the rights of a mesne lord to the wardship and marriage of his tenant by serjeantry seem to have become doubtful, and to have finally disappeared, and by this time the term socage [p.337] already covered so heterogeneous a mass of tenures that it could be easily stretched yet a little further so as to include what Bracton would certainly have called serjeanties. Again, there can be little doubt that a very large number of military tenures became tenures in socage, and this without anyone observing the change. In Bracton's day the test of military tenure is the liability to scutage, and, as already said, the peasant or yeoman very often had to pay it; if he had not to pay it, this was because his lord had consented to bear the burden. In Edward I's day scutage was becoming, under his grandeur, it became, obsolete. There was nothing then in actual fact to mark off the services of the yeoman who was liable to pay scutage as well as to pay rent, from those of the yeoman who was free even in law from this never collected tax. The one was theoretically a military tenant, the other was not: in the one case the lord might have claimed wardship and marriage; in the other he could not; but then we have to observe, that, if the tenant held at a full or even a substantial rent, wardship and marriage would be unprofitable rights. The lord wanted rent-paying tenants; he did not want land thrown on his hands together with a troop of girls and boys with claims for food and clothing. Thus, scutage being extinct, wardships and marriages unprofitable, mere oblivion would do the rest; many a tenure which had once been, at least in name, a military tenure would become socage. Thus socage begins to swallow up the other tenures, and preparation is already made for the day when all, or practically all, tenants will hold by the once humble tenure of the sokemen.

§ 12. Unfree Tenure.

The tenures of which we have hitherto spoken are free tenures. To free tenure is opposed villein tenure, to the free tenement the villein tenement, to the freeholder (libere tenens) the tenant in villeinage. This is the contrast suggested by the word 'free'; but the terms 'free tenement' and 'freeholder' are becoming the centre of technical learning. We may well find that a man holds land and that there is no taint of villeinage or unfreeness in the case, and yet that he has no freehold and is not a freeholder. These terms have begun to imply that the tenant holds heritably, or for life. Perhaps we shall be truer to history if we state this doctrine in a negative form:—these terms imply that the tenant does not hold merely at the will of another, and that he does not hold for some definite space of time: a tenant at will is not a freeholder, a tenant for years is not a freeholder. Such tenancies as these are becoming common in every zone of the social system, and they imply no servility, nothing that is inconsistent with perfect freedom. Thus, for example, King John will provide for his foreign captains by giving them lands 'for their support in our service so long as we shall think fit,' and in such a case this tenancy at will by a soldier is from some points of view the best representative of the beneficia and feoda of past centuries. But now-a-days such tenancies are sharply contrasted with feoda; the tenant has no fee and no free tenement. And so again we may see a great man taking lands for a term of years at a money rent; he has done nothing in derogation of his freedom; the rent may be trifling; still he is no freeholder.

A full explanation of this phenomenon, that a man should hold land, and hold it not unfreely, and yet not hold it freely, can not be given in this context since it would involve a discussion of the English theory of possession or seisin. But we must not fail to notice that the term 'free tenement' has ever since Henry II.'s day implied possessory protection by the king's court. This is of great moment. From our statement of the relation between the freehold tenant and his lord we have as yet omitted the element of jurisdiction. The existence of this element our law fully admitted and at one time it threatened to become of vital importance. It was law that the lord might hold a court of and for his tenants; it was law that if A was holding land of M and X desired to prove that he and not A ought to be M's tenant, M's court (if he held one) was the tribunal proper to decide upon the justice of this claim; only if M made default in justice, could X (perhaps after recourse to all M's superior lords) bring his case before

1 Britton, ii. 10, and the editor's note.

1 See e.g. the provision for Engelard of Cigogné: Rot. Cl. i. 79.
the king's court. This principle of feudal justice is admitted, though its operation has been hampered and controlled; in particular, the king has given in his court a possessory remedy to every ejected freetholder. Every one who can say that he has been "disseised unjustly and without a judgment of his free tenement" shall be restored to his seisin by the king's justices. Thus the term 'free tenement' becomes the pivot of a whole system of remedies. Clearly they are denied to one who has been holding 'unfreely,' who has been holding in villeinage; but a doctrine of possession now becomes necessary and has many problems before it. What if the ejected person was holding at the will of another? Perhaps it is natural to say that, albeit he occupied or 'detained' the tenement, still he was not possessed of it. At any rate this was said. The tenant at will tract nomine alieno; possidet eius nomine possidetur; eject the tenant at will, you disseise (dispossess) not him, but his lord, and his lord has the remedy. And what of the tenant for years? The same was said. He holds on behalf of another; eject him, you disseise that other. Such was the doctrine of the twelfth century; but already before the middle of the thirteenth the lawyers had discovered that they had made a mistake, that the 'termor' or tenant for years deserved possessory protection, and they invented a new action for him. The action however was new, and did not interfere with the older actions which protected the seisin of free tenement; it was too late to say that the termor had a free tenement or was a freetholder. This episode in our legal history had important consequences; it rules the terminology of our law even at the present day and hereafter we shall speak of it more at large: it is an episode in the history of private law. In the thirteenth century the main contrast, suggested by the phrase 'free tenement' was still the villein tenement, and tenure in villeinage is intimately connected with some of the main principles of public law; indeed from one point of view it may be regarded as a creature of the law of jurisdiction, of the law which establishes courts of justice and assigns to each of them its proper sphere.

The name 'villeinage' at once tells us that we are approaching a region in which the law of tenure is as a matter of fact intertwined with the law of personal status: 'villeinage' is a tenure, it is also a status. On the one hand, the tenant in villeinage is normally a villein; the unfree tenements are held by unfree men; on the other hand, the villein usually has a villein tenement; the unfree man is an unfree tenant. Then a gain, the villanus gets his name from the villa, and this may well lead us to expect that his condition can not be adequately described if we isolate him from his fellows; he is a member of a community, a villein community. The law of tenure, the law of status, the law which regulates the communal life of vills or townships are knotted together. Still the knot may be unravelled. It is very possible, as Bracton often assures us, for a free man to hold in villeinage, and thus we may speak of villein tenure as something distinct from villein status. Again, as we shall hereafter see, the communal element which undoubtedly exists in villeinage, is much neglected by the king's courts, and is rather of social and economic than of legal importance.

We may suppose therefore that the tenant in villeinage was a free man. What then are the characteristics of his tenure? Now in the first place we may notice that it is not protected in the king's courts. For a moment perhaps there was some doubt about this, some chance that Patshull and Raleigh would forestall by two long centuries the exploits ascribed to Brian and Danby, and would protect the predecessor of the copyholder even against his lord. This would have been a bold stroke. The ready remedy for the ejected freetholder laid stress on the fact that he had been disseised of his 'free' tenement, and, however free the tenant in villeinage might be, his tenement was unfree. A quite new remedy would have been necessary for his protection; the opportunity for its invention was lost, and did not recur until the middle ages were expiring.1

1 We need hardly say that the whole of this subject is admirably discussed in Vinogradoff's Villeinage in England.

2 The important cases are Restanower v. Montacute, Note-Book, pl. 70, 88, and William Henry's son v. Bartholomew Eustace's son, ibid. pl. 1103. As to the decisions of Brian and Danby under Edw. IV., see Littl. Tenures, sec. 77; it is doubtful whether Littleton wrote this passage.

3 Vinogradoff, Villeinage, 78-81. It is possible to regard these decisions of Patshull and Raleigh as belated rather than premature; but the formula of the villanus disseisin lays stress on the freedom of the tenement, and therefore proves that the lawyers of Henry II.'s reign had not intended to protect villein holding. The original version of Magna Carta might seem to give protection to the free man holding in villeinage; but in 1217 some words were
It was law then, that if the tenant in villeinage was ejected, either by his lord or by a third person, the king's court would not restore him to the land, nor would it give him damages against his lord in respect of the ejectment. He held the land nomine alieno, on his lord's behalf; if a third person ejected him, the lord was disseised. Before the end of the thirteenth century the courts were beginning to state their doctrine in a more positive shape:—the tenant in villeinage is in our eyes a tenant at will of the lord.

The shade of meaning which such words bear at any given moment is hard to catch, for this depends on the relation between the king's courts and other courts. At a time when the feudal courts have become insignificant, denial of remedy in the king's court will be equivalent to a denial of right, and to say that the tenant in villeinage is deemed by the king's court to hold at his lord's will is in effect to say that the lord will do nothing illegal in ejecting him. At an earlier time the royal tribunal was but one among many organs of the law, and the cause for our wonder should be that it has undertaken to protect in his possession every one who holds freely, not that it has stopped at this point and denied protection to those who, albeit free men, are doing what are deemed villein services. We have but to look abroad to see this. By its care for every freeholder, though he were but a socage tenant with many lords above him, our king's court would gradually propagate the notion that those whom it left unguarded were rightful.

But this would be an affair of time. Even in the thirteenth century, the freeholder could not always bring a proprietary action before the royal tribunal without the help of some legal fiction, and in Bracton's day men had not yet forgotten that the royal remedies which were in daily use were new indulgences conceded by the prince to his people.

Interpreted, apparently for the very purpose of showing that his case was outside the charter. The text of 1215 says, 'Nullus liber homo... dissipatam... nisi per legale judicium etc.' That of 1217 says 'Nullus liber homo... dissipatam de libero tenemento suo et libertatis se civibus consulatibus suis... nisi etc.'

1 Bracton, ii. 13: 'Villeinage is tenement de demesne de chasse en seigneur, baliff a tenir a sa volonte par villeins services de emprunter al ois le seigneur.'

2 Bracton, f. 161 b: 'de beneficio principis succurrerit ei per recognizitionem assisse moine dissolvente multis vigilis excommunication et inventam.'
denial of legal right? The king dispossesses the Earl of Glou-
cester; the earl has no remedy, no remedy anywhere; yet we
do not deny that the honour of Gloucester is the earl's by law
or that in dispossessing him the king will break the law.

A good proof that the lords in general felt themselves
bound more or less conclusively by the terms of the customary
tenures is to be found in the care they took that those terms
should be recorded. From time to time an 'extent' was made
of the manor. A jury of tenants, often of unfree men, was
sworn to set forth the particulars of each tenancy and its
verdict condescended to the smallest details. Such extents
were made in the interest of the lords, who were anxious that
all dues services should be done; but they imply that other and
greater services are not due, and that the custom tenants,
even though they be unfree men, owe these services for their
tenements, no less and no more. Statements to the effect that
the tenants are not bound to do services of a particular kind
are not very uncommon.

As characteristics of villein tenure we have therefore these
two features,—it is not protected by the king's courts; in
general it is protected by another court, the court of the lord,
though even there it is not protected against the lord. Still as
a matter of legal theory we cannot regard these features as the
essence of the tenure. We should invert the order of logic
and say that this tenure is villein because the king's
justices treat it as a mere tenure at will; rather they treat it as
a mere tenure at will because it is a villein, an unfree, tenure.
We must look therefore to this as in other cases to the services
which the tenant performs, if we are to define the nature of his
tenure. He holds in villeinage because he performs villein
services.

A brief digression into a domain which belongs rather to
economic than to legal history here becomes inevitable. The
phenomena of medieval agriculture are now attracting the
attention that they deserve; here we are only concerned with
them in so far as some knowledge of them must be presupposed
by any exposition of the law of the thirteenth century.1
Postponing until a later time any debate as to whether the

1 It will be almost needless to refer the reader to the works of Nasse,
Skeffington, Ashley, Cunningham and Vinogradoff. See also Maitland, Domesday
Book, 362 ff.
The field system.

We have usually therefore in the manors of three kinds, (1) the demesne strictly so called, (2) the land of the lord's freehold tenants, (3) the villenarium, the land held of the lord by villein or customary tenure. Now in the common case all these lands are bound together into a single whole by two economic bonds. In the first place, the demesne lands are cultivated wholly or in part by the labour of the tenants of the other lands, labour which they are bound to supply by reason of their tenure. A little labour in the way of ploughing and reaping is got out of the freehold tenants; much labour of many various kinds is obtained from the tenants in villeinage, so much in many cases that the lord has but small, if any, need to hire labourers. Then in the second place, these various tenements lie intermingled; neither the lord's demesne nor the tenant's tenement can be surrounded by one ring-fence. The lord has his house and homestead; each tenant has his house with more or less curtilage surrounding it; but the arable portions of the demesne and of the various other tenements lie mixed up together in the great open fields. There will be two or three or perhaps more great fields, and each tenement will consist of a number of small strips, of an acre or half-acre apiece, dissipated about in each of these fields. These fields are subjected to a common course of agriculture, a two-field system or a three-field system, so that a whole field will lie idle at one time, or be sown with winter seed or, as the case may be, with spring seed. After harvest and until the time for tilling comes, the lord and the tenants turn their beasts to graze over the whole field.

The virgates.

Then we further notice that the various tenements, at least those held in villeinage, are supposed to be of equal extent and of equal value, or rather to fall into a few classes, the members of each class being equal among themselves. Thus it is usual to find a number of tenants in villeinage each of whom is said to hold a virgate or yard of land. Each of them has his house and the same number of strips of arable land; each of them does precisely the same service to his lord. Then there may appear a class of half-virgaters, each of whom does about half what is done by a virgater; and there may be classes which have smaller tenements but which yet have some arable land. Then, most likely, there will be a class of cottagers without any arable; but the cottage and croft of one of them will be regarded as equal to the cottage and croft of another and will provide the lord with the same services. And we sometimes seem to see that the distribution of the arable strips is so arranged as to equalize the value of the various tenements. All the virgates are to be equal in value as well as equal in acreage so far as is possible. One virgater must not have more than his share of the best land. The strips have been distributed with some regularity, so that a strip of B's virgate will always have a strip of A's to the right and a strip of C's to the left of it. Then again, the manor will probably comprise meadow land and pasture land. Each virgater may have a piece of meadow annexed to it, the meadow being treated as an appurtenance of the arable land; or again, some of the meadows may be divided each year by lot between the various tenants, and the lord may have certain strips thereof in one year and other strips in another year; but, when the grass has been mown, all the strips will be thrown open to the cattle of the lord and his tenants. There is also land permanently devoted to pasture: a right to turn out beasts upon it is commonly annexed to every tenement or to every considerable tenement. Lastly, we must just notice that in the lord's court the manor has an organ capable of regulating all these matters, capable for example of deciding how many beasts each tenement may send to the pasture, and, when the rights of the freehold tenants are not concerned, the decrees and judgments of this court will be binding, for the king's courts will give no help to those who hold in villeinage.

Now speaking generally we may say that the services which Villein services.

the tenant in villeinage owes to his lord consist chiefly of the
duty of cultivating the lord's demesne. Before the thirteenth century is over we may indeed find numerous cases in which the payment of a money rent forms a substantial part of his

1 Thus a tenement containing in all but five acres may consist of no less than fourteen disconnected pieces; Pines, ed. Hunter, i. 42.

1 Vinogradoff, p. 239.
service and he is hardly bound to do more labour than is expected from many of the freeholders, some ploughing and some reaping. It is very possible that there are some classes of tenants now reckoned to hold in villeinage, whose predecessors were in this same position at a remote time; they are gavelsman, men who pay gevel, or they are censuarii, and such their forefathers may have been all along. To suppose that in all cases the system of rents paid in money or in produce has grown out of a system of labour services is to make an unverified assumption. On the other hand, in very many cases we can see that the money rent is new. We may see the process of commutation in all its various stages, from the stage in which the lord is beginning to take a penny or a halfpenny instead of each 'work' that in that particular year he does not happen to want, through the stage in which he habitually takes each year the same sum in respect of the same number of works but has expressly reserved to himself the power of exacting the works in kind, to the ultimate stage in which there is a distinct understanding that the tenant is to pay rent instead of doing work. But we may for a moment treat as typical the cases in which the tenant hardly pays anything. Of such cases there are plenty. The tenant may pay some small sums, but these are not regarded as the rent of his tenement. They bear English names; sometimes they seem to have their origin in the lord's jurisdictional powers rather than in his rights as a landlord, as when we read of tithingpenny, wardpenny, withepenny; sometimes they look like a return made to the lord, not for the tenement itself, but for rights over the wastes and waters, as when we read of fishsilver, woodsilver, solspiteleer. But in the main the tenant must work for his tenement.

Now the labour that he has to do is often minutely defined in the manorial custom and described in the manorial 'extent.' Let us take one out of a thousand examples. In the Abbot of Ramsey's manor of Stukeley in Huntingdonshire the services of a virgater are these:

From the 29th of September until the 29th of June he must work two days a week, to wit on Monday and Wednesday; and on Friday he must plough with all the beasts of his team; but he has a holiday for a fortnight at Christmas and for a week at Easter and at Whitsuntide. If one of the Fridays on which he ought to plough is a festival or if the weather is bad, he must do the ploughing on some other day. Between the 29th of September and the 11th of November he must also plough and harrow half an acre for wheat, and for sowing that half-acre he must give of his own seed the eighth part of a quart; whether that quantity be more or less than is necessary for sowing the half-acre he must give that quantity, no more, no less; and on account of this seed he is excused one day's work. At Christmas time he must make two quarters of malt and for each quarter he is excused one day's work. At Christmas he shall give three hens and a cock or four pence and at Easter ten eggs. He must also do six carryings (precationes) in the year within the county between the 29th of June and the end of harvest at whatever time the bailiff shall choose, or, if the lord pleases, he shall between the 29th of June and the 29th of September work five days a week, working the whole day at whatever work is set him, besides carrying corn, for he shall carry but four cartloads of corn for a day's work. If at harvest time the lord shall have two or three 'boon works' (precationes), he shall come to them with all the able-bodied members of his family save his wife, so that he must send at least three men to the work. He pays sheriff's aid, hundred-penny and ward-penny, namely 6d.

Now the main features of this arrangement we find repeated in countless instances. The tenant has to do 'work week' as it has been called: to work two or three days in every week during the greater part of the year, four or five during the busy summer months. Then at harvest time there are also some 'boon days' (precationes); at the lord's petition or boon the tenant must bring all his hands to reap and carry the crops and on these days the lord often has to supply food; at Stukeley it is bread, beer and cheese on the first day, meat on the second, herrings on the third. But matters are yet more minutely fixed. Our Stukeley tenant has to 'work' so many days a week; the choice of work rests with the lord, but custom has fixed the amount that shall be accounted a day's work. For instance on the neighbouring manor of Warboys the tenant must carry three bundles of thorns are regarded as a day's work. At Stukeley if the tenant has to fell timber, the
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day's work is over at noon, unless the lord provides dinner, and then the work lasts all day. Sometimes it is remarked that a task which counts as a day's work can really be done in half a day. The exact distance that he must go with his lord's waggons in order that he may claim to have performed an [averagium] is well known, and, when the lord is bound to supply food or drink, the quantity and quality thereof are determined. On the Ramsay manors a sick tenant will be excused a whole year's work if his illness lasts so long; after the year he must get his work done for him as best he may. A half-virgater will do proportionately less work, a cottager still less; thus at Stukeley the cottager works on Mondays throughout the year and on Fridays also in harvest time.

There is more to be said. Our Stukeley virgater pays 'merchet' as best he may, that is to say, if he wishes to give his daughter in marriage he must pay money to the lord and the amount that he has to pay is not fixed. If he has a foal or calf born of his own mare or cow, he must not sell it without the lord's leave. If he has an oak, ash or pear-tree growing in his court, he must not fell it, except for the repair of his house, without the lord's leave. When he dies his widow shall pay a heriot of five shillings and be quit of work for thirty days. These are common features, and the merchet is of peculiar importance, as will be seen hereafter. Sometimes it is only paid if the girl is married outside the vill; sometimes the amount is fixed. And so as to selling beasts; occasionally the lord's right is but a right of preemption. And then in many cases the villein tenants are liable to be tallaged, sometimes once a year, sometimes twice in seven years; sometimes the [p.351] amount of this tax is defined, sometimes they can be 'tallaged high and low' (de haut et bas). Often they are bound to 'suit of mill,' that is to say, they must not grind their corn elsewhere than at the lord's mill. About all these matters we sometimes find rules which set certain definite limits to the tenant's duty and the lord's right. 1

Such were some of the commonest services due from the holder of a villein tenement. As yet, however, we have attained to nothing that can be called a definition of the tenure. To say that it is a tenure defined by custom but not protected by the king's courts is no satisfactory definition, for this, as already said, is to mistake the consequence for the cause. Now Bracton constantly assumes that everyone will understand him when he speaks of villein services, but he never undertakes to tell us precisely what it is that makes them villein, and, when we turn to the manorial extents, we not unfrequently meet with tenures that we know not how to classify. Apart from the tenants who certainly are freeholders and the tenants who certainly hold in villeinage, we see here and there a few men whose position seems very doubtful; we do not like to predict either that they will or that they will not find protection in the royal courts. We have to remember that the test which in later days will serve to mark off freehold from copyhold tenure is as yet inapplicable. No one as yet holds land 'by copy of court roll'; the lords are only just beginning to keep court rolls and it is long ere the court roll becomes a register of title. If alienations and descents are entered upon it, this is done merely to show that the steward has received or has yet to collect a fine or a heriot, and the terms on which a new tenant takes land are seldom mentioned. If from a modern conveyance of a copyhold tenement we abstract the copy of the court roll and even the court roll itself, we still have left the intermediation of the lord between the vendor and the purchaser; the land is supposed to pass through the lord's hand.

But when dealing with the thirteenth, to say nothing of the twelfth, century, we can not make the lord's intervention a proof of villein tenure. We may well find the conveyance of a freehold taking in all essentials the form of 'surrender and admittance'; the old tenant yields up the land to the lord, the lord gives it to the new tenant; the transaction takes place in court; the symbolical rod is employed; no charter is necessary. Indeed when there was to be no subinfeudation but a substitution of a new for an old tenant, we may well be surprised that this could ever be effected without a double conveyance. Moreover if we say that the lord can prevent the alienation of villein, but can not prevent the alienation of free tenements we still have not solved the question; to say that a tenement is villein

What is the essence of villein tenure.

1 Cart. Rau. i. 315: 'opera ad taschum assignata, quae aliquaundo per dimidium diem poterat adimpleri.'

2 Briefly stated, the tenant owes suit to the lord's mill; but between 1st Aug. and 21st Sept. he may grind elsewhere if the lord's mill is too busy, and corn that he has purchased may be ground anywhere.
because it cannot be alienated without the lord's consent, is to put the cart before the horse.

Nor again can we find the solution in the phrase 'to hold at the will of the lord.' If for a moment we take this phrase merely to denote that the tenure is unprotected by the king's court, we are brought once more to the fruitless proposition that it is unprotected because it is unprotected. If, on the other hand, we take the phrase to imply that there is no court which protects the tenure, or that the lord can at any moment eject the tenant without breach of any custom, then, to say the least, the great mass of villein tenures will escape from our definition. Tenures which really are tenures 'at will,' unprotected by any custom, are to be found, and that too in high places, but then they are in general carefully distinguished from the villein tenures. In the extents and manorial rolls of the thirteenth century it is rare to find that the tenants in villeinage are said to hold at the will of the lord. Still when we turn, as we now must, to find the element in villein services which makes them villein, this phrase 'at the lord's will' must again meet us.

That a tenure which compels to agricultural labour is [p.353] unfree, this we certainly can not say. The philology of the time made ploughing service the characteristic feature of service, and often enough a freethrower had to give his aid in ploughing and reaping his lord's demesne; nor can we say for certain that he could always do his work by deputy, for the duty cast upon him was sometimes such as could not well be delegated, in particular that of riding after the labourers 'with his red' and keeping them up to their work. There is nothing servile in having to do such a duty in person. In general, no doubt, the freethrower only aids his lord's agriculture during a few weeks in the year; he helps at the 'boon works' but does no 'week work'; still it is difficult to make the distinction between freedom and unfreedom turn upon the mere amount of work that has to be done. If there is no villeinage in labouring ten days in the year why should there be any villeinage in labouring three days a week? On the whole our guides direct us not to the character, nor to the amount of the work, but to its certainty or uncertainty.

The typical tenant in villeinage does not know in the evening what he will have to do in the morning. Now this, when properly understood, is very generally true of the tenants who are bound to do much labour, to do 'week work.' They know a great deal about the amount of work that they will have to do in each year, in each week, on each day; they know, for example, that the custom exacts from them three and no more 'works' in every week, that Tuesday is not a work day, that if they are set to pitch they must pitch so many perches before the 'work' will be accomplished, that to drive a cart to one place is 'one work,' to another place 'two works'; they know whether when set to thresh they can stop at noes or must go on to vespers. Still there is a large element of real uncertainty; the lord's will counts for much; when they go to bed on Sunday night they do not know what Monday's work will be: it may be threshing, ditching, currying; they can not tell. This seems the point that is seized by law and that general opinion [p.354] of which law is the exponent: any considerable uncertainty as to the amount or the kind of the agricultural services makes the tenure unfree. The tenure is unfree, not because the tenant 'holds at the will of the lord,' in the sense of being removable at a moment's notice, but because his services, though in many respects minutely defined by custom, can not be altogether defined without frequent reference to the lord's will. This doctrine has good sense in it. The man who on going to bed knows that he must spend the morrow in working for his lord and does not know to what kind of work he may be put, though he may be legally a free man, free to fling up his tenement and go away, is in fact for the time being bound by his tenure to live the same life that is led by the great mass of unfree men. Custom sets many limits to his labours; custom sets many limits to theirs; the idea of abandoning his home never

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This then seems to have been the test usually applied by the king's court. If the labour services are 'uncertain,' the tenancy is unfree; and it is a test which condemns as unfree the great bulk of the tenures which obliged men to perform any considerable amount of agricultural labour for their lord, because, however minutely some particulars of those services may be defined, there is generally a spacious room left for the play of the lord's will. Thus the test roughly consists with another—labour service is not necessarily unfree, but a service which consists of much labour, of labour to be done all the year round, is almost of necessity unfree; for almost of necessity the tenant will be bound to obey, within wide limits, whatever commands the lord or the lord's bailiff may give him. Thus to hold land by 'fork and flail' by work done day by day, or week by week on the lord's demesne, is to hold in villeineage.

Other tests are in use. Any service which stamps the tenant as unfree may stamps his tenure as unfree; and in common opinion such services there are, notably the merchetum.

Now among the thousands of entries in English documents relating to this payment, it would be very utterly impossible to find one which gave any sanction to the tales of a 'the priuate wic.' The context in which this day is usually mentioned (p. 365) explains at least one of the reasons which underlie it. The tenant may not give his daughter (in some cases his son or daughter) in marriage—except to a side the manor—and he may not have his son, or daughter, without the lord's leave: the stock in the tenement is not to be diminished. The whole subject is regarded as very local, and sometimes it is described in vigorous words, which express a free man's loathing for servility:—'he must buy, he must make payment for his flesh and blood.' This is altogether a payment for leave to give one's daughter in marriage or for leave to send one's son to school, naturally suggests bondage, personal bondage, bondage which is in one's blood. It is constantly used as a test of personal servage.

1 See c. 40, Testa de Neville, p. 263.
2 See Reg. Maj. lib. iv. c. 64.
3 Vivian, p. 193, and Britton, i. 196, that it is not conclusive of personal unfreedom. For the law of later days see Litttleton, secs. 174 (an interpolation), 209 and Coke's comment thereon. Coke's doctrine is that the merchet may be exacted from a free man by reason of special reservation, though not by reason of general custom, and the positive half of this rule seems to be borne out by Y. B. 48 Edw. III. f. 5 (Hil. pl. 15); as to the negative half, see Littleton's remark in Y. B. 16 Hen. VI. f. 15 (Mich. pl. 28). In 10 Edw. III. f. 23 (Pasch. pl. 41) a case came before the court illustrating the Northumbrian tenures referred to in our text; the tenant, it is said, did homage, paid scutage, and merchet. It is chiefly in Northumbria, the home of drengage and thegnage (see above, p. 379), that freeholders are to be found paying merchet; but tenants bearing the distinctive name of Freeman and yet paying merchet are met with elsewhere, e.g. Pleas in Manorial Courts, i. 94. Vinogradoff, p. 161, argues from the Hundred Rolls that there were considerable parts of England in which the villeins were not subject to this exaction, since the jurors of some hundreds say nothing about it. But when we find it habitually mentioned throughout some hundreds and never mentioned in others, the sounder inference seems to be that it was almost universal. Some jurats think fit to mention it, others do not; just as some jurats think fit to say that the villeins held at the will of the lord, while others do not. So again the jury for the Langtree hundred of Oxfordshire (ii. 774) call all the tenants in villeineage 'rent,' while in some Cambridgeshire hundreds they are in general customarii. For a discussion of the derivation of the word merchet see Y. B. 16 Edw. III., ed. Pike, Introduction, pp. xxv-xliii.
Other tests are at times suggested. The duty of serving as [p. 356] the lord's reeve whenever the lord pleases, the liability to be tallaged 'high and low,' these also are treated as implying personal bondage. If the tenement descends to the youngest son instead of to the eldest son or to all the sons, the inference is sometimes drawn that it is not free. On the whole, however, our books constantly bring us back to the 'uncertainty' of the service as the best criterion of villein tenure. Certainty and uncertainty, however, are, as we have seen, matters of degree. In few, if any, cases is there no custom setting bounds to the tenant's duty of working for his lord; in most cases many bounds are set; the number of days in every week which he must spend on the demesne is ascertained; often the amount of any given kind of labour that will pass for a day's work is determined; but yet there is much uncertainty, for the tenant knows not in the evening whether in the morning he will be kept working in the fields or sent a long journey with a cart. We need not be surprised therefore if in the thirteenth century 'freehold' and 'villeinhold' are already becoming technical [p.357] ideas, matters of law; jurors who can describe the services are unwilling to say whether they are free or unfree, but will leave this question for the justices. And next we have to note that though labour service, indefinite or but partially defined labour service, seems to be the original essence of villein tenure, this does not remain so for long. When once it has been established

1 Now and then in the extents a man who seems to be a freeholder is said to pay tallage; e.g. Cart. Rami, i. 32; 'dat taliagium cum villanis quotienscumque piraci taliante.' In Y. R. 8 Edw. III. f. 66 (Mich. pl. 31) it is said that the bishop of Ely held land by the service of being tallaged along with the villeins. Of course the bishop was free, but his tenement also seems to have been considered free.

2 Thus, Paul, Abbey, 20 (Mich), in 1215 jurors say—We do not know whether the tenement is free; the tenant had to plough the lord's corn, he owed the best sheep in the lord's fold, to attend boar and hunt, and give an Easter egg: we never heard that he made fine for marrying his daughter or selling his oxen; but the lord used to seek an aid from him once in seven years. Held that the tenement was free. On p. 81 (Birk.) is another special verdict in an action for dower; there was no week work; the jurors however had never heard of a woman being endowed of such a tenement, but after her husband's death the widow used to hold the whole. Held that the tenement was not free, at least for the purpose of endowment. In 1228 (Note Book, pl. 281) we find another case in which, according to one story, the jurors doubted, because, though the tenant owed labour services, he knew 'quid debeat facere et quid non.'

that a tenement is unfree, that tenement will not become free, at least in the eyes of lawyers, even though the services are modified or transformed. Without any definite agreement, a lord begins to take money instead of exacting labour, and gradually it becomes the custom that he shall take money, and a precisely fixed sum of money, in lieu of all the week-work. This change does not give the tenant a freehold, a right in the land which the king's courts will protect; something far more definite would be required for that purpose, an enfranchisement, a feoffment. Thus it falls out that a tenant who according to the custom of the manor pays a money rent and does no more labour for his lord than is owed by many a freeholder, may still be no freeholder but a tenant in villeinage; he still is protected only by custom and in the view of the royal justices is but a tenant at will. Then gradually what has been called 'the conveyancing test' becomes applicable. DEALINGS with villein tenements are set forth upon the rolls of the lord's court; the villein tenement is conceived to be holden 'by roll of court,' or even 'by copy of court roll,' and the mode of conveyance serves to mark off the most beneficial of villeinholds from the most onerous of freeholds; the one passes by 'surrender and admittance,' the other by 'feoffment.' In Henry III.'s time this process which secured for the tenant in villeinage a written, a registered title, and gave him the name of 'copyholder,' was but beginning, and it is possible that in some cases the lord by taking money instead of labour did as a matter of fact suffer his tenants to become freeholders: but probably he was in general careful enough to prevent this, for him undesirable, consequence, by retaining and enforcing a right to some distinctively servile dues. But our definition of villein tenure must be wide enough to include cases in which there has been a commutation of labour service into rent, and on the whole we may do well in saying that villein tenure is the tenure of one who owes to his lord in respect of his tenant 'uncertain' labour services, or who (by himself or his predecessors) has owed such services in the past, or who is subject to distinctively servile burdens such as merchant, ar­my tallage, or the duty of serving as reeve. This we believe is the main idea; but we must receive it subject to two cautions, namely, that, as so often said, 'uncertainty' is a matter of degree, and that in some cases a tenure which all
along had been tenure at a money rent may have been brought
within the sphere of villeinage by some untrue, or at all events
unverified, theory as to its past history. Here as elsewhere law
has done its work of classification by means of types rather
than by means of definitions.1

To fix in precise words the degree of binding force that the [p.359]
lords in their thoughts and their deeds ascribed to the manorial
custom would be impossible. Generalizations about the moral
sentiments of a great and heterogeneous class of men are apt to
be fallacious, and, when a lord pays respect to a custom which
can not be enforced against him by any compulsory process, it
will be hard for us to choose between the many possible motives
by which he may have been urged; provident self-interest, a
desire for a quiet life, humane fellow-feeling for his dependants,
besides a respect for the custom as a custom may all have pulled
one way. There is some evidence to show that the pulled rever-
cence for the custom as a custom grew weaker during the thir-
teenth century. When early in that age the king's justices were
considering whether they would not protect the villein tenant
against his lord, they must have felt that the custom was very
like law. On the other hand, when they had definitely aban-
doned this enterprise, the lords must have been more and more

1 It may be said that we contradicted Bracton in making 'uncertainty' the
definition of villein service, for he not infrequently (e.g., f. 7, 20) speaks of villein
service and service works which are certain and determinate; such are the
service and works owed by some classes of tenants on the ancient demesne.
The truth is that the term 'certain' is used in two different but closely con-
ected senses; the one takes the law of the king's court, the other takes the
custom of the manor as its criterion. Services may be accounted uncertain
either (1) because the custom cannot define them without frequent reference to
the lord's will, or (2) because, if the lord chooses to break the custom, the
king's court will not help the tenants. In the ordinary case of villeinage the
services are uncertain in both senses, and uncertain in the second sense because
uncertain in the first. But there are cases on the ancient demesne in which
the services are uncertain in the first, but not in the second sense, and these
seem to be Bracton's 'certi servitia villana et artis.' We can not fully define
them without fully specifying the lord's will, nevertheless the definition is legally binding
on the lord. Suppose the terms of a tenantry be that A must 'feit for B at whatever kind of agricultural labour B may require; in one
sense these terms are very uncertain, but if courts of law enforce them, then in
another sense they are certain. Still it is not to be denied that the word
'vill-in' may sometimes have been applied to any hard work in the fields. In
the thirteenth century it was a word of abuse; a 'villein deed' is a base and
wrothfully deed; 'villein words' are coarse words, bad language.

2 Above, p. 359.

Unfree Tenure.

Our task is the more difficult because fully developed copy-
hold tenure, even as it exists in the nineteenth century, allows
that there are many acts and defaults by which a tenant may
forfeit his tenement. Now a strict definition of these causes of
forfeiture only appears late in the day; little of the kind is

http://www.britannica.com/EBchecked/topic/525060/tenure

http://www.iana.org/iana/transport/udp

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that there are many acts and defaults by which a tenant may
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forfeiture only appears late in the day; little of the kind is
to be found in the 'extents' of the thirteenth century. Seldom,
ever, were the lords brought to acknowledge that the causes
of forfeiture were definable. Many admissions against their
own interests the 'extents' of their manors may contain; they suffer
it to be recorded that 'a day's work ends at noon, that in return
for some works they must provide food, even that the work is
not worth the food that has to be provided; but they do not
admit that for certain causes and for certain causes only may
they take the tenements into their own hands.

As a matter of fact, it is seldom of an actual ejectment that
the peasant has to complain. If he makes default in his services,
he in general suffers no more than a small amercement; seldom
does it exceed six pence. Even if he commits waste, if, for
example, he lets his house go out of repair, he generally has full
warning and an opportunity for amending his conduct before the
lord takes the extreme measure of ejecting him. An extreme
measure it was, for tenants were valuable; then as now 'it paid
to be a good landlord.' Two motives, and perhaps two only,
might make a lord wish to clear the cultivators from his land;
be might wish to fill their place with beasts of the chase or with
monks. Happily for the peasantry, rights of sporting were
franchises which had to be purchased from the king, while we
may hope that the pious founder dealt generously with his
tenants. One of the stories which best illustrates the nature of
their customary rights tells how when Henry II. was founding

1 Thus Bracton, f. 283: 'villeinagium quod traditum villanam, quod conspectrum et immovable in tenementum possit pro voluntate sumo et revocatione.'

2 See e.g., Britton's definition of the tenure as given above, p. 369.
the Carthusian priory of Witham in Somersett, he cleared the villeins off the land, but gave each of them the choice of becoming free or receiving a tenement in any royal manor that he might choose. But the holy Hugh was not content with this; he made Henry pay compensation to the villeins for their houses; nor did he stop there; they must be allowed to carry away the materials, though for these they have already received a money equivalent. At an earlier date an Earl of Lincoln, clearing the ground for Revesby Abbey, had given the dispossessed rustics a choice between freedom and other tenements.

What the tenant in villeinage had to fear was not so much arbitrary ejectment as an attempt to raise his rent, or to exact from him new and degrading services which would make him an unfree man. We can not altogether acquit the lords of such attempts. The fact that the services described in the later extents are heavier than those described in the earlier, the fact that the debasing mercatum seems to become far commoner as time goes on, these facts are not very cogent, for the extents become more minute and particular and we seldom can be quite sure that what is expressed in the later documents was not implied in the earlier.

We can not so easily dispose of the evidence that late in the thirteenth century large masses of the tenants believed and sought to prove that their lords had broken the custom and imposed new burdens upon them. They sought to show in case after case that they were living on the ancient demesne of the crown, and that therefore they were protected against any increase of services. Generally they failed; Domesday Book was produced and proved that they had no right to claim the king's help. The fact remains that they had hoped to prove that the lords were breaking the custom. To this we must add that in many of these cases the lord was a religious house. Now there is plenty of evidence that of all landlords the religious houses were the most severe—not the most oppressive, but the most tenacious of their rights; they were bent on the maintenance of pure villein tenure and personal villeinage. The immortal but soulless corporation with her wealth of accurate records would yield no inch, would enfranchise no serf, would enfranchise no tenement. In practice the secular lord was more humane, because he was more human, because he was careless, because he wanted ready money, because he would die. Still it is to the professed in religion that we may fairly look for a high theory of justice, and when we find that it is against them that the peasants make their loudest complaints, we may be pretty sure that the religion of the time saw nothing very wrong in the proceedings of a lord who without any cruelty tried to get the most that he could out of his villein tenements.

We may well doubt whether the best morality of the time required him to regard the villein services as fixed for good and all, or as variable only by means of some formal agreement such as never could have been made had but one tenant refused his consent. The process of commutation, which in the end was to give the copyholder his valuable rights, was set going by the lord's will; he chose to exact money instead of labour, and, if he took but a fair sum, he was not to be condemned. We can not contend therefore that the lord's will was fettered by rigid custom, or that any man conceived that it ought to be so fettered. On the other hand, as we shall soon see, there is in the king's treatment of his peasants, the men of the ancient demesne, a convincing proof that the just landlord was expected to pay heed to the custom and not to break through it save for good cause.

Had the tenant in villeinage heritable rights? Of rights Heritable recognized by the king's courts we have not to speak; but the rights in villeinage court frequently admitted that his rights were heritable, at least as against all but the lord. Often a claimant comes into court and declares in set terms how he is the rightful heir and how some one else is wrongfully withholding his inheritance. Thus, for example: John of Bagmere demands against John son of Walter of Wells one virgate of land with the appurtenances in the vill of Combe as his right according to the custom of the manor, and therefore as his right, for he says maner in question was not on the ancient demesne, and only in two cases (if we mistake not) did the tenants get a judgment.
that one John of Bagmere his grandfather died seised thereof as his right according to the custom of the manor, and from that John the right descended according to the custom of the manor to his son William, the demandant's father, whose heir the demandant is according to the custom of the manor. This is just the formula which a man would use in the king's court were he claiming a freehold inheritance, save that at every turn reference is made to the custom of the manor; according to the custom inheritance is a matter of strict right as against all but the lord. The documents are much more chary of admitting that as against the lord the heir has any rights. On the death of a tenant a heriot becomes due, usually the best beast or best chattel or a fixed sum of money; but this is regarded less as a relief to be paid by an heir than as a payment due out of the dead man's estate, and if an 'extent' speaks of the heir at all, this is in general to tell us that he must 'do the lord's will,' or must 'redeem the land at the will of the lord.' The court rolls seem to show that as a matter of fact heirs were admitted on fairly easy terms, the lord taking an additional year's rent or the like, and the pleadings in which hereditary right is asserted against others than the lord testify to a strong feeling that the villein tenements are heritable; still as against the lord the heir has rather a claim to inherit than an inheritance. The records of this age but rarely say that a tenant is admitted 'to hold to him and his heirs,' generally they say no more than that the lord has given the land to A B. When, as would generally be the case, the tenants were personally unfree, the lord would have run some danger in talking about their heirs, for lawyers were saying that the serf could have no heir but his lord and drawing thence the deduction that a serf might be enfranchised by ungarded words. This may be the reason why early court rolls, when they do expressly allow that a new tenant is to have transmissible rights, do so by speaking not of his heirs but of his sequela. This is not a pretty word to use of a man, for it is the word that one uses of pigs and the like; the tenant is to hold to him and his brood, his litter. We shall better understand the nature of the heir's right against the lord, a right to inherit if the lord pleases, if we are persuaded that in many a case the inheritance was not very valuable. Certainly in the fourteenth century there were lords who would but too gladly have found heirs to take up the villein tenements at the accustomed services. We may hardly argue thence to an earlier time; but no doubt the services were often as good a return for the land as could have been obtained. A strong man with strong sons might do them and thrive; the weak and needy could not, and were removed with the full approbation of the other men of the vill, whose burdens had been increased by the impotence of their fellow-labourer.

Further the lord took care that the tenements should not be broken up among coheirs. Often the tenant's widow enjoyed the whole tenement during her life or until she married a second time without the lord's leave. Often the customary rule of inheritance gave the land to the dead man's youngest son, and this was accounted a mark of villein tenure. Perhaps in some cases the family kept together, and the son who was admitted as tenant was regarded as representing his brothers; but this must have been a matter of morals rather than of law or of enforceable custom. By one means or another the unity of the tenement was preserved and it is rare to find it held by a party of coheirs. Exceptions there doubtless were, but on the evidence afforded by the 'extents' and the Hundred Rolls it is hard to believe that in the thirteenth century the lords held themselves bound by custom to admit the heir on his tendering a fixed fine. 'Precarious inheritance,' if we may use such a term, was

1 Proceedings of the Court of the Abbot of Bec at Combe in Hampshire, p. 1290; Select Pleas in Monastic Courts, i. 34; see also p. 39, where a man counts upon the aid of his great-grandmother.
2 Cart. Glose, iii. 115; 'et post decessum ipsius heres eius redimet terram ad voluntatem domini.' Ibid. p. 182; 'et post decessum suum heres eius ante quem terram illum inmediatam redimet illum ad voluntatem domini.' Rot. Hum. iii. 541; 'et si filius eorum voluerit tenere eandem terram tune factum gratum dati Abbatiss.'
3 Blanston, c. 192.4
4 See Book, 794, 1005, 1062.
5 The 'extent' of Hoind in Norfolk, Cart. Rann. i. 401, is a rare example of a manor in which the tenements were allowed to descend to coheirs and
of common occurrence in all zones of society. The baronial relief had but lately been determined; the tenant by serjeanty still relieved his land 'at the will of the lord.' We know too that in later days the heir of a copyhold tenant very often had to pay an 'arbitrary' fine, while in other cases lords have succeeded in proving that the successors of the villein tenants were but tenants for life.

Of the alienation, of the sale and purchase, of villein tenements we read little. We may be sure that this could not be effected without the lord's leave; the seller came into the lord's court and surrendered the land into the steward's hand, who thereupon admitted the new tenant and gave him seisin. The new tenant paid a fine; often it would be one year's value of the tenement. But in this region there seems to have been but little custom, and we may be fairly certain that the lords of this period did not allow that new tenants could be forced upon them against their will. If the tenant attempted to alienate the tenement without the lord's leave, this was a cause of forfeiture; if he attempted to make a lease of it, this, if not a cause of forfeiture, subjected him to an amercement.

Finally we must note that the tenant in villeinage was usually regarded as an unfree man, a bondman, villanus, natus, servus. That a free man should hold in villeinage was possible, and up and down the country there may have been many free men with villein tenements; what is more, there likely enough were many men whose status was dubious. This is one of the most remarkable points in villeinage; villein tenure is of far greater practical importance than villein status. To prove that coheiresses; thus three sons and coheir hold twelve acres, six daughters and coheiresses hold thirty acres. But then the tenure is not villeinage of the common kind; probably it is not freehold, for merchant is paid, but there is no week work. The widow's right to hold the whole or a portion of the tenement is often much better settled than the heir's right. Thus at Brancaster, Curt. Rams. I. 416, the widow gives a heriot and for this becomes entitled to enjoy half the land: the son or daughter, if such there be, must make fine for the other half "quoad motus potest." In the Domesday of St. Paul's, p. 52, there is an often cited passage which seems to show that the Canons in 1229 admitted that some of their customary tenants had heritable rights. On the other hand, in 1327 the monks of Christchurch at Canterbury forbade the steward of a Devonshire manor to admit any heir or other person who demanded admittance as a right; Literae Cantuarienses, i. 229, 385.

The king is a great land-owner. Besides being the supreme lord of all land, he has many manors of his own; there is a constant flow of lands into and out of the royal hands; they are frequently given away to the tenants in fee, or come to him by escheat and forfeiture, they leave him by gifts and restorations. Now a distinction is drawn among the manors that he has. Some of them constitute, so to speak, the original endowment of the kingship, they are that ancient demesne of the crown which the Conqueror held when the great settlement of the Conquest was completed and was registered in Domesday Book. What has fallen in since that time is not considered as so permanently annexed to the kingly office; it is not expected of the king that he will keep in his own hands the numerous honours, baronies, and manors.

\[\text{Tenure.}\]
find any such rule as that the oath of one thegn is equivalent
to the oath of six ceorls. In administrative law therefore the
knight is liable to some special burdens; in no other respect
does he differ from the mere free man. Even military service
and scutage have become matters of tenure rather than matters
of rank, and, though the king may strive to force into knight­
hood all men of a certain degree of wealth, we have no such
rule as that none but a knight can hold a knight’s fee. Still
less have we any such rule as that none but a knight or none
but a baron can keep a seignorial court.

\[\text{§ 3. The Unfree.}\]

In the main, then, all free men are equal before the law.
Just because this is so the line between the free and the unfree
seems very sharp. And the line between freedom and unfreedom
is the line between freedom and servitude. Bracton accepts
to the full the Roman dilemma: Omnes homines aut
liberi sunt aut servi. He will have no mere unfreedom, no
semi-serf class, no merely predaial servage, nothing equivalent
to the Roman colonatus. All men are either free men or
serfs, and every serf is as much a serf as any other serf. We
use the word serf, not the word slave; but it is to be re­
membered that Bracton had not got the word slave. He used
the worst word that he had got, the word which, as he well
knew, had described the Roman slave whom his owner might
kill. And the serf has a dominus; we may prefer to render
this by lord and not by master or owner, and it is worthy of
observation that medieval Latin can not express this dis­
­tinction; if the serf has a dominus, the palatine earl, say,
the king of England, so long as he is duke of Aquitaine, has a
dominus also, and this is somewhat in the serf’s favour; but
still Bracton uses the only words by which he could have
described a slave and a slave-owner. True that servus is
[p.396]

1 Here again we must refer to Vinogradoff’s work for the discussion of many
details. See also Leadam, in Proceedings of Royal Hist. Soc. vi. 167, and in
L. Q. R. i. ix. s48.
2 Bracton, f. 4 b.
3 Bracton, f. 4 b; Bracton and Azo, p. 49.
4 Bracton, f. 5; Fleta, pp. 1, 239, § 23; Britton, i. 197 and the editor’s note.
5 See p. 390 as to Bracton’s odd use of the term servitus.
6 We hold this to have been fully proved by Hallam, Middle Ages, ed. 1857,
vol. iii. p. 256, and by Vinogradoff, pp. 48-56. But they are perhaps inclined
neither the commonest nor yet the most technical name for the
unfree man; more commonly he is called villanus or nativus,
and these are the words used in legal pleadings; but for Bracton
these three terms are interchangeable, and though efforts, not
very consistent or successful efforts, might be made to dis­
tinguish between them, and some thought it wrong to call the
villeins serfs, still it is certain that nativus always implied
personal unfreedom, that villanus did the same when employed
by lawyers, and that Bracton was right in saying that the law
of his time knew no degrees of personal unfreedom. Even in
common practice and by men who were not jurists the word
servus was sometimes used as an equivalent for nativus or
villeanus. The jurors of one hundred will call all the un­
free people servi, while in the next hundred they will be villani.
In French villain is the common word; but the feminine of
villein is nise (nativus).

There are no degrees of personal unfreedom; there is no such
thing as merely predaial servage. A free man may hold his
in villainage; but that is an utterly different thing; he is in
no sort a serf; so far from being bound to the soil he can
slip up his tenement and go whithersoever he pleases. In
later centuries certain niceties of pleading gave rise to the
terms ‘villein in gross’ and ‘villein regardant,’ and in yet later
times, when villainage of any kind was obsolescent, these were
supposed to point to two different classes of men, the villein
regardant being inseverable from a particular manor, while
the villein in gross might be detached from the soil and sold
[p.397] as a chattel. The law of Bracton’s time recognizes no such
distinction. As a matter of fact and a matter of custom,
English serfage may well be called predial. In the first place, it rarely if ever happens that the serfs are employed in other work than agriculture and its attendant processes; their function is to cultivate their lord's demesne. In the second place, the serf usually holds more or less land, at least a cottage, or else is the member of a household whose head holds land, and the services that he does to his lord are constantly regarded in practice as the return which is due from him in respect of this tenement or even as the return due from the tenement itself; such services, as we have already seen, are often minutely defined by custom. In the third place, his lord does not feed or clothe him; he makes his own living by cultivating his villein tenement, or, in case he is but a cottager, by earning wages at the hand of his wealthier neighbours. In the fourth place, he is seldom severed from his tenement; he is seldom sold as a chattel, though this happens now and again;1 he passes from feoffor to feoffee, from ancestor to heir as annexed to the soil. For all this, the law as administered by the king's court permits his lord to remove him from the tenement. It could hardly have done otherwise, for he held in villeinage, and even a free man holding in villeinage could be ejected from his tenement whenever the lord pleased without finding a remedy before the king's justices. But as to the serf, not only could he be removed from one tenement, he could be placed in another; his lord might set him to work of any kind; the king's court would not interfere; for he was a servus and his person belonged [p.38] to his lord; 'he was merely the chattel of his lord to give and 'sell at his pleasure'.


To give too late a date to the appearance of the idea that there are two classes of villeins. Thus in Y. B. 1 Hen. IV. f. 5 (Mich. pl. 11) a nieve brings an appeal for the death of her husband against her lord; it is argued that if the lord be convicted, the appellant will become free; to this it is replied, Not so, if she be regardant to a manor, for in that case she will be forfeited and become the king's niece; but otherwise would it be if she were a villein in gross.

2 Britton, f. 197.

But, whatever terms the lawyers may use, their own first principles will forbid us to speak of the English 'serf' as a slave: their own first principles, we say, for what we find is not a general law of slavery humanely mitigated in some details, but a conception of serfdom which at many points comes into conflict with our notion of slavery. In his treatment of the subject Bracton frequently insists on the relativity of serfdom. Serfdom with him is hardly a status; it is but a relation between two persons, serf and lord. As regards his lord the servus has, at least as a rule, no rights; but as regards other persons he has all or nearly all the rights of a free man; it is nothing to them that he is a servus.1 Now this relative servitude we cannot call slavery. As regards mankind at large the servus so far from being a mere thing is a free man. This seems to be the main principle of the law of Bracton's day. We must now examine each of its two sides: the servus's 'rightlessness' as regards his lord, his freedom or 'quasi-freedom' as regards men in general. It will then remain to speak of his relation to the state.

In relation to his lord the general rule makes him rightless. (1) The Criminal law indeed protects him in life and limb. Such protection however need not be regarded as an exception to the rule. Bracton can here fall back upon the Institutes:—the state is concerned to see that no one shall make an ill use of his property. Our modern statutes which prohibit cruelty to animals do not give rights to dogs and horses, and, though it is certain that the lord could be punished for killing or wounding his villein, it is not certain that the villein or his heir could set the law in motion by means of an 'appeal.' The

1 Bracton, f. 197 b, line 3, appeals to common opinion; 'dicitur enim vulgariter quod quis potest esse servus unius et liber homo alterius.' He uses the same phrase, f. 25, line 13, f. 196 b, line 36. On f. 198 b, he says, 'Cum quis servus sit, non erit servus eumlibet de populo.' Britton, i. 199; Fleta, p. 111 (§ 13).

2 Bracton, f. 6, § 3; f. 155 b, § 3. Britton, i. 195 and the Longsville note.

3 Bracton, f. 141: the servus only has an 'appeal' in case of high treason. For later law as to appeals by villeins see Y. B. 18 Edw. III. f. 32, Mich. pl. 4 (which appears also as 11 Hen. IV. f. 93, Trin. pl. 52); 1 Hen. IV. f. 5, Mich. pl. 11; Fitz. Abr. Coron. pl. 17; Lit. acc. 189, 190, 194; and Coke's comment. Littleton's doctrine is that a villein's heir has an appeal for the death of his ancestor, that a nieve has an appeal for rape, but that a servus has no appeal for mayhem, though for this crime the lord may be indicted. When a civil action was brought for beating, wounding, imprisonment, etc. there seems to
Rightlessness of the serf.

protection afforded by criminal law seems to go no further than [p.899] the preservation of life and limb. The lord may beat or imprison his serf, though of such doings we do not hear very much.

As against his lord the serf can have no proprietary rights. If he holds in villeinage of his lord, of course he is not protected in his holding by the king's courts; but then this want of protection we need not regard as a consequence of his serfdom, for, were he a free man, he still would be unprotected; and then, just as the free man holding in villeinage is protected by custom and manorial courts, so the serf is similarly protected.

His rightlessness appears more clearly as regards his chattels and any land that he may have acquired from one who is not his master. As regards any movable goods that he has, the lord may take these to himself. We hear indeed hints that his 'wainage,' his instruments of husbandry, are protected even against his lord; and that his lord can be guilty against him of the crime of robbery; but these hints are either belated or premature; the lord has a right to seize his chattels. But it is a right to seize them and so become owner of them: until seizure, the serf is their owner and others may and must treat him as such.

As a matter of fact we hear little of arbitrary seizures, much of seizures which are not arbitrary but are the enforcement of manorial customs. The villeins are constantly amerced and distraint; the lord in his court habitually treats them as owners of chattels, he even permits them to make wills, and when they die he contents himself with having been some doubt as to how much of the charge the defendant should formally deny before pleading that the plaintiff was his villein; see Y. B. 33-5 Edw. I. p. 290.

1 Select Pleas of the Crown, p. 3: a villein kept in chains because he wished to run away. For the imprisonment of a body of rebellious tenants in the 14th century see Literae Cantuarienses, vol. ii. p. xxxvi.

2 A ms. of Bracton in the Phillips Library, No. 3510, has a marginal note written early in the fourteenth century which states the hereditary rights of the villeins in forcible terms. 'Item usque ad tertium gradum inclusive illi de parentelis et sanguine villanorum, sive marem sive femineas, successor iure hereditario in terras et tenementa villanorum. Et si per iniquum dominium seuballivum eicintur, iniuriatur eis in hoc, quia legem suam habent ut liberi homines suam.'

3 Bracton, f. 6, § 3; Bracton and Azo, pp. 67, 71; Vinogradoff, p. 74.

4 Bracton, f. 155 b, § 8.

5 See especially Bracton, f. 193 b, line 6.

And then we find that all this rightlessness or unprotectedness exists only where serfdom exists de facto. The learning of seisin or possession and the rigid prohibition of self-help have come to the aid of the serfs. Serfdom and liberty are treated as things of which there may be possession, legally protected possession. A fugitive serf may somewhat easily acquire a 'seisin' of liberty. When he is seized of liberty the lord's power of self-help is gone; he can no longer capture the fugitive without a writ; he can no longer take any lands or chattels that the fugitive may have acquired since his flight.

He must have recourse to a writ, and the fugitive will have an opportunity of asserting that by rights he is a free man, and of asserting this in the king's court before justices who openly profess a leaning in favour of liberty. We need not suppose that this curious extension of the idea of possession is due to this leaning; it is part and parcel of one of the great constructive exploits of medieval law:—relationships which exist de facto are to be protected until it be proved that they do not exist de iure. Still the doctrine, though it had a double
edge, told against the lords. Apparently in Bracton's day a serf who fled had to be captured within four days; otherwise he could not be captured, unless within year and day he returned to 'his villein nest'; a parallel rule gave the ejected landholder but four days for self-help. Of course, however, every absence from the lord's land was not a flight; the serf might be living elsewhere and making some periodic payment, _chevaugion_, head-money, in recognition of his lord's rights: if so, he was not in seisin of his liberty. What the Institutes say about domesticated animals can be regarded as to the point.

Yet another qualification of rightlessness is suggested. More than once Bracton comes to the question whether the lord may not be bound by an agreement, or covenant, made with his serf. He is inclined to say Yes. His reasoning is this—the lord can manumit his serf, make him free for all purposes; but the greater includes the less; therefore the serf may be made a free man for a single purpose, namely that of exacting some covenanted benefit, and yet for the rest may remain a serf. Such reasoning is natural if once we regard serfdom as a mere relationship between two persons. It does not, however, seem to have prevailed for any long time, for our law came to a principle which was both more easily defensible and more hostile to serfdom, namely that if the lord makes a covenant with his serf, this implies a manumission; he becomes free because his lord has treated him as free. Bracton's doctrine very possibly had facts behind it and was no empty speculation, for we do find lords making formal agreements with their serfs; but it ran counter to a main current of English land law. The agreements that Bracton had in view

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2. Bracton, f. 116. These strict possessory rules were being relaxed before the end of the century. Year and day takes the place of the four days; Britton, i. 199, 201.
4. Bracton, f. 24 b, 208 b; Vinogradoff, pp. 70–4.
6. See Vinogradoff, p. 73. Add to his illustrations, Cart. Glouc. ii. 87: grant of land to G, our 'native' for life and to his wife during her virginity, at a rent and in consideration of a gross sum; he is not to marry son or daughter without our leave. Select Pies in Manorial Courts, i. 172: elaborate agreement between the abbot of Battle and his villeins. Note Book, pl. 794, 1814.

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The serf's position in relation to all men other than his lord is simple—he is to be treated as a free man. When the lord is not concerned, criminal law makes no difference between bond and free, and apparently the free man may have to do battle with the bond. A blow given to a serf is a wrong to the serf. It may also give his lord a cause of action against the striker; but here also the law makes no difference between bond and free. If my serf is assaulted so that I lose his services or so that I suffer contumely, I have an action for damages; but it would be no otherwise had the assaulted person been my free servant. So also in defining the master's liability for wrongful acts done by his dependants, the same principles as regards authorization and ratification seem to be applied whether the dependants be free servants or serfs.

It is rather for the acts of members, free or bond, of his household (manuspastus, mainpast) that a man can be held liable than for the acts of his serfs.

Then in relation to men in general, the serf may have lands The serfs and goods, property and possession, and all appropriate remedies. Of course if he is ejected from a villein tenement, he has no action; the action belongs to the lord of whom he holds the tenement, who may or may not be his personal lord; were he a free man holding in villeinage he would be no better off. But the serf can own and possess chattels and hold a tenement against all but his lord. This general proposition may require some qualifications or explanations in particular instances.

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1. See above, pp. 405–6.
2. Bracton, f. 155 § 2, 155 b § 3.
3. Bracton, f. 201, 204 b.
4. A man's liability for the doings of his mainpast will deserve fuller discussion in another context.
5. In Bracton's day the man who purchases and obtains possession of villein land from a villein is protected against the lord's self-help; Note Book, pl. 1203.
ought not to be seized until his own chattels have been exhausted; we read in Bracton that when a lord is to be distracted his villein's chattels should be the very first object of attack; but in these cases we may say that the serf, having no proprietary rights against his lord, is treated as having none against those who by virtue of legal process are enabled to claim what the lord himself could seize:—the general principle is hardly impaired by such qualifications, and it is a most important principle.

Still it is not a natural principle. This attempt to treat a man now as a chattel and now as a free and lawful person, or rather to treat him as being both at once and the same moment, must give rise to difficult problems such as no law of true slavery can ever have to meet. Suppose for example that a villein makes an agreement with one who is not his lord; it seems certain that the villein can enforce it; but can the other contractor enforce it? To this question we have a definite answer from Britton:—a contract can not be enforced against a villein; if he is sued and pleads 'I was the villein of X when this agreement was made and all that I have belongs to him,' then the plaintiff, unless he will contradict this plea, must fail and his action will be dismissed; nor can he sue X, for (unless there is some agency in the case) the lord is not bound by his serf's contract. In later times this rule must have been altered; the plea 'I am the villein of X and hold this land of him in villeinage' was often urged in actions for land, but we do not find the plea 'I am the villein of X set up in purely personal actions, as assuredly it would have been had it been a good plea. But, even if we admit that a villein may be sued upon a contract, the creditor's remedy is precarious, for the lord can seize all the lands and chattels of his serf, and an action against his serf is just what will arouse his usually dormant right. Thus the law, in trying to work out its curious principle of 'relative servitude,' is driven to treat the serf as a privileged person, as one who can sue but can not be sued upon a contract; and, even when it allows that he can be sued, it can give the creditor but a poor chance of getting paid and will hardly prevent collusion between villeins and friendly lords. Again, we see the ecclesiastical courts condemning the villein to pay money for his sins, fornication and the like, and then we see the villein getting into trouble with his lord for having thus expended money which in some sort was his lord's. The law with its idea of relative servitude seems to be fighting against the very nature of things and the very nature of persons.

Lastly, we should notice the serf's position in public law. It is highly probable that a serf could not sit as the judge of a free man, though it may be much doubted whether this rule was strictly observed in the manorial courts. He could not sit as a judge in the communal courts, though he often had to go to them in the humbler capacity of a 'presenter.' So too he could not be a juror in civil causes; this he probably regarded as a blessed exemption from a duty which fell heavily on free men. But in criminal matters and in fiscal matters he had to make presentments. At least in the earlier part of the century, the verdict or testimony which sends free men to the gallows is commonly that of twelve free men endorsed by that of the representatives of four townships, and such representatives were very often, perhaps normally, born villeins. Such representatives served on coroners' inquests, and the king took their testimony when he wished to know the extent of his royal rights. In the halimoots or manorial courts the serfs are busy as presenters, jurors, affeerers of amercements, if not as judges; they fill the manorial offices; the reeve of the township is commonly a serf. What is more, the state in its exactions pays little heed to the line between free and bond; it expects all men, not merely all free men, to have arms; so soon as it begins to levy taxes on movables, the

2 Bracton, f. 217, line 36. We seem to see here a change unfavourable to the villein.
4 See Broke, Abr. Villeinage, pl. 33: in an assize of mort d'ancestor one of the defendants pleaded that he was the villein of X and the action was dismissed. Broke notes that he did not add that he held in villeinage and therefore treats the case as curious. Still this was an action for land.

1 Select Pleas in Manorial Courts, i. 97, 98.
2 On a very early roll of a Norfolk manor, for a sight of which we have to thank Dr Jessopp, a villein is amerced for having cossoined a free man, 'et testatur per curiam quod non potest assolari liberum hominem.'
3 Thus the Hundred Rolls seem to be founded on the presentments made as well by representatives of townships, who would often be unfree, as by free and lawful jurors of the hundreds; see the rolls for Essex, R. H. i. 136 ff.
4 The original Assize of Arms (1181) contemplates only the arming of free
serfs, if they have chattels enough, must pay for them. It is but a small set-off for all this onerous freedom that a serf can not be produced as champion or as compurgator; and even this rule is made to operate in favour of liberty; if a lord produces a serf as champion or compurgator this is an implied manumission. The serfs have to bear many of the burdens of liberty. The state has a direct claim upon their bodies, their goods, their time and their testimony, and if for a moment this seems to make their lot the less tolerable, it prevents our thinking of them as domestic animals, the chattels of their lords.

Having seen what servitude means, we may ask how men become serfs. The answer is that almost always the serf is a born serf; *natum* and *villanus* were commonly used as interchangeable terms. But as to the course by which servitude is transmitted from parent to child we find more doubts than we might have expected. If both parents are serfs, of course the child is a serf; but if one parent is free and the other a serf, then difficulties seem to arise. The writer of the *Leges Henrici* holds that the child follows the father; but he quotes the proverb, 'Vitus matris est cuiusque taurus allusor,' and seems to admit that in practice the child is treated as a serf if either of the parents is unfree. Glanvill is clear that the child of an unfree woman is a serf and seems to think that the child of an unfree man is no better off. Thus we should get the rule, which had been approved by the church, namely, that, whenever free and servile blood are mixed, the servile prevails.

Bracton, however, has a more elaborate scheme. A bastard [p. 406]

...
events if she went to live along with her villein husband in his villein tenement and to bear him villein children, she herself would be accounted a villein. But this was not the rule. How far during the marriage she could make good any rights against her husband’s lord (and it will be remembered that as against all others her husband was a free man) was very doubtful; she could not sue without her husband, and if he joined in the action, the lord would say, ‘You are my villein!’ But on her husband’s death she would be free once more, or rather her freedom would once more become apparent and operative.

1 Bracton, f. 202, 202 b; Britton, i. 281. Bracton’s own opinion seems this:—Free woman with free tenement marries a bondman; his lord ejects them from her free tenement; they can sue him. (See Bracton’s Note Book, p. 183; it is not stated in this case that the disseisor was the villein’s lord.) But apparently Bracton admits that this is not the prevailing opinion, at all events if the lord is in seisin of the husband. Observe the words secundum quod ego non approbo. But at any rate during the marriage the wife can have no action against her husband’s lord save one based on the condition of her possession.

2 Asaile Roll, Lincoln, No. 481 (57 Hen. III.), m. 8: ‘in villa de Belleshby sunt duo feco, solicet, feodium de Faumer et feodium Peverel et... omnes illi qui nati sunt in feco de Faumer liberi sunt, omnes vero illi qui nati sunt in feco Peverel villani sunt.’

3 Bracton, f. 5. But as to the ingratitude of one who has become free by knighthood, or by orders, see Britton, i. 208; Plata, p. 111.

4 24 Edw. I. 55. If they make default they and their heirs shall be servi forever, paying every year four pence per head. A chevage of four pence a head

Influence of place of birth.

If in seisin of the husband. Observe the words secundum quod ego non approbo. But at any rate during the marriage the wife can have no action against her husband’s lord save one based on the condition of her possession.

whether prolonged servitudo de facto will generate servitudo de iure was in Edward I’s day a moot point. Some justices laid down as a maxim that no prescription can ever make servile, blood that once was free. Others flatly denied this rule, and apparently held that if from father to son a succession of free men went on doing villein services, the time would come when an unfree child would be born to a free father. One opinion would have condemned to servitude the fifth generation in a series of persons performing base services, while a Scottish law-book mentions the fourth generation, and a common form

[p. 408] of pleading made a lord assert that he had been seised of the soil, its parents, and their heirs shall be

seems to have been common in France; hence the serv is homo quatuor mem- ronum.


2 But how could a defendant gain anything by saying untruly that he was personally a villein? In an action for land was it not enough to say, ‘I hold in seisin of the husband, or I hold at will, and therefore I am not the right person to be sued’; while is it not in actions for land that we find defendants relying on servitude of any kind? The answer is given by a case of 1292; Y. B. 20–1 Edw. I. p. 41. If the defendant merely pleads tenure in villeinage, the plaintiff may contradict him and the falsehood of the plea may be established; but if he adds that he is a villein, then the plaintiff can make no reply and fails in his suit. Perhaps it was considered improbable that any one would condemn himself and his posterity to perpetual servitude unless he had good cause for so doing. At any rate there was no reply to this confession of villein status until in 1363 a Statute, 37 Edw. III. c. 17, permitted the plaintiff to contradict it. In 15 Edw. III. Fitz. Abr. Riew, 392, the absurdity of the rule is shown:—It is hard; for a man may confess himself villein to his father or his cousin, and then next day get a release from him. ‘Yes, it is hard,’ is the reply, ‘but it is law.’
often brought to a decision. The general rule as to the means by which free or servile status could be conclusively proved was that it must needs be ascribed to servile \[p.410\] that it must needs be ascribed to servile \[p.410\] if it lay on the person whose status was in question, he had to produce free kinsmen; if it lay on the beaufid lord, he had to produce kinsmen of the would-be free man who would confess themselves serfs. A mere verdict of the country might settle the question provisionally and, as we may say, for possessory purposes, but could not settle it conclusively except as against one who had voluntarily submitted to this test. The burden of the proof is thrown on one side or on the other by seisin; the man who is in de facto enjoyment of liberty continues to be free until his servility is proved; the man who is under the power of a lord must remain so until he has shown his right to liberty. On the whole the procedural rules seem favourable to freedom. In Bracton’s day a days flight might throw the burden of proof upon the lord, and he would have to make out his title, not by the testimony of free and lawful neighbours, who would naturally infer servility de iure from servitium de facto, but by the testimony of the fugitive’s own kinsfolk as to the fugitive’s pedigree, and they must confess themselves serfs before their testimony can be of any avail. On the other hand, if a man has been doing villein services, he may as a matter of fact easily fall into serfage, unless he is willing to run from hearth and home and risk all upon a successful flight and an action at law. If for generation after generation his stock has held a villein tenement and done villein services he will be reckoned a villein, that is, a servile; even his kinsfolk will not dare to swear that he is free. There is no form of service so distinctively servile that it must needs be ascribed to servile \[p.410\] status and not to villein tenure; even the merchet, which is regarded as the best test, may sometimes be paid ratione

\[1\] See above, p. 418.

\[2\] On the face of it this looks like an ancient procedure, which has been preserved in this case in favorem libertatis. The lord ends his count by offering a suit to wit, J, B, C, kinsmen of the defendant. In most other cases the production of suit has in the king’s court become a mere formality, but here it is still all important. A jury may be brought in to decide whether the suitors are really of kin to the defendant. Cases illustrating this procedure are, Note Book, pl. 1005, 1041, 1167, 1182; Y. B. 32-3 Edw. 1. p. 514; Northumberland Assize Rolls (Surtees Soc.) pp. 46, 159, 196.

1 See above, p. 373, and Britton, i. 196. In Y. B. 8 Edw. III. f. 66 (Mich. pl. 31) it is said that the bishop of Ely held land by the service of being tailaged along with the villeins.

The best illustration of this point is a case of 20 Edw. I. reported in the notes to Hale’s Pleas of the Crown, ii. 298. Two justices of assize laid down the rule u quod nulla praescriptio temporis potest liberum sanguinem in servitutem reducere.’ The case was then brought before the auditors of complaints, who declared that this maxim omnino falsum est.’ The case was then taken into the King’s Bench, but with what result does not appear. Britton, i. 196, 206, denies that long performance of base services, c.e. payment of merchet, can make a free stock unfree. So does Hengham in Y. B. 33-3 Edw. 1. p. 15: u prae scriptio temporis non redigit sanguinem in servitutem.’ On the other hand, a gloss in the Longueville MS. at Cambridge, printed by Vinogradoff, p. 68, says that in the fifth generation villein services will make free blood servile. The Scottish Quomiam Attachamenta, c. 39 (Acts of Parliament of Scotland, i. 665), makes the fourth generation servile. Then in Fitz. Abr. Villenage, pl. 24, we have an extract from an unprinted Year Book of Edward III., which seems to say that a stock may become servile by holding in villeinage from time immemorial.

\[3\] Britton, f. 194 b. Britton, i. 198.

\[4\] Britton, f. 194.

\[5\] See above, p. 418.
I have conferred full and perfect freedom; the freed man was in all respects the equal of the free born. This could hardly have been otherwise since, as we have seen, serfdom was regarded for the more part as a mere relation between two persons. Glanvill seems to have held a different opinion. He speaks as though the liberation would make the serf free as regards his former lord but leave him a serf as regards all other men. The chief, if not the only, point that Glanvill had before his mind when he wrote this, seems to have been that the freed villein could not be produced as champion or as compurgator. It is possible also that he had in view acts of enfranchisement which were merely private and would not have denied that there were solemn methods by which absolute freedom could be conferred. In the *Leges Henrici* the man who wishes to free his serf must do so in public, "in a church or a market or a county court or a hundred court, openly and before witnesses"; lance and sword are bestowed on the new free man and a ceremony is enacted which shows him that all ways lie open to his feet. Glanvill may have required some such public act if perfect liberty was to be conferred; but Bracton, who habitually regards serfdom as a mere relationship, sees no difficulty; the lord by destroying the relationship destroys serfdom. Here we seem to see a modern notion of relative serfdom growing at the expense of [p. 417] an older notion of true slavery. To turn a thing into a person

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1. Glanvill, v. 5. This passage is very difficult, but seems to be explained by Bracton, f. 194 b. We may doubt whether Glanvill means to deny that a lord can gratuitously liberate his serf. If however he liberates him in consideration of a sum of money then a difficulty arises; this is met by the intermediation of a third person who purchases the serf nominally with his own, though really with the owner's money. Bracton says 'eligat fidem alicuius qui eum emat quasi propriis demisit suis.' Still villeins are said to buy their own liberty; e.g. Note Book, pl. 31, 344. The books of conveyancing precedents of the thirteenth century, e.g. the Ludlow and Carpenter MSS. at Cambridge (R. i. 1; Mm. i. 27), give forms of enfranchisement by way of sale; the former shows how the transaction can be accomplished either by two deeds or by a single deed. But see Vinogradoff, p. 86, who deals somewhat differently with the difficult passage in Glanvill.

2. Glanvill, v. 5.

3. *Leg. Henr. c. 78 § 1: 'et liberas ei vias et portas conscriberat apertas.'
liberi homines nor yet servi; but a merely relative servitude is a juristic curiosity. In defining it we have ever to be using the phrases ‘in relation to’, ‘as regards’, ‘as against’, phrases which would not easily occur to the unlettered, and law which allows my serv to sue any free man but me, even to sue my lord, does not look like a natural expression of any of those deep-seated sentiments which demand that divers classes of men shall be kept asunder. Then this idea of relative servitude has to be further qualified before it will square with facts and customs and current notions of right and wrong. When a lord allows it to be recorded that on the death of his servile tenant he is entitled to the best beast, he goes very far towards admitting that he is not entitled to seize the chattels of his serv without good cause. We hesitate before we describe the serv as rightless even as against his lord, and, if we infer want of right from want of remedy, we feel that we may be doing violence to the thoughts of a generation which saw little difference between law and custom. On the whole looking at the law of Bracton’s day we might guess that here as elsewhere the king’s court has been carrying out a great work of simplification; we might even guess that its ‘serf-villain’, rightless against his lord, free against all but his lord, is as a matter of history a composite person, a serv and a villein rolled into one.

That this simplifying process greatly improved the legal position of the serv can hardly be doubted. We need not indeed suppose that the theow or servus of earlier times had been subjected to a rigorously consistent conception of slavery. Still in the main he had been rightless, a chattel; and we may [p. 431]

1 As to the litter and utiliones see Brunner, D. B. G. i. 104.
2 A comparison between our medieval servitude and the slavery of the ancient world might seem to some beside the point on the ground that the ancients were beaten. But a no less startling contrast might be drawn between our medieval servitude and the law which Englishmen and men of English race evolved for their negro slaves. It was quite untroubled by any idea of relativity, and reproduced, though it had hardly copied, the main features of Roman law. See T. H. Cobb, An Inquiry into the Law of Negro Slavery, Philadelphia, 1864.
3 The contemporary law of France knew how to keep the vitas and the serv well apart. Sometimes the former word is used to describe the whole mass of peasants bond and free. ‘Mais souvent aussi le même mot est employé avec une signification restreinte et s’applique au paysan libre, par opposition au serv, comme la tenue en villeinage est opposée à la tenue en manmeute’: Luchaire, Manuel des institutions, p. 329. A contemporary French critic of Bracton’s book would have accosted him of mixing up two classes of men.

be sure that his rightlessness had not been the merely relative rightlessness of the ‘serf-villain’ of later days, free against all but his lord. Indeed we may say that in the course of the twelfth century slavery was abolished. That on the other hand the villani suffered in the process is very likely. Certainly they suffered in name. A few of them, notably those on the king’s manors, may have fallen on the right side of the Roman dilemma ‘aut liberi aut servi,’ and as free men holding by unfree tenure may have become even more distinctively free than they were before; but most of them fell on the wrong side; they got a bad name and were brought within the range of maxims which described the English theow or the Roman slave.

Probably we ought not to impute to the lawyers of this age any conscious desire to raise the serv or to debase the villein. The great motive force which directs their doings in this as in other instances is a desire for the utmost generality and simplicity. They will have as few distinctions as possible. All rights in land can be expressed by the formula of dependent tenure; all conceivable tenures can be brought under some half-dozen heads; so also the lines which have divided men into sorts and conditions may with advantage be obliterated, save one great line. All men are free or serfs; all free men are equal; all serfs are equal;—no law of ranks can be simpler than that. In this instance they had Roman law to help them; but even that was not simple enough for them; the notion of coloni who are the serfs of a tenement rather than of a person, though it might seem to have so many points of contact with the facts of English villeinage, was rejected in the name of simplicity. They will carry through all complexities a maxim of their own:—the serv is his lord’s chattel but is free against all save his lord. They rock little of the interests of any classes, high or low: but the interests of the state, of peace and order and royal justice are ever before them.

We have spoken at some length of the ‘serf-villains’ of the thirteenth century, for they formed a very large class. For the number of their serfs.

1 Bracton, f. 4 b.
it is highly probable that large numbers of men did not know on which side of the legal gulf they stood; they and their ancestors had been doing services that were accounted villein, paying mercchet and so forth; but this was not conclusive, and if they escaped from their lord it might be very difficult for him to prove them his 'natives.' On the other hand, while they remained in his power, they could have little hope of proving themselves free, and if they fled they left their all behind them. In the third place, a great part of our information comes from the estates of the wealthiest abbeys, and while admitting to the full that the monks had no wish to ill-treat their peasantry, we cannot but believe that of all lords they were the most active and most far-sighted. Lastly, we have as yet in print but little information about certain counties which we have reason to suppose were the least tainted with servitude, about Kent (already in Edward I.'s time it was said that no one could be born a villein in Kent?), about Norfolk and Suffolk, about the Northumbrian shires. Still, when all is said, there remain the Hundred Rolls for the counties of Bedford, Buckingham, Cambridge, Huntingdon and Oxford, and no one can read them without coming to the conclusion that the greater half of the rural population is unfree. The jurors of various hundreds may tell us this in different ways; but very commonly by some name such as nativi or servi, by some phrase about 'ransom of flesh and blood' or the like, they show their belief that taken in the lump those peasants, who are not freeholders and are not royal sokemen, are not free men.

Occasionally a man who was born a villein might find a grand career open to him. It was said that John's trusty captain Gerard de Athée, whose name is handed down to infamy by Magna Carta, was of servile birth; in 1313 the bishop of Durham manumitted a scholar of Merton who was already a 'master'; in 1308 Simon of Paris, mercer and alderman, who had been sheriff of London, was arrested as a fugitive villein, after being required to serve as reeve of his native manor.

1 Kentish Coonun (Statutes, i. 222); Y. B. 90-1 Edw. I. p. 168. But see Note Book, pl. 1419.
3 Depositions and Ecclesiastical Proceedings from the Court of Durham (Siret's Soc.), p. 6.
4 Y. B. 1 Edw. II. f. 1; Liber de Antiquis Legibus, p. 249.

Another large part of medieval society is made up of men civil death. and women who have 'entered religion and become professed,' of monks, nuns, 'regular' canons and friars who have taken vows of poverty and obedience and quitted this world. Now a transition from the villein to the monk seems harsh. Bracton however makes it—the villein being under the power of his lord may, like the monk, be considered as 'civilly dead.' From the lawyer's point of view the analogy that is thus suggested will not seem altogether fanciful and profitless. It is not as a specially holy person but as a property-less and a specially obedient person that law knows the monk. He has no will of his own (non habet velle, neque vollet) because he is subject to the will of another, and, though as a matter of religion that will may be thought of as the divine will expressed in the rule of St Benet or St Bernard, still within the sphere of temporal law it is represented by the will of the abbot. It could not be suffered that by a mere declaration of his intention to live a holy life untroubled by mundane affairs a man should shuffle off not only the rights but the duties that the law has cast upon him; but a vow of obedience is a different matter; it is not very unlike a submission to slavery.

The fiction of 'civil death' seems called in to explain and define rules of law which have been gradually growing up. By the dooms of Æthelred and of Cnut the cloister-monk is forbidden to pay or to receive the feud money, that is to say, the money payable by the kindred of a man-slayer to the kindred of the slain, 'for he leaves behind his kin when he submits to rule-law'; he ceases to be a member of a natural family when he puts himself under the monastic rule and enters a spiritual family. Already Alfred had decreed that if I entrust goods to 'another man's monk' without the leave of

1 Bracton, f. 421 b: 'Est etiam mons civilis in servitu sub potestate dominii constituto.'
2 See e.g. Lyndwood, p. 168.
3 For the parallel and closely similar French law, see Viollet, Histoire du droit civil, p. 283.
4 Æth. viii. 25; Cnut, i. 5, § 2: 'He gb5 of his mæg-lage, bonne he gebil5 iu regal-lage.'

P. M. 1.
THE HISTORY
OF
ENGLISH LAW
BEFORE THE TIME OF EDWARD I.

BY
SIR FREDERICK POLLOCK, BART., M.A., LL.D.,
CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD,
of LINCOLN'S INN, BARRESTER-AT-LAW,

AND
FREDERIC WILLIAM MAITLAND, LL.D.,
DOWNING PROFESSOR OF THE LAWS OF ENGLAND IN THE UNIVERSITY OF CAMBRIDGE,
of LINCOLN'S INN, BARRESTER-AT-LAW.

SECOND EDITION.

VOLUME II.

CAMBRIDGE:
AT THE UNIVERSITY PRESS.
1898

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powers of this kind seem to be implied in its notion of ownership. Not that land has been easily alienable; seignorial and family claims must be satisfied before there can be any alienation at all; but when a man is free to give away his land, [p.12] he is free to do much more than this; he can impose his will on that land as a law that it must obey. In this context we ought to remember that the power to alienate land is one that has descended from above. From all time the king has been the great land-giver. The model gift of land has been a governmental act; and who is to define what may or may not be done by a royal land-book, which, if it is a deed of gift, is also a privilegeum sanctioned by all the powers of state and church? The king’s example is a mighty force; his charters are models for all charters. The earl, the baron, the abbot, when he makes a gift of land will consult, or profess that he has consulted, his barons or his men. This influence of royal privilegium goes far, so we think, to explain the power of the forma doni. Still it would not be adequate, were we not to think of the hazy atmosphere in which it has operated. The gift of land has shaded off into the loan of land, the loan into the gift; the old land-loan was a temporary gift, the gift was a permanent loan; and if the donee’s heirs were to inherit the land, this was because it had been given not only to him, but also to them. This haze we believe to be very old; it is not exhaled by feudalism but is the environment into which feudalism is born. And so in the thirteenth century every sort and kind of alienation (that word being here used in its very largest sense) is a ‘gift,’ and yet it is a gift which always, or nearly always, leaves some rights in the giver. In our eyes the transaction may be really a gift, for a religious house is to hold the land for ever and ever, and the only service to be done to the giver is one which he and his will receive in another world; or it may in substance be a sale or an exchange, since the

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1 Bracton, f. 17 b: ‘Modus enim legem dat donationi, et modus tenendus est contra ius commune et contra legem, quia modus et conventio vincunt legem.’
2 See above, vol. i. p. 346.
3 See Brunner’s two essays, Die Landschenkungen der Merowinger, and Ursprung des droit de retour, which are reprinted in his Forschungen zur Geschichte des deutschen und französischen Rechts. Also, Maitland, Domesday Book, 339.
4 The exception is when there is ‘substitution’ not ‘subinfeudation.’

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14 Rights in Land.

so-called donee has given money or land in return for the so-called gift; or it may be what we should call an onerous lease for life, the donee taking the land at a heavy rent — but in all these cases there will be a ‘gift,’ and precisely the same two verbs will be used to describe the transaction; the donor will say ‘I have given and granted (sciatis me dedisse et concessisse).’

If then ‘the form of the gift’ can decide whether the donee is to hold in fee or for life, whether he is to be a heavily burdened lessee, or whether we must have recourse to something very like a fiction in order to discover his services, we can easily imagine that the form of the gift can do many other things as well. Why should it not provide that one man after another shall enjoy the land, and can it not mark out a course of descent that the land must follow? The law, if we may so put it, is challenged to say what the gift can not do; for the gift can do whatever is not forbidden.

One of the first points about which the law has to make up its mind is what, in the meaning of a gift to a man, and his heirs, The growing power of alienation has here raised a question. Born to the end of the twelfth century the tenant in fee who wished to alienate had very commonly to seek the consent of his apparent or presumptive heirs. While this was so, it mattered not very greatly whether this restraint was found in some common-law rule forbidding disherison, or in the form of a gift which seemed to declare that after the donee’s death the land was to be enjoyed by his heir and by none other. But early in the next century this restraint silently disappeared. The tenant in fee could alienate the land away from his heir. This having been decided, it became plain that the words ‘and his heirs’ did not give the heir any rights, did not decree that the heir must have the land. They merely showed that the donee had an estate that would endure at least so long as any heir of his was living. If on his death his heir got the land, he got
it by inheritance and not as a person appointed to take it by the form of the gift.1

This left open the question whether the donee's estate was [p.14] one which might possibly endure even if he had no heir. Of course if the estate was not alienated, then if at any time an heir failed, the land escheated to the lord. But suppose that it is alienated: then will it come to an end on the failure of the heirs of the original donee? We seem to find in Bracton's text many traces of the opinion that it will. Early in the century it became a common practice to make the gift in fee, not merely to the donee 'and his heirs,' but to the donee, 'his heirs and assigns.' What is more, we learn that if the donee is a bailli, that in this case he might make a free,

But with a certain law of the Mirror (Selden Soc.), pp. 175, 181, holds that no one should be person entitled to it for the time being—he be the original donee, be he an alienee—dies and leaves no heir. This was certainly the law at a somewhat later time.4

1 Bracton, f. 17: 'et sic acquirit donatorius rem donatam ex causa donationis, et heredes cius post eum ex causa successionis; et nihil acquirit [heres] ex donatione facta successoris, quia cum donatorio non est foedus.'

2 Generally in a collection of charters we shall find two changes occurring almost simultaneously: (1) the donor's expectant heirs no longer join in the gift; (2) the donee's 'assigns' begin to be mentioned.

3 Bracton, f. 12 b, 13, 20 b, 212 b; Note Book, pl. 402, 1289, 1706; Britton, ii. 293; ii. 302.

4 Alienation would chiefly be by way of subinfeudation, and Bracton on more than one occasion discusses the case in which a mesne lordship escheats but leaves the demesne tenancy existing: f. 23 b, 48. But unless the donor expressly contracted to warrant the donee's 'assigns' he was not bound to warrant them: f. 17 b, 20, 37 b, 381. See also Note Book, pl. 106, 332, 617, 604, 607, 1289, 1290; also Chron. de Melsa, ii. 104. The position of a tenant who had no warrantor was very insecure, for he could be driven to stake his title on the grand assize; hence the great importance of 'assigns' in the clause of warranty. It was important also in the grant of an advowson:

Bracton, f. 54. Apparently too it might be valuable if the donor's apparent heir was convicted of felony: Ibid. f. 134. But by this time the word in its commonest context was becoming needless: Y. B. 33-35 Edw. I. p. 363. The writer of the Mirror (Selden Soc.), pp. 175, 181, holds that no one should be able to alienate unless his assigns have been mentioned. On the whole we
been thrice inherited by the heirs of the body of the donee. When that degree has been passed, the tenant will be bound to do homage to the donor's heir and perform the forinssec service. [p.16] Probably under twelfth century law the estate of the donee was deemed inalienable, at all events until this degree had been passed. The maritagiun was a provision for a daughter—or perhaps some other near kinswoman—and her issue. On failure of her issue, the land was to go back to the donor or his heirs.

Meanwhile about the year 1200 gifts expressly limited to the donee and the heirs of his body and gifts made to a husband and wife and the heirs of their bodies begin to grow frequent. Before the end of Henry III's reign they are

1 Bracton, f. 21 b.
2 The maritagiun appears already in D. B., e.g. i. 188 b.: 'dedit sum nepte sua in maritaggio.' It appears in Henry I's coronation charter as maritatio; see also Round, Ancient Charters, p. 8, for an example from 1121. Glanvill discusses it in lib. i. 18; Bracton, f. 21-23. During the period between Glanvill and Bracton it causes a great deal of litigation; see cases in Note Book, indexed under 'Marriage Portion' and Select Civil Pleas (Selden Soc.), p. 184. It has been said that 'Marriage is the name not of a species of tenure but of a species of estate.' (Challis, Real Property, 2nd ed. p. 12). This is hardly true of the early period with which we are dealing. The most striking feature of the liberum maritagiun is a tenural quality, namely, tenure which for three generations is tenure without service. The term maritagiun points, we may say, to a peculiar kind of estate; but liberum maritagiun points also to a highly peculiar kind of tenure. See Y. B. 30-31 Edw. I. 388. In later days the gift in frank marriage is deemed to create an estate in special tail for the husband and wife, and the main interest of it lies in the creation of such an estate without any words of inheritance; see Challis, Real Property, 2nd ed. pp. 12, 265. But from an early time it was usual, as a matter of fact, to employ words marking out a line of descent, and in Bracton's day this was not always that of an estate in tail special for husband and wife. The maritagiun may be given to husband and wife and the heirs of their two bodies, or to the wife and the heirs of her body, or to the husband and the heirs of his body; and there are other variations. See Bracton, f. 22 b. So long as feudal services are grave realities it is important to maintain that the marriage portion, whichever of these forms it may take, may be a liberum maritagiun. In 1307 counsel urges that a gift to a woman and the heirs of her body can not be frank marriage. A judge replies 'Why so? If you give me a tenement in frank marriage can I not frame the entail as I please?' See Y. B. 33-35 Edw. I. p. 398.

3 Fines (ed. Hunter), i. 84, 85, 96, 102, 110, 160, 251; ii. 78, 91, 100. These are instances from the reigns of Richard and John. An instance of a royal marriage settlement is this:—in 1292 Henry III gave land to his brother Richard, to hold to him and his heirs begotten of his wife Sanchia, with an express clause stating that the land was to revert on the failure of such heirs to the king and his heirs; Placit. Abbrev. 145.
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 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 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; but she had no action against him, nor had he against her. If she killed him, that was petty treason.

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. In 1291 a case, which was treated as of great importance, decided that a wife whose husband had adjured the realm might sue for her land; after an elaborate search for precedents only one could be found.

§ 3. Infancy and Guardianship.

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. 88. The husband's duty is thus expressed, 'quod ipsae praefatae de et honeste tractabit et gubernabit, se damnum vel malum aliquod edem de corpore suo, aetier quam ad virum suum cum causa regiminis et castigationis uxoris sua licite et rationabili peritter, 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. 435, 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. 1.

Pitz, Bowers, 170.

3 Bot. i. 66-7; Co. Lit. 133 a.

thirteen or fourteen years old he might sell himself. 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 those who have the best right to speak about early Germanic law.

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.

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. 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. 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 relies

1 Theodore's Penitential (Haddan and Stubbs, iii. 202).
2 Stobbe, Privatrecht, iv. 386; Schröder, D. R. G. 313; Heuser, Instit. ii. 435; Essays in A.S. Law, 152-162.
3 See e.g. Cod. Dipl. 82 (i. 98); 1019 (v. 59); 229 (i. 290); 323 (ii. 127); 324 (iii. 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; 650 (iii. 240).
5 Brunner, U. H. G. ii. 614; Wilks, op. cit. 571, 614.
of a ‘perpetual tutelage of women’ were to be found on the continent in times near to our own.

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 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. Our law knows no such thing as ‘emancipation,’ it merely knows an attainment of full age.

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. 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 gentility 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 years old, but he still is for many purposes a minor; in particular, he need not answer to a writ of right, 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. In later 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.

An infant may well have proprietary rights even though his proprietary 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. 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.

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

1 Stobbe, Privatrecht, iv. 427; Viollet, Histoire du droit civil, 290.
2 Bracton, f. 274 b. Bracton and Azo, p. 78.
3 Bracton, f. 6 b; ‘Item per emancipationem solvitur patria potestas: ut si quis filium sumi forisfamilia verit cum aliqua parte heredatis suo, 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 enservatio.
4 Glanvill, vii. 9; Bracton, f. 86 b; Fleta, p. 6; Britton, ii. 9. As to the phrase cote et keye, see Oxford Engl. Dict. 1 Co. Lit. 78 b: ‘A woman hath seven years for severall purposes appointed to her by law: as, seven yeares for the lord to have aid pur flle matter; nine yeares to deserve dower; twelve yeares to consent to marriage; untill fourteen yeares to be in ward; fourteen yeares to be out of ward if she attained thereunto in the life of her ancestor; sixteen yeares for to tender her marriage if she were under the age of fourteen at the death of her ancestor; and one and twenty yeares to alienate her lands, goods and chattells.’
5 Note Book, pl. 418, 1182; Placit. Abbrev. 267 (Westmoreland). In the earliest records an ‘aid prayer’ is hardly distinguished from a voucher.
6 Gloucester, f. 436. Husband and wife have a son; the wife dies; the son inherits from his maternal uncle lands held by knight’s service. Here 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. see 114.
CHAPTER VII.

FAMILY LAW.

§ 1. Marriage.

The nature of the ancient Germanic marriage has in our own day been the theme of lively debates. 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.' 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 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 whom she disliked. 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'—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. 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. 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.

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. 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 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 Banbche; Heuler, Institutionen, ii. 277.
3 Germania, c. 13. But unfortunately Tacitus has an eye to edification.

For an earlier time see Aethelh. 77; Ins. 34.
4 Aethel. 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 heft must be paid and the mund must be purchased.
some rights over the bride which were good against third [p.364] persons, and that any one who carried her off would have had to pay a b6t to him1. 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 bridgroom 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 betrothed2.

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 divorce3. 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 expect4. 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 

1. Ethelb. 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. 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 concubinage1. 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 bishop2. The bishop is becoming the judge of these sinners, and the judge who punishes adultery must take cognizance of marriage.

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 

Leg. Henr. 11, $ 5; cf. D. II. i. 1.

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. 55, 54.
the canon law. A few words about its main rules must be said, though we cannot pretend to expound them at length.

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: sponaulia per verba de futuro, which take place if man and woman promise each other that they will hereafter become husband and wife; sponaulia per verba de prae­sentis, 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 (sponaulia per verba de praesen­tis) 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 (matrimonia), at all events an initiate marriage; the spouses are coniuges; the relationship between them is almost as indissoluble as if it had already become a consummated marriage. Not quite so indissoluble however; a spouse may free himself or herself from the unconsummated marriage by entering religion; 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 in our use of words, be no marriage at all. As to sponaulia 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 no masterpiece of human wisdom. Of all people in the world 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!

The one contract which, to our thinking, should certainly be No ceremony formal, had been made the most formless of all contracts. It is requisite 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 here 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. But the variety of the

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1 The story told in this paragraph is that which is told at great length by Freisen, Geschichte des canonischen Ehelechs. 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 matrimonia perfecta, 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. 134, 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 decreals relates to an English case and will be given below, p. 371. The English canonist John de Athona in his gloss on Ottohen's constitution Consulat honoris says, 'Matrimonii consummatio ad matrimonia multos addit effectus'; it makes the marriage indissoluble by profession and by dispensation; also it is of sacramental importance.

2 Be witthanne swoes weddelinge, Schmid, Gesetz, App. vi.
impediment that could be urged against the proposed union. From that time forward a marriage with banns had certain 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.

It is thus that Alexander III. writes to the Bishop of Decretal of Norwich:—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 (meum),' 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.

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 up 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. 430, and was in his time traditional among English lawyers. Apparently it can be traced to Dr Goldingham, a civil servant who was consulted in the case of Bunton v. Lepiney (Moore's Reports, 109). See Friedberg, Recht der Eheschließung, 314.

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. 430, and was in his time traditional among English lawyers. Apparently it can be traced to Dr Goldingham, a civil servant who was consulted in the case of Bunton v. Lepiney (Moore's Reports, 109). See Friedberg, Recht der Eheschließung, 314.

2 Compilatio Prima, lib. 4, tit. 4, c. 6 (Friedberg, Quinque Compilationes, p. 178).

Another decretal which Alexander III. sent to England contains an elaborate statement of general doctrine; c. 2. N. 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 consummated union. The formless interchange of words prevails over the combined force of ecclesiastical ceremony and sexual intercourse.

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 pleads the lords, it is the vanished cause that will please the historian of the middle ages.

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; féret non debent; the husband and wife who have intercourse with each other before the church has blessed their marriage, sin and should be punished; they will be compelled by spiritual 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 exchanging a consent per verba futura. 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. 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 most instructive case 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, 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 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

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1 We refer to the famous case of *The Queen v. Millis*, 10 Clark and Finley, 581, 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 Stobart 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. Elphinston 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.

2 See above, pp. 369, 370.

3 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 require a ceremony in church; she required the "presence" of an ordained clergyman."

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.

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. 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. 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 Athenas in his gloss on Otton's constitution Eadult, says: "petens restitutionem uxoris non auditar deigne ubi matrimonium est contractum clandestinum, sileet, bannis non editis." Here, however, he is referring to the possessory restitution, the actio spoli, of which hereafter. He knew well enough that there may be a valid marriage without any solemnities; see the gloss on Otton's constitution Continuare.

2 See Friedberg, Recht der Eheschließung, p. 56.

3 Bracton, f. 302-4; Note Book, pl. 891, 1669, 1718, 1875.
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, 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. 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.' 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 fide. A contemporary of Bracton lays down the law in much ruder shape. 'If a woman is divorced for kinship, or fornication, or blasphemy (as says Augustine the Great) she cannot 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.' So late as 1387 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 the divorce. 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. 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.

However, we believe that at this time our temporal courts acceptance of canon law, were at one with our spiritual courts about legitimacy and the canonical rules. One of our contemporaries, a contemporary of Bracton, 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.

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1 From a Cambridge ms. of Glanvill; see Harv. L. ii. 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. Fike, p. 481.
3 Fike, 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.

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Family Law.  [BK. II.

of taking a share in the movable goods of his parents. The general rule, to which this was the exception, was implied 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. 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. But about all other matters the church could have, and apparently had, her way. She could maintain all her impedimenta divinitoria, 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, 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. As to the particular point that has been disputed, we have Bracton's word that a marriage which was not contracted in facie ecclesiae, though it cannot give the wife a claim to dower, may well be a good enough marriage so far as regards the legitimacy of the children. A case which had occurred shortly before he wrote his treatise shows us that he had good warrant for his assertion.

In or about 1254 died one William de Cardunville, a tenant in chief of the crown. In the usual course an inquisito 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 affidavit 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 ilia poterit esse matrimonium legitimum, quod non subsequens matrimonium, ubi non fecit, nam tamen probatum, et ille sequens matrimonium, ubi fecit, non tamen in facie ecclesiae contractum. Quod enim sequens matrimonium non subsequens, nisi fuerit in facie ecclesiae contractum. On f. 392 he speaks with less certain sound about the capacity to inherit of the issue of a clandestine marriage; but the word clandestinum had several distinct meanings; see below, p. 385, note 2. See also Fleets, 340, 353; Britton, ii. 236, 266.
The canons 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, 'droiture'; the canons 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. 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 droiture action, when the bishop's certificate is demanded, such a marriage may be stigmatized as void, and on the other hand an unsanctioned

\[\text{CH. VII. § 1.}\]

Marriage.

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

\[\text{[p.379]}\]

The French parlament seems to have believed in the same manner as our royal court. 'Le Parlement, tant en reconnaissant bien que les officiers royaux ne pouvaient pas apprécier la validité des mariages, déclare qu'elles pourraient constater la possession d'état et s'informer en si fait il y avait eu union régulière; d'où l'on déduit qu'elles étaient compétentes pour trancher au possessoire les questions matrimoniales, et même au péitoire, si les parties ne proposaient pas d'exception.' Languois, Philippe le Hardi, 272.

\[\text{[p.378]}\]

The phrase "de facto marriage" is none of our making; it is used by Bracton, f. 418 b; Y. B. 32-3 Edw. I. pp. 62, 74; 33-5 Edw. I. p. 118. The French parlament seems to have believed in the same manner as our royal court. 'Le Parlement, tant en reconnaissant bien que les officiers royaux ne pouvaient pas apprécier la validité des mariages, déclare qu'elles pourraient constater la possession d'état et s'informer en si fait il y avait eu union régulière; d'où l'on déduit qu'elles étaient compétentes pour trancher au possessoire les questions matrimoniales, et même au péitoire, si les parties ne proposaient pas d'exception.' Languois, Philippe le Hardi, 272.

An interesting letter by Abp Pechham (Register, iii. 940) insists on the difference between the possessoriums and the petitoriums.

\[\text{[p.379]}\]
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.

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 his birth may be necessary in order that we may settle the rights of other persons. 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 etigné and the mulier paixé; 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. It must be remembered that our medieval law did not consistently regard the bastard as filius mulieratus, though such phrases as ‘You are a son of the people’ might be thrown about in court. The bastards with whom the land law had to deal were for the most part the issue of

\[\text{1} \] Bracton, t. 420 b; Y. B. 29-1 Edw. I. p. 193.

\[\text{2} \] Lit. sec. 399, 400; Co. Lit. 244; Bl. Com., ii. 248. The oldest form of the rule seems to be very broad. Placent. Add. p. 105 (6 Edw. I.); ‘et inauditum est et ius [corr. iari] distantum quod aliquis qui per successionem hereditarium pacifice tenuet hereditatem tuto tempore suo bastardetur post mortem suam.’ Fitzherbert, Abr. Bastardy, p. 28: ‘pec iustum est aliquando [corr. aliquem] mortum factore bastardum qui tuto tempore suo tenatur post legitem.’ 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.

\[\text{3} \] Y. B. 32-3 Edw. I. 251: ‘Jeo le face his al peolde.’

\[\text{4} \] Lit. sec. 399, 400; Co. Lit. 244; Bl. Com., ii. 248. The oldest form of the rule seems to be very broad. Placent. Add. p. 105 (6 Edw. I.); ‘et inauditum est et ius [corr. iari] distantum quod aliquis qui per successionem hereditarium pacifice tenuet hereditatem tuto tempore suo bastardetur post mortem suam.’ Fitzherbert, Abr. Bastardy, p. 28: ‘pec iustum est aliquando [corr. aliquem] mortum factore bastardum qui tuto tempore suo tenatur post legitem.’ 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.

\[\text{5} \] Y. B. 32-3 Edw. I. 251: ‘Jeo le face his al peolde.’

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.

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 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. When a woman confronted by her deed, pleads that she was coerte when she sealed it, they hold that ‘No one knew of your coverture’ is a good reply. It is with de facto marriages that they are concerned; questions de iure they leave to the church.

It was, we believe, a neglect of this distinction which in the last 1843 led some of our greatest lawyers astray.—a very natural one, 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. But by far the strongest of these came from the year 1906. 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

\[\text{1} \] Y. B. 30-1 Edw. I. p. 291.

Katharine bore to John a child, namely, William. The jurors were asked whether after John's death, the marriage was declared; they answered, No. The marriage was solemnized in facie ecclesiae, where 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 out of possession, and that William do take nothing by this assize, but be in mercy for his false claim.

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 such ceremony is required for a true and 'driturel' 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 hoarded up impediments in the way of valid unions.

1 This is Del Oldle'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, Tit. 23 Edw. I. (No. 161), p. 203. The reference usually given is false. Fusccest's Case (case of Fusccest's Case), which stands on De Banco Roll, Pascal, 10 Edw. I. (No. 10), p. 34, 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 contumacy against a lord claiming by escheat, a purely possessory cause. The bedchamber 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 Bulfin for helping us to find these records.

CH. VII § 1.] Marriage.

From what has been already said it follows that a marriage unproven 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 manifestum non praeidicit.* 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.

'It is better to marry than to burn:'—few texts have done The 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.

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

1 Esmuin, op. cit. p. 190-191, p. 128: Hostiensis says 'Nam in iudicicio animae consuetudinis tuis ut non reddas debitum contra conscientiam: in foro antem iudiciali excommunicabitur nisi reddat: tolerant ergo excommunicationem.' The maxim 'Clandestinum manifestum non praeidicit' 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 Esmuin, op. cit. p. 192-3.

2 Esmuin, op. cit. p. 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 externum, mais encore devant le forum internum. 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 moeurs ont changé et que l'on n'écrit plus en latin.'

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chance. The most important of these 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.

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 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 remote 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 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. A prohibition 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.

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. Before that decree, the received doctrine was—and it was received in England as well as elsewhere—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 generation); and so to prohibit marriage within seven degrees was to prohibit it

1 c. 8. X. 4. 14.
2 For the history of this matter, see Freisen, op. cit., pp. 371-393. The various modes of counting kinship are elaborately discussed by Ficker, Untersuchungen zur Erbenfolge, vol. i. The German scheme is described by Heuser, Institutionen, ii. 587.
4 Canon of 1075, 1102, 1127; Johnson, Canonii, ii. pp. 14, 27, 36.
5 Heuser, 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. 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' blood kinswomen are connected with me by way of affinity. I am related to her 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 cannot 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. 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. 474-485; Enelein, op. cit. i. 374-383; Friedberg, Lehrbuch des Kirchenrechts, ed. 4, p. 386, where some diagrams will be found.

be disregarded. 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. 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. Then again, regard must be had to spiritual kinship, to 'god-sib.' 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. 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.

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. Inc. c. 76 (Liebermann, Gesetze, p. 129), where a 'bishop's son' means a 'confirmation son'; see Hadden and Stubbs, Councils, ii. 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; 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 'convenient marriage' which he tendered. A statute of 1267 forbade the guardian in socage to make a profit for himself out of the marriage of his ward.

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 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 præsentii 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 it is 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. 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. 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; but we seem to see this rule growing out of an earlier practice which, in accordance with the canons 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 marriage: car au coucher ensemble gaigne femme sa dower selon la consenste de Normennde. 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,' and certain it is that 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, and as a matter of fact parents and guardians often betrothed, or attempted to betroth, children who were less than seven years old. 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. 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.

The biographer of St Hugh of Lincoln has told a story which should be here retold. In Lincolnshire there lived a child, 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 domen promeneri et virum sustinerere.' Fitzherbert, Abr. tit. Doner 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. 230; Samna, p. 255.
3 Co. Ett. 33 a.
4 See the curious but mutilated record in Calend. Genealog. i. 184.
5 See e.g. Note Book, p. 349, 656.
6 C. 39, q. 2; 2. X. 4. 2. This canon, which Gratian ascribes to Pope Nicholas, appears in the English canons of 1175 and 1226; Johnson, Canon. 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 matrimonii toleretur.
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 another woman. The dooms of our own Aethelbert, 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. And though the churches, especially the Roman church, had from an early time been maintaining the indissolubility of marriage, they were compelled to temporize. The Anglo-Saxon and Frankish penitentials allow a divorce a vinculo matrimoni 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.’ But stricter doctrines have prevailed before the church obtains her control over the whole law of marriage and divorce.

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 divinitoria. 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 matrimoni; 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

2 Eibich, 70, 80, 81; Liebermann, Gesetze, p. 8.
3 Freisen, op. cit. pp. 785-790.
4 Theodore’s Penitential (Haddan and Stubbs, Councils, iii. 192-201).
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 acceptance 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 quod virum, which is the equivalent of our ‘judicial separation,’ and (2) what is very often called the divortium quod 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 (Kemmel, op. cit. ii. 86), 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 impedimenta divinitoria.

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