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THE READING
UPON
THE STATUTE OF USES
OF
FRANCIS BACON,
AFTERWARDS
BARON OF VERULAM, AND VISCOUNT ST. ALBAN;
LORD HIGH CHANCELLOR
OF
GREAT BRITAIN.

A New Edition.
WITH VERY FULL
NOTES AND EXPLANATIONS,
AND A
COPIOUS TABLE OF THE CONTENTS.

By WILLIAM HENRY ROWE, Esq.
OF LINCOLN'S-INN.
AUTHOR OF
'OBSERVATIONS ON THE RULES OF DESCENT, AND ON
OUR LAW'S DISALLOWANCE OF LINEAL ASCENT.'
To SIR VICARY GIBBS,
THIS EDITION
OF
LORD BACON's
READING UPON THE STATUTE OF USES,
IS
MOST RESPECTFULLY DEDICATED,
IN TESTIMONY OF THE JUST VENERATION
WITH WHICH
HIS PROFOUND LEARNING,
AND
GREAT PROFESSIONAL SKILL AND TALENTS,
ARE REGARDED,
BY
HIS MUCH OBLIGED AND VERY OBEDIENT,
FRIEND AND SERVANT,
THE EDITOR.
PREFACE.

MY Lord Bacon’s Reading upon the Statute of Uses—of which a new edition is now presented to the profession—appears to have been first printed in the year 1642, a period of about 16 years after the death of the learned author, and of about 40 after its delivery to the Society of Gray’s Inn; and the numerous errors with which that impression of the work abounds are of such a nature as to render it manifest, not merely that it could not have been printed from a correct copy, but that the press was not superintended by any person who was in the least conversant with the learning of uses.

In one of those excellent annotations with which Mr. Hargrave and Mr. Butler have enriched the before invaluable Commentary of Lord Coke upon the Tenures of Littleton, the former of those gentlemen *, at the same time that he spake in high terms of the excellence of the work itself, took notice of the extreme incorrectness of the various editions of it; and accordingly, when it was next printed amongst his Lordship’s other works, many corrections were made.

Those corrections are all preserved in the last edition of the work which was published in the year 1785, and some additional ones made—the persons who had the management of that edition, having had, as they stated, an opportunity of improving the work with the further corrections of a gentleman of considerable knowledge and experience, who had made a very attentive perusal of it, and corrected it in a great number of instances.

The alterations however which first took place in the last edition, merely had in view the removal of a few palpable errors, and indeed, some of those alterations have been

* Co. Litt. 19. 4. N. 64.
made with so little judgment, as to have occasioned a per-
version of the real meaning.

It is by no means the wish of the present editor to detract
from the merit, to which, they who prepared that edition
for the press are in any degree entitled; so very different
is his disposition towards those persons, although he knows
them not, that as often as he has suffered any corrections
which were made in that edition to remain in the present,
he has in justice to them invariably signified at the foot of
the page where such corrections occur, that they were first
inserted in the last edition.

The same motives have induced him to place between
brackets so much as he is responsible for of the matter which
is contained in the margin of the text, in order that it may
be distinguished from what is to be found in the last edition
also.

With respect to the last edition it is further to be observed,
that it contains many errors of the same description with
those it has corrected, and that it is without a single note or
observation of any kind, either to illustrate and explain the
text where it is obscure, or to point out wherein any of the
learned author's positions were at variance with the opinions
of the other great characters of his own day, as well as in
what respect, or to what extent their solidity has been shaken
by more modern determinations. Neither does it contain
any table of the contents of the work, although such a table
would have been very useful to the reader in his occasional
references to it.

Thinking that an acceptable service would be rendered
the profession by an edition which would amend the in-
accuracies, and supply the defects of the former ones, the
present editor resolved upon the attempt; and he will have
great reason to rejoice in his labours, if in the judgment of
the
the learned reader, he shall be thought to have discharged even a small portion of that debt which a great lawyer has truly said, every man owes to the profession of which he is a member; for, having felt the difficulty of the task which he imposed upon himself, the editor has not the vanity to suppose that he has executed it in a manner even bordering upon perfection, and much less has he the presumption to expect that it will be so received.

The editor confesses however, that his ambition of being thought to deserve well of the profession, prompts him to foster the hope that the present edition, although it may fall short of what might have been achieved by greater talents, will notwithstanding be found to possess a larger share of merit than those by which it has been preceded, and he has too high an opinion of the candour and liberality of the profession, not to believe that the sentiment of Horace, est quodam prodire tenus, si non datur ultima, will suggest itself to their minds upon the present occasion.

Having in pursuing his course of legal study acted, at least so far as it is practicable, upon the scriptural maxim to try all things and to hold fast only that which is good, the editor has felt little disposed to take upon trust the opinions of other men, or to accept alloy as genuine gold, merely because it hath, as such, obtained a limited circulation: On the contrary, he has been accustomed to examine as to the stability of the foundation upon which the doctrines now in vogue rest, and whether they are reconcilable with the grounds and principles of more ancient times.

From the research which was necessary to put those doctrines to the test, a conviction has arisen that many of them are untenable; and in going through the following work, he felt himself compelled to differ in many very important instances from certain modern writers, but wherever it has happened, the arguments on each side of the point disputed are laid before.
before the reader, and the reasons which have obtained the ascendency in the mind of the editor are pointed out; but as it is the opinion which is attacked, and not the author of—or the person who has espoused—that opinion, the editor, where he has had occasion to controvert the arguments of living writers, has not thought it necessary—but that it would have been rather indelicate—to mention them by name; or to make a direct allusion to them by a reference to their works.

The editor hath also in a few instances ventured to canvass the conclusions of the noble and profoundly learned author himself: and in order that the imputation of arrogance may not attach upon him on that account, he begs leave to assure the reader that wherever he has done so, it has been with feelings of the deepest humility: But the truth is, that in most of those instances, characters so eminent have differed in opinion, that, as Sir Martin Wright said upon some occasion, 'bare authority ought to have little or no influence upon the judgment, and a person may without vanity or danger of censure, lean towards his own understanding.'

There are a few (of what at this period would be considered) inaccuracies still remaining in the language; but the editor held the text to be sacred, except in those places where the supposed meaning of the author demanded an alteration; and every alteration has been made under the supposition that had the work been first printed from a correct copy, they instead of now being called for, would have been originally in the first edition. Every alteration also is particularly pointed out in the notes; and the imperfections which remain, are not such as to prevent the sense from being easily collected.

It must be admitted, that in some of the notes the recurrences to first principles are more frequent than would have
PREFACE.

have been requisite to convey the sense to the minds of many readers, but readers of that description will, it is hoped, admit the propriety of the arguments not having been put with all the point and brevity of which they were capable, when it is considered, that, by so doing, they would have been rendered incomprehensible to young students, whose minds cannot be supposed to possess the necessary leading ideas upon the topics discussed. The editor is anxious that this excuse should be admitted by the learned reader, because he knows how very irritating to the mind it is, to have the attention solicited to remarks of inferior moment, when one is eager to get at the very pith of the argument.

Conceiving that studied ornaments of stile in law treatises, are but meretricious decorations, and that the appeal should be to the reason and not to the ear merely, the editor has not wasted his time by any attempt of that kind; his only aim has been perspicuity, and with that view he has clothed his ideas in the language which first presented itself, and consequently, has addressed the reader in pretty much the same terms as if he had been discussing the subject with him in person.

The fear of being charged with the affectation of learning and deep investigation, has not prevented the editor's giving such references as appeared to him to afford the fullest sanction to his conclusions, however antient the authority may have been, and one object which he has not lost sight of, is to refer to those authors to whose penetration and discernment we are indebted for subtle and important distinctions, rather than to writers who having borrowed those distinctions without any acknowledgment, have endeavoured to pass what is theirs by adoption only, as being the legitimate offspring of their own minds. It is not meant that such trivial ideas as could not fail to strike every reflecting reader ought always to be referred to their original source; or that it has been done by the editor in the present instance, for it
PREFACE.

would be useless, nay, in many cases impossible; but surely
where writers avail themselves of the ideas of others—and
of such ideas too as could have been first elicited only by
superior minds—it is acting unjustly not to admit the obliga-
tion; and certainly it is a piece of conduct not the most
honourable, where the object of such writers is to take the
whole credit to themselves.

Where the notes are long, and the point spoken of in the
table of contents, doth not constitute the principal matter of
them, there is, for the reader's greater ease, a reference,
not merely to the note, but to the particular page wherein
the point referred to, is mentioned.

The references from the table of contents and the names
of cases, are to the pages as marked in the present edition,
but the references from the notes are to the pages of the last
dition, and which are preserved in the margin of the present.

The editor cannot avoid remarking upon the great in-
convenience which results from the old pages in books of
established reputation not being continued in the new editions
of them: A student returns from the courts to his study with
the chain of reasoning fresh in his memory, and anxious
to examine the full force and bearing of the authorities
which have been referred to upon important cases at the
Bar, and by the Bench, but to his mortification finds himself
foiled in his attempt, in consequence of his being provided
with the last edition of the work, when the references in
the course of the argument have been to the old edition.

The inconvenience is felt in a still greater degree in
pursuing a point of law through the books in the course of
practice, for the references from one book to another in
most cases are according to the pages in the old editions; but
which not being preserved in the new editions, that one is,
in possession of, it becomes necessary to send half the town
over
over to obtain the editions referred to, or waste away one's time in searching page after page through the new edition before a sight can be obtained of the particular passages which have been vouched. This inconvenience on account of the great length of the valuable notes in the last edition of Sir Mathew Hale's History of the Common Law, peculiarly attends that edition, and renders it of less value (notwithstanding the opinions of booksellers to the contrary) than it otherwise would be; and as there can be no doubt that another impression of such a work will be called for, it is hoped that the learned editor will see the propriety of being peremptory with his bookseller, in insisting that the old pages be inserted in the margin.

An essential service would be rendered the profession, and the further growth of the evil prevented, if they whose mere observations would amount to an injunction, would pay a little attention to the subject.

When the editor perceived how great a length the notes which he had written extended, he deemed it prudent to omit so many of them as did not appear to him to be absolutely called for by the matter of the text, and indeed to lop off some small ramifications unto which some of the notes which are retained had originally extended, from the fear, that otherwise the price which it would have been necessary to set upon the work might have been objected to.

With respect to the present price of this edition, the editor begs leave to observe, that although it is so much greater than that of the former impressions, yet he trusts that it will not be deemed exorbitant, when it can scarcely be expected on account of the very limited sale of such a work, that he shall be repaid the expenses of printing and publishing.

Many
Many of the notes which are reserved, contain a discussion of some very important unsettled points arising out of the Law of Uses, and, should the editor be so much flattered by the favourable reception of his notes on the present work as to justify a belief that the publication of the former would be acceptable, he will feel at once happy and proud to present them to the profession in some other shape.

Into the hands of the learned reader the editor presumes to commit this edition of Lord Bacon's Reading upon the Statute of Uses, deeply impressed with the conviction, that for so much as he is responsible, (and he hath in the course of the notes hazarded many observations in the way of argument, for which he cannot shelter himself under the authority of any former writer,) he stands in need of the utmost candour and indulgence; but at the same time confident, that when the great intricacy and abstruseness of the subject is considered, that indulgence will not not be withheld.

No. 7. New Square, Lincoln's Inn.
10th October, 1804.
WHEREAS by the common laws of this realm, lands, tenements, and hereditaments, be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made bona fide, without covin or fraud; yet nevertheless divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometime made by nude parol and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantily had any good memory...
mory or remembrance; at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly, at sundry times, dispossessed, the lords have lost their wards, marriages, reliefs, hurriots, escheats, aids pur fair fitz chivalier, & pur file marier, and scantily any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions, or executions for their rights, titles, and duties; also men married have lost their tenancies by the courtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed; the King's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter
USES AND WILDS.

utter subversion of the ancient common laws of this realm; for the extirping and extinguishment of all such subtle, practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's highness, or any other his subjects of this realm, shall not in any wise hereafter, by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses, or confidences.

It may please the King's most royal majesty, that it may be enacted by his highness, by the assent of the Lords spiritual and temporal, and the Commons, in this present parliament assembled, and by the authority of the same, in manner and form following; that is to say, That where any person or persons stand, or be seized, or at any time hereafter shall happen to be seized of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever it be; that in every such case, all and every such person and persons, and bodies politic, that have,
have, or hereafter shall have any such use, confidence, or trust, in fee-simple, fee-tail, for term of life, or for years, or otherwise; or any use, confidence, or trust, in remainder, or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had, or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition as they had before, in or to the use, confidence, or trust that was in them.

II. And be it further enacted by the authority aforesaid, That where divers and many persons be, or hereafter shall happen to be jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments,
USES AND WILLS.

taments, to the use, confidence, or trust of any of them that be so jointly seized, that in every such case that those person or persons which have or hereafter shall have any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him or them that have, or hereafter shall have any such use, confidence, or trust, such estate, possession, and seisin, of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments; saving and reserving to all and singular persons, and bodies politick, their heirs, and successors, other than those person or persons which be seized, or hereafter shall be seized of any lands, tenements, or hereditaments, to any use, confidence, or trust, all such right, title, entry, interest, possession, rents, and action, as they or any of them had, or might have had before the making of this act.

III. And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be seized to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action, as they or any of
of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they be, or hereafter shall be seized to any other use, as if this present act had never been had, nor made; any thing contained in this act to the contrary notwithstanding.

IV. And where also divers persons stand and be seized of and in any lands, tenements, or hereditaments, in fee-simple, or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of a lie or more, or less, out of the same lands and tenements, and some other person one other annual rent, to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited, and made thereof.

V. Be it therefore enacted by the authority aforesaid, That in every such case the same persons, their heirs, and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements, or hereditaments, that they, and every of them, their heirs, and assigns, be adjudged and deemed to be in possession and seizin of the same rent, of and in such like estate as they had in the title, interest, or use of the said rent or profit,
profite, and as if a sufficient grant, or other lawful conveyance had been made and executed to them, by such as were or shall be seized in the use or intent of any such rent to be had, made, or paid according to the very trust and intent thereof; and that all and every such person and persons as have, or hereafter shall have, any title, use, and interest in or to any such rent or profit, shall lawfully distress for non-payment of the said rent, and in their own names make sequestris, or by their bailiffs or servants make conduances and justifications; and have all other suits, entries, and remedies for such rents, as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed upon the trust and intent for payment or surety of such rent.

VI. And be it further enacted by the authority aforesaid, That whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements, and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband, and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband, and to the wife for term of their lives, or for term

A woman shall not have both a jointer and dower of her husband's lands.
AN ACT CONCERNING

term of life of the said wife; or where any such estate, or purchase of any lands, tenements, or hereditaments, hath been, or hereafter shall be made to any husband; and to his wife, in manner and form above expressed; or to any other person or persons; and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointer of the wife; that then in every such case, every woman married, having such jointer made; or hereafter to be made, shall not claim, nor have title to have any dower of the residue of the lands, tenements, or hereditaments, that at any time were her said husbands, by whom she hath any such jointer, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband; but if she have no such jointer, then she shall be admitted and enabled to pursue, have, and demand her dower by writ of dower, after the due course and order of the common laws of this realm; this act, or any law or provision made to the contrary thereof notwithstanding.

VII. Provided alway, That if any such woman be lawfully expelled, or evicted from her said jointer, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every
USES AND WILLS.

Every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto.

VIII. Provided also, That this act, nor any thing therein contained or expressed, extend, or be in any wise hurtful or prejudicial to any woman or women heretofore being married, of, for or concerning such right, title, use, interest, or possession, as they or any of them have, claim, or pretend to have for her or their jointer or dower, of, in, or to any manors, lands, tenements, or other hereditaments of any of their late husbands, being now dead or deceased; any thing contained in this act to the contrary notwithstanding.

IX. Provided also, That if any wife have, or hereafter shall have any manors, lands, tenements, or hereditaments unto her given and assured after marriage, for term of her life, or otherwise in jointer, except the same assurance be to her made by act of parliament, and the said wife after that fortune to overlive her said husband, in whose time the said jointer was made or assured unto her, that then the same wife so overliving shall and may at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed, or assured during
AN ACT CONCERNING

during the coverture, for term of her life, or otherwise in jointer, except the same assurance be to her made by act of parliament, as is aforesaid, and thereupon to have, ask, demand, and take her dower by writ of dower, or otherwise, according to the common law, of and in all such lands, tenements, and hereditaments as her husband was and stood seized of any state of inheritance at any time during the coverture; any thing contained in this act to the contrary thereof notwithstanding.

X. Provided also, That this present act, or any thing herein contained, extend, nor be at any time hereafter interpreted, expounded, or taken to extinct, release, discharge, or suspend any statute, recognizances, or other bond, by the execution of any estate, of or in any lands, tenements, or hereditaments, by the authority of this act, to any person or persons, or bodies politic; any thing contained in this act to the contrary thereof notwithstanding.

XI. And forasmuch as great ambiguities and doubts may arise of the validity and invalidity of wills heretofore made of any lands, tenements, and hereditaments, to the great trouble of the King’s subjects; the King’s most royal majesty minding the tranquillity and rest of his loving subjects, of his most excellent and accustomed goodness is pleased and contented that it be enacted by the authority
USES AND WILLS.

thority of this present parliament. That all manner true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease before the first day of May, that shall be in the year of our Lord God 1536, of any lands, tenements, or other hereditaments, shall be taken and accepted good and effectual in the law, after such fashion, manner, and form as they were commonly taken and used at any time within forty years next afore the making of this act; any thing contained in this act, or in the preamble thereof, or any opinion of the common law to the contrary thereof notwithstanding.

XII. Provided always, That the King's highness shall not have, demand, or take any advantage or profit for, or by occasion of the executing of any estate, only by authority of this act, to any person or persons, or bodies politic, which now have, or on this side the said first day of May, which shall be in the year of our Lord God 1536, shall have any use or uses, trusts, or confidences in any manors, lands, tenements, or hereditaments holden of the King's highness, by reason of primer seisin, livery, ouster le main, fine for alienation, relief or harriot; but that fines for alienations, reliefs, and harriots, shall be paid to the King's highness, and also liveries, and ouster le mains shall be sued for uses, trusts, and
and confidences to be made and executed in possession by authority of this act, after and from the said first day of May, of lands, and tenements, and other hereditaments holden of the King in such like manner and form, to all intents, constructions, and purposes as hath heretofore been used or accustomed by the order of the laws of this realm.

XIII. Provided also, That no other person or persons, or bodies politick, of whom any lands, tenements, or hereditaments be, or hereafter shall be holden mediate or immediate, shall in any wise demand, or take any fine, relief, or harriot, for or by occasion of the executing of any estate by the authority of this act, to any person or persons, or bodies politick, before the said first day of May, which shall be in the year of our Lord God 1536.

XIV. And be it enacted by authority aforesaid, That all and singular person and persons, and bodies politick, which at any time on this side the said first day of May, which shall be in the year of our Lord God 1536, shall have any estate unto them executed of and in any lands, tenements, or hereditaments by the authority of this act, shall and may have and take the same, or like advantage, benefit, voucher, aid-prayer, remedy, commodity, and profit by action, entry, condition, or otherwise, to all intents, constructions, and purposes,
USES AND WILLS.

purposes, as the person or persons seized to
their use of or in any such lands, tenements,
or hereditaments so executed, had, should,
might, or ought to have had at the time of the
execution of the estate thereof, by the au-
thority of this act, against any other person
or persons, of, or for any waste, disseisin,
trespass, condition broken, or any other of-
rence, cause, or thing concerning or touching
the said lands or tenements so executed by the
authority of this act.

XV. Provided also, and be it enacted by
the authority aforesaid, That actions now de-
pending against any person or persons seized
of or in any lands, tenements, or heredita-
ments, to any use, trust, or confidence, shall
not abate ne be discharged for or by reason
of executing of any estate thereof by authority
of this act, before the said first day of May,
which shall be in the year of our Lord God
1536, any thing contained in this act to the
contrary notwithstanding.

XVI. Provided also, That this act, nor any
thing therein contained, shall not be prejudicial
to the King’s highness for wardships of heirs
now being within age, nor for liverys, or for
ouster le mains, to be sued by any person or
persons now being within age, or of full age,
of any lands or tenements unto the same heir
or heirs now already descended; anything in this
act contained to the contrary notwithstanding.

XVII.
AN ACT, &c.

XVII. Provided also, and be it enacted by the authority aforesaid, That all and singular recognizances heretofore knowned, taken, or made to the King's use, for or concerning any recoveries of any lands, tenements, or hereditaments heretofore sued or had, by writ or writs of entry upon disseisin in le post, shall from henceforth be utterly void and of none effect, to all intents, constructions, and purposes.

XVIII. Provided also, That this act, nor any thing therein contained, be in any wise prejudicial or hurtful to any person or persons born in Wales, or the marches of the same, which shall have any estate to them executed by authority of this act, in any lands, tenements, or other hereditaments within this realm, whereof any other person or persons now stand, or be seised to the use of any such person or persons born in Wales, or the marches of the same; but that the same person or persons born in Wales, or the marches of the same, shall or may lawfully have, retain, and keep the same lands, tenements, or other hereditaments, whereof estate shall be so unto them executed by the authority of this act, according to the tenor of the same; any thing in this act contained, or any other act or provision heretofore had or made to the contrary notwithstanding.
FOR INROLLMENT

OF BARGAINS and SALES.

27 HENRY VIII. CAP. 16.

BE it enacted by the authority of this present parliament, That from the last day of July, which shall be in the year of our Lord God 1536, no manors, lands, tenements, or other hereditaments, shall pass, alter or change from one to another, whereby any estate of inherit-ance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed and in-rolled in one of the King's courts of record at Westminster, or else within the same county or counties, where the same manors, lands, or tenements, so bargained and sold, lie or be, before the Custos Rotulorum, and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same inrollment to be had and made within six months, next after the date of the same writings indented; the same Custos Rotulorum, or justices of the peace and clerk, taking for the inrollment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of forty shillings, ²s. that is to say
FOR INROLLMENT OF

say, 12d. to the justices, and 12d. to the clerk; and for the inrollment of every such writing indented before them, wherein the land comprised exceeds the sum of 40s. in the yearly value, 5s. that is to say, 2s. 6d. to the said justices, and 2s. 6d. to the said clerk for the inrolling of the same. And that the clerk of the peace for the time being, within every such county, shall sufficiently inroll and ingross in parchment the same deeds or writings indented as is aforesaid, and the rolls thereof at the end of every year shall deliver unto the said Custos Rotulorum, of the same county for the time being, there to remain in the custody of the said Custos Rotulorum, for the time being, amongst other records of every of the same counties, where any such inrollment shall be so made, to the intent that every party that hath to do therewith, may resort and see the effect and tenure of every such writing so inrolled.

II. Provided always, That this act, nor any thing therein contained, extend to any manor, lands, tenements, or hereditaments, lying or being within any City, Borough, or Town corporate, within this realm, wherein the mayors, recorders, chamberlains, bailiffs, or other officer or officers, have authority, or have lawfully used to inroll any evidences, deeds, or other writings, within their precinct or limits; any thing in this act contained to the contrary notwithstanding.
INTRODUCED OR CITED CASES.

A.

ADAMS v. Savage, 209, 220, 221, 224.

B.

Baldwin and Flower, 176.
Banbong and Lusher, 245.
Barker against Keat, 150.
Batty v. Trevillion, 144.
Beckwiths case, 239, 244, 246.
Bedfords (Earl of) case, 209, 211, 221.
Blake and Perrin, 228.
Blythe and Colgate, 83, 244.
Bonis and Holland, 179, 184.
Boys and King, 199.
Brents case, 104, 141, 205.
Bucknalls case, 148.

C.

Carew and Lloyd, 234.
Carier v. Franklin, 187.
Ceasar and Springe, 230.
Chudleighs case, or Dillon and Freines, 1, 5, 10, 20, 96, 113, 118, 119, 132, 136, 150, 151, 155, 156, 157, 166, 168, 183, 211, 223, 224, 226, 236.
Clarke v. Smith, 232.
Clareres (Sir Edward) case, 142, 143, 144.

Clough and Clough, 243.
Colgate and Blythe, 83, 244.
Cooper v. Franklin, 186, 187.
Corbetts case, 11, 83, 85, 86.
Cornish and Goodright, 213, 214, 216.
Cosin and Tippin, 210.
Crawley's case, 205, 206.
Cromwells (Lord) case, 186, 187, 189.

D.

Dacres (Lord) case, 11, 84, 98, 103, 113.
Davies v. Speed, 210, 212, 232, 234.
Delamers case, 9, 16, 91, 161.
Dillon and Freines, or Chudleighs case. See Chudleighs case.
Drury v. Drury, 243.

E.


F.

Finches (Sir Moyle) case, 91.
Flower and Baldwin, 176.
Franklin and Carier, 187.
Franklin and Cooper, 186, 187.

G.

INTRODUCED OR CITED CASES.

Goodright against Cornish, 213, 214, 216.
Goodright and Goodman, 214.
Greenbank and Hearle, 239.

H.
Halpeny’s case, 18, 30.
Hearle and Greenbank, 239.
Hollingshead v. Hollingshead, 243.
Holland v. Bonis, 179, 184.
Holland and Rawley, 210, 221, 224.
Hurrell and Penhay, 208, 209.
Hynde’s case, 172, 174.

I. and J.
Iseham v. Morice, 150.
Jenkins v. Young, 233.
Jennings and Mallery, 172.
Joans and Meredith, 233.
Jones v. Morley, 239.

K.
Keat and Barker, 150.
King and Boys, 199.

L.
Lloyd v. Carew, 234.
Lower and Weale, 232.
Lutfich and Mytton, 143, 144, 150.
Lusker v. Banbong, 245.

M.
Maddox Baker and others, against White and others, 243.
Mallery v. Jennings, 172.
Mallory’s case, 149.
Mansfield’s case, 239.
Manxel and Basset and Morgan, 113.
Mildmay’s case, 89.
Mitford and Pibus, 209.
Moore v. Parker, 214.
Morley and Jones, 239.
Morice and Iseham, 150.
Mutton’s case, 227.
Mytton v. Lutfich, 143, 144, 150.

P.
Paget’s (Lord) case, 198, 199, 232.
Parsons and Zouch, 243.
Pay’s case, 221.
Parker and Moore, 214.
Perrin and Blake, 228.
Pibus v. Mitford, 209.
Popham and Thomas, 171.
Portington’s (Mary) case, 239.

R.
Raven and Swanton, 245.
Rawley v. Holland, 210, 221, 224.

S.
Samme’s case, 233.
Sand’s (Lord) case, 6.
Sand’s (Sir George) and Attorney General, 87.
Savage and Adams, 209, 220, 221, 224.
Seymour’s case, 193.
Shelley’s case, 228.
Smith and Clarke, 232.
Speed and Davies, 210, 212, 232, 234.
Springe and Caesar, 230.
Strötton and Shartington, 13, 88.
Swanton v. Raven, 245.

T.
Thomas v. Popham, 171.
INTRODUCED OR CITED CASES.

Trevillion and Batty, 144.
Tyrrel's case, 155.

V.

Villers and Wegg, 151, 153, 155, 167.

W.

Walsingham's case, 185.

Weale v. Lower, 232.
Wegg and Villers, 151, 153, 155, 167.
White and others, and Maddon, Baker and others, 243.

Y.

Young and Jenkins, 235.
Zouch and Parsons, 243.

---

CASES IN THE YEAR BOOKS, &c.

Referred to by the Year in which they were determined.

<table>
<thead>
<tr>
<th>Edward III.</th>
<th>Henry VII.</th>
</tr>
</thead>
<tbody>
<tr>
<td>8 Ass.</td>
<td>2 Henry VII. 6.</td>
</tr>
<tr>
<td>24 Edward III.</td>
<td>103, 104.</td>
</tr>
<tr>
<td>25 Ass.</td>
<td>3 ———— 12, 85.</td>
</tr>
<tr>
<td>31 Edward III.</td>
<td>15.</td>
</tr>
<tr>
<td>44 ————</td>
<td>4 ———— 5, 6.</td>
</tr>
<tr>
<td>Henry V.</td>
<td>5 ———— 5.</td>
</tr>
<tr>
<td>5 Henry V.</td>
<td>15 ———— 75.</td>
</tr>
<tr>
<td>Henry VI.</td>
<td>14 Henry VIII. 15, 18, 36, 47,</td>
</tr>
<tr>
<td>31 Henry VI.</td>
<td>102.</td>
</tr>
<tr>
<td>33 ————</td>
<td>90, 92, 146,</td>
</tr>
<tr>
<td>27 ————</td>
<td>179.</td>
</tr>
<tr>
<td>Edward IV.</td>
<td>24 Henry VIII. 5, 21, 98, 163,</td>
</tr>
<tr>
<td>4 Edward IV.</td>
<td>199.</td>
</tr>
<tr>
<td>5 ————</td>
<td>179, 184, 185,</td>
</tr>
<tr>
<td>8 ————</td>
<td>203.</td>
</tr>
<tr>
<td>14 ————</td>
<td>27 Henry VIII. 16, 21, 25,</td>
</tr>
<tr>
<td>22 ————</td>
<td>108, 185.</td>
</tr>
<tr>
<td>6 Edward VI.</td>
<td>28 ———— 15, 149, 179.</td>
</tr>
<tr>
<td></td>
<td>Edward VI.</td>
</tr>
<tr>
<td></td>
<td>84, 171.</td>
</tr>
<tr>
<td>STATUTES SPOKEN OF.</td>
<td></td>
</tr>
<tr>
<td>---------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Henry III.</strong></td>
<td>52.</td>
</tr>
<tr>
<td></td>
<td>18.</td>
</tr>
<tr>
<td><strong>Edward III.</strong></td>
<td>50.</td>
</tr>
<tr>
<td><strong>Richard II.</strong></td>
<td>1.</td>
</tr>
<tr>
<td></td>
<td>2.</td>
</tr>
<tr>
<td></td>
<td>7.</td>
</tr>
<tr>
<td><strong>Henry IV.</strong></td>
<td>4.</td>
</tr>
<tr>
<td><strong>Henry V.</strong></td>
<td>2.</td>
</tr>
<tr>
<td><strong>Henry VI.</strong></td>
<td>11.</td>
</tr>
<tr>
<td></td>
<td>11.</td>
</tr>
<tr>
<td></td>
<td>15.</td>
</tr>
<tr>
<td><strong>Henry VII.</strong></td>
<td>1.</td>
</tr>
<tr>
<td></td>
<td>3.</td>
</tr>
<tr>
<td></td>
<td>4.</td>
</tr>
<tr>
<td></td>
<td>11.</td>
</tr>
<tr>
<td></td>
<td>19.</td>
</tr>
<tr>
<td><strong>Henry VIII.</strong></td>
<td>21.</td>
</tr>
<tr>
<td></td>
<td>23.</td>
</tr>
<tr>
<td></td>
<td>26.</td>
</tr>
<tr>
<td></td>
<td>32.</td>
</tr>
<tr>
<td></td>
<td>32.</td>
</tr>
<tr>
<td><strong>Elizabeth</strong></td>
<td>31.</td>
</tr>
<tr>
<td><strong>Charles II.</strong></td>
<td>12.</td>
</tr>
<tr>
<td></td>
<td>29.</td>
</tr>
<tr>
<td><strong>George II.</strong></td>
<td>14.</td>
</tr>
</tbody>
</table>
I have chosen to read upon the Statute of Uses made 27 Hen. VIII. a law, whereupon the inheritances of this realm are tossed at this day, like a ship upon the sea, in such sort, that it is hard to say which bark will sink, and which will get to the haven; that is to say, what assurances will stand good, and what will not. Neither is this any lack or default in the pilots, the grave and learned judges: but the tides and currents of received errors, and unwarranted and abusive experience have been so strong, as they were not able to keep a right course according to the law, so as this statute is in great part as a law made in the parliament, held 35 Reginæ; * for in 37 Reginæ, * P. s. by the notable judgment upon solemn arguments of all the judges assembled in the Exchequer-chamber, in the famous cause between Dillon and Freine, concerning an assurance made by Chudleigh, this law Chudleigh's case, 1 Rep. 122; Poph. 71. 1 And. 314. began to be reduced to a true and sound exposition, and the false and perverted exposition, which had continued for so many years, though never countenanced by any rule or authority of weight, but only entertained in a popular conceit, and put in practice at adventure, grew to be controled; since which time, as it cometh to pass always upon the first ré-

FORMING
forming of inveterate errors, many doubts and perplexed questions have risen, which are not yet resolved, nor the law thereupon settled: the consideration whereof moved me to take the occasion of performing this particular duty to the house, to see if I could, by my travel, bring the exposition thereof to a more general good of the common-wealth.

Herein, though I could not be ignorant of the difficulty of the matter, which he that taketh in hand shall soon find; or much less of my own inability, which I had continual sense and feeling of; yet because I had more means of absolution than the younger sort, and more leisure than the greater sort, I did think it not impossible to work some profitable effect; the rather because where an inferior wit is bent and conversant upon one subject, he shall many times with patience and meditation dissolve and undo many of the knots, which a greater wit, distracted with many matters, would rather cut in two than unhurt: and at least, if my invention or judgment be too barren or too weak; yet, by the benefit of other arts, I did hope to dispose or digest the authorities or opinions which are in cases of uses in such order and method, as they should take light one from another, though they took no light from me. And like to the matter of my reading shall my manner be, for my meaning is to revive and recontinue the ancient form of reading, which you may see in Mr. Frowicke's upon the prerogative, and all other readings of ancient time, being of less ostentation, and more fruit than the manner lately accustomed: for the use then was, substantially to expound the statutes by grounds and diversities; as you shall find the readings still to run upon cases of like law and contrary law; whereof
THE STATUTE OF USES.

whereof the one includes the learning of a ground, the other the learning of a difference: and not to stir conceits (a) and subtle doubts, or to contrive a multitude of tedious and intricate cases, whereof all, saving one, are buried, and the greater part of that one case, which is taken, is commonly nothing to the matter in hand; but my labour shall be in the ancient course, to open the law upon doubts, and not to open doubts upon this law.

EXPOSITIO STATUTI.

THE exposition of this statute consists, upon the [Matter to be considered.] matter without the statute: upon the matter within the statute.

Three things are to be considered concerning the statute, and all other statutes, which are helps and inducements to the right understanding of any statute, and yet are no part of the statute itself.

1. * The consideration of the statute at the com- mon law.

2. The consideration of the mischief which the statute intendeth to redress, as also any other mischief which an exposition of the statute this way or that way may breed.

3. Certain maxims of the common law, touching exposition of statutes.

Having therefore framed six divisions, according [Author's division of his subject.] to the number of readings upon the statute itself, I have likewise divided the matter without the statute into six introductions or discourses, so that for every day's reading I have made a triple provision.

(a) The word conceits was first substituted for concise in the last edition.
1. A preface or introduction.
2. A division upon the law itself.
3. A few brief cases for exercise and argument.

The last of which I would have forborn; and, according to the ancient manner, you should have taken some of my points upon my divisions, one, two, or more, as you should have thought good; save that I had this regard, that the younger sort of the bar were not so conversant with matters upon the statutes; and for their ease I have interlaced some matters at the common law, that are more familiar within the books.

1. The first matter I will discourse unto you, is the nature and definition of an use, and its inception and progression before the statute.

2. The second discourse shall be of the second spring of this tree of uses since the statute.

3. The third discourse shall be of the estate of the assurances of this realm at this day upon uses, and what kind of them is convenient and reasonable, and not fit to be touched, as far as the sense of law and natural construction of the statute will give leave; and what kind of them is convenient and meet to be suppressed.

4. The fourth discourse shall be of certain rules and expositions of laws applied to this present purpose.

5. The fifth discourse shall be of the best course to remedy the same inconveniences now a-foot, by construction of the statute, without offering violence to the letter or sense.

6. The sixth and last discourse shall be of the best course to remedy the same inconveniences, and to declare the law by act of parliament: which last I think good to reserve, and not to publish.

DISCOURSE
THE STATUTE OF USES.

DISCOURSE I.

THE nature of an use is best discerned (a) by [Of the nature and definition of an use.] considering what it is not, and then what it is; for it is the nature of all human science and knowledge to proceed most safely, by negatives and exclusives, to what is affirmative and inclusive.

First, an use is no right, title, or interest in law; and therefore master attorney, who read upon this statute, said well, that there are but two rights:

Jus in Re: Jus ad rem.

The one is an estate, which is Jus in re; the other a demand, which is Jus ad rem: but an use is neither; so that in 24 H. VIII. it is said that the saving of the statute of 1 R. III. which saveth any right or interest of intails, must be understood of intails of the possession, and not of the part of the use, because an use is no right nor interest. So * again, * P. 6. you see, Littleton's conceit, (b) that an use should amount to a tenancy at will, whereupon a release might well inure, because of privity, is controled by 4 and 5 H. VII. and divers other books, which say that cestuy que use is punishable in an action of trespass towards the feoffees; only 5 H. V. seemeth to be at some discord with other books, where it is admitted for law, that if there be cestuy que use of an advowson, and he be outlawed in a personal action, the King should have the presentment; which case Master Ewens, in the argument of Chudleigh's case,

(a) [See Note 1.] (b) [See Note 2.] did
READING UPON

[What an use is not.]

Dyer, 12.

Year books.
2 H. VII. 4.
7 H. VII. 11, 12.

Dy. 215. b.
* P. 7.

Diem seem to reconcile thus: where cestuy que use, being outlawed, had presented in his own name, there the King should remove his incumbent; but no such thing can be collected upon that book; and therefore I conceive the error grew upon this, that because it was generally thought that an use was but a pernancy of profits; and then again because the law is, that, upon outlawries upon personal actions, the King shall have the pernancy of profits, they took that to be one and the self-same thing which cestuy que use had, and which the King was intitled unto: which was not so; for the King had remedy in law for his pernancy of profits, but cestuy que use had none (c). The books go further, and say, that an use is nothing, as in 2 H. VII. det was brought and counted sur leas for years rendering rent, &c. The defendant pleaded in bar, that the plaintiff nihil habuit in tenementis (d) tempore dimissionis: the plaintiff, made a special replication, and shewed that he had an use, and issue joined upon that; wherefore it appeareth, that if he had taken issue upon the defendant's plea, it should have been found against him. So again in 4 Reginae, in the case of the Lord Sandes,* the truth of the case was a fine levied by cestuy que use before the statute, and this coming in question since the statute upon an averment by the plaintiff quod partes finis nihil habuerunt, it is said that the defendant may shew the special matter of the use, and it shall be no departure from the first pleading of the fine; and it is said farther that the averment given in 4 H. VII. quod partes finis

(c) [See Note 3.] (d) in tenementis—first added in the last edition.
THE STATUTE OF USES:
nihil habuerunt, nec in possessione, nec in usu, was not. ousted upon this statute of 27 H. VIII. and was no more now to be accepted: but yet it appears, that if issue had been taken upon the general averment, without the special matter shewed, it should have been found for him that took the averment, because an use is nothing. But these books are not to be taken generally or grossly; for we see in the same books, when an use is specially alleged, the law taketh knowledge of it; but the sense of it is, that an use is nothing for which remedy is given by the course of the common law, so as the law knoweth it, but protects it not; and therefore when the question cometh, whether it hath any being in nature or conscience, the law accepteth of it; and therefore Littleton's case is good law; that he who hath but Co. Lit. 27a. forty shillings free-hold in use, shall be sworn in an inquest, (c) for it is ruled secundum dominium naturale, and not secundum dominium legitimum, nam natura dominus est, quia fructum ex re percipit. And some doubt if upon subsidies and taxes cestuy que use should be valued as an owner: so likewise if cestuy que use had released his use unto the feoffee for six pounds, or contracted with a stranger for the like sum, there is no doubt but it is a good condition or contract whereon to ground an action upon the case; for money for release * of a suit in chancery * P. 3. is a good quid pro quo; therefore to conclude, though an use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and conscience: for that may be somewhat in conscience which is nothing in law, like as that may be some-

(c) [See Note 4.] thing
thing in law which is nothing in conscience; as, if the feoffees had made a feoffment over in fee, bona fide, upon good consideration, and, upon a subpoena (f) brought against them, they pleaded this matter in chancery, this had been nothing in conscience, not as to discharge them of damages.

A second negative fit to be understood is, that an use is no covin, nor is it a collusion, as the word is now used; for it is to be noted, that where a man doth remove the state and possession of land, or goods, out of himself unto another upon trust, it is either a special trust, or a general trust.

The special trust is either lawful or unlawful.

The special trust unlawful is, (g) according to the case, provided for by ancient statutes of pernors (h) of the profits; as where it is to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the praecipe, or the statute of mortmain, or the lords of their wardships, or the like; and those are termed frauds, covins or collusions.

The special trust lawful is, (i) as when I infeoff some of my friends, because I am to go beyond the seas, or because I would free the land from some statute; or bond, which I am to enter into, or upon intent to be infeoffed, or intent to be vouched, and so to suffer a common recovery, or upon intent that the feoffees shall infeoff over a stranger, and infinite the like intents and purposes, which fall out in mens dealings and occasions: and this we call confidence, and the books do call them intents; but where the trust is not special, nor transitory, but general and

(f) [See Note 5.] (g) [See Note 6.] (h) The word pernors was first added in the last edition. (i) [See Note 7.]
THE STATUTE OF USES.

permanent, there it is an use; and therefore these three are to be distinguished, and not confounded; the covin, confidence and use.

So as now we are come by negatives to the affirmative, what an use is, agreeable to the definition in Plowden 352. Delamer's case, where it is said:

An use is a trust reposed by any person in the tenant, that he may suffer him to take the profits, and that he will perform his intent.

But it is a shorter speech to say, that Usus est dominium fiduciariwm: Use is an ownership (k) in trust.

So that usus & status, sive possessio, potius differunt secundum rationem foiri, quam secundum naturam rei, for that one of them is in court of law, the other in court of conscience; and for a trust, which is the way to an use, (l), it is exceeding well defined by a civilian of great understanding:

Fides est obligatio conscientiae unius ad intentionem alterius.

And they have a good division likewise of rights: Jus precarium: Jus fiduciariwm: Jus legititum.

1. A right in courtesy, for the which there is no remedy at all.

2. A right in trust, for which there is a remedy, but only in conscience.

3. A right in law.

* So much of the nature and definition of an use. *P. 10.

It followeth to consider the parts and properties of an use: wherein by the consent of all books, as it was distinctly delivered by Justice Walmsley in 36 of Elizabeth: That a trust (m) consisteth upon three parts:

(k) Ownership was in the last edition substituted for Owner's Life.  (l) [See Note 8.]  (m) [See Note 9.]
The first, that the feoffee will suffer the feoffor to take the profits.

The second, that the feoffee upon request of the feoffor, or notice of his will, will execute the estates to the feoffor, or his heirs, or any other by his direction.

The third, that if the feoffee be dispossessed, and so the feoffor disturbed, the feoffee will re-enter, or bring an action to re-continue the possession; so that those three, pernancy of profits, execution of estates, and defence of the land, are the three points of trust.

The properties of an use are exceeding well set forth by Fenner, justice in the same case; and they be three:

1. Uses, saith he, are created by confidence:

2. Preserved by privity, which is nothing else but a continuance of the confidence, without interruption:

3. Ordered and guided by conscience: either by the private conscience of the feoffee; or the general conscience of the realm, which is chancery.

The two former of which, because they be matters more thoroughly beaten, and we shall have occasion hereafter to handle them, we will not now dilate upon:

* But the third, we will speak somewhat of; both because it is a key to open many of the true reasons, and learnings of uses, and because it tendeth to decide our great and principal doubts at this day.

Coke solicitor, entering into his argument of Chudleigh's case, said sharply and stily: "I will put never a case but it shall be of an use, for an use in law hath no fellow," meaning, that the learning
THE STATUTE OF USES.

That uses are ordered and guided by conscience and do not ensue the nature of possessi-
sions.

Year book.
4 Ed. IV. 7.
[Fitz. Abr. tit. subtena 5.
Bro. Abr. tit. meoff. al uses 33.
and tit. descant 36.]
2 Rep. 38.
[a And. 134.]

ing of uses is not to be matched with other learnings. Anderson, chief justice, in the argument of the same case, did truly and profoundly control the vulgar opinion collected upon 5 E. IV. that there might be possession frateris (n) of an use; for he said, that it was no more but that the chancellor would consult with the rules of law, where the intention of the parties did not specially appear; and therefore the private conceit, which Glanville, justice, cited in the 42 Regime, in the case of Corbet, in the common pleas, of one of Lincolns Inn, whom he named not, but seemed to allow, is not sound; which was, that an use was but an imitation, (u) and did ensue the nature of a possession (o).

This very conceit was set on foot in 27 H. VIII. Year book.
in the Lord Dacre’s case, in which time they began to heave at uses: for thereafter the realm had many ages together put in use the passage of uses by will, they began to argue that an use was not deviseable, (p) but that it did ensue the nature of the land; and the same year after, this statute was made; so that this opinion seemeth ever to be a prelude and forerunner to an act of parliament touching uses; and if it be so meant now, I like it well: but in the mean time the opinion itself is to be rejected; and because, in the same case of Corbet, three reverend judges of the court * of common pleas did deliver * P. 12. and publish their opinion, though not directly upon the point adjudged, yet obiter as one of the reasons of their judgment, that an use of inheritance could not be limited to cease; and again, that the limita-

(n) [See Note 10.] (u) [See Note 16.] (o) [See Note 11.]
(4) [See Note 12.]
tion of a new use could not be to a stranger; (q) ruling uses merely according to the ground of possession; it is worth the labour to examine that learning. By 3 Hen. VII. you may collect, that if the feoffees had been disseised by the common law, and an ancestor collateral of cestuy que use had released unto the disseisor, and his warranty had attached upon cestuy que use; yet the chancellor, upon this matter shewed, would have no respect unto it, to compel the feoffees to execute the estate unto the disseisor: for there the case being, that cestuy que use in tail having made an assurance by fine and recovery, and by warranty which descended upon his issue, two of the judges held, that the use is not extinct; and Bryan and Hussey, that held the contrary, said, that the common law is altered by the new statute; (r) whereby they admit, that by the common law that warranty will not bind and extinguish (s) a right of an use, as it will do a right of possession; and the reason is, because the law of collateral warranty is a hard law, and not to be considered in a court of conscience. In 5 Edw. IV. it is said, that if cestuy que use be attained, query, who shall have the subpæna, (t) for the lord shall not have the subpæna; so as there the use doth not imitate (u) the possession; and the reason is, not because the lord hath a tenant (v) by title; for that is nothing to the subpæna, but because the feoffor's (c) intent was never to advance the lord, but only his own blood; and therefore the query of the book

(q) [See Note 13.]  (r) [See Note 14.]  (s) extinguish was substituted for extinct in the last edition.  (t) [See Note 15.]

(v) [See Note 16.]  (v) [See Note 17.]  (c) [See the two or three concluding lines of Note 17.]
THE STATUTE OF USES.

aristeth, what the trust* and confidence of the feoffe did tye him to do, as whether he should not sell the land to the use of the feoffor's (c) will, or in pios usus? So favourably they took the intent in those days; as you find in 37 Hen. VI: that if a man had appoint ed his use to one for life, the remainder in fee to another, and cestuy que use for life had refused, be cause the intent appeared not to advance the heir at all, nor him in reversion, presently the feoffe should have the estate for life of him that refused, some ways to the behoof of the feoffor. But to proceed in some better order towards the disproof of this opinion of imitation, (w) there be four points wherein we will examine the nature of uses.

1. The raising of them.
2. The preserving of them.
3. The transferring of them.
4. The extinguishing of them.

1. In all these four, you shall see apparently that uses stand upon their own reasons, utterly differing from cases of possession. I would have one case shewed by men learned in the law, where there is a deed, and yet there needs a consideration; as for parole, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it: and therefore in 8 Regine (w) it is solemnly argued, that a deed should raise an use without any other consideration. In the Queen's case a false consideration, if it be of record, will hurt the patent, but want of considera-

(c) [See the two or three concluding lines of Note 17.]
(w) [See Note 16.]
tion doth never hurt it; and yet they say that an
use is but a nimble and light thing; and now, con-
trariwise, * it seemeth to be weightier than any thing
else: for you cannot weigh it up to raise it, neither
by deed, nor deed inrolled, without the weight of a
consideration; but you shall never find a reason of
this to the world's end, in the law: But it is a rea-
son of chancery, and it is this:

That no court of conscience will inforce *donum
gratuitum, though the intent appear never so clear-
ly, where it is not executed, or sufficiently passed
by law; (x) but if money had been paid, and so a
person damned, or that it was for the establishment
of his house, then it is a good matter in the chancery.
So again I would see in the law, a case where a man
shall take by a conveyance, be it by deed, livery, or
word, (y) that is not party to the grant: I do not say
that the delivery must be to him that takes by the
deed, for a deed may be delivered to one man to
the use (z) of another. Neither do I say that he must
be party to the delivery of the deed, for he in the
remainder may take though he be not party; but he
must be party to the words of the grant: here again
the case of the use goeth single, and the reason is,
because a conveyance in use is nothing but a publi-
cation of the trust; and therefore so as the party
trusted be declared, it is not material to whom the
publication be. So much for the raising of uses.
Now as to the preserving of them.

2. There is no case in the common law, wherein
notice simply and nakedly is material to make a
covin, or *particeps criminis; and therefore if the

(x) [See Note 19.] (y) [See Note 20.] (z) [See Note 21.]
THE SEATUTE OF USES.

heir which is by descent, infeoff one which had notice of the disseisin, if he were not a disseisor de facto, it is nothing: so in 33 H. VI. if a feoffment be made upon collusion, and feoffee makes a feoffment over 33 H. VI. 5. upon good consideration, the collusion is discharged, * P. 15. and it is not material if they had notice or no. So as it is put in 14 H. VIII. if a sale be made in a market overt upon good consideration, although it be to one that hath notice that they are stolen goods, yet the property of a stranger is bound; (a) though in the book before remembered 33 H. VI. some opine to the contrary, which is clearly no law; so in 31. E. III. if assets descend to the heir, and he alien it upon good consideration, although it be to one that had notice of the debt, or of the warranty, it is good enough. So 23 Ass. p. 1. if a man enter (b) of purpose into my lands, to the end that a stranger which hath right, should bring his praecipe and evict the land, I may enter notwithstanding any such recovery; but if he enter, having notice that the stranger hath right, and the stranger likewise having notice of his entry, yet if it were not upon confederacy or collusion between them, it is nothing; and the reason of these cases is, because the common law looketh no farther than to see whether the act were merely actus factus in fraudem legis: and therefore wheresoever it findeth consideration given, it dischargeth the covin.

But come now to the case of use, and there it is otherwise, as it is in 14 H. VIII. and 28 H. VIII. and divers other books; which prove that if the feoffee sell the land for good consideration to one that to 13. a.

(a) [See Note 22.] (b) [See Note 23.]

hath
ha[h notice, the purchaser shall stand seized to the ancient use; (c) and the reason is, because the chancery looketh farther than the common law, namely, to the corrupt conscience of him that will deal in the land, knowing it in equity to be another's; and therefore if there were radix amaritudinis, the consideration * purgeth it not, but it is at the peril of him that giveth it: so that consideration, or no consideration, is an issue at the common law; but notice, or no notice, is an issue in the chancery. And so much for the preserving of uses.

3. For the transferring of uses, there is no case in law whereby an action is transferred, but the subpoena in case of use (d) was always assignable; nay farther, you find twice 27 H. VIII. fol. 20. pla. 9. and fol. 29. and pla. 21. (e) that a right of use may be transferred: for in the former case Montague maketh the objection, and saith, that a right of use cannot be given by fine, but to him that hath the possession; Fitz-Herbert answereth, Yes, well enough; query the reason, saith the book.

And in the latter case, where cestuy que use was infeoffed by the disseisor of the feoffee, and made a feoffment over, Englesfield doubted whether the second feoffee should have the use. Fitz-Herbert said, "I marvel you will make a doubt of it, for "there is no doubt but the use passeth by the feoff-"ment to the stranger, and therefore this question "needeth not to have been made." So the great difficulty in 10 Reginae, Delamer’s case (f) where the case was in effect tenant in tail of an use, the remainder in fee; tenant in tail made a feoffment in

(c) [See Note 24.] (d) [See Note 25.] (e) [See Note 26.] (f) [See Note 27.] fee;
fee; tenant, by the statute of 1 R. III. and the feoffee
infeoffed him in the remainder of the use, who
made it over; and there question being made, whe-
ther the second feoffee should have the use in re-
mainder, it is said that the second feoffee must needs
have the best right in conscience; because the first
feoffee claimed nothing but in trust, and the cestuy
*que use cannot claim it against his sale; but the
reason is apparent, as was touched before, that an
use in esse was but a thing in action, or in suit to be
brought in court of conscience, and where the sub-
pana was to be brought against the feoffee, in pos-
session to execute the estate, or against the feoffee
out of possession to recontinue the estate, always
the subpana might be transferred; for still the action
at the common law was not stirred but remained in
the feoffee; and so no mischief of maintenance or
transferring rights.

And if an use being but a right may be assigned,
and passed over to a stranger, à multo fortiori, it may
be limited to a stranger upon the privity of the first
conveyance, as shall be handled in another place:
and as to what Glanvile, justice, said, he could
never find by any book, or evidence of antiquity,
a contingent use limited over to a stranger; I answer,
first, it is no marvel that you find no case before
E. IV. his time, of contingent uses, where there be
not six uses in all; and the reason I doubt was, men
did choose well whom they trusted, and trust was well
observed: and at this day, in Ireland, where uses be
in practice, cases of uses come seldom in question,
except it be sometimes upon the alienations of te-
nants in tail by fine, that the feoffees will not be
brought to execute estates to the disinheritance of
ancient
ancient blood. But for experience in the conveyance, there was nothing more usual in obits, than to will the use of the land to certain persons and their heirs, so long as they shall pay the chantry priests their wages, and in default of payment to limit the use over to other persons and their heirs; and so, in case of forfeiture, through many degrees; and such conveyances are as ancient as R. II. his time.

4. Now for determining and extinguishing of uses, I put the case of collateral warranty before, and to that the notable case of 14 H. VIII. Halpeny’s case, where this very point was as in the principal case; for a rent (g) out of land, and the land itself in case of possession, cannot stand together, but the rent shall be extinct; but there the case is, that the use of the land and the use of the rent shall stand well enough together; for a rent charge was granted by the feoffee to one, that had notice of the use, and ruled, that the rent was to the ancient use, and both uses were in esse simul & semel: and though Brudenell, chief justice, urged the ground of possession to be otherwise, yet he was over-ruled by the other three justices, and Brooke said unto him, he thought he argued much for his pleasure. And to conclude, we see that things may be avoided and determined by the ceremonies and acts, like unto those by which they are created and raised; that which passeth by livery ought to be avoided by entry; that which passeth by grant, by claim; that which passeth by way of charge, determineth by way of discharge: and so an use which is raised but by a declaration or limitation, may cease by words of declaration or

(g) [See Note 28.] Limitation,
THE STATUTE OF USES:

Limitation, as the civil law saith, in his magis consentaneum est, quam ut iisdem modis res dissolvantur quibus constituuntur.

For the inception and progression of uses, I have for a precedent in them searched other laws, because states and commonwealths have common accidents; and I find in the civil law, that that which cometh nearest in name to the use, is nothing like in matter, for them, which is usus fructus: for usus fructus & dominium P. 19. is with them, as with us particular tenancy and inheritance. But that which resembleth the use most is fidei commissio, (h) and therefore you shall find in Justinian, lib. 2. that they had a form in testaments, to give inheritance to one to the use of another, Hæredem constituo Caium: togo autem te, Caiæ, ut hæreditatem restitutas Scio. And the text of the cilians saith, that for a great time if the heir did not as he was required, cestuy que use (i) had no remedy at all, until about the time of Augustus Caesar there grew in custom a flattering form of trust, for they penned it thus: Rogo te per salutem Augusti, or per fortunam Augusti, &c. Whereupon Augustus took the breach of trust to sound in derogation of himself, and made a rescript to the prætor to give remedy in such cases; whereupon within the space of a hundred years, these trusts did spring and speed so fast, as they were forced to have a particular chancellor only for uses, who was called prætor fidei-conmissarius; and not long after, the inconvenience of them being found, they resorted unto a remedy much like unto this statute; for by two decrees of senate, called senatus-consultum Trebellianum & Pe-

(h) [See Note 29.]  (i) [See Note 30.]

D 2  gasianum,
gasianum, they made cestuy que use to be heir in substance. I have sought likewise, whether there be any thing which maketh with them in our law, and I find that Periam, chief baron, in the argument of Chudleigh's case, compareth them to copyholders, and aptly for many respects.

First, because as an use seemeth to be an herediment in the court of chancery, so the copyhold seemeth to be an herediment in the lord's court.

Secondly, this conceit of imitation (u) hath been troublesome in copy-holders as well as in uses; for it hath been of late days questioned, whether there should be dowers, tenancies by the courtesy, intails, discontinuances, and recoveries of copy-holds, in the nature of inheritances, at the common law; and still the judgments have weighed, that you must have particular customs in copy-holds, as well as particular reasons of conscience in use, and the imitation (u) rejected.

And thirdly, because they both grew to strength and credit by degrees: for the copyholder first had no remedy at all against the lord, and was as tenancy at will. Afterwards it grew to have remedy in chancery, and afterwards against their lords by trespass at the common law; and now, lastly, the law is taken by some, that they have remedy by ejectione firmae, (l) with a special custom of leasing. So no doubt in uses: at the first the chancery made question (l) to give remedy, until uses grew more general, and the chancery more eminent; and then they grew to have remedy in conscience: but they could never obtain any manner of remedy at the common

(u) [See Note 16.] (l) [See Note 31.]
THE STATUTE OF USES.

law, neither against the feoffee, nor against strangers; but the remedy against the feoffee was left to the subpoena; and the remedy against strangers to the feoffee.

Now for the causes (m) whereupon uses were put in practice, Coke in his reading doth say well, that they were produced sometimes for fear, and many times for fraud (n). But I hold that neither of these causes (m) were so much the reasons of uses, as another reason in the beginning, which was, that the lands by the common law of England were not testamentary* or deviseable; (o) and of late years, *P. 21. since the statute, the case of the conveyance for sparing of purchases and execution of estates; and now last of all an excess of evil in mens minds, affecting to have the assurance of their estate and possession to be revocable in their own times, and irrevocable after their own times.

Now for the commencement and proceeding of them, I have considered what it hath been in course of common law, and what it hath been in course of statute. For the common law the conceit of Shelley in 24 H. VIII. and of Pollard in 27 H. VIII. seemeth to me to be without ground, which was, that the use succeeded the tenure: (p) for after that the statute of 2lua emptores terrarum, which was made 18 E. I. had taken away the tenure between the 9, 10. feoffor and the feoffee, and left it to the lord paramount; they said that the feoffment being then merely without consideration, should therefore intend an use to the feoffor; which cannot be; for

(m) Causes was first substituted for cases in the last edition.

(n) [See Note 33.] (o) [See Note 34.] (p) [See Note 35.]

by
by that reason, if the feoffment before the statute had been made tenendum de capitalibus dominis, as it must be, (q) there should have been an use unto the feoffor before that statute. And again, if a grant had been made of such things as consist not in tenure, as advowsons, rents, villeins, and the like, there should have been an use of them, wherein the law was quite contrary; for after the time that uses grew common, it was nevertheless a great doubt whether things that did lie in grant, did not carry a consideration in themselves because of the deed.

And therefore I do judge that the intendment of an use to the feoffor, where the feoffment was made without consideration, grew long after, when uses waxed general; (r) and for this reason, because when feoffments were made, and that it rested doubtful whether it were an use or a purchase, because purchases were things notorious, and uses were things secret, the Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendment towards the use, and put the proof (s) upon the purchaser.

And therefore as uses were at the common law in reason, for whatsoever is not by statute, nor against law, may be said to be at the common law; and both the general trust and the special, were things not prohibited by the law, though they were not remedied by the law; so the experience and practice of uses were not ancient; and my reasons why I think so, are these:

(q) [See Note 36.]  (r) [See Note 37.]  (s) [See Note 38.]

First,
THE STATUTE OF USES.

First, I cannot find in any evidence before king R. II. his time, the clause *ad opus & usum*, (i) and the very Latin of it savoureth of that time; for in ancient time, about Edw. I. his time, and before, when lawyers were part civilians, the Latin phrase was much purer, as you may see by Bracton's writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin; wherein this phrase, *ad opus & usum*, and the words, *ad opus*, is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he had found *opus & usus* coupled together, and that they did govern an ablative case: as they do indeed since this statute, for they take away the land and put them into a conveyance.

* Secondly, I find in no private act of attainder, *P. 23*.

the clause of forfeiture of lands, the words, "which "he hath in possession or in use," until Edw. IV.'s reign.

Thirdly, I find the word "*use*" in no statute until 7 Rich. II. cap. 11. *Of provisors*, and in 15 Rich. *Of mortmain*.

Fourthly, I collect out of Choke's speech in *Year book*.

8 Edw. IV. where he saith, that by the advice of all the judges it was thought that the *subpœna* did not lie against the heir (*u*) of the feoffee which was in by law, but *cestuy que use* was driven to his bill in parliament, that uses even in that time were but in their infancy; for no doubt but at the first (*v*) the chancery made difficulty to give remedy at all, and did leave it to the particular conscience of the feoffee: but after

(i) [See infra 24. Note 41.] (u) [See Note 39.] (v) [See supra 20. Note 32.]
the chancery grew absolute, as may appear by the
statute of 15 H. VI. (w) that complainants in chan-
cery should enter into bond to prove their suggestions,
which sheweth that the chancery at that time began
to embrace too far, and was used for vexation; yet
nevertheless it made scruple to give remedy against
the heir being in by act in law, though he were
privy; so that it cannot be that uses had been of any
great continuance when they made that a question:
as for the case of matrimonii praecuti, it hath no
affinity with uses; for wheresoever there was remedy
at the common law by action, it cannot be intended
tobe of the nature of an use.

And for the book commonly vouched of 8 Ass.
where Earl calleth the possession of a conuiz upon a
fine levied by consent and entry in autre droit, and
* 44 of E. III. where there is mention of the feoffees
that sued by petition to the King, they be but im-
plications of no moment. So as it appeareth the
first practice of uses was about Richard II. his time;
(x) and the great multiplying and overspreading of
them was partly during the wars in France, which
drew most of the nobility to be absent from their
possessions; and partly during the time of the trouble
and civil war between the two houses about the title
of the crown.

Now to conclude the progression of uses in course
of statutes, I do denote three special points.

1. That an use had never any force at all at the
common law, but by statute law.

2. That there was never any statute made direct-
ly for the benefit of cestuy que use, as that the descent

(w) [See Note 40.] (x) [See Note 41.]
THE STATUTE OF USES.

of an use should toll an entry, or that a release should [Of the incep-
be good to the pernor of the profits, or the like;
but always for the benefit of strangers and other per-
sons against cestuy que use, and his feoffees: for
though by the statute of Richard III. (y) he might
alter his feoffee, yet that was not the scope of the
statute, but to make good his assurance to other
persons, and the other came in ex obliquo.

3. That the special intent unlawful and covinous
was the original of uses, (z) though after it induced
to the lawful intent general and permanent; for (a) 50
Edw. III. is the first statute (b) I find wherein mention 50 Ed. III.
is made of the taking of profits by one, where the
estate in law is in another.

For as to the opinion in 27 Hen. VIII. that in case [27 H. VIII.
of the statute of Marlebridge, the feoffors took the
profits, (c) it is but a conceit: for the law is at this
* day, that if a man infeoff his eldest son, within age, * P. 25,
and without consideration, although the profits be
taken to the use of the son, yet it is a seoffment
within the statute. And for the statute De religiosis
7 Edward I. which prohibits generally that religious [7 Edward I.
persons should not purchase arte vel ingenio, yet it
maketh no mention of an use, (d) but it saith colore
donationis, termini, vel alicujus tituli, reciting there
three forms of conveyances, the gift, the long lease,
and feigned recovery; which gift cannot be under-
stood of a gift to a stranger to their use, for that
came to be holpen by 15 Richard II. long after. 15 Ric. II. c. 15

But to proceed, in 50 Edward III. a statute was
made for the relief of creditors against such as made

(y) [See Note 42.] (x) [See Note 43.] (a) [See Note 44.]
(b) [See Note 45.] (c) [See Note 46.] (d) [See Note 47.]

E covinous
covinous gifts of their lands and goods, and conveyed their bodies into sanctuaries, there living high upon other's goods; and therefore that statute made their lands liable to their creditors executions in that particular case, if they took the profits. In 1 Richard II. a statute (c) was made for relief of those as had right of action, against those as had removed the tenancy of the præcipe from them sometimes by infeoffing great persons, for maintenance; and sometimes by secret feoffments to others, whereof the demandants (f) could have no notice; and therefore the statute maketh the recovery good in all actions against the first feofors, so as they took the profits, and so as the demandants (f) bring their actions within a year of their expulsions. In 2 Richard II. cap. 3. session 2. (g) an imperfection of the statute of 50 Edward III. was holpen; for whereas the statute took no place, but where the defendant appeared, and so was frustrated, the statute giveth upon proclamation made at the gate of the place privileged, that the land should be liable without appearance.

In 7 R. II. a statute was made for the restraint of aliens, to take any benefices, or dignities ecclesiastical, or farms, or administration to them, without the King's special licence, upon pain of the statute of provisors: which being remedied by a former statute where the alien took it to his own use; it is by that statute remedied, where the alien took it to the use of another, as it is said in the book; though I guess, that if the record were searched,

(c) [See Note 48.]  (f) The word demandants was very properly substituted for defendants in the last edition, and the 50 Ed. III. for 5 Ed. III. a few lines above.  (g) [See Note 49.]
THE STATUTE OF USES.

it should be, if any other purchased to the use of
an alien, and that the words, "or to the use of an-
other," should be "or any other to his use."

In 15 Rich. II. cap. 5. a statute was made for the
relief of lords against mortmain, where feoffments
were made to the use of corporations; and an ordi-
nance made that for feoffments past the feoffees
should, before a day, either purchase license to
amortise them, or alien them to some other use,
or other feoffments to come, or they should be
within the statute of mortmain. In 4 Hen. IV. cap. 7. the statute of 1 Richard II. is enlarged in the
limitation of time; for whereas the statute did limit
the action to be brought within the year of the fee-
offment, this statute, in case of a disseisin extends the
time to the life of the disseisor; and in all other ac-
tions, leaves it to the year from the time of the ac-
tion grown. In 11 Hen. VI. cap. 3. that statute,
of 4 Hen. IV. is declared, because the conceit was
upon the statute, that in the case of disseisin the
limitation of the life of the disseisor went only to the
assise of novel disseisin, and to no other action; and
therefore that statute declareth the former law to
extend to all other actions, grounded upon novel
disseisin. In 11 Hen. VI. cap. 5. a statute was made
for relief of him in remainder against particular
tenants, for lives, or years, that assigned over their
estates, and took the profits, and then committed
waste against them; therefore this statute giveth an
action of waste, being pernors of the profits. In all
this course of statutes no relief is given to purchasers,
that come in by the party, but to such as come in
by law, as demandants (h) in præcipes, whether they

(4) [See Note 50.]
be creditors, disseisees, or lessors, except only in case of mortmain: and note also, that they be all in cases of special covinious intents, (i) as to defeat executions, tenancy to the praecipe, and the statute of mortmain or provisors. From 11 Henry VI. to 1 R. III. being the space of fifty years, there is a silence of uses in the statute book, which was at that time, when, no question, they were favoured most. In 1 Rich. III. cap. 1. cometh the great statute (y) for relief of those that cometh in by the party, and at that time, an use appeareth in his likeness; (k) for there is not a word spoken of taking the profits, to describe an use by, but of claiming to an use; and this statute ordained, that all gifts, feoffments, grants, &c. shall be good against the feoffors, donors and grantors, and all other persons claiming only to their use; so as here the purchaser was fully relieved, and cestuy que use was obiter enabled to change his feoffees; (y) because there were no words in the statute, of feoffments, grants, &c. upon good consideration; but generally (l) in Henry VII.’s time, new statutes were made for further help and remedy to those that came in by act in law; as 1 Henry VII. cap. 1. a formedon is given without * limitation of time against cestuy que use; and obiter, because they make him a tenant, they give him advantage of a tenant, as of age, and voucher: query 4 H. VII. cap. 17. the wardship is given to the lord of the heir of cestuy que use, dying, and no will declared, is given to the lord, as if he had died seised in demesne, and action of waste given to the heir against

(i) [See Note 51.] (y) [See supra 24. Note 42.] (k) [See Note 52.] (l) [See Note 53.]
THE STATUTE OF USES.

the guardian, and damages, if the lord were barred [Of the inception and progression of uses, and in this place of the progression of uses in course of statutes.]
in his writ of ward; and relief is likewise given unto the lord, if the heir holding by knights service be of full age. In 19 Hen. VII. cap. 15. there is relief given in three cases, first to the creditors upon matters of record, as upon recognisance, statute, or judgment, where the two former were not aided [19 Hen. VII. cap. 15.]
at all by any statute: and the last was aided by a statute of 50 (m) E. III. and 2 R. II. only in cases of sanctuary men. Secondly, to the lords in socage for their relief, and heriots upon death, which was omitted in the 4 Henry VII. and lastly to the lords of villeins, upon a purchase of their villeins in use. In 23 Henry VIII. cap. 10. a further remedy was [23 Hen. VIII. cap. 10.]
given in a case like unto the case of mortmain; for in the statute of 15 Richard II. remedy was given where the use came ad manum mortuam, which was when it came to some corporation: now when uses were limited to a thing, act, or work, and to a body, as to the reparation of a church, or an abbot, or to a guild, or fraternities as are only in reputation, but not incorporated, as to parishes: or such guilds or fraternities as are only in reputation, but not incorporated, that case was omitted, which by this statute is remedied, not by way of giving entry unto the lord, but by way of making the use utterly void; neither doth the statute express * to whose benefit the * P. 29. use shall be made void, either the feoffor, or feoffee, but leaveth it to law, (n) and addeth a proviso, that uses may be limited twenty years from the gift, and no longer.

This is the whole (o) course of statute law, before [Recapitulation of the principal points above discussed.]
this statute, touching uses. Thus have I set forth

(m) [See Note 54.] (n) [See Note 55.] (o) [See Note 56.]

unto
unto you the nature and definition of an use, the
differences of an use and trust, and the parts and
qualities of it; and by what rules and learnings uses
shall be guided and ordered: by a precedent of them
in our laws, the causes of the springing and spread-
ing of uses, the continuance of them, and the pro-
ceedings that they have had both in common law and
statute law; whereby it may appear, that an use is no
more but a general trust when any one will trust the
conscience of another better than his own estate and
possession, which is an accident or event of human
society, which hath been, and will be in all laws,
and therefore was at the common law, which is
common reason. Fitz-Herbert saith in the 14 H. VIII.
common reason is common law, and not conscience;
but common reason doth define that uses should be
remedied in conscience, and not in courts of law,
and ordered by rules in conscience, and not by
straight rules of law; for the common law hath a
kind of rule and survey over the chancery, to de-
termine what belongs to the chancery. And there-
fore we may truly conclude, that the force and
strength that an use had or hath in conscience, is by
common law; and the force that it had or hath by
common law, is only by statutes.

DISCOURSE
* DISCOURSE II. * P. 30.

NOW followeth in time and matter the consider-
ation of this statute, which is of principal labour; c. 10.—of uses, for those former considerations which we have handled serve but for introduction.

This statute, as it is the statute which of all others hath the greatest power and operation over the heritages of the realm, so howsoever it hath been by the humour of the time perverted in exposition, yet in itself is most perfectly and exactly conceived and penned of any law in the book. 'Tis induced with the most declaring and persuading preamble, 'tis consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes; and lastly 'tis the best pondered in all the words and clauses of it of any statute that I find; but before I come to of the circumstances attending the statute itself, I will note unto you three matters of circumstance.

1. The time of the statute.
2. The title of it.
3. The precedent or pattern of it.

For the time of it was in 27 H. VIII. when the King was in full peace, and a wealthy and flourishing estate, in which nature of time men are most careful of their possessions; as well because purchasers are most stirring, as again, because the purchaser when he is full, is no less careful of his assurance to his children, and of disposing that which he hath gotten, * than he was of his bargain for the compassing * P. 31. thereof.

About
About that time the realm likewise began to be infranchised from the tributes of Rome, and the possessions that had been in mortmain began to stir abroad; for this year was the suppression of the smaller houses of religion, all tending to plenty, and purchasing: and this statute came in consort with divers excellent statutes, made for the kingdom in the same parliament; as the reduction of Wales to a more civil government, the re-edifying of divers cities and towns, the suppressing of depopulation and inclosures.

For the title, it hath one title in the roll, and another in course of pleading. The title in the roll is no solemn title, but an act intituled, An act expressing an order for uses and wills; the title in course of pleading is, Statutum de usibus in possessionem transferendis: wherein Walmsly justice noted well 40 Reginae, that if a man look to the working of the statute, he would think that it should be turned the other way, de possessionibus ad usus transferendis; for that is the course of the statute, to bring possession to the use. But the title is framed not according to the work of the statute, but according to the scope and intention of the statute, nam quod primum est intentione, ultimum est in operatione. The intention of the statute by carrying the possession to the use, is to turn the use to a possession; for the words are not de possessionibus ad usus transferendis; and as the grammarian saith, præpositio, ad denotat notam actionis, sed præpositio, in, cum accusativo denotat notam alterationis: and therefore *Kingsmill justice in the same case saith, that the meaning of the statute was, to make a transsubstantiation of the use into a possession. But it is to be noted
THE STATUTE OF USES.

noted, that titles of acts of parliament severally came in but in the 5 Hen. VIII. for before that time there was but one title of all the acts made in one parliament; and that was no title neither, but a general preface of the good intent of the King, tho' now it is parcel of the record.

For the precedent of this statute upon which it is drawn, I do find by 1 Richard III. whereupon you may see the very mould whereon this statute was made, that the said King having been infeoffed, before he usurped, to uses, it was ordained that the land whereof he was jointly infeoffed should be as if he had not been named; and where he was solely infeoffed, it should be in cestuy que use, in estate, as he had the use.

Now to come to the statute itself, the statute consisteth, as other laws do, upon a preamble, the body of the law, and certain savings, and provisos. The preamble setteth forth the inconveniences, the body of the law giveth the remedy, and the savings and provisos take away the inconveniences of the remedy. For new laws are like the apothecaries drugs, though they remedy the disease, yet they trouble the body; and therefore they use to correct them (p) with spices: so it is not possible to find a remedy for any mischief in the commonwealth, but it will beget some new mischief; and therefore they spice their laws with provisos to correct and qualify them.

* The preamble of the law was justly commended by Popham chief justice in 36 Regina, where he saith, that there is little need to search and collect (h) them,—first added in the last edition.
out of cases, before this statute, what the mischief
was which the scope of the statute was to redress;
because there is a shorter way offered us, by the suffi-
ciency and fulness of the preamble, and therefore it
is good to consider it and ponder it thoroughly.

The preamble hath three parts.

First, a recital of the principal inconveniences,
which is the root of all the rest.

Secondly, an enumeration of divers particular in-
conveniences, as branches of the former.

Thirdly, a taste or brief note of the remedy that
the statute meaneth to apply.

The principal inconvenience, which is radix om-
nium malorum, is the diverting from the grounds
and principles of the common law, by inventing a
mean to transfer lands and inheritances without any
solemnity or act notorious: so as the whole statute
is to be expounded strongly towards the extinguis-
ghment of all conveyances, whereby the freehold or
inheritance may pass without any new confections of
deeds, executions of estate or entries, except it be
where the estate is of privity and dependence one
towards the other; in which cases, mutatis mutandis,
they might pass by the rules of the common law.

The particular inconveniences by the law re-
hearsed may be reduced into four heads.

1. First, that these conveyances in use are weak
for consideration.

2. Secondly, that they are obscure and doubtful
for trial.

3. Thirdly, that they are dangerous for want of
notice and publication.

4. Fourthly, that they are exempted from all such
titles as the law subjecteth possessions unto.

The
THE STATUTE OF USES.

The first inconvenience lighteth upon heirs. [Of the particular inconveniences mentioned in the preamble.]
The second upon jurors and witnesses.
The third upon purchasers.
The fourth upon such as come in by gift in law.
All which are persons that the law doth principally respect and favour.

For the first of them, there are three impediments, to the judgment of man, in disposing justly and advisedly of his estate.

First, trouble of mind.
Secondly, want of time.
Thirdly, of wise and faithful counsel about him.

1. And all these three the statute did find to be in the disposition of an use by will, whereof followed the unjust disinhерison of heirs. Now the favour of law unto heirs appeareth in many parts of the law; as the law of descent privilegeth the possession of the heir against the entry of him that hath right by the law: no man shall warrant against his heir, except he warrant against himself, and divers other cases too long to stand upon: and we see the ancient law in Glanvill's time was, that the ancestor could not disinherit his heir by grant, or other act executed in time of sickness; neither could he alien land which had descended unto him, except it were for consideration of money or service; but not to advance any younger brother without the consent of the heir.

2. For trials, no law ever took a straiter course that evidence should not be perplexed, nor juries inveigled, than the common law of England; as on the other side, never law took a more precise and

(q) [See Note 57.]

F 2 strait
READING UPON

[As to the second head of particular inconveniences,—that uses are obscure and doubtful for trial.]

...strait course with juries, that they should give a direct verdict. For whereas in a manner all laws do give the triers, or jurors, which in other laws are called judges de facto, a liberty to give non liquet, that is, to give no verdict at all, and so the case to stand abated; our law inforceth them to a direct verdict, general or special; and whereas other laws accept of plurality of voices to make a verdict, our law inforceth them all to agree in one; and whereas other laws leave them to their own time and ease, and to part, and to meet again; our law doth duress and imprison them in the hardest manner, without light or comfort, until they be agreed, in consideration of straitness and coercion; it is consonant, that law do require in all matters brought to issue, that there be full proof and evidence; and therefore if the matter in itself be of that surety as in simple contracts, which are made by parole without writing, it alloweth wager of law (r).

In issue upon the mere right, which is a thing hardly to discern, it alloweth wager of battail to spare jurors, if time have wore out the marks and badges of truth: from time to time there have been statutes of limitation, where you shall find this mischief of perjuries often recited; and lastly, which is the matter in hand, all inheritances could not pass * but by acts overt and notorious, as by deeds, livery, and records.

...P. 36.

[As to the third head of particular inconveniences, —that uses are dangerous for want of notice.]

3. For purchasers, bona fide, it may appear that they were ever favoured in our law, as first by the great favour of warranties which were ever for the help of purchasers: as where by the law in Edw. III.'s time,

(r) [See Note 58.]
THE STATUTE OF USES.

time, the disseisee could not enter upon the feoffee in regard of the warranty: so again the collateral warranty, which otherwise is (s) a hard law, grew in doubt only upon favour of purchasers; so was the binding of fines at the common law, the invention and practice of recoveries, to defeat the statute of intails, and many more grounds and learnings are to be found, which respect to the quiet of the possession of purchasers. And therefore though the statute of 1 Rich. III. (t) had provided for the purchaser in some sort, by enabling the acts and conveyances of cestuy que use; yet nevertheless, the statute did not at all disable the acts or charges of the feoffees: and so as Walmsly justice said 42. Reginae, they played at double hand, for cestuy que use might sell, and the feoffee might sell, which was a very great uncertainty to the purchaser.

4. For the fourth inconvenience towards those that come in by law; conveyances in uses were like privileged places or liberties: for as there the law doth not run, so upon such conveyances the law could take no hold, but they were exempted from all titles in law. No man is so absolute owner of his possessions, but that the wisdom of the law doth reserve certain titles unto others; and such persons come not in by the pleasure and disposition of the party, but by the justice and consideration of law, * and therefore of all others they are most favoured: * P. 37. and also they are principally three.

1. The king and lords who lost the benefit of attainders, fines for alienations, escheats, aids, herriots, reliefs, &c.

(s) [See Note 59.] (t) [See supra page 27, and Note 42.]
2. The demandants (u) in *praecipes* either real or personal, for debt and damages, who lost the benefit of their recoveries and executions.

3. Tenants in dower, and by the courtesy, who lost their estates and titles (v).

1. First for the King: no law doth endow the King or sovereign with more prerogatives or privileges: for his person is privileged from suits and actions, his possessions from interruption and disturbance, his right from limitation of time, his patents and gifts from all deceits and false suggestions. Next the King is the lord, whose duties and rights the law doth much favour, because the law supposeth the land did originally come from him; for until the statute of *Quia emptores terrarum*, the lord was not forced to destruct or dismember his signiory or service. So until 15 H. VII. the law was taken, that the lord, upon his title of wardship, should put out a conuze of a statute, or a termor; so again we see, that the statute of mortmain was made to preserve the lord's escheats and wards: the tenant in dower is so much favoured, as that it is the common by-word (w) in the law, that the law favoureth three things.

1. Life.
2. Liberty.
3. Dower.

* So in case of voucher, the feme shall not be delayed, but shall recover against the heir incontinent; so likewise of tenant by courtesy it is called tenancy

*(u) [See Note 60.] (v) [See Note 61.] (w) Byword—is in the last edition put between brackets, as if it had been there first added, but that word is in the edition of 1641, and in the tracts also, published in 1737.*
by the law of England, and therefore specially favoured, as a proper conceit and invention of our law; so as again the law doth favour such as have ancient rights, and therefore it telleth us it is commonly said that a right cannot die: and that ground of law, that a freehold cannot be in suspense, sheweth it well, insomuch that the law will rather give the land to the first comer, which we call an occupant, than want a tenant to a demandant’s action.

And again the other ancient ground of law remitter, sheweth that where the tenant faileth without folly in the defendant, the law executeth the ancient right. To conclude therefore this point, when this practice of feoffments to use did prejudice and damnify all those persons that the ancient common law favoured; and did absolutely cross the wisdom of the law, to have conveyances considerate and not odious, and to have trial thereupon clear and not inveigled, it is no marvel that the statute condudeth, that their subtle imaginations and abuses tended to the utter subversion of the ancient common laws of this realm.

The third part of the preamble giveth a touch of the remedy which the statute intendeth to minister, consisting in two parts.

First, the extirpation (x) of feoffments

Secondly, the taking away of the hurt, damage, and deceit of the uses; out of which have been gathered two extremities of opinions.

* The first opinion is, that the intention of the statute was to discontinue and banish all conveyances.

(x) The word *extirpation* was in the last edition first substituted for *expiration.*
READING UPON

in use; (y) grounding themselves upon the words, that the statute doth not speak of the extinguishment or extirpation of the use, namely, by an unity of possession, but of an extinguishment or extirpation of the feoffment, &c. which is the conveyance itself.

Secondly, out of the words, abuse and errors, heretofore used and accustomed, as if uses had not been at the common law, but had been only an erroneous device or practice. To both which I answer.

To the former, that the extirpation which the statute meant was plain, to be of the feoffee's estate, and not to the form of conveyances.

To the latter I say, that for the word, abuse, that may be an abuse of the law, which is not against law, as the taking long leases at this day of land in capite to defraud wardships, is an abuse of the law, which is not against law, but wandering or going astray, or digressing from the ancient practice of the law; and by the word, errors, the statute meant by it, not a mistaking of the law, into a by-course; as when we say, erravimus cum patribus juris, it is not meant of ignorance only, but of perversity. But to prove that the statute meant not to suppress the form of conveyances, there be three reasons which are not answerable (z).

The first is, that the statute in the very branch thereof hath words de futuró, 'that are seised, or hereafter shall be seised:' and whereas it may be said that these words, were put in, in regard of uses suspended by disseisins, and so no present seisin to the use, until a regress of the feoffees; that intendment is very

(y) [See Note 62.]  (z) [See Note 63.]  particular
THE STATUTE OF USES.

particular, for commonly such cases are brought in by provisos, or special branches, and not intermixed in the body of a statute; and it had been easy for the statute to have said, "or hereafter shall be seised upon any feoffment, &c. heretofore had or made."

The second reason is upon the words of the statute of inrolment, which saith, that no hereditaments shall pass, &c. or any use thereof, &c. whereby it is manifest, that the statute meant to leave the form of conveyance with the addition of a farther ceremony.

The third reason I make is out of the words of the proviso, where it is said, that no primer seisin, livery, no fine for alienation, shall be taken for any estate executed by force of the statute of 27, (a) before the first of May 1536, but they shall be paid for uses made and executed in possession for the time after; where the word, made, directly goeth to conveyances in use made after the statute, and can have no other understanding; for the words, executed in possession, would have served for the case of regress: and lastly, which is more than all, if they had had any such intent, the case being so general and so plain, they would have had words express, that every limitation of use made after the statute should have been void; and this was the exposition, as tradition goeth, that a reader of Gray's-Inn, which read soon after the statute, was in trouble for, and worthily, who, as I suppose, was a Boy, whose reading I could never see; but I do now insist upon it, because now again some, in an immoderate invective against uses, do relapse to the same opinion.

(a) [See Note 64.]

G

The
* The second opinion, which I called a contrary extremity, is, that the statute meant only to remedy the mischiefs in the preamble, recited as they grew by reason of divided uses; and although the like mischief may grow upon the contingent uses, yet the statute had no foresight of them at that time, and so it was merely a new case not comprised. Whereunto I answer, that it is the work of the statute to execute the divided use; and therefore to make an use void by this statute which was good before, though it doth participate of the mischief recited in the statute, were to make a law upon a preamble without a purview, which were grossly absurd. But upon the question what uses are executed, and what not; and whether out of possessions of a disseisor, or other possessions out of privity or not, there you shall guide your exposition according to the preamble; as shall be handled in my next day's discourse, and so much touching the preamble of this law.

For the body of the law, I would wish all readers that expound statutes to do as scholars are willed to do: that is, first to seek out the principal verb; that is, to note and single out the material words whereupon the statute is framed; for there are in every statute certain words, which are as veins where the life and blood of the statute cometh, and where all doubts do arise, and the rest are literae mortae, fulfilling words.

The body of the statute consisteth upon two parts.

First, a supposition or case put, as Anderson 36 Regina, calleth it.

Secondly, a purview or ordinance thereupon.
THE STATUTE OF USES:

- The cases of the statute are three, and every one hath his purview. The general case. The case of co-feoffees to the use of some of them. And the general case of feoffees to the use or intent (b) of rents or profits.

The general case is built upon eight material words. Four on the part of the feoffees. Three on the part of cestuy que use. And one common to them both.

The first material word on the part of the feoffees is the word, person. This excludes (a) all alien nées; (d) for there can be no trust reposed but in a person certain: it excludes again all corporations; for they are created (e) to an use certain: for note on the part of the feoffee ever (f) the statute insists upon the word person, and on the part of cestuy que use, that added body politic.

The second word material, is the word, seised: this excludes chattels. The reason is, that the statute meant to remit the common law, and not but that the chattels might ever pass by testament or by parole; therefore the use did not pervert (g) them. It excludes rights, (h) for it is against the rules of the common law to grant or transfer rights; and therefore the statute would not (i) execute them. Thirdly, it excludes contingent (k) uses, because the seisin cannot be but to a fee-simple of an use; and when that is limited, the seisin of the feoffee is spent; for

(b) [See Note 65.] (a) [But see infra 59 and Note 119.] (d) The words alien nées were in the last edition properly inserted in the place of alliances, both here and in the next page. (e) [See Note 66.] (f) [See Note 67.] (g) [See Note 68.] (h) [See Note 69.] (i) [See Note 70.] (k) [See Note 71.]

G 2 Littleton
READING UPON

Littleton tells us, that there are but two seisins, one in dominio ut de feodo, the other ut de feodo & jure; and the feoffee by the common law could execute but the fee-simple to uses present, and not post uses; and therefore the statute meant not to execute them.

* The third material word is, hereafter: that bring-eth in again conveyances made after the statute; it brings in again conveyances made before, and disturbed by disseisin, and recontinued after; for it is not said, infeoffed to an use hereafter raised (l).

The fourth word is, hereditament, which is not solely (m) to be understood of those things whereof an inheritance is in esse: for if I grant a rent charge de novo for life to an use, this is good enough; yet there is no inheritance in being of this rent: this word likewise excludes annuities and uses themselves; so that an use cannot be to an use (n).

The first words on the part of cestuy que use, are the words, use, confidence, or trust, whereby it is plain that the statute meant to remedy the matter, and not words: (o) and in all the clauses it still carrieth the words.

The second word is the word, person, again, which excludeth all alien nées; it excludeth also all contingent uses and uses (p) which are not to bodies lively and natural, as the building of a church, the making of a bridge; but here, as noted before, it is ever coupled with body politic.

The third word is the word, other; for the statute meant not to cross the common law. Now at this

(l) [See Note 72.] (m) [See Note 73.] (n) [See Note 74.]
(o) [See Note 75.] (p) [See Note 76.]
time uses were grown to such a familiarity, as men could not think of possession, but in course of use; and so every man was seised to his own use, (q) as well as to the use of others; therefore because statutes would not stir nor turmoil possessions settled at the common law, it putteth in precisely this word, other; meaning the divided use, and not the conjoined use; and this causeth the clause of joint *feoffees to follow in a branch by itself; for else that *p. 44-case had been doubtful (r) upon this word, other.

The words that are common to both, (s) are words expressing the conveyance whereby the use ariseth, of which words, those that breed any question are, \textit{agreement, will, otherwise}, whereby some have inferred that uses might be raised by agreement parole, so there were a consideration not (t) of money or other matter valuable, for it is expressed in the words before, bargain, sale, and contract, but of blood, or kindred; the error of which collection appeareth in the word immediately following, namely, \textit{will}, whereby they might as well include, that a man seised of land might raise an use by will, especially to any of his sons or kindred, where there is a real consideration; and by that reason, mean, betwixt this statute and the statute of 32 Hen. VIII. c. 1. of wills, lands were deviseable, especially to any man's kindred, which was clearly otherwise; and therefore those words were put in, not in regard of uses raised by those conveyances, but that uses already raised by those conveyances, (u) or without, or likewise

(q) [See infra 62, Note 134.] (r) [See infra 49.] (s) [See Note 77.] (t) [See Note 78.] (u) [See Note 79.]

by
by will, might be transferred; (v) and there was a person seised to an use, by force of that agreement or will, namely, to the use of the assignee (w).

And for the word, otherwise, it should by the generality of the word include a disseisin, to an use; but the whole scope of the statute crosseth that, which was, to execute such uses as were confidences and trust, which could not be in case of disseisin; for if there were a commandant precedent, then the land was vested in cestuy que use upon the entry; and if the disseisin were of the disseisor's own head, then no trust. And thus much for the case of the position of this statute; here follow the ordinance and purview thereupon.

* The purview hath two parts, the first operatio statuti, the effect that the statute worketh; and there is modus operandi, a fiction, or explanation how the statute doth work that effect. The effect is, that cestuy que use shall be in possession of like estate as he hath in the use; the fiction quomodo is, that the statute will have the possession of cestuy que use, as a new body compounded of matter and form; and that the feoffees shall give matter and substance, and the use shall give form and quality. The material words in the first part of the purview are four.

The first words are, remainder and reverter, the statute having spoken before of uses in fee-simple, in tail, for life, or years, addeth; or any use (x) in remainder or reverter: whereby it is manifest, that the first words are to be understood of uses in possession. For there are two substantial and essential differences of estates, the one limiting the times,

(v) [See Note 80.] (w) [See Note 81.] (x) [See Note 82.]
THE STATUTE OF USES.

for all estates are but times of their continuances; this maketh the difference of fee-simple, fee-tail, for life or years: (y) and the other maketh difference of possession as remainder: all other differences of estate are but accidents, as shall be said hereafter; these two the statute meant to take hold of, and at the words, remainder and reverter, it stops: it adds not words, right, title or possibility, nor it hath not general words, or otherwise: it is most plain, that the statute meant to execute no inferior uses to remainder or reverter; (z) that is to say, no possibility or contingencies, but estates, only such as the seoffees might have executed by conveyance made. Note also, that the very letter of the statute doth take notice of a difference between an use in remainder and an use in reverter; which though it cannot be *properly so called, because it doth not depend upon * P. 46. particular estates, as remainders do, neither did then before the statute draw any tenures as reversions do; yet the statute intends that there is a difference when the particular use, and the use limited upon the particular use, are both new uses; in which case it is an use in remainder; and where the particular use is a new use, and the remnant of the use is the old use, in which case it is an use in reverter.

The next material word is, from henceforth, which doth exclude all conceit of relation that cestuy que use shall not come in as from the time of the first feoffments to use, as Brudnell's conceit (a) was in 14 Hen. VIII.; that is, the seoffee (b) had granted [14 Hen. VIII. a rent charge, and cestuy que use had made a seoff.] 410.

(y) [See Note 83.] (z) [See supra 42. Notes 69, 71.] (a) [See Note 84.] (b) [See Note 85.]
ment in fee, by the statute of 1 Richard III. the
feoffee (c) should have held it discharged, because
the act of cestuy que use shall put the feoffee in, as
if cestuy que use had been seised in from the time of
the first use limited; and therefore the statute doth
take away all such ambiguities, and expresseth that
cestuy que use shall be in possession from henceforth;
that is, from the time of the parliament for uses then
in being, and from the time of the execution for uses
limited after the parliament.

The third material words are, lawful seizin, estate,
and possession, not a possession in law only, but a
seizin in fact; (d) not a title to enter into the land,
but an actual estate.

The fourth words are, of and in such estates as
they had in the use that is to say, like estates, fee-
simple, fee-tail, for life, for years, at will, in pos-
session, and reversion, which are the substantial dif-
ferences of estates, as was said before; but both
these latter clauses are more fully perfected and ex-
pounded by the branch of the fiction of the statute
which follows.

This branch of fiction hath three material words
or clauses: the first material clause is, that the estate,
right, title, and possession that was in such person,
&c. shall be in cestuy que use; so (e) that the matter
and substance of the estate of cestuy que use is the
estate of the feoffee, and more he cannot have; so as
if the use were limited to cestuy que use and his heirs,
and the estate out of which it was limited was but
an estate for life, cestuy que use can have no inheri-
tance: so if when the statute the heir of the

(c) [See Note 86.] (a) [See Note 87.] (e) [See Note 88.]
feoffee had not entered after the death of his ancestor, but had only a possession in law, cestuy que use in that case should not bring an assize before entry, because the heir of the feoffee could not; so that the matter whereupon the use must work is the feoffee's estate. But note here; whereas before when the statute speaks of the uses, it spake only of uses in possession, remainder and reverter, but not in title or right; now when the statute speaks what shall be taken from the feoffee, it speaks of title and right: so that the statute takes more from the feoffee than it executes presently, (f) in case where there are uses in contingence which are but titles.

The second word is, clearly, which seems properly and directly to meet with the conceit of scintilla juris, (g) as well as the words in the preamble of extirpating and extinguishing such feoffments, so that (h) their estate is (h) clearly extinct.

The third material clause is, after such quality, *manner, form, and condition as they had in the use; *P. 48. so as now as the feoffee's estate gives matter, so the use gives form: and as in the first clause the use was endowed with the possession in points of estate, so here (i) it is endowed with the possession in all accidents and circumstances of estate. Wherein first note, that it is gross and absurd to expound the form of the use any whit to destroy the substance of the estate; as to make a doubt, because the use gave no dower or tenancy by the courtesy, that therefore the possession when it is transferred would do so like-

(f) [See Note 89.]  
(g) [See Note 90.]  
(h) The words that and is were first added in the last edition.  
(i) [See Note 91.]  

wise:
wise: no, but the statute meant such quality, manner, form and condition, as is not repugnant to the corporal presence and possession of the estate.

Next for the word, condition, I do not hold it to be put in for uses upon condition, though it be also comprised within the general words; but because I would have things stood upon learnedly, and according to the true sense, I hold it but for an explaining, or word of the effect; as it is in the statute of 26 of treasons, where it is said, that the offenders shall be attainted of the overt fact by men of their condition, in this place, that is to say, of their degree or sort: and so the word condition in this place is no more, but in like quality, manner, form and degree, or sort; so as all these words amount but to modo & forma. Hence therefore all circumstances of estate are comprehended as sole seisin, or jointly seisin, by intierties, or by moieties, a circumstance of estate to have age as coming in by descent, or not age as purchaser; or circumstance of estate descendable to the heir of the part of the father, or of the part of the mother; a circumstance of estate conditional or absolute, remitted or not remitted, * with a condition of inter-marriage or without: all these are accidents and circumstances of estate, in all which the possession shall ensue the nature and quality of the use: and thus much of the first case, which is the general case.

The second case of the joint feoffees needs no exposition; for it pursueth the penning of the general case: only this I will note, that although it had been omitted, yet the law upon the first case would have been taken as the second (k) case provided: so that it is rather an explanation than an addition; for

(k) [See Note 92.]
THE STATUTE OF USES:

...turn that case the other way, that one were infeoffed to the use of himself and another, (l) I hold the law to be, that in the former case (m) they shall be seised jointly; and so in the latter case (m) cestuy que use shall be seised solely: for the word, other, it shall be qualified by the construction of cases, as shall appear when I come to my division. But because this case of co-feoffees to the use of one of them was a general case in the realm, they foresaw it, and expressed it precisely, and passed over the case (n) converso, which was but an especial case: and they were loth to bring in this case, (n) by inserting the word, only, into the first case, to have penned it to the use only of other persons: for they had experience what doubt the word, only, bred upon the statute of 1 R. III. (o) After this second case and before the third case of rents comes in the second saving; and the reason of it is worth the noting, why the savings are interlaced before the third case; the reason of it is, because the third case needeth no saving, and the first two cases did need savings; and that is the reason of that again.

* It is a general ground, that where an act of parliament is donor, if it be penned with an ac si, it needs (p) not a saving, for it is a special gift, and not a general gift, which includes all rights; and therefore in 11 Henry VII. where upon the alienation of [11 Hen. VII. c. 20.] women, the statute intitles the heir of him in remainder to enter, you find never a saving (q) because the statute gives entry not simpliciter, but within an ac si; as if no alienation had been made, or if the

(l) [See Note 93.] (m) [See Note 94.] (n) [See Note 95.]
(o) [See Note 96.] (p) [See Note 97.] (q) [See Note 98.]
feme had been naturally dead (r). Strangers that had right might have entered, and, therefore no saving needs. So in the statute of 32 Hen. VIII. (o) of leases, the statute enacts, that the leases shall be good, and effectual in law, as if the lessor had been seised of a good and perfect estate in fee-simple; and therefore you find no saving in the statute; and so likewise of diverse other statutes, where the statute doth make a gift or title good specially against certain persons, there needs no saving, except it be to exempt some of those persons, as in the statute of 1 R. III. (s). Now to apply this to the case of rents, which is penned with an ac si, namely, as if a sufficient grant or lawful conveyance had been made, or executed by such as were seised; why if such a grant of a rent had been made, one that had an ancient right might have entered and have avoind the charge; and therefore no saving needeth; but the first and second (x) cases are not penned with an ac si, but absolute, that cestuy que use shall be adjudged in estate and possession, which is a judgment of parliament stronger than any fine, to bind all rights; nay, the first clause hath farther words, namely, in lawful estate and possession, which maketh it stronger than any in the second clause. (t) For if the words only had stood upon the second clause, namely, * that the estate of the seoffice should be in cestuy que use, then perhaps the gift should have been special, and so the saving superfluous: and this note is material in regard of the great ques-

(r) [See Note 99.] (o) The words Hen. VIII. first added in the last edition, (s) [See Note 100.] (x) The words first and second were in the last edition substituted for second first.
(t) [See Note 101.]
THE STATUTE OF USES.

tion, whether the feoffees may make any regress; (u) which opinion, I mean, that no regress is left unto them, is principally to be argued out of the saving; [The savings of the statute considered.]
as shall be now declared: for the savings are two in number: the first saveth all strangers rights, with an exception of the feoffees; the second is a saving out of the exception of the first saving, namely, of the feoffees in case where they claim to their own proper use: it had been easy in the first saving out of the statute, other than such persons as are seised, or hereafter should be seised to any use, to have added to these words, executed by this statute; or in the second saving to have added unto the words, claiming to their proper use, these words, or to the use of any other, not (v) executed by this statute: but the regress of the feoffee is shut out between the two savings; for it is the right of a person claiming to an use, and not unto his own proper use; but it is to be added, that the first saving is not to be understood as the letter implieth, that feoffees to use shall be barred of their regress, in case that it be of another feoffment than that whereupon the statute hath wrought, but upon the same feoffment; as if the feoffee's to an use (w) before the statute had been disseised, and the disseisor (x) had made a feoffment in fee to I. D. his use, and then the statute came: this executeth the use of the second feoffment; but the first feoffees may make a regress, and they yet claim to an use, but not by that feoffment upon which the statute hath wrought.

(u) [See Note 102.] (v) [See Note 103.] (w) [See Note 104.]
(x) The word disseisor was in the last edition first substituted for disseised.

4

* NOW
NOW followeth the third case of the statute, touching execution of rents; wherein the material words are four:

First, whereas diverse persons are seised, which hath bred a doubt that it should only go to rents in use at the time of the statute; but it is explained in the clause following, namely, as if a grant had been made to them by such as are or shall be seised.

The second word is, profit; for in the putting of the case, the statute speaketh of a rent; but after in the purview is added these words, or profit.

The third word is ac si, scilicet, that they shall have the rent as if a sufficient grant or lawful conveyance had been made and executed unto them.

The fourth words are the words of liberty and remedies attending upon such rent, scilicet, that he shall distrain, &c. and have such suits, entries, and remedies, relying again with an ac si, as if the grant had been made with such collateral penalties and advantages.

Now for the provisoes; the makers of this law did so abound with policy and discerning, as they did not only foresee such mischiefs as were incident to this new law immediately, but likewise such as were consequent in a remote degree; and therefore besides the express provisoes, they did add three new provisoes which are in themselves substantive (y)

(y) The word substantive was in the last edition first substituted for subtrative.
THE STATUTE OF USES.

for foreseeing that by the execution of uses, wills* P. 54. formerlly made should be overthrown: they made an ordinance for wills. Foreseeing likewise, that by execution of uses women should be doubly advanced; (z) they made an ordinance for dowers and jointures. Foreseeing again, that the execution of uses would make franktenement pass by contrac̄ts parole, they made an ordinance for inrolments of bargains and sales (a). The two former they inserted into this law, and the third they distinguished into a law apart, but without any preamble as may appear, being but a proviso to this statute. Besides all these provisional laws; and besides four provisos, whereof three attend upon the law of jointure, and one of persons born in Wales, which are not material to the purpose in hand; there are six provisos which are natural and true members and limbs of the statute, whereof four concern the part of cestuy que use, and two concern the part of the feoffees. The four which concern the part of cestuy que use, tend all to save him from prejudice by the execution of the estate.

The first saveth him from the extinguishment of any statute or recognisance, as if a man had an extent of a hundred acres, and an use of the inheritance of one: Now the statute executing the possession to that one, would have extinguished his extent being intire, in all the rest: or as if the conuozor (x) of a statute having ten acres liable to the statute, had made a feoffment in fee to a stranger of two, and

(a) [See Note 105.] (z) [See Note 106.] (x) Conuozor was in the last edition substituted for commissioner.
after had made a feoffment in fee to the use of the
conuizee and his heirs (b). And upon this proviso
there arise three questions:

* First, whether this proviso were not superfluous,
in regard that cestuy que use was comprehended in
the general saving, though the fooffees be excluded?

Secondly, whether this proviso doth save statutes
or executions, with an appoittment, or intire?

Thirdly, because it is penned indefinitely in point
of time, whether it shall go to uses limited after the
statute, as well as to those that were in being at (c)
the time of the statute; which doubt is rather in-
forced by this reason, because there was remedy for
uses at the time of the statute; for that the execu-
tion of the statute might be waved: but both pos-
session and use, since the statute, may be waved.

The second proviso saveth cestuy que use from the
charge of primer seisin, riveries, ouster les mains,
and such other duties to the King, with an express
limitation of time, that he shall be discharged for the
time past, and charged for the time to come to the
King, namely, May 1536, to be communis terminus.

The third proviso doth the like for fines, reliefs,
and herriots, discharging them for the time past,
and speaking nothing of the time to come.

The fourth proviso giveth to cestuy que use all col-
lateral benefits of vouchers, aid-prayers, (d) actions
of waste, trespass, conditions-broken, and which the
feoffees might have had; and this is expressly limited
for estates executed before 1 May 1536. And this
proviso giveth occasion to intend that none of these
benefits would have been carried to cestuy que use,

(b) [See Note 107.] (c) See Note 108.] (d) [See Note 109.]
THE STATUTE OF USES.

by the general words in the body of the law, (c) [The provision in the statute scilicet, that the feoffees estate, right, title, and considered.]

possession, &c.

* For the two provisos on the part of the tertenant, *P. 45.

they both concern the saving of strangers from prejudice, &c.

The first saves actions depending against the feoffees, that they shall not abate.

The second saves wardships, liveries, and ouster les maines, whereof title was vested in regard of the heir of the feoffee, and this in case of the King only.

(c) [See Note 119.]
DISCOURSE III.

What persons may be seised to an use, and what not. What persons may be cestuy que use, and what not. What persons may declare an use, and what not.

Though I have opened the statute in order of words, yet I will make my division in order of matter, namely,

1. The raising of uses.
2. The interruption of uses ($f$).
3. The executing of uses ($f$).

Again, the raising of uses doth easily divide itself into three parts: The persons that are actors to the conveyance to use. The use itself. The form of the conveyance.

Then it is first to be seen what persons may be seised to an use, and what not; and what persons may be cestuy que use, and what not.

The King cannot be seised to an use; no, not where he taketh in his natural body, and to some purpose as a common person; and therefore if land be given to the King and I. D. pour terme de leur vies, this use is void for a moiety.

* Like law is, if the King be seised of land in the right of his dutchy of Lancaster, and covenanteth by his letters patents under the dutchy seal to stand seised to the use of his son, nothing passeth.

($f$) [See infra 66. Note 144.]
THE STATUTE OF USES.

Like law, if King R. III. who was feoffee to

[What persons
diverse uses before he took upon him the crown,

may and may not
had, after he was King, by his letters patent grant-
be seised to an
ed the land over, the uses had not been renewed (g).

use.]

The Queen, speaking not of an imperial Queen (h)

(The queen,]
but by marriage, cannot be seised to an use, though

she be a body enabled to grant and purchase with-

out the King: yet in regard of the government and
interest the King hath in her possession, she cannot

be seised to an use.

A corporation cannot be seised to an use, (i) be-

[A corporation.]
cause their capacity is to an use certain; again, be-

cause they cannot execute an estate without doing

wrong to their corporation or founder; but chiefly

because of the letter of this statute which, in any
clause when it speaketh of the feoffee, resteth only

upon the word, person, but when it speaketh of

cestuy que use, it addeth person or body politic.

If a bishop bargain or sell lands whereof he is

[A Bishop.]
seised in the right of his see, this is good during his

life; otherwise it is where a bishop is infeoffed to

him and his successors, to the use of I. D. and his

heirs, that is not good, no not for the bishop's life,

but the use is merely void.

Contrary law of tenant in tail; (k) for if I give

[Tenant in tail.]
land in tail by deed since the statute to A. to the use

of B. and his heirs; B, hath a fee-simple determina-

ble upon the death of A, without issue. And like

law, though doubtful before the statute, was; for

the chief reason which bled the doubt before the* p. 58.

statute, was because tenant in tail could not execute

(g) [See Note 111.] (h) [See Note 112.] (i) [See
Note 113.] (k) [See Note 114.]
an estate without wrong; but that since the statute is quite taken away, because the statute saveth no right of intail, as the statute of 1 R. III. did; and that reason likewise might have been answered before the statute, in regard of the common recovery.

A feme covert and an infant, though under years of discretion, may be seised to an use; for as well as land might descend unto them from a feoffee to use, so may they originally be infeoffed to an use; yet if it be before the statute, and they had upon a subpoena brought, executed their estate during the coverture or infancy, they might have defeated the same; and then they should have been seised again to the use, and not to their own use; (l) but since the statute no right is saved unto them.

If a feme covert or an infant be infeoffed to an use precedent since the statute, the infant or baron come too late to discharge or root up the feoffment; but if an infant be infeoffed to the use of himself and his heirs, and if (m) I. D. pay such a sum of money to the use of I. G. and his heirs, the infant may disagree and overthrow the contingent use (n).

Contrary law, if an infant be infeoffed to the use of himself for life, the remainder to the use of I. S. and his heirs, he may disagree to the feoffment as to his own estate, but not to divest the remainder, (o) but it shall remain to the benefit of him in remainder.

And yet if an attainted person be infeoffed to an use, the King's title, after office found, shall prevent *

(l) [See Note 115.] (m) [See Note 116.] (n) [See Note 117] (o) [See Note 118.]
THE STATUTE OF USES.

the use, and relate above it; but until office the use

cestuy que use is seised of the land (p).

Like law of an alien; for if land be given to an alien to an use, the use is not void ab initio: yet neither alien nor attainted person can maintain an action to defend the land.

The King's villein if he be infeoffed to an use, the King's title shall relate above the use; otherwise in case of a common person (q).

But if a lord be infeoffed to the use of his villein, the use never (r) riseth, but the lord is in by the common law, and not by the statute, discharged of the use.

But if the husband be infeoffed to the use of his wife for years, if he die the wife shall have the term, and it shall not inure by way of discharge, (s) although the husband may dispose of the wife's term.

So if the lord of whom the land is held be infeoffed to the use of a person attainted, the lord shall not hold by way of discharge of the use, because of the King's title, annum, diem & vastum (t).

A person uncertain is not within the statute, nor any estate in nubibus or suspense executed: as if I give land to I. S. the remainder to the right heirs of I. D. to the use of I. N. and his heirs, I. N. is not seised of the fee-simple, but (u) of an estate pour vie of I. S. till I. D. be dead, and then in fee-simple.

Like law, if before the statute I give land to I. S. pour autre vie to an use, (v) and I. S. dieth, living

(a) [See Note 119.] (q) [See Note 120.] (r) [See Note 121.] (s) [See Note 122.] (t) [See Note 123.] (u) [See Note 124.] (v) [See Note 125.]

cestuy
READING UPON

cestuy que vie (c) whereby the freehold is in suspense, the statute cometh, and no occupant entremeth; the use is not executed out of freehold in suspense (w).

* For the occupant, the disseisor, the lord by escheat, or the feoffee upon consideration, not having notice, and all other persons which shall be seised to use, not in regard of their persons but of their title; I refer them to my division touching disturbance and interruption of uses (x).

It followeth now to see what person may be a cestuy que use. The King may be a cestuy que use; but it behoveth both the declaration of the use, and the conveyance itself, to be matter of record, because the King's title is compounded of both; I say, not appearing of record, but by conveyance of record. And therefore if I covenant with I. S. to levy a fine to him to the King's use, which I do accordingly; and this deed of covenant be not inroll'd; and the deed be found by office, the use vesteth not. E converso, if inroll'd. If I covenant with I. S. to infeoff him to the King's use, and the deed be inroll'd, and the feoffeement also, and it (y) be found by office, the use vesteth.

But if I levy a fine, or suffer a recovery to the King's use, and declare the use by deed of covenant inroll'd, though the King be not party, yet it is good enough (z).

[A corporation.] A corporation may take an use, and yet it is not material whether the feoffeement or the declaration be by deed; (a) but I may infeoff I. S. to the use of a corporation, and this use may be averred.

(c) vie—first added in the last edition. (w) [See Note 126.]
(x) [See infra 66, Note 144.] (y) [See Note 127.] (z) [See Note 128.]
(a) [See Note 129.]

An
THE STATUTE OF USES.

An use to a person uncertain is not void in the first limitation, but executeth not till the person be in esse; so that this is positive, that an use shall never be in abeyance as a remainder may be, but ever in a person certain upon the words of the statute, and the estate of the feoffees shall be in him or them which have the use. The reason is, because no confidence can be reposed in a person unknown and uncertain; and therefore if I make a feoffment to the use of I. S. for life, and then to the use of the right heirs of I. D. the remainder is not in abeyance, but the reversion is in the feoffor, quousque. So that upon the matter all persons uncertain in use, are like conditions or limitations precedent.

Like law, if I infeoff one to the use of I. S. for years, the remainder to the right heirs of I. D. this is not executed in abeyance, (b) and therefore not void.

Like law, if I make a feoffment to the use of my wife that shall be, or to such persons as I shall maintain, though I limit no particular estate at all; yet the use is good, and shall in the interim return to the feoffor.

Contrary law, if I once limit the whole fee-simple of the use out of land, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of the use: but look how I should have gone unto the feoffor; if I begin with a contingent use, so it shall go to the remainder; if I intail a contingent use, both estates are alike subject to the contingent use when it falleth; as when I

(b) [See Note 130.]

make
READING UPON

make a feoffment in fee to the use of my wife for life, the remainder to my first begotten son; I having no son at that time, the remainder to my brother and his heirs: if my wife die before I have any son, the use shall not be in me, but in my brother. And yet if I marry again, and have a son, it shall divest * from my brother, and be in my son, (c) which is the skipping they talk so much of.

So if I limit an use jointly to two persons, not \textit{in esse}, and the one cometh to be \textit{in esse}, he shall take the entire use; and yet if the other afterward come \textit{in esse}, he shall take jointly with the former; as if I make a feoffment to the use of my wife that shall be, and my first begotten son for their lives, and I marry; my wife taketh the whole use, and if I afterwards have a son, he taketh jointly with my wife (d).

But yet where words of abeyance work to an estate executed in course of possession, it shall do the like in uses; as if I infeoff A to the use of B for life, the remainder to C for life, the remainder to the right heirs of B, this is a good remainder executed (e).

So if I infeoff A to the use of his right heirs, A is in the fee-simple, not by the statute, but by the common law (f).

Now are we to examine a special point of the disability of such persons as do take by the statute: and that upon the words of the statute, where diverse persons are seised to the use of other persons; so, that by the letter of the statute, no use is contained, but where the feoffor is one, and \textit{cestui que use} is another.

(c) [See Note 131.] (d) [See Note 132.] (e) [See Note 133.] (f) [See Note 134.]

Therefore
THE STATUTE OF USES.

Therefore it is to be seen in what cases the same persons shall be both seised to the use and cestuy que use, and yet in by the statute; and in what cases they shall be diverse persons, and yet in by the common law; wherein I observe unto you three things:

* First, that the letter is full in the point.

Secondly, that it is strongly urged by the clause of joint estates following.

Thirdly, that the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded, that where the party seised to the use, and the cestuy que use is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use, to take effect by the common law.

And therefore if I give land to I. S. in fee (g) to the use of himself for life or for years, and if I. D. pay a sum of money, then to the use of I. D. and his heirs, I. S. is in of an estate for life, or for years, by way of abridgment of estate in course of possession, and I. D. upon payment of the money, (h) in of the fee-simple by the statute.

So if I bargain and sell my land after seven years, the inheritance of the use only passeth; and there remains an estate for years (i) by a kind of subtraction of the inheritance or occupation (k) of my estate, but merely at the common law.

But if I infesoff I. S. in fee (l) to the use of himself in tail, and then to the use of I. D. in fee, or covenant to stand seised to the use of myself in tail, and to

(g) [See Note 135.] (h) [See Note 136.] (i) [See Note 137.] (k) [See Note 138.] (l) [See Note 139.]
the use of my wife in fee; in both these cases the estate tail is executed by this statute; because an estate tail cannot be re-occupied out of a fee-simple, being a new estate, and not like a particular estate for life or years, which are but portions of the absolute fee; and therefore if I bargain and sell my land to I. S. after my death without issue, (m) it doth not leave an estate * tail in me, nor vesteth any present fee in the bargainee (n) but is in an use expectant.

So if I infeoff I. S. (o) to the use of I. D. for life, and then to the use of himself and his heirs, he is in of the fee-simple merely in course of possession, and as of a reversion, and not of a remainder.

Contrary law, if I infeoff I. S. (o) to the use of I. D. for life, then to the use of himself for life, the remainder to the use of I. N. in fee: Now the law will not admit fraction of estates; but I. S. is in with the rest by the statute.

So if I infeoff I. S. (o) to the use of himself and a stranger, they shall be both in by the statute, because they could not take jointly, taking by several titles.

Like law, if I infeoff a bishop and his heirs to the use of himself, and his successors, he is in by the statute in the right of his see.

And as I cannot raise a present use to one out of his own seisin; so if I limit a contingent or future use to one being at the time of limitation not seised, but after become seised at the time of the execution

(m) [See Note 140.] (n) The word bargainee was first substituted for bargain in the last edition. (o) [See Note 141.]
of the contingent use, there is the same reason and [of the seisin
the same law, and upon the same difference which I
have put before.

As if I covenant with my son, that after his mar-
riage I will stand seised of land to the use of himself
and his heirs; and before marriage I infeoff him to
the use of himself and his heirs, and then he marri-
eth; he is in by the common law, (p) and not by the
statute; like law of a bargain and sale.

But if I had let to him for life only, then he
should have been in for life only by the common law,
* and of the fee-simple by statute.

Now let me advise you of this, that it is not a
matter of ability or conceit to take the law right,
when a man cometh in by the law in course of pos-
session, and where he cometh in by the statute in
course of possession: but it is material for the decid-
ing of many causes and questions, as for warranties,
actions, conditions, waivers, suspicions, and divers
other provisions.

For example; a man's farmer committed waste:
after he in reversion covenanteth to stand seised to
the use of his wife for life, and after to the use of
himself and his heirs; his wife dies; if he be in his
fee untouched, he shall punish the waste; if he be
in by the statute, he shall not punish it:

So if I be infeoffed with warranty, and I covenant
with my son to stand seised to the use of myself for
life, and after to him and his heirs; if I be in by the
statute, it is clear my warranty is gone; but if I be
in by the common law, it is doubtful.

(a) [See Note 142].

K 2  So
READING UPON

So if I have an eigne right, and be infeoffed to the use of I. S. for life, then to the use of myself for life, then to the use of I. D. in fee, I. S. dieth. If I be in by the common law, I cannot waive my estate, having agreed to the feoffment: but if I am in by the statute, yet I am not remitted, because I come in by my own act: but I may waive my use, and bring an action presently; for my right is saved unto me by one of the savings in the statute.

Now on the other side it is to be seen, where there is a seisin to the use of another person, and yet it is out of the statute; which is in special cases upon the ground, wheresoever cestuy que use had remedy for the possession by course of common law, where the statute never worketh; and therefore if a disseisin were committed to an use, it is in him by the common law (d) upon agreement; so if one enter as occupant to the use of another, it is in him till disagreement (q).

So if a feme infeoff a man, causa matrimonii praecocii, she hath a remedy for the land again by course of the law; and therefore in those special cases the statute worketh not; and yet the words of the statute are general, where any person stands seised by force of any fine, recovery, feoffment, bargain and sale, agreement or otherwise; but yet the feme is to be restrained for the reason aforesaid.

It remaineth to shew what persons may limit and declare an use: wherein we must distinguish; for there are two kinds of declarations of uses, the one of a present use upon the first conveyance, the other upon a power of revocation or new declaration; the

*(d) [See Note 143.]
(q) [See Note 144.]

latter
THE STATUTE OF USES:
latter of which I refer to the division (r) of revoca-
tion: now for the former.

The king upon his letters patent may declare an [The King.] use, though the patent itself implieth an use, if none be declared.

If the King gives lands by his letters patent to I. S. and his heirs, to the use of I. S. for life, the King hath the inheritance of the use by implication of the patent, and no office needeth; for implication out of matter of record, amounteth ever to matter of record.

If the Queen give land to I. S. and his heirs to [The Queen.] the use of all the church-wardens of the church of Dale, the patentee is seised to his own use, upon that confidence or intent; but if a common person * had given land in that manner, the use had been * P. 67. void by the statute of 23 H. VIII. and the use had [23 H. VIII. c. 10.] returned to the feoffor and his heirs.

A corporation may take an use without deed, (s) [A corporation.] as hath been said before; but can limit no use without deed.

An infant may limit an use upon a feoffment, [An infant.] fine, or recovery, and he cannot countermand or avoid the use, except he avoid the conveyance; (t) contrary, if an infant covenant in consideration of blood or marriage to stand seised to an use, the use is merely void (u).

If an infant bargain and sell his land for money, for commons or teaching, it is good with aver-
ment; if for money, otherwise: if it be proved it is avoidable; if for money recited and not paid, it is void: (v) and yet in the case of a man of full age the recital sufficeth.

(r) [See Note 145.]  (s) [See Note 146.]  (t) [See Note 147.]  (u) [See Note 148.]  (v) [See Note 149.]
READING, &c.

If baron and feme be seised in the right of the feme, or by joint purchase during the coverture, and they join in a fine, the baron cannot declare the use for longer time than the coverture, and the feme cannot declare alone; (w) but the use goeth, according to the limitation of law, unto the feme and her heirs: but they may both join in declaration of the use in fee; and if they sever, then it is good for so much of the inheritance as they concurred in; for the law avoucheth all one as if they joined: as if the baron declare an use to I. S. and his heirs, the use is good to I. S. in fee.

And if upon examination the feme will declare the use to the judge, and her husband say not to it, it is void, and the baron’s use is only good: the rest of the use goeth according to the limitation of law.

(w) [See Note 150.]

END OF THE TEXT.
NOTES

AND

EXPLANATIONS.

NOTE 1. p. 5. (a).

With the view of assisting the reader, it was erroneously stated in the margin of the last edition of this work, that this part of it related to the nature of uses before the statute; and there is reason to suppose, that the error hath conduced to certain false conclusions, upon which some remarks will be made in note 6.

In a subsequent part of this his first discourse (p. 18), our author hath given,—the inception and progression of the use before the statute; and it is presumed, that the error above noticed, must have arisen from the supposition; that, when he said in the last page, that his first discourse should be 'the nature and definition of an use, and its inception and progression before the statute';—the word before related to both parts of the sentence, when it was confined to the last, as is evident from his speaking in the present tense throughout the whole of his observations wherein a definition of the use is given.

It should be kept in remembrance therefore, that our author is in this place about to give, the nature and definition
definition of an use as it was held to be in his time; and his observations upon this head, are applicable to the state of the use at the present day.

NOTE 2. p. 6. (b).

Littleton, did not give it as his opinion, that every use amounted to a tenancy at will, for the case put by him is not a general but a particular case,—it is the case of an use resulting to a feoffor by construction or intendment, and therefore, clearly distinguishable from the cases in the reign of Hen. VII. referred to by Lord Bacon, as having controled that opinion, inasmuch as those cases are all of uses express.

As no release could operate by way of enlargement of estate, unless there was privity of estate between the releasor and releasee, the question was, if any such privity existed between the feoffees to uses and their cestui que use, who was in possession without a grant from them? Now Littleton (See Litt. sect. 462, 463, and 464.) thought, that there would be such a privity where a feoffment was made upon confidence to perform the will of the feoffor, because it would be intended by the law, that the feoffor ought presently to occupy the land at the will of the feoffee; and then, the feoffor's right to the occupation, being given by the law, the same law, would also give a privity between him and his feoffees, upon the principle mentioned by Coke in his commentary (Co. Litt. 272. b.) that, 'when the law gives any estate or possession, it giveth also a privity and other necessaries to the same.' Littleton's opinion then, being founded upon the supposition, that privity of estate was given by the law as an appendage to the possession at will of the land, was not controled by the cases in the reign of Hen. VII.; because,
NOTES AND EXPLANATIONS.

because, in each of them, the use was not in the feoffor by gift of law, but, by the express limitation of the parties: but, although the ground of Littleton's opinion, was not shaken by those cases, yet, its solidity seems questionable, for reasons, which in the conclusion of this note will be laid before the reader.

However, Chief Baron Gilbert (See Gilbert's law of uses, 201, 202, and 203.) has taken the same distinction that Littleton did, between an use express, and an use by intendment of law, as to the right of cestui que use to the occupation; he admits it to be regularly true, that, if the cestui que use entered upon his feeoffice he was a trespasser; but observes, that, in some cases by intendment of law he might enter and occupy at the will of the feoffees, and he states the case put by Littleton as being one wherein the law gave the feoffor such leave to enter and occupy.

If it were to be admitted, that the feoffor in the case supposed by Littleton and Gilbert had the use by intendment of law, their reasoning would be substantial; but, did the use before the statute of uses result to the feoffor by construction of law? on the contrary, was it not an intendment of the chancery? Now, although the law of the chancery may be said to be—what one of the judges in an undecided case of an express use in the reign of Edw. IV. (See the year book, 4th Edw. IV. 8.) held that it was—the common law of the land; and therefore, speaking generally, the expression with respect to a resulting use, that, the feoffor had the use by intendment of law may have been correct enough; yet, in the discussion of a point in which it is a material consideration whether the intendment of an use to the feoffor, is, at law, or only in equity—if it should upon an investigation be found, that his use
or right to the profits was merely equitable, it would in strictness be incorrect to say, that the feoffor had that right by intendment of law. Did then the use result to the feoffor by construction of law or of equity? All writers agree, and Lord Bacon in this work proves, that, at law, the title of the feoffees to uses was by the feoffment perfect—that they were entitled by it, whether made upon or without a consideration, to the possession as well as the profits of the land,—that at law, there was no such thing as an use, or right to the profits of the land distinct from the land itself, and—that it was only in equity that the use was supported or that it resulted to the feoffor: but the circumstance of the feoffors having an equitable right to the profits, never could have conferred on him a legal title to the occupation of the land as tenant at will, and upon no other ground than that of the feoffor’s having had a legal title, can the opinion of Littleton, and the distinction taken by Gilbert be supported.

The feoffor therefore in Littleton’s case, not having had, as it is conceived, any legal right to the profits and occupation of the land, had no title to enter; and consequently, supposing him to be in possession without a grant from the feoffees, privity of estate would be wanting between the feoffor who has the use in equity and his feoffees, and their release to him could not operate by way of enlargement of estate.

NOTE 3. p. 6. (c)

The observation, that ‘cestui que use had no remedy for his perrnancy of profits,’ does not appear to be satisfactory, for, if he had a title at law as tenant at will, he would have had a remedy for his perrnancy of profits.

Whatever
NOTES AND EXPLANATIONS.

Whatever might have been the ground of the decision in the case of the advowson, it is certain, that a contrary doctrine was afterwards established and continued to prevail; for, upon the same principle that the King had a right to the presentment and other profits, in the case of an outlawry in a personal action—would he or the lord have also had a right to the land itself, in the case of the attainder of cestui que use; and in a case in 5 Edw. IV. cited infra, p. 12. where cestui que use was attainted, it was held that the lord should not have the land.

NOTE 4. p. 7. (e).

The statute 2 Hen. V. c. 3. stat. 2. enacts, that he who passeth in an inquest ought to have lands and tenements, when therefore, it was ruled, that cestui que use should be a juror, it was contrary to the words of the statute: the reason of this construction was, as Frowick Ch. J. in 15 Hen. VII. 13. said, that at the time when the statute was made the greatest part of the land of England was in feoffments to uses, and therefore, the intent of those who made the statute was not that cestui que use should not be a juror, for then there could be but few men on juries; they therefore construed the statute in such form that cestui que use should be a juror and not the feoffees, contrary to the words of the statute; and this construction was admitted as being conformable to the intention of the makers. See Co. Litt. 272 a and b.

NOTE 5. p. 8. (f).

This process was first issued by the chancery in the 5 Rich. II. when Waltham Bishop of Salisbury was chancellor.
NOTES AND EXPLANATIONS.


NOTE 6. p. 8. (g).

Lord Bacon hath been understood to mean, that the instances here given of the special trust unlawful were never looked upon as being uses, but, were ever distinguished from uses by the denomination of special trusts unlawful; his observations however, do not bear any such signification, for he is attempting to show, that according to the definition of an use in his time—as the word was then used—it implied no covin nor collusion; he does not mean to deny, that what in the reign of Elizabeth were termed frauds, covins and collusions, had been in the earliest state of the use considered as and termed uses.—That the legislature conceived them to be uses is certain, since they are called uses in many of the statutes enacted concerning them, as for example the statute 15 Rich. II. c. 5. which was passed in order to make the use subject to mortmain. And that Lord Bacon himself looked upon them as instances of what formerly had been uses, is equally certain, since in a subsequent part of this work, (p. 23.), he adduces the last mentioned statute, and also the statute of provisors, as his reason for thinking that the first practice of uses was about the time of Rich. II.—because those statutes were the first in which he had found the word use mentioned, and since also, in stating the progress of the use in course of statutes, he has taken notice of all the statutes for remedying those unlawful trusts in which (as Lord Coke observed in Chudleigh's case, and as Lord Bacon himself says
NOTES AND EXPLANATIONS.

in a subsequent page,) *cestui que use* is spoken of under the title of pernor of the profits. See also notes 8, 43, and 48.

This false conclusion with respect to our author's meaning, was perhaps occasioned, by its having been supposed, that Lord Bacon was giving the definition of an use before the statute; whereas he was defining the use according to the acceptation of the word in his time, when the use was become a very different thing to what it had been originally, for originally the use was resorted to in fraud of the law, but by the time that Bacon wrote, it had been moulded to the purposes of family convenience, in marriage settlements.

It is a little remarkable, that the writer above alluded to, who hath contended that those special trusts unlawful were never looked upon as uses, hath contented himself with contrasting the use with the special trust lawful, which do not bear any resemblance to each other; whereas, had he attempted to support his distinction by a comparison of the use with the special trust unlawful, it would have appeared that in the reign of Richard the Second they were one and the same thing; in fact the same writer by a strange contradiction admits afterwards, that the special trust unlawful for evading the statute of mortmain was the case of an use.

NOTE 7. p. 8. (i).

These instances of the special trust lawful were never looked upon as uses—it was never meant, that the legal estate of the land should be in one person and the profits be at the same time taken by another, which is the characteristic of an use; but, on the contrary,
78 NOTES AND EXPLANATIONS.

in order that the object of the parties might be effectuated, it was necessary that the possession and profits should go together.

Where it was intended that the feoffees should enfeoff over, and in other cases similar, it is probable that such feoffments were generally made expressly upon condition; or if the words to the intent were employed, that there was a clause of re-entry added in case of default, so that the feoffor might re-enter in case the feoffee did not enfeoff over in due time; and in such cases, as the feoffor had a remedy by the course of law the court of chancery had nothing to do with them; but, if the feoffment was made to the intent to enfeoff over and there was no clause of re-entry added, the estate of the feoffees was absolute at law; and then the feoffor had merely a confidence and trust (Shep. Touch. 123. Dyer 138. b.) which if the feoffees refused to observe, the feoffors only remedy against them was in chancery for a breach of trust; but then, there would be no use in any one,—no right to the profits distinct from the possession.

There however appears to be a material difference between the three first, and the other; cases of special lawful intents mentioned by our author, which requires an explanation—thus, where a feoffment was made to the intent to enfeoff over a stranger, it is obvious that the feoffor was not to have the profits; but, where a feoffment was made because the feoffor was to go beyond the seas, although the reason of making the feoffment is apparent, yet the object intended to be obtained by it is not expressed: it must therefore be understood, either, that the deed plainly showed in the last mentioned case that the intention of the parties was that the feoffee should have the profits; or, that the use was
NOTES AND EXPLANATIONS.

was declared to the feoffee and then trusts superadded; for otherwise it would be the case of an use; since there would be nothing to prevent the use from resulting to the feoffor, and the deed would be rendered nugatory, as the feoffor would be again seised of the land in consequence of the statute having executed the possession to the use.

NOTE 3. p. 9. (l)

'A trust is the way to an use.'—It has been supposed by some modern writers, that the trust here spoken of, is the special trust; and upon the authority of this, and of another passage in a subsequent part of the reading, and upon which a few remarks will be submitted in a future note, (see note 43.) the same writers in treating of uses and trusts before the statute, have said, that 'trusts were introduced into this kingdom prior to uses;' and that 'the special trust was the root from which uses sprang.' Now, supposing this to be the true exposition of Lord Bacon's meaning, it would favour the opinion which has been controverted in note 6, that the instances before given of the special trust unlawful were not originally uses, but that they merely led to the practice of uses—of uses too as they were when first introduced, for it is not meant to be contended by the editor, that the special trust unlawful which was the use in the time of Richard II. did not afterwards lead to the trust general and permanent which was the use in the time of Lord Bacon; the editor's objection only is to the doctrine that uses and the special trust unlawful were not originally the same thing, but on the contrary essentially different; and to the support of which doctrine different passages in the reading have been unwarrantably vouched.

With
NOTES AND EXPLANATIONS.

With respect to the expression *a trust is the way to an use*, it has not, nor was it Lord Bacon’s intention that it should have, the meaning which has been imputed to it; the word *is* confines the sense of the passage to the time in which it was written, and demonstrates that the mind of the author was not carried back to the distant period when the use was first introduced; but, that he was speaking of the time then present—that a trust was *then* the way to an use.

To obviate any difficulty which the word *is* might occasion, the advocates for the doctrine above noticed found it necessary to alter the passage, and to represent our author as having said that a trust *was* the way to an use—however the editor declines availing himself of this hint for the improvement of the text.

But what kind of trust is it that Lord Bacon speaks of? certainly not of trusts as contradistinguished from uses,—not of the special trust lawful or unlawful; but of that trust which the civilian has defined, and whose definition Lord Bacon has adopted, viz. the *fides* or obligation in conscience, by which, all trusts whether special or permanent are constituted. In saying that *a trust is the way to an use* nothing more was meant therefore, than that the reposing a confidence is the way to, or mode of raising an use, or to borrow an expression from the next page of the work, uses are created by confidence.

NOTE 9. p. 10. (*m*).

It may be proper to observe, that the trust *here* meant, is not the trust or confidence which is the subject of the last note, but the general and permanent trust or use itself.

NOTE
NOTES AND EXPLANATIONS.

NOTE 10. p. 11. (n).

Lord Bacon does not mean to deny, that the sister of the whole blood had the use before the statute in cases where at common law she would have had the land under the rule possessio fratris, &c.; but his objection must be understood to be to the vulgar opinion, that she had the use under or by virtue of that rule.

It is absurd to suppose, that the feudal rules relating to inheritances ever governed the descent of the use, which was not the subject of tenure, and which was in law no hereditament, but merely esteemed as such: The sister of the whole blood, was not considered as having any right to the subpœna upon the ground that the nature of the use was such as to give her a title under the rule possessio fratris; but, because the chancellor thought it equitable, where the intention of the parties did not specially appear, that the same persons should have the profits of the land, who would, had not the possession been removed, have been entitled under similar circumstances to the land itself.

NOTE 11. p. 11. (o).

The expression, that 'an use ensued the nature of the possession or land,' is to be met with in many books of the first authority; thus in Lord Coke's commentary on Littleton, (Co. Litt. 13. a.) it is said, 'A man seised as heir on the part of the mother maketh a feoffment in fee to the use of him and his heirs, the use being a thing in trust and confidence shall ensue the nature of the land and shall descend to the heir on the part of the mother;' and perhaps there is room to suppose that the sense in which the expression hath been used by Lord Coke, is not precisely the same as that
that in which it appears to have been understood by Lord Bacon, for Lord Bacon seems to have understood it, as importing, that the nature of uses was such as to cause them to ensue the nature of the land, and to be subject to the same rules and restrictions as the land—his observations in page 13, where, he proposes to examine the nature of uses, and says, 'it will be seen apparently that uses stand upon their own reasons utterly differing from cases of possession' favour the supposition that Lord Bacon did so understand the expression; but it is conceived, that Lord Coke's meaning was very different,—that he never intended to say that uses resembled the land or cases of possession, and that they were on that account regulated by the same rules as the land; but, that as the feoffor was seised of the land _ex parte materna_, so the use of the same land should go to the heirs _ex parte materna_ and ensue the nature of the land: and why? Not because the use was alike in nature to the land, so as to cause it to descend in the same manner and under the same rules as the land itself would have done; but for the reason given in the authority to which Lord Coke refers us, 1 _Rep._ 100, that forasmuch as the land moves from the part of the mother, therefore, in equity, the use which is nothing but a trust and confidence should go also to the heirs on the part of the mother.——Now here Lord Coke rests upon the same ground as Lord Bacon,—that it was equitable that the heir on the part of the mother should have the use; in fact, the chancery presumed, that the heirs to whom the use was limited, were the same heirs who had been inheritable to the land itself; and therefore granted the _subpæna_ to them: Or rather, the chancellor thought, that where the feoffment was to the use of the feoffor and his heirs, that the use was
NOTES AND EXPLANATIONS.

was not an use newly created, but that the old use continued in the feoffor as it is said in Co. Litt. 23. (a); and then, the chancellor, consulting (according to the opinion of Anderson,) the rules of law as to the manner in which the land would have descended but for the feoffment; and finding that if the feoffment had not been made, the heirs _ex parte materna_ of the feoffor would have taken the land and the right to the profits together with the land, thought it equitable as the feoffment had passed the land only and not the use of the land, that the use as a thing undisposed of should go to the heirs _ex parte materna_ in the same manner as before the feoffment; and the _subpœna_ was granted to those heirs accordingly. And, as the use went in this way before the statute, so was the same person held to be entitled to it after. See the case of _Colgate and Blythe_, cited 1 Rep. 127. 9 Rep. 126.

Lord Coke, in saying that—'the use shall ensue the nature of the land' means nothing more than that as it was the nature of the land in the case above supposed to descend to the heir _ex parte materna_, therefore, the use of the land shall go in the same course; whereas Lord Bacon takes up the same expression in the general sense in which it was used by three of the judges in _Corbet's_ case, who argued from it as from a principle, that uses were not devisable and that they could not be limited to cease as to one person and to take effect in another, for that the nature of an use was such that it resembled an estate in possession, and was guided and directed according to the rules and reason of the common law; thereby, as our author observes in the next page, ruling uses merely according to the ground of possession. It is the latter signification of the expression only that Lord Bacon combats, and the editor conceives,
ceives, that he has done so with the most complete success, by examining the nature of the use in every stage and contrasting it with cases of possession.

NOTE 12. p. 11. (p).

When Lord Dacre's case was argued, uses had not only been held by the courts to be devisable but the legislature had virtually admitted the right although the Lord would in consequence lose his fruits of tenure, for a statute in the reign of Hen. VII. (4 Hen. VII. c. 17.) enacted, that, 'the lord should have the guardianship of the heir of cestui que use where no will was declared;' which implied, that cestui que use might devise the use, and that if he should devise it the lord should not have the guardianship of the heir. See the statute and post 28. In Lord Dacre's case, however, the crown contended for the guardianship and marriage of the heir, upon the ground, that an use was not devisable; and it is very probable that the decision in that case, which was against the crown, led to the statute of uses which was passed a few months after,


Although the arguments of the judges went to this extent, yet it had been decided in a previous case in the 6 Ed. VI. that an use might change from one to another by some act or circumstance ex post facto, as well after as before the statute 27 Hen. VIII. c. 10.; as, if a man had made a feoffment in fee to the use of W. and his heirs until A. paid him 40l. and then to the use of A. and his heirs, upon payment of the money and a proper entry made by A. he should be seised in fee, Br. Abr. tit. feoff. al. uses pl. 30. The above decision
NOTES AND EXPLANATIONS.

decision was not shaken by that in Corbet's case (supra page 11.) for there the proviso for determining the estate was not for an absolute, but a partial and illicit determination of it; viz. that an estate tail should cease as if tenant in tail was dead; and it was held by the judges, that such a proviso was repugnant, impossible and against law, for that the death of the tenant in tail was not a cesser of the estate tail; and, that if the estate tail should cease as if he were dead, his issue inheritable to the estate tail, would have it by descent in the life of his father, or he in the remainder or reversion have it in the life of tenant in tail, which was not possible.


It seems proper to observe, that the statute alluded to is the statute of 1 Rich. III. c. 1. and that although Lord Bacon speaks of the case as if the judges were divided in opinion, yet, according to the report of the case there were more than two (Hussey, Brian chief justice, and others say the books) of opinion, that cestui que use should be bound by the warranty.—The case in the 3 Hen. VII. therefore, amounted to a decision, that after the statute of 1 Rich. III. the right of an use might be bound by warranty. See the year book 3 Hen. VII. 13. and Bro. Abr. tit. feoff. al. uses pl. 21.

NOTE 15. p. 12. (t).

Quære who shall have the subpæna?—In the other editions it is said who shall have the land for the lord shall not have the land—perhaps Bacon said who shall have the subpæna to have the land as it is in Bro. Abr. feoff. al. uses 34. for the court could not decide at once that cestui que use was entitled to the land, because
the land was in the feoffees to uses; they could only determine who was entitled to the subpæna, which was to be sure indirectly determining who should have the land, since the person entitled to the subpæna could compel the feoffee to convey the land to him: however, in the case referred to, the question merely was, who should have the subpæna? See the year book of 5 Edw. IV. 7.

NOTE 16. p. 11, 12, 13, 20. (u).

The words imitation and imitate have been in several parts of the text substituted in the place of limitation and limitate, and the editor felt himself justified in doing so because the opinion which Lord Bacon controverts, is, that an use resembled or imitated the possession or land, for it is the conceit cited by Glanville in Corbet's case which he condemns, and by referring to that case in 1 Rep. 88, the reader will see that Glanville's observation was that the chancellor judged by imitation of the rules of the common law, and that the statutes in the reigns of Richard III. and Henry VII. had made uses to imitate and resemble estates in possession.


'The reason is not because the lord hath a tenant by title.'—In the last edition the passage reads thus, 'the reason is, [not] because the lord hath a rent by title; for that is nothing to the subpæna [but] because,' &c. the words not and but between brackets having been first—and it is conceived very properly—inserted in that edition: but with respect to the expression that the lord hath a rent by title, the present editor considers it an absurdity, there being no rent in the case;
and in order to justify himself for the alteration which he has made in the text by substituting the word tenant in the place of rent, an alteration made under the conviction that it was necessary to express the author's meaning, he begs leave to submit the following remarks to the reader's consideration.—Lord Bacon is endeavouring to point out the true reason why the lord was not entitled to the subpæna.—In the case itself no reason was assigned. Now one reason why the lord should not have the subpæna, might have been, as Hale afterwards held, that a trust of inheritance was not forfeitable, for if it were, the lord would be in by escheat, which could not be but for want of a tenant, and in such cases the feoffees are tenants. *Att. Gen. v.* *Sir Geo. Sands. Hard.* 494, 495. that if it were otherwise there would be a double forfeiture of the same thing, viz. by the trustee and by the *cestui que trust*, which would be unreasonable and could not be (ibid. 489.) So it was said in the same case (page 491,) that the reason why a trust in fee was not in a case in Croke forfeited to the King by way of escheat, was, because that the King had a tenant in by title. Here then is the same expression used in speaking upon a similar question.

Our author, however, attributes the lord's want of title to the subpæna, to the circumstance, not of his having a tenant in by title, but of its never having been the intention of the feoffor to benefit the lord.—
‘The reason is, not that the lord hath a tenant by title; for that is nothing to the subpæna, but because the feoffor's intent was never to advance the lord,' &c.

It is said in the former editions the feoffee's intent and also in the fifth line below the feoffee's will, &c. but that it ought to be feoffor's intent, will, &c. is too obvious to stand in need of any comment.

**NOTE**

The case alluded to is that of Sharington v. Strotton; see Plow. 298, 309. wherein it was held, that in a covenant to stand seised, affection for the provision of the heirs male which the covenantor should beget, and his desire, that the land should continue in his blood and name and brotherly love were sufficient considerations to raise uses.


The meaning is, that the court of chancery will not enforce a gift merely gratuitous, if the possession or estate at law hath not been removed from the persons from whom the gift proceeds unto another to the use of the person meant to be benefited; but if there has been such a transmutation of the possession, then, the court of chancery will enforce such a gratuitous gift.——The reason of the difference, arises from the different equity of the two cases: In the one case, the application to the court of chancery would be to deprive a person, for example, A. of the use or profits of the estate when A.'s title is at law absolute, and to give B. a right to them although A. has not received any consideration from B. for such use or profits, which there could be no equity in doing.——In the other case, the estate is no longer A.'s, but is at law the estate of C.; the question therefore here would not be between B. to whom the use is declared and A. from whom the gift came, but between B. and C. a third person, and consequently, whether a consideration was given to A. or not by B. can be no way material,—the only thing to be considered, is, whether B. the cestui que use or C. the feoffee to uses has the equity? Now, as upon the face.
face of C.'s conveyance it appears that the intention of the parties was not to benefit him, but B.; the court of chancery has sufficient reason to enforce the gift to B. although gratuitous, against C. who has no equitable claim.

No question could arise in this second case between A. and B. because, although the court of chancery where no consideration is given by the feoffees, will presume that it was intended for the use of the feoffor; yet no such presumption can be entertained, where the feoffor himself by his own declaration proves that it was meant for the benefit of another. See Gilbert's law of uses 222, 223. Mildmay's case, 1 Rep. 176, and 1 Lord Raymond 290.


Since Lord Bacon wrote, the law hath been altered with respect to conveyances made by parole or word of mouth only, for by the statute 29 Car. II. cap. 3. "no lease estate or interest in lands, tenements, or hereditaments, made by livery of seisin or parole only (with the exception of leases not exceeding three years from the making, and whereon the reserved rent is at least two thirds of the real value,) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant or surrender of any interest in any freehold hereditaments be valid, unless in both cases the same be put in writing and signed by the party granting or his agent lawfully authorized in writing," see 2 Black. Com. 297.


The injudicious application of the phrase—to the use, in this place, renders it necessary to be observed, that
NOTES AND EXPLANATIONS.

Lord Bacon does not allude to a conveyance to uses; but that he means a delivery of the deed to one as an attorney in behalf of another.—If he meant a conveyance to uses, his observations would not be reconcilable; for in the third or fourth line below he informs us, that the person to whose use the deed is delivered, that is to say, the person who takes by the deed, must be a party to the words of the grant—in other words, that he must be named in the deed, &c., and immediately after it is said, that in the case of an use so as the party trusted be declared it is not material to whom the publication be, that is to say whether the costui que use be named in the deed or not; but, by giving to the passage the signification above suggested the whole is rendered consistent with itself as well as consistent with the law.

NOTE 23. p. 15. (a).

Although the policy of the common law was to encourage as much as possible, a supply of commodities necessary for the consumption of the people; and to that end ordained, that all sales and contracts of any thing vendible in fairs or markets, should bind not only the parties themselves to such sales, but others who had right to those commodities; yet there were as Coke informs us in his exposition of the 31st Elizabeth c. 12. many exceptions; one of which goes directly to disprove the above opinion of Lord Bacon.—"If the buyer" (observes Coke) "doth know whose goods they were, and that the seller thereof hath at the most but a wrongful possession, this shall not bind him that right hath." See 2 Inst. 713.

The cases in as well the 14 Hen. VIII. as the 33 Hen. VI. are decidedly against Lord Bacon's doctrine;
NOTES AND EXPLANATIONS.

trine; for in each of them, it was held, that the property was not changed by the sale. See the Year book, 14 Hen. VIII. 8. Bro. Abr. tit. Collusion and covin, pl. 4.

NOTE 23. p. 15. (b).

The entry must be understood to be upon collusion between the person who enters and the stranger; for otherwise, the stranger not being particeps criminis, there would not be any material difference between this case and that next following, with which Lord Bacon contrasts it. See Liber Assisarum 25, pl. 1.

NOTE 24. p. 15. (c).

It was so held as early as the 5 Edw. IV. See Bro. Abr. seoff. al usei, pl. 32. Fitz. Abr. tit. subjêna 2.

NOTE 25. p. 16. (d).

The words in case of use are important, for the subjêna was never assignable in cases of bare trust and confidence. See the case of Sir Moyle Finch in Coke's 4th Inst. 85.


In all the other editions it is written 27 Hen. VIII, fol. 10. pla. 9. and fol. 30. and pla. 21. but should be as altered. See the Year book.

NOTE 27. p. 16. (f).

The point which was decided in Delamere's case was, that the seoffment of cestui que use in remainder was not within the statute of 1 Rich. III. and that that statute ought to be intended of cestui que use in possession.

The difficulty however to which Lord Bacon alludes, was not as to the point adjudged; but upon another point.
NOTES AND EXPLANATIONS.

point which was debated in the argument of the case, and which depended upon the question—whether a right of use could be given by a feoffment or not? Perhaps the case and question which Lord Bacon states, will, with less difficulty be understood by its being put in the manner following.—A. was enfeoffed, to the use of B. in tail, remainder to the use of C. in fee.—B. the cestui que use in tail enfeoffed D. in fee; then D. enfeoffed C. the remainder-man in use, who enfeoffed E. Now we are to observe, that by the feoffment of B. the cestui que use in tail, the use in remainder to C. was discontinued, because the seisin of A. to that use was devested; but that C.'s use would be revived upon the entry of A:—A. did afterwards enter, and the question was in whom the use in remainder should be revived? whether in A. whom Lord Bacon distinguishes by the title of the first feoffee? or in E. distinguished by the title of the second feoffee? or in C. the original cestui que use in remainder? but upon this point the court was not agreed. See Plow. Comm. 352, 353.

In all the cases cited by Lord Bacon the judges were divided in opinion, whether a right of use was assignable or not:

NOTE 28. p. 18. (g).

In all the other editions it is right out of land, but should be rent, &c. as here altered. See the case in the Year book, 14 Hen. VIII. 4.


Lord Chief Baron Gilbert was of opinion, that the original of uses was from a title in the civil law, which allows of an usufructuary possession distinct from the substance
NOTES AND EXPLANATIONS.

substance of the thing itself. See Gilbert's law of uses, page 3. Lord Bacon however, observes, that the use is nothing like in matter to the usus fructus of the civil law, but that it beareth the greatest resemblance to the fidei commissio of that law.—If the editor might without the imputation of arrogance exhibit to the reader his sentiments upon the subject, he would say, that to his mind the use appears to partake the nature of as well the usus fructus as the fidei commissio—that both are necessary to make up the idea of an use.—As far as concerns the trust or confidence which is reposed in the tertenant, the use resembles the fidei commissio.—In relation to the object meant to be effected by placing that trust and confidence, viz. the possession and disposition of the rents and profits whilst the land or substance of the thing remains in another, the use resembles the usus fructus.

The usus fructus, then, signifying in the civil law the enjoyment of the profits by one, whilst the substance of the thing itself was in another, in all probability gave the title of an use to a similar taking of the profits in our law.

As the statutes of mortmain had prevented the clergy from having the land itself, it seems likely, since they were masters of the civil law, that the usus fructus of that law suggested to them the possibility of their still being able to have the benefit of the land although they were debarred from having the land itself; and that the plan which they hit upon was, to take shelter under the laity and get feoffments made to laymen to their own use; and by that mean they enjoyed the profits of the land; but still they had no mode of enforcing an execution of the trust which had been reposed in the feoffee—like the hæres fidei commissarius in the infancy of
of the *fidei commissio*, the *cestui que use* was at first wholly dependant on the good faith of his feoffee.—
The *fidei commissio* is more like the special trust lawful than the use or trust unlawful; inasmuch as the trust reposed in the *haeres fiduciaris* was not to retain the land and suffer another to take the profits, but to give the inheritance or land itself to the *haeres fidei commissarius* as is evident from the request which accompanied the nomination of the heir in such cases—

*Hugo te Luci Titi* (the *haeres fiduciaris*) *ut cum primum poteris hereditatem meam adire, cum Caio Scio* (the *haeres fidei commissarius*) *reddas* (et) *restituas* See *Just. Inst. Lib. 2. tit. 23. De Fidei. Hered.*

*NOTE 30. p. 19. (i).*

It is to be observed, that the books of the civil law do not call him *cestui que use*, (as the words of our author seem to imply) but the *haeres fidei commissarius*.—If he had been called *cestui que use*, there would have been a stronger reason for the opinion that the *fidei commissio* bore a greater resemblance to the use than did the *usus fructus.*

*NOTE 31. p. 20. (k).*

See *Gilbert's Tenures* 212, 213, and 214, 4. edition, and Mr. Watkins's note, (note 92).

*NOTE 32. p. 20. (?).*

When uses were first introduced the court of chancery could not give remedy in many cases, if it could in any case,
NOTES AND EXPLANATIONS.

case, for want of a competent proof of the trust which had been reposed in the feoffees.—That this proof was wanting in many cases is evident from the chancellor’s afterwards issuing the writ of subpœna to compel the feoffee to answer before him respecting such trust; see Reeves’s Hist. Eng. Law. 193. for if there had been sufficient evidence of the trust by writing or otherwise, there could not have been any necessity for extorting from the feoffee a confession of the fact by means of the subpœna. But, when, in consequence of that writ the chancellor possessed the power of giving remedy, it does not seem probable that he then made question to do so; because uses at that time were mostly for the benefit of the clergy, and the chancellor who was himself an ecclesiastic, no doubt shewed the utmost favour to such uses; indeed the subpœna, according to Blackstone, (3 Black. Comm. 52.) was, by Waltham Bishop of Salisbury and chancellor to Richard the second, devised for the very purpose of making the feoffee to uses accountable to his cestui que use, as it hath been already observed in note 5.

It seems more reasonable to suppose, that the chancery first made a difficulty about giving any remedy after the use had been made subject to the statutes of mortmain; for when the clergy could no longer be benefited by the use, it is probable that the chancellor, (whose chief inducement in compelling the feoffee to a performance of his trust had been to benefit the clergy) did then refuse the subpœna to other persons.

Another reason, why the chancellor about the time that the use was made subject to mortmain might probably have hesitated to give remedy, is, that he was at that time very narrowly watched by the legislature, and his
his newly constituted authority attempted to be controlled. See 3 Reeves's Hist. of Eng. Law. 193.

NOTE 33. p. 20. (n).

That is to say—"fear in times of trouble and civil wars to save their inheritances from being forfeited; and fraud, to defeat due debts, lawful actions, wards, escheats, mortsains, &c." See 1 Rep. 121, 123.

As the gentleman, (I. P. Smith, Esq. of Gray's-Inn,) to whose circumspect research the profession is indebted for the discovery of the original manuscript of Lord Coke's Commentary on the tenures of Littleton, (See the Law Journal, v. 3. p. 117.) expresses himself to be not without hopes of obtaining Lord Coke's reading upon the statute of uses also, to which our author refers, the profession must indulge with pleasure the expectation, of shortly having an opportunity to make so valuable an addition to their libraries. Comprising (as no doubt it would be found to do) a comprehensive and methodical discussion of the subject, it is indeed a desideratum. If however it should not be found, there will be the less reason for regret in consequence of the very full view with respect to the learning of uses, which hath been taken by Lord Coke in his argument on Chudleigh's case, and the other cases in his reports in which he bore a part.

NOTE 34. p. 21. (o).

Our author here attributes the first practice of uses to the reason that the lands were not devisable, in other words,—to the desire of having an indirect testamentary power over the lands by devising the use or profits; and it seems likely, as the ecclesiastics generally obtained their benefactions from dying persons, that the doctrine
NOTES AND EXPLANATIONS. 97

... doctrine of an use being desirable although by law the lands themselves were not, was established for the very purpose that some of the frauds to which Lord Coke alluded might more easily be committed, as for example, the evasion of the statutes of mortmain. See 2 Black. Comm. 328.

NOTE 35. p. 21. (p).

Our author hath just before informed us, that he had considered what the commencement and proceeding of uses had been in course of common law; and what it had been in course of statute; and he is now about to make his reader acquainted with the result of such his examination and reflection upon the subject: and in considering—what it hath been in course of common law—he in the first place attempts to expose the weakness of one opinion upon the subject to which he could not accede, viz. that the use succeeded the tenure.

Pollard and Shelly were contending, that,—an use was not at common law, for that it could not be maintained to be at the common law unless it had had continuance beyond the time of memory, which is beyond the time of King Richard the First; then, in order to show that it was not so ancient, they advance the argument that the use succeeded the tenure, that is to say, that before the statute, Quia emptores terrarum, 18 Edw. I. (passed a long time subsequent to the time of memory,) when a feoffment was made the law created a tenure between the feoffor and the feoffee, which tenure being a consideration, caused the feoffee to be seised to his own use; and that it was not until after the tenure had been taken away by that statute that there was an intendment of an use to the feoffor where a feoffment was made without consideration;
and therefore, inasmuch as uses must have had their commencement after the statute *Quia emptores terrarum* an use could not be at common law: and as the use had not been created by any statute there consequentially could not be any good uses. See the Year book 27 Hen. VIII. 8, 9. *Lord Dacre's case.* The other case 24 Hen. VIII. is to be found in *Bro. Abr. feoff. al. uses,* pl. 40.—Now, supposing this doctrine to be correct, it would follow that uses commenced so early as the reign of Edward the First when the tenure between the feoffor and feoffees was taken away by the statute *Quia emptores terrarum*; and therefore our author, who contended that the first practice of uses was not until the reign of Richard the Second, being a space of upwards of 80 years after that statute, opposes the doctrine by showing that the argument in support of it goes for nothing, because by their own reason if the feoffment had been *tenendum de capitalibus dominis* there would have been an use to the feoffor before the statute. And again—if the use was to the feoffor where there was no tenure, then if a grant had been made of things not consisting in tenure there should have been a use of *them* to the grantor; but instead of the use being to the grantor in such cases, the law was quite contrary; for after the time that uses grew common, it was doubtful, whether things lying in grant did not carry a consideration in themselves because of the deed.—The argument was advanced by Pollard and Shelly in the cases above referred to, with the view of proving that uses were not at the common law; but our author's object in disproving it, is, lest otherwise any conclusion may be drawn from it that uses were so ancient as the time of Edw. I.—his reasons for thinking that uses may be properly said to be at the common law are stated in the next page.

**NOTE**

These words appear to imply that whenever a feoffment was made before the statute _Quia emptores terrarum_, it must have been _tenendum de capitalibus dominis_; that however was not the case, for it was this very statute that required it.

Before the statute _Quia emptores terrarum_, tenants could not _de jure_ alien or transfer the tenure itself without the licence of the lord; in other words, they could not enfeoff _tenendum de capitalibus dominis_ without the consent of those lords; but they might have given a part of their lands to hold of themselves, and a feoffment always created a tenure between the feoffor and feoffee.—The statute, took from the tenants the power of disposing a part of their lands to hold of themselves; and instead of it gave them a general liberty to sell all or any part to hold of the next immediate lord. See Wright's _Tenures_ from page 152 to 160, and authorities.

The words of the statute are _de capitali domino_, but they are to be understood of the next immediate lord. See Lord Coke's exposition of this statute, 2 _Inst._ 501.

Lord Bacon must not therefore be understood to speak of _feoffments_ in general before the statute; but, where there was an alienation with the consent of the lord; and confused to such cases his argument holds good.

NOTE 37. p. 22. (r).

This opinion will derive strength from the reflection, that when the clergy could be benefited by the use and more especially before the introduction of the _subpæna_, it would not have answered the purpose to have construed an use in the feoffor; because, when it was intended
to bestow the profits of the land upon the religious houses, the method was, to make a conveyance of the land to a layman with a secret understanding that the religious houses should have the use or profits; and in such cases to have construed an use in the feoffor would have defeated the object in view.

One great inducement to the intendment of an use to the feoffor where a feoffment was made without consideration may have been, that it took away the temptation to commit perjury and the danger of the feoffor's being defrauded consequent upon that temptation, which must have existed in those cases, where, in consequence of the trust not being committed to writing the court of chancery was obliged to depend entirely on the oath of the feoffee and his regard to truth for a knowledge of the fact, whether a feoffment so made without consideration was intended by the parties as a conveyance of the land for the feoffee's own benefit, or whether it was intended that there should be an use to the feoffor.

NOTE 38. p. 22. (s).

Then it became necessary for the feoffee, when the feoffment was intended for his benefit, to have a declaration of the use to himself where there was no consideration given; and if there was a consideration, either to have a declaration of the use or proof of such consideration.

NOTE 39. p. 23. (u).

See the Year book, Trin. 8 Edw. IV. 5, 6. and Fitz. Abr. tit. subpana pl. 8.—However in the 14 Edw. IV. it was adjudged, that the subpana did lie against the heir of the surviving feoffee. See Fitz. Abr. ubi. sup. pl. 14.

The
NOTES AND EXPLANATIONS.

The case in the Year book 22 Edw. IV. 6, usually referred to by writers in treating of this point, is not applicable; for it was not the case of an use; but the question there was, whether the chancellor ought to grant the subpoena in order to restrain a recognisee from suing execution, the recognisor having paid the money and omitted to take a release? Hussey Chief Justice did indeed in that case say, (alluding probably to the above case in 8 Ed. IV.) that when he came first to the court, it was agreed in a case by all the court, that the subpoena did not lie against the heir of the feoffee in trust; but the chancellor at the same time said, that it was the common course in the chancery to grant it against the heir of the feoffee who was in by descent. Hussey must have been unacquainted with the adjudication in the 14 Edw. IV. by which it was settled that the subpoena did lie against the heir, or he would not have relied upon a previous case where the determination was different.—This case in the 14 Edw. IV. also accounts for its having become—as the chancellor said—the common course of the chancery in the 22 Edw. IV. to grant the subpoena against the heir.

Mr. Justice Blackstone (2 Comm. 329,) relying upon what was advanced by Vavisor in a case in Keilway (Keil. 42. b.) observes, that the subpoena's not lying against the heir was altered in the reign of Hen. VI. which is certainly wrong; for in the eighth year of the succeeding reign all the judges were of opinion, that it did not lie against the heir, as appears from the case mentioned by our author.

A more modern writer also, after stating that 'the principles of equity were so little understood in the reign
reign of Edw. IV. that the subpæna did not extend to the heir of the feoffee who was in by law, adds—that this was soon remedied; and refers to the above mentioned case in Keilway. Now, even supposing the dicta in the case in Keilway to be correct, yet as it refers to the reign of Hen. VI. it is difficult to imagine how any thing which passed in that reign, could remedy the very defect which existed in the subsequent reign of Edw. IV. but the fact is, that it was not settled in the reign of Hen. VI. that the subpæna lay against the heir of the feoffee nor until the 14 Edw. IV. as above observed.

From the first introduction of uses to the 31 Hen. VI. (See Fitz. Abr. tit. subpæna, pl. 19,) it remained undetermined, whether cestui que use could have the subpæna against any other person than the feoffee himself; and even that decision seems to go no farther than this, that if the second feoffee was a stranger, the subpæna did not lie against him; otherwise according to Yelverton and Wylby clerks of the roll if he was enfeoffed merely on confidence.—The question whether the subpæna would lie against a person who gave a valuable consideration, but who had notice of the use, was not determined until the 5 Edw. IV.; when it was held, that if the second feoffee had notice of the intent of the first feoffment, although the land was sold to him, he should be bound by writ of subpæna to perform the last will of the cestui que use. See Fitz. Abr. tit. subpæna, pl. 2.

NOTE 40. p. 23. (w).

It is said in the other editions 13 Hen. VI. but should be the 15. as altered. See the statute 15 Hen. VI. c. 4. and see also 3 Reeves's Hist. Eng. Law. 274, 275.

NOTE
NOTE AND EXPLANATIONS.

NOTE 41. p. 24. (x).

In saying that the first practice of uses was about the time of Rich. II. Lord Bacon did not mean to assert that they commenced in that reign, as is evident from his taking the statute passed in the last year of the reign of Edw. III. (see page 25.) when he comes to notice the progression of uses in course of statutes: however, his opinion certainly was, that uses were not in being before the very close of the third Edward's reign. In that opinion he was opposed by Lord Chief Justice Popham, Poph. 78. and many others of great authority, who considered the cases in 8 Ass. pl. 1. Bro. feoff. al. uses 20, and 44 Edw. III. 25. Bro. ubi. sup. 9. as instances of uses.

With respect to the writ causa matrimonii praecocuti, —which lay where a woman enfeoffed a man to the intent that he should marry her and the man afterwards refused—although on account of the confidence reposed in the man, Montague in Lord Dacre's case (sup. page 11.) argued, that by consequence uses were at common law, yet as Lord Bacon says 'the case of matrimonii praecocuti had no affinity with uses;' for there was no taking of the profits by one whilst the estate at law was in another:—the resemblance was more striking between the case of such a feoffment and intents or special trusts lawful, than between the former and uses; and it was so considered in Dyer 138. b. But there are cases in the books exclusive of those disputed ones in 8 Ass. and 44 Edw. III. which render it certain, that the use was introduced into our law much earlier than the reign of Rich. II. In a case in 24 Edw. III. for example, it is said that a person enfeoffed his friends and took the profits a son oeps demesne,
NOTES AND EXPLANATIONS.

demesne, see Dyer 160. a. 295. a. which is a clear case of an use; and proves that the word opus was used before the reign of Rich. II. although Lord Bacon hath observed in the preceding page, that he had not been able to find any evidence of it: And the case in 24 Edw. III. was cited by Dyer in his argument on Brent's case to prove that uses were in practice a long time before the 15 Rich. II. and Dyer there said that the record of the case was shown in the exchequer in the reign of Mary. See 2 Leo. 17. In Leonard it is said in the 34 Edw. III. but whether it was in the 24 or 34 it equally answers the purpose for which it is here quoted.

NOTE 42. p. 24. (y).

A few remarks on this statute and the intention of the legislature in passing it will be proper—at law, the feoffee to uses was absolute owner of the land and cestui que use had nothing (supra page 6.) so that if the cestui que use had made a feoffment, the first feoffee having still the legal right might have entered on the second feoffee, who would have been at law without remedy, at least as against the first feoffee; this suggested to the owners of land a mode of fraud, by secretly enfeoffing persons of their lands to their use, and then, being still in possession and apparently the owners, conveying them away to bona fide purchasers upon whom the feoffee to uses entered by virtue of such secret feoffments. Now, as long as this fraud was capable of being practised with success no purchaser could have been secure; and therefore, to remedy the evil, the statute 1 Rich. III. c. 1. was passed; which, after stating that 'by privy and unknown feoffments purchasers and others were not in perfect surety, &c. enacts, that every estate
NOTES AND EXPLANATIONS.

estate, feoffment, gift, &c. &c. should be good and effectual to him to whom it should be so made had or given, and to all others to his use against the seller, feoffor, donor, and against all others claiming only to the use of the same seller, feoffor, donör, &c. — It was not for the purpose of making cestui que use more independent of his feoffee — nor as it hath been said "to give cestui que use an alienable power over the possession as well as the use" — that the statute was passed; but to protect purchasers against the joint collusion of both, by making the feoffment, &c. of cestui que use a bar to the entry of his feoffee.

That the intention of the statute was not to give cestui que use generally an alienable power over the possession, is manifest from the preamble of the statute, which states the grievance about to be redressed as arising from privy and unknown feoffments; but although the intention of the legislature was only to guard against the evil consequences of those fraudulent feoffments, yet the enacting part of the statute being general it was held to extend to give every cestui que use in possession the power of disposing of the land by barring the right of entry of the feoffee to his use.

Lord Bacon observes that the statute enabled him to alter his feoffee; that is, supposing A. to be seised to the use of B. as the statute made good the feoffment of B. he might convey to C. to his use and so alter his feoffee; for the operation of the statute was not confined to those feoffments, grants, &c. of cestui que use which should be made upon consideration.

NOTE 43. p. 24. (z).

The special intent unlawful and covinious was the original of uses — In consequence of this as well as a former
NOTES AND EXPLANATIONS.

former expression of our author which has been commented upon in note 8, some modern writers have held, that the cases of special covinous intents mentioned in a former page were never looked upon as uses; but it never could have been Lord Bacon's meaning; for one of the reasons given by him for thinking that the first practise of uses was about the time of Rich. II. is, that the statute 15 Rich. II. which related to one of those special covinous intents, viz. the evading the statute of mortmain, had in it the word use. Indeed in the three or four pages immediately following the one which contains a reference to this note, he has taken all the statutes concerning those special covinous intents when considering the progress of the use in course of statutes; and after having stated all the statutes before 1 Rich. III. and which are all in cases of special covinous intents, he observes (page 27,) that there is a silence of uses in the statute book.——

Now what is the inference to be drawn from all those passages but that those special covinous intents were formerly uses and looked upon as such by Lord Bacon? By the above expression therefore, it is conceived that Lord Bacon's meaning was, that uses in the beginning, or in other words when first introduced were of an unlawful and covinous nature, although they afterwards induced to the lawful intent general and special or use as it was in his time. And see notes 6, 8, and 48.

NOTE 44. p. 24. (a).

In the other editions the words are general and special; but should as the editor conceives be general and permanent; for our author's meaning is evidently that what was then called the special intent unlawful induced to uses; and in page 9 he informed us that an use is where the trust is general and permanent.

NOTE
NOTES AND EXPLANATIONS.

NOTE 45. p. 24. (b).

As the statute 50 Edw. III. hath been adduced by Lord Bacon as his reason for thinking that the special intent unlawful was the original of uses, there arises an inference that in Lord Bacon's opinion the first application of the use was for the purpose of committing those frauds on creditors which that statute was passed to prevent; and consequently, that uses were not first introduced by the clergy for the purpose of evading the statute of mortmain as contended for in note 29; but it doth not appear to the editor, that the bare circumstance of the 50 Edw. III. having a priority in point of time to all the other statutes relating to uses, warrants any such conclusion; because the subpoena not having been introduced at the time of that statute the clergy had no means of compelling an execution of the trust; and the observance of his trust not being compulsory on the feoffee to uses the payment over of the profits to the houses of religion was not deserving of the legislature's attention; for as it was entirely optional with the feoffee either to pay over the profits or not, the clergy had no manner of control over the land or the profits of the land; and consequently, there could not have been any reason to apprehend from that application of the use those evil consequences against which the statutes of mortmain were intended as a safeguard: but when in the reign of Rich. II. the subpoena was introduced, and the chancery established, as the chancellor considered it as a part of the duty of the feoffees—and therefore compelled them—to answer for the profits of the land; and to make such estates of the and as their cestui que use should direct; the cestui que came to have a control over, not only the use,
NOTES AND EXPLANATIONS.

or profits of the land, but the land itself: and then the same policy which had dictated the statutes of mortmain with respect to the land, required, that the use should be made subject to mortmain also, and the statute 15 Rich. II. was accordingly enacted for that purpose. No conclusion therefore is to be drawn that uses were not first introduced by the clergy for the purpose of evading the statutes of mortmain from the mere circumstance that the first statute respecting uses concerns an application of the use for the purpose of defrauding creditors; because in the former case uses were resorted to for the evasion of some statutes relating to the land, which had been passed chiefly from motives of civil policy; and consequently, there could not be any reason for making the use subject to those statutes, until the legislature had cause to apprehend the same dangerous consequences from the use of the land being in mortmain, that had formerly existed with respect to the land itself; but in the latter case as individuals were defrauded the inconvenience of uses was in that particular case immediately felt, and legislative interference sooner demanded.

NOTE 46. p. 24. (c).

The editor hath altered the text in this place, by substituting the word feoffors instead of feoffees, because the opinion to which Lord Bacon alludes, was, that when persons enfeoffed their eldest sons within age, in order to defraud the lords of the fee of their wardships, there the feoffors took the profits during their lives. See the case in the Year Book, 27 Hen. VIII. 8. and Bro. Abr. feoff. al. uses, pl. 4.

Notwithstanding Lord Bacon considered this opinion as being but a conceit, Mr. Reeves in his valuable his-
NOTES AND EXPLANATIONS.

tory of the English law, 3 vol. 175. has adopted it; and hence concludes that uses were as ancient as those feoffments; for, (he observes) no doubt the ancestor retained to himself a right to the profits during his life. If this conclusion be just, uses are of a very ancient date indeed even before the statute of mortmain, 7 Edw. I.; and then it would follow, that the distinction between the lands and the profits of the land was not introduced by the clergy from the civil law for the purpose of evading that statute: but in reply to the observation of Mr. Reeves, that the feoffor did take the profits, the editor has to remark, that it comes unsupported by any reasoning, and merely rests upon the unsubstantial ground of probability—it is assuming the very thing which ought to be proved before it is made the groundwork of an argument; and perhaps the following positive assertion of Lord Chief Justice Popham, (see Poph. 71.) that 'the use always went with the possession and was not to the feoffor' in this case, would of itself induce the reader to believe, that whatever the probability of the thing may, in the estimation of some, be, the fact was that the profits were not taken by the feoffor. If however Popham shouldn't be regarded as a sufficient authority, the most convincing reasons are here given by Lord Bacon, to prove that the use was not to the feoffor, in case of the statute of Marlebridge; for he says, that the law in his time was, that if a man enfeoffed his eldest son within age and without consideration, the profits would be taken to the use of the son, and yet it would be a feoffment within the statute: now, if there had been an use to the feoffor at the time of the statute of Marlebridge, in such a case as Lord Bacon hath above supposed, their would be by the same reason an use to the feoffor,
feoffor in his time; but the law he observes was otherwise, for notwithstanding such a feoffment would be within the statute of Marlebridge, still the profits would not be to the feoffor, but to the use of the son. Lord Bacon's object was to infer what the law had been formerly, by proving what it was in his time in a case and under circumstances precisely similar.

The fraud which the statute was passed to remedy was this.—In order to prevent infant heirs from being in ward, it was usual to enfeoff them of the lands which they would otherwise have by descent, to the end that they might claim as purchasers and so defraud the lord, who had no right to the wardship of the infant heir of his tenant, unless the heir were in by descent.

The statute itself is become obsolete since Lord Bacon's time; in consequence of the statute 12 Car. II. cap. 24. having converted tenure by knight service, into free and common socage.

NOTE 47. p. 25. (d).

This, certainly furnishes a very strong presumption that uses had not been introduced when this statute was passed; for if they had the use would have been mentioned as well as the gift, long lease, and feigned recovery.

The words arte vel ingenio cannot be understood to allude to the use particularly as a thing then in being; but only show, that the legislature was aware that every thing in the way of evasion was to be apprehended from the craft of the clergy; and the event proved that the suspicion was not without foundation, since they afterwards imported the distinction between the lands and the use or profits from the civil law.
NOTE 48. p. 25. (e).

It has been said by a modern writer, that "the trusts hinted at in this as well as in the statue 50 Edw. III. are not uses;" but as this opinion is at variance with all former authority, and contradicted by Lord Bacon himself, some of whose observations have been cited in support of it, the editor is compelled (not however without much reluctance) to offer a few remarks in reputation of it.

The reason given for this opinion, is, that the trusts mentioned in those statutes, being of a special and transitory nature, want the permanent quality of an use; and the reason itself wholly depends upon the following expression of Lord Bacon's, in page 9—

"Where the trust is not special and transitory, but general and permanent, there it is an use."

It will be contended by the editor, that that expression of Lord Bacon's does not warrant any such conclusion as that the statutes just mentioned did not relate to uses; and the ground upon which it will be contended, is, that Lord Bacon was not describing the nature of an use at the time of those statutes, but what the word use imported at the time of his reading.—If Lord Bacon, when he used the expression, had been defining the use in the reign of Richard II. it would have followed that the trusts mentioned in those statutes were not uses being of a special and transitory nature; but as he was treating of the use in his time, upwards of two centuries subsequent to the reign of Rich. II. it did not follow, that because the use was then a general and permanent trust, that it had not been formerly a trust special and transitory.

The
The gentleman above alluded to seems to have argued upon the ground, that because the trusts mentioned in those statutes were temporary, and uses are permanent trusts, that therefore there was a fundamental difference in the nature of the one and the other; whereas, they were exactly the same in nature; for the nature of an use consisted in this—that one person had a right in conscience to the profits whilst the estate of the land at law was in another—or, as Lord Bacon has expressed it in page 9. supra.—‘An use is an ownership in trust.’—Then, supposing that a right to, or the equitable ownership of, the profits distinct from the land, to mark the nature of an use, our author has not asserted any where that there was any difference in nature between the special trust unlawful and permanent trust lawful. When he used the expression quoted above, he was giving the definition of an use as it was in his time, and nothing could be more correct than his observations, that although an use according to the signification of the word when he wrote (as the word was then used, see page 8.) was no covin, yet that the special intent unlawful and covinous was the original of uses; for there is no doubt but that the use with respect to the purposes of its application underwent a change—the idea was introduced fraudulently says Blackstone, 2 Comm. 329, but was afterwards innocently, and sometimes very laudably, applied to a number of civil purposes.

It has been also said by the modern writer above alluded to in support of his opinion, that ‘it appears very clearly, that the legislature did not conceive the trusts mentioned in the statute 50 Edw. III. c. 6. to be uses; that statute made the lands, subject to them,
liable to the execution of the creditors of cestui que trust in the hands of the trustee; whereas the lands of cestui que use were not liable to executions in the hands of the feoffees, neither was the use itself extendible for the debt of cestui que use, as appears by a subsequent statute,' viz. 19 Hen. VII. c. 15. But the fact is, that the statutes 50 Edw. III. c. 6, and 19 Hen. VII. c. 15, both related to uses, and had in view the remedying of the same evil, as will appear from what our author himself says in page 28: the only difference is, that the former of those statutes aided by the 2 Ric. II. c. 3. gave relief to judgment creditors in cases of sanctuary men only; that is to say, to those who made feoffments of their lands upon trust for themselves and then fled to privileged places; and the latter statute, as far as it relates to creditors by judgement, made the relief against cestui que use general.

We have seen by what argument the opinion that the trusts mentioned in the statutes 50 Edw. III. c. 6, and 1 Ric. II. c. 9, are not uses—has been attempted to be supported: and with respect to authority, it is believed that every authority has looked upon those trusts as uses.—Montague in Lord Dacre's case (supra 11.) considered the trusts in 50 Edw. III. and 1 Ric. II. c. 9, uses; and York in the same case, in speaking of the last statute so considered them: so again Plowden in his argument of the case of Basset and Morgan v. Manrel, after observing that the statute 1 Ric. II. c. 9, makes recoveries good against those who take the profits says, which is as much as to say, cestui que use. See appendix to Plowd. Com. 3. Coke also, in his argument in Chudleigh's case (1 Rep. 123.) observes expressly, that the pernorr of the profits mentioned...
tioned in this statute of 1 Ric. II. c. 9. was "autui que use;" and Popham also Poph. 78. with respect to the statute 50 Edw. III. is to the same effect.

That they were considered as relating to uses by Lord Bacon also, is certain, from his mentioning those statutes when he states the progression of uses in course of statutes, and from his observation in page 29, after he had reviewed the other statutes and alluding to those in common with the others—"This is the whole course of statute law touching uses." See also notes s. 3. and 43. In fine, there is no authority in support of the opposite doctrine.

NOTE 49. p. 25. (g).

At this time, the several statutes passed in one year did not follow each other chapter after chapter throughout the whole year, as now; but the acts of each session were kept separate from the acts passed in the other sessions of the same year. Thus the second act passed in the first session of the 2 of Ric. II. was distinguished by the second chapter of the first statute or session of Ric. II.; and so the third act passed in the second session of the same year was distinguished by the third chapter of the second statute or session of the 2 Ric. II.

NOTE 50. p. 27. (h).

In all the editions preceding the last, this and the following line read thus "as defendants in præcipes whether they be creditors, disseisors or lessors, and that only in case of mortmain,"—the propriety of inserting the words demandants and disseisees in the room of defendants and disceisor is obvious; but the alteration of the words and that to the word except seems to require
NOTES AND EXPLANATIONS.

require an observation, since it materially changes the sense of the passage.—Lord Bacon has stated generally that no relief is given to purchasers that come in by the party, but to such as come in by law. Now, the words, and that only in case of mortmain, gave this meaning to the whole, that even to those who came in by law relief was given only in case of mortmain, although he observes at the same time that such relief was given to demandants in prœcipites whether creditors, disseisors, or lessors, who all come in by act of law, but yet have nothing to do with mortmain: and in addition to the contradiction which the words and that occasioned, it is to be observed, that in the case of mortmain, relief was not given to those who came in by law. It could not therefore have been Lord Bacon's intention to have used the words and that.

With respect to the word except, it is presumed, that a sufficient reason for its being substituted, will appear, when it is considered that in case of mortmain relief was given by the above mentioned statute, 15 Ric. II. c. 5. to those who come in by the party, for that statute enacted, that the lands in use should within a certain time be amortised by the licence of the king and lords or aliened to some other use.—Lord Bacon therefore having said that in all the course of statutes which he had spoken of, and whereof the said statute, 15 Ric. II. was one there was no relief given to those who came in by the party, must have intended to qualify the generality of that assertion by an exception of the case of mortmain.

NOTE 51. p. 27. (i).

From this it appears to have been Lord Bacon's opinion, that uses had been hitherto in course of statutes
what in his time were not called uses, but distinguished from uses by the title of special covinous intents.

NOTE 52. p. 27. (k).

That is to say—uses at that period bore a resemblance to the use in the time of Lord Bacon: they had become general and permanent. The practice of making feoffments to uses was not when the statute 1 Ric. III. was passed, resorted to for the temporary purpose of committing a particular fraud, but fear had now become the instigator—the fear of losing the land if they themselves continued seised of it during the civil commotions, when each party as Blackstone observes, 2 Comm. 329, as it became uppermost alternately attainted the other.—This led them to trust the possession of the land to some person in whose hands it would probably be more safe than in their own; hence the reason, why Richard the Third was enfeoffed in so many cases. For the cause of making the statute 1 Ric. III. c. 1. see note 42.

NOTE 53. p. 27. (l).

The editor is inclined to think, it was Lord Bacon's meaning, that the statute was not confined to feoffments, &c. upon good consideration but was generally worded; and consequently, that the passage ought to end with the word generally and a new one commence with the word in; but it does not appear sufficiently obvious to induce the editor to alter the punctuation.

NOTE 54. p. 28. (m).

In the last edition it is said the 56, owing most probably to an error of the press, for Edward III. reigned only fifty years and a few months.
NOTES AND EXPLANATIONS.

NOTE 55. p. 29. (n).

The use returned to the feoffor and his heirs in this case, see page 67.

NOTE 56. p. 29. (o).

There is one statute which Lord Bacon has omitted to notice which enacts, that grants made by fraud or covin of chattels to the use of the persons that made the same, shall be void. See 3 Hen. VII. c. 4.

NOTE 57. p. 34. (q).

For the first of them—There are three impediments—The word them was in the last edition substituted for these; and it has been deemed proper to continue the alteration as Lord Bacon alludes to the first head of the particular inconveniences spoken of above, viz. that conveyances in use are weak for consideration.

The word there is an addition by the present editor who thinks it impossible that Lord Bacon could have meant to say—'For the first of the particular inconveniences are three impediments,' because such an expression would have been not only ungrammatical but without sense. By the words for the first of them it is conceived that Lord Bacon intended to intimate, that he was about to treat of the first head of the particular inconveniences, and that he then intended to commence his observations on that head with observing—There are three impediments, &c. Indeed this conjecture is sanctioned by his stating the second head relating to trials in a similar way in the next page.
NOTES AND EXPLANATIONS.

NOTE 58. p. 35. (r).

For trials by wager of law, and wager of battle mentioned in the second line below, see 3 Black, Comm. 341 and 347.

NOTE 59. p. 36. (s).

In the former editions it was as a hard law, but should be as it is conceived is a hard law; for in page 12 the author observes, the law of collateral warranty is a hard law, and his meaning in this place appears to be that the collateral warranty although it is in all cases a hard law, yet it grew in doubt only in favour of purchasers.

NOTE 60. p. 37. (u).

The word demandands hath been in this edition inserted in the place of defendants.

NOTE 61. p. 37. (v).

In the other editions, it is estates and tithes—the propriety of the alteration from tithes to titles is obvious.


Whether it was the intention of the legislature utterly to abolish all conveyances to uses, was a disputed point in the time of Lord Bacon, and one upon which a difference of opinion exists at this day.—It was formerly a point of considerable moment, inasmuch as a very important question was governed by it, namely, whether any uses should be preserved by the equity of the statute which otherwise would by the strict construction of its letter be destroyed?—Thus in Chudleigh's case Periam and Walmsley who argued in favour of the contingent use, contended, that it was not the inten-
tion of the statute to extinguish or eradicate any uses (1 Rep. 132); whilst on the other hand, the eight justices and barons who argued against it, held, that the statute should not—against the express letter of it—be construed by equity for the preservation of contingent uses, (ibid. 138. 1 And. 335. 343, 344.) and indeed this resolution of the eight judges in Chudleigh's case may be regarded as a judicial acknowledgment that the intention of the statute was to root out the practice of making conveyances to uses, and notwithstanding the observations of Lord Bacon in this place against that conclusion it does really appear to the present editor to be warranted by the statute itself.

The editor proposes to state in this note, the arguments in favour of the opinion that it was the intention of the legislature in passing 27 Hen. VIII. c. 10. to extirpate the practise of making conveyances to uses, examining as he proceeds all that Lord Bacon has advanced with the view of lessening the force of those arguments; and in the next note to examine the arguments of Lord Bacon in support of the opposite doctrine.

The statute, then, after stating that the evils of which it complains arose by reason of fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, goes on to say, that for the extirpating and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors heretofore used and accustomed, &c.—the estate of the feoffee shall be in cestui que use.—Now, if the intention of the legislature is to be collected from its own positive expressions declaratory of what that intention was, the object which it aimed to attain was the extirping of all such subtle practised feoffments to uses theretofore
NOTES AND EXPLANATIONS.

theretofore used. Lord Bacon says, that the extirpation which the statute meant was plain to be of the feoffee’s estate, and not to the form of conveyance; but this is saying that the intention of those who made the statute was not that which they themselves have in definite terms declared that it was—it is giving to plain and express words an exposition different from their clear literal import, and—quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est.

Even if that intention had not been positively expressed, there would have been sufficient matter in the other parts of the preamble to justify a conclusion, that the legislature could not have intended that feoffments to uses should continue—feoffments, to which the epithet fraudulent is applied as if to mark the odious light in which they were viewed. To suppose that the legislature meant to continue such feoffments is to believe that it meant to countenance frauds.

The words heretofore used also seem to admit of an inference of its having been expected, that the feoffments to uses which had been used before, would not be used after, the act.

As all the benefit which cestui que use derived from the use, as well as all the mischief which the use occasioned to other persons, arose, in consequence of the use or equitable right to the profits being separate from the possession, it was perhaps expected by the makers of the statute, that the transferring of the possession to the use, and thereby blending them, would have had the effect of extirpating the practice of conveyances to uses, by taking away that temptation to the practice which existed when the use was distinct from the possession.

By
NOTES AND EXPLANATIONS.

By transferring the possession to the use, it was in fact rendering a feoffment to uses a nullity as to any advantage to be derived from the use; for if a feoffment after the statute had been made to A. to the use of B. by the operation of the statute it would have been the same thing as if a conveyance of the land had been made to B. in the first instance; for B. could not dispose of the use by will in this case, as he might have done before the statute, inasmuch as a devise of the use by reason of the possession's being united with it would have amounted to a devise of the land itself, and lands at the time of the statute were not devisable.

Another consequence of uniting the possession and use, was, that if the cestui que use died, his heir within age, the lord would have had the wardship of the heir—the wife of cestui que use would have had dower, &c. &c. B. might therefore as well have taken a conveyance of the land to himself, as to a trustee to his use: and for the same reasons no one could have had any inducement to convey away the possession for the purpose of taking back the use to himself, seeing that the use, in consequence of the possession being united with it, would be subject to the same incidents of tenure, &c. as before the conveyance made; and that cestui que use was then as incapable of devising the use as the land itself. A devise of the use, was in fact, after the statute equivalent to a devise of the land and therefore void. But it is conjectured, that a new mode of indirectly devising lands was struck out between the statutes of uses and wills by means of feoffments to the use of such persons as should be appointed by will; thereby making the will a designation of the person to
take the use, and not a devise of the use then vested in
the testator; but for this see infra note 80.

Again—the words *abuses and errors* which are joined
with the feoffments, &c. show strongly, that the statute
meant to root out those feoffments, &c. and the *abuses*
and *errors* to which they had given rise.—When the
statute says that for the *extinguishment of such* feoff-
ments, *abuses and errors*—be such and such things
caused—is it to be supposed that the statute meant
that those feoffments, abuses, and errors, should con-
tinue? Lord Bacon, in commenting upon these words
says, 'that may be an abuse of the law which is not
against law'—admitted—but when the statute provides
means for the avowed purpose of extinguishing such
an abuse is there not every reason to suppose that it
was intended to prevent the future practice of it?

The 14th section of the act also, furnishes a very
strong reason for thinking, that the statute meant to
discountenance the practice of uses in future; for it
gives to the *cessei* que *use*, benefit of voucher, aid-
prays, &c. only where his estate should be executed
within a year from the time of the statute, viz. until
the 1 of May 1536, but not after. Now, if it had been
intended to preserve the practice of uses, the same ad-
vantages would have been also given to such *celes que*
*use* as should have their estates executed after that
period.

Upon the above grounds therefore, it appears to the
editor, not unreasonable to conclude, that the intention
of the legislature was (what the act itself says) the extir-
pation of those fraudulent feoffments to uses; and the
extinguishment of the abuses which existed in conse-
quence of those feoffments; and that the way which
they
they thought the fittest for such extirpation and extinguishment was the rendering such feoffments a nullity by annexing the possession to the use.—The subject will be continued in the next note.

NOTE 63. p. 39. (z).

In attempting to controvert arguments which Lord Bacon has pronounced unanswerable, the editor must be understood to speak with the utmost diffidence. In the preceding note it hath been contended, that the transferring the possession to the use was not the ultimate design of the legislature, but that they had a further object in view, viz. the extirpation of the practice of uses; and that the blending the possession and use was the mean which they provided to promote that end, conceiving as all the mischief had arisen from the possession and use being separate, that uniting them would have the effect of putting an end to the practice, by rendering it unavailing, but to this doctrine our author is decidedly hostile.

The first argument advanced by him to prove that the statute meant not to suppress conveyances to uses, is—that it hath in the very branch thereof words de futuro, 'that are feized or hereafter shall be seized.' Now, without relying on the argument, that those words were inserted in regard of uses suspended by disseisins, they do not appear to me to authorise the opinion that the statute meant to continue uses; for whatever might have been the object of the statute, those future words were most certainly necessary to perfect the means which the legislature had provided. If the act had merely said, 'where any person or persons stand or be seised' it would have applied to conveyances to uses at the time of the act, but would not have
have extended to uses created after.—The only legitimate inference from the circumstance of the statute's having words de futuro, in the humble apprehension of the editor, is, that it was foreseen by the legislature that uses would continue unless some such words were inserted, but not any such inference, as that the legislature expected that uses would continue or meant to countenance their continuance.

The second reason—"that no hereditaments shall pass, &c. or any use thereof," is sufficient to show that at the time of the statute of enrolments it was thought that uses would continue in the case of bargains and sales, but not that there would be conveyances to uses after the statute; nay, the presumption is, that it was not thought that uses would continue in other cases than bargains and sales, or they would have required an enrolment of all instruments whereby the use might pass. If they had thought that there would have been recoveries (for example) to uses, there would have been the same policy in requiring an enrolment of the deeds to lead the uses of those recoveries, for the purpose of preventing a secret transfer of the land by a transfer of the use, as there was in requiring an enrolment of bargains and sales.

But it will be asked, what reason could the legislature have had for supposing that uses would continue in the case of bargains and sales, and not in other cases? If the editor has taken an accurate survey of his subject, there was a sufficient reason, and it is this—that as it was probably thought that the annexing the possession to the use would render conveyances to uses nugatory, the practice of making feoffments, levying fines and suffering recoveries, to uses, would fall to the ground; but with respect to bargains and sales at the time
NOTES AND EXPLANATIONS.

time of the statute, the having of the use was not the primary object; on the contrary, the intention was, that the bargainee should have the land itself; but where by reason of any defect in the feoffment, or by the refusal of the bargainor to make such feoffment according to his contract, the bargainee failed of having the land itself, in such cases the court of Chancery considered the bargainor after payment of the purchase-money, as being seised to the use of the bargainee: the court of Chancery therefore, ruled by the same equitable motives, would, it might have been supposed by the legislature, continue to make the same construction in similar cases, and to prevent the land from passing secretly in this way an enrolment was directed.

The motives to the raising of uses were different in general cases to what they were in the case of bargains and sales; for in general cases, by which is meant in cases of conveyances made to uses, the end and intent of those conveyances, was, that the use might be disposed of distinct from the land; and that it might be free from those charges to which land was subject; but as these things could not be after the land was transferred to the use, it must have been reasonable to suppose, that, as the motive to the making those conveyances necessarily ceased, the practice would cease also; but in the case of bargains and sales, the court of Chancery gave the use to prevent an injury to the bargainee, and as the same equitable motives would continue, it was reasonable to suppose, that the construction of an use to the bargainee would continue.

The statute of enrolments, therefore, does not prove, that it was expected there would be conveyances to uses after the statute.
NOTES AND EXPLANATIONS.

With respect to the third reason advanced by our author, and which is grounded upon the statutes speaking in one of the provisos of uses made and executed after the 1 of May 1586, the same remarks which were made on the first reason, apply with equal force here, that because they thought it possible that uses might continue, does not favour the opinion—and much less prove—that it was intended that they should continue, or that it was expected they would, for the legislature might have supposed the possibility of their being conveyances to uses after the statute, and yet have entertained an expectation that there would not be any such conveyances in consequence of their having by transferring uses into possession so altered the use as to have taken away every inducement to the practice. But Lord Bacon says, if they had had any such intent, the case being so general and so plain, they would have had words express 'that every limitation of use made after the statute should have been void.' This argument, which Lord Bacon seems to have considered the strongest, really does not appear to the editor to be a very forcible one; for where different means present themselves, which are likely to attain the end in view, does it necessarily follow, because the most prompt were not made choice of, that it was not intended to attain that end at all? or if such an inference could be drawn where the intention was dubious—could it be entertained in a case where it is said in positive terms, that the means were provided for the very purpose of carrying that intention into execution? And here the legislature says, that it is for the extirping and extinguishment of those fraudulent feoffments, &c. to uses and the abuses, and errors consequential thereupon, that it is about to enact that the estate, &c. of the feoffees shall be in cestui que use.
It is impossible to say positively, why the legislature preferred the joining the use and possession, in order to prevent the practice of conveyances to uses, rather than to declare uses at once void; but the editor will be allowed to observe, that the practice of uses was at the time of the statute prevalent throughout the kingdom; and it might therefore have been thought by those who planned the act, that the most likely way to make it pass, was, to make use of indirect rather than direct means: and perhaps the means which were provided, considered in every point of view, were the wisest; for if, as Lord Bacon suggests, the act had said, that every limitation of an use made after the statute should be void, it would have taken in uses on bargains and sales which arose from the equitable construction of the court of Chancery, and from motives the most base; and uses upon bargains and sales, Lord Coke observes, they thought convenient to continue, 1 Rep. 125.

Another reason why the makers of the act must have had objections to declare every limitation of uses which should be made after the statute void, is, that by a statute passed only four years before, viz. the 23 Hen. VIII. c. 10. such uses as those to parish churches, chapels, guilds, fraternities, &c. not being corporations, were made good, provided such uses were not appointed to continue above the term of 20 years from their commencement. Now if they had said in the statute 27 Hen. VIII. that 'every limitation of use made after the statute should be void,' then the authority which had been so recently given by the statute 23 Hen. VIII. of limiting such uses as are mentioned in that statute would have been taken away; but it is plain that the legislature did not mean to interfere with that class of uses, because the statute 27 Hen. VIII. is...
so worded as only to have operation where there is a person seised to the use of another person or a corporation, and in the case of 23 Hen. VIII. they are not so seised but only to the use of a thing, work, or fraternity not incorporated.

Viewing therefore the three reasons advanced by our author in the above light, the editor cannot but acquiesce in the sentiments of Coke, that it would be absurd to say that the makers of this act intended to preserve uses when they expressly say that they intended to extirpate and extinguish uses. See 1 Rep. 125.

NOTE 64. p. 40. (a).

The words of 27 constitute a very vague description of the statute 27 Hen. VIII. c. 10. which is the statute alluded to. A particular description of the statute was redundant inasmuch as the proviso of which our author is speaking forms a part of the statute itself, and the words of the proviso are by authority of this act without saying more.

NOTE 65. p. 42. (b).

In some of the other editions the expression is to the use or pernancy—in others, to the use or pernors—but ought to be to the use or intent as is evident from the statute, which see.

The case alluded to by Lord Bacon is the case touching the execution of rents; for which see page 52.

NOTE 66. p. 42. (c).

' For they are created to an use certain'—In the editions preceding the last the expression, was, ' for they are equalled to an use certain,' and if Lord Bacon intended to have made use of the word equalled, (which the
the editor cannot think he did, it must have been in this sense—that a corporation of itself implies the having to its own use and behalf, as it is said in Gilbert's Law of Uses 170, and so was equalled to an use certain. In the last edition, the word enfeoffed was substituted for equalled; but the word enfeoffed is not, it is conceived, calculated to give to the passage that significance which the author intended it to bear, for a corporation would be enfeoffed to an use certain if enfeoffed to other uses than for its own benefit. Lord Bacon's meaning obviously is, however, what he has more clearly expressed in page 57, viz. that 'their capacity is to an use certain,' or in the words of Gilbert in the work just now quoted (page 5,) that they can only take for the ends of their creation: and the editor conceives, that the word created is a more proper word for the purpose of passing that meaning than either equalled or enfeoffed. Whether a corporation can stand seised to an use or not, see note 113 infra.

NOTE 67. p. 42. (f).

In the other editions instead of feoffee over, it is said feoffor over; but there is not any part of the statute which speaks of a feoffor over. Lord Bacon is taking notice of the material words on the part of the feoffees, and therefore it is presumed that he intended to express what indeed is apparent from the act itself—that the statute when speaking of the feoffee doth ever (in every instance) insist upon the word person.

NOTE 68. p. 42. (g).

The word prevent was injudiciously substituted for pervert in the last edition. The meaning of the passage evidently is, that, as chattels themselves, viz. the substance
NOTES AND EXPLANATIONS.

substance or thing itself was transmissible by will; therefore they were not perverted by the use, that is to say, nothing was turned out of the ordinary course by the devise of the use of them, so that there was no necessity for uses of chattels to be executed by the statute in order to remit the common law as to them; and hence the reason why some words applicable to chattel interests were not made use of as well as words applicable to freeholds.

NOTE 69. p. 42. (A).

Therefore, supposing that future uses are limited to arise upon any given event, if before the happening of that event the estate of the feoffees has been devested and turned to a right of entry, the statute will not carry that right to the persons intended to take the new uses, so as to enable them to enter and to acquire the possession; but the feoffee himself must first enter and revest before any thing will be executed by the statute: And as uses are not executed when in contingency (for which see pages 42 and 43, and note 71,) this constitutes an answer to those who contend, that 'where the estates have been so devested and turned to a right, the re-entry of the feoffees is not in any case necessary in order to give effect to future uses, and to their being executed by the statute, but that the future cestui que use may well enter without any such previous entry by the feoffees,' for as the statute does not transfer rights, and as by reason of the disseisin there is nothing left in the feoffees but a right of entry, it follows, that when the event happens upon which the new use was to have arisen, there is not anything in the feoffee which the statute can carry to the use, and consequently the statute could not give the intended cestui que use any right.
right to enter until the feoffee has entered and re vested
his estate, when immediately that estate would be
executed to the use by the statute. See notes 89.
and 90.

NOTE 70. p. 42. (i).
The word not was first inserted in the last edition,
and was clearly necessary since Lord Bacon is observing
that rights are excluded in other words not executed by
the statute.

NOTE 71. p. 42. (k).
That is—so long as they continue contingent—when
they come in esse the statute will execute them. The
reason here given by Lord Bacon against the execution
of uses whilst in contingency, viz. that the fee simple
cannot be but to (in other words, that it cannot be to
more than) the fee simple of an use, would not be
satisfactory in all cases; as for example, where a
feoffment in fee is made to the use of one for life with
a contingent remainder to his eldest son, the non-
execution of the use to the son, would not be accounted
for by the reason that the present uses draw away from
the feoffees all the fee simple of the land; because, in
the supposed case, the uses limited do not comprize
the whole fee simple of the use. And in cases where
the present uses amount to the whole fee simple of the
use, as if in the above case,—the remainder of the use
had been limited over to one and his heirs after the
contingent remainder to the eldest son—the reason
above given by Lord Bacon, would not satisfactorily
account for the non-execution of the contingent use,
since had that use as well as the other uses been in esse,
the fee simple of the feoffees would have been com—
petent to supply the whole with the possession, according to the measure of the different estates in the use.

A better ground and a sufficient one in every case is, that, which was relied on by a great majority of the judges in Chudleigh's case, that the statute only executes the possession to the use where the cestui que use is in esse in consequence of the words of the statute, which say, that the estate and possession, &c. shall be in such person who hath the use, and that said eight of the judges cannot be till the person and the use also be in esse. See 1 Rep. 136. b.

The other reason assigned by Lord Bacon, viz. that the feoffee could only execute to uses present' is a reason why the legislature might have declined to cause the execution of contingent uses, rather than a reason why the statute does not admit of being extended to them.

NOTE 72. p. 43. (l).

The word raised hath been in this edition substituted for seised.—Our author having said, that in consequence of the word hereafter conveyances to uses which had been made before, disturbed by disseisin at the time of, and re-continued after, the statute, were brought in, obviously intends to impress his reader with the opinion, that there is nothing to prevent their being so brought in; inasmuch as there are not other words coupled with the word hereafter similar to those which he states and which if used would have the effect of excluding them.—" For it is not said enfeoffed to an use hereafter—" Lord Bacon could not have intended to add the word seised for the passage would be without meaning; or if it could be said to carry any meaning
meaning at all, it must be this—enfeoffed to uses to which the feoffees had been already seised, and to which they should be again thereafter seised; and then the words would have gone directly to bring in uses, the seisin to which had been disturbed before the statute, and recontinued after, whereas he evidently intended to set down words, which if inserted in the statute would have prevented the word hereafter from extending to a subsequent seisin to such uses. Now had it been said enfeoffed to an use hereafter raised, then the statute could not have extended to conveyances to uses made before the statute; but only to those uses which should be raised by conveyances made after the statute; and Lord Bacon is supposing words which if used would have confined the statute to uses afterwards raised—For these reasons the editor conceives, that Lord Bacon wrote raised and not seised.

NOTE 73. p. 43. (m).

In all the other editions it is said 'which is to be understood;' but it is apprehended, that our author's meaning was, that the word hereditament did not confine the operation of the statute to inheritances in esse; but that it applied also to other things whereof there was no inheritance in being; and on that account the editor hath given a different turn to the signification of the passage, by an addition to it of the words not solely.—Indeed the observation made by our author upon the case which he hath stated immediately after by way of example, proved, that the addition was necessary; for after saying, that a rent charge granted de novo to an use is good he observes, "yet there is no inheritance in being of this rent."
NOTES AND EXPLANATIONS.

It was deemed proper to say not solely because if no other word besides the word not had been inserted, the passage would have implied, that the word hereditament had no reference to inheritances in esse; but to those things merely, whereof there was no inheritance in esse; which would have been wrong, the meaning being, that the word hereditament is not confined to inheritances in esse, but that it applies to other things of an inheritable nature as well.

NOTE 74. p. 43. (n).

The position that "an use cannot be upon an use, hath in the introduction to a recent publication been made the subject of much intemperate though impotent censure—intemperate it may well be considered, when with the view of ridiculing the profoundly learned character by whom it was advanced, such observations are made respecting it as that "the declaration was made by some wise man in the plenitude of legal learning," that "this very wise declaration must have surprised every one who was not sufficiently learned to have lost his common sense, &c." and—impotent will the censure be found, when the solid basis is examined upon which the position rests:—With the view of pointing out the principle, why, an use which is limited upon an use, cannot be executed by the statute, let us suppose, that a feoffment in fee had been made before the statute to A. to the use of B. to the use of, or in trust for C.; now A. was not seised to the use of C. but of B.; whatever equitable claims C. had were on B.; but B. had in law no hereditament when therefore the statute 27 Hen. VIII. c. 10. came and executed the possession of hereditaments, and of hereditaments only (in the legal signification of that word) to the use,
it executed the use of B. because there was a person that is A. seised of an hereditament to that use; but it could not execute the use of C. because to C.'s use neither B. nor any other person was seised of any hereditament, or indeed seised at all. By the same reason that an use upon an use might have been executed, uses on chattels might be executed also; but all such interests are excluded by the words of the statute.

Before Lord Bacon wrote, the same doctrine had been held in Tyrrel's case, Dyer 155. a. and some other cases.

It should however be observed, that the second use although not executed by the statute will be enforced in equity as a trust.

NOTE 75. p. 43. (o).

So that it is immaterial by what words the use is created, in order to its being executed by the statute. Any words, from which it may appear to be the intention of the parties to raise such an use, confidence or trust, as the statute alludes to, will be sufficient.

One gentleman hath said that the words confidence and trust were meant to apply particularly to those trusts, which as he says (and as the editor will endeavour to prove in note 125 says erroneously) were never looked upon as uses; but the fact is, that the words use, confidence, and trust, relate to one and the same thing, and were often employed as convertible terms in speaking of the use before the statute. Thus Littleton (Ten. Sect. 463.) in treating of a feoffment to the use of a man's will, calls it, a feoffment upon confidence to perform the will of the feoffor; and thus the feoffees to uses before the statute are in some cases called
called feoffees to *uses*, and in other cases precisely similar, they are sometimes called *feoffees upon confidence*, as in a case in the reign of Edward IV. See *Fitz. Abr. tit. subpana*, pl. 9.; and sometimes *feoffees upon trust* as in a case, *Bro. Abr. tit. feoff. al. uses*, pl. 38. And therefore there is not the smallest reason to suppose, that the words *confidence and trust* refer to any thing which was not considered as the use at the time of the statute. See Note 125.

**NOTE 76. p. 43. (p).**

In the other editions the passage reads thus—"It excludeth all contingent uses which are not to bodies lively and natural"—and it must have been imperfect; for such uses as Lord Bacon has instanced, viz. the making a bridge, &c. could not in any case whether contingent or present be executed by the statute, because the feoffor would not be seised to the use of any *person*; and with respect to contingent uses—the passage unaltered would have implied, that such uses limited to bodies lively and natural would not be excluded; whereas no contingent uses, no matter in what manner or to what persons limited, can be executed before they come *in esse*; because the feoffees would not, pending the contingency, be seised to the use of any *person*, as it was held in Chudleigh's case; see note 71. and as Lord Bacon himself hath asserted in the preceding page. These considerations led the editor to conclude, that Lord Bacon's meaning was what the passage as altered imports.

**NOTE 77. p. 44. (s).**

The words referred to by Lord Bacon as being common to both the feoffee and *cestui que use*, are the words *bargain*, 
NOTES AND EXPLANATIONS.

\textit{bargain}, \textit{sale}, \textit{feoffment}, \textit{fine}, \textit{recovery}, \textit{covenant}, \textit{contract}, \textit{agreement}, \textit{will}, or \textit{otherwise}, in that part of the statute where it is speaking of the instrument by which uses may be declared, as well as the conveyances by which they may be raised in the first place: And in saying that they "are words expressing the conveyance whereby the use ariseth," Lord Bacon did not merely mean, that they were expressive of the conveyances by which the use was created or raised; but of those conveyances also, by which \textit{cestui que use} might have been possessed of the use; as for example, where a feoffment was made to A. to the use of B.'s will, and B. devised the use to C.—Now, Lord Bacon did not mean merely the feoffment to A. by which C.'s use was raised, but the will of B. by which the use arose to C.; and this is clear from his saying a few lines below, that some of the words were put in as relating not to the raising but transfer of the use. And this shows also, that Lord Bacon did not mean that every word was alike common to the feoffice and \textit{cestui que use}. Many of them are common to both, but others are appropriated to the declaration of the use.

\textbf{NOTE 78. p. 44. (t).}

The word \textit{but} in the second line below, plainly showed, that there must have been an omission of the word \textit{not} in some preceding part of the passage; and in the last edition, that word was so inserted, as to cause the passage to read thus—"for it is not expressed in the words before, bargain, sale, &c." Now what does the pronoun \textit{it} represent? clearly the consideration in money or other matter valuable: but a consideration in money or other matter valuable, is expressed in the words before \textit{bargain}, \textit{sale}, and \textit{contract}, inasmuch as

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it is essential to the raising of an use by bargain, sale, and contract, that there be a consideration in money or other matter valuable:—when therefore it was written in the last edition—it is not expressed, &c. the word not was misplaced.

Lord Bacon's meaning was, it is presumed, that some had inferred from the words agreement, will, otherwise, that uses might be raised by agreement parol provided the consideration were—not of money or other matter valuable, for it (a valuable consideration) is expressed in the words before bargain, sale, and contract; in other words, a valuable consideration would have made it a bargain and sale, and then, being a bargain and sale, it would not have been good by parol on account of the statute of enrolments, which requires bargains and sales to be in writing—but that uses might be raised by agreement parol, upon consideration of blood or kindred; at least such was the opinion of some of the judges in Callard v. Callard, to whom it is very probable that Lord Bacon alludes:—they thought, that as uses might be raised by parol at the common law, and as the statute of enrolments only extended to bargains and sales where a valuable consideration was given, that therefore uses might after the statute be well raised by agreement parol if upon the consideration of blood or marriage. See Cro. Eliz. 344. and see also Poph. 47. who has reported the case under the title of Collard v. Collard.

NOTE 79. p. 44. (u).

The words but that uses already raised by those conveyances, are not in the other editions, but they were by the editor deemed necessary to make sense of the passage, and appeared to him to be calculated to express
press the meaning of the author, whose design obviously was to give the reason why the words agreement, and will were inserted in the statute; and he in the first place observes, that "those words were put in, not in regard of uses raised by those conveyances" (he could not have meant to add immediately after) "or without, or likewise by will," for that would imply that uses might be raised by parol or will which he has himself denied.

As our author sets out with observing, that the words were put in, there is every reason to suppose that after putting it negatively and stating why they were not inserted, he then meant to inform us why they were; and the words which conclude the sentence, viz. 'and there was a person seised to an use by force of that agreement or will, namely to the use of the assignee;' lead us to suppose, that he had given that reason; for the concluding words just now cited, were evidently used for the purpose of explaining how there would be a person seised to an use by force of an agreement or will although such use should not be raised by an agreement or will, but should be in the cestui que use as assignee.

Those concluding words appear to have been inserted by our author for the purpose of showing, that the statute is reconcilable to the interpretation which he has given of it; the act having said, 'where any person is seised, &c. to the use, &c. by reason of any feoffment, &c. agreement, will, &c.' he here observes, that there will be a person seised to the use of another by force of an agreement, will, &c. although no use be raised by the will or agreement; inasmuch as that agreement or will may operate to transfer the use, and in that point of view there would be a person seised to the use of another by force of that agreement or will,
that other being the assignee of the use whose title is by force of that will or agreement.—To sum up the whole in a few words—it was evidently the opinion of our author, that the words agreement and will are not spoken of in the statute as instruments whereby the use might be raised in the first place, but that they are only applicable to the declaration of the use.

NOTE 80. p. 44. (v).

It is held by modern writers, that an indirect devise of lands by a disposition of the use by will, was absolutely lost after the statute 27 Hen. VIII. c. 10, because, as they say, the use when the possession was annexed to it became merged in the land; and indeed our author himself in another place, (see Bacon's Law Tracts, 154,) observes, that by this statute the power of disposing land by will, was clearly taken away. The editor must however take the liberty of questioning the accuracy of this doctrine; but let it at the same time be understood, that he does so with all due deference: he admits then, that if A. made a feoffment to the use of himself, or to the use of B. that A. or B. could not after the statute of uses and before that of wills have devised the use; because the possession having been conjoined to it, such a devise would have amounted to a devise of the land itself; but he at the same time contends, that lands might notwithstanding have been indirectly devised after the statute, by making the will, not a devise of an use as of a thing then vested in the testator, but a limitation and appointment of an use under a preceding feoffment; as if a feoffment had been made to the use of such persons for such estates, &c. as the feoffor should limit and appoint by his will—now, although the use would result to the feoffor until appointment, and the possession be annexed.
nexed to the use; yet the use raised by the feoffment, would not be merged in the land, but would be capable of vesting in the appointee under the will; for as Manwood said, in Brent's case (2 Leo. 16.) the property and quality of the use as abstracted from the possession shall not be drowned in the possession: when the feoffor limits the use by his will, and points out the person who is to take it, the will does not operate as a devise of an use then vested in the testator, and consequently not as a devise of the land, but merely as a declaration of the use of the feoffment, and as a designation of the person who is to take that use; whereas in the other case, it is a devise of the very thing which the testator has in him, and the devisee would take it if at all by the will. In this point of view, the distinction mentioned in Co. Litt. 111. b. 112. a. between a feoffment to the use of a man's will, and a feoffment to the use of such persons as he shall appoint by his last will may be seen to be important. In the one case, there are no words of disposition to other persons, and the feoffor has the use to himself and his heirs absolutely, and the statute executes the possession to his use absolutely, and his devise of the use would have been a devise of the land also, as being annexed to that use, and therefore void lands not being then deviseable. In the other case, the feoffment doth contain words of disposition to other persons, and the feoffor has the use not absolutely, but in a qualified manner only, determinable upon the appointment to take it of the persons alluded to in the feoffment, and therefore the statute executes the possession, not absolutely, but for a limited time only, viz. until a designation of those persons; when that designation is made, the person so appointed doth not take from the testator the use as a thing which was in
in him as owner, for that use ceased upon the appointment; but he takes a new use under the feoffment in the character of a person therein referred to, and to whom a future use was limited, and in the same manner as if the feoffment had been immediately to his use in the first place, for as it was said in Moore, 517, in treating of the above distinction, "the quality of all future uses is, that although they take their construction by a future act, yet their inception and perfection proceeds from the first livery, and they are regarded as uses on the first livery:" in the last-mentioned case the office of the will is merely to nominate. See Moore, 516, 517. 6 Rep. 18. Sir William Jones, 7. 9. and Gilbert's Law of Uses, 35, 36.

That an indirect mode of devising the land by a disposition of the use by will, was not absolutely lost after the statute of uses, may it is conceived be argued from authority, for there is a case in Brooke, from which it may be inferred, as the editor thinks, that an use might be declared by will notwithstanding the statute of uses; for it was there made a question in what cases an use might be changed? and it was held, that if a man declared his use in this manner, "I will that my seoffees shall be seised to such an use," there he may change the use because by will. Now, as this case was decided, between the statute of uses, and those statutes which made lands devisable, viz. in the 30 Hen. VIII. it seems a fair inference, that the statute of uses had not prevented a disposition of the use by will. See Bro. Abr. seoff. al. uses, pl. 47.

Again in Sir Edward Clere's case mentioned above, one Harwood seised of three acres of land held in capite, made a feoffment of two to the use of his wife for her jointure, and afterwards made a feoffment of the
NOTES AND EXPLANATIONS.

the third acre to the use of such person, &c. for such estate, &c. as he should limit and appoint by his will, and devised the said third acre to one in fee; and whether this devise was good for all the said third acre or not, or for two parts of it, or void for the whole; was the question? And it was decided, that Harwood had no power (having before disposed of two out of the three acres) to devise any part of the third acre as owner of the land, but that the devise endured as a limitation of the use: now, as the statutes of 32 and 34 Hen. VIII. gave a power of devising only two parts in three of lands held in capite, or by knight's service, of consequence one third of land so held, remained the same as before those statutes passed, until the restriction as to that third was removed in consequence of the statute of the 12 Car. II. having converted knights service into socage; therefore, as Clere's case was determined before that restriction was removed, by the same reason that the devise of the third acre in that case endured as a limitation of the use, would a limitation of the use of the whole land have been good after the statute of 27 Hen. VIII. c. 10. and before the statute of devises in the 32 and 34 of the same reign.

So in the case of Mytton and Lutwich; (Sir William Jones, 7. 9.) where, there was a conveyance of the manor of Shipton held in capite to the use of Lutwich in tail, with remainder to the use of such person, &c. as he should declare by his last will in writing, it was adjudged, that the will was good as a limitation of the whole use of the first conveyance, and was not a devise of two parts of the land; and as the case of Mytton and Lutwich was determined in the 18 of James I. and therefore before the restriction as to one third of lands.
NOTES AND EXPLANATIONS.

lands held under that tenure was removed, it establishes the soundness of the conclusion above drawn from the case of Sir Edward Clere.

With respect to the distinction between a feoffment to the use of such person, &c. as one shall appoint by his last will, and a feoffment to the use of one's last will, the editor has further to observe, that it is only by admitting the distinction that the cases in the books can be reconciled; for instance, the above case of Mytton and Lutwiche would be at variance with that of Batty v. Trevillion, Moore, 280. wherein it was adjudged, that when a feoffment is made to perform one's will, or to the use of one's last will, the land passeth by the will and not by the feoffment; and then only two parts pass; but there is nothing contradictory in those determinations, if the above distinction be a substantial one.

NOTE 81. p. 44. (w).

In the other editions the punctuation, &c. is in this part different, and the meaning misrepresented or at least rendered very obscure in consequence. It there stands in this manner—"namely, to the use of the assignee; and for the word, otherwise, it should by the generality of the word, include a disseisin to an use. But the whole scope of the statute crosseth that which was to execute such uses, as were confidences and trusts," &c. Now, by making the sentence commence at the word but, it carried the meaning, that the whole scope of the statute crosseth the execution of such uses as were confidences and trusts; whereas the signification was intended by Lord Bacon to have been directly the reverse, viz. that the whole scope of the
the statute crosseth that, (viz. a disseisin to an use) which was, (viz. the whole scope of the statute was) to execute such uses as were confidences and trusts which (viz. a confidence and trust) could not be in case of disseisin: and the reason, why a confidence and trust could not be in the case of disseisin, is, that if the disseisor entered to the use of another person by the command of such other person, then, upon such entry the land or possession itself, and not the use as distinct from the possession, was vested in such other person to whose use the entry was made; so that there could not be any use. And, on the other hand, if the disseisin were of the disseisor's own head, that is to say, without the agreement of the person to whose use he might enter, then there could not be any trust because no privity; and their being no trust, the statute could not execute the possession, since it only operates where there is a confidence and trust, for without a confidence and trust an use could not be. See note 143.

NOTE 82. p. 45. (x).

In the other editions, instead of the words or any use, it is said or otherwise.—The necessity of the alteration was obvious, since Lord Bacon was stating the words of the statute, which are 'or any use, confidence, or trust, in remainder or reverter.'

NOTE 83. p. 45. (y).

That is to say, that estates are either estates for life, or for years, &c. according to the times for which they are to continue; as where the time of continuance is limited to the period of a life, there it is an estate for life; where for a certain number of years, there an estate for years.
NOTES AND EXPLANATIONS.

NOTE 84. p. 46. (a).

Brudnell's opinion was, that by the feoffment of _cestui que use_ under the statute 1 Ric. III. all the intermediate acts of the feoffees to uses would be avoided, for that the entry of the _cestui que use_ should have relation to the time of the first feoffment; but according to Brooke, all the other justices thought otherwise. See the _Year Book_, 14 Hen. VIII. 4. 10. and _Bro. Abr._ _feoff. al. uses_, pl. 10.

NOTE 85. p. 46. (b).

It is _feoffor_ in the other editions, but should be _feoffee_; because the case itself makes it apparent that the person spoken of is the _feoffee_ to uses. See the references in the last note.

NOTE 86. p. 46. (c).

The word _feoffor_ is also in this place, and in the second line below, erroneously inserted for _feoffee_ in the other editions; and it may be proper to observe, that the person here meant, is not the first _feoffee_ to uses, but the person who takes under the feoffment of the _cestui que use_.

NOTE 87. p. 46. (d).

It is difficult to imagine, how a person can be put into actual possession by the bare operation of an act of parliament—Gilbert in his _Law of Uses_, page 230, observes, that it is impossible an act of parliament should give any more than a civil seisin, and that it cannot give a natural one: and Lord Coke (Co. _Litt._ 266. b.) says, 'if a man doth bargain and sell land by deed, indented and inrolled, the freehold _in law_ doth pass presently,' and a freehold in law he informs us is
NOTES AND EXPLANATIONS.

is the civil seisin, and the freehold in deed the natural seisin; so that it was his opinion also, that the statute gave only a civil seisin.

That the statute does not give to cestui que use a seisin in fact appears from the circumstance of his being unable to bring trespass before he gains the actual possession by an actual entry. See 2 Lill. Abr. 335. and Gilbert's Law of Uses, ubi supra.

As the validity of the conveyance by a bargain and sale for years under the statute and release which is now become the most general assurance, was formerly disputed, and particularly by that very distinguished lawyer Mr. Noy, who was attorney general to Charles the First, and whose disapprobation of the conveyance appears to have been so decided, that he has not in his celebrated maxims even mentioned it, although he has treated of every other kind of assurance; and as the books which intimate that doubts have existed respecting the efficacy of the conveyance without an actual entry by the bargainee for a year, do not inform the reader upon what basis they rested, or why an actual entry was not dispensed with by the statute—the editor trusts that he shall be excused in endeavouring to prove that substantial objections might have been urged against it.—Where a man was in possession as tenant for years or at will, he was at common law enabled to take the freehold and inheritance of his lessor by way of release, for it was considered vain to make an estate by livery of seisin to one who had already possession, of the same land by the lease of the releasor. Litt. sect. 460. but without an actual possession a release was not good to increase the estate of the lessee, for before possession in some other person there could be no reversion in the lessor; and where the lessor had

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not
NOTES AND EXPLANATIONS.

not a reversion but the possession, of course livery of
seisin was indispensable; if therefore a lease for years
at common law had been made and before the lessee was
in possession, (and which could only be by entry) the
lessor had released to him, such release would not have
been good to enlarge his estate. See Co. Litt. 270. a.
46. b.—When the statute of uses came and said that
‘the cestui que use should be in possession of and in
such estâtè as he had in the use,’ it was thought by
some, that nothing more was requisite than to raise an
use for a year to the intended releasee, who would
then by the operation of the statute be as much in
possession as the lessee for years under a common law
lease was after entry, and consequently equally capable
of taking a release, and under that impression they
framed the conveyance by a bargain and sale and
release. Then, the point to be considered appears to
be, whether the statute does give the bargainee for a
year, the same possession without entry as the lessee
at common law had after entry, or merely that kind of
interest which the lessee at common law had between
the time of the lease made and that of actual entry?
And it is contended that such statutes as the 27
Hen. VIII. c. 10. are not to be intended as taking
away any incidents, ceremony, or circumstance, which
the common law requires, nor to do any thing con-
trary to the common law; and consequently, that when
the statute executes the possession to an use for years,
the cestui que use is placed in the same situation with
the lessee at common law before entry, and that to the
enurement of a release by way of enlargement of estate,
an actual entry is as much necessary in the one case by
the bargainee, as it is by the lessee at common law, in
the other. Thus in Bucknall’s case, 9 Rep. 36. a it
is
NOTES AND EXPLANATIONS.

is said, 'although the purview of the act 21 Hen. VIII. c. 19. be general, that the lord may avow, &c. as in lands and tenements within his fee and seignory, alleging the same lands to be holden of him without naming any person certain or upon any person certain, yet all necessary incidents are intended, and therefore the avowant ought to allege seinis by some hands.'

The editor was induced to notice the case of the avowry for the sole purpose of evincing, that it may be regarded as a principle, and not confined to a single case, that such statutes as the statute of 27 Hen. VIII. c. 10. do not take away any incidents, ceremonies, or circumstances of estate; for it was not necessary for him to reason by analogy from that case to the case of a bargain and sale under the statute, because there are other cases in the books wherein the principle contended for has been acknowledged with an express reference to the statute of uses itself; as in a case in the 23 Hen. VIII. (and from its having been decided in the very next year after the statute, we are enabled the better to ascertain what kind of seinis the statute was intended to give;) it was agreed, that where the statute 27 Hen. VIII. c. 10.—of uses, enacts, that the actual possession shall be adjudged according to the use, yet it ought to have the circumstance which is requisite by the common law, seil.—actual entry in fact. See Dyer 28. a. pl. 182.—In Mallory's case also, 5 Rep. 113. the same doctrine was resolved by the whole court, and the above observation in Dyer with respect to the statute of uses, was quoted as an example for that doctrine; so that it is clear from those cases, that the statute ought not to have been construed to give a seinis in fact, as Lord Bacon said, nor does it give such a possession to a bargainee for years, as upon strict
strict legal principles a release will work upon without an actual entry in fact by the bargainee; and hence also it appears, that there was formerly abundant reason to doubt the validity of the conveyance. However, by the cases of Mytton and Lutwicb, 18 James I. Sir William Jones, 7, 9, of Iseham, v. Morrice, in the 4 Cha. I. Cro. Car. 109. and Barker against Keat, in the 29 Cha. II. 1 Mod. 262. 2 Mod. 249. all decided after our author wrote, the conveyance was judicially sanctioned; and indeed if it had never received the sanction of the courts, its efficacy would not be permitted to be questioned at this day, when perhaps upon the validity of the conveyance, the title to every estate in the kingdom depends.

NOTE 88. p. 47. (c).

In the other editions the expression is "for that" but it is conceived, that it should be "so that" for Bacon does not appear to be assigning a reason why the foregoing words were made use of in the statute; but to be drawing a conclusion from those words, viz. that the matter and substance of the estate which the cestui que use is to have under the statute, is, the estate of the feoffee.

NOTE 89. p. 47. (f).

Periam and Walmsley, in Chudleigh's case were of this opinion: They thought that nothing remained in the feoffees, but that their whole estate was out of them by force of the act, and that until the future use should come in esse, the estate which was to be executed to it should be in the preservation of the law. See 1 Rep. 132, 133, 134. but Popham and Anderson chief justices, and six of the other justices and barons held the contrary; and they said, (what indeed constitutes
NOTES AND EXPLANATIONS.

an answer to the observation of our author, as to the statutes taking more from the feoffee, than it executes presently,) that those who had argued on the other side, had taken but the first part of the sentence, that is to say, that the estate shall be out of the feoffees, but that they had forgot the latter part of the sentence, scil. that the estate shall be in such person who hath the use; and that, said the eight judges, cannot be, till the person and the use also be in esse: and they further said, that by the clause it also appears, that no estate of the feoffees shall be transferred in abeyance out of the feoffees and vested in nobody, or be transferred to a possibility of an use which hath not any being, which would be against reason, and against the letter and meaning of the act, for the words are and shall "be adjudged in him or them that shall have such use;" ergo (said the eight judges) the estate of the feoffees shall not be in abeyance, 1 Rep. 136. b. See the next note.

NOTE 90. p. 47. (g).

Notwithstanding Lord Bacon considered the doctrine of a scintilla juris but as a conceit, and the feoffees estate to be extinct, it has been established by the decision in Chudleigh's case, and the resolutions of Rolle and the other justices of the King's Bench in the case of Wegg and Villers, that where there are contingent or future uses limited, the estate of the feoffees is not utterly out of them; but, that they still have a possibility to serve the future use when it comes in esse;—that when the future use comes in esse they will have sufficient estate and seisin to serve the future use, (if the possession be not disturbed by disseisin or other means,) and,—that the feoffees have a possibility of
of entry or *scintilla juris*, as Dyer (see *Dyer* 340. b.) called it, remaining in them; and in case of such disturbance of the possession and its not being recontinued, that they will have a power to enter and revive the contingent uses so that they may be executed by the statute of uses. (See 1 *Rep.* 129, 136. b. 137. a. and 2 *Roll.* 797. pl. 14, and 16.) And further, that where the revival of the uses depends upon the entry of the feoffees, there, if the feoffees release all there right in the land or make feoffment of the land or bar their entry by any other way, the contingent use never could be executed by the statute; but must for ever fail. See 1 *Rep.* 137. a. and 2 *Roll.* 797. pl. 16. and see also *Dyer* 340. a. as to the feoffees being barred of their entry by their feoffments by the opinions of Dyer, Manwood, and Mounson, against Harper.

It should however be observed, that the necessity of an entry by the feoffees, where there has been a disseisin hath been questioned by the late Mr. Fearne, in his truly excellent work on contingent remainders; but upon grounds which in the editor's opinion, are not calculated to shake that doctrine; for it seems to have been entirely out of that gentleman's view, that the statute of uses has not any operation, unless those four things concur at one and the same time, that is to say,—1. Seisin in the feoffees.—2. *Cestui que use* in *rerum natura.*—3. An use *in esse,* and—4. that the estate of the feoffees may vest in *cestui que use,* 1 *Rep.* 126. But to understand the subject the better, let us suppose, that a feoffment is made to A. and B. to the use of C. for life, remainder to the use of the eldest son of C. in tail, he having no son at the time, remainder to the use of D. in fee; and then, that C. the tenant for life is disseised, afterwards has a son born,
and then dies without having revested the seisin: Mr. Fearne contends, that in such a case the contingent remainder in use to the son of C. will take effect and be executed by the statute without any previous entry by A. and B. the feoffees to uses; but it admits of proof, that the contingent use without such an entry never can be executed by the statute, because the statute only works where (in its own words) any person is seised to the use of another person: Now, before the birth of the son of C. it is perfectly clear, that the use to that son could not be executed, for the feoffees were not seised to the use of that son, there being no such person in existence; at that time, the one of the four requisites which was wanting, was, a cestui que use in rerum natura; and, after the birth of the son it is equally clear, that the use to that son could not be executed, because the seisin which was to have reverted to the feoffees, (see note 102.) had been previously devested, and the feoffee had consequently never been seised to that use; so that when the intended cestui que use was in rerum natura, another requisite to the operation of the statute was wanting, viz. seisin in the feoffees; and that seisin must necessarily continue to be wanting until it is revested by entry.

There is no doubt but that the right of entry in C. was sufficient to support the contingent use to his son, so as to preserve its capacity of taking effect, provided there should afterwards be a seisin to that use; the case of Wegg and Villers above quoted decided that point. The only question is, if the contingent use will be executed by the statute without such a seisin? In support of the affirmative of it, Mr. Fearne (Fearne’s Cont. Rem. 445. 4 ed.) asks, does not the statute enact,
that "where any person, &c. is seised to the use of others, the cestui que use shall be deemed in lawful seisin, &c. to all intents, constructions, and purposes in the law?" And he asks also "if the words to all intents, constructions, and purposes in the law must not be referred to the legal properties, qualities, and capacities of estates of the like degree or measure at common law? If so, (he argues) as it is one of the legal qualities of an estate at common law of the degree or measure of freehold, to support a contingent remainder when turned to a right of entry, so will a preceding vested use support a contingent use; and as one of the qualities of a contingent remainder at common law, is, a capacity of being supported by a right of entry, so will a right of entry alone without any entry by the feoffees preserve the capacity of the contingent use to vest and take effect."—It is admitted by the editor in answer to Mr. Fearne, that uses when executed by the statute, acquire the legal qualities of estates of the like degree or measure at common law; and consequently, that a right of entry in a person having a preceding vested use of the degree or measure of freehold, will support an use limited in contingency, so as to preserve its capacity of taking effect if there should afterwards be a seisin to that use: But it is at the same time denied, that the contingent use can vest and take effect without an entry by the feoffees, because the statute hath never executed the possession to that use for want of a seisin to it in the feoffees, and a cestui que use in rerum natura occurring at the same time; and as the statute hath never executed the possession to that use, the contingent use has never been in a situation to have the legal qualities, &c. of a contingent remainder at common law; for it is only where the statute
statute hath carried the legal estate to the use, that an use can have those legal qualities, &c. If the son of C. had been born before the disseisin, the use to that son would have been immediately executed; and then, upon the death of C. the son might have entered without any previous entry by the feoffees, in the same manner as a person to whom a contingent remainder at common law is given, may do; and the sole reason, why, a person having a contingent use cannot enter also, is, that as the disseisin in the case above supposed happened before the birth of the son, the statute has not—for want of a seisin in the feoffees—been able to execute the possession to that use, so as to clothe it with the legal qualities of an estate at common law.

The doctrine which Mr. Fearne opposed, was firmly established by the decision in Chudleigh's case, as the extracts from that case given in the former part of this note prove;—how then came it to pass, that Mr. Fearne in questioning the soundness of that doctrine, confined his strictures to the extrajudicial resolutions of the judges, in the case of Wegg and Villers, when there lay in his path a solemn adjudication in favour of it? The very ground of the conclusion of eight of the judges in Chudleigh's case against the contingent use, was, that on account of the disseisin an entry by the feoffees was necessary, in order to give effect to that use; and that the feoffees having barred themselves of their entry in that case, the contingent use could never take effect. This appears from Coke's report of the case, who, after stating the resolutions of the judges as cited above, sums up in the following words, "so all the justices and barons of the exchequer, except Periam, Walmsley, and Gawdy, did conclude, that forasmuch as the statute 27 Hen. VIII. doth not extend
but to uses in esse, and to persons in esse, and not to any uses which depend only in possibility, for that reason the contingent uses in the case at bar remain so long as they depend in possibility, only at the common law; and by consequence, they might be destroyed or discontinued before they came in esse, by all such means as uses might have been discontinued or destroyed by the common law," 1 Rep. 137. b. Now, at the common law uses were discontinued where the seisin to the use was devested, and they could only be revived by the entry of the feoffees to regain that seisin; and if the feoffees barred themselves of their entry the uses were destroyed, because it would be impossible that they should ever be revived. See 1 Rep. 121, 122, and 126, and the authorities there referred to.

It is evident, that Mr. Fearne wholly misapprehended the principle of the decision in Chudleigh's case; for he attributes that decision to—the determination in law of the particular estate by forfeiture, before the birth of the son to whom the contingent use was limited; whereas so far from deciding that point were the judges, that they were only agreed that the determination in fact of the particular estate by the death of the particular tenant, before the birth of the son, would have destroyed the contingent use, 1 Rep. 137. b. 138. a.; but with respect to the determination in law of the particular estate before the birth of a son, only four of the judges expressed themselves of opinion, that a contingent use would be destroyed by such a determination of the particular estate, 1 Rep. 135. b.: And only one of the four was governed by that opinion in his judgment, and the seven other judges instead of being of that opinion, were (according to Pollexfen, Poll. 389, and indeed from reasonable presumption furnished by the
NOTES AND EXPLANATIONS. 157

the reports of the case) rather of the contrary opinion. And it is not to be wondered at, that seven of the judges did not accede to the opinions of the other four upon the last mentioned point, for when Chudleigh's case was argued, it was not taken for law, that the determination in law of the particular estate by forfeiture, would be a destruction of a contingent remainder even at common law, nor was it settled until a few years after in Archer's case; for although Archer's case is reported by Coke before Chudleigh's, yet the latter was first adjudged. See Poll. 389, 390. But whatever may have been the sentiments of the judges upon the destruction of a contingent use by the determination in law of the particular estate, certain it is, that it was not adjudged as Mr. Fearne thought, nor made a point in the case; for Coke distinctly tells us, that, "the question in the case was no other, but whether the contingent uses before their existence by the said feoffment of the feoffees, were destroyed and subverted, so that they should never arise out of the estate of the feoffees after the birth of the issues." See 1 Rep. 121.

NOTE 91. p. 48. (i).

In the other editions it is said, 'so there it is endowed,' but should be 'so here, &c.' as altered, for our author is speaking of the effect which the words now under his consideration have, as distinguished from the effect of the first clause already considered.

NOTE 92 p. 49. (k).

The word second is not in the other editions; but the editor conceived that it was called for, because it was evidently Lord Bacon's intention to observe, that the second case in the statute, viz. of joint feoffees,
of which he was treating, was not absolutely necessary; since the first case would have comprehended what the second case particularly provided for. — The observation 'so that it is rather an explanation than an addition,' demonstrates, that the second case was meant, and that the word it refers to that case, for the second case only and not the first can be an explanation of, rather than an addition to, the first. There would not have been any room for a doubt, that the first case of the statute extended to that of co-feoffees, if the statute had not said where any person is seised to the use of any other person.

NOTE 93. p. 49. (l).

In the other editions it is merely said enfeoffed to the use of himself; but the addition of the words and another was necessary, for Lord Bacon is endeavouring to show, that the law upon the first case would have been taken as the second case provided for; and it is with that view, that he supposes the second case of co-feoffees to the use of one of them to be turned the other way, viz. one person to be seised to the use of himself and another; for, if the first clause of the act applies to the case of one seised to the use of himself and another, for which case no separate provision is made, it would be capable also of extending to the case of co-feoffees to the use of one of them which is expressly provided for. If however the statute would not extend to the case of co-feoffees to the use of one of them, without its being separately provided for, then the case è converso would be excluded by the act, no separate provision being made for it; but as the case è converso is according to our author, included in the first clause, so would the first clause have applied to that which.
which is expressly provided for; and therefore no separate provision for it was necessary: and the only reason why a separate provision was made for it, was, as we are informed a few lines below, on account of its being a general case in the realm.

NOTE 94. p. 49. (m).

There is a want of perspicuity in this part which renders it necessary to be observed, that Lord Bacon alludes to the former and latter case or clause of the statute, viz. to the first or general case and the second case of joint feoffees to the use of one of them; and not to the former and latter case as stated for argument.

The object aimed at, is, to prove that the law would have been taken upon the general case as was expressly provided for by the case of joint feoffees, and with that view it is that Lord Bacon observes, that if one were enfeoffed to the use of himself and another—a case for which no separate provision is made by the statute—they (the celles que use) shall in or under the former case or clause of the statute be seised jointly, and that where there are co-feoffees to the use of one of them cestui que use shall in or under the second case or clause of the statute be seised solely. Now, if the first case or clause of the statute applies to the converse of that case which is expressly provided for by the second case or clause of the statute, by the same reason would the first case or clause of the statute apply to the very case itself, which is so expressly provided for; and therefore the separate provision made by that second case or clause of the statute unnecessary; for the word other (used in that part of the first case or clause of the statute, where it is said to the use of other person or persons)
persons) would not be more in the way of the case of joint feoffees to the use of one of them, than, of the case of one seised to the use of himself and another; and that word is to be qualified (Lord Bacon observes) so as not to be in the way of either case.

As the second case or clause of the statute relates to the case of joint feoffees, seised to the use, not only of one, but of some of them, it may be proper to observe, that Lord Bacon is in this place considering it, as if it applied merely to the case of many seised to the use of one of them.—This is evident from his saying a few lines below, that this case of co-feoffees to the use of one of them was a general case in the realm.

NOTE 95. p. 49. (n).

'They were loth to bring in this case by inserting the word only into the first case'—This expression seems to imply, that if in the first clause the word only had been inserted the case of one seised to the use of himself and another to which Lord Bacon alludes, would have been brought in or included in the first case; but that they had an objection to have the first case extend to it. That however could not possibly have been Lord Bacon's meaning; for the first case or clause of the statute, if the words only had been inserted in it, would not have provided for the case where one is seised to the use of himself and another. The clause would then have read thus—'where any persons, &c. is seised to the use only of other persons.' Now, in the case supposed, the feoffee not being seised to the use of others only, but of himself as well as others, it would have been shut out instead of being brought in, had the first clause of the statute been so written. According to the editor's conception, the sense in which Lord Bacon
NOTES AND EXPLANATIONS.

Bacon used the expression is this—that they were loth to insert the word *only*, in the first clause of the statute, and thereby to cause the case of one seised to the use of himself and another to stand in need of a separate provision being brought into the statute to meet it. In short the substance of the whole is, that they objected to have a particular and precise provision for every separate case; as—one, for the case where the feoffees are nothing more than feoffees to uses, and neither of them a *cestui que use.*—Another, for the case of joint feoffees to the use of one or more of the same feoffees.—And a third, for the case of one feoffee seised to the use of himself and another or others.—And that the ground of their objection was, that they were loth to insert the word *only*, which must have been employed to have confined the first clause of the act to the case where the feoffees and *celles que use* are distinct persons, from the fear, that it might be productive of the same inconvenience and uncertainty that it had bred on the statute of 1 Ric. III.; and therefore that the makers of the act preferred having a general and comprehensive clause which might include all cases: and the general case, as framed, would, it is observed, have had that effect; but still, as the case of joint feoffees was a common case, they thought proper to express it precisely.

For the doubt which the word *only* bred on the statute, 1 Ric. III. see *Delamere's case*, *Plowd. Com.* 350.

NOTE 96. p. 49. (o).

The punctuation hath been altered in this place.—In the last edition it is in this manner,—‘bred upon the statute of 1 Ric. III. after this second case: and before the third case of rents,’ &c. which would import, 

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that
that the second case had something to do with the doubts upon the statute of Richard; but Lord Bacon merely meant to observe, that the second saving came in between the second case and the case of rents.

The word second was substituted for third in the last edition.

NOTE 97. p. 50. (p).

In the other editions the expression is—it is not a saving; but clearly ought to be needs not, &c. as altered; for Lord Bacon having a few lines before said, that the third case needeth no saving, is in this place, assigning a reason, why, it needs it not.

NOTE 98. p. 50. (q).

In the other editions it is written, you find never a stranger; which must be incorrect; for Lord Bacon, in order to prove that the third case in the statute of uses needed no saving, is giving instances of other statutes penned with an ac si, in which no saving is to be found.—Thus, in speaking of the statute 32 Hen. VIII. a few lines below, he observes, 'and therefore you find no saving in the statute.'—The editor, therefore, thought himself justified in substituting the word saving instead of stranger.

NOTE 99. p. 50. (r).

So that the statute in effect merely says, that in case of such an alienation, the person in remainder shall have the same right to enter immediately, as he would have otherwise had upon the death of the woman, in case no alienation had been made, leaving him in all respects in the same situation with respect to other persons, as if no such act had been made; and the rights
NOTES AND EXPLANATIONS.

rights of others not being touched on account of the special wording of the statute, there could be no necessity for a saving of those rights.

It should, however, be observed, that where the woman and an after taken husband join in the alienation, it is provided by the statute, that after the decease of her husband she may re-enter according to her first estate.

NOTE 100. p. 50. (s).

The saving in the statute of 1 Ric. III. is, ' of such right, title, action, or interest, by reason of any gift in tail, as if that act had not been made;' and in 24 Hen. VIII. it was held, that this saving was to be taken of tenant in tail in possession, and not tenant in tail in use. See Bro. Abr. feoff. al. uses, pl. 40. and supra p. 5.

NOTE 101. p. 50. (t).

In the other editions the passage runs thus.—' Nay it hath farther words, namely, in lawful estate and possession, which maketh it stronger than any in the first clause.'

The propriety of the alteration with respect to the substitution of the words first clause, instead of the word it, will be manifest, when it is considered, that there is nothing which the pronoun it can represent; for Lord Bacon in the former part hath not been speaking of one case or clause only, but of both the cases or clauses which are not penned with an ac si; and when it is considered also, that only one of the clauses, and that the first, contains the words lawful estate, &c.

And with respect to the alteration from first clause to second clause in the concluding part of the sentence,
the statute itself will evince that it was warranted; for the clause alluded to, is the one which hath not the strongest words, and by referring to the statute it will be seen, that in the second clause the words are not so strong as in the first; the words in the first clause being, that *cestui que use* shall be in lawful estate, &c.; and in the second clause, merely, that he shall have such estate in the land as he had before in the use, without the word lawful.

As both clauses cause the estate of the *foeoffees* to be in *cestui que use*, but the first only, and not the second, says, that he shall be in *lawful* possession, the following observation of Lord Bacon's is accounted for—"for if the words only had stood upon the second clause, namely, that the estate of the *foeoffee* should be in *cestui que use*, then perhaps the gift would have been special and so the saving superfluous:" but the words *lawful* estate and possession, &c. in the first clause, clearly rendered the saving, as to that clause at least, indispensable.

**NOTE 102. p. 51. (u).**

Supposing the estate, &c. of the *foeoffees* to be absolutely taken from them by the purview of the act in the first instance, their regress to revive future uses would certainly be barred, at least by the letter of the act, for the reason here given by Lord Bacon, that the statute has no saving of the right of the *foeoffees* where they claim to the use of another; and in that case, if the possession should be disturbed by disseisin, and should not be revested by some one having a vested use, then could a future use never arise on account of the inability of the *foeoffees* to enter. But the editor contends, that the *foeoffees* are not driven to seek a shelter
shelter under the savings of the statute; and his argument rests upon this ground, that where future uses are limited, the statute does not operate to take the estate of the feoffees absolutely and permanently out of them, but that they have still a possibility pending the contingency of the rise of the future use; and, that upon the happening of that contingency, the possession would by act of law revert to them; but if there has been a disseisin to prevent the reverter, that then the law considering the feoffee as entitled to the possession, would give him the remedy of regaining it by entry.

With the view of supporting the above propositions, it is to be observed, that it is enacted by the statute, that 'the cestui que use shall be deemed in lawful seisin of and in such like estate as he had in the use;' and that 'the estate, &c. of the feoffees shall be deemed to be in cestui que use after such quality, manner, form, and condition, as he hath in the use.' Now, in consequence of those qualifying words in the act, the property and quality of the use as abstracted from the possession, is not drowned when the possession is executed to the use; but on the contrary, as uses were at common law guided at the wills of the parties, so also are the possessions when annexed to those uses. See 2 Lea, 16. 2 Rep. 78. 1 Rep. 100. Therefore, if an use be limited to A. in fee, and if B. pay 40l. then to B., in fee; here, although all the seisin of the feoffees is taken from them, and immediately executed to the use of A. in fee, yet, forasmuch as that use would have been determinable before the statute upon B.'s payment of the 40l. so the possession of the feoffees having been taken from them not permanently, but only during the continuance of the use, does upon the
NOTES AND EXPLANATIONS.

the determination of the use revert to the feoffees; and then, the event having happened upon which the use to B. is to arise, immediately upon the possession's reverting to the feoffees, they become seised to the use of B. and the statute instantly transfers the possession to the new use.

Until the event happens upon which the new uses are to arise, the feoffees have but a possibility, and that possibility, as well as the manner of its being reduced to an estate, was well explained by Fenner, Justice in Chudleigh's case, (See I Rep. 137.) 'If tenant for life, said Fenner, make a lease to him in the reversion, although the lessee had but a freehold and departed with a freehold, yet, the lessee hath a possibility which by the death of him in the reversion may come in estate; so, although the whole estate of the feoffees be transferred to the uses in esse' (as to A. who has the present fee simple of the use,) 'yet a possibility doth remain in the feoffees; which by the determination of the first uses may be reduced to an estate sufficient to serve the future uses.' Then, as the estate, possession, &c. of the feoffees is not—where future uses are limited—absolutely and permanently taken from them when it is executed to the uses in esse, but will by law revert to them when the event takes place upon which the first uses are to cease, and the new uses are limited to arise, it follows, that if upon the happening of that event, the reverter of the possession is impeded by reason of its having been disturbed by disseisin, the feoffees will have a right of regress for the purpose of restoring it.

That the feoffees may make a regress in such cases was held by the major part of the judges in Chudleigh's case, (1 Rep. 136. b. 137. a.) who said, 'the constuction
NOTES AND EXPLANATIONS.

struction of the feoffees having a possibility before the coming in esse of the future use, and of their having sufficient estate and seizin to serve the future use when it does come in esse, was just and consonant to reason and equity, for that by such constriction the interest and power that every one had would be preserved by the act; for, if the possession were disturbed by seizin or otherwise, the feoffees would have power to enter to revive the future uses according to the trust reposed in them.'

The doctrine of a right of entry in the feoffees, was also resolved by Rolle and the other judges in the case of Wegg and Villers. See 2 Roll. 797. pl. 14. and note 91. supra.

For the purpose of showing, that the feoffees are in some cases entitled to a regress, although not by virtue of the savings of the statute, has the editor been thus minute in his examination of the point; a point which is of great importance, inasmuch as in cases where the seizin has been devested and not revested by those who have vested uses, all uses which were in contingency at the time of the seizin, must for ever fail of having effect, unless, in consequence of the qualified manner in which the possessin is taken from the feoffees by the statute where future uses are limited, they are entitled to a regress. See 1 Rep. 126, 137. and note 90.

NOTE 103. p. 51. (v).

In the other editions it is and—instead of not—executed by this statute.—Lord Bacon is pointing out by the insertion of what additional words in the savings of the statute, the feoffees would have had a right of entering for the benefit of a future use:—Now had the word and been inserted in the second saving, the feoffees
feoffees would have had a right of entering, not for the benefit of uses as yet unexecuted, but in respect of those uses which had been already executed, by the statute. The word and would have enabled the feoffees to intermeddle with the possession whilst it was annexed to the uses executed by the statute, which was the very thing the act meant to prevent, when it excluded them: But the word not would have saved to the feoffees a right of regress for the benefit of such uses only as never had been touched by the statute, as future and contingent uses; and the great question to which Lord Bacon alludes, and which was much debated in Chudleigh's case, cited in the preceding note, was, whether the feoffees had a right of regress for the revival of these future and contingent uses?—The substitution therefore of the word not in the place of and was necessary.

NOTE 104. p. 51. (w).

In the other editions, instead of feoffees to an use there is the word feoffe only. That the alteration is correct appears from what is said a few lines below in allusion to the person here spoken of—and they yet claim to an use.

NOTE 105. p. 53. (z).

Before the making of the statute of 27 Hen. VIII. c. 10, the greatest part of the land of England was in conveyances to uses; and for as much as a wife was not dowerable of uses, it had been usual for her friends upon her marriage, to require, that the husband should cause the feoffees to his use to make an estate to him and his wife for their lives or in tail, for a competent provision for the wife, after the husband's death; and this was the original of jointures.
NOTES AND EXPLANATIONS.

The dower at common law could not in those times be depended on; because, although the husband might be in the enjoyment of large estates and to all appearance the legal owner, yet it was possible, nay probable, as uses were so general, that the legal estate in the lands was in coheeres, and he himself merely cestui que use, and consequently his wife not entitled to dower; hence, prudence demanded, that a certain estate should be settled as a provision for the wife.

When the statute transferred the possession and estate of the lands to the use, the wife of cestui que use became dowable of those lands of which the husband at the time of the statute had only the use; and consequently, wives who had been so jointured, would in addition to their jointures have had dower in the residue of their husbands lands; and as Lord Bacon observes, have been doubly advanced if the statute had not made provision to the contrary; for the lands settled on the wife on her marriage in satisfaction of dower would not have barred her, because, dower is a freehold, and a right or title to any inheritance or freehold, cannot be barred by collateral satisfaction or recompence.

By this statute, if a jointure is made on a woman before marriage, and accepted by her in lieu of dower, she cannot after the husband's death waive it and take her dower; but, when the jointure is made after marriage, she hath an election to have either the jointure or dower at common law. See the statute, and see also Vernon's case, 4 Rep. 1. and Gilbert's Law of Uses, 147.

NOTE 106. p. 53. (a).

The franktenement or freehold doth not pass by the bargain and sale before enrolment. Two modern writers
NOTES AND EXPLANATIONS.

was altered at common law before the statute of enrolments, and that by the statute of uses the possession had been executed accordingly, if the statute of enrolments had not been made to restrain it." So that it appears from this case, that the statute of enrolments restrains the alteration of the use from the bargainor to the bargainee until enrolment; and consequently,—as it is only by reason of its following the use that the bargainee can have the legal estate or freehold—the legal estate or freehold is prevented from being in the bargainee, upon the execution of the deed.

In Hyndes case, 4 Rep. 70, 71. it was held, that "if a bargainor makes a bargain and sale, and levies a fine to the bargainee before enrolment, and then the bargain and sale is enrolled within the six months, the bargainee shall be in by the fine, and not by the bargain and sale." Now, that which was first intended to be conveyed by the bargain and sale, could not have passed from the bargainor to the bargainee by the fine, unless it had remained in the bargainor to pass.

The same implication arises out of the case of Mallery v. Jennings, 2 Inst. 674. Sewster made a bargain and sale to one on the 7th of November, on the 9th he acknowledged a recognizance to another, and on the 20th the bargain and sale was enrolled. The question was, whether Sewster the bargainor was seised in fee on the 9th of November? And it was adjudged una voce that he was not. Now, if we were not to examine further, the impression would perhaps be, that the freehold did not remain in the bargainor until enrolment, since the adjudication was, that on the 9th, a day between the date of the bargain and sale and the enrolment, he was not so seised; but the case goes on to give a reason which conducts us to a different conclusion;
elusion; the reason assigned is, 'for that when the 
' deed was enrolled, the bargainee was in judgment of 
' law seised of that land from the delivery of the deed'.
So that the reason, why Sewster the bargainor was 
held not to have been seised on the 9th of November, 
was not upon the ground, that the freehold passed out 
of him to the bargainee upon the execution of the bar-
gain and sale; but, in consequence of the enrolments 
relating back to the delivery, and causing the bargainee 
to be in judgment of law seised as from the delivery. 
And it is to be inferred from the words,—'the bar-
gainee was in judgment of law seised when the deed 
was enrolled,' that such bargainee was not in judgment 
of law seised before the deed was enrolled; and con-
sequently, that until enrolment it remained in the bar-
gainor.

That the freehold does not pass to the bargainee 
upon the execution of the deed, is also evident from 
this, that if a man bargain and sell his manor to which 
there is an advowson appendant, the bargainee can 
make no title to present before enrolment, 1 Bac. Abr. 
470. 5 ed. and Gilbert's Law of Uses, 92. and the 
authorities there referred to.

And it is further evident from the circumstance, that 
if a bargainor seised in fee before the making of the 
bargain and sale, marries and dies between the date 
and enrolment of the bargain and sale, his wife is 
dowable; but her dower is liable to be taken away, if 
the bargain and sale be afterwards enrolled in due time, 
because the enrolment would relate back to the time of 
the date, and consequently place the bargainee para-
mount the title of dower; but it is certain, that if the 
estate had not continued in the bargainor until enrol-
ment, his wife would not have had any dower to be 
taken
taken away. See Com. Dig. tit. bargain and sale, (B. 9.) Shop. Touch. 226, 227. There are many other cases in the books, not one of which favours a different conclusion.

We are now come to that, which in addition to what hath been already advanced upon the subject, will, it is presumed, be conclusive.—The author of Bacon's abridgment assigns as a reason, why the bargainee in such cases as Hyndes' case above cited, is in by the fine and not by the bargain and sale, "that the freehold " and the use is in the bargainor till enrolment." See 1 Bac. Abr. 471. ed. sup. And again, in the same page—" the contract (bargain and sale) had not any " effect to pass the estate from the bargainor before " enrolment." Lord Chief Baron Gilbert, also (Law of Uses and Trusts, page 92.) says expressly, that the bargainee hath not the freehold till enrolment, for till then there is no conveyance effectual to alter the property.

Lastly, what says the statute itself.—" No manors, " lands, &c. shall pass, &c. from one to another, " whereby any estate of inheritance or freehold, shall " be made or take effect in any person or persons, or " any use thereof to be made by reason only of any " bargain and sale thereof, except the same bargain " and sale be made by writing indented, sealed, and " inrolled, &c." See the statute 27 Hen. VIII. c. 16. which is prefixed. The words of the statute are therefore peremptory, that the freehold shall not pass before enrolment, nor by the way, the use thereof, although the hypothesis of a third writer is that before enrolment the bargainee hath an use and but an use.

It is true, that many cases have been determined upon the principle, that the freehold was in the bar-
NOTES AND EXPLANATIONS.

gainee and not in the bargainor between the date of the bargain and sale and the time of enrolment; but those cases do not go any way towards proving, that the legal estate or freehold vested in the bargainee upon the execution of the conveyance, or at any other time before enrolment; because, the ground, upon which the bargainee was in those cases, held to have the freehold, was, that when the enrolment was made it had a retrospect viz. a relation back to the delivery of the deed, so as to cause the bargainee to be in judgment of law seised as from that time.—In veritate rei, the bargainee is not seised until enrolment; but when the enrolment takes place then by fiction of law, (and a relation back is nothing but a fiction of law, which is ever otherwise than the thing is in truth. Finch’s Law 66. 3 Rep. 29.) he is considered, as having been seised from the time of the date or delivery; but, for saying at a time when no enrolment hath been made, that the bargainee is either in fact or in judgment of law seised of the freehold, there is not the smallest foundation; as, supposing a bargain and sale to be made on the 1st of May, and to be enrolled on the fourth of the same month—it would have been a false assertion to have said on the 2nd or 3rd of May that the bargainee was seised of the freehold; but after the enrolment on the 4th had taken place, it would have been correct enough to have said, that the bargainee was seised of the freehold on the 2nd and 3rd; because, in consequence of the enrolments having a relation back to the time of the date, the bargainee would be in judgment of law seised as from the 1st of May. There is a case stated by our author himself, in pages 58 and 59, which will serve to elucidate the point under consideration.—‘‘ If an attainted person be enfeoffed to an use, the King’s title after
NOTES AND EXPLANATIONS.

'after office found shall prevent the use, and relate above it, but until office the cestui que use is seised of the land.' So, after enrolment, the title of the bargainee shall prevent the freehold from being in the bargainor after the date of the deed, and relate above it; but until enrolment, the bargainor was seised in the one case, in the same manner as the cestui que use was, until office, seised in the other.

This note hath already proceeded to so great a length as to induce the editor to decline a disquisition of the different and contradictory cases which are to be met with in the books with respect to what purposes the enrolment shall have a relation back to the delivery; and he will therefore content himself with observing, that all the books are agreed, that the enrolment will have a relation back to make good the recovery of the bargainee against whom the præcipe was brought before enrolment. The books are also all (with an exception, however, of what was said by Jones justice in the case of Flower and Baldwin, Cro. Car. 217. against the opinion of Croke, and in which case there was no judgment given) agreed, that the relation back of the enrolment will avoid all mean estates or charges made to a stranger by the bargainor, after the delivery of the bargain and sale, and also take away the dower of the wife of the bargainor, where he marries and dies after the delivery of the deed and before enrolment. But with respect to almost all other purposes, if not every other purpose, the books are at variance upon the question, whether the enrolment shall have a relation back or not.

NOTE 107. p. 53. (b).

The reason of these cases is, that every part of the land being liable to the extent and to the statute,
NOTES AND EXPLANATIONS.

(merchant, &c. which is the kind of statute our author means,) they, like a rent charge, cannot be apportioned; and the consequence would have been, but for this proviso of the statute, that if, as in the case supposed by our author, a man had an extent of 100 acres and the use of one of them, the statute executing the possession to the use of one, would have been an extinguishment as to that one, and then, the extent not being apportionable, it would have been an extinguishment as to the whole. And with respect to the conuze of a statute, it was likely to have happened, that the conuze at the time of the statute of uses had taken a conveyance of part of the land which was subject to the statute, to some person to his use, in order to prevent that very extinguishment, which would in such cases have been the consequence of the statute, but for this proviso.

NOTE 108. p. 54. (c).

In the other editions it is all the time of the statute; and in the last edition the word remedy in the next line but one, was first inserted.

NOTE 109. p. 54. (d).

In the last edition it is said, collateral benefits, or vouchers, aid-priers; but should be, of vouchers, &c. the vouchers, &c. being the collateral benefits alluded to: and it should be aid-prayers instead of aid-priers, as appears from the statute itself. The aid-prayer, is, where a person impleaded, as tenant for life for example, petitions the court to call in help from another person, that hath an interest in the thing disputed, as the remainder-man, or reversioner; that is, that they may be joined in the action and help to defend the title: See 3 Black. Comm. 300.

A-a

NOTE
NOTE 110. p. 54. (c).

It giveth occasion also to intend, that, as the general words in the body of the law do not confer those benefits—and, that, as by this proviso they are not given to any cestui que use, after the expiration of a year from the time of the statute, viz. after the 1st of May, 1536—it was the intention of the legislature, that cestui que use, who might have an estate executed after that time should not have those advantages; and favours the opinion, that it was the intention of the legislature to discourage the practice of uses as observed in a preceding note. See note 62.

NOTE 111. p. 57. (g).

The lands would not have been subject to the use in the hands of the grantee, although the grantee had notice that the King had been originally a feoffee of it to uses; because, at the time of the grant, it was not subject to the use in the hands of the grantor. To prevent the injury which might happen to those persons to whose use Richard had been enfeoffed before his usurpation, the statute mentioned by Lord Bacon in page 32, was passed.

NOTE 112. p. 57. (h).

An imperial Queen, would be as much incapable of being seised to an use as a King, and for the same reason.

NOTE 113. p. 57. (i).

The two reasons first assigned by Lord Bacon, are reasons, why a corporation could not be seised to an use at common law; but the third, which he considers the chief reason, is one which accounts for the non-execution
NOTES AND EXPLANATIONS.

execution of such an use by the statute, even supposing, that at common law a corporation might have been seised to an use. At the time of the statute of uses, it was unsettled, whether a corporation could take to any other than to its own use. Brooke in the 14 Hen. VIII. inclined to the opinion, that a corporation might be enfeoffed to an express use. See the Year book, 14 Hen. VIII. 8. a. and Bro. Abr. feoff. al. uses, pl. 10. But in a subsequent case, in 24 Hen. VIII. Bro. Abr. feoff. al. uses, pl. 40. he states it as being the better opinion, that a corporation cannot be seised to an use, for their capacity only is to take to their own use. In a case in the 28 Hen. VIII. the next year after the statute, (See Dyer 8. b.) it was said, that an abbe and convent could only take to their own use.

It should be observed here, that the above cases are, that a corporation cannot take to the use of another, for,—as to whether a corporation can stand seised to an use—a material distinction is to be made between their capacity of standing seised to an use, where they are enfeoffed to an use originally, and so take to that use in the first instance; and, where they stand seised to an use by limiting an use out of, or charging an use upon, possessions already theirs; for in the case of Sir Thomas Holland and Bonis, 3 Leo. 175. reported also in 2 Leo. 121. under the title of Holland v. Bonis, this distinction was taken.

Upon the authority of the last mentioned case, Chief Baron Comyns (See Com. Dig. tit. bargain and sale, [B. 3.] ) concludes, that ' a corporation may give an use, though they cannot be seised to an use;' and that conclusion is, in the present day, generally received; but it doth not appear to the editor, that any such conclusion is warranted by that case; but, on the con-
NOTES AND EXPLANATIONS.

trary, if it amounts to any decision at all upon the subject, it is, that a corporation may be seised to the use of another, as he will now attempt to prove.—We are informed by the reporter, that "it was further objected, that a bargain and sale by a corporation is not good; for a corporation cannot be seised to another's use; and the nature of such a conveyance is to take effect by way of use in the bargainee, and afterwards the statute to draw the possession to the use: but that the court utterly rejected that exception as dangerous, for that such were the conveyances of the greater part of the possessions of monasteries." This is all that was said by the court upon the point. Then, as the objection was, that a corporation could not be seised to an use, and as that exception was utterly rejected by the court, did not the court in effect determine that a corporation might be seised to an use? And if so, where is the authority for the modern doctrine? In fact, it is absolutely impossible, that an use could have been at common law, or can be since the statute, without a seisin to it; and consequently, it is impossible, for a corporation to give an use without being seised to an use.

It is further observed by Leonard, that it was said in that case by Serjeant Shuttleworth, that, "although such a corporation could not take an estate to another's use, yet they might charge their own possessions with an use to another." And there certainly is a material difference between their taking to the use of another and their limiting an use to another out of their own possessions, for that is, as the editor conceives, what Shuttleworth meant. All the arguments, that—'their capacity is only to an use certain,—that they can only purchase for the common benefit and for
NOTES AND EXPLANATIONS.

for the ends of their creation, and—that they want power to take lands to the use of other people,' (see supra 42, 57, and Gilbert's Law of Uses 5, and 170,)
—are very strong against their taking to another's use; but do not apply against their limiting an use to another out of their own possessions; at least, not where they have authority to convey away those possessions; nor does the reason above given by Lord Bacon, that 'they cannot execute an estate without doing wrong to their corporation or founder,' carry any influence in such cases. It is in fact taking pretty much the same distinction with respect to a corporation, as Lord Bacon hath taken with respect to a bishop in the case which he has next stated, viz. that the bargain and sale of a bishop will be good for his life, but that if a feoffment be made to him and his successors to an use, the use is not good for the bishop's life even, but merely void.

It should be remarked however, that a modern writer understands the expression of Shuttleworth, 'that they might charge their own possessions with an use,' in this sense, viz. that they might annex an use to the land itself, as distinguished from an use annexed in privity to the estate and to the person touching the land; but this does not appear to be a fair interpretation of the passage; for there is no reason to suppose, that Shuttleworth meant to say, that uses might be created in a different way by a corporation than by common persons, and it was contrary to the nature of uses to be annexed to the land: It had been argued, that a corporation could not be seised to an use, and Shuttleworth admitted that they could not take to the use of another, but that they might charge their own possessions with an use to another. Now it is reason-
able to suppose, that what he meant was that they might do what had been done in that case, scilicet, give an use to another.—If the expression had been that a corporation could not stand seised but might charge, as through mistake it hath been represented, there would be some colour for the above exposition; because as they could not raise an use out of their own possessions to another without being seised to an use, it would be reasonable to suppose, that by the expression of charging their possessions with an use a mode of limiting uses different from the common one was meant; but as the expression was that they could not take but might charge, it is more reasonable to suppose, that he meant they might give an use, or in other words raise an use to another, of their own possessions: If, however, Shuttleworth meant to attach to the expression he used, the meaning which the author alluded to hath supposed, then it would be proved erroneous by every principle and authority to be found in the books, as 1 Rep. 121. amongst others, and most certainly an observation so absurd would not have been worthy of being recorded.—It is to be presumed, from the circumstance of Leonard's having preserved the expression, that it had been approved of, as a sound and substantial distinction; but if it had been meant, that a corporation might limit an use differing altogether from uses in general, it is not to be believed, that such a doctrine would have been listened to one moment by the court. The editor would not have said so much upon the expression of Shuttleworth, if very great stress had not been laid upon it by others, who (as it is thought) have misapprehended its meaning.—But, whatever may have been the arguments of counsel
in the case, it is positive, that the opinion of the court was, that a corporation might be seised to another's use by their bargain and sale.

There appears to me to be a strong argument in favour of a corporation's being seised to an use, for where they might convey by feoffment, &c. as the chancellor considered the purchaser for a valuable consideration as having the use, and the bargainor as a trustee for him where the bargainor refused to convey, so would the bargainee of a corporation be considered as having an use at common law, and the corporation as being a trustee for him; but then would come the argument which is to be met with in Plow. Comm. 538, and Gilbert's Law of Uses 5, that the chancery hath no process on the persons who form the body corporate to compel them to discharge the trust—an argument, however, which would not hold at this day, for bodies politic may be trustees, and in such cases, are considered in a court of equity as individuals. See Bac. Abr. ed. by Gwillim, 7 vol. 94, in a note by the editor and the authorities to which he refers. And as it is now held, that bodies politic may be trustees, the weight of the objection which was stated in Chudleigh's case against a corporation's being enfeoffed to the use of another, 'because that a trust and confidence could not be placed in a corporation on account of its being a dead body,' is done away; but still the bargain and sale of a corporation would not pass an use to the bargainee which would be executable by the statute, as Lord Bacon observes, on account of the word person which is used in the statute when it speaks of the feoffee, a term which is not applicable to a corporation; and the legislature evidently considered that it was not inasmuch
NOTES AND EXPLANATIONS.

inasmuch as it adds the words *body politic* to the words *person* or persons when speaking of the *cestui que use*.

In the above case of *Holland v. Bonis*, it seems indeed to have been the opinion of the court, that an use raised by the bargain and sale of a corporation would be executed by the statute, but the editor cannot think that any court would consider itself bound by what was said in that case, to decide contrary to an act of parliament, (and contrary to the act would such a decision be, because although by a court of chancery the members of a corporation may be considered as natural persons, yet in a court of law they would be looked upon as merely constituting a dead body, to which the word *persons* as used in the statute on the part of the feoffees, would not extend, and clearly was not intended by the legislature to extend, since bodies politic are spoken of *expressly* where it was intended to include them,) especially as the decision in that case did not establish the bargain and sale, but on the contrary, was against the person who claimed under the bargain and sale upon the ground, that the conveyance was not well pleaded; for they had pleaded it as a grant, whereas it ought to have been pleaded as a bargain and sale. See 2 *Leo*. 122. in note.

NOTE 114. p. 57. (k).

Whether an estate tail can be by express limitation to the use of another has been *vexata questio*.—It was held in a case in 24 Hen. VIII. *Bro. Abr. feoff. al. uses*, pl. 40. that a tenant in tail should not be seised to an use express, but to his own use: The case was, 'a man made a feoffment in fee to four to his use; and the feoffees made a gift in tail to a stranger without consideration, who had no knowledge of the first use,
NOTES AND EXPLANATIONS.

habendum in tail, to the use of cestui que use and his heirs, and it was held, that the tenant in tail should not be seised to the first use, but to his own use. And in a subsequent case, Year book 27 Hen. VIII. 10. a. it was said, that it had been of late adjudged by the advice of all the justices, that tenant in tail could not be seised to the use of another; and the adjudication alluded to, was probably the above-mentioned case in Brooke. At the time of the statute of uses therefore, the law was, that tenant in tail could not be seised to an use. Plowden also in his report of Walsingham's case, in the 15 of Elizabeth, declared the law to be, that an use could not be limited upon an estate tail; for one of the counsel in that case having argued, as if there might have been an use upon an estate tail, Plowden to prevent the reader from being misled, adds a note for the purpose of informing him, that the law was not what the counsel had inferred; and he refers to the above case in the 24 Hen. VIII. as an adjudication upon the point. See Plow. 555.

However, from the obiter expressions of Manwood and others in two cases, in the 14 and 25 of Elizabeth, (see Dyer 312. a. and 2 Leo. 16.) an opinion seems to have been entertained, that such uses would be good; but, whether such uses were good or not, was not made a question in either of those cases, and uses on estates tail were spoken of, only for the purpose of showing, that although, where by reason of tenure an use was implied in one person, yet an express use to another would be good. Those expressions, therefore, could not be considered as shaking in the slightest degree the positive decision before the statute, with which they were inconsistent; but, if from the respectable quarter whence those expressions proceeded, they
NOTES AND EXPLANATIONS.
they at first carried any weight, a case was afterwards decided which totally took it away.—The case alluded to, was Lord Cromwell's case, in the 43 of Elizabeth, wherein the judges held, upon the authority of the above cases in the reign of Hen. VIII. and as a reason for one of their resolutions, that an estate tail could not be by express limitation to the use of another. See 2 Rep. 78. a. and 2 And. 87. And in the last case, they looked upon the saving of estates tail in the 1 Ric. III. (supra page 5 and note 100,) as an admission and an adjudication by parliament to that effect. It appears, therefore, to have been determined by positive decisions upon cases, as well after as before the statute, that an estate tail could not be to the use of another: and it is material to note it pointedly, because the case of Cooper v. Franklin, which hath been relied upon by the most respectable characters as an authority against the use on an estate tail, is not perfectly satisfactory, in consequence of the different reporters of that case not being agreed as to what the actual determination was. That case, which arose in the reign of James I. was twice argued, and one of the points in it was, whether an use might be limited upon an estate tail at common law or at that day after the statute 27 Hen. VIII.—of uses?—Croke, who has reported the first argument, says, that the opinion of the court upon the argument inclined, that the limitation of an use out of an estate tail was void, as well after the statute as before. See Cro. Jac. 401. and in Bulstrode's reports, (see 3 Bulst. 184.) we are informed, that the judgment of the court upon a second argument was, that a tenant in tail could not be seised to an use. However, according to Godbolt, (see Godb. 269.) the resolution of the court was directly contrary, viz. that tenant
NOTES AND EXPLANATIONS.

tenant in tail might stand seised to an use expressed, but that such use could not be averred. There is reason to suppose, however, that the determination in the case of Cooper v. Franklin, was as Bulstrode represents it; for Coke (see Co. Litt. 19. b.) and Rolle (1 Roll. Rep. 384. 2 Roll. Abr. 780.) expressly say, that it was adjudged in that case, that tenant in tail could not stand seised to the use of another. As for Moore's report of the case (see Moore 848.) under the title of Carter v. Franklin, it doth not concern the question under consideration, but relates entirely to another point in the case, viz. whether the heirs to whom the use was limited should be intended to be the same heirs as those mentioned in the habendum?

If the case of Cooper v. Franklin, is to be taken as an authority, it must be in favour of the doctrine, that tenant in tail cannot stand seised to an use; for surely the concurrent testimony in its favour, furnished by the reports of Bulstrode and of Rolle, as well as by Coke's Commentary upon Littleton, (to say nothing of Coke, although he informs us, that the judges were upon the first argument inclined against the use,) will not be outweighed by the single report of Godbolt; but, if the contrary report of Godbolt should be considered sufficient to render the accuracy of all the other reporters doubtful, the doctrine is still firmly established by the cases before the statute, and Cromwell's case already noticed.

Nor does the doctrine, that an estate tail cannot be by express limitation to the use of another, depend solely upon the authority of adjudged cases, for all our great law writers, with the single exception of Lord Bacon, have given it their unqualified support; as Lord Coke, (Co. Litt. 19. b.) Chief Baron Comyns, B b 2

(Dig.)
(Dig. tit. uses. F.) the authors of Sheppard's Touchstone, and Bacon's abridgment, (see Shep. Touch. 509. and Bac. Abr. 5 ed. 7 vol. 95.) and Chief Baron Gilbert, (Gilbert's Law of Uses 11, 205, 206.) all uniformly agree, that tenant in tail cannot stand seised to the use of another.—So far in point of authority.

It remains to examine the arguments upon principle, which have been advanced upon the subject; but it should be previously observed, that the statute 27 Hen. VIII. c. 10. only executes such uses as were good uses before the statute, (see 2 Roll. 780.)—The chief reasons why tenant in tail cannot stand seised to the use of another are, first, 'that by the statute de donis, the land is as it were appropriated to the tenant in tail and his issue;' (see Bro. Abr. feoff. al. uses, pl. 40. Co. Litt. 19. b.) And secondly, that 'no man can be seised to the use of another but he who before the statute might have executed to cestui que use, an estate perfect in law;' (see Bro. Abr. ubi. sup.)‘ and who at the same time might have been compelled to have executed such an estate by the chancery.' See Cro. Jac. 401. Now tenant in tail could not have executed a perfect estate to cestui que use, for the issue in tail had a formedon under the statute de donis: (see Bro. Abr. ubi. sup. and Gilbert's Law of Uses, 205, 206.) Nor could the court of chancery compel the execution of such an estate, for it is bound by the statute de donis, (see Gilbert's Law of Uses, 11,) Lord Bacon alluding to the reason that tenant in tail could not execute an estate without wrong, observes, that "it is quite taken away since the statute, because the statute saveth no right of entail as the statute 1 Ric. III. did;" but this observation does not appear to possess any great force, for the nature and operation of the one statute
NOTES AND EXPLANATIONS.

statute and of the other are essentially different. The statute of Richard III. would perhaps, (that is, even supposing the use not to be void ab initio, but which the editor at the same time conceives that it would be, for indeed it was so held in Cromwell's case, 2 And. 87. and so asserted by Lord Coke; (see Co. Litt. 19. b.) but for the saving of estates tail, have made uses on those estates good which were before void; in other words, it would have prevented the issue in tail from having his formedon against the alienee of cestui que use, inasmuch as the statute, but for this saving, would have made the alienation of cestui que use good against his feoffee and all other persons: But the statute 27 Hen. VIII. only executing the possession to such uses as were good uses, and as might have been lawfully compelled to be executed before the statute, (see 2 Roll. 780.) has not the effect of making uses on estates tail good, and therefore any saving of them would have been superfluous. Whether the statute 27 Hen. VIII. affects uses on estates tail or not, is dependant on the question, whether at the time of that statute such uses could have been compelled to be executed? and it has been before proved that they could not.—It does not therefore follow, that because the statute of Richard might have established uses on estates tail, but for the saving, that therefore such uses must be established on account of the want of such a saving in the statute of Henry VIII.

Some from their manner of arguing appear to think, that before the statute of Richard III. tenant in tail might have stood seised to the use of another, and that his incapacity was occasioned by that statute; but that is a false conclusion, for the saving in the statute rather shows, as it was observed in Cromwell's case, 2 And.
NOTES AND EXPLANATIONS.

87. that the law was then taken by the parliament to be, that an use so limited was void. If, at the time of the last mentioned statute, tenant in tail might have been seised to an use, why was not the alienation of cestui que use of lands in tail made good as well as the alienations of those who had the use of other estates, seeing how easily the statute might have been evaded in consequence of its not extending to uses on estates tail? Had there been any such uses, the saving of estates tail would have furnished a clew whereby any person wishing to evade the statute might have succeeded; for it would only have been necessary to make a gift in tail to the use of the donor, instead of a feoffment in fee to the use of the feoffor, and then, the donee or his issue not being bound by the statute by reason of the saving, might have entered on the alienation of his cestui que use: And therefore it is to be presumed, that there could not have been uses on estates tail at the time of that act, but that such uses were by the legislature deemed void, ab initio, in which case nothing was to be feared from the saving. But it may be asked, where then was the necessity for any saving? The answer would be,—in order to prevent the issue in tail from being barred of their formedon, where tenant in tail passed a tortious fee to others to the use of himself, for there, the use not being upon an estate tail would have been a good use; and then, the statute making good the alienation of cestui que use, the issue in tail would have been defeated but for a saving of their rights.

The remark by Lord Bacon, that, 'the reason might have been answered before the statute in regard of the common recovery,' is certainly the strongest; for, as the donee in tail to an use might have suffered a recovery
covery and thereby barred the estate tail, he might have enabled himself to execute to the cestui que use such an estate as the issue in tail could not have disturbed; but still this argument is very far from being conclusive, because the donee in tail was not compellable by the chancery to suffer a recovery; for though the barring of estates tail was tolerated, the restriction imposed by the statute de donis was never taken off; and therefore, the court of chancery being bound by the statute, could not compel the performance of a deed which the legislature had in effect interdicted. The trust reposed in the seors— and consequently the obligation on his conscience which the court of chancery would have enforced, was, to execute that estate which he had received, viz. the tail, and not to acquire a new estate.—As, therefore, the estate which the donee in tail received to the use, could not have been perfectly and effectually executed—an use upon an estate tail before the statute, was void in its first limitation, as observed above.

In a modern publication it is said, that, “the reason formerly urged against the capacity of a tenant in tail to hold in use, that he could not execute the estate tail to the cestui que use, without committing a wrong, appears now to be altogether inapplicable to the execution of uses; inasmuch as the use is executed by the operation of the statute, and not by the donee.”

In answer to that observation, the editor admits, that, if the use limited on an estate tail be capable of execution by the statute, no wrong would be done by the donee in the execution, since the execution would not be by him; but he contends, that the observation has nothing to do with the argument, which is, that as the donee could not execute the estate tail to cestui que use, at common law,—the statute cannot, nor was intended,
tended, to execute it: And it is to be observed, that the words, *inasmuch as the use is executed by the statute*, beg the very question in dispute, that question being, whether the use be executed by the statute or not?—The observation might have some weight if the question were, whether an use executable by the statute, would be more perfectly executed by *it* than it could have been by the feoffee himself at common law, as for example, the case of the infant and feme covert in the next page of our author; but the argument is, that no use limited upon an estate tail can be executed at all by the statute, by reason that the statute only extends to such uses as were good uses *before* the statute; and before the statute, uses limited on estates tail were void, as it was held in the above cited cases before the statute, and expressly resolved since.—Suppose that a gift in tail had been made to an use immediately *before* the statute; when the statute came, it could not execute the estate tail to the use; for the reason that the donee in tail was not seised to any use, the use being void in the first limitation.

It is a mistake to suppose, that, "the real question now is, are the words of the statute sufficiently comprehensive to include estates tail?" for it is but a secondary consideration; the primary question is—Could there have been an estate tail to the use of another at the time of the statute? if the affirmative should be made out, then would it come to be considered, whether the words of the statute are sufficiently comprehensive to include estates tail? but, as it has been already proved, as well, upon the authority of positive decisions, as, upon principle, that there could have been no such uses, that, which some have thought to be the real question, is not, in truth, any question at all.

4

With
NOTES AND EXPLANATIONS.

With respect to the argument of tenure between the donor and the donee—as it can have no influence where uses are expressly declared in writing, (see 2 Leò. 16. Dyer 311. b. 312. a.) the editor hath not thought it worthy of notice in the consideration of the present question. But it may be proper to observe, that this note is meant for the case, whether, if land be given in tail to A. to the use of B. and his heirs, B. will have a fee simple determinable upon the failure of the issue in tail of A.? for there is no doubt, that a tenant in tail may stand seised to an use determinable upon the death of tenant in tail himself, as in Seymour's case, 10 Rep. 96.—and that being the case, the bargain and sale of tenant in tail passeth such an use as will draw the freehold to it, and cause the bargainee to be a good tenant to the precept for suffering a recovery.

The editor therefore conceives, that in opposition to the opinion of Lord Bacon, it would at this day, upon the great strength of the authority on the other side, be received by the courts at clear law—that an estate tail cannot be by express limitation to the use of another.

NOTE 115. p. 58. (l).

By defeating the estate executed during the coverture or infancy, they would be seised as they were before such execution; consequently to the uses declared on their estates; but executions by the statute of the estates of infants and feme coverts cannot be defeated by them, because, as it is enacted generally without any qualification, that the estate, &c. of the feoffees to uses shall be in cestui que use, the power given to feme coverts and infants by the common law of avoiding their own acts, is controled; and there is no right reserved
NOTES AND EXPLANATIONS.

reserved to such feoffees in particular, nor to feoffees in general, where their claim is to the use of another. See note 147.

NOTE 116. p. 58. (m).

The word if is not in the other editions; and for want of it, and according to the punctuation in those editions, the passage there imports that the sum of money was to be paid to the use of I. G. and his heirs; but Lord Bacon is supposing, that the use is in the first instance limited to the infant feoffee and his heirs, and that the use of the land shall change from him, and be to I. G. and his heirs if I. D. pay the money, so as to cause the use to I. G. and his heirs to be until payment of the money, a contingent use.

NOTE 117. p. 58. (n).

The difference between the two cases is, that, in the one of an use precedent, there being an use in esse upon the making of the feoffment, the statute instantly takes the possession from the feme covert or infant feoffee and vests it in the cestui que use, before the baron or infant can possibly destroy the feoffment by his disagreement; but in the second case, as the use does not arise to I. G. before payment of the money, the infant may before the rise of the new use disagree to the feoffment, and by destroying the feoffment, overthrow the contingent use. See note 147. So where a feme covert is enfeoffed to a contingent use in a similar manner—as the baron may by his disagreement, avoid his wife's feoffment, and divest the whole estate, (Co. Litt. 3. a.) it is in his power, by so doing before the future use arises, to prevent it from ever arising at all; and if the husband should not disagree during his life,
NOTES AND EXPLANATIONS.

life, yet, as the wife after his death may waive the feoffment, (Co. Litt. ibid.) she may also defeat the use by disagreeing before the event happens upon which it is to arise: and so may her heirs also, if after the death of her husband she does not by some act, express her agreement to the feoffment.—Lord Bacon acted with his usual wariness, in supposing a case, where the use should be limited to the infant feoffee himself until the payment of the money; for if the feoffment had been to the use of any other person than the feoffee, as to I. S. for example, and then to I. G. upon payment of the money, the future use to I. G. could not have been overthrown by any disagreement of the infant; because, as the seisin would immediately be executed to the use of I. S. it would so far be the case of an use precedent, and the disagreement would come too late; and the same law of a feme covert; for, as the statute contains no saving of the rights of infants and feme coverts, the right which they had at common law of setting aside such feoffments, is taken away by the statute, as observed in note 115; whereas in the other case, notwithstanding the use is declared to them they continue seised at common law, and the statute has no operation until payment of the money; consequently, so long as the money remains unpaid, their right of doing away the feoffment by their disagreement, is not in any degree controled.

NOTE 118. p. 58. (o).

As in the minds of some persons a doubt may arise, whether the remainder to I. S. and his heirs will continue after the disagreement of the infant feoffee, as well, upon the ground of the infancy of the feoffee, as of the destruction of the particular estate, it is necessary that
that the editor should—in endeavouring to assign the reason why the remainder is not divested—consider the case in two distinct points of view: first, as to the connection, between the infant merely in his character of feoffee to uses, and I. S. as cestui que use; and secondly, in relation to the connection, between the infant as being the person to whom the particular estate in the use is limited, and I. S. as having the remainder of the use exceptant upon the determination of that particular estate.

With respect to the first—supposing the infant in his character of tenant of the particular estate not to disagree, as the remainder in use to I. S. is not contingent, but capable of vesting immediately, it is immediately executed by the statute; before the feoffee upon the ground of infancy can set aside the feoffment; and is so far a similar case to that of the use precedent spoken of in the last passage of the text, and in the last note, which see.

And with respect to the second, namely, whether by the disagreement of the infant to whom the particular estate in the use is limited, the remainder over is divested?—it will be proper to enter a little into the difference between limitations of the use of the land and limitations of the land itself; but in the first place premising, that the infancy of the particular tenant is not upon this part of the case in any degree material. It is clear then, that in case of a limitation of land, if the particular estate was limited to one who refused to take it, or who was incapable of taking it, the remainder was void; as if lands had been limited to A. for life, with remainder over in fee to I. S. or to a monk for life with such remainder over, in one case, the remainder would be void by the refusal or disagreement
of A.; in the other, by reason of the incapacity of
Abr. 415. The reason, why the remainder is not
good, is, that as by the rules of the common law no
remainder of the land can take effect without livery of
seisin be made to the particular tenant, (see Co. Litt.
49. a. 49. b.) it follows, that where the person to whom
the particular estate is given, either refuses—or has
not capacity—to accept livery of seisin, the remainder
must necessarily be void. See Bro. Abr. tit. dev.
pl. 14. But, if the remainder hath once vested by
good title, then it cannot be destroyed by any sub-
sequent disagreement of the particular tenant; as if a
lease be made to an infant for life, the remainder in
fee, and the infant at his full age disagree to the estate
for life, yet the remainder is good. See Co. Litt.
298. a.

However, in cases of limitations in use, as the case
put by Lord Bacon is, and of devises of the land, al-
though the person to whom the particular estate is given
is not capable or refuses, the remainder will be good
Plowd. 414. 2 Roll. 415. Dyer 127. b. pl. 54. and 310.
a. pl. 79, and 1 Rep. 101.

The reader will perceive, that the ground of the
remainders being void in the case of limitations of the
land, viz. the want of livery of seisin to the particular
tenant, does not apply to limitations in use and devises,
because limitations in use and devises are not in the
manner of their taking effect, governed by the rules
of the common law, but are, on the contrary, con-
strued by the judges according to the meaning of the

Whether,
NOTES AND EXPLANATIONS.

Whether, in cases where the particular estate does not take effect, the estate and interest of the remainder-man shall commence presently, or not until the time is run out for which that particular estate was to have continued, are questions which depend upon the construction of the terms in which such remainders may be couched. If the words import, that the remainder is to vest in possession upon the determination of the particular estate, then, if that estate does not take effect, the remainder-man's interest commences presently; but if the words have a reference to the expiration of the time for which the particular estate is limited to continue, then, although the particular estate should fail, yet the remainder-man's interest will not commence before that time is run out; for example—if an use be limited, or a devise be, to A. for a term of twenty-four years, and then the remainder over, is by such words as the following, and after the end or expiration of the said term of twenty-four years, (or any other words, which show that the determination of the legal interest and not the time is meant;) then to another in fee; if A. should be incapable of taking, or should refuse to take, the term, the interest of the remainder-man commences presently: but, if the words be, and after the end or expiration of the said twenty-four years, (so as to make it evident, that the expiration of the time and not the determination of the estate was meant;) then to another in fee; the estate of the remainder-man will not commence until twenty-four years are expired by effluxion of time; for by express limitation the use is not to commence till that period. See Lord Paget's case, 1 Lew. 194. 1 Moore 193. 1 Rep. 154. and see Gilbert's Law of Uses 225, 226, and 227.
NOTES AND EXPLANATIONS.

In Lord Paget's case, there was a diversity taken by Popham, Att. Gen. and Manwood Chief Baron, with respect to the commencement of the remainder-man's interest, between the case of a feoffment to uses and a covenant to stand seised, upon the ground, that in case of a covenant to stand seised, the considerations of raising the different uses are several—a diversity which merits the reader's intention.

With respect to the commencement of the remainder-man's interest, see also supra p. 13. Year Book, 37 Hen. VI. 36. and Fitz. Abr. tit. subprena, pl. 1.

NOTE 119. p. 59. (p).

Attainted persons can purchase for the benefit of the crown or the lord of the fee only; but the law doth not give the king his right, until office found: Therefore, until the jury or inquest find the feoffee to uses guilty of felony, the statute has the same operation as if the feoffee were an innocent person; but immediately upon their finding such office, the king's title relates back to the time of the feoffment, and as the attainted feoffee could only purchase for the benefit of the crown, the use is prevented.

So if the feoffee be an alien—before office found the statute will execute the possession to cestui que use; but if an inquest of office should be held to inquire into the fact of his being an alien and the office should be found, the king's title would relate back in like manner, and prevent the use. See Co. Litt. 2. b. 42. b. 2 Black. Comm. 291. 3 Black. Comm. 253. and see the case of King and Boys, Dyer 283. b.

There are a few special cases where the King is entitled without office, for which, see Co. Litt. 2. b. Plowd. 229, 230.

NOTE
NOTE 120. p. 59. (q.)

The reason of the difference is, that, as where the villein of a common person purchased land the latter had only the possibility of an estate before entry and must have entered to gain an estate, the consequence was, that if the villein had aliened before the entry of the lord—the lord would have being barred of the possibility which he had to the land for ever; (see Co. Litt. 118. a.) so, where the villein of a common person was enfeoffed to an use, the statute would immediately execute the possession to the use, and such an execution would have had the same effect of preventing the lord from gaining his estate by entry, as an alienation by the villein himself. But in case of the king's villein—inasmuch as where the villein aliened before the king (upon an office found for him) had entered, yet as the king after office found would have had the land quia nullum tempus occurrit regi; (Co. Litt. ubi. sup.) so where the king's villein was enfeoffed to an use, although the statute took the possession from the villein and transferred it to cestui que use, yet might the king after office found have entered upon the cestui que use, for the same reason that he might have entered upon the alienee.

Villeinage is now abolished.

NOTE 121. p. 59. (r).

Never riseth—In the other editions it is written neither riseth, and for want of a comma after the word statute, the passage in those editions seems to import, that he was not in by the statute discharged of the use, but by the common law; whereas the author's
author's meaning was, that as the use never arises, the lord is in by the common law discharged of the use, and not by the statute.

NOTE 122. p. 59. (?5).

In the case where a feoffment was made to a villein; the land would be absolutely in the lord upon his entry; and where the lord was made a feoffee to the use of his villein, he being by the feoffment in possession, the use was as much incapable of raising, as where a man was enfeoffed to the use of himself; but as the chattels real of the wife do not upon his being in possession of them, absolutely vest in the husband, although he may dispose of them; and as he is only possessed in her right, and the term or legal interest continues in her; (see 1 Roll. Abr. 342. and authorities, Co. Litt. 351. a. and 1 Bac. Abr. 476. 5 ed. in a note by the editor;) and as they will belong to her in case she survives and he has made no disposition of them—the circumstance of the husband's being in possession by reason of his having been made a feoffee to the use of his wife for years, does not prevent the use from arising, nor cause it to ensue by way of discharge; the statute, therefore, executes the possession to the use of the term in the same manner as if any other person than the husband had been made a feoffee; and consequently, the use vests in the wife in the first place, and then the statute carries the term itself or legal interest to the use and vests it in her, when the husband becomes possessed of it in her right and may if he thinks proper dispose of it; but if he does not, the wife will have the term upon his death in the same manner as where a demise is made to her.
NOTE 123. p. 59. (t).

The king's title to his year, day and waste, would not arise if the lord should hold discharged of the use; and in order that it might not prevent his title from arising, the limitation of the use is considered good, and the feoffe in by the statute. For the reason why the king had the profits for a year and day, and might cause waste to be made, unless the lord agreed with him for the redemption of such waste. See Staunf. Praeg. 44, and Wright's Ten. 120.

NOTE 124. p. 59. (u).

The word but is not in the other editions: it however appeared to the editor to be necessary.—Lord Bacon is supposing a case where land is given to I. S. for life, the remainder to the right heirs of I. D.; and that both the estate for life and the remainder are to the use of I. N. and his heirs; and then means to observe, that on account of the remainder to the heirs of I. D. being in suspense, (for he can have no heir as long as he lives, because, nemo est hæres viventis) I. N. is not seised of the fee simple, but of an estate for the life of I. S. only till I. D. be dead, (when the fee simple would be, no longer in suspense) and then in fee simple.—Indeed without the word but, the passage had not any sense.

It is to be observed also, that if I. S. the particular tenant, should die before I. D. the consequence would be that I. N. the cestui que use could never have the fee simple; because the contingent remainder to the right heirs of I. D. would be totally destroyed, it not being capable of vesting at the time when the particular estate would determine.
NOTE 125. p. 59. (v).

Lord Bacon here speaks of an estate for life to an use before the statute, from which it appears certain, that an use might have been upon such an estate at common law. A modern writer however, asserts, that neither tenant for life nor years could stand seised before the statute even to an express use, and he relies solely upon what was said in a case 24 Hen. VIII. which will be presently referred to; but it will be contended in this note, not only, that no such conclusion is warranted by that case, but, that the inference from what is there said, is in favour of the contrary doctrine; and, it will be contended also, that there are other cases which plainly prove, that there might have been an estate for life to an use before the statute. In the case above alluded to, the question was, if tenant in tail should stand seised to the use of another? and amongst other arguments against it, the following observations were made: "Also here is tenure between the donor and donee, which is consideration that the tenant in tail shall be seised to his own use; and the same law is, of tenant for term of years and tenant for term of life, there fealty is due, and where rent is reserved, there, although an use shall be expressed to the use of the donor or feoffor, yet it is a consideration, that the donee or lessee shall have it to his own use." See Bro. Abr. feoff. al. uses, pl. 40. How an opinion, that tenant for life cannot be seised to an express use, can possibly be gathered from those words, the editor confesses that he is wholly at a loss to conceive; for it appears to him, that it may be collected from the expression,—"where rent is reserved, there although an use shall be expressed to the use of the donor"
donor or feoffor, yet, &c.'—first, that the lessee shall have it to his own use, if rent be reserved although an use shall be expressed to the lessor; and secondly, that if no rent be reserved, and an use be expressed to the use of the lessor, that the lessee for life shall not be seised to his own use, but to the use of him to whom the use is so expressed.—The whole seems to favour the conclusion, that tenure is a consideration that the lessee for life or years shall have it to his own use, if no use be declared, as it is said in another place in *Bro. same* tit. pl. 10. "if the feoffee lease for life he shall have fealty, this shall be to the use of the lessee if an use be not expressly reserved." Now is it not a necessary inference, that if an use be expressly reserved, it shall not be to the lessee, but to the person to whom it is so reserved?

If tenure prevented an use from being by express limitation to any other person than the lessee for life himself, how do the advocates for that doctrine account for the execution of such uses by the statute at a period when tenure still remained in force? They tell us, indeed, that such uses were mere *confidences* and *trusts* before the statute, and that they are included under the words *confidence* and *trust* which the statute contains; but it has been already shewn in note 75, that the words *use*, *confidence* and *trust*, instead of relating to different things, were employed as convertible terms in speaking of the *use* before the statute. The fact is, that although tenure drew the use to the lessee, where the use was left to the construction of law, yet an use declared to another upon the estate of the lessee would have been good. There is an observation—by *Mr. Justice Manwood*, in *Brent's*
Brent's case (see 2 Leo. 16.) which is directly to the purpose—"a lease for life, is made to another use, yet notwithstanding that the law doth create a tenure upon the lease, yet the use expressed shall be good.

That uses might have been upon estates for life and for years before the statute, is evident, from the statute 11 Hen. VI. c. 5. which was made for the relief of him in remainder against particular tenants for lives or years, who assigned over their estates and took the profits, and then committed waste; and this statute hath been in a former page spoken of by Lord Bacon, as relating to uses. See supra, p. 27.

In a case, in the 2 and 3 of Elizabeth (Dyer, 186. a), of a gift of land to two for their lives to the use of another, a query was made, as to whether the consequences would have been the same had the gift been made before the statute? which was admitting that there might have been such estates to uses before the statute.

From Crawley's case also, it appears, that there might have been an use on an estate for life before the statute—"If one grant rent to two," says the case, "without more words, to the use of a feme before the statute. 27 Hen. VIII. the grantees have an estate in the rent during their lives to the use of the feme." See 2 And. 130. Cro. Eliz. 721.

There was nothing therefore incorrect in Lord Bacon's putting the case of an estate for life to an use before the statute. It is said in the books, that the statute only executes what were good uses before the statute. Now, it is clear, that uses on estates for life, are, at this day executed by the statute: if, then, as some have said, there were no such uses before the statute, there would be a variance between the doctrine laid down
down in the books with respect to the operation of the statute and the actual operation of it, and in order to avoid this contradiction, the writer alluded to, has found it necessary to create an exception of uses or estates for life, out of the rule, that those uses only are executed by the statute which were good uses before the statute; but the cases which have been referred to as proving this exception, so far from even intimating anything of the kind, do some of them afford a conclusion, that there might have been an estate for life to the use of another before the statute; for example, the above cited case in Dyer and Crawley's case: and the truth is, that the rule as laid down in the books has no exception (see 2 Roll. 780.) nor can it need one, because, it is certain, from the cases above quoted, that there might have been an estate for life to an use before the statute; and that being so, all that is to be found in the books on the subject harmonises.

NOTE 126. p. 59. (v).

By altering the punctuation in this place the whole is rendered intelligible. In the other editions it is in this manner—"the use is not executed out of the freehold in suspense for the occupant, the disseisor, the lord by escheat. The feoffee," &c. It was evidently requisite, that the period should end with the word suspense, and the next sentence commence with the word for; because the occupant, disseisor, and feoffee upon consideration without notice, are all in the same class; and it was therefore our author's intention to refer them to the same division of his work. He has already considered, who should be seised to uses in regard of their persons; and having afterwards to inquire, who should be seised to uses in regard of their titles,
NOTES AND EXPLANATIONS.

titles, he refers his reader for the cases of the occupant, the disseisor, &c. and all others in that class, to another division of his work, mentioned in p. 56; but which is, however, unfortunately lost, see note 145.

NOTE 127. p. 60. (y).

The words *and it* are not in the other editions, and without them the passage carries the meaning—that nothing more is requisite to the vesting of the use, than, that the deed of covenant should be enrolled and the feoffment be found by office; which would be incorrect; for the deed and feoffment must *both* be enrolled and *both* be found by office. Lord Bacon himself says just before, it behoveth *both* to be by conveyance of record, because the king's title is compounded of both; and he puts the case of a covenant not enrolled, but found by office, as an example, that, although the covenant is appearing of record in consequence of its having been found by office, yet the use does not vest; because, not being by enrolment it is not by matter of record, and for the same reason, the mere finding of the feoffment by office, without enrolment, is not sufficient: and both the covenant and declaration must be found by office, for it is against the policy of the law to permit the king to take, until the grounds of his claim have been found by a jury. The words *and it* were therefore necessary to show, that the whole matter, viz. the enrolment, not only of the covenant, but of the feoffment also, was to be found by office.

NOTE 128. p. 60. (z).

The fine and recovery being assurances by matter of record, and therefore not requiring any enrolment like a feoffment.

NOTE
NOTE 129. p. 60. (a).

It was not material when Lord Bacon wrote; but now in consequence of the statute 29 Car. II. c. 3. the feoffment and declaration must be both in writing. See note 20.

NOTE 130. p. 61. (b).

The remainder in use to the right heirs of I. D. is a good contingent remainder, although the preceding term of years in I. S. is not competent to its support.—If the use of the term had been declared to the feoffor himself, the remainder in use to the right heirs of I. D. would have been void as a contingent remainder.—And being void as a contingent remainder, it would, had it been limited per verba de futuro, have taken effect by way of a future or springing use; but, being limited per verba de praesenti, it would not have been a good future or springing use, if it had failed of effect as a contingent remainder.

It is intended to offer a few observations in support of—and to give the reason of the law with respect to—the above propositions; and first—where, as in the above case stated by our author, the use for years is not limited to the feoffor himself, the remainder would be a good contingent remainder; because it would be supported by the estate of freehold which would in such a case result to the feoffor for his life by implication; as in the case of Penhay v. Hurrell, 2 Vern. 370. a conveyance was made to A. to the use of trustees for 70 years, if A. should live so long; remainder to the use of trustees for 3000 years; and from and after the death of A. to the use of B. his son for life; with divers remainders over; the objection was,
was, that the limitation to B. together with the remainders over were void, being an estate of freehold to commence in futuro; for that the first freehold estate was limited to B. which was not to arise until the death of A. and no estate for life was limited to A. unless an estate for life should be supposed to result back to him; but, after solemn argument upon the point, and a case stated to the judges, it was held, that an estate for life resulted to A. which supported the limitations over. See Fearne's Cont. Rem. 27, 50. 4 ed. and see the case of Pechus v. Mitford, 1 Vent. 372. Upon the same ground therefore, that the remainder to B. in the case of Penhay v. Hurrell was good, is the limitation to the right heirs of I. D. in the case stated by our author, good also.

Secondly— if the use for the term had been declared to the feoffor himself, the remainder to the right heirs of I. D. would as a contingent remainder have been void.—In a case in the 34 and 35 of Elizabeth,—and which, as far as it concerns our present purpose, was as follows, Francis, Earl of Bedford, enfeoffed certain persons in fee, to the use of himself for years, with remainder to the use of the right heirs of the Earl;—it was agreed, that the remainder to the right heirs could not be supported by the estate for years, for that it ought to be a freehold at least to preserve such a remainder: and they said, that at that day, they did not think there was any diversity, between the case of a remainder in possession limited to the right heir of one, and of a remainder in use so limited over to another. See Poph. 3, 32. and Moore 718. So in the case of Adams v. Savage,—where, by a lease and release A. conveyed in fee to trustees, to the use of himself for ninety-nine years; remainder, to the use of trustees for twenty-five years; remainder to the heirs
male of the body of A.; remainder, to his own right heirs;—it was held, that the limitation to the heirs male of the body of A. was void, because there was not a preceding estate of freehold limited to support it. See 2 Salk. 679. And in the case of Davies and Speed, 2 Salk: 675. and Rawley v. Holland, cited Fearne's Cont. Rem. 51. 4 ed. the same doctrine is held: and in the first and last of those three cases, the court said, that no estate of freehold could result to A. for his life by implication; because another estate, viz. for ninety-nine years, was expressly limited to him, which would be inconsistent with a freehold by implication. It is almost superfluous to observe, that although a term be not limited to the grantor, yet, if the freehold be limited away to another, as to G. for instance, it cannot result to the grantor, Tippin v. Cosin, 4 Mod. 380; and that in such a case the remainder would be supported by the freehold in G.

We are now come to by far the most difficult point, which was proposed to be discussed in this note; viz. the distinction, between limitations per verba de praesenti and per verba de futuro, in order to their taking effect as springing uses, in cases, where, as contingent remainders they are void; but, before that distinction is gone into, it will be the better plan to submit to the reader's consideration, the reasons for thinking, that the courts, would at this day, construe such limitations in use to be good-springing uses, provided they are so worded as to admit of such construction.—Let us therefore suppose, that A. enfeoffs B. to the use of A. the feoffor, for twenty years, with remainder in fee of the use, to such son of A. as shall be first born; or, with remainder to the right heirs of I. S. after the death of I. S. Now, it is perfectly clear, that before the
NOTES AND EXPLANATIONS.

Mature those uses in remainder, and indeed uses limited to arise at any greater distance of time; however remote, would have been good springing uses. It is also perfectly clear, that such remainders of the land would have been totally void, being of freeholds to commence in futuro. When, therefore, the statute 27 Hen. VIII. c. 10. came and caused the land to be attendant upon the use, the consequence would have been, that, the rule against a freehold being limited to commence in futuro, and the other rules relating to the land, would have been undermined if the judges had not interfered, see note 131. It is not to be wondered at; then, that the judges in the above cited case of the Earl of Bedford, and in Chudleigh's case, should have held, in opposition to the strict principles of uses, that limitations in use in remainder should be void, in those cases where common law remainders would be so; because, as the limits for the vesting of executory devises and for the rise of future uses were not then fixed—to have permitted future uses to take effect in the same manner after the statute as they had done before, would have established perpetuities, against which it was the policy of the common law to guard: But now—when executory devises of the land itself are permitted to take effect, provided they vest within certain limits which preclude the fear of a perpetuity, that is 21 years, and the period of gestation after a life or lives in being—there can be no reason, why such uses as those limited to the eldest son of A. and to the heirs of I. S. in the cases above supposed, should not, although void as remainders, be allowed to take effect as springing uses; seeing, that they must arise within the above bounds, if they do at all, and therefore no danger of a perpetuity: and upon the strength of what Holt said in

E. 2
the case of Davies v. Speed, 12 Mod. 39. that a bargain and sale to the use of another five years hence, or feoffment to the use of the right heirs of I. S. after the death of I. S. are good future uses, it seems reasonable to suppose, that, as future or springing uses, the courts would at this day give them effect.

With respect to the distinction between limitations in use, per verba de presenti and per verba de futuro.— From the dicta of Holt in the case of Davies v. Speed just now quoted, Mr. Fearne seems to have imbibed an opinion, that in case of a conveyance to the use of C. for ninety-nine years, with remainder in use to the heirs male of the body of A.; such remainder, although limited per verba de presenti would be capable of taking effect as a future use; and, that it would be within the reason of the cases put by Holt, to give it effect as such. (See Fearne's Cont. Rem. 428 ed. sup.) but it does not appear to me, that they warrant any such conclusion; for, it is to be observed, that in the cases put by Holt the future uses are all limited in terms de futuro, as it stands with reason that they ought to be; whereas, in the case alluded to by Mr. Fearne, the remainder to the heirs male of A. is per verba de presenti; so that, taking it as a future or springing use—as being unconnected with, and independant of, any preceding estate—it must necessarily be a void limitation; as much so, as a limitation would be, to one who had been for years in his grave.—It is not a limitation to one, who shall at a future period answer the given description, as the case put by Holt is, viz. to the right heirs of I. S. after the death of I. S. by which time it will be ascertained who that héir is, but it is a limitation to one as if actually in existence when in fact there is no such person.—By the terms of the limitation
NOTES AND EXPLANATIONS.

limitation, the estate is to vest in interest immediately; but there is no person in whom it can so vest.—All this is capable of being explained, by what was said by Holt with respect to executory devises in the case of Goodright against Cornish, 12 Mod. 52, 53. for, the analogy between the learning of executory devises and future uses is so very close, that what serves to explain the one, does also at the same time, tend to elucidate the other. In the last mentioned case, a testator devised to his son J. for 50 years, if the said J. should so long live; and after the determination of the said term, then to the heirs male of the said J.; and there, Holt said, that "the remainder limited by the devise to the heirs of the body of J. was void, having no freehold to support it; and, that, per verba de præsentì one could not devise an estate to the heir of one living; but per verba de futuro one may; viz. to the heirs of I. S. after the death of I. S. and this shall enure as an executory devise." And he said also, that "this was not an executory devise to the heir of the body of J. it being limited expressly as a remainder."

Now, the same reason for the inefficacy of the limitation to the heir of the body of J. in the case of the executory devise last mentioned, applies with equal force to prove, that the limitation to the heirs male of the body of A. in the case of the use, was not capable of taking effect by way of springing use. And it is worthy of remark, that Holt puts the same case, as well with respect to executory devises as springing uses, and in words de futuro—to the heirs of I. S. after the death of I. S. Holts opinion therefore (and it was solely upon the opinion of Holt, that Mr. Fearne relied,) must have been, that such a limitation as that
NOTES AND EXPLANATIONS.

to the heirs male of the body of A. in the case alluded to by Mr. Fearne was void; being, per verba de præsentī, and consequently, that gentleman's conclusion was not warranted.

The reader will find cases in addition to the above case of Goodright against Cornish, which strongly favour the conclusion, that executory devises and springing uses cannot take effect as such, unless limited per verba de futuro; as the cases of Moore v. Parker, 1 Lord Raym. 37. 4 Mod. 316. Goodman v. Goodright, 2 Burr. 873. and Scattergood v. Edge, 12 Mod. 278. 1 Salk. 229. Indeed the last mentioned case is express upon the point, as we shall presently see.

Mr. Fearne has endeavoured to show by some recent cases, that the distinction between an executory limitation to a person not in esse, when made per verba de præsentī, and when made per verba de futuro, is no longer attended to, (see Fearne's Ex. Dea. 144. and from 506 to 511. 4 ed.) The editor, however, cannot think, that that gentleman's attempt hath been successful; for it is to be observed in the first place, that it may be collected from the cases cited by him, that although the limitations were per verba de præsentī, yet the intention of the testator was future; and the intention being future, the inference is, that the testator had not in his contemplation, the person who should at the time of his death answer the description mentioned in the limitation; but, the person who should answer such description at the future period to which he alludes; and, that he did not mean, that the estate so limited should vest immediately upon his death; but when that future period should arrive; and consequently, there does appear to have been sufficient reason for giving effect to limitations where the intention is future; and
NOTES AND EXPLANATIONS.

and that, without in the least questioning the accuracy of the distinction taken by Holt and others between verba de praesenti and verba de futuro.

It seems to the editor, that the only question to be considered in such cases, is, whether the intention of the testator be future or not?—Executory devises and springing uses derive their legal essence from the intention; and, consequently, are regulated by that intention, whenever it is apparent; so far at least, as the law hath given it a range. Powel, justice, in Scattergood v. Edge, cited above, said, "the rule is, that when by the words of the devisor it apparently is designed for a future interest or devise, it is good."

If the intention be future—whether the words of limitation make it so, or, whether it is to be collected from other matter in the will—there can be no room for contending, that it must take effect and vest at all events, upon the death of the testator if at all; but, on the contrary, it will be sufficient, should it be capable of taking effect and vesting at the future time which the testator had in view. If present—as where he limits in terms in praesenti, and there is nothing in any part of the will from whence it can be inferred, that the intention was otherwise than present—the conclusion is, that the testator intended that the limitation should take effect and vest in the person described by it presently upon his death; and if at that time, there is no such person in existence, such limitation must necessarily fail of effect for want of a person to take it. What possible reason can there be, for supposing, that the testator meant an executory devise, whenever thing in the will favours the opinion, that it was meant to take effect presently? In a devise to the first son of L. S., who has no son at the time, none can tell by
by the words of the devisor, said Powel, justice, in the last mentioned case, whether he meant it should take presently or futurely; and therefore, it is no more than a present devise to a person not in esse.

Mr. Fearne, also, in opposing the distinction, hath refused to allow to the authority on the other side its due weight; for he hath represented (see Fearne's Ex. Dev. 504 ed. sup.) the sentiments of the court in the aforesaid case of Goodright v. Cornish, upon the question whether the devise to the heirs male of the body of John was in that case an executory devise, to have only seemed to incline to the opinion, that it was not an executory devise; and it must be acknowledged, that, in the abridgment of that case in Salkeld, upon which authority Mr. Fearne relies, it is not said positively, that the court did not think it an executory devise, but that they seemed to think it not so. It is certain, however, that the opinion of the court was express, that it was not an executory devise; for, in the very report to which Salkeld himself refers (1 Lord Raym. 3.) it is said, that it was adjudged that this limitation to the heirs male of John, was not an executory devise, but a plain contingent remainder; and, that it was ill because there was no freehold to support it: And according to 12 Mod. 52, 53. which contains the fullest report of the case, it was said by Holt Chief Justice in that case, that per verba de praesenti one could not devise an estate to the heir of one living, but per verba de futuro one may, as it hath been observed above: And, that this was not an executory devise to the heir of the body of J.

It is admitted, that the judgment did not rest upon the point of its being good or not, but, with respect to the opinion of the court, and to what the decision would
NOTES AND EXPLANATIONS.

would have been, had the judgment rested upon that point, there cannot be two opinions, after what Lord Raymond has said, but that the decision would have been, that the limitation being per verba de præsentii, was not good as an executory devise.

Mr. Fearne also says, that he has not found any case determined upon the distinction between verba de præsentii and verba de futuro; and, that the case of Scattergood v. Edge did not decide the point, that a limitation per verba de præsentii would be void as an executory devise. See Fearne’s Ex. Dev. 504, 505. ed. sup. But the editor conceives, that the point was decided by that very case; and that, if Mr. Fearne had consulted the full report of the case in the Modern Reports, where the arguments of the judges are given at length, instead of the abridgment of it in Salkeld, it is probable that he would have been of the same opinion. That case was—to state it in as brief a manner as possible—a devise to a trustee for eleven years, and then to the issue male of George Jakes; and if he should die without issue male, then to the issue male of George Convoy. Jakes had no issue at the time of the devise, and died without issue: Convoy had issue at the time of the devise, who, upon the expiration of the term of years, entered. The judges delivered their opinions seriatim upon the case; and the only question was, which of the two devises, viz. that to the first issue of George Jakes he having no issue at the time, or, that to the first issue of George Convoy who had issue—should stand; for they were incompatible and could not both subsist? And it was moved and admitted, that the case ought to be considered, as if the contest were between the issues of Jakes and Convoy. If the devise to the first issue of Jakes was void, then the devise to
the issue of Convoy was good; but, if the former devise was good, then the latter devise was void.—Bractowe, Justice, held the devise to the issue of Jakes to be good; and consequently, that by the rule of executory devises, the devise to the issue of Convoy could not possibly be good: he admitted, that, if the intent was by the first devise to pass a present interest, it would be void, because there was none in esse to take it; and then, the second would be good: but he conceived, that the testator intended it as an executory devise, and that it was therefore good. Powell, Justice, said, in addition to what hath been noticed above, that it seemed plain, that the devisor intended that the issue of Jakes should be preferred; but he conceived such intent was inconsistent with the rules of law; for it could not be, but by way of executory devise, and that would not do as that case stood. And again, in the same argument, and with a direct application to the case, Powell said, "I for a long time have been of opinion, that this being after the term for eleven years would be a good executory devise to the issue of George Jakes; but upon great consideration, I hold it nought now."—Neville, Justice, said that it was plainly a present devise to the issue of George Jakes, and therefore void, there being none in esse; and then the second devise to the issue of George Convoy is good.—Treby, Chief Justice, said, here the issue of George Jakes could not take presently, because not in being; nor futurely by way of executory devise, because the devise is in verbis de praesenti; and therefore he could not take at all, and then the second devise is good. Treby, further said, where, by the words of the will it appears a present devise was intended, it ought not to be rather construed an executory
tory one, than the will should be frustrated; and for that, devise to the right heirs of I. S. who is in full life, shall not be made good. See 12 Mod. 278. Thus, then it appears, that it was decided, by a majority of three judges against the opinion of Blencowe, that the limitation to the first issue of Jakes was void as an executory devise, being *per verba de praesenti*; and it appears also, that Blencowe would likewise have considered it void, if he had not thought there was sufficient matter from whence to infer, that the intention of the testator with respect to that limitation, was future. The distinction therefore, between limitations *per verba de praesenti* and *per verba de futuro*, is, upon the strength of a direct decision respecting it, substantial.

Mr. Fearne, however, in discussing the point, whether a devise *per verba de praesenti* shall take effect as an executory devise, when he noticed the last mentioned case of *Scattergood v. Edge*, observed, that since B. (or George Jakes) died without issue, it became void in event whatever it was in its creation; and that he therefore apprehended, the judgment did not decide that point (See Fearne's *Ex. Dec.* 504. ed. sup.) But in answer to Mr. Fearne, it will be sufficient to evince, that, whether it became void in event or not, was totally immaterial; and, that the only question in the case, was, whether it was, or was not, good, in its first creation? Now, not one of the judges, thought it necessary to consider, what the event was; on the contrary, the case was argued by each of them, upon the validity of the devise to the issue of George Jakes, *in the first instance*; for upon the validity or invalidity of that devise, did the whole case turn: If it was good, then the devise to the issue of Convoy, the defendant, was void; but, if the devise to the issue of Jakes was
void; then the devise to the issue of Convoy was
good. Nay, so far were they from regarding the
event of the death of Jakes without issue as being of
any consequence, that it was moved and admitted, as
before observed, that the case ought to be considered,
as if the question had been between the issue of Jakes
on the one side, and the issue of Convoy on the other;
and it was not possible to place the case in a better point
of view, not merely, for the purpose of examining
the merits of that particular case, but also, of putting
to the test the general doctrine, whether a devise *per
verba de præsenti* to one not *in esse*, was capable of
taking effect by way of executory devise? Indeed,
with respect to any difference which the *event* might
occasion, it was expressly said by Blencowe, justice,
if this be a good devise to the issue of George Jakes
by the *first constitution thereof*, it cannot be vitiated
by matter *ex post facto*.—The judgment of the court,
therefore, in the case of *Scattergood v. Edge*, went
directly to decide the point, that a devise *per verba
de præsenti* to a person not *in being*, is not a good
executory devise.

There is another point immediately relating to the
subject under investigation, upon which, the editor
is compelled to differ from Mr. Fearn.—That gentle-
man observes, that “before the statute of uses, if
there had been a feoffment to the use of A. for years,
remainder (of the use) in contingency, the contingent
use would have been good, for the feoffees remained
tenants of the legal freehold; but that since the statute
it is otherwise, for now no estate remains in the
feoffees,” (see Fearn’s Cont. Rem. 427. 4 ed.;) and,
he then instances, the above cited case of *Adams v.
Savage*, where the use for years was limited to the
grantor
NOTES AND EXPLANATIONS.

grantor himself. Now, what the editor thinks incorrect, is, the opinion, that no estate remains in the feoffees since the statute; for if it be true, then the freehold may be in abeyance for an age, a century, or any other given time. Suppose, for example, that A. makes a feoffment to the use of himself for years, with a remainder over of the use in contingency, to the right heirs of I. S. after the death of I. S.—it is certain from the above cases of Adams v. Savage, and Rawley v. Holland, that the freehold would not result to A.; nor would it be executed to the use limited to the right heirs of I. S; and, unless the freehold should be construed to be in the feoffees, there could be no praecipe brought for the land during the term, and all the other inconveniences of the suspense of the freehold would ensue: but it is not an idea to be entertained for a moment, that any such thing would be suffered, for it is a ground of law, that a freehold cannot be in suspense, as observed, sup. 38. In fact, it is to prevent this suspense of the freehold, that it cannot at common law be limited to commence in futuro, and that an estate for years is not capable of supporting a contingent remainder amounting to a freehold; and thus it is, that an executory devise by which the freehold is not limited to vest in the devisee until a future period, is good, by reason that the freehold descends to and vests in the heir in the mean time (see Pay's case, Cro. Eliz. 878.)

Rather than suffer the inconveniences of a suspense of the freehold to take place, the courts would, it is conceived, hold such a limitation as that to the right heirs of I. S. in the supposed case to be void; and then the remainder of the use would revert to the feoffor as in the Earl of Bedford's case, see Moore, 718—721;
in which event the term would merge in the reversion, and the feoffment thereby become nugatory. But, in opposition to Mr. Fearne's doctrine, it is contended by the editor, that in cases similar to the one under consideration, the freehold of the land does after the statute remain in the feoffees, pending the contingency; and is not in suspense; and consequently, that the limitation to the right heirs of I. S. would be a good springing use. It is clear that at common law the fee simple passes absolutely to the feoffees. It is also clear that the statute of uses takes not any estate from the feoffees, unless where there is at the same time cestui que use in esse, to whose use such estate can be executed; for the words of the statute are 'where any person or persons are seised to the use of any other person or persons,' &c. See Note 89, and the authorities there referred to. Then, as in the supposed case the only person in esse to whom an use is limited, is the feoffor himself, who takes a term for years in the use—the statute can only take from the feoffees so much of their estate as will supply that use for years with the possession; but with respect to the contingent use in fee simple to the right heirs of I. S., nothing is taken from the feoffees and executed to that use; because there is no cestui que use in esse in whom it can be executed, for nemo est duxres viventis; and the consequence is, that the freehold and inheritance, which passed to the feoffees by the feoffment, not being, until the happening of the contingency, touched by the statute, must remain in them as at common law, subject to be taken from them by the operation of the statute, and executed to the use when the contingency shall happen. And this reasoning is backed by indisputable authority; for it was expressly held by the two Chief Justices and six of the other
NOTES AND EXPLANATIONS.

other justices and barons in Chudleigh's case, that this clause (viz. the clause which directs, that 'the estate of the feoffees shall be in such person who hath the use') doth not divest any estate out of the feoffees, but when it can be executed in the cestui que use: and the eight justices and barons further said, that by this clause it also appears, that no estate of the feoffees shall be transferred in abeyance out of the feoffees and vested in nobody. (See 1 Rep. 136. b.) If there were a possibility of the uses resulting by construction to the feoffor until the happening of the contingency, then, indeed, the estate of the feoffees would be taken from them and executed to that use; but we are supposing a case, where there is no room for such a construction—where, to make such construction, would defeat the declared intention of the feoffment, which was, that the feoffor should have the use for years only; and his estate for years would be lost if the freehold were held to result to him, for both estates could not stand together. The intendment of an use to the feoffor, is, only, where the use is left to the disposition of the law, and not where the intention of the parties is apparent. See note 19.

It was said by Noy, that, if a man make a feoffment in fee to the use of himself for life, the fee simple remains in the feoffees; for, otherwise he shall not have an estate for life according to his intent (see Dyer 111. b. in note): and so by the same reason, would the fee simple, pending the contingency of the rise of the future use to the right heirs of I. S. in the case above supposed, remain in the feoffees; for—as to the feoffor’s being seized during the contingency—where is the difference, whether no use be limited in remainder after the term to the feoffor or a contingent use be limited, see-
NOTES AND EXPLANATIONS.

ing that the statute doth not not touch the seizin of the
feoffees until the contingency happens? Indeed, it is
said in the place last cited, that it was held by Popham
and Anderson in 34 and 35 of Elizabeth, that if A.
make a feoffinient to the use of himself for 40 years, and
does not limit any other estate, that the fee is in the
feoffees.

Mr. Fearne, therefore, was mistaken in supposing,
that no estate remains in the feoffees after the statute;
for that can only be the case where the whole fee sim-
ple of the use vests.—How Mr. Fearne was drawn into
that error is not to be accounted for; but it is observ-
able, that for authority, he refers to that part of
Lord Coke's report of Chudleigh's case which contains
the observations of Periam and Walsmsley in that case;
and the accuracy of which observations were expressly
contradicted by eight of the other judges, and in the
terms which are copied in a former part of this note.

There is however a difficulty which will strike the
mind of every reader. If the freehold is in the feoffees,
in those cases, where the use of the freehold is not li-
mitied to any other person in esse, and where it cannot
result to the feoffor, why were the limitations to the
heirs male in the above cited cases of Adams v. Savage
and Rawley v. Holland held to be void as contingent
reminders; when a freehold in the feoffees would have
been as competent to their support, as a freehold in the
feoffor himself could have been; for certainly the rea-
son of the rule against limitations of the freehold com-
mencing in futuro, viz. the inconvenience arising from
a suspense of the freehold, would not have been inter-
fered with, if those remainders had been permitted to
take effect?—If, however, the principle contended for

4
NOTES AND EXPLANATIONS.

be correct, it hath not been impeached by those cases; although, perhaps, it would be controled by them, so far as it may respect any future cases which may occur under similar circumstances.

The editor has been led much further by his subject than he suspected he should have been when he commenced this note; but he is disinclined to curtail it, because abstractedly considered the subject matter of it is of very great importance; and indeed no part of it is wholly irrelevant to the context.

NOTE 131. p. 62. (c).

It was evidently the opinion of Lord Bacon that uses might arise and vest in the same manner after as before the statute; and that they should not, although the possession was to be executed to the use, be subject to the rules of the common law with respect to the land; or, as he observes in pages 45 and 48, that "the statute will have the possession of cestui que use, as a new body compounded of matter and form; and that the feoffees estate shall give matter and substance, and the use shall give form and quality." Upon these grounds it was held by him, that although the son was not in existence when the particular estate in the use was determined, yet that upon the son's coming in esse the use should devest from the brother and be in the son; contrary to what would have been the consequence of a similar limitation of the land; for in case of the land, the contingent remainder would be destroyed for ever, if it were not capable of vesting upon the determination of the preceding estate. There were motives of policy, however, which must have prevented the courts from adopting that doctrine; for, although the inconveniences of an abeyance of the freehold would not have been
been the consequence of giving effect to the contingent use to the son at a period after the determination of the particular estate, for the reason, that the use and the possession as being annexed to it, would be in the brother in the mean time; yet there would have been cause to apprehend an evil of no less magnitude, that is, perpetuities; because—no limits having been then prescribed to the vesting of future and executory interests,—upon the same principle, that the use might have taken effect in the son in the case stated by Lord Bacon, might also future uses limited to arise at any greater distance of time have taken effect also; for the nature of uses at common law was such, as to admit of their being limited to arise at any future period however remote. Thus it was usual, as he observed in pages 17 and 18, to limit the use over to other persons, and their heirs in case of forfeiture, through many degrees. Although, therefore, in strictness, remainders in use did not depend upon particular estates as remainders of the land did (see page 46); yet, to have admitted limitations of uses after the statute which had a tendency to a perpetuity, would in effect have been admitting perpetuities of the land, inasmuch as after the statute the possession or land followed and was regulated by the use; and therefore, in order to guard against the mischief of perpetuities, the courts held, that remainders limited in use should follow the rule and reason of estates at common law. Thus, in Chudleigh's case, all the justices and barons agreed unanimously, that 'if the estate for life in that case had determined by the death of the feoffees;' (to whom, the particular estate preceding the contingent remainders in use to the eldest and other sons, was limited;) 'before the birth of the eldest son; that the said remainders in futuro were void;
NOTES AND EXPLANATIONS. 237

void; and should never take effect although the sons were born after." See 1 Rep. 137, 138. However, since the space of a life or lives in being and twenty one years and a few months over, has been fixed upon as the boundary within which executory devises must vest; it is reasonable to suppose, that where limitations of the use are void as contingent remainders, the courts would notwithstanding give them effect as future or springing uses, provided they are limited to vest within those bounds; and provided also that they are not couched in terms which preclude the conclusion, that the intention with respect to such limitations was future. See notes 130 and 140.

NOTE 132. p. 62. (d).

This is another consequence of the statute's executing the possession after the form and quality of the use; for in case of the land, such limitations are void being of freeholds to commence in futuro. So if an use be limited to two persons jointly, only one of whom is in esse at the time, as to the foessor's brother and first begotten son, he having no son at the time; yet the son would upon his birth take jointly with the brother, contrary to the rule of law with respect to the land, which is, that if an estate be limited to two, the one capable and the other not capable, that he who is capable shall take the whole. See 1 Rep. 101. Dyer. 274. b. 339. b. pl. 48. Co. Litt. 188. a. 13 Rep. 56. b. and Mutton's case Moore 96.

NOTE 133. p. 62. (e).

The words right heirs of B. are words of limitation of estate and not of purchase (see Co. Litt. 319. b.): They do not create a contingent remainder to the heirs, but
but work to the estate of B. for life, and vest the fee simple in him, under the rule, which is generally described by the appellation of the rule in Shelley's case, and which was in that case thus defined—'When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediatly or immediately to his heirs in fee or in tail; that always in such cases (the heirs) are words of limitation of the estate, and not words of purchase.' See 1 Rep. 104.

The editor would be culpably negligent if he omitted to recommend to the student's attentive perusal, the argument of Mr. Justice Blackstone in the case of Perrin and Blake, 1 Harg. Law Tracts, 489. The remarks of the late Mr. Fearne upon the rule, Fearne's Cont. Rem. 4 ed. 283. et seq.; Mr. Hargrave's 'Observations on the Rule,' 1 Harg. Law Tracts, 551; Mr. Butler's note on Co. Litt. 376. b. note 1; and Mr. Preston's 'Succinct View of the Rule;' in all of which—as indeed every reader would be led to expect from the known talents of the respective authors—the learning relating to this most important rule is profoundly and ingeniously discussed.

NOTE 134. p. 62. (f).

It is the same thing as if the use had been declared to A. and his heirs, for hæres est pars antecessoris and in judgment of law the ancestor beareth in his body all his heirs. See Co. Litt. 22. b. And that being the case, A. is not in by the statute, but by the common law, upon the ground mentioned by our author in page 63. that were the party seised to the use and the cestui que use is one person, he never taketh by the statute if the
the use can take effect by the common law; and here the cestui qui use is completely seised of the fee simple at common law, by virtue of the feoffment.—It was with the view of preventing the statute from having any operation in such a case, that the word other was inserted. See supra, page 43.

At the time of the statute, uses were grown to such a familiarity that men could not think of possession but in course of use; as our author observes in the place just now referred to. So much did this prevail, that, where a feoffment was made to a purchaser for a valuable consideration even, it was usual for him to have an express declaration of the use to himself. The editor thinks that the great prevalence of the practice may be accounted for in this way—It hath been observed in note 38, that, when the chancery made an intendment of an use to the feoffor, where a feoffment was made without consideration, it became necessary for the feoffee to have a declaration of the use, if no consideration was given, and the feoffment was meant for his benefit; and it is conjectured, that the declaration of the use to the feoffee was originally employed, in order to repel the construction of an use to the feoffor upon such feoffments; in which cases an express declaration was absolutely necessary: and that the practise once introduced, came to be adopted in cases even where the consideration given by the feoffee would of itself have carried the use to him, and have left no room for any construction as to the intention of the parties by the chancery. But in all such cases as those last mentioned, an express declaration of the use was merely surplusage; and so it is indeed at this day, where a feoffee or releasee is a purchaser for a valuable consideration.

NOTE
NOTE 135. p. 63. (g):

In the last edition the words are—'and therefore if I give land to I. S.' (without the words in fee) 'to the use of himself and his heirs. &c.'—the word therefore having been first inserted in that edition; and properly, since Lord Bacon is about to give an example.

The words in fee, which are not in any other edition besides the present, were deemed by the present editor to be a necessary addition, inasmuch as, had the lands been given to I. S. without saying more, he would have taken an estate for life merely in the land; which estate, would not have yielded sufficient seisin for the supply of the fee simple of the use to I. D. when that use should arise: for Lord Bacon himself hath said in page 47, 'the matter and substance of the estate of cestui que use, is the estate of the feoffee, and more he cannot have;' and he mentions this very case of a feoffee having but an estate for life, to show that cestui que use can have no inheritance.

With respect to the words for life or for years, in this edition substituted for and his heirs.—If the limitation of the use had been to the donee and his heirs, he would have had the fee until the payment of the money by I. D. and not an estate for life or years. See Bro. Abr. feoff. al. uses, pl. 30. and Springe and Ceasar, 1 Roll. Abr. 415. pl. 12. Lord Bacon instead of and his heirs must therefore have said for life or for years, since he afterwards points out in what manner I. S. will be in of those estates; for it is impossible that Lord Bacon's meaning should have been, that the kind of estate which I. S. had presently, should depend upon the
NOTES AND EXPLANATIONS.

the distance of the time when I. S. might chance to pay the money; as it is uncertain when it might be paid, or whether it would be ever paid at all.

NOTE 136. p. 63. (h).

The words—upon payment of the money—are not in the other editions; but the editor thinks it obvious, either, that those words ought to have been added because by the terms of the limitation the use is not to arise to I. D. until the money is paid; or otherwise, that the conditional words, if I. D. pay a sum of money in the preceding part of the sentence, omitted; and it is probable, that Lord Bacon, had he corrected his work for the press, would not have retained those conditional words; since they were not in the least necessary to make a part of the case stated by him, for his intention evidently was, merely to give an instance where one cestui que use should be in by the common law, and another be in by the statute, and I. S. and I. D. would be so in immediately, if there had been no conditional words in the case.

Although the editor has a very strong belief, that Lord Bacon meant to state the case in such a manner, as that I. D. should take presently; and consequently, that the conditional words would never have been in the work if it had been printed from a correct copy; yet he thinks, that it would be unjustifiable in him to leave out those words of the text, and he therefore thought it better, to insert such additional words, as appeared to him to be indispensably requisite to complete the case.

NOTE 137. p. 63. (i).

From what Lord Bacon here says, he appears to have thought, that in such cases as he states, the inheritance
NOTES AND EXPLANATIONS.

inheritance of the use passes and vests in the bargainee presently; and, that there remains only an estate for years in the bargainor; but although much might be urged in support of his opinion, a contrary doctrine is now too firmly established to admit of being shaken.—In Lord Paget’s case, which was decided a few years before the time of Lord Bacon’s reading, it was asserted arguendo by Cook, that, if 'I covenant that after twenty-four years ended, I and my heirs will stand seised to the use of my son, &c. there the use in fee doth vest in my son presently;' but the court was against him. See 1 Leo. 195. and 1 Rep. 154. In the case of Weale v. Lower, (Poll. 65.) Lord Chief Justice Hale expressly said, that, if the limitation of an use be, that after two years or after the death of John at Stiles it shall be to the use of I. N. in fee, the feoffor hath the fee simple remaining in him until this future use comes in esse. So Lord Chief Justice Holt, in the case of Davies v. Speed, (1 Salk. 675.) held, that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use; and that the whole estate remains to the feoffor in the mean time. According to the report of the case in 12 Mod. 39. Holt put it of a bargain and sale; but it is no way material in relation to the point under consideration, whether such an use be raised by bargain and sale or by feoffment.

With respect to executory devises also, the same doctrine is established—as, where A. seised in fee, devised to B. in fee to commence six months after A.’s death, it was held good as an executory devise; and, that, during those six months, the estate descended and continued in the heir at law. See the case of Clarke v. Smith, cited in Fearne’s Ex. Dev. 4. ed. 18 and 511.

NOTE
NOTES AND EXPLANATIONS.

NOTE 138. p. 63. (k).

It is occupier in the other editions; but it is con-
ceived that Bacon meant, that there remains an estate
for years or occupation of my estate by a kind of sub-
traction of the inheritance, &c. In the edition of
1642, (when the editor apprehends the work was first
printed) the word occupier is in a different letter,
owing probably to its not appearing clearly from the
manuscript, whether it should be occupier or not.

NOTE 139. p. 63. (l).

The words in fee are not in the other editions; but
unless the feoffment were in fee to I. S. neither the
limitation of the use to him in tail, nor to I. D. in fee,
would be uses executed by the statute, but limitations
of the legal estate.

Without the words in fee, this case would be similar
to that which is reported in Cro. Car. under the title
of Jenkins v. Young, in pages 230, 231. and under
the title of Meredith v. Joans, in pages 244, 245.
where, lands were given to one Randall and his wife,
habendum to the said baron and feme to the use of them
and the heirs of their two bodies; and for default of
such issue, to the use of Edward Morgan and his heirs;
and the judges held, that they were limitations of the
legal estate and not of an use divided from the estate:
and they said, it should be taken as a limitation to
them (the baron and feme) and the heirs of their bodies,
remainder to the other and the heirs of the other. Lord
Bacon must therefore have intended a feoffment in fee
to I. S.

If there had been no remainder limited over to I. D.
the use in tail would have been executed by the statute
in the same manner 13 Rep. 56.

H h

NOTE
Note 140. p. 63. (m).

This use, being limited to commence after a dying without issue, would be void, as being too remote. See Fearne's Ex. Dev. 4 ed. 116. and the cases there cited. Had any words been added to confine it within proper limits, the use would have been good—as, if he had said, after my death without issue, if I die without issue within twenty-years, Per. Holt Ch. J. in Davies v. Speed, 2 Salk. 675.

It has been remarked by Mr. Fearne, that the ground upon which the proviso in the case of Lloyd v. Carew was admitted to take effect, affords an inference, that future and shifting uses and other executory interests which are not remainders, are to be considered as subject to the same limits and restrictions as executory devises. See Fearne's Ex. Dev. ed. sup. 84. and Mr. Powell's note. In order that a limitation may be good and capable of taking effect as an executory devise, it must be limited to commence on an event which must necessarily happen within twenty-one years and the ulterior period of gestation after a life or lives in being. See Fearne's Ex. Dev. passim. There is however one exception to this, and that is of an executory devise to commence in derogation of an estate tail; and the reason for this exception, is, that—as all collateral and conditional limitations annexed to an estate tail, and therefore all executory devises are barrable by the common recovery of tenant in tail,—there cannot be any foundation for apprehending the inconveniences of perpetuities, which is the cause of all other executory devises being confined within the above-mentioned limits. See Fearne's Cont. Rem. 16. and Ex. Dev. 106 and 107. ed. sup. in note.
NOTES AND EXPLANATIONS.

NOTE 141. p. 64. (o).

There are references to this note from many parts of the text; and in each of those places our author must be understood to mean a feoffment in fee as a less estate than a fee would be inadequate.

NOTE 142. p. 64. (p).

Lord Bacon's meaning is, that he continues in by the common law after he marries; for he is in by the common law before his marriage under the feoffment. The use which was to have arisen upon the marriage is prevented, because the intended cestui que use has the land; and it is a similar case to the one where a man should covenant to stand seised to the use of himself. Upon the marriage, the use therefore does not arise to him, so as to cause him to be in by the statute; but he continues in at the common law.

NOTE 143. p. 66. (d.)

In Summes case, it was said, "if a disseisin be had to the use of two, and one of them agreeeth at one time and the other at another time, they shall be joint-tenants;" see 13 Rep. 56, 57; and see also Co. Litt. 188. a. Now, if a statute use be meant, the above doctrine is not reconcilable with our author's observation above, that upon agreement it is in the cestui que use by the common law; but the editor apprehends, that there is sufficient matter from whence to conclude, that their being seised as joint-tenants by virtue of the statute of uses was not meant; for we are to observe, that in Summes case their agreement to the disseisin, was spoken of as being necessary previously to their becoming tenants: but, if the use had arisen to them

H h 2
upon the disseisin, in other words, if the disseisin had been to the use of the two, as to an use executable by the statute of uses, that statute would have executed the possession to the use immediately upon the moment that the use arose; and they would have been jointly seised before any agreement. There is a case in Statham, (see Stath. Abr. tit. entr. cong. Pasch. 34 Edw. III.) which comes directly to the point.— "Where one enters claiming to himself and another or to the use of another, where his entry is not lawful, this does not give the possession to the others without agreement; otherwise it is where it is lawful". From whence it is to be collected, that the person to whose use the entry must be made, had upon agreement, the possession at common law; and as it was so before the statute of uses, then, (forasmuch as the statute doth not work, where cestui que use had remedy for the possession by course of common law, as our author observes,) he would also be in by the common law since the statute; even supposing, that an use executable by the statute may be upon a disseisin; but which it is contended there cannot be, for the reasons advanced in page 44, and in note 81.

It is laid down in broad terms by some modern writers, that a disseisor cannot stand seised to an use, than which, nothing can be more incorrect. It is true, that, where at common law the feoffee to uses was disseised, the disseisor did not stand seised to those uses, because privity of estate was wanting; the disseisor being in of a different estate than that, to which the uses were annexed in privity: and the observations in Chudleigh's case, (1 Rep. 122.) are confined to the point, that the disseisor should not stand seised to the same uses that the disseisce did. But there can be no doubt,
NOTES AND EXPLANATIONS.

It is conceived, but that a disseisor has the same capacity, by covenant, bargain, and sale, &c. to limit uses out of the estate which he is so possessed of by disseisin, as any other person hath out of an estate lawfully vested in him. Whence arises his inability?

NOTE 144. p. 66. (q.)

It was observed in the last note, that, where an entry is made to the use of another as A. for example, by one whose entry is lawful, the possession will be in A. without agreement; and for this reason, in the case of an occupant, the possession would be in him to whose use the occupant entered without any previous agreement; because, where tenant pur autre vie died and there was no special occupant, the entry of any person on the land was lawful; and he who first entered, was entitled to retain the land, so long as cestui que vie lived by right of occupancy. See 2 Black. Comm. 258. Co. Litt. 41. b. But, as the law will not suffer the possession to be forced on a person contrary to his will, it of course would not, after disagreement, consider the possession to be in him to whose use the occupant entered.

It should however be observed, that common occupancy since Lord Bacon's time hath been utterly abolished by the statutes 29 Car. II. c. 3. and 14 Geo II. c. 20. the former of those statutes, enacts, that the tenant pur autre vie may devise his estate by will; and if not devised, that it shall go to his executors or administrators and be assets in their hands for payment of debts; and the latter statute enacts, that the surplus of such estate pur autre vie, after payment of debts, shall go in a course of distribution like a chattel interest.

With
NOTES AND EXPLANATIONS.

With respect to special occupancy—as where the grant *pur autre vie* is to a man and his heirs,—no other persons, than those specially marked out by the original grant, have any right to the possession of the land after the death of the tenant; and the title of the special occupant is not touched by the above-mentioned statute.

As an occupant continues the estate of tenant *pur autre vie*, as his substitute, he must take it as he found it; consequently, to the uses declared thereupon.—An occupant therefore may be seised to an use. See Gilbert's Law of Uses, 11.

NOTE 145. p. 66. (r).

This most important branch of the subject, as well as the second and third divisions of the third discourse mentioned in page 56, of the former of which, it is likely that the division of revocation formed a part, are not to be found in any part of this work; and are in all probability for ever lost to the profession.—The editor had it in contemplation to subjoin the case of revocation of uses from Bac.'s Law Tracts; but when it was considered, that no very large portion of the learning on the subject is embraced by that case, he relinquished his original plan. He however thinks it right to refer the reader to that case, and to Mr. Powell's book on powers, where the different cases are brought together.

NOTE 146. p. 67. (s).

They cannot at this day, for all declarations of uses must now be in writing. See Note 20.

NOTE 147. p. 67. (t).

The reason why the use cannot be countermanded without avoiding the feoffment, fine, or recovery upon which
which it arises, is, that the uses are but as accessory to the feoffment, fine, or recovery, which are the principal. See what is said upon this subject in Beckwith's case, (2 Rep. 58. a.) in Mary Portington's case, (10 Rep. 42. b.) and in Mansfield's case, 12 Rep. 124.—
So long as the feoffment, &c. remain in force, the law considers, that the infant was enabled as to the principal, as a man of full age; and therefore, would not at the same time upon the ground of infancy, consider him disabled to do that, which, when done, is but an accessory to that very principal.—‘ The declaration of uses is the same conveyance, and if the one stands the other must,’ by Lord Hardwicke, in Hearle and Greenbank, Powell on Powers 48.—‘ The deed limiting the uses is supported by the fine, and infancy cannot be allledged against it so long as the fine continues in force,’ by Lord Chief Justice Holt in Jones v. Morley, 1 Lord Raymond 289. In order therefore to destroy the uses in such cases, it is necessary to strike at the root whence they sprang, that is, the conveyance itself.

If the uses limited by an infant on a fine or recovery be not avoided before he arrives at full age, they cannot afterwards; because, the non-age of the party to avoid the fine or recovery must be tried by inspection; and such a trial after full age would prove him under no disability; but, perhaps, if inspection were made when under age, it would be sufficient to enable him to avoid the fine or recovery after he should arrive at full age; because there would be evidence of his non-age at a period of time after the fine levied or recovery suffered, and consequently, sufficient proof, it is presumed, of his having been an infant at the time of the fine or recovery. The reason, why those acts of record
NOTES AND EXPLANATIONS.

record must be avoided by writ of error, and, why they become obligatory and unavoidable if not set aside before the infant comes of age, is, that the contracts being entered into under the inspection of the judge, who is supposed to do right, the infant cannot against them aver his disability; but must reverse them by a judgment of a superior court, which by inspection hath the same means to determine whether the inferior jurisdiction has done right that first received the contract. See 3 Bac. Abr. 597. 5. ed. and authorities.

But with respect to uses declared upon feoffments made by infants—as such feoffments themselves may be avoided by the infant, either within age, or at any time after his full age, and by his heirs after him in case he agreed not to the feoffment after his full age, (Co. Litt. 2. b. 248. a.) so of course may the uses declared by the infant upon those feoffments be avoided also; but, where the infant himself is the person who was seised to the use, there, after execution by the statute the uses are not avoidable by him, because the statute does not contain any saving of his rights in such a case, as observed in page 58 of the text and in note 115, which see.

It is however conceived, that Lord Bacon does not mean to say, that in no case can an infant avoid the use without avoiding the conveyance by which it was created; but only in those cases, where the feoffment, &c. is made by the infant himself, as the cases in Coke's reports above referred to are. But upon the authority of the above passage in the text and of those cases, it has been laid down as a general proposition and without any exception, that 'declarations of uses by an infant will continue valid, as long as the conveyance,'
ance, upon which the uses are declared remains of force,' and that the infant 'cannot avoid the declaration of the use without avoiding also the fine or recovery;' but to that doctrine, the editor cannot accede, for suppose, that a fine is levied, recovery suffered, or feoffment made, to such uses as A. a purchaser shall during his life, and in case of no appointment by him, as B. the eldest son of A. then living, shall limit and appoint. A. the purchaser dies without having appointed; and upon his death B. under age executes the power, and limits the uses. Can he avoid the appointment, and the uses thereby limited, without avoiding the fine, feoffment, or recovery? Now, although the declaration of uses, as above observed, is but as a part of the fine, &c.; yet the fine, &c. not being in the case we are supposing, the act, or by the contract of the infant, and consequently, not avoidable by him, there can be no reason why the infant may not avoid the declaration without the fine, &c. since—as observed in Bac. Abr. ubi. sup.—they are regularly allowed to break through all contracts in pais made during their minority.

The ground, why the declaration in the cases mentioned in the beginning of this note, shall not be avoided without the conveyance itself, is, that as the conveyance continues in force, the declaration of uses must be considered good, since the disability would be fatal to one as much as to the other; and therefore, from the circumstance of the conveyance being in full force, it would be presumed in those cases, that the infant was enabled to make a perfect declaration of the uses: but here the case is different, for the conveyance creating the use not having been made to or by the infant, he has merely a power under it; and the sole question, is, whether
NOTES AND EXPLANATIONS.

whether he can do away any execution of that power? and it is conceived, that there can be no doubt, but that the infant may vacate such a declaration of the uses, although the fine, &c. still remain in force, since his act extends no further than the declaration; and consequently, that an execution of the power during his infancy may be set aside, and the same power executed with effect upon his coming of age. Whether such an execution under age, would be void in the first instance, or only voidable, would depend upon the same principles as the case of the bargain and sale mentioned by Lord Bacon a few lines below. And see the following note. It must be understood therefore, that the necessity of avoiding the conveyance in order to set aside the limitation of the use of it, is only where that conveyance is the infant's own act.

NOTE 148. p. 67. (u).

Those contracts from which the infant may receive benefit, are avoidable only; but those, in which there is no apparent benefit or semblance of benefit to the infant, are absolutely void. See Cro. Car. 502. and 3 Bac. Abr. 598. 5 ed. and authorities. It must therefore have been upon the principle, that there was no apparent benefit to the infant from the consideration of blood or marriage, that Lord Bacon considered this use void. As there is a sufficient benefit from the subject of those considerations to raise an use out of the seisin of an adult, it must be understood,—when the law speaks of benefit to the infant—that it means the benefit arising from the improvement of his estate and property merely, and not the benefit or satisfaction resulting from his relationship or marriage; and hence the reason, why an use under the covenant by an infant in
in consideration of relationship or marriage, is void in the first place, and not merely voidable.

But it is to be observed, that it was laid down by Lord Mansfield in the case of Drury v. Drury, (5 Brq. Parl. Cas. 570.) and has since been relied upon in the case of Maddon, Baker and others, against White and others, 2 Term Rep. 159. that if an agreement be for the benefit of an infant at the time it shall bind him, and the case of Drury v. Drury was that of an infant, who was held to be bound in a settlement before marriage by the jointure which she accepted.

So in the case of Hollingshead v. Hollingshead—where an infant having a power to make a jointure, covenanted with the relations of the wife, to settle within six months after he came of age, so much of the land as should amount to 100l. per. annum, on his intended wife—it was held, the infant was bound by this covenant. See 1 Fonb Tr. Eq. 78. 3 Bac. Abr. 603. 5 ed. and Pow. on Pow. 2 ed. 180. See further as to the distinction between such acts of infants as are voidable only and such as are void in Perk. sect. 12; the case of Zouch and Parsons, 3 Burr. 1794; and Har. and But. Co. Litt. 51. b. No. 3. and 246. a. No. 1.

NOTE 149. p. 67. (v).

The meaning of this passage is, that the bargain and sale of an infant is good, with an averment that the money which was the consideration of the bargain and sale was expended for commons or teaching, which may be considered in a certain degree as necessaries. That if the bargain and sale was for money simply, without an averment that the money was for necessaries as for commons or teaching, it would not be good.

Then,
NOTES AND EXPLANATIONS.

Then, not being good for want of such an averment, if it should be proved that the consideration money was paid, the bargain and sale would be voidable only; but, if it should recite that money was paid, and the fact should be proved to be otherwise, the use would be void.

In Coke's 2 Inst. 673. it is said generally, that an infant may avoid his bargain and sale when he will, for that the deed was of no effect to raise an use.

In the case of a man of full age, the recital of money paid, is, our author observes, sufficient; and, for that reason, it is, that in the case of a bargain and sale for a year whereon to ground a release, no other consideration is necessary than the merely nominal one of five shillings.

NOTE 150. p. 67. (w).

With respect to declarations of uses by Baron and Feme, of a fine levied by them of land whereof they were seised in right of the feme, the following points were in substance resolved in Beckwith's case, 2 Rep. 56. Moore 196. (Reported by Anderson under the title of Colgate v. Blith. 1 And. 164.)—That, a declaration of the use of such a fine, by the husband only, shall bind the wife if her disassent does not appear; for, when she joins with her husband in the fine, it shall be intended, if the contrary cannot appear, that she joined also with him in agreement in the declaration of the uses of the fine.

That, the wife only, although she is owner of the land, yet for as much as she is sub potestate viri, she cannot, in respect of her coverture, without her husband, limit the use. And, on the other side, the husband
husband who hath not any estate in his own right, cannot against the agreement of the wife limit the use, for he is not owner of the land.

That, if the husband makes one declaration of the use and the wife another, and the uses under the two declarations be not in perfect conformity, even, if the variance be only in the first particular use, as, for example, the wife limiting it to herself only for her life, and the husband limiting it to him and his wife for their lives, and although all the other uses in remainder in both the declarations are according to both their consents, yet all such uses are void.

But if the husband and wife agree in the limitation of the use of part of and in the land, and vary in the limitation of the residue of the land, it is good for the part in which they so agreed; and void for the residue.—The difference may be explained, by supposing, that a fine has been levied of Whiteacre and Blackacre.—If the husband declares the use of both acres by one deed, and the wife declares the use of both by another, and there should be any variance, however slight, between the uses so declared, although in the main they may be the same, all the uses will be void.—But supposing that the uses with respect to Whiteacre correspond in each declaration, and the variance should be only with respect to Blackacre, then, both declarations will be void as to Blackacre only, and good for Whiteacre.—This explains Lord Coke's note in the above case as to the difference, between variance touching the limitation of the use of part of the estate of the land; and touching the limitation of the use of part of the land itself. See further the cases of Lusher v. Banbong, Dyer 290. a. Anon. Moore 22. pl. 73. and Swanton v. Raven, 3 Atk. 105.

Although
NOTES AND EXPLANATIONS.

Although it may be collected from what Bacon says in the context, as well as from Beckwith's case above cited, that the husband alone may make a perfect declaration of the uses during the coverture; yet, on account of a difference in the reports of that case by Coke and Moore, it is doubtful, supposing the husband to make one declaration of the uses and the wife another and there is any variance between them, whether the declaration by the husband will bind him during the coverture or be totally void? According to Moore it was considered good during the coverture. See Moore 197. But Coke, to his report of the case, adds a note, in which, he expressly says, that although the husband may dispose of the wife's lands during the coverture, yet in that case for the reasons and causes aforesaid, (that is the variance in the two limitations,) his declaration was merely void. See 2 Rep. 58. b. Anderson says, that both the declarations were utterly void; which seems to strengthen Lord Coke's representation, for, if both were deemed to be utterly void, then the husband's declaration could not have been considered good during the coverture. See 1 And. 164.

As, in this note hitherto, declarations of uses on fines only, are treated of, it may not perhaps be superfluous to observe, that the law is the same upon declarations of the uses of recoveries suffered by the husband and wife; but, with respect to a feoffment of the wife's land, or any other conveyance than a fine or recovery, if the husband and wife should join in declaring the uses it would not be good against her, for as she would not be bound by the feoffment, &c. she might by setting aside the principal, vacate the declaration which is but as accessory.
CONTENTS.

ABEYANCE.

ESTATE of the land in, not executed by the statute, 61, 62, and N. 124.
An use in, not executed, 63.
Unless where in a similar case of the land the rule in Shelley’s case would apply, 64.
Whether any part of the estate of the feoffees is transferred in abeyance where future uses are limited, 49. N. 89.
The freehold cannot be in, 39, 221.

ADVOWSON.

Whether king could present to, where restui que use of was outlawed in personal action, 5. N. 3.
Bargainee has no title to present to, before enrolment, N. 106. p. 173.

AID-PRAYER.


ALIEN.

May be seised to an use until office, 61. N. 119.
Other matters concerning aliens, 26, 43, 44.

ANNUITIES.

Uses of not executed, 44.

APPOINTMENT

Of the use by will between the statutes of uses and wills amounted to an indirect devise of the land itself, N. 80.

ATTAINED PERSON

May be seised to an use until office found, 60, 61.
Where Lord enfeoffed to the use of, 61.
Can only purchase for the benefit of the crown or the Lord of the fee, N. 119.

BARGAIN
CONTENTS.

BARGAIN AND SALE.
Enrolment of, 41, 55.
As to relation back of the enrolment, N. 106.
Whether bargainee under seised before enrolment, ibid.
Opinions on this subject controverted, ibid.
Of an infant where good or not, or void, or only voidable, 69. N. 149.
Under bargain and sale for a year, the bargainee has not the actual possession without entry, N. 87.
To what purposes the enrolment shall have a relation back to the date, N. 106.

BARGAINOR AND BARGAINEE.
Whether the bargainor or bargainee seised between the date and enrolment, N. 106.
Some opinions upon this head controverted, ibid.

BARON AND FEME.
Feme may be enfeoffed to an use, 60.
Baron cannot root up the feoffment after the use executed, ibid. N. 117, 115.
May destroy the feoffment and prevent the use where contingent, 60. N. 117.
Distinction where the use is, or is not, first limited to the feme, N. 117.
As to execution by the feme before the statute, 60. N. 115.
Baron may be seised to the use of his feme for years, and she have the term after his death, 61. N. 122.
As to declarations of uses by, 70. N. 150.
As to alienations by the feme of the lands of her deceased Baron, 51. N. 99.
How executions by the statute of the estate of a feme covert differ from executions by the party at common law, N. 115 and 117.
Chattels real of the feme do not absolutely vest in the baron, N. 122.
Whether where there is a variance between the declarations by the baron and feme, the baron's shall bind him during the coverture, N. 150.
The feme not bound by the joint declaration of herself and baron of the use of any other conveyance, than a fine or recovery, ibid.

BISHOP.
As to an use on the seisin of, 59.
Enfeoffed to the use of his successors, 66.

CESTUI
CONTENTS.

CESTUI QUE USE
Was without remedy at the common law, 20, 21.
The king may be, 62.
Where cestui que use and the person seised is the same and yet in by the statute, 65 to 68.
Where different persons and yet in by the common law, 68.
At common law was a trespasser if he entered upon his seoffice, N. 2. p. 73.
At common law might be a juror, N. 2. p. 75.
Must be in esse before the statute will execute the possession to the use, N. 71.
Cannot bring trespass without an actual entry, N. 87. p. 147.
One cestui que use may be in by the common law in course of possession, and another be in by the statute although both uses are upon the same seisin, 65 and N. 136.

CESTUI QUE VIE.
Where he survives tenant pour autre vie, 61, 62. N. 144.

CHANCERY.
Hesitated to give remedy, 20, 23, 24. N. 32.
Could not at first, N. 32.
Could not compel the execution of an estate tail to an use at common law, N. 114. p. 188.

CHATTELS.
Uses of not executed by the statute and why, 43. N. 68.
Were ever deviseable, ibid.
Chattels real of the feme do not absolutely vest in the baron, N. 122.

CONDITION.
Signification of this word as used in the statute, 50.

CONFIDENCE.
The reposing of, the way to an use, 9, 19. N. 8.
Used as a synonymous term with the word use before the statute, N. 75. N. 125. p. 204.

CONSIDERATION
Necessary to raise an use, 14. Ns. 18 and 19.

CONSTRUCTION.
Use by, N. 2.
Whether of law or of equity, ibid.
CONTENTS.

Uses cannot be by construction where others are expressly limited. Ns. 19 and 125, and N. 130. p. 223.

CONTINGENT USES.

Not executed by the statute till cestui que use is in esse, 43, 44, 63. Ns. 71 and 76.

In remainder, will be supported by a right of entry in any person who has had a vested freehold in the use, N. 90. p. 153

Contingent remainders of the use will in some cases be supported by the freehold which results to the feoffor, &c. where the particular estate expressly limited is only for years, N. 150.

Not so where a term for years is limited to the feoffor, &c. himself, ibid.

Where void as contingent remainders they will be good as springing uses if limited to arise within proper bounds, ibid, and N. 131.

Contingent remainders of the use at common law did not depend upon the particular estate like contingent remainders of the land, N. 131.

But held to do so after the statute, ibid.

CONTINGENT REMAINDERS.

To an use, not executed, 61. N. 124.

CONUZOR, CONUZEE.

Of a statute, 55, 56. N. 107.

COPYHOLD.

Its resemblance to uses, 20.

CORPORATIONS.

Uses not executed upon the seisin of, 43. N. 113.

If they could stand seised to an use, 59. N. 113.

As to the distinction between giving and standing seised to an use, N. 113.

May take an use, 62.

May limit an use, 69.

Distinction between its taking and limiting an use, N. 113.

COURTESY.

Tenant by, 38, 39.

COVENANT TO STAND SEISED

By an infant, as to its being merely void or not, 69. N. 149.

DECLARATIONS
CONTENTS.

DECLARATIONS OF USES

Must now be in writing, Ns. 29 and 146.

DEVISE. (See Will also.)

- Uses at common law deviseable, 11, N. 12.
  Lands not being so was one cause of uses, 21 and N. 34.
  If uses deviseable between the statutes of uses and wills,
  45, N. 80.

DISSEISIN, DISSEISOR, DISSEISEE.

Disseisin, 44. N. 102.
Disseisin novel, 27.
Disseisin to an use, 46, 68. Ns. 81 and 143.
Disseisor may be seised to an use, and some opinions to the
contrary taken notice of, N. 143.
The land not subject in the hands of the disseisor or to the
same uses that the disseisee held subject to, ibid.

DOWER

At common law, could not be depended upon before the
statute, N. 105.
Could not by the common law be barred by collateral
satisfaction, ibid.
Will be barred by this statute by a jointure made before
marriage, but if made after marriage the feme hath an elec-
tion, ibid.
Ordinance respecting in the statute, 55.
Bargainor’s wife entitled to, where he marries and dies
between date of the deed and enrolment, N. 106, p.
173.
But liable to be taken away if the deed afterwards enrolled
in due time, ibid.

ENROLMENT.

Statute of, 41, 55. N. 106.
As to relation back of, to the date, N. 106. p. 175.
Whether bargainee seised before, ibid.
Some opinions upon this head controverted, ibid.
Declarations of the use and the conveyance unless of
record must be enrolled in case of the king, 62. N. 127.
Hath a relation back to make good recovery of bargainee
against whom the præcipe was brought before enrolment,
N. 106. p. 176.
And to avoid the mean charges of the bargainor and the
dower of his wife, ibid.
As to what other purposes doubtful, ibid.

K k 2

ENTAILS.
ENTAILS.

Saving of, in statute Ric. III. how to be taken, 5.
No saving of, in the statute of uses, 60. N. 114. p. 188, 189.

ENTRY.

A right of, not executed by the statute, N. 69.
Of the sefioees, necessary in some cases in order to the execution of uses by the statute, ibid. and N. 90.
An actual entry necessary before cestui que use can bring tre-pas, N. 87. p. 147.
An actual entry by bargainee for a year necessary upon strict principles of law before a release can operate upon his estate by way of enlargement, N. 87.
If the sefioees bar their entry in some cases contingent uses must fail, N. 90.
The arguments of Mr. Pearne against the necessity of an entry by the sefioees in some cases where there has been a dissein, canvassed, Ns. 90 and 69.
Right of, sufficient to support a contingent use, so as to preserve in capacity of taking effect, N. 90. p. 153.

ESTATES.
Substantial differences of, 46, 48. N. 83.
Fraction of, the law will not admit, 66;

EXECUTORY DEVISES.

The limits within which they must vest and the reason of those limits, N. 130. p. 211. N. 131. p. 227. and N. 140.
Where a devise in fee is to commence after a term, the fee descends and continues in the heir in the interim, N. 137.

EXTENT.
Would have been extinguished by the statute in some cases but for the saving, 55. N. 107.

FEE SIMPLE.

Whether where an use in fee is limited to arise after a term, the fee simple or an estate for years only remains in the feodor in the mean-time, 65; N. 137.

FEME. (See Baron and Feme.)

FEOFFEE, OR FEOFFEES TO USES.
Estate of, is the substance of the estate of cestui que use, 48.
Joint sefioees to the use of, one of them, 50, 51.

Whether
CONTENTS.

Whether the estate of transferred in abeyance in any case, 49. N. 89.
Their estate, &c. is not permanently taken from them by the act where future uses are limited, N. 102.
If entitled to a regress where future uses are limited, and the seisin divested and not vested, 53, N. 102.
An estate remains in the feoffees since the statute in some cases, N. 130. p. 220 to 225.
Mr. Fearne's opinion to the contrary controverted, N. 130.
Their entry in some cases necessary in order to the execution of uses by the statute, Ns. 69 and 90.
A contrary doctrine disputed, ibid.
Of an use to the right heirs of the feoffee, 64.

FEOFFMENT.
The distinction between a feoffment to the use of a man's will, and a feoffment to the use of such persons as he shall appoint by his last will taken notice of, N. 80.

FIDEI COMMISSIO.
Its resemblance to the use, 19, and N. 29.

FINE.
Where one bargains and sells and before enrolment levies a fine to the bargainee and then the bargain and sale enrolled the bargainee in by the fine, N. 6. p. 172.

FORMEDON
Given against cestui que use, 28.
Issue in tail had, under the statute de donis, N. 114. p. 188.
Issue in tail might have been barred of, by the statute 1 Ric. III. but for the saving, N. 114. p. 190.

FREEHOLD
Cannot be in suspense, 39, 221.
Is given by the law to the first comer rather than it should be in suspense, 39; 62.
Doth not pass by a bargain and sale before enrolment, N. 106.
Some opinions upon this head controverted, ibid.
Use of, cannot result to the person who conveys if an estate for years be limited to him, N. 130.
Where the use of the freehold will if not expressly limited, result to a seffor, &c. and support a contingent remainder, N. 130.
Cannot be limited to commence in futuro and the reason of it, ibid, p. 224.

HEIR.
CONTENTS.

HEIR.
Of seofee, subpenna did not lie against originally, 23.
When remedied, N. 39.
Oversight of Mr. J. Blackstone and others noticed, ibid.
Favour of the law unto, 35.

INFANT
May be seised to an use, 60.
Feoffee cannot root up the feoffment after the use executed, ibid. Ns. 117 and 115.
May destroy the feoffment and prevent the use where contingent, 60. N. 117.
Distinction where the use is or is not first limited to the infant, N. 117.
As to execution by the infant before the statute, 60.
May limit an use, 69.
Cannot avoid the use without avoiding the conveyance, ibid. N. 147.
Distinction where the conveyance is not by the infant, N. 147.
Bargain and sale of, where good or not, or void, or only voidable, 69, N. 148.
How executions by the statute of the estate of, differ from executions by the party at common law, Ns. 115 and 117.
Uses limited by an infant on a fine or recovery, must be avoided by the infant during his infancy, and why, N. 147.
Perhaps inspection, under age would be sufficient to their being avoided after full age, N. 147.
Uses declared upon feoffments and other conveyances not of record, may be avoided by him and his heirs at any time, ibid.
Bargain and sale of, where good and where not, 69. N. 149.

INHERITANCE.
Statute sometimes operates although no inheritance in esse, 44. N. 73.

INQUEST.
Cestui que use at common law might have been sworn upon, 7. N. 4.

INTENTS.
What so called in the books, 8.

INTENTION.
CONTENTS.

INTENTION.

JOINTENANTS
Shall be of an use although not in esse when first limited, 64, N. 132.

JOINTURES.
Origin of, N. 105.
Ordinance respecting in the statute, 55.

KING (the)
Cannot be seised to an use, 58.
His title after office shall relate above an use on the seisin of person attained and alien, 61, N. 119.
May limit and declare an use, 69.
The law does not permit him to take until office, Ns. 119 and 127.

LAND.
Rent of, could not stand with, 18.
Use of land and use of rent might stand together, 18.
Lands were indirectly deviseable by a disposition of the use as well after as before the statute, N. 80.

LEASE AND RELEASE. See Release.
At common law, N. 87.
Observations upon, N. 87.
Modern conveyance by not valid upon strict legal principles without an entry by the lessee or rather bargainee for a year, ibid.

LEGISLATURE. See Statute.

LIFE.
Might have been an estate for, to an use before the statute, 61. N. 125.
An opinion to the contrary controverted, N. 125.

LIMITATION.
Per verba de prestanti or per verba de futuro, distinction between supported, N. 130.
The arguments of Mr. Fearne upon the subject canvassed, ibid.

LORD.
If entitled to the subpoena in case cestui que use attained, 12 and N. 17.

MATRIMONII
CONTENTS.

MATRIMONII PRÆLOCUTI CAUSA.
No affinity with uses, 24. N. 41.
The statute works not in case of, 68.

MARLEBRIDGE. Statute of.
Feoffors did not take the profits in case of, 25.
An opinion to the contrary controverted, N. 46.

MAINTENANCE.
No mischief of maintenance from a transfer of the subpoena at common law in case of use, 17. N. 25.

MORTMAIN.
Matters relating to the statute of, and to the use being made subject to, 8, 27, 28, 38, Ns. 29, 45 and 46.

NOTICE.
Caused particeps criminis in case of an use, 15, 16. N. 39.
Not so in common law cases and examples given, 14, 15, and N. 22.

OCCUPANT.
May be seised to an use, N. 144.

OCCUPANCY.
The reason of occupancy, 39.

OFFICE.
Declaration of the use and conveyance in the King's case must both be found by, N. 119, 62. N. 127.
In a few special cases he is entitled without, N. 119.

PAROLE.
As to limitations of the use, &c. by parole, 69, Ns. 20 and 146 and p. 14, 55.

PARTICULAR ESTATE.
Where it does not take effect, when interest of remainderman in use to commence, 13. N. 118. p. 198.
Where it failed the remainder was void in case of the land, N, 118.
But good in case of use and devises and the reason of the difference, bid.
Determination of in law or in fact, N. 90. p. 156.
POSSESSIO FRATRIS.
If there might have been of an use, 11. N. 10.

POSSIBILITY.
Not executed by the statute, 47.
Where future uses are limited the feoffees have a possibility remaining, Ns. 90. and 102.

PRECIPES.
Bargainee good tenant to, before enrolment if afterwards enrolled, N. 106.
Bargain and sale of tenant in tail will make a good tenant to, N. 114. p. 193.

PRIVITY
Given by the law where it confers any estate or possession, N. 2.

PURCHASER.
Ever favoured in our law, 36, 37.

QUEEN,
Cannot be seised to an use, 59, N. 112.

RECORD.
Where the King is cestui que use both the conveyance and declaration must be by matter of record, 62, N. 127.

REGRESS RE-ENTRY.
If the feoffees may make, 53 and N, 102.

RELEASE BY WAY OF ENLARGEMENT,
Whether it could operate upon the use at common law, 6. N. 2.
Privity of estate between the releasor and releasee necessary to the operation of, N. 2.
Would not upon strict legal principles operate upon a bargain and sale for a year under the statute without an entry by the bargainee, N. 87.

REMAINDER AND REVERTER. (See Contingent Remainders.)
The consideration of those words as used in the statute, 46.
A difference between an use in remainder and an use in reverter, 47.
CONTENTS.

Remainder in case of the land void where the particular estate fails, N. 118.
But good notwithstanding in cases of use and devises, ibid
When it shall commence, where good, N. 118.
Remainder contingent, not executed to the use, 61. N. 124

RENTS.

Use of rent and use of land might stand together, 18.
Rent of land and the land itself cannot, ibid.
Use on rent charge granted de novo for life executed, 44.
Touching execution of, by the statute, 54.

RIGHTS.

Only two in our law, and what, 5.
An use neither, ibid.
Division of, in civil law, 9.
Not executed by the statute, 43, 47. N. 69.
Right eigne, 68.

SCINTILLA JURIS.

Taken notice of, 49.
The accuracy of Lord Bacon's opinion upon the subject questioned, N. 90.

SEISIN.

There are but two seisins, and what, 44.
If the statute gives a seisin in fact, 48 and N. 87.
Who may be seised to an use, 58 to 62.
Where the person seised and cestui que use is the same he shall be in by the statute, 64 to 68.
Where the person seised, and cestui que use are different persons and yet shall be in by the common law, 68.
How it reverts to the feoffees where future uses are limited, N. 102.
Of its coming to one to whom a future use is limited, 66.

SUSPENCE. See Abeyance.

TAIL. Tenant in. Estate tail.

If he may stand seised to an use, 59 and N. 114.
Could not have executed a perfect estate at common law, N. 114. p. 188.
Tail estate cannot be re-occupied out of a fee-simple, 66.
If it may be by express limitation to the use of another, N. 114.
Some opinions upon this subject canvassed, ibid.

TENURE.

Whether the use succeeded, 21, 22 and N. 35.
Had no influence in raising an use by construction where
an express use was limited, N. 114. p. 193.

SHELLEY'S CASE.
Rule in, taken notice of, 64. N. 133.
The principal works pointed out wherein the learning re-
specting the rule is treated of, N. 133.

STATUTE,
Merchant 55, N. 107.

STATUTE OF USES
Considered, 31, 32.
Title of in the roll, 32.
—in course of pleading, ibid.
Precedent of, 33.
Preamble of, considered, 33 to 42.
Whether intended to abolish conveyances to uses, 39 to 42,
and Ns. 62, 63 and 110.
Body of, expounded, 42. N. 77.
The savings in, taken notice of 51 to 53.
What kind of seisin it gives, 48 and N. 87.
Requisites to the operation of, N. 90.

STATUTE of 1 Ric. III.
Intention of, N. 42.
Whether the feoffment of cestui que use under this statute
avoided the intermediate acts of the first feoffees, 47,
48. N. 84.
The saving in, how to be taken, N. 100.
The necessity of that saving, N. 114. p. 190.

STATUTES.
Some observations and rules respecting, 42, 51, 52.

SUBPOENA.
If it was assignable in case of use, 16, 17. N. 27.
Not in case of bare trust, N. 25.
When first issued by the chancery, N. 5.
Why devised, ibid., and N. 92.
When it was held to lie against the heir of the fofohee and
some erroneous opinions upon the subject taken notice
of, N. 39.
If it lay originally against any other person than the fofohee
himself, N. 92.

L12

TRUST.
260. CONTENTS.

TRUST.

A definition of a, 9.
Lawful, what, 8.
Unlawful, what, ibid.
Unlawful, was originally the use, N. 6, 8, 43 and 48.
An opposite opinion controverted, ibid.
Lawful never looked upon as uses, N. 7.
An opinion that trusts were introduced before uses controverted, N. 8.
Trust is the way to an use. Signification of the expression, 9. N. 8.
Often used as a synonymous term with use before the statute, N. 75 and N. 125. p. 204.

USE.

What it is not, 5 to 8.
What it is, 9.
When taken notice of by the law, 7.
Parts of, 10.
Properties of, ibid.
Was guided by conscience and utterly differed from cases of possession, 10 to 19. N. 2. p. 73, 74.
Whether it might change from one to another, 11, 12, and N. 13.
A consideration necessary to raise it, and what a sufficient one, 14. N. 18 and 19.
As to the preserving of uses, 14 to 16.
Were transferrable, 16, 17, and N. 27.
Were devisable at common law, 11, N. 12.
As to the extinguishment of, 18.
As to a precedent for, 19, 20. N. 29.
As to the causes of, 21.
Commencement and first practice of, 21 to 24, Ns. 35, 41, 46 and 47.
Construction of, to feoffor when it commenced, 22, and N. 37.
Whether it results by construction of law or chancery, N. 2. p. 73, 74.

Where at common law, 22.
Progression of, in course of statutes, 24 to 29.
Original of, 25, Ns. 43, 29, 45 and 46.
Statute of, considered, 31, 33.
Uses were exempted from all titles in law, 37.
Whether the statute intended to abolish the practice of, 39 to 42, and N. 62 and 63.

Contingent,
CONTENTS.

Contingent, not executed by the statute, 43, 44. Ns. 71, 76.
Use cannot be to an use, and why, 44, N. 74.
The position defended, N. 74.
Uses not limited to bodies natural not executed, 44, and N. 76.
Use gives form, 49, N. 102. p. 165.
Who may be seised to, 58 to 62.
Uses resulting, 63. Ns. 37. and 130.
Shifting, 64.
Who may declare and limit, 68.
As to declarations of, by baron and feme, 70. N. 150.
In what sense uses can be said to ensue the nature of the land, N. 11.
Often spoken of before the statute under the words trust or confidence, Ns. 75, and 125, p. 204.
Property and quality of the use not drowned in the possession since the statute, N. 80. p. 141. Ns. 102 and 132.
Distinction where the use is precedent or not, as to execution by the statute, N. 117.
Use limited in remainder when it may where void as a remainder, take effect as a springing use, N. 130.
The limits and restrictions of future springing and shifting uses, and the reason for those limits, N. 130. ps. 211, and 212. N. 131. p. 227, and N. 140.
An use limited to commence after a general dying without issue, void, as being too remote, although Lord Bacon puts the case as if good, 66. N. 140.

VIE.
Estate pour autre, to an use, 61. N. 125.

VILLEIN.
Where enfeoffed to an use, the king's title related above the use, but a common person's not, 61, N. 130.
Where Lord enfeoffed to the use of, the use arose not, 61. N. 121.

UNCERTAIN PERSON.
An estate to a person uncertain to an use not executed, 61.
An use to, not executed till the person be in esse, 63.

USUS FRUCTUS.
What in the civil law, 19, and N. 29.

WARDSHIP.
Was given to the Lord of the heir of cestui que use, 28.

WARRANTY
WARRANTY

Was for the help of purchasers, 36.

Whether warranty extinguished a right of an use at common law or after the statute, 1 Ric. III. 12, and N. 14.

Difference, as to warranty being destroyed, whether a person is in by the common law or the statute, 67.

WASTE.

Action of, against particular tenants, 27.

WILL. Tenancy at.

Whether an use amounted to, 5. N. 2.

WILL. See devise also.

Lands were indirectly devisable by a disposition of the use after the statute of uses, N. 80.

A contrary opinion controverted, ibid.

The distinction between a feoffment to the use of a man's will and a feoffment to the use of such persons as he shall appoint by his last will taken notice of, ibid.

FINIS.
ERRATA AND ADDENDA.

Page 11, at the bottom instead of (b) insert (p).


19. read re instead of se.

25. read est in intentione.

45 last line but one, place a comma after the word raised.

48 last line, fill up the blank with the word came.

54 last line after substantive, add the word laws.

58 and 62, bottom of the pages, instead of Note 144, read Notes 145.

Note 76, Line 7. read sconce instead of scoffer.

Page 141 6. a new sentence to commence with the word When.

160 last line but six for persons read person.

205 4. place two inverted commas after the word good, to denote the end of the quotation.

243 5. after 570 add, and Zouch and Parsons, 3 Burr. 1794.

249 22. after 1794 add, and Clough and Clough, 3 Woodson, 453 in note.
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