

opportunity of defending themselves. Every communication for commercial or other purposes, by those in this country, with such persons or bodies is a criminal offence ('trading with the enemy'), unless licensed by the Crown. Any contract or transaction, the formation or execution of which involves such communication, is (or, if made before the war, becomes) void.

## 5 Property

1. THE CONCEPTION OF PROPERTY. There is, perhaps, nothing more difficult than to give a precise and consistent meaning to the word 'property'. The word 'estate' is often used to denote the whole of a man's proprietary rights, more especially after his death. This sense of the word 'estate' must not be confused with the special meaning which it has in regard to interests in land (see p. 75). When we speak of a man of property, we may think, perhaps, in one of two ways. First, we may think of the traditional or even old-fashioned type of man with tangible material things which belong to him—land and houses, horses and cattle, furniture and jewellery and pictures—things which he may use or destroy (so far as that is physically possible); from which he may exclude others; which he may sell or give away or bequeath; which, if he has made no disposition of them, will pass on his death to persons related to him. Alternatively we may think of the more modern figure of a man whose wealth lies in his investments in stocks and shares. Whichever type of man we think of, we may find it difficult to say whether by 'property' we mean the things themselves or the aggregate of rights which are exercised over them. To confine the word to either sense would hardly be possible without pedantry; though, on the one hand, we may agree that a thing which has no owner—a rare event in a civilized country, except in the case of a few things, like wild animals at large—is not property, and, on the other, we may often avoid confusion by using the word 'ownership' for the most extensive right which a man can have over material things. But, further, we shall find that our conception of property relates to many things which are not tangible or material. Our man of property may be an author or a patentee, and we shall hardly be able to say that his copyright or patentright is not part of his property, or even to avoid speaking of his ownership of the copyright or patent. He will have debtors: his bank is a debtor to him for the amount

standing to his credit; his investments of money are claims to receive payment from the State or from corporations or individuals. Such debts and claims are not rights over any specific tangible objects; they are mere rights against the State or the corporation or the person liable to pay. Yet these rights are transferable, and will pass on his death to his representatives. We cannot exclude them from our notion of property or deny that in a sense, at any rate, he is the owner of them. On the other hand, his 'property' clearly does not include all his rights. To say nothing of his general right of liberty or reputation, his rights as a husband or a parent are not proprietary rights, nor is his right to recover damages for personal injury or defamation; but we may include among proprietary rights the right to recover damages though unliquidated (i.e. of uncertain amount until settled by a judge or jury) for breach of contract, or, probably, even for injury to his property. Generally speaking, we shall include under the notion of a man's property in its widest sense all rights which are capable of being transferred to others, of being made available for payment of his debts, or of passing to his representatives on his death.

2. OWNERSHIP AND POSSESSION. Turning to rights over tangible things, we must notice the distinction between ownership and possession. The owner of a thing is the person who has, in the fullest degree, those rights of use and enjoyment, of destruction, and of disposition, which have been mentioned above—subject, of course, to the general rules of law which protect the rights of others, to certain limited rights which he or his predecessors may have created in favour of others, and, in the case of land, to rules imposed by statute under which local and other authorities may purchase property compulsorily.<sup>1</sup> The owner of a firearm is none the less owner because the law prohibits him from discharging it in a public highway; the owner of a field does not cease to be owner because the public or a neighbour has the right to use a footpath across it.

The essence of ownership, then, is that it is a right or an aggregate of rights. Possession, on the other hand, is primarily a matter of fact. If the owner of a watch is robbed of it by a thief, the owner's rights as rights remain intact; the thief acquires no right to the watch as against the owner. But the owner's possession, and with it his actual power to exercise his rights, is

for the time being gone; he must recover the watch—as he may even lawfully do by his own act—before he can be said to be again in possession of it. So, too, the owner of land may be out of possession, and another without right may be in possession. In this case the forcible retaking of possession is prohibited under penalties by statute; but the retaking, though punishable, is none the less effective to restore the possession.

The cases of the thief and the squatter have been taken as the clearest instances of possession acquired without any right whatever. But possession may be lawfully acquired, and yet be unaccompanied by ownership. An owner who delivers a car or a bicycle by way of loan or hire to another, parts with the possession to him, but does not cease to be owner. The same is true of one who delivers articles to another in order that the latter may bestow his labour upon them. Such voluntary transfers of possession are called bailment, and the person who so acquires possession is a bailee of the goods. In none of these cases do we think of the owner as having parted with the right of ownership, though it may be that the contract between the parties creates rights in favour of the bailee which the owner cannot use his right of ownership to override.

If we try to analyse the conception of possession, we find two elements. In the first place, it involves some actual power of control over the thing possessed. In the second place, it involves some intention to maintain that control on the part of the possessor. The nature and extent of the control and intention necessary to constitute possession will vary with the circumstances, and particularly with the character of the thing of which the possession is in question. Possession of a house, for instance, will be evidenced by acts different from those which would suffice for possession of a strip of waste land. The occupier of a private house (but not the owner of a house who had never entered into possession of it) would probably be considered to be in possession of anything placed or left in it—at any rate unless it was concealed—while the occupier of a shop has been held not to be in possession of a thing dropped in a part of the shop to which the public had access. By a somewhat artificial rule, a servant who receives a thing from his master for the master's use is deemed not to be in possession of it, though the contrary is true where he receives it from a stranger for the master's use.

So far we have thought of ownership and possession as sharply distinguished—the one a matter of right, the other of fact. Nevertheless, possession is a fact which has an enormous legal significance, a fact to which legal rights are attached. In the first place, actual possession is evidence of ownership, and, except in cases where ownership is based on a system of public registration, it is hard to see how any ownership can be proved, otherwise than by going back to some prior possession. If A claims the ownership of land by reason of B's bequest or sale to him, this only raises the question, On what is B's ownership based? and ultimately we shall have to rest content with saying that the root of A's title is the possession of some predecessor, X. Such evidence, however, is not conclusive. The presumption of ownership which follows from A's or X's possession may, for instance, be rebutted by a rival claimant, Y, who can show that he or his predecessor was in possession, and that A or X wrongfully dispossessed him.

In the second place, possession is not merely evidence of ownership, but (subject to the rights of the owner) is itself and for its own sake entitled to legal protection. If A has been disturbed in his possession by a trespass committed by B, or even if B has deprived A of possession, A's claim to legal protection or redress against B cannot be met by B's plea that C and not A is the true owner. The finder of goods is entitled—except only against one who can show himself to be the owner—to legal protection against all the world. Nor is this right of the possessor based on any responsibility on his part to the owner. The Postmaster-General (later the Minister of Posts and Telecommunications) was held entitled to recover damages for the loss of the mails destroyed by the fault of a colliding ship, though he was not the owner and disclaimed all responsibility to the owners for the loss. This right to redress which the law confers on the possessor is independent of, and at least as old as, if not older than, the legal protection given to the owner. The possessor's right is even spoken of as a 'special property', in contradistinction to the 'general property' of the owner. It is a right which he may transfer, and which on his death will pass under his will or according to the rules of intestacy.

Lastly, we may notice that even a wrongful possession, if continued for a certain length of time, matures into what may be, for practical purposes, indistinguishable from ownership. A

wrongful possession of land for twelve years, or of goods for six years, destroys not only the former owner's right to recover the land or goods by action, but also his title; and so the possessor has the best of titles known to the law—a possession which no one can dispute.

3. REAL PROPERTY AND PERSONAL PROPERTY. Between the ownership of land and of goods every system of law must needs draw distinctions, which are founded on the nature of the subject matter. But the distinctions drawn by English law were, till the passing of the Property Acts, which came into force on 1 January 1926, founded, not so much on the nature of the subject matter, as upon the historical accidents in the development of the English law of property.<sup>2</sup> Property was divided into the two categories of real property and personal property; and personal property was divided into two categories of chattels real and chattels personal.

Real property included most of the interests in land recognized by the law, and other rights, such as easements and profits (see p. 78), annexed to the land. This property was called 'real' because, from the first, it was recoverable specifically by a real action. In fact anything thus recoverable was real property. Property thus recoverable developed a set of legal characteristics which caused it to differ considerably from property which was recoverable only by a personal action; and so, though the real actions have long been abolished, and for a still longer time disused, the differences between real and personal property survived.

Not all the interests in land known to the law were included in the category of real property. Interests in land for a term of years (leaseholds) were originally regarded, not as interests in the land, but as contractual rights. The lessee was protected, not by a real action, but by a personal action against his lessor, in which he could recover, not the land itself, but only damages for the breach of his landlord's contract to allow him the use of the land. Hence his interest is personal property, and is classed as a chattel, though, by reason of its close relation to real property, it is distinguished as a chattel real. Leaseholders long since obtained remedies for the specific recovery of their land: and those remedies were in fact far superior to the old real actions. But because these interests in land were protected by personal and not by the real actions, they developed a set of legal characteristics

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which caused them to differ from the interests classed as real property. Notable differences were to be found in the rules as to succession on intestacy and in the variety of estates and interests which could be created in these two kinds of property.

All property other than real property and chattels real is classed as chattels personal. Chattels personal consist either of tangible goods, or of intangible rights such as patents, or stocks and shares. They differ from real property in two main respects. First, chattels personal can be owned, while real property is held mediately or immediately of the King. Secondly, until 1926, at law (as opposed to equity) no limited interests in chattels personal could be created—the notion of estates had no application to chattels personal till the Law of Property Act 1925 made it possible to create an entailed interest in them. In this respect equity differed from the common law. We shall see that it was always possible to settle chattels personal upon trusts for various persons with limited interests (see pp. 83, 96–100).

4. TENURE. In the medieval period, it was a very significant legal commonplace that full ownership of land was possible for no person save the King. Those commonly called landowners were regarded as 'holding' their land, by various forms of 'tenure', of the King. Of these, the most honourable, but at the same time the most burdensome, was tenure by knight service, which involved many irksome 'incidents' (see Chapter 2, note 3). The incidents of socage tenure consisted of fixed, and nominal, agricultural services. By the Statute of Tenures 1660, all free tenures (with insignificant exceptions) were converted into socage.<sup>3</sup> Though 1660 marked the end of feudalism in its political aspect, in the sphere of private law it continued to cause many difficulties, which were not removed until 1925. One practical mark of its survival was the doctrine of escheat. If a socage tenant died without heirs and intestate, his land escheated, i.e. went back to the lord of whom it was held, who in practically all cases had come to be the King. A statute called *Quia Emptores* (1290) had enacted that whenever a tenant alienated his land for an estate in fee simple, the alienee should hold, not of the alienor, but of the alienor's lord. The long-term result of this statute was that practically all land held by free tenure had come to be held of the King. Escheat was swept away, together with the old law of intestate

succession, by the new scheme introduced by the Administration of Estates Act 1925.

5. ESTATES IN POSSESSION. The different types of tenure marked out the leading characteristics of the different forms of land holding known to the law; but they told us nothing of the nature and incidents of the various interests which those who held by these tenures might have in the land. It is this question of the nature and incidents of these interests which we must now consider.

The word used by English law to denote the tenant's interest in the land is the word 'estate'. An estate is a portion of the ownership of the land, more or less limited in time. This limitation in time is most clearly seen in the case of a life estate, whether it be an estate held for the life of the tenant, or what is called an estate *pur autre vie*, one held for the life or lives of some other person or persons. The holder of such an estate in land is, like an owner, entitled to the possession, use, and enjoyment of the land, and he can dispose of his interest; but at the death of the person by whose life the extent of his estate is measured, the estate comes to an end, and nothing passes from the holder. Even the holder's enjoyment is restricted (unless he be declared 'unimpeachable for waste') by consideration for the rights of those who have subsequent estates in the land. He must not diminish the capital value of the land by the commission of acts called 'waste', such as cutting timber or opening mines.

At the other end of the scale we have the estate in fee simple. Such an estate is practically equivalent to ownership. It confers full rights of possession and enjoyment (unrestricted by any rules as to waste) and full rights of disposition whether during the tenant's lifetime or by his will. If he dies intestate, the land will pass to his relations entitled in that event (see pp. 106–8 for the modern law on this subject). Only in the event of his death intestate and without relations so entitled, will the estate come to an end, and the land pass to the Crown. The limit in time is here practically non-existent.

Intermediate between the life estate and the estate in fee simple is the estate tail. The tenant in tail has full rights of possession and enjoyment without regard to waste. Nor does the estate come to an end with the tenant's death: it passes to his heirs, but only to a

limited class of heirs, 'the heirs of his body', that is, his descendants. (For the rules of inheritance for ascertaining the heir, see pp. 106-8.) The line of descent may be further restricted by making the estate an estate in tail-male, i.e. one descendible only to males and only in the male line, or conceivably (though in practice this appears never to be done) in tail-female descendible only to and through females. There is even an estate known as an estate in 'special tail', inheritable only by the issue of the tenant by a certain wife or husband. In the latter case, if the wife or husband dies without issue the tenant is said to be tenant in tail, 'after possibility of issue extinct', and his rights are substantially no greater than those of a tenant for life. Before 1926 a tenant in tail had no power to dispose of his estate by will; but a tenant in tail in possession could in his lifetime, and still can, bar the entail by a deed, i.e. he can turn it into a fee simple estate. If his estate is not in possession, e.g. if it is limited to A for life and then to B in tail, A is the 'Protector of the settlement', and B cannot bar the entail without A's consent.

We shall see that, since 1 January 1926, the only one of these estates which survives as a legal estate is the estate in fee simple. The others exist only as equitable interests. Their incidents are similar to the incidents of the old legal estates, though certain important changes have been introduced (see p. 83).

6. *ESTATES IN FUTURO*. Before 1 January 1926 there were three main varieties of legal estates *in futuro*.

(1) *Reversions and remainders*. An estate for life was less than an estate tail, and both were smaller than a fee simple. Suppose now that a tenant in fee simple granted the land to another to hold for life or in tail. If he did nothing more he would still retain his fee simple, but he would have deprived himself of the right to present possession and enjoyment of the land; his estate would become a future estate, which would again become a present estate, an 'estate in possession', only when the smaller estate, the 'particular estate' which had been carved out of it, came to an end. For the time being, what was left to him was called a reversion. Further, he might by the same instrument grant a present estate, say for life, to A, followed by an estate for life or in tail to B, and, if he wished, as many further particular estates (for life or in tail) to other persons successively as he pleased, ending up, if he thought fit, with an estate in fee simple to some person named. Each of

these future estates was called a remainder. No reversion or remainder, however, could be placed after a fee simple. Each of these future estates, though it gave no present right to possession or enjoyment, was treated as something already in existence, which could be disposed of and would descend (so far as it is inheritable) just like a present estate. If, for instance, A was tenant for life and B tenant in fee simple in reversion or remainder, B's death before A's would not destroy the estate in fee simple, but B's heir, or the person to whom B had conveyed it by deed, or left it by will, was entitled to come in on A's death. So again, if A was tenant in tail, and B tenant in fee simple in reversion, the failure of A's issue at his death, or at any later time, would vest the fee simple in possession in whatever person then represented B. In such cases, ownership, we may say, was cut up into lengths called estates. None of the holders of an estate, except the tenant in fee simple when in possession, was fully owner, but each as he came into possession was a 'limited' owner.

(2) *Shifting and springing uses*. We have seen that if A held land to the use of B, the Statute of Uses turned B's equitable estate into a legal estate (see pp. 22-3). Now it was possible for a settlor who conveyed land to A to direct him to hold to the use of B; and then to direct that, on the happening of an event, e.g. B's marriage, B's use should shift to C. This use in favour of C was a shifting use. Or the settlor could direct that in a certain event a new use should spring up in D's favour. This use in favour of D was a springing use. When the use in favour of C or D arose, C or D's uses were turned into legal estates by the Statute of Uses.

(3) *Executory devises*. The Statute of Wills 1540 gave testators power to create future legal estates by their wills. These estates were known as executory devises.

We shall see that since 1 January 1926 none of these future legal estates can be created, but that similar results can be effected by the creation of future equitable interests through the medium of a trust.

7. *CO-OWNERSHIP*. Co-ownership entitles two or more persons concurrently to the possession and enjoyment of the same land. Before 1 January 1926 it could take three forms: coparcenary, or tenancy in common, or joint tenancy. Coparcenary existed if a person died intestate leaving two or more females as his heirs. They took the land as coparceners. When two or more persons

took as tenants in common, the share of each was treated as a separate item of property which could not only be transferred by him in his lifetime, but which would pass on his death to his representatives. In the case of joint tenancy, on the other hand, the rights of each (except the last survivor) are extinguished by his death so as to increase the interest of the survivor or survivors. A joint tenant might, however, transfer his interest in his lifetime (though not by will); and such a transfer would, before 1 January 1926, have had the effect of making the transferee a tenant in common with the other or others, though the others continued as between themselves to be joint tenants. Any one of a number of co-owners was entitled to have the property 'partitioned', i.e. divided, or at any rate to have the property sold and his share paid out to him. Where a number of trustees are appointed they are always made joint tenants, in order that, on the death of one, the whole property may be vested in the survivors; but in other cases joint tenancy is inconvenient and rarely occurs. We shall see that since 1 January 1926 the only one of these three forms of co-ownership which exists as a legal estate is joint tenancy (see p. 83); but that both coparcenary and tenancy in common exist as equitable estates.

Both ownership in common and joint ownership may exist in the case of chattels personal as well as in the case of land.

8. OTHER INTERESTS IN LAND. Besides the interests in land which are known as estates, and which, when they are present estates, give a right to possession of the land, English law, like other systems, recognizes rights of a more restricted kind. Among these we may notice *easements*, such as rights of way, rights of light, rights to take water or to discharge water over the land of another. A true easement must always be 'appurtenant' to a piece of land. An individual cannot, for instance, as such have a right of way over my land, but only as owner of some adjacent piece of land. Rights similar to easements may, however, exist in favour of the public, e.g. a public highway; or in favour of a limited class—e.g. the fishermen of a village may by custom have the right to dry their nets on a piece of land, the inhabitants of a village may have a right to use the village green for purposes of recreation. *Profits à prendre* are rights to take things of value (other than water) from land, such as the right of common pasture, or rights of fishery (commoners, it should be noticed, are

not owners of the common). Such rights, though commonly appendant or appurtenant to land—there is little practical difference between the two phrases—are not necessarily so. They may exist in favour of individuals, and in some cases in favour of a limited class, but, with the exception of the public right of fishing in tidal water, they cannot exist in favour of the public at large.

The effect of long-continued possession of land in extinguishing adverse rights, and so converting the possession into what is indistinguishable from ownership, has already been referred to (see pp. 72–3). Different in theory, but similar in effect, are the provisions of the Prescription Act 1832, under which rights to easements and *profits à prendre* may be established by reason of enjoyment for a period of not less than twenty years in the one case, and not less than thirty in the other. Special rules as to the acquisition of public rights of way by lapse of time have been made by the Rights of Way Act 1932.

A rentcharge is the right to receive an annual sum out of the income of land, usually in perpetuity, and to distrain if the payments are in arrear; the owner of the land is also personally liable to pay, and further remedies against the land have been given by statute. In some parts of the country it has been the practice to sell freehold land for building, and to take the price in the form of a perpetual rentcharge created by the purchaser; this practice took the place of the more common building lease. The Rentcharges Act 1977 prohibited the creation of further rentcharges, and provided also for the extinguishment of all existing rentcharges at the end of sixty years starting on 22 July 1977, or on the date the rentcharge first became payable, whichever is later. Alternatively a rentcharge may, under the 1977 Act, be bought out by a lump sum payment.

The right to take tithes, i.e. a share of the produce of the land in kind, originally vested only in ecclesiastical persons and bodies, was at the Reformation transferred in many cases to laymen, though tithes continued to form the most important kind of ecclesiastical endowment. Under the legislation of the nineteenth century tithes were commuted into tithe rentcharge, an annual sum varying with the price of corn. In 1936 tithe rentcharge was abolished. Tithe owners were compensated by the issue to them of redemption stock charged on the Consolidated Fund, and land charged with tithe was charged instead with redemption annuities

payable to the Crown. Such redemption annuities were originally intended to be payable till 1996, but they were ended by the Finance Act 1977, and the final payments (of double the normal sum) were made on 1 October 1977. The rights of presentation to livings in the Church of England, known as advowsons, which are often in the hands of laymen, are also regarded as interests in land. But the effect of a Measure of the Church Assembly of 1923 has been to render advowsons virtually inalienable, except in the case of a sale of land to which an advowson is appendant.

9. CHATTELS REAL. The most important class of chattels real are leasehold estates. A leasehold estate is measured by a fixed period of time; it is often called a term of years, though a tenancy for weeks or months is equally a leasehold. There is no superior limit; a term of 1,000 or 10,000 years (such terms actually occur) is still a leasehold. Nor does a term cease to be a leasehold because it is determinable by an event which may happen, or which is certain to happen, within the term—e.g. if A holds land for 99 years or for 999 years, ‘if he shall so long live’, he is still a leaseholder, though it is nearly or quite certain that he will not outlive the term. A freeholder may grant a lease of any duration, though unless he is a tenant in fee simple, or the lease is made under the powers given by the Settled Land Acts, the lease will fail when the lessor dies. A leaseholder (unless prohibited by his own lease) can himself grant a lease for any term less than that which he holds; a grant for an equal or greater term would be merely a transfer of his own interest.

Between the grantor of a leasehold and the tenant (lessor and lessee) there is a relation of tenure, and while the lease subsists the lessor has a reversion. The most important incident of the reversion is the lessor’s right to the rent reserved by the lease, generally substantial and often equal to the full annual value of the property. This right he can enforce not only by action, but also by a form of self-help known as distress, the seizure of any goods, whether belonging to the tenant or a stranger, which may be found on the premises. Originally this was merely a method of putting pressure upon the tenant, but the distrainer has had, since the end of the seventeenth century, a power to sell the goods and so pay himself, the surplus (if any) going to the owner. Legislation has largely restricted the right to distrain goods found upon the premises but not belonging to the tenant.

The rights and duties of the leasehold tenant are, as a rule, explicitly provided for by the terms of the lease, which will contain covenants such as those relating to payment of rent, repair, cultivation, and building, or forbidding the carrying on of certain trades. Such covenants, so far as they relate to the premises leased, are binding on and enforceable by assignees both of lessor and lessee. The lessor is usually further protected by a proviso allowing him to re-enter and put an end to the lease in the event of the tenant’s failure to pay rent or observe the other covenants. A proviso for re-entry in the event of the tenant’s assigning or underletting the premises without the lessor’s consent was sometimes enforced in the most oppressive way; but, under the Landlord and Tenant Act 1927, a proviso that the consent is not to be unreasonably withheld is implied; and in this case, and in other cases, with one or two exceptions, the courts have power to give relief to the tenant. Moreover, in most cases, the right to re-enter cannot be exercised until the tenant has been given an opportunity of making good the breach of covenant. At the end of the lease the tenant must yield up the premises, together with all buildings, fixtures, trees, and plants thereon, including even what he has himself added; but to some extent this rule is relaxed in favour of trade and agricultural fixtures; and a right to remove tenants’ fixtures may be given by the terms of the lease. Under the Agricultural Holdings Act 1948, tenants of agricultural land, and under the Landlord and Tenant Acts 1927 and 1954, other lessees, are entitled to claim compensation from their landlords for many improvements made by them, and also, in some cases, compensation for the disturbance by reason of notices to quit. Recent legislation has done much to stabilize rents, and generally to give security of tenure to tenants against landlords.

A special form of leasehold is the tenancy from year to year, which continues until notice to put an end to it is given by either party. In ordinary cases the notice must be a six months’ notice, ending with a completed year, but in the case of agricultural tenancies the Agricultural Holdings Act 1923 requires a full year’s notice.

Closely akin to leaseholds, and like them classed as personal interests in land, are tenancies at will and at sufferance. The former is a tenancy made by the agreement of the parties on the

terms that either may put an end to it at any moment at the shortest notice; the latter arises where a tenant whose interest has expired continues in possession without the landlord either assenting or dissenting.

The Leasehold Reform Act 1967 for the first time introduces leasehold enfranchisement, whereby a lessee is entitled to compel his lessor to sell him the freehold upon payment of compensation on a scale fixed by the Act. By no means all leases come under these provisions. For a tenant to claim the benefits of the Act he must show that his tenancy is of a house, that it was originally granted for more than twenty-one years, that the rent payable is less than two-thirds of its rateable value, and that the rateable value is itself not in excess of certain modest limits. A side effect of the Act, however, has been that many owners of leasehold property no longer regard such investments as sound and they have voluntarily negotiated the sale of freeholds even where the property concerned did not fall within the provisions of the 1967 Act.

10. THE PROPERTY ACTS.<sup>2</sup> The three main objects of these Acts are, (1) to get rid of the artificial distinctions which the historical development of the law had drawn between land and movable property—leaving only those distinctions which are due to the natural qualities of these two forms of property; (2) to assimilate the law relating to chattels real and real property, and, so far as this is possible, the law relating to land and movable property; and (3) to simplify and cheapen dealings in land. The principal changes in the law by which the framers of these Acts have sought to effect these objects can be summarized as follows:

(i) One of the leading differences between real and personal property was their devolution on intestacy. The Administration of Estates Act 1925 has, as we shall see, provided a uniform scheme of intestate succession for all kinds of property. Similarly, if a man died without heirs and intestate, the process by which the land devolved to the Crown was different. Real property escheated to the Crown: personal property devolved on the Crown as *bona vacantia*. Escheat has been abolished, and all property in such a case devolves on the Crown as *bona vacantia*.

(ii) The abolition of escheat has meant the abolition of the last of the practical consequences of free tenure. Tenure is now only important as between a lessor for a term of years and his lessee.

(iii) Great simplifications have been made in the law as to estates and interests in land, with the result that the law of property has been made very much more uniform. (a) The Law of Property Act 1925 reduces the number of legal estates in the land to two—a fee simple absolute in possession, and a term of years absolute. The estate of the tenant from year to year is included in the term of years absolute; and the interests of a tenant at will and at sufferance are still recognized. The other estates exist, but as equitable, not as legal, interests. (b) Estates tail, which formerly could only be created out of freeholds, can now, as equitable interests, be created out of any kind of property; they are known as 'entailed interests', and can be barred not only *inter vivos* by a deed, but also by a will, provided that the tenant in tail's interest is in possession, and provided that he specifically refers in his will to the entailed property or the instrument creating it. (c) The Statute of Uses has been repealed; and future legal estates in real property cannot now be created. Such estates can now only be created as equitable interests by means of the machinery of a trust. This has always been the only way in which future interests in personal property can be created. The result is that future estates and interests in all kinds of property are now assimilated. (d) Legal tenancy in common gave rise to great difficulties in the tracing of titles to land, because it was necessary to investigate separately the title of each tenant. It is therefore abolished as a legal estate. When formerly two or more persons would have taken as legal tenants in common, they take now as joint tenants on trust for the tenants in common; and no severance of this legal joint tenancy by alienation or otherwise is allowed. Owing to the changes made in the law of intestate succession (see pp. 106-8), coparcenary can exist only in the case of an entailed interest. (e) For a long period real property was only liable to certain of the debts of its deceased owner: chattels real and personal were always liable to all the debts of a deceased person which survived his death. Even when real property was made liable to all these debts, it was made liable by a different process and in a different order from personal property. The Administration of Estates Act 1925 has provided a uniform method for the administration of all the property of a deceased person.

11. CONVEYANCES OF LAND. From a very early period the courts have been opposed to restrictions upon the free alienation of

land. In the thirteenth century they got rid of old restrictions which fettered the freedom of alienation in the interest of lords or heirs. The Statute of *Quia Emptores* 1290 gave free power of alienation *inter vivos* to all tenants in fee simple; and the effect of the Statute of Wills 1540 and the Statute of Tenures 1660 was to give a free power of testamentary disposition. We have seen that the rule against perpetuities is designed to regulate or to prevent practices which would restrict the free alienation of land.

It follows that the law which regulates the modes in which landowners can exercise this power of alienation—the law of conveyancing—has always been an important part of the land law. It has had a long and complicated history; but, at the present day, the form required by law for the creation and transfer of estates and interests in land is both uniform and simple. Generally speaking, one may say that apart from dispositions by will, a deed, i.e. a sealed writing, is necessary, though leases in possession for not more than three years at the best rent obtainable without taking a premium may still be made without a deed or even by word of mouth. But an agreement evidenced by writing and for value, to confer an interest in land, is specifically enforceable in equity, and an attempted disposition for value by unsealed writing will be treated as equivalent to such an agreement. Moreover, even at common law a lease which ought to be made by deed but is not will not completely fail of effect, if possession is taken and rent paid under it; the tenant will be treated as tenant from year to year upon the terms of the lease so far as they are applicable to such a tenancy.

The trouble and expense involved in all dealings with land is still very great in the absence of any general provision for preserving any public record of title. Upon a sale of land the purchaser is normally entitled to have produced to him and to investigate the deeds recording previous transactions in the land going back for fifteen years (Law of Property Act 1969: formerly the period was thirty years); and though this period is sometimes reduced by agreement, the shortening of the period throws a risk on the purchaser, who is not only bound by all legal interests in the land which actually exist whether he discovers them or not, but also by all equitable interests which he would have discovered if he had insisted on an investigation for the longer period. Obviously no purchaser can, without expert assistance, make the

investigation, of which the result will depend on the effect of numerous technical documents, such as settlements and mortgages. Supposing that the result of the investigation is satisfactory, and the purchase is completed, a subsequent purchaser must again go through the whole process; the results of each investigation are practically thrown away for the future. To do away with the evils of this system, as well as to guard against dangers of fraud and forgery, a Land Registry was established by the Land Transfer Act 1875, which was amended and extended by the Land Transfer Act 1897, both Acts being repealed and replaced by the Land Registration Acts 1925–1971. The ideal of land registration is that a government office, after investigating the title, enters the applicant upon the register as owner, and furnishes him with a certificate in accordance with the entry; the entry is conclusive as to his right, and no further investigation of the previous title can subsequently be necessary. At every subsequent dealing with the land a new entry must be inserted on the certificate. One may compare such a public certification of the title with the stamp on a coin, which attests the genuineness of the metal, whereas the system of private investigation of title is as if a man was obliged to employ an expert analyst to test the genuineness of the coins which might be tendered to him. Such a system of registration has been found to work well in other countries, and there can be no doubt that it can, and will, be made universal with us. Though we have not yet attained a full system of compulsory registration, we may be said to be moving, surely and at an increasing pace, in that direction. Registration was made compulsory under the Act of 1897 in the Counties of London and Middlesex—now Greater London, as provided by the London Government Act 1963. The Land Registration Act 1925 exhibited an intelligible reluctance to hurry extension to other parts of the country until sufficient time had elapsed for testing the general effects of the property legislation of 1925. This period was fixed at ten years, and so it became possible, after the beginning of 1936, to extend compulsory registration to any county in England and Wales. Extension is now going forward on a large scale, delays being due partly to the necessity of thorough surveys, partly to the shortage of skilled staff. The compulsory system now covers virtually all built-up areas, and more than three-quarters of the total population of England and Wales; parallel with this development, under the

Commons Registration Act 1965, the registration of common land and rights of common has now been completed.

12. SETTLEMENTS. The way in which wealthy Englishmen have dealt with their capital has changed greatly in the last hundred years. At the beginning of the Victorian era, family property usually meant land. The concern of the wealthy landowner was to continue as long as possible the wealth and social status of the family. The law relating to family settlements was therefore concerned with the ways in which limited interests could be created in favour of various members of the family, stretching out as far as possible into the future. What had to be watched therefore was the perpetuity rule. There was no thought in those days of the Commissioners of Inland Revenue or of capital transfer tax.

With the increase of industry and commerce in the nineteenth century, and especially with the development of joint stock companies with limited liability, investment in money rather than in land became the most convenient and popular form. Essentially such investments were of two types: either in fixed-interest securities, mainly Government stocks, or in stocks and shares of public companies on the Stock Exchange. Government stocks were safer. Interest payments were assured. And, above all to the Victorians, the capital was secure. The pound sterling maintained a steady value during the Victorian era, and in the then current atmosphere of British security and superiority the possibility of any erosion of the value of the pound was unthinkable. On the other hand, investment in shares of public companies quoted on the Stock Exchange ('equities') introduced the risk of dependence upon the fortunes of the company selected. There were bad times as well as good. Investment in equities involved risk. Such investments were not therefore available to trustees, without specific authorization. But large fortunes were made this way. The capitalist system needed investment of private capital to make it grow. It is only since 1945 that the inevitable inflation of the currency has led investors to think that 'equities' are safer than gilts; for they maintain a value even if the value of the currency deteriorates. And it is only in the slump of 1929-33, and more recently in 1973-5, that catastrophic falls in Stock Exchange values have shown the true vulnerability of equities. At the time of writing the investor may often be uncertain where to

turn. In the last fifteen years there have been times when he would have done better to return to investment in land.

The development of the money economy and the decrease in the status attached to ownership of land led to change in the form of family settlements. No longer is the settlor trying to retain the family mansion and parkland in the family for ever. He is trying to establish and retain a block of capital available for the members of his family for as long as he can do so. And now the main enemy is not the perpetuity rule, but fiscal legislation. It is no good to tie up the property by a series of limited interests for as long as the law will allow, if the bulk of the capital will have disappeared to the Revenue authorities in the meantime. The main problem of the present-day settlor is so to draft the limitations of the settlement as to attract the least amount of income tax and capital transfer tax. To achieve this end, a wide and detailed knowledge of fiscal legislation and tax-planning technique is required. Only the most general comments will be made here. In order to understand the changes which have taken place in the practice relating to family settlements since the Victorian days, a brief description will follow, first of the standard form of eighteenth-century settlement of land, and then an outline of a modern tax-saving settlement.

(1) *Settlements of land.* We have seen that landowners have from early times sought methods of retaining their land in the family. It must be protected against spendthrift or incompetent successors, against creditors and moneylenders, against improvident sales, and, until the Forfeiture Act 1870, against forfeiture for treason. These objectives could be achieved by ensuring that no member of the family is ever capable of alienating the fee simple. A series of limited interests makes the alienation of the land very difficult, and, if skilfully done, impossible.

The most sophisticated method of tying up land in strict settlement developed in the seventeenth and eighteenth centuries. Possession of the land was to follow the normal order of succession to land, as would a hereditary title if one existed in the family. Provision needed to be made for dowager widows, and for younger sons and for daughters, and perhaps for other persons. All this could be done by giving a life estate to the head of the family; with the remainder to his sons successively in tail-male, with remainder to the daughters in tail, subject to a rentcharge in

favour of the life tenant's widow upon his death, and in favour of any other persons desired to be benefited; and with power to the trustees to create long leases in the property for the purpose of charging the lease in order to provide portions for younger sons and daughters who did not inherit the land. Thus the property was tied up for a generation.

Upon the death of the life tenant, his eldest son, the remainderman, would then be tenant in tail in possession. He would be able, provided that he was of age, to bar the entail and dispose of the fee simple. In order to avoid this situation, the practice was to effect a resettlement each generation. This was done upon the eldest son attaining the age of twenty-one years. He then became able to bar the entail, but, being tenant in tail remainder only, he could only effect a total bar by disentailing with the consent of his father, the tenant in possession. By an arrangement between father and son, a disentailment could be effected; but not so as to alienate the fee; rather to reduce the son's interest to a life estate in remainder, with remainder to his issue successively in tail. He could be compensated by an annuity charged upon the land. The limitations are then to the father for life, remainder to the son for life, remainder to the son's issue successively in tail, and subject to terms concerning rentcharges and portions as desired. The land is then tied up for another generation. This procedure, carried out each generation, could tie up the land indefinitely. The system was not obnoxious to the perpetuity rule, because each settlement and resettlement was designed to comply with the rule, and the perpetuity period began afresh from the time of each resettlement.

The industrial and commercial expansion of the nineteenth century required land to be available for development. Profits were available for landowners who were willing to develop the land by opening coal-mines, building factories, or developing in other ways. It was not possible to raise the necessary capital, or to sell or grant a long lease to developers, where the only marketable title was the life estate of the head of the family. This would be the situation pending a resettlement. It was in the interest of the public and of the landowners to make land freely alienable.

This was effected by the Settled Land Acts 1882 and 1925. The problem, in short, was to find a system where the landowner could continue to create all the beneficial interests he wished in

favour of members of the family, and, at the same time, would be able to deal with the land, by sale, long lease, or mortgage, as if he were a sole owner. The dilemma was solved by the principle of over-reaching. The Settled Land Act 1882 provided that the tenant for life should have power to sell, grant leases, or mortgage the land, giving to the purchaser, lessee, or mortgagee a title free from the beneficial interests under the settlement. Capital money was however always to be paid, not to the life tenant, but to trustees, who were to hold the money upon the same trusts as those upon which the land had been held. Thus, on sale, the purchaser got a clear title from the tenant for life, free from the limitations of the settlement. The beneficiaries lost their interests in (say) £100,000 worth of land, but received exactly the same interests in £100,000 of money. The transaction is regarded as a change of investment. The policy was continued, with a number of amendments, in the 1925 legislation. Thus all land, however 'tied up' it may be by complex entails and other interests, has since 1882 been alienable by the tenant for life under his statutory powers.

Much the same result could be achieved by creating a trust for sale of the land; that is to say, by conveying the land to trustees upon trust to sell, and to hold the income of the land until sale, and the proceeds of sale, upon trust for beneficiaries in any desired order. Here the over-reaching principle is clear. The beneficial interests are attached to the proceeds of sale. And, further, the equitable doctrine of Conversion operates, treating as done that which ought to be done, to effect a notional conversion in equity of the land into the proceeds of sale. Since 1925 the same interests can be created in personalty as in realty, and all the beneficial interests which can be created under a settlement can similarly be created behind a trust for sale.

We have seen that settled land is always alienable by the tenant for life. He sells or retains as he thinks fit. Under a trust for sale the trustees obviously can sell, and they are given by statute a discretionary power to retain. Thus, the two procedures are alternative methods of creating settlements of land. The trust for sale has the enormous advantage of being available also for trusts of personalty, or of mixed land and personalty, and is also more convenient for creating discretionary trusts, which of course have no life tenant. The strict settlement method is rarely used at the

present day. But many older titles are still dependent upon an understanding of its conveyancing procedures.

(2) *Modern Settlements.* A modern settlement, which will usually be of personalty or of mixed fund of land and personalty, will be designed so as to attract the lowest possible tax liability. The income of a trust is liable to income tax at the rate applicable to the beneficiary to whom the income is paid. Thus, lower rates will be payable if the income is paid to beneficiaries with low incomes. Capital gains tax is payable by the trustees when investments are sold, or when the trust is terminated in whole or in part, and a beneficiary becomes entitled absolutely against the trustees to some property within the settlement. Capital transfer tax is payable on property which passes on a death, other than from a husband to a wife or vice versa. Property passing on a death is defined in the Finance Act 1894, as amended by the Finance Act 1969, and includes: property owned absolutely by the deceased, property given away by the deceased within seven years of death, and property in which the deceased owned a limited interest within seven years of his death. Thus, on the death of a life tenant, the property passes and capital transfer tax becomes payable upon the capital value of the fund in which the deceased held his interest. For the purpose of establishing the rate at which capital transfer tax is payable, all property (with certain exceptions) passing on the death is aggregated together. It will be obvious that the old-fashioned strict settlement, containing a series of life and other limited interests, is poorly designed for capital transfer tax purposes.

In order, therefore, to avoid capital transfer tax, the settlor should make the settlement seven years before his death, and the settlement should be designed to benefit the beneficiaries without giving limited interests to them. These requirements were substantially met before 1969 by the creation of discretionary trusts, by which property is given to trustees upon trust to apply the income on capital in favour of such one or more members of a group of beneficiaries as the trustees shall in their absolute discretion determine. None of the beneficiaries has any interest in the property—except in respect of income on capital actually paid to him. Until 1969 no property passed upon the death of a member of a class of beneficiaries under a discretionary trust, and no estate duty (the precursor of capital transfer tax) was therefore

payable for the duration of the trust. This was too wide a loophole for the tax planners: no wonder capital transfer tax is called a voluntary tax. The Finance Act 1969 provided, in effect, that on the death of a beneficiary what in 1974 became capital transfer tax should be payable upon the proportion of the capital which corresponded to the proportion of the income which the deceased had received within a certain period before his death (usually seven years). Payments of capital do not attract capital transfer tax liability, except in so far as income earned by the fund has not been paid out. To the extent that income has been retained, payments out are treated as income. Thus discretionary trusts have lost many of their fiscal advantages. Their flexibility, however, enables the trustees to make payments in a manner most suited to all the circumstances, including especially the needs of individual beneficiaries and the fiscal situation.

It is not possible here to say more about the different types of trust which are commonly created at the present time, nor of the powers and duties of the trustees, nor of the methods of administration. Specialist books on these topics need to be consulted. A wide variety of choice of settlement is available. The individual settlor must express his wishes to his legal advisors, and they will recommend the most appropriate type of trust to meet the particular situation. The main point to understand here is that different types of trust are designed to meet different situations. The past century has seen the standard form of family trust change from the old strict settlement based on successive limited interests and designed to keep specific land in the family, to the discretionary trust of personalty designed to give no interest to anybody for capital transfer tax purposes. No one can say what the next century will bring. But so long as capitalism remains, trusts will continue to change and develop so as to meet changes in social conditions and the tax structure.

13. **MORTGAGES OF LAND.** We have seen that, under the ordinary form of a mortgage of freehold land used before the Property Acts, the legal estate was conveyed to the mortgagee, so that at law he became the owner of the property; but that the mortgagor was treated by equity as the owner—he had an equity of redemption, which was an equitable estate in the land; and he could only be deprived of his equity of redemption in certain defined ways, e.g. by foreclosure or sale. To permit this method

of mortgaging land to continue would have been quite contrary to the policy of the Property Acts, which is that the owner of property shall be able to convey to a purchaser a good legal title free from all equities affecting that property. The real owner, the mortgagor, could not convey any legal title because he had none; and the legal owner, the mortgagee, could only convey a title subject to the mortgagor's equity of redemption. For this reason the Property Acts have revolutionized the modes of creating mortgages and some of their legal effects.

A legal mortgage can now be effected in one of two ways: (1) the mortgagor demises the land to the mortgagee for a term of years absolute, subject to a proviso that the term shall cease when the mortgagor repays the loan. If the mortgagor is a lessee for years he effects the mortgage by a sub-lease. A second legal mortgage can be created by leasing the land to the second mortgagee for a term longer by at least one day than the term limited to the first mortgagee. (2) The mortgagor creates by deed a legal charge upon the land. Both these methods of creating a mortgage give the mortgagee a legal interest in the land. Other methods can be used if it is desired to give him only an equitable interest in the land. Thus if A borrows money from B, and deposits with B the title-deeds of his land as security for the loan, B has an equitable mortgage on A's land. In the case of such deposits the rule that writing is required for the creation of interests in land is dispensed with.

Whether a mortgage is legal or equitable, the mortgagee can enforce his security by applying to the court for an order for foreclosure. Upon proof of the mortgage the court will make an order for foreclosure *nisi*, under which an officer of the court is directed to find what is due for principal, interest, and costs, and the mortgagor is ordered to pay within six months from the time when the amount is certified. If he fails to do so, the mortgagee will be entitled to an order of foreclosure absolute, the effect of which will be to vest the mortgaged property in him absolutely, but at the same time to prevent him—even if the property should prove insufficient—from claiming payment from the mortgagor, except upon terms of giving him a fresh right to redeem. As an alternative to foreclosure, the court may direct a sale of the property, and this may be fairer to both parties, since any surplus

upon such sale will belong to the mortgagor, while the mortgagee may still sue for any deficiency.

In order to redeem, the mortgagor must give six months' notice or pay six months' interest. He may apply to the court if his right to redeem is disputed. Without any application to the court, the mortgagee, if his mortgage is a conveyance of the legal estate or ownership, may take possession; but this course is hazardous, since he may be called upon in a redemption action to account strictly not only for profits actually received by him, but also for those which he might but for his default have received, and all such profits, so far as they exceed the interest due for the time being, must be set off against the principal. A mortgage may contain a clause giving the mortgagee a power of sale, and such a power (subject to certain conditions) is now implied in every mortgage made by deed. If the power is exercised, the proceeds are applicable in the same way as the proceeds of a sale ordered by the court, and the mortgagor will remain liable to pay any deficiency. A power for the mortgagee to appoint a receiver who will collect the rents and profits is also now implied in mortgages by deed. To appoint a receiver is more convenient for the mortgagee than taking possession. Since the receiver is the mortgagor's agent, the mortgagee is not responsible for the receiver's acts and defaults; and any surplus beyond the outgoings (including the receiver's remuneration) and the interest due, must be paid over to the mortgagor, and will not go in reduction of the principal.

Mortgagor and mortgagee have each, while in possession, considerable powers of leasing land mortgaged by deed, unless, in the case of the mortgagor, the deed excludes them.

The changes made in the form of a mortgage have led to great changes in the law as to the priority of successive mortgages on the same land. In outline the modern rules are as follows:

Mortgagees, whether legal or equitable, of a legal estate, rank according to the date at which they have registered their charges under the Land Charges Act 1972. But this rule is not so simple as at first sight it looks, for it means, not that priority is gained by registration, but that it is lost through failure to register. If any mortgage, other than a mortgage accompanied by transfer of the title-deeds, is unregistered, it is void as against a subsequent mortgagee, whether he registers his mortgage or not. A mortgagee

who takes the title-deeds cannot register, and his position as against that of a mortgagee whose mortgage is registerable and registered is at present, for lack of judicial decision, merely conjectural. The better opinion is that the pre-1926 priorities of the legal over the equitable estate, and of the earlier in time over the later, still apply, except in so far as they are abrogated by the provisions of the 1925 legislation.<sup>4</sup>

In certain cases, a prior mortgagee may make further advances to the mortgagor which will rank in priority to subsequent mortgages. (i) If he had no notice of a subsequent mortgage when he made his further advances—but registration of a subsequent mortgage is equivalent to notice. (ii) If the prior mortgage was made expressly to secure a current account or other further advances, and further advances are made by the prior mortgagee, he can hold the land as security for both the original loan and the further advances, unless he had notice of a subsequent mortgage—registration (except in certain special cases) is not equivalent to notice. (iii) If the mortgage deed imposes an obligation on the mortgagee to make further advances he gets priority for these advances even though he had notice of a subsequent mortgage.

If the mortgage is a mortgage of the equitable estate, the priority of successive mortgagees depends upon the order in which they give written notice to the trustees or other persons holding the legal estate. This rule, which was formerly applicable only to equitable interests in choses in action and personal trust funds, now applies to equitable interests in all kinds of property.

14. **GOODS.** The transfer of goods is most commonly made by merely handing them over, and such a transfer is equally effectual whether the transfer is for value or by way of gift. An unconditional contract of sale of goods which are specific and ready for delivery is sufficient to transfer the ownership without any delivery. When goods are on board ship, the indorsement and delivery of the bill of lading (which is an acknowledgement of delivery of the goods given by the master of the ship) transfers the ownership. Further, goods may be transferred without delivery by deed, and where the transaction is for value even by writing without seal. Such deeds or instruments as a rule require for their validity to be registered under the Bills of Sale Acts (1878 and 1882), which have been passed to prevent persons from obtaining credit by continuing to remain in possession of goods when they

have secretly transferred their interest in them to others. A bill of sale is commonly used as a means of mortgaging goods (see p. 100), but it may also be used as an out-and-out conveyance. The property in British ships can only be transferred by means of a bill of sale which is registered in the shipping register.

There are a few exceptions to the general rule that no one can make a transfer of goods who is not the owner. A person who receives current coins for value and in good faith, and a purchaser of goods in open market ('market overt') in good faith, acquires a good right even from a thief. So, too, the Factors Act 1889 protects persons who receive goods in good faith and for value from a mercantile agent to whom goods have been entrusted by the owner for the purpose of being sold or pledged.

15. **INTANGIBLE PERSONAL PROPERTY.** A patent is the exclusive right granted by the Crown of 'using, exercising, and vending' an invention. Such grants are based on the Statute of Monopolies 1623, which, while in general prohibiting the grant of monopolies, made an exception in favour of patents 'for the term of fourteen years or under for the sole working or making of any manner of new manufactures within the realm to the true and first inventor or inventors of such manufactures, which others at the time of making such letters patent and grants shall not use'. The validity of a patent still turns mainly upon the question whether it complies with this enactment. The term of the grant is sixteen years, but where it appears that a patentee has been insufficiently remunerated, the Court may extend the term for a period not exceeding five, or, in an exceptional case, ten years. As a condition of obtaining the patent, the applicant must furnish a specification (which in all ordinary cases is open to public inspection), showing the nature of his invention and the method of carrying it into effect. A register of patents is kept at the Patent Office, and assignments and licences to use patents must be entered upon it. In some cases a patentee can be compelled to grant a licence to use his patent on reasonable terms.

Copyright, which under the Copyright Act 1956 extends to every original literary, dramatic, musical, and artistic work, including photographs, sculpture, and architecture, means the sole right of producing or reproducing the work in any material form, and of performing, or in the case of a lecture, delivering, it in public; it includes the sole right of translation and of

converting a dramatic into a non-dramatic work, and vice versa, and of making gramophone records, movie films, and similar devices for the mechanical performance of the work. As a rule the right is first vested in the author, and continues for fifty years after his death; but in the case of photographs and gramophone records the original owner of the negative or plate is treated as the author, and the right lasts for fifty years from the time when the negative or plate was made. The right is personal property, and passes upon the death of the owner to the persons named in his will or entitled upon his intestacy. It is assignable in writing by the owner during his lifetime; but in spite of any assignment or agreement made by the author, it will revert to his representatives twenty-five years after his death.

The right to registered trade marks grew out of the rules of common-law and equity, under which a trader who passed off his goods upon the public as those of another was held liable to damages and an injunction at the suit of the latter. These rules still exist (see pp. 139-41), but they have been supplemented by statutory provisions which enable a trader to acquire by registration at the Patent Office the exclusive right to use a distinctive trade mark in connexion with his goods. Words (other than invented words, e.g. 'tabloid') which directly refer to the character or quality of the goods, and names of places, cannot be so appropriated. The right to a trade mark can be assigned only in connexion with the goodwill of the business concerned in the goods for which it has been registered, and comes to an end with that goodwill.

The transfer of interests in the National Debt and public funds and in the debts of municipal and other public authorities, and of debentures, stocks, and shares in companies, is governed by numerous statutes. Such interests cannot be transferred without writing, and in most cases a deed is required; in any case the transfer is not complete except by entry in the books of the Bank of England or of the body or company concerned.

Something has already been said as to the assignment of ordinary debts and 'choses in action'; and the law relating to negotiable instruments—bills of exchange, cheques, and promissory notes—will be dealt with in the next chapter.

16. TRUSTS. The reader who has followed what was said in the second chapter will already have appreciated the nature of the trust, one of the most characteristic institutions of English Law,

and its enormous importance as a part of our law of property. The importance of trusts has been greatly increased by the Property Acts, because, as we have seen, it is only by means of the trusts that future interests in land can now be created (see p. 83).

Except that trusts of land must be created by writing, a trust may be created by any sufficient expression of intention to create it, whether the legal ownership is transferred to another to hold as trustee or remains with the creator of the trust, who in that case will himself be the trustee. (It may be noted that equitable rights may themselves form the subject of a trust. A, who has an interest in property held by B upon trust for him, may hold that interest upon trust for D, or transfer it to C upon trust for D.) If, however, an attempt is made to create a trust by transfer to a trustee, but the transfer itself fails from a defect in form—where land, for instance, is transferred by unsealed writing, or the transfer of shares in a company has not obtained some necessary consent of the Treasury—the trust also will fail, unless the transaction is one made for value, a term which includes settlements or agreements for settlement in consideration of a contemplated marriage, but not of one already celebrated. So too an attempt to make a direct gift, which fails because the proper method of transfer is not employed, will not take effect as a trust. On the other hand, a trust will not fail because the intended trustee refuses to undertake it, or, in the case of a trust created by will, dies before the testator. A disposition, as distinct from creation, of a trust, whatever its subject-matter, must be in writing, and the term 'disposition' includes a mandate by the beneficiary to his trustee to hold it on behalf of someone else.

Trusts arise not only by a direct expression of intention but also by an inference or implication which may or may not correspond to any actual intention. Thus an agreement for the sale of land makes the vendor a trustee, subject to the payment of the purchase money, for the purchaser. Upon a bequest to a trustee upon trust for a beneficiary who predeceases the testator, the trustee will hold the property for the benefit of the testator's representatives. A gratuitous transfer of property into the joint names of himself and another will be presumed to be made upon trust for the person transferring, unless there is something to show that a benefit to the transferee was intended; such intention will be presumed where the transfer is made by a father to his

child. Again, a person who acquires property for his own benefit by taking advantage of his position as trustee will be treated as holding it for the benefit of those entitled under the trust.

When all the possible beneficiaries are of full age and under no disability (such as that of an infant or lunatic), they may put an end to the trust by requiring the trustee to transfer the property to them or to dispose of it according to their directions; and this is so in spite of any direction to the contrary in the settlement, such as a direction that payment is not to be made to a beneficiary till he reaches the age of twenty-five.

The duties of a trustee may be indefinitely varied by the terms of the instrument which creates the trust, and may range from a mere duty to make a legal conveyance to the beneficiary at his request, and in the meantime to permit him to possess and enjoy the property, to extensive and onerous duties of management, sale, investment, and application of capital and income. Apart from certain exceptional cases, a trustee is entitled to no remuneration for his trouble, unless the terms of the trust so direct, and is liable not only for dishonest dealing with the trust property, but for all loss due either to non-observance of the directions in the settlement and the general rules of law, or to failure on his part to act up to the high standard of care which equity and statute law require of him. The range of permissible investments, for instance, is defined by statute in so far as the settlement makes no provision; but, even within the limits of investment allowed by statute or settlement, a trustee may incur liability by want of due care in exercising his discretion. Any failure of duty in a trustee, however innocent morally, is a breach of trust. In practice, however, and especially in the matter of investments, the older picture of an inexorable equity exercising unrelenting vigilance over the trustee's conduct is passing. It would be impossible to persuade anyone to act as trustee unless the discretion entrusted to him were very liberally conferred, and it is now possible for a trustee to delegate to an agent, not merely pieces of business requiring especial skill, but the whole business of the trust, and escape liability so long as he acts in good faith.

In cases of doubt, a trustee may protect himself by obtaining, at the cost of the trust property, the direction of the court, and the Trustee Act 1925, section 61, had enabled the court to relieve a trustee, who has acted honestly and reasonably and ought fairly to

be excused, from liability for breach of trust. The Variation of Trusts Act 1958 gives the court wide powers to vary trusts and sanction dealings with trust property in the interests of beneficiaries.

Upon the death or retirement of a trustee, the surviving trustees have, in the absence of any provision in the settlement, the power of appointing another in his place. The court also has a power to appoint new trustees and to remove a trustee for unfitness or misconduct.

The rights of the beneficiaries under a trust, as has already been seen, are interests in property closely analogous to legal interests, and but little inferior to them in security. Not only do they hold good against the trustee himself, and against his creditors during his life-time and his representatives after his death, but also against all to whom he may have transferred the property, and who cannot show that they acquired it for value and without notice of the trust. Even where a trustee has misappropriated trust property the fund may still preserve its identity, and, so long as it can be identified, the rights of the beneficiaries will attach to the fund into whatever form it may have been converted by him. If he has used it to swell his bank balance, it will be presumed that, in drawing on that balance, he has drawn out his own money before touching trust money; if he has made an investment with trust money—even an investment which is itself a breach of trust—that investment is still trust property, to which the trustees' creditors have no claim.

We have seen that the difficulty of obtaining the gratuitous services of suitable persons to act as trustees has necessarily led to the practice of reposing an ever wider range of discretion in those who can only thus be persuaded to act. The present danger is perhaps not so much that an honest trustee may be unfairly penalized as that a dishonest trustee may with impunity inflict loss on the beneficiaries. The provision sometimes inserted in a settlement for giving remuneration to a professional man who is one of the trustees is open to considerable objection since it may give him an interest in incurring expense, and will, in any case, tend to make the other trustees leave the management mainly in his hands. An Act of 1906 instituted the office of Public Trustee. This officer may be appointed trustee under any will or settlement, either as a mere 'custodian' trustee, in whom the ownership of the trust property is vested, leaving the active duties

to other trustees; or as an ordinary trustee, with powers and duties of management. Fees in proportion to the value are payable in respect of all property in the hands of the Public Trustee; but his remuneration, like that of other Government servants, is a fixed salary. The Consolidated Fund of the United Kingdom is liable to the beneficiaries for the acts and defaults of the Public Trustee and his subordinates. In recent years, however, the Public Trustee has only had a small and declining proportion of the total work of trusteeship and executorship (see pp. 108-9), and in 1972 a Committee of Enquiry recommended that no new work should be taken on, and that the office be wound up and merged with that of the Official Solicitor. But this recommendation, accepted by the Government at the time, was later rejected by the Government in 1974. The Public Trustee's office therefore continues to discharge the work it retains, though the volume of this work is still declining.

17. MORTGAGES AND PLEDGES OF PERSONALTY. *Mortgages* can be made of chattels personal as well as of land. A mortgage of debts and of equitable interests in personalty can be made in the form of a conveyance by the mortgagor to the mortgagee with a proviso for redemption. The priority of successive mortgagees depends on the date when the mortgagee gives notice to the debtor or trustee. Mortgages of shares are usually made by depositing the share certificate with the lender. This, like a deposit of title-deeds in the case of land (see p. 92), creates an equitable mortgage. Priority, as between successive mortgagees of shares, is determined by the date at which the mortgages were effected, as a company is under no obligation to accept notices by mortgagees. A mortgage of tangible property is made by a deed, which is called a Bill of Sale; and, under the Bills of Sale Act 1882 (as modified by the Consumer Credit Act 1974), it must be in the form given in the schedule to the latter Act, and attested and registered as required by that Act. It cannot be given in consideration of any sum under £30. The priority of successive mortgagees depends upon the order in which successive Bills of Sale are registered. The Bills of Sale Acts do not apply to documents accompanying transactions in which the possession of the chattels passes. Therefore they do not apply to pledges.

A *pledge* is a security upon goods created by the actual transfer of the possession of the goods themselves, or of such documents

of title to goods as bills of lading, but without the conveyance of any legal ownership. A pledge carries with it a power of sale, but there is nothing corresponding to foreclosure. The business of pawnbrokers, which consists in lending money upon pledges of goods, is the subject of special statutory regulation.

18. LIENS. The term *lien* is used in different senses. A common law or possessory lien is the right to retain goods, money, or documents which are in one's possession until payment of some claim due from the owner. It commonly arises in respect of services rendered in relation to the property, as in the case of the carriage of goods; but in some cases, like those of a solicitor and banker, the lien may be asserted in respect of the general balance due from the customer. An innkeeper has a lien for his charges upon the traveller's goods brought to the inn, and, contrary to the usual rule, has by statute been given a power of sale over such goods. Liens of this kind, being mere rights of retention, are lost as soon as possession is given up.

The equitable lien of the vendor of land, who has conveyed the property without receiving payment of the purchase money, is quite independent of possession, and gives a right to have the property sold under an order of the court.

Maritime liens upon ships and cargoes are also in the nature of mortgages or charges independent of possession. They arise in respect of damage done by collision, and upon advances of money or the rendering of services, such as salvage, in times of emergency. Inasmuch as the later advance or service is beneficial to the holder of an earlier lien, it will, as a rule, rank in priority to it.

19. EXECUTION AND BANKRUPTCY. When judgement has been obtained against a man in respect of any debt or liability, it will be enforced, if need be, by execution, i.e. the court will make an order, under which a sufficient part of the debtor's property is seized and sold or otherwise made available for payment. At one time execution might be made against the debtor's person, and he could be kept in prison indefinitely in default of payment. Since 1869 imprisonment for debt has been rare, and by the Administration of Justice Act 1970 it has been completely abolished, and replaced by the remedy of attachment of earnings, i.e. a procedure whereby a portion of the debtor's earnings may be directed by the court to be paid direct to the creditor.

When a person's property is insufficient for payment of his debts, it would obviously be unfair that the creditors who first obtain judgement and execution should be paid in full, leaving nothing to those who may try to enforce their claims later; nor is it desirable that a man should indefinitely remain under a load of debts which (it may be through no fault of his own) he is unable to meet. This is the justification of the law of bankruptcy, originally applicable only to traders, but now, with few exceptions, to all insolvent persons. A corporation cannot be made bankrupt; but a company formed under the Companies Act 1948 or similar earlier Acts can be wound up, and its property distributed, according to rules similar to those applicable to bankruptcy.

The debtor or a creditor presents his petition to the Bankruptcy Court of the district in which the debtor resides or carries on business—in London, the High Court; elsewhere, normally one of the County Courts. An act of bankruptcy must be proved, and under this term are included various acts, which show the debtor's insolvency or his intention to delay or defraud his creditors. If this is proved, the court makes a preliminary order, called a 'receiving order', which protects the debtor's property and prevents creditors from suing him without the leave of the court. The debtor may then (with the court's approval) make a composition or scheme of arrangement with his creditors; but if this is not done he will be adjudicated bankrupt, and the whole of his property (not including property of which he is himself a trustee, or—up to the value of £250—the tools of his trade and the necessary clothing and bedding of himself and his family) will vest in the 'official receiver' (a public officer) or some other trustee, and become divisible among his creditors who prove their debts. Previously the limit was £20, but it was raised to £250 by the Insolvency Act 1976. Rates and taxes, wages of clerks and servants, and some other claims are, within limits, paid in preference to others, and the rights of secured creditors, such as mortgagees, are not prejudiced by the bankruptcy; but in general the distribution will be made rateably. Voluntary settlements (in particular family settlements made after marriage) are set aside by a bankruptcy if made within two years before; and even if made within ten years before, unless it is shown that at the time the bankrupt was able to meet his liabilities without the settled property.

At any time after adjudication a bankrupt may apply to the court for his discharge, which, if granted, will enable him to start again, stripped of his property, but (with certain exceptions) free from any claim which might have been proved against him in the bankruptcy. But the discharge may be refused or postponed if he has been guilty of certain offences or misconduct in connexion with the bankruptcy, or if his assets are insufficient for the payment of 50p in the £, unless this is shown not to be due to the debtor's fault.

20. *WILLS.* A testator had, before 13 July 1939, an unlimited power of disposition by will over all his proprietary rights which survive him, including, since 1925, an entailed interest in possession. But on and after that date the Inheritance (Family Provision) Act 1938 gives to the dependants of a testator, and the Intestates' Estates Act 1952 gives to those of an intestate, power to apply to the court for a reasonable maintenance out of the estate, if such is not provided by the will, or the law of intestacy, or the combined operation of will and law where the intestacy was only partial. The 1938 Act was repealed and replaced by the Inheritance (Provision for Family and Dependants) Act 1975, which increases the range of dependants who may apply for provision on death and gives the court wider powers than previously existed so that it can make whatever type of order may be most appropriate in the circumstances. Dependants are defined in the 1975 Act as a wife or husband; a former spouse who has not remarried; a child of the deceased (including an illegitimate or adopted child); a person who was treated by the deceased as a child of the family in relation to any marriage of the deceased (e.g. a child of the deceased's wife by a former marriage); and any other person who was being wholly or partly maintained by the deceased immediately before his death. To qualify in this last category a dependant need not have been related to the deceased, and thus a mistress would be included. Furthermore there is no qualifying period during which the applicant must have received maintenance from the deceased. 'Maintained' means that the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of the applicant, and he did not receive full valuable consideration for this: thus food and shelter are included in the definition. The court may attach to its grant such conditions as it

sees fit. The maintenance ordered may be in the form of a lump sum, by way of periodical payments of income, or by transfer or settlement of specific property, or the variation of a settlement. Such payments to a spouse will normally end if he or she remarries, but the original provisions in the 1938 Act excluding a child from further benefit on attaining the age of majority or on marriage have been repealed by the 1975 Act. The court must take into consideration the nature of the testator's property, the pecuniary position of the dependant, his or her conduct to the testator, and any other relevant circumstance, and the testator's reasons for the dispositions made by him in his will.

For the making of a will compliance with the following formalities is now necessary: (1) The will must be in writing. (2) It must be signed by the testator or by some person in his presence and by his express direction. (3) The signature must be made or acknowledged by the testator in the presence of two or more witnesses, both present at the same time. (4) The witnesses must attest and sign the will in the testator's presence, or acknowledge their signatures in his presence.

A soldier or airman on active service, or mariner at sea, can make an informal will, even by word of mouth, which will be valid provided that his communication to his audience was not a mere statement, but a request to him to see his intention carried out. The Administration of Justice Act 1982 also sets out the form of an international will recognized as formally valid in all countries subscribing to the Convention on International Wills.

Any legacy or benefit given by the will to a witness or to a witness's wife or husband was formerly void, though the will as a whole was unaffected. But the Wills Act 1968 provides that if a will is already duly executed with two other qualified witnesses, the attestation of any person who would have been caught by this rule must be disregarded.

A testator can revoke his will at any time during his life. But breach of a contract not to revoke it will subject his estate to a claim for damages. Furthermore, if two parties (usually, but not necessarily, husband and wife) make 'mutual wills', with identical ultimate beneficiaries, the death of one of the parties without alteration of his will may have the effect of binding the survivor to make no alteration, in the sense that a trust will arise, under which the terms of the will must be fulfilled.

A will is revoked (1) by the marriage of the testator, unless it appears from the will that at the time it was made the testator was expecting to be married to a particular person, and that he intended that the will (or a particular disposition in the will) should not be revoked by that marriage, and that marriage takes place. (2) By the making of a new will or of a codicil or other writing executed with the same formalities as a will, so far as such later document is inconsistent with the will. A codicil is really a supplementary will, and is generally used for making some alteration in a will without revoking it as a whole. (3) By burning, tearing, or otherwise destroying a will, if this is done by the testator or any person in his presence and by his direction with the intention of revoking it. (4) A complete and intentional obliteration of a will or any part of it, so that what was written can no longer be seen, amounts to a revocation of what is obliterated; but merely striking words through with a pen or altering them has no effect, unless the cancellation or alteration is signed by the testator and attested by two witnesses like a new will. Where, after a testator has made a will, his marriage is dissolved or annulled, the will takes effect as if any appointment of the former spouse as an executor were omitted, and any devise or bequest to such former spouse lapses.

The accidental loss or destruction of a will has no effect upon its validity, and its contents may be proved by the production of copies or drafts, or even by the recollection of persons who have seen it or heard it read.

Bequests of real estate are technically known as devises, bequests of personalty as legacies. A legacy may be specific, i.e. given in terms which show that a particular thing and no other is meant (e.g. 'my only gold watch', 'my G.L.C. stock'). A legacy which earmarks, not a particular thing, but a particular fund or collection out of which it is to come (e.g. 'one of my three violins') is called demonstrative. A legacy which earmarks neither thing nor collection (e.g. 'a violin', '£500') is called general. A bequest of the surplus is called residuary. A specific bequest will fail, if the testator parts with the thing before death. But a demonstrative legacy, if the fund out of which it is to come ceases to exist before the death, becomes payable as a general legacy. Devises are of two kinds only, specific and residuary. The interests of all persons who take under a will can take effect only after payment of the

debts of the deceased. Under the Administration of Estates Act 1925, real and personal estates are equally liable to the payment of these debts.

Under the Administration of Justice Act 1982, where a will contains a devise or bequest to a child or remoter descendant of the testator, and the intended beneficiary dies before the testator, leaving issue who are living at the time of the testator's death, then, unless a contrary intention appears in the will, the devise or bequest passes to the issue living at the testator's death. For the purposes of this provision, such issue include illegitimate children and any persons conceived before the testator's death and born living thereafter.

When a bequest fails through the death of the person for whom it was intended, and does not pass under a residuary bequest, as must necessarily be the case if the bequest which fails is itself residuary, the property will be dealt with as upon an intestacy.

21. **INTESTACY.** Before 1926, when a person died wholly or partly intestate, the distribution of his property differed widely according as it was real or personal estate. The real estate descended to the heir in accordance with rules laid down by statutes of 1833 and 1859. The personal estate was distributed in accordance with rules laid down by the Statutes of Distribution of Charles II's and James II's reigns. The Administration of Estates Act 1925 has repealed the Statutes of Distribution altogether, and has confined the operation of the statutes of 1833 and 1859 to three specific cases.<sup>5</sup> This Act has been further amended by the Family Provision Act 1966. Apart from these cases, the entire property, other than that in which the deceased's interest ceased at his death, is held by the executors or administrators on trust for sale, in the first instance for the payment of his debts, and then for distribution as laid down in the Intestates' Estates Act 1952, which has replaced the relevant provisions of the Act of 1925. Since, however, cases concerning property which has devolved according to those provisions will for many years continue to come before the courts, they are summarized in a note at the end of the book.<sup>6</sup>

The present rules are:

- (1) *Rights of surviving spouse.* He or she takes—
- (i) All the personal chattels (that is chattels such as furniture, motor cars, and articles of household or personal use or

ornament, but not chattels used for business purposes).

- (ii) If there is issue, £8,750, free of capital transfer tax.
- (iii) If there is no issue, £30,000, free of capital transfer tax.
- (iv) If there is issue, a life interest in half the remaining estate, which may, at his or her option, be redeemed for a capital payment. The other half, and the reversion in the first half, are held on the 'statutory trusts' for the issue.
- (v) If there is no issue, but there are parents, or, failing them, brothers and sisters of the whole blood, then the spouse takes half the remaining estate absolutely, the other half going to parents, or being held on the 'statutory trusts' for brothers and sisters, as the case may be.
- (vi) The claims of the spouse override absolutely those of all relations remoter than those mentioned in (v).
- (vii) Where part of the estate consisted of a 'matrimonial home', i.e. a house in which the surviving spouse was resident at the time of the death, the spouse may normally require the representatives to appropriate the deceased's interest in the house in or towards the satisfaction of his or her absolute interest in the estate.

The phrase 'statutory trusts' calls for some explanation. The term 'issue' includes not only children, but also the children of children who have predeceased the intestate. The scheme is that these take an 'absolutely vested interest' only on the attainment of eighteen years or marriage. Until then, the property is held in trust for them. Should a child die before attaining an absolutely vested interest, his interest passes on to those next entitled, that is to say, other children, a parent, brothers and sisters of the whole blood, a surviving spouse, or remoter relatives if there is no surviving spouse. The personal representatives have the powers to maintain and advance children given to trustees by the Trustee Act 1925. In order to equal the shares of the children, any sum paid by the intestate to a child by way of advancement or on the marriage of the child must be brought into account. An advancement means a sum of money paid to a child to start him in business or to make a permanent provision for him; it does not include casual payments given as a present or to help to tide over temporary difficulties.

The interests of the children, if there is no surviving spouse, absolutely override those of any other relatives. Under the

Children Act 1975 an adopted child has the same right to succeed on the intestacy of his adoptive parent as any other child born to that parent.

(2) *Rights of parents.* Where there are no issue and no surviving spouse, the parents, if both are alive, take the property in equal shares. If only one is alive, that parent takes all.

(3) *Rights of brothers and sisters of the whole blood.* If spouse, issue, and parents are all lacking, the property is held on the statutory trusts for brothers and sisters of the whole blood, or the children of deceased members of that class.

(4) *Rights of remoter relatives.* It must be emphasized that relatives remoter than parents, or brothers or sisters of the whole blood, and children of such brothers and sisters deceased, can succeed to no part whatever of the estate, if there is a surviving spouse. If there is no spouse, they take in the following order, (i) brothers and sisters of the half blood; (ii) grandparents in equal shares; (iii) uncles and aunts, who are brothers and sisters of the whole blood of a parent of the intestate; (iv) uncles and aunts who are brothers or sisters of the half blood of a parent of the intestate. Class (ii) take the property absolutely. In the case of Classes (i), (iii), and (iv) the property is held on the statutory trusts, as in the case of issue. Thus, just as grandchildren can take, so can nephews and nieces and first cousins. But in the case of these classes, the rule relating to the bringing into account of advances does not apply.

22. EXECUTORS AND ADMINISTRATORS. Even if a will does not give property to trustees, the property, whether real or personal, does not go directly to those for whose benefit it is given, nor does property passing on intestacy go directly to those entitled under the rules above stated. It vests in the first instance in 'personal representatives', namely the executor appointed by the will, or where there is no will or no executor appointed under the will, in the administrator—usually a person interested in the property—appointed by the court. The Public Trustee may be appointed as executor or administrator (but see pp. 99–100).

The executor or administrator, whose duties in many ways resemble those of a trustee, must in the first instance discharge the funeral expenses, the cost (including the payment of capital transfer tax) of obtaining probate of the will or 'letters of administration', and the debts of the deceased. It is only after

these claims are discharged that the executor or administrator will transfer the property to those entitled; or, if the property is settled by will and the executor is not himself trustee, to trustees for them. In many cases, as where the persons entitled are not of age, or not yet in existence, or not to be found, an executor or administrator will have to retain the property in his hands for a considerable time, though he may sometimes relieve himself by a payment or transfer into court, and in any case he can obtain the direction of the court when doubts arise as to the proper course which he should take.