

Cambridge University Library, MS. Add. 6863, fo. 57

Memorandum quod apud Sarum le Seignior Rychardson, quant il fuit al Salisbury, son turne fuit de sitt upon the goale, quel il performe, et quant il fuit a doner judgment sur les prisoners, pur ceo que son voice fuit weak il caus les prisoners destre port al inner bar al intent que ils poient melieux heare son exhortation, et quant il ad done judgment un [blank], que fuit un stronge fellowe et ad judgment pur robbery per hault chemin, que ad estre un notorious offender devant, et esteant per le negligence del gaoler nient manacled come est use, sudenment throwe ove grand violence un great stone al heade del dit Seignior Rychardson quel per le mercy del Dieu did come close to his hatt et missed him et auxi le Seignior George que sitt prochin a luy, et le stone hitt the wanescott behind them and gave a great rebound, quel si ceo stone had hitt le dit Seignior Rychardson il voet have killed him.

Le grand jury esteant la et nient discharge, il fuit indite de ceo et araigne et convict: et il ad son main dexter succide sur un scaffolde in le market place, et ceo al request del justices de peace et grand jurie. Et cest fuit un bon exemple de justice in cest insolent age. Et apres imediatement il fuit la pendus sur un gibett in le dit lieu. Fuit dit que il scarce shrinke ou fuit move ove le succider et cuttinge of de son main.

Ascuns diont que cest fuit plus que poit estre fait, intant que il fuit adevant devant le fact [convict] de felony: et pur misdemeanour comytt apres ceo ne doit estre punish si non que il ad comytt un plus greinder offence (come treason), car al cest temps il fuit un mort person in ley.

J. H. BAKER.

JANE AUSTEN AND THE LAW*

JANE AUSTEN "was always very careful not to meddle with matters which she did not thoroughly understand. She never touched upon politics, law or medicine . . ." ¹ Her novels are not in any sense about law: there are no trial scenes or criticisms of legal rules or institutions. Nevertheless, lawyers do appear in her books, if generally in minor roles; and there are many legal puzzles and allusions. In addition there is something to be said of her views of real lawyers; and at least one interesting legal problem arises out of (rather than in) one of the novels. A collection of these various points may serve simply to illustrate Mrs. Clay's observation that "The lawyer plods, quite care-worn" ²; but to me at least they have seemed of sufficient interest to merit some discussion.

I. LAWYERS

In her letters, Jane Austen refers to a number of real lawyers. The first of these is Thomas Lefroy, who evidently admired the young Jane Austen ³ and she, at the age of 20, tells us that "the day is come on which I am to flirt my last with Tom Lefroy." ⁴ Some two years later, she writes that "he was gone back to London in his way to Ireland, where he is called to the Bar and means to practise." ⁵ When Lefroy was 76, he was appointed Chief Justice of Ireland, and he did not retire from the office until he had reached the age of 90. ⁶ In another letter, Jane Austen refers with warm praise to a lawyer who

* This essay grew out of an attempt to explain legal puzzles in Jane Austen's works to non-lawyers; but it is hoped that it may nevertheless be of some interest to readers of this Review.

References in these notes to the works of Jane Austen are to *The Oxford Illustrated Jane Austen* edited by R. W. Chapman. References are to pages unless otherwise indicated.

The following abbreviations are used:

S & S	=	<i>Sense and Sensibility</i>
P & P	=	<i>Pride and Prejudice</i>
MP	=	<i>Mansfield Park</i>
E	=	<i>Emma</i>
NA	=	<i>Northanger Abbey</i>
P	=	<i>Persuasion</i>
MW	=	<i>Minor Works</i>
Letters	=	<i>Jane Austen's Letters</i> , collected and edited by R. W. Chapman (Oxford, 1952)
Memoir	=	<i>A Memoir of Jane Austen</i> by J. E. Austen Leigh (London, Macmillan ed., 1906)
Life	=	<i>Jane Austen, Her Life and Letters</i> , by W & R. A. Austen Leigh (New York, 1913)
Facts and Problems	=	<i>Jane Austen, Facts and Problems</i> , by R. W. Chapman (Oxford, 1948)
Bl. Com.	=	<i>Commentaries on the Laws of England</i> , by William Blackstone, 1st ed. (Oxford, 1765-69)

¹ *Memoir*, 14

² *P*, 20.

³ *Life*, 87-89; *Facts and Problems*, 58

⁴ *Letters*, 6.

⁵ *Letters*, 27

⁶ *D.N.B.*, Vol. XI, 845.

had advised her brother Edward: "Excellent Letters; & I am sure he must be an excellent Man. They are such thinking, clear considerate Letters as Frank might have written. I long to know who he is, but the name is always torn off. He was consulted only as a friend."⁷ There is also the story that Jane Austen's father, George Austen, was left an orphan at the age of nine, and befriended by "a kind uncle, Mr. Francis Austen, a successful lawyer at Tunbridge, . . . who, though he had children of his own, yet made liberal provision for his nephew."⁸ Later, the same uncle presented George Austen to the living of Deane, having previously bought the next presentation.⁹ Probably, these facts were known to Jane through family tradition, particularly as Francis Austen's wife was her godmother.¹⁰ Jane Austen does not often refer to real lawyers; but when she does, she gives us no reason to suppose that she thought ill of them.

By contrast, lawyers in the novels do not on the whole cut a very good figure. Most of them are solicitors (or attorneys) and are clearly not socially acceptable. In *Pride and Prejudice* one of the points held against the Bennet girls is that their uncle Philips is a country attorney. He is described by Miss Bingley as one of their "low connections"¹¹ and provides her and Mrs. Hurst with the opportunity to indulge "their mirth for some time at the expense of their dear friend's vulgar relations."¹² Miss Bingley returns to the point when taunting Darcy with the prospect of being related to the Philips: "Do let the portraits of your uncle and aunt Philips be placed in the gallery at Pemberley. Put them next to your great uncle the judge. They are in the same profession, you know; only in different lines."¹³ In a similar vein, Lady Catherine de Bourgh, tries to shame or bully Elizabeth into promising that she will not become engaged to Darcy: "Who are your uncles and aunts?"¹⁴ These views should perhaps not be taken too seriously, for they extend equally to the girls' other uncle, Mr. Gardiner, of whom we are meant to approve. But with regard to Mr. Philips, Elizabeth seems to take the same view as the ladies with whom she agrees on little else. When the gentlemen enter the drawing room after dinner at the Philips' we are told that Wickham was as far superior to the other officers "as they were superior to the broad-faced stuffy uncle Philips, breathing port wine, who followed them into the room."¹⁵

⁷ *Letters*, 382, where the lawyer is conjectured to have been "one of the Judges," but no further clue is given as to his identity

⁸ *Memoir*, 4, *Life*, 4

⁹ *Life*, 16-17

¹⁰ *Life*, 22

¹¹ *P & P*, 36

¹² *P & P*, 37

¹³ *P & P*, 52-53

¹⁴ *P & P*, 356

¹⁵ *P & P*, 76 Clearly Mr Philips is here seen through Elizabeth's eyes

Elizabeth and Darcy at the end of the story are said to be "on the most intimate terms"¹⁶ with the Gardiners, but one cannot imagine that the Philips were ever invited to Pemberley.

Much the same view of lawyers appears in *Emma*, when Mr. Elton turns out not to be in love with Harriet. Emma considers other suitors for her and rejects William Coxe: "Oh! no, I could not endure William Coxe—a pert young lawyer."¹⁷ The Cox family indeed make their appearance at the party at the Coles—but then the Coles are "of low origin, in trade."¹⁸ The Cox daughters come in for their share of Emma's censure: one of them is "impertinently curious"¹⁹ and as a group they are "without exception, the most vulgar girls in Highbury."²⁰ In *Sanditon*, Lady Denham laments that no person of property has come to Sanditon: "An Income perhaps, but no Property. Clergyman, may be, or Lawyers from town . . . And what good can such people do anybody?"²¹ The list of subscribers to the library is "commonplace"; it includes a "Mr. Beard—Solicitor, Gray's Inn."²²

That lawyers are undesirable connections further appears from the fact that many of Jane Austen's less estimable characters have legal connections. In *Pride and Prejudice*, Mrs. Bennet is the daughter of an attorney²³; indeed, Mr. Philips had "succeeded him in the business"²⁴ and married his other daughter. Wickham, too, is evidently the son of an attorney; and we get an early clue to his hypocrisy when he tells Elizabeth that his father "began life in the profession which your uncle, Mr. Philips, appears to do so much credit to."²⁵ (The "broad-faced stuffy uncle Philips" had appeared just five pages ago.) According to family tradition, Mary Bennet is destined to marry "nothing higher than one of her uncle Philips' clerks."²⁶ In *Emma*, the affected and conceited Mrs. Elton passed, on the death of her parents, into the care of "an uncle . . . in the law line—nothing more distinctly honourable was hazarded of him than that he was in the law line . . . Emma guessed him to be the drudge of some attorney, and too stupid to rise."²⁷ Emma's guesses are not, of course, reliable; but on this occasion there is nothing to indicate that she is wrong. In *Northanger Abbey*, Isabella Thorpe's

¹⁶ *P & P*, 388

¹⁷ *E*, 137

¹⁸ *E*, 207 "Coxe" and "Cox" clearly refer to the same family For similar inconsistency in the spelling of surnames, cf *P & P*, 28 ("Philips") with *P & P*, 52 ("Philps")

¹⁹ *E*, 232

²⁰ *E*, 233

²¹ *MW*, 401

²² *MW*, 389

²³ *P & P*, 28

²⁴ *P & P*, 28

²⁵ *P & P*, 81

²⁶ *Memoir*, 148

²⁷ *E*, 183

father had been (according to Catherine Morland) "A lawyer, I believe"²⁸—and not, it seems, very successful in the business for Mrs. Thorpe "was a widow, and not a very rich one."²⁹ In *Persuasion*, the scheming Mrs. Clay is the daughter of a lawyer. The lawyer's daughter whom Robert Watson marries in *The Watsons* is "pert and conceited"³⁰; she indulges in the same sort of vanity and social one-upmanship that Mrs. Elton displays in *Emma*.

The lawyers mentioned so far are simply figures of fun, insignificant or socially unacceptable; but others have more seriously disagreeable qualities. In *The Watsons* we meet Robert Watson, "an Attorney at Croydon, in a good way of Business."³¹ He is patronising and condescending towards his sister Emma Watson, as she is too poor to bring him any business. She is glad to get away from him and his wife into her father's room where she finds peace "from the immediate endurance of Hard-hearted prosperity, low-minded Conceit, & wrong-headed folly, engrafted on an untoward Disposition."³² We find similar qualities, though softened by diplomacy, in John Shepherd, the "civil, cautious lawyer"³³ who features in the opening chapters of *Persuasion*. He is said to be one of the "two confidential friends"³⁴ of Sir Walter and Elizabeth Elliot, the other being Lady Russell; but he is clearly not their social equal. This appears not only from the way in which he is addressed by Sir Walter³⁵ but also from the relationship between his daughter, Mrs. Clay, and Elizabeth—a relationship regarded by Lady Russell as "a friendship quite out of place."³⁶ Elizabeth herself, when warned by Anne that Mrs. Clay might marry their father, shows that she is well aware of the gulf between her and her friend: "'Mrs. Clay,' said she warmly, 'never forgets who she is . . . she reprobates all inequality of rank and condition more strongly than most people.'"³⁷

Given his inferior position, Mr. Shepherd is remarkably good at getting his own way. He "would rather have the *disagreeable* prompted by any body else"³⁸ and so defers to the judgment of Lady Russell "from whose known good sense he fully expected to have just such resolute measures advised, as he meant to see finally adopted."³⁹ When Sir Walter is manoeuvred into saying that he would rather quit Kellynch-hall than agree to the economies pro-

²⁸ NA, 205.

²⁹ NA, 34.

³⁰ MW, 349.

³¹ MW, 348.

³² MW, 361.

³³ P, 11.

³⁴ P, 10.

³⁵ See P, 17.

³⁶ P, 11.

³⁷ P, 35.

³⁸ P, 11.

³⁹ P, 11.

posed by Lady Russell, "the hint was immediately taken up by Mr. Shepherd, whose interest was involved in the reality of Sir Walter's retrenching."⁴⁰ Mr. Shepherd continues skilfully to guide Sir Walter in the desired direction: he dissuades him from settling in London, feeling that Sir Walter "could not be trusted"⁴¹ there; he hints that rumours of Sir Walter's intention to let Kellynch-hall may get abroad⁴² (and we are left in little doubt as to how this happens: "the very first application for the house was from an Admiral Croft, with whom he [Mr. Shepherd] shortly afterwards fell into company in attending the quarter sessions at Taunton"⁴³); when Sir Walter threatens to curtail the privileges of his tenant, Mr. Shepherd "presumed to say, 'In all these cases there are established legal usages which make everything plain and easy between landlord and tenant'"⁴⁴; and when he introduces Admiral Croft to Sir Walter, the latter is "flattered into his very best and most polished behaviour by Mr. Shepherd's assurances of his being known, by report, to the Admiral, as a model of good breeding."⁴⁵

Mr. Shepherd also provides us with the one example in the novels of an extended parody of the convoluted style then used by lawyers. In a long speech to Sir Walter, Mr. Shepherd seems to get a little lost; but when he finally comes to the point he does so with some abruptness. "Therefore, Sir Walter, what I would take leave to suggest is, that if in consequence of any rumours getting abroad of your intention—which must be contemplated as a possible thing, because we know how difficult it is to keep the actions and designs of one part of the world from the notice and curiosity of the other—consequence has its tax—I, John Shepherd might conceal any family matters that I chose, for nobody would think it worth their while to observe me, but Sir Walter Elliot has eyes upon him which may be very difficult to elude—and therefore, thus much I venture upon, that it will not greatly surprise me if, with all our caution, some rumour of the truth should get abroad—in the supposition of which, as I was going to observe, since applications will unquestionably follow, I should think any from our wealthy naval commanders particularly worth attending to—and beg leave to add that two hours will bring me over at any time to save you the trouble of replying."⁴⁶ Perhaps another, briefer, parody of legal language occurs at the beginning of *Mansfield Park* where Miss Maria Ward "with only seven thousand pounds" marries Sir Thomas

⁴⁰ P, 13.

⁴¹ P, 14.

⁴² *Infra*, at note 46.

⁴³ P, 21.

⁴⁴ P, 19.

⁴⁵ P, 32.

⁴⁶ P, 17-18.

Bertram. "All Huntingdon exclaimed on the greatness of the match, and her uncle, the lawyer, himself, allowed her to be at least three thousand pounds short of any equitable claim to it."⁴⁷ Perhaps Jane Austen had heard a lawyer use "equitable" in its technical sense; though it is just as likely that she used it in its popular sense to refer to fairness. One may compare the later passage in which, on Henry Crawford's arrival, "Miss Bertram's engagement made him in equity the property of Julia."⁴⁸

Turning to the other branch of the legal profession, the only member of the Bar to appear in the novels is Mr. John Knightley in *Emma*. It is true that we are never expressly told that he is a barrister—he is described merely as "a lawyer"⁴⁹ and Jane Austen's use of the word "lawyer" does not indicate to which branch of the profession she refers. (Mr. Shepherd is "a civil, cautious lawyer"⁵⁰ but clearly what we would call a solicitor.) That Mr. John Knightley is a member of the Bar seems scarcely open to doubt; and some evidence of it may be provided by our being told that his brother had some papers delivered to him "at his chambers."⁵¹ There is also the statement that he "must be in London again by the end of the first week in November"⁵²—then the start of Michaelmas Term. The date would have much less significance for a solicitor. But too much cannot be made of this; for the shortness of the John Knightleys' Christmas visit to Hartfield ("a delightful visit;—perfect, in being much too short"⁵³) cannot be explained by reference to the legal calendar: the Christmas vacation would have been longer than a week or ten days⁵⁴ and would not have ended on December 28, when "Mr. John Knightley must be in town again."⁵⁵

Mr. John Knightley is much the most interesting of the lawyers in the novels. He is described as "a tall, gentleman-like, and very clever man; rising in his profession, domestic and respectable in his private character."⁵⁶ The defects in his character are not (at least necessarily) associated with his profession. He had "reserved manners which prevented his being generally pleasing"; he was "capable of being sometimes out of humour"; "his temper was not his great perfection"; and "he could sometimes act an ungracious, or say a severe thing."⁵⁷ His greatest fault, in *Emma's* eyes, was "the want of

⁴⁷ *MP*, 3

⁴⁸ *MP*, 44

⁴⁹ *E*, 79

⁵⁰ *P*, 11

⁵¹ *E*, 471, *cf. infra* at notes 73 and 82

⁵² *E*, 484

⁵³ *E*, 108

⁵⁴ See *E*, 79, 91, it seems that Mr Woodhouse had pessimistically compressed 10 days into seven

⁵⁵ *E*, 79

⁵⁶ *E*, 92

⁵⁷ *E*, 92-93

respectful forbearance towards her father."⁵⁸ She does not object to his being abrupt with Mr. Elton ("I know nothing of the large parties of London, sir—I never dine with any body"⁵⁹); but it is different when at Randalls he pursues "his triumph [over Mr. Woodhouse] rather unfeelingly"⁶⁰—and even with a touch of sarcasm; or when a dispute breaks out between them about the relative advantages of South End and Cromer as seaside resorts.⁶¹ Occasionally, a note of cynicism even creeps in, as in his conversation with Jane Fairfax about letters of business and letters of friendship—he calls the latter "the worst of the two" for "Business, you know, may bring money, but friendship hardly ever does."⁶² But by the end of the conversation he is shown as generous and sympathetic: "As an old friend, you will allow me to hope, Miss Fairfax, that ten years hence you may have as many concentrated objects as I have."⁶³ And although his temper was sometimes, in *Emma's* eyes, a source of "little injuries to Isabella,"⁶⁴ it is surely significant that Isabella never felt them herself. Speaking of Mrs. Churchill, she says: "To be constantly living with an ill-tempered person must be dreadful. It is what we happily have never known anything of."⁶⁵ One suspects that Mr. John Knightley is less bad-tempered at home. Towards the end of the book, Mr. Knightley goes on a visit to him "to learn to be indifferent.—But he had gone to a wrong place. There was too much domestic happiness in his brother's house."⁶⁶ Mr. John Knightley "was not a great favourite with his fair sister-in-law"⁶⁷; but even *Emma* accepts that "Isabella had connected herself unexceptionably."⁶⁸

Mr. John Knightley, though sometimes short-tempered, is never boorish (as Mr. Palmer is in *Sense and Sensibility*). Even his occasional ill-humour is generally based on reasonable grounds or on personal qualities which are, in themselves, estimable. He likes the tranquillity of his home and his family; and this accounts for his amazement at Mr. Weston's walking over, after a day in town, to join the party at Hartfield "for the sake of being in mixed company till bed-time, of finishing his day in the efforts of civility and the noise of numbers."⁶⁹ The sentiment is similar to that expressed by Edmund Bertram to Fanny at the ball at Mansfield: "I am worn out

⁵⁸ *E*, 93

⁵⁹ *E*, 116

⁶⁰ *E*, 126

⁶¹ *E*, 105-106

⁶² *E*, 293

⁶³ *E*, 294

⁶⁴ *E*, 93

⁶⁵ *E*, 121

⁶⁶ *E*, 433

⁶⁷ *E*, 93

⁶⁸ *E*, 358

⁶⁹ *E*, 303

with civility,' said he. 'I have been talking incessantly all night and with nothing to say.'⁷⁰ It appears again when Mr. John Knightley protests against having to go out to dinner at Randalls just before Christmas: "Going in dismal weather, to return probably in worse;—four horses and four servants taken out for nothing but to convey five idle, shivering creatures into colder rooms and worse company than they might have had at home."⁷¹ Emma does not agree; but then she (in spite of Mr. Woodhouse's assertion to the contrary)⁷² was fond of dining out, even to the extent of wanting to accept an invitation from the Coles. But Jane Austen, one suspects, has some sympathy with Mr. John Knightley's views on the point. He emerges as a person whom one is bound to respect in spite of minor blemishes of character.

A final group consists of persons for whom a legal career was contemplated or suggested but who in the end did not go into the law. The first is Edward Ferrars in *Sense and Sensibility*. He wants to go into the church, but his family try, without success, to push him into a more glamorous profession. "The law was allowed to be genteel enough; many young men, who had chambers in the Temple, made a very good appearance in the first circles and drove about town in very knowing gigs. But I had no inclination for the law, even in this less abstruse study of it which my family approved."⁷³ In *Mansfield Park*, Sir Thomas Bertram is quite content for his younger son Edmund to go into the church. But this does not satisfy Mary Crawford, when she thinks of marrying Edmund. In the law or in the army, she tells him, "distinction may be gained, but not in the church."⁷⁴ During the tour of Sotherton she says: "You really are fit for something better. Come, do change your mind. It is not too late. Go into the law"—"Go into the law! with as much ease as I was told to go into this wilderness." "Now you are going to say something about law being the worst wilderness of the two, but I forestall you; remember I have forestalled you."⁷⁵ But when Mary later returns to the attack, there is no further mention of the law: "You ought to be in parliament, or you should have gone into the army ten years ago."⁷⁶ These two cases, in which the virtuous resist the attempts of their ambitious relations or friends to push them into a legal career, may be contrasted with two others. The first is Wickham in *Pride and Prejudice* who gives up the prospect of a career in the church and tells Darcy that he has "some intention . . . of studying the

law."⁷⁷ Darcy makes no objection even though he is aware of the "vicious propensities"⁷⁸ that make Wickham unfit to be a clergyman; but Darcy can be defended from the charge of foisting a scoundrel on the legal profession, for he regards Wickham's studying the law as a "mere pretence."⁷⁹ Three years later Wickham abandons the law, having found it "a most unprofitable study."⁸⁰ The second is Mr. William Elliot in *Persuasion*. At the time of his breach with Sir Walter and Elizabeth, he was "a very young man, just engaged in the study of the law."⁸¹ Mrs. Smith tells us that "he had chambers in the Temple, and it was as much as he could do to support the appearance of a gentleman."⁸² Like Wickham, he finds the law unprofitable, or at least not immediately profitable: "Mr. Elliot . . . at that period in his life had one object in view—to make his fortune, and by a rather quicker process than the law. He was determined to make it by marriage."⁸³—and did so "by uniting himself to a rich woman of inferior birth."⁸⁴ Lawyers may comfort themselves by reflecting that, while Jane Austen's heroes disdain to go into the law, her villains (if unprincipled characters like Mr. Wickham and Mr. William Elliot may be so described) only contemplate the law as a profession but do not persevere in their design.

II. LEGAL PUZZLES

(1) *Property settlements*

In many of the novels, the devolution of property forms an important element in the plot. There seems to be a general assumption that property is to be kept in the family; and the original legal device for achieving this result was the estate tail, by which land was settled on a man "and the heirs of his body." The estate might be limited to male heirs in which case it was called a tail male, or to heirs of either sex, in which case it was called a tail general. Long before Jane Austen wrote, however, the estate tail had ceased to be an effective means of keeping land in the family; for machinery had been devised by which a person who held land in tail could bar the entail, with the result that the land was then at his free disposal. But lawyers had made it possible to ensure that land was kept in the family in spite of the fact that entails could be barred. The technique was to settle land, not simply on A in tail, but on A for life, remainder to his eldest son in tail male (if it was desired to restrict

⁷⁰ MP, 278

⁷¹ E, 113

⁷² E, 209

⁷³ S & S, 102-103

⁷⁴ MP, 92, cf 91

⁷⁵ MP, 93-94

⁷⁶ MP, 214

⁷⁷ P & P, 200

⁷⁸ P & P, 200

⁷⁹ P & P, 201

⁸⁰ P & P, 201

⁸¹ P, 8

⁸² P, 199

⁸³ P, 200

⁸⁴ P, 8

the succession to males). Of course it was equally possible to leave the succession open to descendants of either sex by creating a remainder in tail general. In either case, A, being only tenant for life, could not alienate the land. Assuming that the succession under the settlement was limited to males, and that the life-tenant had a son, that son would become tenant in tail; and on his father's death (but not before) he could bar the entail and dispose of the land. To prevent the land from going out of the family in this way, it was customary, when the son came of age, to resettle the land on the father for life, then on the son for life and then on *his* eldest son in tail male. When that son came of age, the process would be repeated and so the land could be kept in the family for many generations.⁸⁵

Now one might ask: why should the son agree to accept a life-estate in lieu of the more valuable estate tail? The answer is that during his father's life-time he was not entitled to any income from the estate. There is an allusion to this point in *Lady Susan* where Sir Reginald De Courcy (whose estate is "considerable & I believe certainly entailed"⁸⁶) writes to his son to dissuade him from marrying Lady Susan: "You know your own rights & that it is out of my power to prevent your inheriting the family Estate. My Ability of distressing you during my Life, would be a species of revenge to which I should hardly stoop under any circumstances."⁸⁷ Evidently there had not yet been a resettlement; and from Lady Susan's point of view this would have the advantage that young De Courcy would eventually be able to bar the entail so that she (if her influence over him still prevailed) would be able to get her hands on the capital.

Settlements might also contain provisions for members of the family other than the one who was to inherit the estate. They might, for example, provide for the widow of the tenant for life by way of jointure, that is by an annuity charged on the estate; and for "younger children" by way of "portions," that is by lump sums to be raised (for example) by selling timber or by mortgaging the estate. Whether such provisions were included would depend partly on the wishes (or whims) of the settlor and partly on the size of the estate. Provisions for such other members of the family might also be found in further settlements that were likely to be made on marriage.

It should be stressed that these settlements followed no uniform pattern. Property did not necessarily go to the eldest male descendant; nor were there necessarily any provisions for widows and younger children. The above sketch of certain typical provisions merely provides a background against which the dispositions found

⁸⁵ For a fuller description of the process, see Megarry and Wade, *The Law of Real Property* (4th ed., 1975), 384-389

⁸⁶ *MW*, 256

⁸⁷ *MW*, 261

in the novels can be examined. Those dispositions vary widely according to the demands of the story.

In *Sense and Sensibility* the Norland estate appears to be settled by "the old Gentleman"⁸⁸ on Henry Dashwood for life, then on his son by his first marriage, John Dashwood, for life, remainder to John Dashwood's son (little Harry).⁸⁹ It is not clear whether little Harry's remainder is in tail or in fee simple—presumably because it is irrelevant to the plot. A thousand pounds is left to each of Henry Dashwood's daughters, but no provision is made for his widow. Henry Dashwood has "no power of providing for those who were most dear to him, and who most needed a provision, by any charge on the estate or by any sale of its valuable woods."⁹⁰ In the first edition, "any charge on" read "any division of"; this was altered to the present text in the second edition,⁹¹ not because division would be a legal impossibility, but because a charge would be a more usual way of providing for children who were not to inherit the estate. The powers of a tenant for life to make "charges" would depend on the terms of the settlement. We may from this point of view contrast Henry Dashwood's position with that of Sir Walter Elliot in *Persuasion*: "There was only a small part of his estate that Sir Walter could dispose of; but had every acre been alienable, it would have made no difference. He had condescended to mortgage as far as he had the power, but he would never condescend to sell."⁹² Although the exact devolution of the Kellynch estate is never made clear, it seems that Sir Walter was tenant for life, with remainder in tail male; and that Mr. William Elliot ("great grandson of the second Sir Walter") was "Heir presumptive"⁹³ not only to the baronetcy but also to the estate: "the Kellynch estate," we are told, "would as surely be his hereafter as the title."⁹⁴

The Norland settlement contains no provision at all for Mrs. Henry Dashwood. She "had nothing" but her husband left her the seven thousand pounds which he had "in his own disposal,"⁹⁵ as well as "all the china, plate, and linen"⁹⁶ from Stanhill, which had been their home before they moved to Norland. Her position may be compared with that of Mrs. Bennet in *Pride and Prejudice*: we are told that her father "had left her four thousand pounds,"⁹⁷ and that "Five thousand pounds was settled by marriage articles on Mrs.

⁸⁸ *S & S*, 4

⁸⁹ *S & S*, 4

⁹⁰ *S & S*, 4

⁹¹ See *S & S*, 383

⁹² *P*, 10

⁹³ *P*, 4.

⁹⁴ *P*, 140. Only "as surely". see *infra* p 564 note 34

⁹⁵ *S & S*, 4.

⁹⁶ *S & S*, 13

⁹⁷ *P & P*, 28

Bennet and the children."⁹⁸ The relationship between these two amounts is not made clear. It is possible that *both* were intended for Mrs. Bennet, or for her and her children. But this is unlikely in view of what is said of her financial plight in the event of Mr. Bennet's death, and of the financial expectations of her daughters.⁹⁹ More probably, the four thousand pounds formed part of the five thousand settled by the marriage articles. One possibility is that Mrs. Bennet's father was already dead when she married. Another is that he had promised on her marriage to settle four thousand pounds on her, and the obligation so created was later satisfied by a legacy of the same amount.¹ The extra thousand pounds may have been contributed by Mr. Bennet from a source other than the Longbourn estate: his property consisted "*almost entirely*"² of that estate. But on Mr. Bennet's death it seems that Mrs. Bennet will have no income from Longbourn. Not only is it true that then Mr. Collins "may turn you all out of this house as soon as he pleases"³ (which is more or less what happens to Mrs. Dashwood and her daughters in *Sense and Sensibility*); but Mrs. Bennet will have nothing to live on except the interest on £5,000. When she supposes that Mr. Bennet will be killed in a duel with Wickham, she says to Mr. Gardiner: "The Collinses will turn us out before he is cold in his grave; and if you are not kind to us, brother, I do not know what we shall do."⁴ Clearly she would find it hard to support herself and her daughters on £250 a year⁵: in *Sense and Sensibility*, £200 a year is thought to be no more than sufficient to support a bachelor living alone.⁶ The point appears again when Mrs. Bennet scolds Elizabeth for not accepting Mr. Collins: "I am sure I do not know who is to maintain you when your father is dead.—I shall not be able to keep you—and so I warn you."⁷

Other widows are more fortunate. In *Sense and Sensibility*, Mrs. Jennings has "an ample jointure"⁸ while Mrs. Ferrars is in entire control of her property. We may assume that this includes property coming to her on her husband's death for both her sons are entirely dependent on her; and she is scarcely the sort of person to have married a penniless man. Similarly in *The Watsons* Mr. Turner

⁹⁸ P & P, 308.

⁹⁹ *Infra* at notes 4–6 and p.562 at note 17; cf. P & P, 302.

¹ Under the so-called presumption against "double portions": see Snell's, *Principles of Equity* (28th ed., 1982), 512–520. See also the terms of Lydia's proposed marriage settlement: P & P, 302.

² P & P, 28 (italics supplied)

³ P & P, 61.

⁴ P & P, 287

⁵ Cf. *Life*, 182: on the death of Jane Austen's father, her mother's annual income was only £210, but this was increased by contributions from some of her sons to £460.

⁶ S & S, 283.

⁷ P & P, 113.

⁸ S & S, 36.

leaves all his property to his widow at her free disposition (with the result that it gets into the hands of her second husband, a Captain O'Brien). Emma Watson's expectations of inheriting the property are disappointed and her brother (the attorney from Croydon) protests: "I thought Turner had been reckoned an extraordinary sensible, clever man.—How the Devil came he to make such a will . . . He might have provided decently for his widow without leaving everything that he had to dispose of, or any part of it at her mercy."⁹ In *Sanditon*, Lady Denham is similarly left all the property of her first (wealthy) husband, Mr. Hollis, "& all at her Disposal."¹⁰ Somewhat like Mrs. Ferrars, she uses this position to tyrannise her relations, though one feels that she does it for the sake of wry amusement rather than for the sake of family ambition. After the death of her second husband, Sir Harry Denham, she is described as the "Dowager"¹¹ of the Denham estate, of which Sir Edward Denham is "Heir." But "Dowager" here seems to be a courtesy title: it does not import that she is entitled to dower or to a jointure in lieu: "things do not stand between us in the way they commonly do between those two parties.—Not a shilling do I receive from the Denham Estate. Sir Edw: has no Payments to make to me."¹² By contrast when "the poor old dowager"¹³ Lady Ravenshaw dies in *Mansfield Park*, so as to put an end to the Ecclesford theatricals, Tom Bertram observes that "the jointure may comfort *him*,"¹⁴ *i.e.* the present Lord Ravenshaw. He assumes (or perhaps knows) that some provision had been made for the old lady out of the estate.

One puzzle in *Pride and Prejudice* concerns the de Bourgh property. After observing to Elizabeth that "your father's estate is entailed on Mr. Collins," Lady Catherine continues: "I see no occasion for entailing estates from the female line.—It was not thought necessary in Sir Lewis de Bourgh's family."¹⁵ From this and the description of Miss Anne de Bourgh (by Mr. Collins) as "the heiress of Rosings, and of very extensive property,"¹⁶ one might think that the de Bourgh property had been settled on Lady Catherine for life (she can scarcely have *less* than a life interest in it, for it is inconceivable that she is living at Rosings as her daughter's guest); and that, subject to her life interest, it was entailed successively on the first and other children (male or female) born to her

⁹ *MW*, 352; the Austen family are said to have been disappointed when Jane's uncle, James Leigh Perrot, left a substantial part of his property to his widow at her free disposal: *Life*, 384–385.

¹⁰ *MW*, 375.

¹¹ *MW*, 400.

¹² *MW*, 400.

¹³ *MP*, 122.

¹⁴ *MP*, 123.

¹⁵ P & P, 164.

¹⁶ P & P, 67.

and Sir Lewis. Now generally Mr. Collins is scrupulously accurate in financial matters. When proposing to Elizabeth he rightly says "that one thousand pounds in the 4 per cents. which will not be yours till after your mother's decease, is all that you *may* ever be entitled to"¹⁷: the exact amount of her entitlement "depended on the will of the parents."¹⁸ But in his description of Miss de Bourgh he may well be using "heiress" in the popular (rather than the legal) sense.¹⁹ In this sense, an "heir" or "heiress" often means someone who is *expected* to inherit property. Hence when Mr. Collins refers to Miss de Bourgh as "heiress" he does not necessarily mean that she had on her father's death inherited an estate tail in remainder, to take effect in possession after her mother's death. It is just as likely that Sir Lewis had left his property to Lady Catherine at her free disposal,²⁰ and that it was simply inconceivable that she would want to leave it to anyone except her daughter. Expressions such as "heir" or "heiress" are quite commonly used in the novels in this popular sense: for example, in *Emma* we are told that Frank Churchill is being brought up as Mr. Churchill's "heir"²¹; and in *Persuasion* Mr. Musgrove senior regards little Charles as his "heir."²² Similarly, in *Sense and Sensibility* Henry Dashwood is described as "the legal inheritor of the Norland estate, and the person to whom [old Mr. Dashwood] intended to bequeath it"²³ (what seems to be meant is that he would have inherited it on intestacy). A legally more accurate phrase occurs in *The Watsons* where Emma Watson is described as "the expected Heiress of an easy Independence"²⁴—but the whole point is that her expectation of inheriting is defeated as a result of her aunt's second marriage. On the other hand in *Emma* the description of the heroine as "the heiress of thirty thousand pounds"²⁵ seems to mean neither that Emma might inherit this amount, nor that she was entitled to it in the future, but rather that she was already entitled to it now: the prudent Mr. Elton would scarcely propose to her on any other basis. And her entitlement to

¹⁷ *P & P*, 106 (italics supplied)

¹⁸ *P & P*, 308

¹⁹ In law, no living person can have an "heir." He can only have an heir apparent, who will inherit if he survives him, or an heir presumptive, who will inherit if he survives and no one with a superior title intervenes, but his "heir" cannot be ascertained till he dies. A person who inherits under a will likewise has no rights to the estate till the testator dies, for a will is revocable at any time before death.

²⁰ This would put Lady Catherine in the same position as Mrs. Ferrars in *Sense and Sensibility* and Mrs. Turner in *The Watsons* see *supra* pp 560, 561, at notes 8-9. Cf also *NA*, 252. "The Fullerton estate, being entirely at the disposal of its present proprietor, was consequently open to every greedy speculation."

²¹ *E*, 17, cf *Life*, 48 where Mr & Mrs Thomas Knight are said to have "adopted" Edward Austen (Jane's brother) as their "heir."

²² *P*, 54

²³ *S & S*, 3

²⁴ *MW*, 362

²⁵ *E*, 135

it may well have been under a settlement rather than under a will. It is not at all clear from whom she could have *inherited* her fortune, though the possibility that she might have done so from her mother cannot be ruled out.

The reference to Emma as an "heiress" raises another problem—that of the ultimate destination of the Hartfield estate. Clearly that estate was far more extensive than the amount of which Emma was "heiress." The Woodhouses were "first in consequence"²⁶ in Highbury. They had been "settled for several generations at Hartfield, the younger branch of a very ancient family . . . The landed property of Hartfield certainly was inconsiderable, being but a sort of notch in the Donwell Abbey estate, to which all the rest of Highbury belonged; but their fortune from other sources was such as to make them scarcely secondary to Donwell Abbey itself, in every other kind of consequence . . ."²⁷ It seems likely that, on Mr. Woodhouse's death, the Hartfield property would go in equal shares to Emma and Isabella. As it consisted largely of assets other than land there would be no strong objection to its being divided in this way.

The best known of the problems relating to the devolution of property in the novels is that concerning the entail of the Longbourn estate in *Pride and Prejudice*. We are told that "Mr. Bennet's property consisted almost entirely in an estate of two thousand a year, which, unfortunately for his daughters, was entailed in default of heirs male, on a distant relation,"²⁸ who turns out to be Mr. Collins. The first puzzle is why no steps were taken to bar the entail. Mrs. Bennet (the daughter of an attorney) seems to have been dimly aware of this possibility; for on one of the occasions on which she complains about the entail to Mr. Bennet she says: "I am sure if I had been you I should have tried long ago to do something or other about it."²⁹ The most likely reason why Mr. Bennet could not "do something or other about it" is that he was not tenant in tail of the Longbourn estate but only tenant for life under a resettlement, with remainder to his first and other sons successively in tail male and, in default of such male issue, to the male descendants of an original settlor some generations back. Mr. and Mrs. Bennet envisage that they are to have a son and that it will then be possible to have a resettlement within the family: "When first Mr. Bennet had married, economy was held to be perfectly useless; for, of course, they were to have a son. This son was to join in cutting off the entail, as soon

²⁶ *E*, 7

²⁷ *E*, 136

²⁸ *P & P*, 28

²⁹ *P & P*, 62. There is a hint in *Life*, 301, that Mr. Thomas Knight, who had left his property to Edward Austen, may have failed properly to bar an entail, thus involving Edward in an expensive compromise.

as he should be of age, and the widow and younger children would by that means be provided for"³⁰ (It was by no means unusual to refer to daughters in this situation as "younger children," irrespective of their actual age.) In other words, there was to be a resettlement with the co-operation of the son. In default of the birth of a son, there could be no resettlement. Mr. Collins could not join in "cutting off the entail" as he was only heir presumptive: he would not inherit Longbourn if Mr. Bennet had a son. Mr. Collins therefore did not have to make the choice between respect for his "miserly father"³¹ and an income from the Longbourn estate (which would no doubt have been attractive to him before he became rector of Hunsford).

There is a similar point in *Persuasion*: even if there had been no estrangement between Sir Walter and Mr. Elliot, the two could not have joined in barring the (probable) entail of the Kellynch estate, for Mr. Elliot was only "Heir presumptive."³² His expectation of inheriting could be defeated by Sir Walter's remarrying and having a son—possibilities that Mr. Elliot strives hard to forestall. But on the assumption that his efforts to that end succeed, Mr. Elliot will, on Sir Walter's death be able to bar the entail and to dispose of the estate. When he is a young man that is precisely what he intends to do: "my first visit to Kellynch will be with a surveyor, to tell me how to bring it with best advantage to the hammer."³³ If Sir Walter does remarry and have a son, "they will leave me in peace, which may be a decent equivalent for the reversion."³⁴ Mr. Elliot may not here be using the word "reversion" in its technical legal sense³⁵; but the meaning is clear enough—that the Kellynch estate will go to Mr. Elliot on Sir Walter's death, unless Sir Walter remarries and has a son. Of course there is another possibility: Sir Walter may have been prevented from disposing of the estate, and from leaving it to anyone except the next baronet, by family pride rather than by legal restrictions. But this is inconsistent with the statement already quoted that "there was only a small part of his estate that Sir Walter could dispose of."³⁶ The more probable explanation of the fact that Mr. Elliot will be able to dispose of the entire estate, while Sir Walter has no such power, is that, on Sir Walter's coming of age, there had been a resettlement, under which the estate was settled on Sir Walter for life, with remainder in tail male.

The situation of the Bennets differed from that of the Elliots in

³⁰ *P & P*, 308

³¹ *P & P*, 70

³² *P*, 4

³³ *P*, 203

³⁴ *P*, 203

³⁵ Cf. *supra* p 562 at note 19, lawyers would call his interest a remainder, a reversion being an interest that reverts to an original grantor see Megarry and Wade, *op. cit. supra* note 85, 47 Mr Elliot's study of the law (*supra*, at note 81) had evidently not yet progressed very far

³⁶ *P*, 10, cf. also *supra* at note 94

that Lady Elliot was dead while Mrs. Bennet was very much alive and so could theoretically still have a son. The birth of a son to her had, indeed, "at last been despaired of"³⁷; but this was of no legal significance, for the law then took the view that a woman was never past the age of childbearing.³⁸ In contemplation of law, therefore, a son could still be born to Mrs. Bennet, and that son (rather than Mr. Collins) would be entitled to the Longbourn estate. There was also the possibility that Mr. Bennet might survive his wife, remarry and have a son. But Mr. Collins scarcely needed to lose any sleep over this possibility. In the novels, widowers do occasionally remarry (e.g. when Mr. Weston marries Miss Taylor, and when Henry Dashwood marries a second time). But if Mr. Bennet had survived his wife, he would surely have retired to his library.

The failure of the Bennets to have a son was hardly so unusual an event that the lawyers who, on Mr. Bennet's coming of age, had drafted the resettlement could not have foreseen and provided for it. Modern textbooks suggest that resettlements would normally make provision for the son's widow and "younger children"³⁹; and some of the other novels seem to provide illustrations of this practice. Younger sons, indeed, are generally provided for by being placed in some profession such as the church (Edmund Bertram and Henry Tilney)⁴⁰ the law (John Knightley) or the army (Colonel Fitzwilliam—though he does not regard the provision as adequate: "Younger sons cannot marry where they like"⁴¹). But many daughters have substantial "portions." Miss Darcy has thirty thousand pounds, as does Emma (and presumably Isabella) Woodhouse; Anne Elliot is entitled to ten thousand pounds (though her father's extravagance makes it impossible for him to raise this sum on her marriage); and it can scarcely be supposed that Eleanor Tilney and the Misses Bertram are portionless. Even Augusta Hawkins (the future Mrs. Elton) had "so many thousands as would always be called ten."⁴² The source of these funds is never made clear. They may have come from resettlements of the kind described above; but other possible sources are marriage settlements or inheritance. Marriage settlement was the only source of such "portions" as the Bennet girls had in *Pride and Prejudice*; but, as Mr. Collins says to Elizabeth when pressing his proposal of marriage, "Your portion is unhappily so small that it will in all likelihood undo the effects of your loveliness

³⁷ *P & P*, 308

³⁸ *Jee v Audley* (1787) 1 Cox 324, see now Perpetuities and Accumulations Act 1964, s 2

³⁹ e.g. Megarry and Wade, *op. cit. supra* note 85, 385

⁴⁰ Henry Tilney was also "eventually secure" of "a very considerable fortune" by marriage settlements *NA*, 249

⁴¹ *P & P*, 183

⁴² *E*, 181

and amiable qualifications."⁴³ The reason why more adequate provision was not made for the "younger children" in the resettlement of the Longbourn estate is probably that the estate was too small. The annual income was only two thousand pounds; and on the general assumption in the novels that capital yields five per cent., this would put its capital value at £40,000. Out of this sum, it might have been possible to provide a decent allowance for a widow but scarcely any very generous "portions" for "younger children." It is hard to see how his purely financial constraint could have been removed by the hoped-for birth of a son.

Another puzzle relating to the Longbourn estate is the question of surnames. When, under an entail, property can only go to males, it must also descend *through* males: for example, the birth of a son to one of the Bennet daughters before Mr. Bennet's death would not have affected Mr. Collins' rights. How, then, does it come about that a Collins can succeed a Bennet? One would expect them to have the same surname. A perfectly plausible answer to this question is to suppose that the original settlor had two daughters and settled the estate on the male issue of the elder with remainder in default of such issue on the male issue of the younger.⁴⁴ Another, and perhaps simpler, explanation is that one of two branches of a family all having the same surname of Collins changed that name to Bennet on or after succeeding to the Longbourn estate. The practice was not uncommon at the time. One of Jane Austen's own brothers changed his name in her lifetime to Knight, having succeeded to the property of a childless relation of that name.⁴⁵ Admittedly, the change was not made till 1812,⁴⁶ when the text of *Pride and Prejudice* must have been complete or nearly complete (the first edition was published in 1813); but it can scarcely have been a surprise in the family. And the novels provide another example: Mr. Weston's son is called Frank Churchill, this time only in the expectation of inheriting the Churchill property. No elaborate hypotheses are necessary to account for the difference in the surnames of the present holder of the Longbourn estate and of his likely successor.

A minor problem concerns the furniture of Longbourn House. When Mr. Collins arrives on his first visit, he admires "the hall, the dining room, and all its furniture," raising in Mrs. Bennet "the mortifying supposition of his viewing it all as his own future property."⁴⁷ This may suggest that the furniture, like the estate, was subject to the entail; but before 1926 the law was that personalty

⁴³ P & P, 108

⁴⁴ G R Y Radcliffe, in (1924) *Notes and Queries*, 48

⁴⁵ i.e. Edward Austen see *supra* p 562, note 21

⁴⁶ *Letters*, 500

⁴⁷ P & P, 65

could not be entailed.⁴⁸ One has to suppose that, when the Longbourn estate was resettled on Mr. Bennet's coming of age, he agreed to accept a life-interest in furniture to which he was in law absolutely entitled⁴⁹; or (less plausibly) that some items of furniture were heirlooms.⁵⁰ Alternatively, Mrs. Bennet may simply have been wrong in her "mortifying supposition." Jane and Elizabeth had often attempted "to explain to her the nature of an entail"; but without success: "it was a subject on which Mrs. Bennet was beyond the reach of reason."⁵¹ Elsewhere, too, furniture and household articles are regarded as going with a house. In *Sense and Sensibility*, Mr. and Mrs. Henry Dashwood bring to Norland their own china, plate and linen from Stanhill, their former home. This is left by Henry Dashwood's will to Mrs. Dashwood, who takes it with her when she leaves Norland, giving rise to Fanny's complaint that "the set of breakfast china is twice as handsome as what belongs to this house."⁵² Perhaps the point in *Sense and Sensibility* is simply that old Mr. Dashwood had left the Norland furnishings to John Dashwood.

A somewhat similar point arises out of another passage in *Sense and Sensibility*. John Dashwood, having failed to perform his promise to his father to do everything in his power to make Mrs. Dashwood and her daughters comfortable, tries to ease his conscience by suggesting that Elinor and Marianne will be remembered in Mrs. Jennings' will. He conjectures that "she must have a great deal to leave"; but Elinor replies: "Nothing at all, I should rather suppose, for she has only her jointure, which will descend to her children."⁵³ This is the text of the second edition, and is now generally adopted; but it is interesting to note that in the first edition it is not "her jointure" but "her furniture"⁵⁴ which is said to descend to her children. "Furniture" may simply have been a misprint; but another possibility is that someone pointed out to Jane Austen that furniture did not necessarily go to her children. "Jointure" may have been substituted for that reason; though even a jointure does not strictly "descend to her children"—it simply becomes extinct, so that the children now have the property free from the charge created to secure the jointure.

(2) Ecclesiastical benefices

A second group of puzzles concerns the disposal of ecclesiastical

⁴⁸ 2 *Bl Com* 113, see now Law of Property Act 1925, s 130(1)

⁴⁹ Cf Megarry and Wade, *op cit supra* note 85, 388-389

⁵⁰ See 2 *Bl Com* 428

⁵¹ P & P, 62

⁵² S & S, 13

⁵³ S & S, 226

⁵⁴ See S & S, 385

benefices. Such a disposal might contravene the prohibition of simony, defined by Blackstone as "the corrupt presentation of any one to an ecclesiastical benefice for money, gift or reward."⁵⁵ Simony was an ecclesiastical, though not a common law, offence; and it resulted also in certain statutory forfeitures.⁵⁶ Subject to one difficulty to be discussed below, Jane Austen's account of the disposal of livings is consistent with the law of simony as it stood in her day. Two points call for discussion.

The first arose from the fact that the right to present to a living (a right known as an advowson) was recognised as a species of property, and as such it could be disposed of, for example, by will or by sale. At first sight, it might seem that the sale of an advowson would have often constituted simony. In the words of Best C.J., "Undoubtedly much simony is indirectly committed by the sale of next presentations. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the courts of law have never thought that they were authorized to go to this length . . ."⁵⁷ They distinguished between cases in which the right to make the next presentation was sold before, and those in which it was sold, after, the living had fallen vacant. The point is reflected in *Sense and Sensibility*, where John Dashwood is astonished at Colonel Brandon's generosity in giving the Delaford living to Edward Ferrars; and even more astonished that "the next presentation"⁵⁸ was not sold while the former incumbent was still alive. To sell once the incumbent was dead would, as Blackstone tells us, be "open and notorious simony"⁵⁹; and so John Dashwood rightly observes, "Now indeed it would be too late to sell, but a man of Colonel Brandon's sense!— I wonder that he should be so improvident in a point of such common, such natural concern!"⁶⁰ In *Pride and Prejudice* Lady Catherine de Bourgh similarly did not sell the Hunsford living; but perhaps she judged the amount forgone to be a small price to pay for having at her disposal a subservient and obsequious rector. And though Wickham levels many charges at Darcy in relation to the living of Kympton,⁶¹ the one thing he does not accuse him of is avarice. When Wickham finally claimed the living, it was "on the

⁵⁵ 2 *Bl. Com.* 278.

⁵⁶ Simony Act 1588; Simony Act 1713 (13 Anne, c.11, also cited as 12 Anne, Stat. 2, c.12).

⁵⁷ *Fox v. Bishop of Chester* (1829) 6 Bing. 1, 17. But by s.2 of the Simony Act 1713 a contract by which a person bought the next presentation and then presented himself was deemed simoniacal. Hence in *Mansfield Park* the Mansfield living cannot (without violating this enactment) have been sold directly to Dr. Grant.

⁵⁸ *S & S*, 295.

⁵⁹ 2 *Bl. Com.* 279.

⁶⁰ *S & S*, 295.

⁶¹ *P & P*, 328; this was the "valuable family living" intended by the late Mr. Darcy for Wickham: *P & P*, 200.

decease of the incumbent,"⁶² so that the next presentation could no longer be sold.

In *Mansfield Park*, the two livings were intended for Edmund Bertram. One was the Mansfield living held by his uncle, Mr. Norris, who dies early in the story: "The living was hereafter for Edmund, and had his uncle died a few years sooner, it would have been duly given to some friend to hold till he were old enough for orders. But Tom's extravagance had, previous to that event, been so great, as to render a different disposal of the next presentation necessary, and the younger brother must help to pay for the pleasures of the elder."⁶³ The crucial phrase here is "previous to that event." This could either refer to Edmund's being "old enough for orders" or to Mr. Norris's death. The probability is that it refers to the latter "event" (described in the preceding paragraph as "The first event of any importance in the family")⁶⁴; for if it referred to the former, and the disposal was after Mr. Norris's death, it would amount to simony; and the discussion of the Delaford living makes it clear that Jane Austen was well aware of the point. In fact, the two events must have been separated by some three years. When Fanny comes to Mansfield, she is 10,⁶⁵ Tom is 17 and Edmund is a year younger than Tom.⁶⁶ Mr. Norris's death occurs five years later "when Fanny was about fifteen."⁶⁷ So at that time Edmund must have been about 21; but he would not be "old enough for orders," in the sense of becoming a priest and holding a living till he was 24.⁶⁸

The second problem arose because a living intended for a son of the patron might fall vacant before the son was qualified to hold it. A common way out of this difficulty was to give the living to a third person, who would undertake to resign it at the appropriate time. This in turn gave rise to the problem that many undertakings to resign were regarded as simoniacal;⁶⁹ but this rule was subject to important exceptions,⁷⁰ one of which is illustrated by further reference to *Mansfield Park*. It had been Sir Thomas Bertram's original intention that the Mansfield living was to be held for Edmund; and the living of Thornton Lacey actually was so held till he took orders.⁷¹ Mary Crawford, in her efforts to dissuade Edmund from going into the church, tries to make him feel guilty on this score; she suggests that he is influenced by the fact that "There is a very good

⁶² *P & P*, 201.

⁶³ *MP*, 23.

⁶⁴ *MP*, 23.

⁶⁵ *MP*, 12.

⁶⁶ *MP*, 17.

⁶⁷ *MP*, 23.

⁶⁸ Clergy Ordination Act 1801, s.1; cf. *MP*, 226. "four or five-and-twenty"

⁶⁹ Under Simony Act 1588, s.5.

⁷⁰ See Burn, *Ecclesiastical Law*, (6th ed., 1797), Vol. III, 353-365.

⁷¹ *MP*, 31; cf. *P*, 217.

living kept for you, I understand, hereabouts."⁷² But neither Edmund nor Fanny sees anything wrong with this; and they are supported by one of Blackstone's examples of contracts which are not simoniacal: "bonds to resign, when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for his son."⁷³ Indeed, general bonds to resign were also prima facie legal "for they may possibly be given for one of the legal considerations before-mentioned."⁷⁴ They were only simoniacal if a corrupt motive could be actually proved.⁷⁵ This possibility may account for the "Conscientious refusal"⁷⁶ of Jane Austen's brother James to hold a living until the young man for whom it was designed should be of an age to take it.

(3) Elopements

Pride and Prejudice raises some further puzzles as to the law of marriage. Lydia Bennet (then aged 16) elopes with Wickham, intending to go to Gretna Green⁷⁷ in order to be married to him. One reason why eloping couples went to Gretna Green is well known. In 1753 Lord Hardwicke's Marriage Act had imposed formal requirements on marriages, in particular the requirement of calling of banns in church to ensure publicity.⁷⁸ These provisions could be evaded by going to Scotland since the Act did not apply there. The Act further required the consent of parents or guardians for the marriage of persons below the age of 21.⁷⁹ This requirement again did not apply in Scotland and so Lydia would have a second reason for wishing to be married in Scotland. Similarly, in *Sense and Sensibility*, Colonel Brandon and Eliza Williams (then aged 17) were "within a few hours of eloping together for Scotland"⁸⁰ when her maid betrayed them; while in *Mansfield Park* Julia Bertram and Mr. Yates elope to Scotland and are validly married there without Sir Thomas Bertram's consent, even though Julia may still have been under 21 at the time.⁸¹ In the modern law, a distinction is drawn between the formalities of a marriage and capacity to marry, the former being governed by the law of the place of celebration and the latter by another system of law which would no doubt be English

⁷² *MP*, 109

⁷³ 2 *Bl Com* 280

⁷⁴ *Ibid*

⁷⁵ *Ibid*

⁷⁶ *Letters*, 238 and R W Chapman's note thereto

⁷⁷ *P & P*, 291

⁷⁸ s 1

⁷⁹ s 11

⁸⁰ *S & S*, 206

⁸¹ *MP*, 422 Julia is two years older than Fanny (*MP*, 12-13) who is 18 just before the Mansfield ball (*MP*, 270) News of Julia's elopement reaches Fanny a little over four months later (*MP*, 253, 553, 555)

law in the situations with which we are concerned.⁸² But that would not alter the fact that Lydia could escape from the requirement of parental consent by going to Scotland; for that requirement has been classified as a formal one.⁸³ Moreover, the distinction between formalities and capacity was not recognised till 1861.⁸⁴ Before then the validity of a marriage was thought in all respects to depend on the law of the place of celebration, which would (if Lydia's plan had been carried through) have been Scotland.

But of course the plan was not carried through: Lydia and Wickham remained in London. When this becomes apparent, Jane supposes that "Many circumstances might make it more eligible for them to be married privately in town than to pursue their first plan."⁸⁵ Mrs. Gardiner takes the same view: "It is not likely that money should be very abundant on either side; and it might strike them that they could be more economically, though less expeditiously, married in London than in Scotland."⁸⁶ Elizabeth objects: "But why all this secrecy? Why any fear of detection? Why must their marriage be private?"⁸⁷ There is also another objection. Without being detected, Lydia and Wickham might comply with the requirement of calling of banns; but they could not hope to comply with the requirement of parental consent. In the modern law, this would not matter in the sense that failure to obtain such consent would not invalidate the marriage.⁸⁸ But under Lord Hardwicke's Act such failure was expressly said to make the marriage "absolutely null and void to all intents and purposes whatsoever."⁸⁹ This state of the law caused much hardship, as marriages of minors without such consent no doubt took place⁹⁰; but the law was not altered till 1823.⁹¹ One may assume that Mr. Bennet's consent to the marriage would have been forthcoming once Lydia and Wickham had begun to live together; but they could not be validly married in "private," *i.e.* without the knowledge of Lydia's family. The suppositions, made after Elizabeth and the Gardiners return to Longbourn, that Lydia and Wickham may have been married "privately," without the *previous* consent of Mr. Bennet,⁹² cannot be squared with the state of the law as it then stood. Perhaps Wickham was keeping this card

⁸² Dicey & Morris, *The Conflict of Laws* (10th ed., 1980), Rules 32 and 33

⁸³ *Ibid*, 265-266

⁸⁴ *Brook v Brook* (1861) 9 H L C 198

⁸⁵ *P & P*, 275

⁸⁶ *P & P*, 282-283

⁸⁷ *P & P*, 283

⁸⁸ Marriage Act 1949, s 48(1)

⁸⁹ s 11

⁹⁰ See *Letters*, 95 "Mrs Estwick is married again to a Mr Sloane, a young Man under age—without the knowledge of either family—He bears a good character, however" The letter is dated 20 November 1800

⁹¹ Marriage Act 1823

⁹² *P & P*, 288, 302

up his sleeve in case Lydia became too importunate. His study of the law may not have been a mere pretence.

Before eloping with Lydia Bennet, Wickham had intended to elope with Georgiana Darcy; and while he had to be bribed to marry Lydia he was clearly anxious to marry Georgiana. Darcy conjectures that his "chief object was unquestionably my sister's fortune, which is thirty thousand pounds."⁹³ A modern reader may feel some difficulty with this as Georgiana at the time was only 15,⁹⁴ especially if he compares the episode with Mrs. Bennet's rejoicings on the impending marriage of Lydia to Wickham: "The marriage of a daughter, which had been the first object of her wishes, since Jane was sixteen, was now on the point of accomplishment."⁹⁵ But whatever may have been the social conventions, the legal age of marriage at the time was not 16, as it is today. In England it was 12 for girls and 14 for boys⁹⁶; and this state of law was not changed until 1929.⁹⁷ The ages were the same in Scotland,⁹⁸ where there was no requirement of parental consent. A Gretna Green marriage between Wickham and Georgiana would therefore have been valid without the consent of Darcy and Colonel Fitzwilliam, who were Georgiana's guardians.

(4) Family Law

The novels contain references to a number of other institutions in family law—divorce, guardianship and adoption. In *Sense and Sensibility* Colonel Brandon's brother divorces his wife Eliza in consequence of her "fall"⁹⁹; and in *Mansfield Park* Mr. Rushworth likewise "had no difficulty in procuring a divorce"¹ from Maria in consequence of her adultery with Henry Crawford. Divorce in the modern sense of a total dissolution of the marriage could in those days only be procured by the expensive procedure of a private Act of Parliament; the only kind of "divorce" available from a court was the so-called divorce *a mensa et thoro* which could be granted by the ecclesiastical courts. This was the equivalent of the modern judicial separation and did not leave the parties free to remarry. It is clear that Mr. Rushworth's divorce involved an Act of Parliament (money would have been no object); for the text contemplates his remarriage: "He was released from the engagement to be mortified and unhappy, till some other pretty girl could attract him into matrimony again . . ."²

⁹³ P & P, 202

⁹⁴ P & P, 202

⁹⁵ P & P, 310

⁹⁶ 4 Bl Com 424

⁹⁷ Marriage Act 1929

⁹⁸ See Bell's *Principles of the Law of Scotland* (10th ed., 1899), §1523

⁹⁹ S & S, 206

¹ MP, 464

² MP, 464

There is no suggestion that Maria receives any allowance from Mr. Rushworth; on the contrary, it seems that financial provision for her is made by Sir Thomas Bertram: "As a daughter—he hoped a penitent one—she should be protected by him, and secured in every comfort,"³ though she would not be received at Mansfield. Eliza, however, in spite of being the "guilty" party, is said to have a "legal allowance" which was "not adequate to her fortune, nor sufficient for her comfortable maintenance."⁴ The source of this "legal allowance" is not clear. One possibility is that it came from her former husband, who tells his brother, Colonel Brandon, "that the power of receiving it had been made over some months before to another person. He imagined, and calmly could he imagine it, that her extravagance and consequent distress had obliged her to dispose of it for some immediate relief."⁵ The result was to make her destitute: Colonel Brandon found her "in a spunging house"⁶ where she was confined for debt. The modern law tries to guard against ex-wives becoming destitute in this way by making ineffective the assignment of maintenance and other similar payments to which a party becomes entitled as a result of matrimonial proceedings.⁷ But as Eliza was herself guilty of adultery, this explanation is implausible; for in proceedings for divorce *a mensa et thoro* "alimony" would not then be awarded to an adulterous wife.⁸ An alternative possibility is that Eliza's "legal allowance" was due under a marriage settlement. In that case, one would have expected it to be more substantial as "Her fortune was large."⁹ But her marriage was forced on her by Colonel Brandon's father (her uncle and guardian) and his motive was to secure her fortune for the Brandons, the "family estate being much encumbered."¹⁰ One can imagine that Eliza did not have the benefit of good independent advice when her marriage settlement was drawn up; and this could account for the inadequacy of her legal allowance.

While Mr. Brandon senior is the traditional wicked guardian, other references to guardianship are more neutral or even favourable. In *Sense and Sensibility* we are told that Mr. and Mrs. Ellison are the guardians of Miss Sophia Grey, who marries Willoughby; but they play no part in the matter for Miss Grey "is of age and may choose for herself; and a pretty choice she has made!"¹¹ Georgiana Darcy in *Pride and Prejudice* is similarly under the joint guardianship

³ MP, 465

⁴ S & S, 207

⁵ S & S, 207

⁶ S & S, 207

⁷ *Watkins v Watkins* [1896] P 222

⁸ 3 Bl. Com 94

⁹ S & S, 205

¹⁰ S & S, 205

¹¹ S & S, 195

of her brother and Colonel Fitzwilliam.¹² Presumably all these guardians were appointed by will.¹³ The older Eliza Williams is the only ward to have only a single guardian. Perhaps this was an unusual situation; but the plot demanded it.

There is a reference to adoption in *Emma* where we are told that "as to Frank, it was more than being tacitly brought up as his uncle's heir, it had become so avowed an adoption as to have him assume the name of Churchill on coming of age."¹⁴ Legally, the reference to adoption is an anachronism: English law made no provision for adoption until 1926¹⁵; but as a social institution "adoption" was no doubt well known. (It is in this sense that Mrs. Norris is said to have been "forward to adopt"¹⁶ Fanny in *Mansfield Park*.) One presumes that Mr. Churchill made a will in Frank's favour; but had he died intestate (e.g. because the will was invalid) Frank would not have been entitled by virtue of the "adoption" to any share in his property. An essential feature of these "adoptions" is that financial provision is to be made for the person adopted. Frank Churchill is to inherit the Churchill property; and, if Fanny should not succeed in "settling well,"¹⁷ Sir Thomas Bertram regards himself as obliged to make for her "the provision of a gentlewoman."¹⁸ From this point of view Fanny's position may be contrasted with that of Jane Fairfax in *Emma*. Colonel Campbell offers to undertake "the whole charge of her education"¹⁹; but he cannot make financial provision for her as "his fortune was moderate and must be all his daughter's."²⁰ Probably for this reason, there is no reference to any "adoption" of Jane Fairfax. She gets no money or property from the Campbells: all they can do is to provide her with the qualifications for earning her living as a governess.

(5) Tenancies

Tenancies in the novels present a number of features that are strange to a modern reader. In *Sense and Sensibility* Mrs. Dashwood is offered Barton Cottage at a "rent" described as "uncommonly moderate."²¹ When she arrives there, she is "upon the whole well satisfied" with the "size and furniture of the house."²² Some additional furniture was brought to the house by the Dashwoods, but

¹² P & P, 184

¹³ Cf 1 *Bl Com* 450

¹⁴ E, 17, cf *supra* p 562, note 21

¹⁵ Adoption of Children Act 1926

¹⁶ MP, 31

¹⁷ MP, 6

¹⁸ MP, 7

¹⁹ E, 164

²⁰ E, 164

²¹ S & S, 24

²² S & S, 29

this "chiefly consisted of household linen, plate, china, and books, with an handsome pianoforte of Marianne's."²³ From all this it is evident that Mrs. Dashwood has taken a furnished tenancy; and yet she plans to make quite extensive alterations to the house—so extensive, indeed, that Elinor (somewhat sarcastically) suggests that the "large fortune" wished for by Margaret could be spent on these hypothetical "improvements"²⁴ (which were never carried out). In *Persuasion* Kellynch-hall was likewise let furnished to the Crofts (the Admiral could not live with Sir Walter Elliot's many looking-glasses and so "shifted their quarters")²⁵; and the Crofts actually do make the minor alteration of rehangng the laundry door.²⁶ In the case of a furnished tenancy, the "established legal usages"²⁷ referred to by Mr. Shepherd were evidently different then from those which prevail today.

The lease of Kellynch-hall was under seal: we are told that "Mr. Shepherd's clerks were set to work, without there having been a single preliminary difference to modify of all that 'This indenture sheweth.'"²⁸ An indenture was a deed whose top was indented as a precaution against fraud, so that the two parts could be matched. Under the present law, a lease for more than three years is for certain purposes ineffective unless it is under seal.²⁹ But this state of the law only goes back to 1845³⁰; in Jane Austen's day it was enough if such a lease was in writing³¹: no seal was necessary. Then, as now, however, documents were occasionally executed under seal when there was no legal requirement to that effect. The extra solemnity of sealing would no doubt appeal to Sir Walter Elliot and may have been employed by Mr. Shepherd for that very reason.

(6) Duelling

There are two references to duelling in the novels and one in the letters. In *Pride and Prejudice* Mr. Bennet goes to London in search of Lydia and Wickham, when it becomes clear that they have not gone to Scotland to be married; and Mrs. Bennet supposes that her husband "will fight Wickham, wherever he meets him, and then he will be killed, and what is to become of us all?"³² Elizabeth may have a similar point in mind when she laments that "Lydia has no brothers to step forward . . ."³³ Later, Mrs. Bennet regards Mr.

²³ S & S, 26

²⁴ S & S, 92

²⁵ P, 128, cf *ibid*, 22, 32

²⁶ P, 127

²⁷ *Supra* p 553, at note 44

²⁸ P, 32

²⁹ Law of Property Act 1925, ss 52, 54(2)

³⁰ Transfer of Property Act 1844, s 4, Real Property Act 1845, s 3

³¹ Statute of Frauds 1677, s 1

³² P & P, 287

³³ P & P, 283

Bennet's return to Longbourn as "the only security for her husband's not being killed in a duel."³⁴ But when he does return "without poor Lydia," she is equally distressed: "Who is to fight Wickham and make him marry her, if he comes away?"³⁵ One has to remember that "The business of her life was to get her daughters married . . ."³⁶ The duel is of course a mere figment of Mrs. Bennet's imagination. But in *Sense and Sensibility* such an encounter does actually take place. After Willoughby has seduced young Eliza Williams, Colonel Brandon challenges him to a duel, "he to defend, I to punish his conduct. We returned unwounded, and the meeting, therefore, never got abroad. Elinor sighed over the fancied necessity of this; but to a man and a soldier, she presumed not to censure it."³⁷ Her unspoken disapproval had the support of the law, for to take part in a duel in a public place constituted the common law offence of affray and was, moreover, regarded as an aggravated form of that offence. Blackstone gives, as an example of aggravated affray, the case "where two persons coolly and deliberately engage in a duel . . . though no mischief has actually ensued."³⁸ Even if the duel took place on private premises, one of the parties would be guilty of the offence of challenging to fight, and both would be guilty of assault, consent being no defence in view of the likelihood that serious injury or death would result.³⁹ That duelling was criminal must have been generally known; and such knowledge can be inferred from a passage in one of Jane Austen's letters in which she relates that one Earle Harwood has "accidentally shot himself through the Thigh." She continues: "One most material comfort however they [his parents] have; the assurance of it's being really an accidental wound, which is not only positively declared by Earle himself, but is likewise testified by the particular direction of the bullet. Such a wound could not have been received in a duel."⁴⁰

(7) Deathbed promises

In the opening Chapter of *Sense and Sensibility*, when Mr. Henry Dashwood is on the point of death, his son John promises him "to do everything in his power to make them [*i.e.* "his mother-in-law and sisters"] comfortable."⁴¹ Such promises could be legally binding if they induced the deceased to make a will in the promisor's favour, or to refrain from making a will so that the deceased's property went

³⁴ P & P, 294

³⁵ P & P, 298

³⁶ P & P, 5

³⁷ S & S, 211

³⁸ 4 Bl. Com 145

³⁹ *Ibid.*, 149; and see *ibid.*, 199 for the position if death did result; cf *R. v Coney* (1882) 4 Q.B.D. 534, 553, 554, 556

⁴⁰ *Letters*, 83-84

⁴¹ S & S, 5

on intestacy to the promisor. In that event the promise was said to give rise to a "secret trust" in favour of the persons for whose benefit the promise was made⁴²—"secret" because it did not appear on the face of the will, and binding because it resulted in the receipt by the promisor of property of the deceased. But in *Sense and Sensibility* that was not the position. Henry Dashwood had no power to dispose of the Norland estate, so that John received nothing extra because of the promise to his father and was legally free to disregard it. He may even have known this for he gives the impression of one who would be as scrupulous in performing legal obligations as he would be heartless in asserting legal rights. From a legal point of view, Lady Denham in *Sanditon* is on less certain ground; though her behaviour is better. In spite of the statement that she had "got nothing but her Title"⁴³ from her second husband, Sir Harry Denham, it seems that he made a will leaving certain personal chattels to her; when she says "Not a shilling do I receive from the Denham Estate"⁴⁴ she probably means that she has no jointure or similar charge on the estate. Among the personal chattels left to her was Sir Harry's gold watch; but she respects his wish that this should go to his nephew and heir, Sir Edward. She regards this as a generous gesture for "It was not in the Will. He only told me, & that but once, that he should wish his Nephew to have his Watch; but it need not have been binding if I had not chose it."⁴⁵ The facts are somewhat sketchily stated; but if she induced Sir Harry to make a will leaving personal chattels to her, or not to revoke or alter it, by promising to give the watch to Sir Edward, there may well have been a secret trust of it in Sir Edward's favour.

Jane Austen by her will⁴⁶ left almost all her property to her sister Cassandra, who, writing after Jane's death to one of their nieces, says: "In looking at a few of the precious papers which are now my property I have found some memorandums, amongst which she desires that one of her gold chains may be given to her god-daughter Louisa, and a lock of her hair be set for you. You can need no assurance, my dearest Fanny, that every request of your beloved aunt will be sacred with me."⁴⁷ Unlike Lady Denham, Cassandra is here doing more than she is legally obliged to do; for, as Jane's wishes were not communicated to her till *after* Jane's death, they would not have given rise to any secret trust.⁴⁸ A similar moral

⁴² Snell, *op. cit. supra* p.560, note 1, 109-114 (indicating that the doctrine goes back to the 18th—and possibly the 17th—century).

⁴³ *MW*, 376.

⁴⁴ *MW*, 400.

⁴⁵ *MW*, 400.

⁴⁶ See *Letters*, 518. The will appears to be unattested but this would not (before the Wills Act 1837) have affected its validity as it disposed only of personalty.

⁴⁷ *Letters*, 518.

⁴⁸ Snell, *op. cit. supra* p.560, note 1, 110

principle of giving effect to death-bed wishes which have no legal force appears in *Mansfield Park* when little Mary gives her mother her silver knife "only two hours before she died" and says, "Let sister Susan have my knife, mamma, when I am dead and buried."⁴⁹ Mary is plainly too young to make a testamentary or quasi-testamentary disposition; but Susan's vehement claim to the knife as "her own knife"⁵⁰ seems to be recognised in the family as well-founded, even though she does not get undisputed possession till Fanny buys another knife for their spoilt sister Betsey.

One cannot be sure of the exact method by which the late Mr. Darcy in *Pride and Prejudice* intended to make provision for Wickham. The first account of the matter comes from Wickham himself when he tells Elizabeth that "the late Mr. Darcy bequeathed me the next presentation of the best living in his gift."⁵¹ This suggests an actual gift by will and is so understood by Elizabeth when she pertinently asks: "how could his will be disregarded?—Why did not you seek legal redress?" Wickham's reply is evasive: "There was just such an informality in the terms of the bequest as to give me no hope from law."⁵² Later Jane reports that the living "was left to him [Wickham] conditionally only,"⁵³ which still suggests some kind of gift by will. But in his letter to Elizabeth, Darcy says that his father's "attachment to Mr. Wickham was to the last so steady, that in his will he particularly recommended it to me, to promote his advancement in the best manner that his profession might allow, and if he took orders, desired that a valuable family living might be his as soon as it became vacant."⁵⁴ This looks more like an exhortation than a bequest; and is clearly conditional on Wickham's taking orders. Wickham's declaration of "having finally resolved against taking orders"⁵⁵ makes the fulfilment of the condition highly unlikely; and when Darcy pays him three thousand pounds in return for his resigning "all claim to assistance in the church"⁵⁶ it seems that he is acting more out of respect for the memory of his father than in performance of any legal obligation. The fact that Wickham, three years later, was "absolutely resolved on being ordained"⁵⁷ clearly could not revive any moral, or imagined legal, claims that he may once have had to the living. Later, when Wickham returns to Longbourn as Lydia's husband, Elizabeth says that she had heard that the living "was left you conditionally only, and at the will of the

⁴⁹ *MP*, 386–387.

⁵⁰ *MP*, 386.

⁵¹ *P & P*, 79.

⁵² *P & P*, 79.

⁵³ *P & P*, 96.

⁵⁴ *P & P*, 200.

⁵⁵ *P & P*, 200.

⁵⁶ *P & P*, 201.

⁵⁷ *P & P*, 201.

present patron."⁵⁸ Though there may be a hint of a testamentary disposition in the opening words of the phrase, the conclusion clearly takes the position that no legal obligation to present Wickham to the living of Kympton was imposed on Darcy by his father's will.

(8) *Contract puzzles*

A number of statements or situations in the novels raise issues of contract law. We have seen that the promise made in *Sense and Sensibility* by John Dashwood to his father on the latter's deathbed was not binding under the law of trusts. Equally, that promise was not binding as a contract. For one thing, it was gratuitous (John Dashwood neither got nor was promised anything in return for it): it was, as lawyers would say, not supported by any consideration; and English law does not generally enforce informal gratuitous promises.⁵⁹ For another, the promise was one for the benefit of third parties (*i.e.* Mrs. Dashwood and her daughters); and such third parties generally acquire no rights under contracts made between others.⁶⁰ It is true that these points were not as clearly established in 1811, when *Sense and Sensibility* was published, as they were later in the century⁶¹; but the qualifications to which they were subject in 1811 would not have applied to the circumstances in which John Dashwood's promise was made. And even if these objections could be overcome, the terms of the promise ("to do everything in his power to make them comfortable"⁶²) were so vague as to preclude legal enforceability.⁶³

Another reason why a promise may not be binding contractually is that the person making it was under age. When Willoughby says that "Every year since my coming of age, or even before, I believe had added to my debts,"⁶⁴ he is on doubtful ground with regard to the period before his coming of age. He could then have incurred legally enforceable debts for "necessaries,"⁶⁵ but his habits of extravagance make it unlikely that the reference is to such debts. Perhaps it is to debts which he incurred before and ratified after

⁵⁸ *P & P*, 328.

⁵⁹ Treitel, *the Law of Contract* (6th ed., 1983), Chap 3

⁶⁰ *Ibid.*, Chap. 15.

⁶¹ *Eastwood v. Kenyon* (1840) 11 A. & E. 438 rejected the earlier theory that a "moral" obligation could constitute consideration; but "moral" was here used in a restricted sense: see Treitel, *op. cit. supra*, 63. *Dutton v. Poole* (1678) 2 Lev. 210 supported the rights of third party beneficiaries (later rejected in *Tweddle v. Atkinson* (1861) 1 B. & S. 393); but there the son by his promise induced the father not to make certain dispositions in favour of "younger children". John Dashwood did nothing of the kind.

⁶² *S & S*, 5.

⁶³ Treitel, *op. cit. supra*, 40, 124, 128.

⁶⁴ *S & S*, 320.

⁶⁵ Treitel, *op. cit. supra*, 409.

majority: such ratification was then effective,⁶⁶ though this state of the law was altered in 1874.⁶⁷

Willoughby presumably paid all his debts, at least after his marriage to Miss Grey, whether or not some of them were unenforceable by reason of his minority. The same cannot be said for Wickham, who left unpaid debts both at Brighton and Meryton. Mr. Gardiner "pledged" himself "with assurances of speedy payment" to the Brighton creditors and asked Mr. Bennet to do the same thing with regard to those at Meryton.⁶⁸ On their face, these "pledges" would not be binding since the creditors would seem to provide no consideration for the promises of Mr. Gardiner and Mr. Bennet. The fact that they had supplied goods or services to Wickham in the past would not suffice for it is clear law that such past acts cannot constitute consideration.⁶⁹ The requirement of consideration is only satisfied by something given or promised *in exchange* for the promise, not by something already accomplished before the promise was made.⁷⁰ It is, however, possible to argue that the creditors provided consideration in another well-recognised way, namely by forbearing to sue Wickham for the sums that he owed them.⁷¹ Though the amounts that they could have got in this way may have been small, their giving up the chance of getting something would be sufficient to make the promises of payment binding; for the law does not require consideration to be adequate.⁷² Even this argument, however, will not work in relation to Wickham's gaming debts, described as "debts of honour."⁷³ The implication of this phrase is that these "debts" were not legally enforceable, though they are described as "very pressing"⁷⁴ and as the cause of Wickham's leaving his regiment. If they were not legally enforceable because they were gaming debts, the gaming creditors would give up nothing by forbearing to sue Wickham for them; and so they would provide no consideration for Mr. Gardiner's and Mr. Bennet's promises. The exact circumstances in which the "debts of honour" were incurred do not appear; but presumably they were invalid under or by reason of one or more of the various statutes prohibiting credit for gaming⁷⁵ or making certain games illegal.⁷⁶ The general principle that gaming contracts are invalid only became part of English law in 1845,⁷⁷ and it was not

⁶⁶ *Ibid.*, 420

⁶⁷ Infants Relief Act 1874, s 2

⁶⁸ *P & P*, 313

⁶⁹ *Cf supra* p 579 at note 59

⁷⁰ Treitel, *op cit supra*, 60

⁷¹ *Ibid.*, 69

⁷² *Ibid.*, 57

⁷³ *P & P*, 298

⁷⁴ *P & P*, 323

⁷⁵ e.g. Gaming Act 1710

⁷⁶ See 4 *Bl Com* 173

⁷⁷ Gaming Act 1845, s 18

until 1892 that legislation was passed making ineffective such promises as those given by Mr. Gardiner and Mr. Bennet, so far as they related to Wickham's gaming debts.⁷⁸ But the legal enforceability of the "pledges" would not concern Mr. Gardiner or Mr. Bennet. They are clearly going to pay to save the family honour, irrespective of legal enforceability.

One also finds the converse situation in the novels, that is, cases in which contractual promises are not kept, or in which the possibility of their not being kept is contemplated, even though there is no doubt that they are legally binding. In *Mansfield Park*, Mrs. Price does not expect her servant Rebecca (evidently engaged under a yearly hiring) to stay till "her year was up." She tells Fanny that "Servants are come to such a pass, my dear, in Portsmouth, that it is quite a miracle if one keeps them more than half-a-year."⁷⁹ In the same work, Sir Thomas Bertram offers to extricate Maria from her engagement to Mr. Rushworth. He "assured her that every inconvenience should be braved, and the connection entirely given up, if she felt herself unhappy in the prospect of it. He would act for her and release her."⁸⁰ Sir Thomas recognises higher values than the sanctity of contract, but Maria is too proud to accept his offer of help. In *Emma* it seems that Jane Fairfax actually enters into a contract to become governess to Mrs. Smallridge's children and that her release from the arrangement is procured by Mrs. Elton: "But I want to set your heart at ease as to Mrs. S.—My representation, you see, has quite appeased her."⁸¹ In the cancelled Chapter of *Persuasion* Admiral Croft indicates that he will not insist on his right to remain as tenant of Kellynch-hall if the house is required for Anne after her rumoured marriage to Mr. Elliot.⁸² Renegotiation is clearly part of the social scene and is considered on its merits, irrespective of legal niceties.

At the beginning of *Mansfield Park*, Lady Bertram's younger sister marries a "a Lieutenant of Marines, without education, fortune, or connections."⁸³ Sir Thomas, we are told, "had interest" which he "would have been glad to exert for the advantage of Lady Bertram's sister; but her husband's profession was such as no interest could reach."⁸⁴ R. W. Chapman suggests that on this point Jane Austen may have been mistaken⁸⁵; and the suggestion is supported by the colourful eighteenth-century case of *Morris v. McCulloch*.⁸⁶ Here

⁷⁸ Gaming Act 1892

⁷⁹ *MP*, 385

⁸⁰ *MP*, 200

⁸¹ *E*, 454

⁸² *P*, 257-258

⁸³ *MP*, 3

⁸⁴ *MP*, 3-4

⁸⁵ *MP*, 541

⁸⁶ (1763) *Amb* 432

the defendant had agreed to procure a commission in the Marines for the plaintiff for £200; "and accordingly the defendant, being acquainted with Mrs. Stot, who was, or pretended to be, the wife of a captain Stot, and was intimately acquainted with the late admiral Boscawen, did, by her means and interest with the admiral (who was then one of the Lords of the Admiralty), obtain a commission of second lieutenant for the plaintiff."⁸⁷ However, six months later the plaintiff's fellow-officers discovered that he had "been a livery servant"; whereupon they "refused to roll with him"⁸⁸ and successfully petitioned the Admiralty for his discharge. The Lord Chancellor, Lord Henley, held that the plaintiff was entitled to the return of his £200, saying, "That if a man sells his interest, to procure a person an office of trust or service under the Government, it is a contract of turpitude."⁸⁹ As a decision on the effects of such turpitude on the rights of the parties to a contract, the case is now of doubtful authority⁹⁰; but it does suggest that "interest" could procure advancement in the Marines. What was objectionable in Lord Henley's view was not the *exercise* of that interest, but its *sale*. Elsewhere in *Mansfield Park* we are told that Admiral Crawford "had interest,"⁹¹ which he exercises in favour of William Price; but there is no suggestion that the Admiral (though "a man of vicious conduct"⁹²) expected to be, or was, paid for his part in the affair.

(9) Miscellaneous references

There is a miscellany of other legal references in the novels. In *Mansfield Park*, Sotherton is described as "the capital freehold mansion, and ancient manorial residence of the family, with all its rights of Court-Leet and Court-Baron."⁹³ These courts no longer played any significant part in the judicial system in Jane Austen's day,⁹⁴ though they continued to form part of the machinery for conveying copyhold land so long as that tenure endured.⁹⁵ They were not formally abolished till 1977.⁹⁶ In the same novel, Mr. Rushworth bores Maria with "repeated details of his day's sport," including "his jealousy of his neighbours, his doubts of their qualification, and his zeal after poachers."⁹⁷ Here "qualification" refers to the Game Laws: Blackstone uses the same expression when he

⁸⁷ *Ibid.*, 433.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 434. The sale of commissions in the army was then an exception to this rule: cf. *P & P*, 324: Wickham's commission in the army was "purchased."

⁹⁰ Treitel, *op. cit. supra* p 579, note 59, 380.

⁹¹ *MP*, 266.

⁹² *MP*, 41.

⁹³ *MP*, 82; see 2 *Bl. Com.* 91, 4 *Bl. Com.* 270.

⁹⁴ Holdsworth, *A History of English Law*, vol. 1, 135-137, 187

⁹⁵ It was abolished by Law of Property Act 1922, s 128.

⁹⁶ Administration of Justice Act 1977, s.23 and Sched 4

⁹⁷ *MP*, 115

lists "the *qualifications* for killing game."⁹⁸ There is a further reference to these laws in *Persuasion* when Admiral Croft, in negotiating for the lease of Kellynch-hall, indicates that he "would be glad of the deputation,"⁹⁹ *i.e.* of authority to kill game. A rather more obscure point in *Persuasion* is the description of Mrs. Smith's property in the West Indies as having been "for many years under a sort of sequestration for the payment of its own incumbrances."¹ Strictly, sequestration ought to refer to a method of enforcing a judgment; but as it was only a "sort of" sequestration, the property may merely have been in the hands of a receiver appointed by a mortgagee. Mrs. Smith "could not afford to purchase the assistance of the law,"² but later Captain Wentworth "with the activity and exertion of a fearless man" puts her "in the way of recovering"³ the property. Just what he could have done to get rid of the incumbrances is far from clear. Elsewhere we find references to property being taken in execution,⁴ and in one of the letters there is the jocular supposition that in the course of one such proceeding Cassandra and some fellow travellers of hers might have been "seized by the Bailiffs when you stopt at the Crown & sold altogether for the benefit of the creditors."⁵ There is also a farcical reference to a lady who forged her *own* will⁶; and an equally farcical proposal for law reform to make wards financially independent of their guardians.⁷

In *Emma* we learn that Mr. Knightley was a justice of the peace and that "As a magistrate, he had generally some point of law to consult John about, or, at least, some curious anecdote to give."⁸ Mrs. Elton alleges that Mr. Elton is much in demand as "the magistrates, and overseers, and churchwardens are always wanting his opinion."⁹ This is of a piece with her claim that "Mr. E. is Knightley's right-hand."¹⁰ Lady Catherine de Bourgh in *Pride and Prejudice* is prevented by her sex from actually being a magistrate; but she is not deterred by this technicality: "though this great lady was not in the commission of the peace for the county, she was a most active magistrate in her own parish, the minutest concerns of which were carried to her by Mr. Collins; and whenever any of the cottagers were disposed to be quarrelsome, discontented or too poor, she sallied forth into the village to settle their differences,

⁹⁸ 4 *Bl. Com.* 175.

⁹⁹ *P*, 22, and see the notes *ibid.* 292-293

¹ *P*, 210.

² *Ibid.*

³ *P*, 251

⁴ *MW*, 89; cf *ibid.* 88.

⁵ *Letters*, 76

⁶ *MW*, 175

⁷ *MW*, 169.

⁸ *E*, 100

⁹ *E*, 455.

¹⁰ *E*, 456

silence their complaints and scold them into harmony and plenty."¹¹ Jane Austen's own brother Edward was a justice of the peace and she records that he "went to inspect the Gaol, as a visiting Magistrate, & took me with him.—I was gratified—& went through all the feelings which People must go through—I think in visiting such a Building."¹² Perhaps she recalled the episode 14 years earlier when her aunt, Mrs. Leigh Perrot, was arrested on a charge of larceny and detained for more than six months until her trial (in which she was acquitted). Actually, Mrs. Leigh Perrot was not detained in the gaol but in the gaoler's home; and her sister-in-law, Mrs. Austen, had offered to send her nieces Cassandra and Jane to keep her company. The offer was declined as there was not enough room in the gaoler's house to accommodate the two young ladies and it was not thought fit that they should be lodged in the county gaol itself.¹³

III. AN ACTUAL TRANSACTION

The story of the sale and repurchase of the manuscript of *Northanger Abbey* has been often told.¹⁴ Under its original title of "Susan," the work was sold in 1803 for £10 to a London publisher called Richard Crosby. The seller was a Mr. Seymour, who is conjectured to have been Henry Austen's "man of business."¹⁵ Early publication seems to have been envisaged; Crosby advertised the book but apparently took no further steps in the matter. Some six years later, in April 1809, a letter¹⁶ is written to "Crosbie & Co.," in which the writer enquires why the work "of which I am myself the Authoress" has never been published and asks for a reply to be sent to "Mrs. Ashton Dennis, Post Office, Southampton." She alleges that "early publication was stipulated for" and concludes: "Should no notice be taken of this address, I shall feel myself at liberty to secure the publication of my work by applying elsewhere." Richard Crosby replies¹⁷ denying that any time was stipulated for publication, threatening proceedings if anyone else publishes the book and adding "The MS. shall be yours for the same as we paid for it." This offer was not taken up at the time. But in 1816, after the publication of "four novels of steadily increasing success"¹⁸ one of Jane Austen's brothers—probably Henry¹⁹—entered into negotiations with Crosby, who was "very

¹¹ *P & P*, 169

¹² *Letters*, 465

¹³ See *Life*, Chap 9, F D MacKinnon, *Grand Larceny*, Emma Austen Leigh, *Jane Austen and Bath*, Chap 2, *Facts and Problems*, 34, cf *ibid* 48 ("Jane was fond of her uncle [Leigh Perrot] but did not pretend to like his wife")

¹⁴ *Memour*, 129–130, *Life*, 174–175, 230–234, *Facts & Problems*, 44, 73

¹⁵ *Life*, 175, 231

¹⁶ *Letters*, 263

¹⁷ *Letters*, 264

¹⁸ *Memour*, 129

¹⁹ *Facts and Problems*, 73

willing to receive back his money and to resign all claim to the copyright." He did not, of course, connect Henry Austen with the author of *Sense and Sensibility*, *Pride and Prejudice*, *Mansfield Park*, and *Emma*, for all these works had been published anonymously. "When the bargain was concluded and the money paid, but not till then, the negotiator had the satisfaction of informing him that the work which had been so lightly esteemed was by the author of 'Pride and Prejudice.'"²⁰

This story raises a problem that has been discussed by lawyers for many centuries—the problem of non-disclosure. A party to a contract must not misrepresent facts; but it is generally held that he is not under any duty actively to disclose facts known to him but not to the other party.²¹ The rule is based on the difficulty of specifying just which circumstances known to one party ought to be disclosed to the other. Its most common application is to the case in which a seller knows that the subject-matter has defects of which the buyer is unaware. In modern cases the courts have become increasingly uneasy with this aspect of the rule and have subjected it to important exceptions: for example, where the defect makes the subject-matter dangerous.²² But the rule also applies in the converse situation, where the buyer knows that the subject-matter has some quality of which the seller is unaware and which *increases* its value: for example, where an estate is bought and the buyer knows, but the seller does not, that it contains valuable minerals. Such a case has been judicially described as "one in which a man of tender conscience and high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that a contract for the sale of the estate would be binding."²³ The contract for the repurchase of *Northanger Abbey* was thus clearly valid; nor is it generally thought that the Austen family should as a matter of "tender conscience and high honour" have disclosed the identity of the author to Richard Crosby. One reason for this view can be found in Crosby's previous conduct in relation to the work: in 1803 he had driven what appears to be a hard bargain; and he may not have performed even that, if early publication was indeed promised. Another is that he had every opportunity in over 12 years to form a judgment as to the merit of the work, and a publisher who spurned one of Jane Austen's novels is not likely to command our sympathy. Most readers will share the sense of triumph evidently felt by Henry Austen when the transaction was concluded.

It seems unlikely that Jane Austen, or Henry, took legal advice in

²⁰ *Memour*, 130

²¹ Treitel, *op cit supra* p 579, note 59, 300

²² *Ibid.*, 301

²³ *Smith v Hughes* (1871) L R 6 Q B 597, 604

relation to this transaction; but their instinct for proprieties led them into a course of action that was also entirely in accordance with the law. Much the same point can be made about the legal puzzles in the novels. One cannot infer that Jane Austen had any knowledge of law beyond that possessed by the ordinary layman; but she is generally accurate in stating the effects of the law on the situations with which the novels are concerned. The accuracy of her observation rather than any expert knowledge saved her from errors of law.

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DELEGATION AND THE ALTER EGO PRINCIPLE

THE rule that a delegate upon whom important governmental functions have been conferred may not further delegate those functions,¹ is subject to a number of qualifications. It comes under intense pressure where power is given to a delegate who is unable to exercise the power personally because of the amount of work involved in the exercise of the power or his workload as a whole. In such cases the rule against delegation may have to give way to administrative necessity. The most spectacular example is the conferment of power on a Minister. The law recognises that despite the rule against delegation, important powers may be exercised on the Minister's behalf by authorised departmental officials.

While it is possible to analyse the situation by recognising an exception to the rule against delegation,² it is also common to deny that the rule has any application because in the eyes of the law the authorised official is the *alter ego* of the Minister.³ There is no harm in this rather fictional approach provided that the fiction is not carried too far. In any case, the term "*alter ego* principle" is a useful shorthand to describe the exception to or qualification of the rule against delegation.

In this article the nature and scope of the *alter ego* principle will be examined. The first section will be concerned with the nature of the principle in its classic setting, the case of powers given to Ministers. Secondly, an attempt will be made to examine possible inherent limitations on the principle. The third section will discuss cases concerned with the possible exclusion of the principle by some kind of positive statutory provision. The fourth section will examine cases where attempts, not always successful, have been made to extend the principle beyond Ministerial powers.

1. THE NATURE OF THE ALTER EGO PRINCIPLE

In its application to Ministers of the Crown the *alter ego* principle has five features.

¹ There are many cases in support of the rule. *e.g.* *Allingham v. Minister of Agriculture* [1948] 1 All E.R. 780; *Vine v. National Dock Labour Board* [1957] A.C. 488; *Ratnagopal v. Attorney-General* [1970] A.C. 974; *Racecourse Sugar Association v. Attorney-General* (1979) 26 A.L.R. 321.

² *e.g.* *R. v. Harrison* (1976) 66 D.L.R. (3d.) 660; *Re Butler* (1977) 20 Nfd and P.E.I.R. 469. The equivalent principle in the United States is sometimes called sub-delegation: K. C. Davis, *Administrative Law Treatise* (2nd ed., 1979), Vol. 1, pp. 216-223.

³ *e.g.* *Lewisham Borough Council v. Roberts* [1949] 2 K.B. 608; *R. v. Skinner* [1968] 2 Q.B. 700; *Re Golden Chemicals Products Ltd.* [1976] Ch. 360; *Re Reference Under Section 11 of the Ombudsman Act* (1979) 2 A.L.D. 86; *O'Reilly v. Commissioner of the State Bank of Victoria* (1982) 44 A.L.R. 27.