1226.

[2] Note Book, pl. 754. See also pl. 421.

which he can make good. Often enough it happens that an infant brings an action against the person who, according to the infant's assertion, ought to be his guardian. The lord has entered on the tenement that was left vacant by the ancestor's death and denies the rights of the infant heir. This is a common case; the lord sets up rights of his own and is sued by [p. 439] the infant[1]. He is sued, we say, by the infant; the record will say so; that is the legal theory[2]. But the infant may be a baby. Who, we may ask, is it that as a matter of fact sets the law in motion? The plea roll will not say, and the court, we take it, does not care. Some 'friend' of the infant sues out the writ and brings the child into court. But, so far as we can see, any one may for this purpose constitute himself the infant's friend. The action will be the infant's action, not the friend's action, and the court will see that the infant's case is properly pleaded. It will allow a child some advantages that would be denied to a mature litigant; it will not catch at his words[3]. Even when the infant has a guardian who is in possession of the land, an action for waste can be brought by the infant against the guardian, and, if the waste is proved, the guardianship will be forfeited[4]. Statutes of Edward I.'s day introduced a more regular procedure into the suits of infants; if the infant could not himself obtain a writ, some 'next friend' (*prochein amy, proximus amicus*) might obtain one for him[5]. How weak the family tie had become we see when we learn that this next friend need not be a kinsman of the infant; in course of time the judges will hold that one of their subordinate officers will be the best *prochein amy* for the good furtherance of the infant's cause[6].

[1] Bracton, f. 253 b.

[2] See *e.g.* Note Book, pl. 1477: 'Assisa venit recognitura si Matillis...mater Ricardi...fuit seisita...Et Ricardus dicit quod est infra etatem.'

[3] Note Book, pl. 1948. An infant first vouches *A* and then vouches *B*; 'et quia est infra etatem non occasionetur.'

[4] In some of these cases of waste we find that a named person, often the infant's mother, is said to sue the guardian. See Note Book, pl. 485, 717, 739, 1056, 1743. But in others, pl. 1075, 1201, 1840, the infant is said to sue. In pl. 1840 one Milisant brings a novel disseisin against her guardian, and casually in the course of the record we read of some unnamed person 'qui pro ea loquitur.' Bracton, f. 285, speaks of 'aliquis parens vel amicus qui de vasto sequatur pro minore.'

[5] Stat. West. I. c. 48; Stat. West. II. c. 15.

[6] Second Inst. 261, 390; Co. Lit. 135 b *note*. The orthodox learning is that 'At common law, infants could neither sue nor defend, except by guardian; by

Infants as defendants.

An infant can be sued. The action is brought against him in his own name and the writ will say nothing of any guardian. Very often the record will say that the infant appears and that [p. 440] some named person who is his guardian appears with him[1]. When the action is one in which the guardian has an interest, when, for example, it will if successful take away from an infant land which the lord is enjoying as his guardian, then this guardian has a right to come into court with the infant; the infant will perhaps refuse to answer until this guardian is summoned[2]. But it is very possible that there is no guardian who has any interest in the action, and it is not impossible that the infant has no guardian at all. In these cases the court seems quite content if some person, who as a matter of fact has charge of the child, appears along with him[3]. Such a person will not always be called a guardian (*custos*), but he seems to act as a guardian *ad litem*. Sometimes however we read no word of any such person. Our record tells us that the infant is sued and that he 'comes and says' this or that by way of answer[4]. An infant must answer for his own wrongdoing, for example, a disseisin that he has perpetrated, and he may not have any guardian either in law or in fact. Now as to the 'coming,' we must take our record at its word; the infant does appear before the court. As to the 'saying,' this may be done by the mouth of a professional pleader. But the court itself watches over the interest of the infant litigant[5], and, as we shall

whom was meant, not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent.' Then the Statutes of Westminster allowed a *prochein amy* to sue. 'But,' says Coke (Second Inst. 390), 'observe well our books, where many times a gardein is taken for a *prochein amy*, and a *prochein amy* for a gardein.'

[1] Note Book, pl. 43, 421, 571, 845, 968, 1083. [2] Note Book, pl. 1442.

[3] Thus Bracton, f. 247 b, supposes a *Quare impedit* brought against an infant, who has no property open to distress; 'tunc summoneatur ille in cuius manu fuerit et cuius consilio ductus quod sit et habeat [infantem coram iusticiariis] tali die.'

[4] Note Book, pl. 191: 'et idem Johannes praesens est et est infra etatem et dicit quod non debet ad cartam illam respondere.' Ibid. pl. 200: action on a fine against Richard: 'Et Ricardus venit et est infra etatem et dicit quod bene potest esse etc....Et quia Ricardus non dedicit finem....Ricardus in misericordia.' Bracton, f. 392: 'Ad finem factum respondebit quilibet minor, etsi non esset nisi unius anni.'

[5] Note Book, pl. 1958: 'set quia Alicia [*plaintiff*] est infra etatem, nec credendum est custodi suo, vel alicui eorum, cum ambo [*plaintiff and defendant*] sint infra etatem, ideo inquiratur per sacramentum iuratorum etc.'

see, proprietary actions are in general held in suspense so long as there is infancy on the one side or on the other.

Demur of the parol.

We here come upon a principle fertile of difficulties and distinctions. We may state it thus:—During infancy the [p. 441] possessory *status quo* is to be maintained[1]. On the one hand, if the infant inherits from an ancestor who died seised as of fee, he is entitled to seisin and his seisin will be upheld during his non-age. If any one has a better title, he will not be able to recover the land from the heir until the heir is of full age. He can indeed begin an action against the infant, but infancy will be pleaded against him, and 'the parol' will 'demur' (*loquela remanebit*): that is to say, the action will remain in suspense, until the heir has attained his majority. On the other hand, if the infant inherits from an ancestor who at his death was out of seisin, then the heir so long as he is under age will not be able to make good his ancestral claim[2]. He may bring his action, but the parol will demur. And what can not be done by action must not be done by force. The *status quo* which the dead ancestor left behind him is stereotyped, whether it be to the advantage or to the detriment of the infant heir. We see once more that deep reverence for seisin which characterizes medieval law. For a period of twenty years the claim of the true owner who has lost seisin may be kept in suspense. This principle did not work very easily; it was overlaid by numerous distinctions between the various forms of action; but it was deeply rooted[3]. We see it even in the region of debt. The heir need not answer the demands of his ancestor's creditors so long as he is under age[4]. So distant from our law has been any idea of the representation of an infant by a guardian, that it will hang up a suit for many years rather than suffer it to proceed while an infant is interested in it.

Law of guardianship.

No part of our old law was more disjointed and incomplete than that which deals with the guardianship of infants[5]. When

[1] This principle appears in other countries; Schröder, D. R. G. 316.

[2] Bracton, f. 274–5 b; 421 b–5 b; Note Book, vol. i. p. 95.

[3] Much of the learning is collected in *Markal's Case*, 6 Coke's Reports, 3 a.

[4] Note Book, pl. 1543: 'Et Willelmus dicit quod infra etatem est et non debet respondere de debito avi sui, et petit etatem suam. Et habet etc.' The demurrer of the parol was not abolished until 1830; Stat. 11 Geo. IV. and 1 Will. IV. c. 47, sec. 10.

[5] As to guardianship in chivalry and in socage, see above, vol. i. pp. 318–329.

it issued from the middle ages it knew some ten kinds of guardians, and yet it had never laid down any such rule as that there is or ought to be a guardian for every infant[1]. It had [p. 442] been thinking almost exclusively of infant heirs, and had left other infants to shift for themselves and to get guardians as best they might from time to time for the purpose of litigation. The law had not even been careful to give the father a right to the custody of his children; on the other hand, it had given him a right to the custody of his heir apparent, whose marriage he was free to sell[2]. It had looked at guardianship and paternal power merely as profitable rights, and had only sanctioned them when they could be made profitable. A statute was required to convert the profitable rights of the guardian in socage into a trust to be exercised for the infant's benefit[3]; and thereupon Britton denied that such a guardian is rightly called a guardian since he is no better off than a servant[4]. The law, at all events the temporal law, was not at pains to designate any permanent guardians for children who owned no land. We may suppose that in the common case the sisters and younger brothers of the youthful heir dwelt with their mother in the dower house—often she purchased the wardship of her first-born son—but we know of no writ which would have compelled her or any one else to maintain them, or which would have compelled them to live with her or with any one else. Probably the ecclesiastical courts did something to protect the interests of children by obliging executors and administrators to retain for their use any legacies or 'bairns' parts' to which they had become entitled[5]. Here again the fissure in our law of property, which deprived the temporal courts of all jurisdiction over the fate of the dead man's chattels, did much harm[6].

[1] Co. Lit. 88 b.

[2] See *Ratcliff's Case*, 3 Co. Rep. 37, and Hargrave's note to Co. Lit. 88 b. The writ for a father or other 'guardian by nature' against the abducer of the child, called the child the plaintiff's *heres*, and contained the words *cuius maritagium ad ipsum pertinet*. According to the old law there was no 'guardianship by nature' except the ancestor's guardianship of an apparent—and perhaps of a presumptive—heir.

[3] Prov. Westm. (1259) c. 12; Stat. Marlb. (1267) c. 17; see above, vol. i. p. 322.

[4] Britton, ii. 9.

[5] See above, vol. ii. p. 362.

[6] At any rate in later times, the courts of the church tried to enforce as far as they were able some romanesque law about tutors and curators; but they could not interfere with a wardship. See Swinburne, Testaments (ed. 1640), pp. 170–181; also Hargrave's note to Co. Lit. 88 b.

[p. 443] But a comprehensive law of guardianship was the less necessary, because, according to our English ideas, the guardian is not a person whose consent will enable the infant to do acts which he otherwise could not have done. The general rule about the validity of the acts of an infant, to which our courts were gradually coming, was that such acts are not void, but are voidable by the infant. The case of a feoffment is typical. The infant makes a feoffment; the feoffee will enjoy the land until the feoffor or some heir of the feoffor avoids the feoffment[1]. But, be this as it may,—and by degrees our law came to an elaborate doctrine,[2]—the guardian can neither bind the infant nor help the infant to bind himself. There is no representation of the ward by the guardian, nor will the guardian's authority enable the infant to do what otherwise he could not have done.

The guardian not a *curator*.

This part of our law will seem strange to those who know anything of its next of kin. Here in England old family arrangements have been shattered by seignorial claims, and the king's court has felt itself so strong that it has had no need to reconstruct a comprehensive law of wardship. That the king should protect all who have no other protector, that he is the guardian above all guardians, is an idea which has become exceptionally prominent in this much governed country. The king's justices see no great reason why every infant should have a permanent guardian, because they believe that they can do full justice to infants. The proceedings of self-constituted 'next friends' can be watched, and a guardian *ad litem* can be appointed whenever there is need of one.

The kin guardianship.

We have now traversed many of the fields of private law. For a moment we may pause, and glancing back along our path we may try to describe by a few words the main characteristics of the system that we have been examining. Of course one main characteristic of English medieval law is that it is medieval. It has much in common with its sisters, more especially with its French sisters. Bracton might have travelled through France and talked with the lawyers whom he met without hearing of much that was unintelligible or very surprising. And yet English law had distinctive features. Chief among these, if we

Review English private law.

[1] The writ of entry *dum fuit infra aetatem* (Reg. Brev. Orig. f. 228 b) is the infant's action.

[2] See Co. Lit. 380 b, 172 a, 308 a, etc.

are not mistaken, was a certain stern and rugged simplicity. [p. 444] On many occasions we have spoken of its simplicity, and in so doing we have encountered that common opinion which ascribes all that it dislikes or cannot understand to 'the subtleties of the Norman lawyers.' Now subtlety is the very last quality for which we should either blame or praise the justices who under Henry II. and his sons built up the first courses of our common law. Those who charge them, and even their predecessors of the Norman reigns, with subtlety are too often confusing the work of the fifteenth century with the work of the twelfth, and ascribing it all to 'Norman lawyers':—they might as well attribute flamboyant tracery to architects of the Norman age. Gladly would we have had before us a judgment passed by some French contemporary on the law that is stated by Glanvill and Bracton. The illustrious bailli of Clermont, Philippe de Remi, sire de Beaumanoir, lawyer and poet, may have been in England when he was a boy; he sang of England and English earls and the bad French that they talked[1]. If he had come here when he was older, when he was writing his Coutumes, what would he have said of English law? Much would have been familiar to him; he would have read with ease our Latin plea rolls, hesitating now and again over some old English word such as *sochemannus;* the 'Anglo-French' of our lawyers, though it would have pained his poet's ear, was not yet so bad that he would have needed an interpreter; hardly an idea would have been strange to him. We are too ignorant to write his judgment for him; but some of the principles upon which he would have commented would, so we think, have been these:—(1) In England there can be no talk of *franc alleu,* nor of *alleu* of any kind; (2) Every inheritable estate in land is a *feodum,* a *fief;* (3) English *gentix hons* have no legal privileges, English counts and barons very few; (4) The *vilain* is a *serf,* the *serf* a *vilain;* (5) There is no *retrait lignager;* the landowner can sell or give without the consent of his heir; (6) Land can not be given by

[1] Beaumanoir, besides the Coutumes du Beauvoisis, wrote two poems, La Manekine and Jehan et Blonde. These were published by Hermann Sucher for the Société des anciens textes français. The editor (i. p. x.) thinks that Beaumanoir may have been in England between 1261 and 1265, perhaps as a page in the train of Simon de Montfort. The second of the two poems was published by the Camden Society under the title Blonde of Oxford; the scene is laid in England, and the earls of Oxford and Gloucester are introduced; the latter talks bad French.

[p. 445] testament; (7) There can be no conveyance of land without the real livery of a real seisin; (8) The eldest son absolutely excludes his brothers from the paternal inheritance; (9) Succession to movables, whether under a will or upon intestacy, is a matter that belongs to the courts of Holy Church; (10) There is no community of goods, no *compaignie,* between husband and wife; the bride's chattels become the bridegroom's. When, after dipping into foreign books, we look at all these principles together, we shall find their common quality to be, not subtlety, but what we have called a stern and rugged simplicity. They are the work of a bold high-handed court which wields the might of a strong kingship. From the men who laid down these rules, from Ranulf Glanvill, Hubert Walter and their fellows, we cannot withhold our admiration, even though we know that a premature simplicity imposed from above is apt to find its sequel in fiction and evasion and intricate subtlety; but their work was permanent because it was very bold.