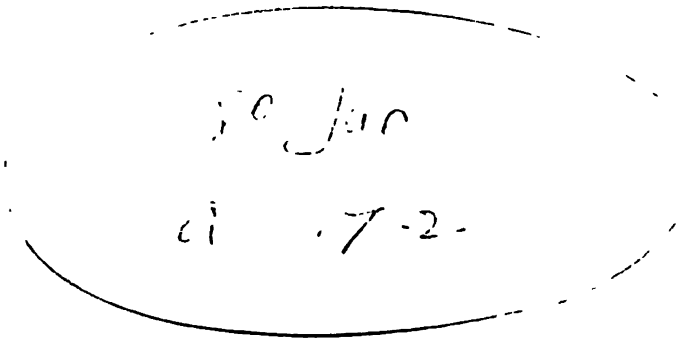

L.L.

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Hoc lege, quod possis dicere jure meum est. MART.

Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

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An ANALYSIS of LITTLETON, written by an unknown Hand in 1658-9.

THE SEVENTEENTH EDITION,
IN TWO VOLUMES;
With ADDITIONAL NOTES,
BY CHARLES BUTLER, ESQUIRE.

VOL. I.

LONDON:
PRINTED FOR W. CLARKE & SONS; C. HUNTER; AND S. BROOKE.
1817.

Printed by Luke Hansard and Sons,
near Lincoln's-Inn Fields.
***

ADVERTISEMENT.

A SEVENTEENTH EDITION of this Work being called for, the latter Editor has endeavoured to render it as perfect as it was in his power. He is indebted to Mr. THOMAS CANNING, of Lincoln's Inn, for the elaborate Index to the Notes, which accompanies the present Edition, and several observations, interspersed in the additions to the notes: and to Mr. RITSO's *Introduction to the Science of the Law*, for many useful remarks, both on the literal accuracy and learning of the text.

It appearing to be the universal wish of the Profession that the Notes should be printed under the Text, and the whole Work comprised in Two Volumes, this has been effected in the present Edition; but, with a necessary sacrifice of the ancient Norman-French of the Text of Littleton. The Editor submitted, the more easily to this sacrifice, as it enabled him to adopt a regular system of paging and reference, the want of which, in the former octavo editions, was much felt, and generally complained of; and as Lord Coke's version has long been considered an authentic representation of the text.

Lincoln's Inn, 22d Sept. 1817.

This mark ☞ is placed in the text, at the beginning of each half page or folio in the Thirteenth Edition, the paging of which is always preserved in the margin, and noted at the top of every page, of the present edition.

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MR. HARGRAVE'S

FIRST ADDRESS TO THE PUBLIC.

THE very high and advanced price, at which the *twelfth* edition of *Sir Edward Coke's First Institute*, or *Commentary upon Littleton*, has been sold for a long time past, is a proof, that a *new* edition is now wanted in order to supply the Public demand. This of itself may be thought a sufficient reason for offering a *new* edition; but another, and more cogent motive concurs in inducing to such a proposal; for, notwithstanding the advantages, which may have been given to the *tenth*, *eleventh*, and *twelfth* editions, there still remains an ample field for further improvements. It is not intended, by this observation, in the least to derogate from the merit of those three editions; of which the *tenth* and *eleventh* are particularly thought by some to deserve commendation, as well on account of the care and industry exerted in correcting the errors of former impressions, as on account of the knowledge and judgment shown in the additional notes and references. But a work like Sir Edward Coke's Commentary, so crowded with references to other books and authorities, will ever leave room for corrections; and being written on a subject so dependant, as the law necessarily is, on the opinions of the time *present*, and so frequently undergoing changes by acts of the legislature, will continually call for additions. These considerations may suffice to evince the propriety of attempting a *new* edition; but something further is requisite to recommend *that* now offered to the Public; and therefore the editor will explain the plan, on which he proposes to conduct it.

Littleton's Tenures and *Sir Edward Coke's Commentary* will be printed from the *second* edition, that being generally esteemed the most correct one of the Commentary; but it will be occasionally compared with the *first* and *other* editions, *all* of which have been procured for that purpose. Also the text of Littleton will be collated with the *Rohan* edition, which was that preferred by Sir Edward Coke, and a still *earlier* one by *Lettou* and *Mechlinia*, which

was printed in the life-time of Littleton, or within a year after his death, and has *never yet* been made use of in any edition of the Commentary. For the use of these two most curious and scarce editions of Littleton, the editor is indebted to the kindness of one, whose name he should think it an honour to be at liberty to mention. The editor is also provided with the curious editions of Littleton by *Pynson* and *Redman*, which are the next in date to the *Rohan* edition. He is possessed too of an edition in 1534 by Rastell, and of *most* of the *other* editions of Littleton, which are very numerous; but these latter, not being of so great authority, will seldom be consulted. It is proper to add, that the editor proposes to give the various readings of *four* or *five* of the earliest editions of Littleton, which has never been attempted before. But no various readings will be given, except where they appear to the editor *substantially* to affect the sense of the author*; and therefore the reader will not find *any* in the *first* section; the difference of the several editions, so far as regards that section, being apparently quite *immaterial*. As to *references*, those in the *first*, *second*, and *other* editions of Sir Edward Coke's Commentary before the *tenth*, having been made by Sir Edward Coke himself, will be *wholly* retained, with such corrections only of apparent mistakes as shall occur to the editor. Many of the additional references in the *tenth*, *eleventh*, and *twelfth* editions will also be retained; it being intended only to omit such as the editor shall discover to be plainly foreign to the purpose. The editor is aware, that even some of Sir Edward Coke's own references have been complained of as not pertinent; which, when the prodigious number of them, and the great variety of public and private affairs which commanded his attention through life, are considered, may be accounted for, without any great reflection on his care and accuracy. But the editor would deem it a presumption in

* This may seem not quite consistent with *sometimes* giving the word *Nota* as a various reading; but the reason of it is, that Littleton is thought by Sir Edward Coke to use the word *Nota* in a sense peculiarly significant. See Co. Litt. 22. a. The various readings of Littleton, taken from the edition by *Lettou* and *Mcchlinia*, will be distinguished by *L.* and *M.* those from the *Rohan* edition by *Roh.* those from *Pynson*'s edition by *P.* and those from *Redman*'s edition by *Red.* and if a reading should be taken from any *other* edition, it will be particularly mentioned. In *Redman*'s edition there are references to cases in some of the more ancient Year Books, which it was once intended to have given as part of the various readings from Redman; but on re-consideration, they do not appear of sufficient consequence to be taken notice of.

in him to *omit any* part of the *original* work; though, in respect to the references, such a liberty is in very numerous instances taken in the *twelfth* edition *; and besides, he would by no means be understood to engage for an examination of *every* reference with the book cited, which is a task far greater than his other avocations will allow him to engage in †. Further, it is proposed by the editor, to give some additional references, particularly to the reports published since the *twelfth* edition; and some notes; but he avoids promising a *great* number of either, lest he should undertake more than he may hereafter be able to accomplish. However, in order to make amends for the smallness of the number of new notes and references ‡, great care shall be taken in the choice of them: and they shall be so expressed, as clearly to show whether they tend to confirm, to question, to contradict, or to illustrate the doctrine advanced in the text; a distinction very requisite for the convenience and information of the reader, though in new editions of law-

* The editor has not yet found such a liberty taken in any edition, except the *twelfth*; but in *that* the omission of lord Coke's references is very frequent indeed, and he doubts whether many pages can be found without instances of it. In several pages he finds *twenty* or *thirty* references omitted, and in some *forty* or *fifty*. The truth of this will appear by examining fol. 4. b. and 5. a. of the *twelfth* edition with the same folios in any preceding one. The editor would not be so *early* in making this observation, if it was not with a view to show, how unaccountable it is, that notwithstanding this *suppression* of a great part of the authorities, on which lord Coke founds his opinions, the *twelfth* edition should sell for *six pounds*, whilst the price of some of the more early editions, though they contain the *whole* of the original work, and therefore are infinitely more valuable, is scarcely as many *shillings*.

† It is necessary to mention this, lest the *continuation* of those mistaken references by lord Coke, which are to be found in all the former editions, should be imputed to the inattention of the editor of the present edition, and as a negligence not consistent with his engagements to the public. The editor may add, that many of the mistakes are of such a kind, that to correct them, and to refer to the books or authorities intended, would exceed his utmost diligence and power.

‡ At first the editor doubted, whether it would be in his power to give the time necessary for writing *many* notes and references; but this first number of the work, he hopes, will convince his readers, how anxious he is to furnish a great number; and he will exert himself to the utmost in order to continue the work on the same enlarged plan. Having engaged in the undertaking, he is resolved as all events to make great sacrifices, rather than suffer it to languish in his hands.

law-books too frequently neglected. In the *eleventh* and *twelfth* editions, the *new* references are not distinguished from Sir Edward Coke's; but in this present edition it is thought proper to acquaint the reader, which belong to him, and which to his respective editors; and for that purpose, the additional references taken from the *tenth*, *eleventh*, and *twelfth* editions will be enclosed between *parentheses*; and those, with the notes by the editor of this edition, with the various readings of Littleton, will be referred to by figures, and placed at the bottom of the page. Such a discrimination is a justice due to those from whom the references proceed, particularly to Sir Edward Coke; and, at the same time, must be a satisfaction to the reader.—The *eleventh* and *twelfth* editions contain some notes and additions, showing the alterations in the laws since the time of Sir Edward Coke, which were printed separately at the end of the work. This has been found inconvenient; and therefore, in the present edition, they will be placed in the margin of the book where they respectively apply; except such of them as the editor shall find improper to be retained, or such as shall consist of extracts from acts of parliament, which, being too long for marginal insertion, will be omitted; and it is hoped, that the omission of those extracts will not be disapproved of, as a short reference to the statutes themselves, with an intimation that they have altered the law, will be substituted, which will equally answer the purpose of apprizing the reader*.—In all the former editions, the French text of Littleton's Tenures, and the whole of Sir Edward Coke's Commentary, were printed in the *black* letter; but in this edition only *Roman* and *Italic* letters will be used, which, it is presumed, will be both an agreeable and useful alteration in the printing; the *black* letter being generally deemed less pleasing, and more fatiguing to the sight, than either of the others.—In respect to the *Index* to the First Institute, it is at present intended, that it shall be the same as in the *eleventh* and *twelfth* editions; the editor thinking that having already undertaken so much, it would be imprudent to pledge himself still further, by entering into any engagement for making additions to the Index.

To

* The notes added in the 11th and 12th editions, exclusive of extracts from acts of parliaments, are so *few*, that all put together scarcely amount to so much as the additional matter given by the editor of the present edition in his first number; and he is now doubtful, whether he shall retain any of them in their original form. However, if he should, they shall be distinguished in the manner above mentioned.

To the *ninth* and *subsequent* editions were added Sir Edward Coke's *Readings* on the *Statute of Fines*, and on *Bail* and *Mainprize*; to the *tenth*, *eleventh*, and *twelfth* was added his *Copyholder*; and to the two latter the *Treatise* of the *Old Tenures* was also added. All these tracts will be given in the present edition; but with this difference, that the *Reading* on the *Statute of Fines* will be in *English*, and the *Treatise* of *Old Tenures*, instead of being in French only, will be accompanied with the *Old English* translation, as printed at the end of the *first* edition of the *Terms of the Law*. The *original French* of the *Old Tenures* is continued on account of the great antiquity of the book; but in the printing, the *black* letter will not be used *.

Besides Sir Edward Coke's *Tracts* and the *Old Tenures*, the present edition will have an *Analysis* of *Littleton*, from a manuscript, dated 1658-9, which has never yet been printed. This *Analysis* is a methodical summary of Littleton, containing not only a *general* view of the *whole* work, but also a *particular* one of *each* chapter. It accidentally fell into the hands of the editor. He is not informed who was the author; but it appears to him to be judiciously and ingeniously executed, and worthy of publication; and he hopes that it will not be deemed an improper addition, more especially as it will neither occasion the suppression of any other matter, or increase the price of the work to the purchasers.

To the whole will be prefixed a new *Preface*, by the editor of the present edition. In this Preface, he proposes, in the *first* place, to consider the merit of *Littleton's Tenures* and *Sir Edward Coke's Commentary*, and to point out the excellencies of each; in the next place, to give a *particular* account of the several editions of both; and *lastly*, to explain how this will differ from the former editions.

Such is the edition of Sir Edward Coke's First Institute, now submitted as a candidate for the public favour and encouragement; nor shall any exertion within the power of the editor be wanting to deserve them. He foresees that *great pains* and labour will be necessary to the effecting a due performance of his engagements, and that *little fame* can be expected from the most successful execution of an undertaking so humble as scarce to exceed that of a *mere*

* [*Towards the conclusion of this work it was found advisable wholly to omit the republication of these tracts, being already printed in a separate octavo volume.*]

a *mere editor*. But still he looks forward with pleasure. His veneration for the names of Littleton and Coke; his admiration of their writings; his persuasion that an attentive contemplation of them, by the improvement it must produce, will be its own reward; and his zeal to be instrumental in exhibiting them to the public eye, pure, genuine, and undisguised, and with as many advantages as a faithful and industrious editor can bestow: these were the considerations which *chiefly* prompted him to commence the undertaking; and these, he trusts, will continue to animate him till it is completed. If by perseverance and an unremitting ardour, the editor should succeed in his endeavours, he will then have the pleasing satisfaction of reflecting, that his labours have been useful, instructive, and agreeable to himself, and, at the same time, not wholly unprofitable or unacceptable to the community.

FRA. HARGRAVE.

ADDRESS

FROM

Mr. HARGRAVE,

ANNOUNCING HIS RELINQUISHMENT OF THIS WORK, &c.

MR. HARGRAVE, the editor of so much of the NEW EDITION of COKE UPON LITTLETON as has been published, at length finds his relinquishment of the undertaking in an unfinished state quite unavoidable. Numerous and severe are the sacrifices, which he has heretofore made in order to accomplish the original proposals in their fullest extent. To this moment he feels the effect of those sacrifices; nor is he likely ever to conquer wholly the disadvantage already incurred from them. But it might be improper and disgusting to enter into particulars upon this head, which in its nature is too personal to the editor to be interesting to others. He will therefore be content with generally declaring, that his situation is become such, as to render him unequal to any longer sustaining the weight of those labours, which he has ever found incident to the work upon the extended plan of annotation adopted by him from the commencement of the edition, though certainly not belonging to it from the very limited professions and terms originally held out to the Public. It is from personal considerations, and in his own defence, that he thus adverts to having passed the bounds of the first undertaking in the actual execution: because, as he feels himself open to censure, from those indisposed to yield to indulgent construction, for having done LESS than he promised, he too plainly sees the necessity of striving to soften such censure by the recollection of his having also done MORE. In truth, had he not rashly exceeded the limits first prescribed, by wandering into the wide field of annotation, it is most probable, that the WHOLE of the edition would have been finished long ago, and consequently that the editor would not now have to mortify himself by apologizing for executing only ONE HALF OF IT*.

This

* The COKE upon LITTLETON, exclusive of the Preface and Index, consists of 393 folios, or 786 pages. Mr. HARGRAVE has proceeded in the new edition, and actually published to the end of folio 190 or page 380, which is *exactly* 13 pages short of one half of the work.

This to be sure is the most favourable point of view for the editor; its tendency being to show, that his excess of zeal to render the edition VALUABLE has been one cause of his finally leaving it IMPERFECT. If it shall be thought proper by others kindly to receive the editor's apology in this form, it will qualify his unhappiness at the painful and trying moment of separation from a very favorite work before its advancement into maturity. Should a less indulgent construction be applied to the editor, it will deeply wound feelings already enough exercised; but from a consciousness of being open to some degree of exception for what rigid observers may style an indefensible abandonment of a work so long promised to be completed, he must in that case kiss the rod, and submit himself to the severity of animadversion with a patient humility.

It is no small consolation to Mr. Hargrave to accompany this recital of his failure in the edition, with information of its having fallen into the hands of a professional gentleman * of such a description, as to warrant expecting from him a quick and able execution of the remainder of the undertaking. As Mr. Hargrave understands, his successor is prompted to engage in the work by an extreme partiality for it, and having been in the habit of studying and annotating on the COKE UPON LITTLETON. He also possesses the important advantage of having long practised in the conveyancing line; to which, as Mr. Hargrave can speak from his own experience as a barrister in that branch of the law, a familiarity with the law of real property, and consequently with the writings of LITTLETON and COKE, is peculiarly essential. These and other considerations claim from Mr. Hargrave much beyond a hope, that the depending edition of COKE UPON LITTLETON will gain considerably by change of the editor; and that the new adventurer in this arduous undertaking will stamp the remainder of the edition with much greater value than could be reached by any efforts however vigorous from the original editor.

FRA. HARGRAVE.

Boswell-Court, 18 *Jan.* 1785.

* CHARLES BUTLER, of Lincoln's-Inn, Esquire.

Mr. BUTLER's PREFACE

TO THE

THIRTEENTH EDITION.

THE reputation of LITTLETON'S TREATISE on TENURES is too well established, to require any mention of the praises which the most respectable writers of our country have bestowed on it. No work on our laws has been more warmly or generally applauded by them. But some foreign writers have spoken of it in very different terms. At the head of these is Hottoman, who, in his Treatise "De verbis feudalibus," thus expresses himself: "Stephanus Pasquerius excellenti vir ingenio, et inter "Parisienses causidicos dicendi facultate præstans, libellum mihi "Anglicanum Littletonium dedit, quod Feudorum Anglicorum Jura "exponuntur, ita inconditè, absurdè, et inconcinnè scriptum, ut "facilè appareat, verissimum esse, quod Polydorus Virgilius, in "Anglicâ Historiâ, de Jure Anglicano testatus est, stultitiam in eo "libro, cum malitiâ, et calumniandi studio, certare." This passage from Hottoman is cited without any disapprobation in the 6th edition of Struvius's Bibliotheca Juris Selecta; but in the 8th edition of that work (Jenæ 1756) it is qualified by the words "singularia "sed parum apta sunt, quæ Franciscus Hottomanus profert, &c." Gatzert, in his "Commentatio Juris exotici Historico-Literaria de "Jure communi Angliæ," (Gottingen 1765) gives the following account of Littleton and his works: "Æqualis huic, tempore, ast "doctrinâ famâ et meritis longe superior fuit, immortalitatem nomi- "nis apud posteros, si quis unquam merito consecutus, Thomas "Littleton; a quo juris studium inchoant hodie Angli, plane ut "suum olim, ab edicto Prætoris et XII Tabulis, Romani. Hic "igitur ICtus, absolutis disciplinis academicis, jura patria mox cum "plausu in Interiori Templo Londinensi, quæ paulo ante ibidem "didicerat, aliquantum temporis professus, ab Henrico VI. ad "officium primo judicandi in curia Palatii vocatus est. Advocati "deinde

General observations on Littleton's Tenures.

" deinde ac procuratoris regii (king's serjeant) muneri a° 1455 ad-
" motus, judexque porro ambulatorius factus provincialis, (justice of
" assizes) et tandem inter judicantes communium placitorum curiæ
" a°. 1466 ab Edoardo IV. relatus, dignus habitus est, qui multum
" ampliori, quam solebat, stipendio ordinisque adeo Balnei honori-
" bus a° 1475 donaretur. Vivere desiit a° 1533*.—Unicum librum
" scripsit, sed qui plurium loco est, si spectas eruditionem et argu-
" mentum. In eo excusait doctrinam juris patrii difficillimam, gra-
" vissimam, usuque quotidiano maxime commendabilem; qualia
" nempe, et quotuplicia sint feuda Angliæ, quænam eorum jura,
" obligationes, præstationes atque servitia, in usus quidem Ri-
" chardi filii, et aliorum quorundam ad explicanda illis capita ali-
" quot opusculi DE TENURIS ab incerto auctore Edoardi III. ævo
" conscripti. Gallice primo fuit compositus, mox Gallice deinde
" sæpius et Anglice, mox vero Gallice et Latine, typis excusus.
" Viginti quinque servitiorum feudalium genera statuit, quæ tribus
" libris, in quos omne opus dispertitur, persecutus est. Titulum hunc
" esse voluit OF TENURES. In anno editionis originariæ a Cokio
" qui a° 1533 ponit dissentiunt, eamque circa a° 1477 non diu post
" inventam typographiæ artem prodiisse, valde vero similiter statu-
" unt Biographi Brit. vol. V. qui cum Nicolsono, p. 233, late etiam
" de argumento imprimis, et divisione libri agunt. Editio duode-
" cima 1738 lucem vidit. Cokus in præfatione sui ad Littletonum
" Commentarii, de quo mox disseram, inter plura quæ auctorem
" concernunt ejusque opus XV. ICtos nominis magni alios appel-
" lat, qui eodem tempore floruerunt. Exhibit præterea imaginem
" Littletonianam. Cæterùm liber ob methodi brevitatem, argumen-
" tandi subtilitatem, atque dictorum ordinem, laudem omnino me-
" retur; sed nec minus fatenduin est, adeo sæpissime obscuritati
" bonum hominem studuisse, ut ænigmata legum maluisse, quam
" præcepta tradere videatur. Multa jam immutata esse, plura in-
" veterata atque obsoleta, non urgeo. Interim communis ICtorum
" Anglorum hæc vox est perfectissimum et absolutissimum hoc
" opus esse ex omnibus quæ unquam in ulla scientia humana scrip-
" ta sint quæ unquam proferre potuerit hominis ingenium; non
" intelligere qui culpent. Ita parum abest, quin credant, falli eum
" fuisse nescium!"

The English reader will probably be surprised at these accounts of Littleton. Hottoman has the reputation of great learning, and elegant

* This is a strange mistake, as Littleton died in 1482.

elegant writing; but he has been blamed very generally for the contemptuous language with which he speaks even of the writers of his own civil law.

Gravina, while he mentions his endowments, both natural and acquired, with admiration, censures his abuse of other judicial writers with great severity. Speaking of him, he says, "Non modo in "Accursianis et Bartolinis interpretibus reprehendendis, sed in ipso "Triboniano perpetuo exagitando, collectam totâ vitâ opinionem "verecundiæ atque modestiæ, prorsus amisit." Grav. lib. 1. § 179.

Cujas also was supposed to allude to him in a passage of his works, where having occasion to mention the writers who find fault with the disposition and arrangement of the civil law, he says, "Quam "illi sunt imperitissimi! nam neque quid ars sit sciunt; neque ar-"tem digestorum aut principia certa juris ulla perceperunt unquam; "suaves tamen ad ridendi materiam."

But Hottoman's general disposition to abuse, is not the only circumstance by which his virulent censure of Littleton may be accounted for. Full of the doctrines of the feudal laws of his own country, he might expect to find doctrines of a similar nature in Littleton, without adverting that the greatest part of Littleton's work treats of the subordinate and practical part of the laws of England, which, like that of every other country, is in a great degree peculiar to itself, and bears but a remote analogy to those of other countries. It is allowed, that the feudal polity of the different countries of Europe is derived from the same origin; that there is a marked similitude in their principal institutions; and a singular uniformity in the history of their rise, perfection, decline, and fall. But the more we go from a view of their general constitutions and governments to a view of their laws and customs, the less this similitude and uniformity are discoverable.

Thus the history of every country where the feudal laws have prevailed, while it presents us, on the one hand, with an account of the many restraints imposed by them upon alienation, and of the many methods which have been taken to make property unalienable, presents us, on the other, with an account of the different arts which have been used to elude those restraints, and to make property free. This is as observable in the law of England, as it is in the law of any other country.

But the mode by which it has been effected in England is peculiar to England. In other countries, where a liberty of alienation has

been introduced, it has rested on a kind of compromise with the lord, by paying him a certain fine; and a kind of compromise with the relations of the feudatory, by allowing them a right of redemption, commonly called the "jus retractus." But the steps by which a free alienation of property has obtained ground in England are very different. In England an unlimited freedom of aliening socage and military land was soon allowed; the practice of sub-infeudation was soon abolished; the alienation of lands was restrained by the introduction of conditional fees, and afterwards by the introduction of estates tail; entails from their first establishment were greatly discountenanced by the courts of justice, and they were eluded by the doctrines of discontinuance and warranty. In the course of time, a fine was made a bar to the claims of the issue in tail, and a common recovery to the claims both of the issue and of those in remainder and reversion. Most of these circumstances are peculiar to the History of England. Hence an English reader, who opens the writings of the foreign feudists with an expectation of finding there something applicable to the practical parts of the law of his own country, respecting the alienation of landed property, will be greatly disappointed. He will find the most positive prohibition of aliening the fee without the consent of the lord: he will find very nice and subtle disquisitions of what amounts to an alienation: he will find that, in some countries, the lord's consent still continues a favour; that in others it is a right, which the tenant may claim on rendering a certain fine. In short, he will find the works of foreign feudists filled with accounts of the "jus retractus," or "droit de rachat," the "retraite lignager," and the "droit des lods et des ventes;" but he will hardly find the words, or any thing equivalent to the words, conditional fee, estate tail, discontinuance, warranty, fine, or recovery, in the sense in which we use them.

The same may be observed on the doctrine of conditions. According to the strict principles of the feudal law, no conditions could be annexed to a fief, except the implied conditions to which every fief was subject, from the obligation of service on the part of the tenant, and the obligation of protection on the part of the lord. Every fief to which any express or conventionary condition was annexed, was, from that very circumstance, ranked among improper fiefs. But fiefs in England were at all times susceptible of every kind of condition.

It would be easy to pursue these observations through the subsequent chapters of Littleton's Treatise. If even we consider the subject on a more extensive scale, we shall find some circumstances

peculiar to the English law, which must necessarily occasion a very essential and marked difference between the constitution and forms of the government of England and the constitution and forms of the government of other countries. Such are the universal conversion of allodial lands into fiefs; the total abolition of sub-infeudation; the freedom of alienation of estates in fee-simple; and the limited and dependant situation of our nobility, when contrasted with the situation of the high nobility of foreign countries: all these are peculiar in a great measure to our laws. It follows, that our writers must be silent on many of the topics which fill the immense volumes of foreign feudists; and they, from the same circumstance, must be equally silent on many of the subjects which are discussed by our writers. That this is so, will appear to every person conversant with the ancient writers on our laws, who will give a cursory look at the writers on the feudal laws of other countries. Nothing in this respect can be more different than those parts of the writings of Bracton, Britton, Fleta, Littleton, sir Edward Coke, and sir William Blackstone, which treat of landed property, and the books of the fiefs, Cujas's Commentary upon them, the various treatises on feudal matters collected in the 10th and 11th volumes of the "Tractatus "Tractatuum*, Du Moulin's Commentarii in "priores tres Titulos "Consuetudinis Parisiensis†," or the more modern treatises of Monsieur Germain Antoine Guyot‡, and Monsieur Hervé§.

These

* The title of this work is, "Oceanus Juris, sive Tractatus Tractatuum "Juris universi, duce et auspice Gregorio 13, in unum congesti, a Fr. Zilletti." There are two editions of this work, both printed at Venice; the first in 1548, the second in 1584. The first edition is in 16 tomes, generally bound in 12 volumes; the second is in 18 tomes, generally bound in 29 volumes. The arrangement of this work is greatly admired; but it is not a work in great request, even in those countries which are governed by the civil law.

† This is usually the first treatise printed in the general collection of his works. An abridgement of it was published in 1773 by Mr. Henrion de Pansey, under the title of "Traité des Fiefs de Du Moulin, Analysé et "Conféré avec les autres Feudistes."

‡ The title of this work is, "Traité des Matieres Feodales, tant pour le Pays "Coutumier que pour celuy du Droit ecrit, avec des Observations. Par Ger-"main Antoine Guyot." Paris, 1738, and Ann. Suiv. 7 vol. in 4to.

§ "Theorie des Matieres Feodales et Censuelles, ou l'on developpe la Chaine "de ces Matieres, dans un Ordre et sous un Aspect, qui en facilitent l'Intel-"ligence, et repandent de nouvelles Lumieres, et menent a des Definitions

These observations are offered with a view to account for the contemptuous manner in which the two foreign writers, cited above, speak of Littleton. They may also account, in some measure, for a circumstance which has been a matter of some surprize, the total silence of sir Edward Coke on the general doctrine of fiefs. It is obvious, how extremely desirous his lordship is upon every occasion to give the reasons of the doctrines laid down by him; and what forced, and sometimes even puerile reasons he assigns for them; yet though so much of our law is supposed to depend upon feudal principles, he never once mentions the feudal law.

"I do marvel many times, says sir Henry Spelman, that my lord "Coke, adorning our law with so many flowers of antiquity and "foreign learning, hath not (as I suppose) turned aside into this "field, i.e. feudal learning, from whence so many roots of our law "have, of old, been taken and transplanted. I wish some worthy "would read them diligently, and show the several heads from "whence those of ours are taken. They beyond the seas are not "only diligent, but very curious in this kind; but we are all for "profit and 'lucrando pane,' taking what we find at market, with-"out inquiring whence it came." But this complaint is open to observation.

There is no doubt but our laws respecting landed property are susceptible of great illustration from a recurrence to the general history and principles of the feudal law. This is evident from the writings of lord chief baron Gilbert, particularly his treatise of Tenures, in which he has very successfully explained, by feudal principles, several of the leading points of the doctrines laid down in the works

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"neuves des Contrats de Fiefs, & de Cens. Par Monsieur Hervé. 1785. "Paris, 6 vol. in 8vo." The first volume of this work contains an historical account of the rise, progress, and present state of fiefs in France. In 1756, Monsieur Bouquet published one volume of a work, intitled, "Le Droit "Public de la France." In his preface to it he promised to continue and complete it in two more volumes, but he is since dead, without having published any part of the continuation; a circumstance greatly to be regretted by the lovers of this kind of learning, as the first volume is executed in a most masterly manner. The English reader will perhaps find it the most interesting and instructive work that has yet appeared on the subject in the French language. If the reader wishes to pursue his researches on the subject, he will find some assistance from a small work printed at Frankfort in 1770, intitled, "Joannes Adami Koppii Historia Juris Scientiæ Romanæ "Feudalis Privatæ ac Publicæ." 1 vol. 8vo.

works of Littleton and sir Edward Coke, and shown the real grounds of several of their distinctions, which otherwise appear to be merely arbitrary. By this he reduced them to a degree of system, of which till then they did not appear susceptible. His treatise, therefore, cannot be too much recommended to every person who wishes to make himself a complete master of the extensive and various learning contained in the works of those writers. The same may be said of the writings of sir William Blackstone. Much useful information may be derived also from other writers on these subjects.

But the reader, whose aim is to qualify himself for the practice of his profession, cannot be advised to extend his researches upon these subjects very far. The points of feudal learning, which serve to explain or illustrate the jurisprudence of England, are few in number, and may be found in the authors we have mentioned.

It is not impossible but further inquiries might lead to other interesting discoveries. But the knowledge absolutely necessary for every person to possess who is to practise the law with credit to himself and advantage to his clients, is of so very abstruse a nature, and comprehends such a variety of different matters, that the utmost time which the compass of a life allows for the study, is not more than sufficient for the acquisition of that branch of knowledge only; still less will it allow him to enter upon the immense field of foreign erudition. It were greatly to be wished that some gentleman, possessed of sufficient time, talents, and assiduity, would dedicate them to this study. Those who have read the late doctor GILBERT STUART'S View of Society in Europe, in its Progress from "Rudeness to Refinement," will lament that he did not pursue his researches. From such a writer, a work on this subject might be expected, at once entertaining, interesting, and instructive; but such a work is not to be expected from a practising lawyer. Whatever may be the energies of his mind, his industry, his application and activity, he will soon feel, that to gain an accurate and extensive knowledge of the law, as it is practised in our courts of justice, requires them all. Thus, on the one hand, the student will find an advantage in some degree of research into feudal learning; on the other, he will feel it necessary to bound his researches, and to leave, before he has made any great progress in them, the Book of Fiefs, and its commentators, for Littleton's Tenures and sir Edward Coke's Commentary *. If

* In the thirteenth edition an attempt is made to continue Mr. Hargrave's

If it were proper to enter into a further defence of Littleton, it might be done by observing, that it must be a matter of great doubt, whether Hottoman ever saw, or Gatzert more than saw, the work they so severely censure. Hottoman, if he had read it, *might* think it inelegant and absurd; but he *could not* think it malicious, or indicative of a disposition to slander. Gatzert says Littleton specifies twenty-five kinds of feudal services. It is probable, that by services he meant tenures: if he did, it is obvious that he confounded those chapters of Littleton which treat of the nature of the feudal estate, with those chapters which treat of the nature of the feudal tenure: in every other sense the word Services, applied in this manner to Littleton's work, is without a meaning.—Besides, he mentions Latin editions of Littleton, when no edition in that language ever appeared.

In fact, were it not for the general observations to which they naturally give rise, neither the criticism of Hottoman nor that of Gatzert would have been noticed.

When doctor Cowell, in his Law Dictionary, cited the passage in question from Hottoman, it raised universal indignation, and he expunged it from the later editions of his book. It certainly was unjust to impute it as a crime to doctor Cowell, that he inserted this citation in his work; but the manner in which it was received is a striking proof of the high estimation in which Littleton's Treatise was held.

General observations on sir Edward Coke's Commentary.

The reputation of SIR EDWARD COKE's COMMENTARY is not inferior to that of the work which is the subject of it. It is objected to it, that it is defective in method. But it should be observed, that a want of method was, in some respects, inseparable from the nature of the undertaking. During a long life of intense and unremitted application to the study of the laws of England, sir Edward Coke had treasured up an immensity of the most valuable common-law learning. This he wished to present to the public, and chose that mode of doing it, in which, without being obliged to dwell on those doctrines of the law which other authors might explain equally well, he might produce that profound and recondite learning which he felt himself to possess above all others. In adopting this plan, he appears to have judged rationally, and consequently

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inchoate note on the Feudal Tenures, and to render it as useful as the nature of the subject admits to the practitioner and the student.

equally ought not to be censured for a circumstance inseparable from it.

It must be allowed that the style of sir Edward Coke is strongly tinged with the quaintness of the times in which he wrote; but it is accurate, expressive, and clear. That it is sometimes difficult to comprehend his meaning, is owing, generally speaking, to the abstruseness of his subject, not to the obscurity of his language.—It has also been objected to him, that the authorities he cites do not, in many places come up to the doctrines they are brought to support. There appears to be some ground for this observation. Yet it should not be forgot, that the uncommon depth of his learning, and acuteness of his mind, might enable him to discover connections and consequences which escape a common observer.

It is sometimes said, that the perusal of his Commentary is now become useless, as many of the doctrines of law which his writings explain are become obsolete; and that every thing useful in him may be found more systematically and agreeably arranged in modern writers. It must be acknowledged, that when he treats of those parts of the law which have been altered since his time, his Commentary partakes, in a certain degree, of the obsoleteness of the subjects to which it is applied; but even where this is the case, it generally happens that the doctrines laid down by him serve to illustrate other parts of the law which are still in force. Thus, there is no doubt but the cases which now come before the courts of equity, and the principles upon which they are determined, are extremely different in their nature from those which are the subject of sir Edward Coke's researches. Yet the great personages who have presided in those courts, have frequently recurred to the doctrines laid down by sir Edward Coke, to form, explain, and illustrate their decrees. Hence, though portions charged upon real estates, for the benefit of younger children, were not known in Littleton's time, and not much known in the time of sir Edward Coke; yet on the points which arise respecting the vesting and payment of portions, no writings in the law are more frequently or more successfully applied to than sir Edward Coke's Commentary on Littleton's Chapter of Conditions. It may also be observed, that notwithstanding the general tenor of the present business of our Courts, cases must frequently occur which depend upon the most abstruse and intricate parts of the ancient law. Thus the case of Jacob v. Wilcox led to the discussion of escheats and uses as they stood

before the statute of Henry VIII. and the case of Taylor v. Horde turned on the learning of disseisins.

But the most advantageous, and, perhaps, the most proper point of view in which the merit and ability of sir Edward Coke's writings can be placed, is by considering him as the centre of modern and ancient law.—The modern system of the law may be supposed to have taken its rise at the end of the reign of king Henry VII. and to have assumed something of a regular form about the latter end of the reign of king Charles II. The principal features of this alteration are, the introduction of recoveries; conveyances to uses; the testamentary disposition by wills; the abolition of military tenures; the statute of frauds and perjuries; the establishment of a regular system of equitable jurisdiction; the discontinuance of real actions; and the mode of trying titles to landed property by ejectment. There is no doubt, but, during the above period, a material alteration was effected in the jurisprudence of this country; but this alteration has been effected, not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects. Hence a knowledge of ancient legal learning is absolutely necessary to a modern lawyer. Now sir Edward Coke's Commentary upon Littleton is an immense repository of every thing that is most interesting or useful in the legal learning of ancient times. Were it not for his writings, we should still have to search for it in the voluminous and chaotic compilation of cases contained in the Year-books; or in the dry, though valuable, Abridgments of Statham, Fitzherbert, Brooke, and Rolle. Every person, who has attempted, must be sensible how very difficult and disgusting it is, to pursue a regular investigation of any point of law through those works. The writings of sir Edward Coke have considerably abridged, if not entirely taken away, the necessity of this labour.

But his writings are not only a repository of ancient learning; they also contain the outlines of the principal doctrines of modern law and equity. On the one hand, he delineates and explains the ancient system of law, as it stood at the accession of the Tudor line; on the other, he points out the leading circumstances of the innovations which then began to take place. He shews the different restraints which our ancestors imposed on the alienation of landed property, the methods by which they were eluded, and the various modifications which property received after the free alienation

alienation of its form allowed. He follows, how the notorious and public transfer of property by livery of seisin, was superseded by the secret and refined mode of transferring it, introduced in consequence of the statute of uses. We may trace in his works the beginning of the disuse of real actions; the tendency in the nation to convert the military into socage tenures; and the outlines of almost every other point of modern jurisprudence. Thus his writings stand between, and connect the ancient and modern parts of the law, and by shewing their mutual relation and dependency, discover the many ways by which they resolve into, explain, and illustrate one another.

Account of the editions of Littleton without the Commentary.

It has not yet been settled, and perhaps cannot now be settled, with any degree of precision, when the first EDITION of LITTLETON's work was printed. Sir Edward Coke's mistakes respecting the Rohan edition, are pointed out in the note taken from the 11th edition to that part of his Preface. Doctor Middleton, in his Account of Printing in England, conjectures the edition by J. Lettou and W. Machlinia, to have been printed in 1481, and that it is the first edition. This makes the printing of the book to have been within six or seven years after Caxton's introduction of the art into England, and within twenty-four years after the first invention of it. Dr. Middleton's conjecture is supported by the concurrent circumstance of the time when those printers appear to have been in partnership; and no other edition bears evidence of a prior title to antiquity. Another edition of nearly equal pretensions to precedence with the Lettou and Machlinia edition, has lately appeared from the library of the late William Bayntun, esq. It has remained hitherto undescribed, and was probably unknown to all who have undertaken to notice the several editions of this work. At the end it is said to be printed by Machlinia alone, then living near Fleet-bridge: from which, and other circumstances, it is clearly distinguishable from the former edition. The letter used in printing it is less rude, and more like the modern English black letter, than the letter used in the joint edition of Lettou and Machlinia, and the abbreviations are much less numerous. These circumstances afford some, though but a faint ground to suppose it posterior in date to the former. Mr. Hargrave has both these editions. In 1766, Mons. Houard, an Avocat in the Parliament of Normandy, and Conseiller Echevin of the town of Dieppe, published at Rouen, in two volumes, the text of Littleton, with a French interpretation, notes, a glossary, and Pieces Justificatives. Many editions

editions of Littleton in French and English only have been published in small octavo, twelves, sixteens, and twenty-fours. They are all of them very inaccurate. The French edition in 1583 is the first in which the sections are numbered. An edition in French and English, in double columns, with a table of the principal matters, was printed in duodecimo in 1671. Considering the universal estimation in which Littleton's work is held, and that it generally is the first work put into a student's hand, it is very singular, that since the editions by Lettou and Machlinia, and the Rohan edition, no correct edition of it without the Commentary has yet been published. The reader will hear with pleasure, that Mr. Hargrave has it in contemplation to favour the public with such an edition, and to print it in such a manner as will make it a typographical curiosity.

Editions of Littleton with sir Edw. Coke's Commentary.

The first EDITION of SIR EDWARD COKE'S COMMENTARY upon Littleton was published in his life-time, in 1628: it is very incorrect. The second edition was printed in 1629, and is supposed to have been revised by the author. The subsequent editions, to the eighth inclusively, seem to have been printed from the second, without much variation. The ninth edition includes sir Edward Coke's Reading on Fines, and his Treatise on Bail and Mainprize. To the tenth edition are added, the Complete Copyholder, with many references. In the eleventh edition the book intitled the Olde Tenures is inserted. At the end, both of the edition of Littleton by Lettou and Machlinia, and of that by Machlinia only, Littleton's work is called the "Tenores Novelli," to distinguish it (it is presumed) from the Treatise of "Olde Tenures." The eleventh edition has also several notes and additions, tending principally to show the alteration of the law since the time of Littleton and his commentator. The twelfth and last edition was published in 1738. Some observations upon it may be found in Mr. Hargrave's Address to the Public on his undertaking the present edition. An Abridgment of sir Edward Coke's Commentary was published in 1714, by Mr. Serjeant Hawkins; short but pointed observations are occasionally introduced in it, to explain the principles of the old law, and the alterations made in it by subsequent statutes.

Present edition.

Mr. Hargrave began the PRESENT EDITION, by publishing it in Numbers. Soon after his publication of the First Number, he was favoured with lord chief justice Hale's manuscript notes. By an advertisement prefixed to the Second Number, he informed the Public that they were very numerous, as far as the Chapter of Knight Service; that there were few on the subsequent parts of the work;

that

that for the accommodation of them, he was indebted to the liberal spirit of a noble lord*, who, he observed, had ever distinguished himself as a zealous encourager of undertakings having the least tendency to promote science and learning; that in the original, some of the notes were in Latin, but most of them in Law-French; and that it was thought most convenient to give the latter in a literal English translation. Upon the publication of the Second Number, Mr. Hargrave received from sir William Jones an account of some few various readings from two English manuscripts of Littleton's Tenures. By an advertisement prefixed to the Third Number he informed the Public, that both of these manuscripts were in the public library at Cambridge, being marked D d 11. 60, and M m 52; that the first was written on vellum, and was imperfect at the beginning, and in the Chapter of Warranty; and that the second, which seemed to be the most valuable, was written on paper, and had only one leaf torn, and that its antiquity appeared from the following note in the first page:

Iste liber emptus fuit in cœmeterio Sti. Pauli
London, *27th die* Julii, *anno regis E. 4ti.* 20*mo.* 10s. 6d.

that this date showed that the manuscript was of Littleton's time, July 20 E. 4. being in 1481, which was the year before Littleton's death; that in referring to the manuscripts, that in vellum would be distinguished by Vell. MS. and that in Paper by Paper MS. With these assistances Mr. Hargrave completed that part of the edition which is executed by him. He then relinquished the work, and by an Advertisement, (which immediately precedes this Preface) he informed the Public of it, and of the present editor's undertaking to continue the work.

Soon after the publication of this Advertisement, the present editor, through the obliging interference of John Holliday, esq. of Lincoln's-Inn, with the executors of the will of the late sir Thomas Parker, was favoured with a copy of the notes of lord chancellor Nottingham and lord Hale upon this work. The following account is given of them in a note in sir Thomas Parker's own hand-writing:

"The notes to this book, in my hand-writing (except one note "in folio 86. b. and some modern cases), were transcribed from a "copy of the lord Chancellor Nottingham's manuscript notes, in "the margin of his lord Coke's Commentary upon Littleton, "which

* The present Earl of Hardwicke.

" which copy was made for the use of his son Heneage Finch, esq. " solicitor-general, afterwards earl of Aylesford, and is now in the " possession of the honourable Mr. Legge, to whose favour I am " indebted for these notes.

" The notes in a different hand-writing were transcribed from a " copy of lord chief justice Hale's MS. notes in the margin of " Coke upon Littleton, presented by lord Hale to the father of " Philip Gybbon, esq. which copy was made for the use of the " honourable Charles Yorke, esq. his Majesty's solicitor-general. " The book in which the notes are in the hand-writing of lord " Hale, is now in the possession of Mr. Gybbon; and the book from " which these notes were transcribed by the favour of Mr. Yorke, " is now in his possession.

" T. PARKER, 1758."

Under these circumstances the THIRTEENTH EDITION has been completed in its present form.

When it became generally known that Mr. Hargrave had relinquished the work, the present Editor engaged in it; but he did not engage in it while there was the slightest probability of its being undertaken by any other person: and even then, he would not have engaged in it, if by doing so he incurred any obligation of completing Mr. Hargrave's undertaking in *all* its parts. He thought, an *imperfect execution* of the remaining part of the work would be more agreeable to the public than *none;* that to present them with the remaining part of the text of Littleton and his Commentator, with *some* references, and *some* notes, would be an acceptable offering to them. No other person appeared with any; and the present Editor's performance does not prevent the exertions of any future adventurer.

LINCOLN'S-INN,
Nov. 4, 1787.

CHARLES BUTLER.

DEO,
PATRIÆ,
TIBI,

Proœmium.

OUR author, a gentleman of an ancient and a fair-descended family de Littleton, took his name of a town so called, as that famous chief-justice sir John de Markham, and divers of our profession, and others, have done. The name and degree of our author.

Thomas de Littleton, lord of Frankley, had issue Elizabeth his only child, and did bear the arms of his ancestors, viz. argent a chevron between three escalop-shells sable. The bearing hereof is very ancient and honourable; for the senators of Rome did wear bracelets of escalop-shells about their arms, and the knights of the honourable order of St. Michael in France do wear a collar of gold in the form of escalop-shells at this day. Hereof much more might be said, but it belongs unto others. His arms. Instituted by Lewis the Eleventh, king of France, 9 E. 4. 1469.

With this Elizabeth married Thomas Westcote, esquire, the king's servant in court, a gentleman anciently descended, who bare argent, a bend between two cotisses sable, a bordure engrayled gules, bezanty. Thomas Westcote.

But she being fair, and of a noble spirit, and having large possessions and inheritance from her ancestors de Littleton, and

and from her mother, the daughter and heir of Richard de Quatermeins, and other her ancestors (ready means in time to work her own desire), resolved to continue the honour of her name (as did the daughter and heir of Charleton, with one of the sons of Knightly, and divers others), and therefore prudently, whilst it was in her own power, provided by Westcote's assent before marriage, that her issue inheritable should be called by the name of de Littleton. These two had issue four sons, Thomas, Nicholas, Edmund, and Guy, and four daughters.

Our author bore his mother's surname.

Thomas the eldest was our author, who bare his father's christian name Thomas, and his mother's surname de Littleton, and the arms de Littleton also; and so doth his posterity bear both name and arms to this day.

Camden.
"The just shall flourish like the palm-tree, and spread abroad like the cedar in Libanus." Psal. xcii. 12.

Camden, in his Britannia, saith thus: Thomas Littleton, alias Westcote, the famous lawyer, to whose Treatise of Tenures the students of the common law are no less beholden, than the civilians to Justinian's Institutes.

The dignity of this fair-descended family de Littleton hath grown up together and spread itself abroad by matches, with many other ancient and honourable families, to many worthy and fruitful branches, whose posterity flourish at this day, and quartereth many fair coats, and [*] enjoyeth fruitful and opulent inheritances thereby.

[*] The best kind of quartering of arms.

He was of the Inner Temple, and read learnedly upon the statute of *W.* 2. *De donis conditionalibus*, which we have. He was afterwards called *ad statum et grad' servientis ad legem*, and was steward of the court of Marshalsey of the King's houshold, and for his worthiness was made by King *H.* 6. his serjeant, and rode justice of assise the Northern Circuit, which places he held under King *E.* 4. until he, in the sixth year

King's serjeant, Rot. Pat. 33 H. 6. part. 1. m. 16.
Mich. 34 H. 8. fol. 3. a. Judge of the Common Pleas, Rot. Pat. 6 E. 4. part. 1. m. 15.

er of his reign, constituted him one of the judges of the court of common pleas, and then rode Northamptonshire circuit. The same king, in the 15th year of his reign, with the prince, and other nobles and gentlemen of ancient blood, honoured him with the knighthood of the Bath.

Knight of the Bath, 15 E. 4.

He compiled this book when he was judge, after the fourteenth year of the reign of King *E.* 4, but the certain time we cannot yet attain unto, but (as we conceive) it was not long before his death, because it wanted his last hand; "for "that tenant by *elegit*, statute-merchant, and staple, were in "the table of the first printed book, and yet he never wrote "of them *."

When he wrote this book. 14 E. 4. tit. Garranty 5.

Litt. Sect. 692. 729. & 740.

Our author, in composing this work, had great furtherance that he flourished in the time of many famous and expert men of the law. [*a*] Sir Richard Newton, [*b*] sir John Priaot, [*c*] sir Robert Danby, [*d*] sir Thomas Brian, [*e*] sir Pierce Arcum, [*f*] sir Richard Choke, [*g*] Walter Moyle, [*h*] William Paston, [*i*] Robert Danvers, [*k*] William Ascough, and other justices of the court of common pleas: and of the king's bench, [*l*] sir John June, [*m*] sir John Hody, [*n*] sir John Fortescue, [*o*] sir John Markham, [*p*] sir Thomas Billing, and other excellent men flourished in his time.

The deceases of his contemporaries.

[*a*] He died 27 H. 6.
[*b*] He died 39 H. 6.
[*c*] Died 11 E. 4.
[*d*] Died 16 H. 7.
[*e*] Died 7 E. 4.
[*f*] Overlived our author.
[*g*] Survived him also.
[*h*] Died 23 H. 6.
[*i*] Survived our author.
[*k*] Died 33 H. 6.
[*l*] Died 18 H. 6.
[*m*] Died 20 H. 6.
[*n*] Removed 1 E. 4.
[*o*] Removed 8 E 4.
[*p*] Died 21 E. 4.

And of worldly blessings I account it not the least, that in the beginning of my study of the laws of this realm, the courts

* That Littleton did intend to write of those tenancies, is plain from the 323d and 324th Sections; but it may be justly questioned whether the fact be true, as alleged by my lord Coke, to support his opinion, be true; because in the copy of the Roman edition, now in Lincoln's-Inn Library, and in that at present in the bookseller's custody, the Table mentions nothing concerning those tenancies; nor does it seem probable that there ever was any such Table, both the copies appearing, on the nicest examination, to be genuine. *Note to the 11th edition.—See also Note* 1 *to* 163. a. *of the present Edition.*

of

of justice, both of equity and of law, were furnished with men of excellent judgment, gravity, and wisdom. As in the chancery, sir Nicholas Bacon, and after him sir Thomas Bromley. In the exchequer-chamber, the lord Burghley, lord high treasurer of England, and sir Walter Mildmay, chancellor of the exchequer. In the king's bench, sir Christopher Wray, and after him sir John Popham. In the common pleas, sir James Dyer, and after him sir Edmund Anderson. In the court of exchequer, sir Edward Saunders, after him sir John Jeffery, and after him sir Roger Manwood, men famous (amongst many others) in their several places, and flourished, and were all honoured and preferred by that thrice noble and virtuous queen Elizabeth of ever blessed memory. Of these reverend judges, and others their associates, I must ingenuously confess, that in her reign I learnt many things, which in these Institutes I have published: and of this queen I may say, that as the rose is the queen of flowers, and smelleth more sweetly when it is plucked from the branch, so I may say and justify, that she by just desert was the queen of queens, and of kings also, for religion, piety, magnanimity, and justice; who now by remembrance thereof, since Almighty God gathered her to himself, is of greater honour and renown than when she was living in this world. You cannot question what rose I mean; for take the red or the white, she was not only by royal discent and inherent birth-right, but by roseal beauty also, heir to both.

Queen Elizabeth.

And though we wish by our labours (which are but *cunabula legis*, the cradles of the law) delight and profit to all the students of the law in their beginning of their study (to whom the First Part of the Institutes is intended), yet principally to my loving friends, the students of the honourable and worthy societies of the Inner Temple and Clifford's Inn, and of Lion's Inn also, where I was some time reader. And yet of

Inner-Temple.
Clifford's-Inn.
Lion's-Inn.

it them more particularly to such as have been of that famous university of Cambridge, *alma mea mater*. And to my much honoured and beloved allies and friends of the county of Norfolk, my dear and native country; and to Suffolk, where I passed my middle age; and of Buckinghamshire, where in my old age I live. In which counties, we, out of former collections, compiled these Institutes. But now return we again to our author.

He married with Joban, one of the daughters and coheirs of William Burley, of Broomscrost castle, in the county of Slop, a gentleman of ancient discent, and bare the arms of his family, argent, a fess checkie or and azure, upon a lion rampant sable, armed gules; and by her had three sons, sir William, Richard the lawyer, and Thomas. His marriage. His issue.

In his life-time, he, as a loving father and a wise man, provided matches for these three sons, in vertuous and ancient families, that is to say, for his son sir William, Ellen, daughter and coheir of Thomas Welsh esquire, who by her had issue Joban his only child, married to sir John Aston of Tixal, knight: and for the second wife of sir William, Mary the daughter of William Whittington esquire, whose posterity in Worcestershire flourish to this day. For Richard Littleton his second son, to whom he gave good possessions of inheritance, Alice, daughter and heir of William Wimbury of Pilleton Hall in the county of Stafford esquire, whose posterity prosper in Staffordshire to this day. And for Thomas his third son, to whom he gave good possessions of inheritance, Anne, daughter and heir of John Bottreaux esquire, whose posterity in Shropshire continue prosperously to this day. Thus advanced he his posterity, and his posterity, by imitation of his vertues, have honoured him. The re-establishment of his posterity, by the matches of his three sons with virtue and good blood. He gave possessions of inheritance to his younger sons for their better advancement.

His last will.

He made his last will and teſtament the 22d day of Auguſt in the twenty-first year of the reign of king Edward the

His executors, his supervisor.

fourth, whereof he made his three sons, a parson, a vicar, and a servant of his, executors: and constituted supervisor thereof his true and faithful friend, John Alcock, doctor of law, of the famous university of Cambridge, then bishop of Worcester; a man of singular piety, devotion, chastity, temperance, and holiness of life; who, amongst other of his pious and charitable works, founded Jesus College in Cambridge; a fit and fast friend to our honourable and vertuous judge.

His age.

His departure.

He left this life in his great and good age, on the 23d day of the month of August, in the said twenty-first year of the reign of king Edward the fourth: for it is observed for a special blessing of Almighty God, that few or none of that profession die *intestatus et improles*, without will, and without child; which last will was proved the 8th of November following, in the Prerogative Court of Canterbury, for that he had *bona notabilia* in divers diocesses. But yet our author liveth still *in ore omnium juriſprudentium*.

1 H. 7 fol. 27. 21 H. 7. fol. 32. b.

Littleton is named in 1 *H.* 7, and 21 *H.* 7. Some do hold, that it is no error either in the reporter or printer; but that it was Richard the son of our author, who in those days professed the law, and had read upon the statute of *W.* 2. *quia multi per malitiam*, and [*] unto whom his father dedicated his book: and this Richard died at Pilleton Hall in Staffordshire, in 9 *H.* 8.

W. 2. cap. 11. [*] See Littleton, Sect. 749.

His sepulchre.

The body of our author is honourably interred in the cathedral church of Worcester, under a fair tomb of marble, with his statue or portraiture upon it, together with his own match, and the matches of some of his ancestors, and with a memorial

tal of his principal titles; and out of the mouth of his statue proceedeth this prayer, *Fili Dei miserere mei*, which he himself caused to be made and finished in his life-time, and remaineth to this day. His wife Johan, lady Littleton, survived him, and left a great inheritance of her father, and Ellen her mother, daughter and heir of John Grendon, esquire, and other her ancestors, to sir William Littleton her son.

When this work was published.

This work was not published in print, either by our author himself, or Richard his son, or any other, until after the deceases both of our author and of Richard his son. For I find it not cited in any book or report, before sir Anthony Fitzherbert cited him in his *Natura Brevium*; who published that book of his *Natura Brevium* in 26 *H.* 8. Which work of our author, in respect to the excellency thereof, by all probability should have been cited in the reports of the reigns of E. 5. *R.* 3. *H.* 7. or *H.* 8. or by St. Jermyn in his book of the Doctor and Student*, which he published in the three-and-twentieth year of *H.* 8. if in those days our author's book had been printed. And yet you shall observe, that time doth ever give greater authority to works and writings that are of great and profound learning, than at the first they had. The first impression that I find of our author's book was at Roan in France, by William de Tailier (for that it was written in French) *ad instantiam Richardi Pinson*, at the instance of Richard Pinson, the printer of king *H.* 8. before the said book of *Natura Brevium* was published; and therefore upon these and other things that we have seen, we are of opinion, that it was first printed about the four-and-twentieth year of the reign of king *H.* 8. since which time he

F. N. B. 212. c.

Note.

When this work was first imprinted.

* This book appears to have been first published by J. Rastell, 1523. Ames.

he had been commonly cited, and (as he deserves) more and more highly esteemed *.

He

* This opinion of my lord Coke's, concerning the time of the first impression of Littleton's Tenures, although it hath been followed by sir William Dugdale, in his *Origines Juridiciales*, and by bishop Nicholson, in his Historical Library, is certainly erroneous; for it appears by two copies now in the bookseller's custody, that they were printed twice at London in the year 1528, once by Richard Pinson, and again by Robert Redmayne; and that was the nineteenth year of the reign of *H.* 8. To determine certainly when the Rohan edition was published, is almost impossible; and before any conjectures can be offered on that subject, it will be necessary to consider how conclusive the arguments his lordship draws from our author's not being cited as authority in the books he mentions may be; it either proves what his lordship uses it for, or else that Littleton's authority was not then so well established as it is now (for which he gives us here a very good reason): and that this last is true, the aforesaid editions do sufficiently evince, for their titles and conclusions run thus: "Littleton's Tenures, newly and most truely corrected." And in the end, *Explicient Tenores Littletoni cum alterationibus eorundem et additionibus novis, necnon cum aliis non minus utilioribus*: nay, these very additions are incorporated into the book itself, nor are they distinguished by any mark from the original. The weakness of this argument will further appear, if it should be applied to the discovering the time my lord Coke's Commentary on Littleton was first published, for this was not cited as authority for some time after its publication. The old editions above mentioned, Pynson's and Le Talleur's name, and the manner Littleton is printed in at Rohan, seem to be the only means of discovering what we seek. From those editions we may collect, not only that the Rohan impression is older than the year 1528, but also by what occurs in the beginning and end of them, that there had been other impressions of our author. From Pynson's name at the end of the Rohan edition, it may be concluded that he would not have engaged his friend William Le Talleur to have printed Littleton at Rohan, had he ever before printed any books in French; and that he printed an Abridgment of the Statutes, part of which is in French, in the year 1499, appears by one of those books now in the same person's custody. Statham's Abridgment has his name to it, but there is no date, yet it being printed with the same types, and in the same manner, Littleton was at Rohan, and as it is a larger book, it is highly probable it was printed some time after the publication of Littleton's Tenures, and that Pynson's success in the lesser undertaking induced him to venture on the greater; which in those days was the work of two or three years. William Le Talleur

He that is desirous to see his picture, may in the churches of Frankley and Hales Owen see the grave and reverend countenance of our author, the outward man; but he hath left this book, as a figure of that higher and nobler part, that is, of the excellent and rare endowments of his mind, especially in the profound knowledge of the fundamental laws of this realm. He that diligently reads this his excellent work, shall behold the child and figure of his mind, which the more often he beholds in the visual line, and well observes him, the more shall he justly admire the judgment of our author, and increase his own. This only is desired, that he had written of other parts of law, and especially of the rules of good pleading, (the heart-string of the common law) wherein he excelled; for of him might the saying of our English poet be verified:

His picture.

The figure of his mind

> Thereto he could indite and maken a thing;
> There was no wight could pinch at his writing:

Chaucer.

so far from exception, as none could pinch at it. This skill of good pleading he highly in this work commended to his son, and under his name to all other students sons of his law. He was learned also in that art, which is so necessary to a complete lawyer; I mean of logick, as you shall perceive by reading of these Institutes, wherein are observed his syllogisms,

Good pleading.

Logick.

Tallent printed a Chronicle of the Duchy of Normandy, as appears by his name and cipher at the end thereof, and the date in the beginning in the year 1487. The book itself is printed without any title-page, initial letter of the chapters, number of the leaves or year, and in a character much resembling writing, and with such abbreviations as are used in manuscripts: all which it is well known to those who have seen many old books, are undoubted proofs of a book's being printed when that art was in its infancy. Upon the whole it may certainly be concluded, that the book was printed some years before 1487; because the above-mentioned Chronicle, which hath not so much marks of antiquity, was printed in that year; and from what has been observed concerning the manner it is printed in, it will be thought by those who are versed in ancient books, to have been published ten years before that time. *Note to the 11th Edition.*

gisms, inductions, and other arguments; and his definitions descriptions, divisions, etymologies, derivations, significations, and the like. Certain it is, that when a great learned man (who is long in making) dieth, much learning dieth with him.

Seneca.

The commendation of his work.

That which we have formerly written, that this book is the ornament of the common law, and the most perfect and absolute work that ever was written in any human science; and in another place, that which I affirmed and took upon me to maintain against all opposites whatsoever, that it is a work of as absolute perfection in its kind, and as free from error, as any book that I have known to be written of any humane learning, shall to the diligent and observing reader of these Institutes be made manifest, and we by them (which is but a Commentary upon him) be deemed to have fully satisfied that, which we in former times have so confidently affirmed and assumed. His greatest commendation, because it is of greatest profit to us, is, that by this excellent work, which he had studiously learned of others, he faithfully taught all the professors of the law in succeeding ages. The victory is not great to overthrow his opposites, for there never was any learned man in the law, that understood our author, but concurred with me in his commendation: *Habet enim justam venerationem quicquid excellit*; for whatsoever excelleth hath just honour due to it. Such as in words have endeavoured to offer him disgrace, never understood him, and therefore we leave them in their ignorance, and wish that by these our labours they may know the truth and be converted. But herein we will proceed no farther, for *Stultum est absurdas opiniones accuratius refellere.* It is meer folly to confute absurd opinions with too much curiosity.

Cicero.

Aristotle.

And albeit our author in his Three Books cites not many authorities, yet he holdeth no opinion in any of them, but is proved

proved and approved by these two faithful witnesses in matter of law, authority and reason. Certain it is, when he raiseth any question, and sheweth the reason on both sides, the latter opinion is his own, and is consonant to law. We have known many of his cases drawn in question, but never could find any judgment given against any of them, which we cannot affirm of any other book or edition of our law. In the reign of our late sovereign lord king James of famous and ever blessed memory, it came in question upon a demurrer in law, Whether the release to one trespasser should be available or no to his companion? Sir Henry Hobart, that honourable judge and great sage of the law, and those reverend and learned judges, Warburton, Winch, and Nichols, his companions, gave judgment according to the opinion of our author, and openly said, that they owed so great reverence to Littleton, as they would not have his case disputed or questioned: and the like you may find in this part of the Institutes. Thus much (though not so much as his due) have we spoken of him; both to set out his life, because he is our author, and for the imitation of him by others of our profession.

Note.

Mich. 3 Jac. in communi banc. inter Cock & Ilnours.

We have in these Institutes endeavoured to open the true sense of every of his particular cases, and the extent of every of the same, either in express words, or by implication; and where any of them are altered by any latter act of parliament, to observe the same, and wherein the alteration consisteth. Certain it is, that there is never a period, nor (for the most part) a word, nor an *&c.* but affordeth excellent matter of learning. But the module of a preface cannot express the observations that are made in this work, of the deep judgment and notable invention of our author. We have by comparison of the late and modern impressions with the original print, vindicated our author from two injuries: First, from divers corruptions in the late and modern prints, and

What is endeavoured by these Institutes.

restored our author to his own: Secondly, from all additions and encroachments upon him, that nothing might appear in his work but his own*.

The benefit of these Institutes.

Our hope is, that the young student, who heretofore meeting at the first, and wrestling with as difficult terms and matter, as in many years after, was at the first discouraged as many have been, may, by reading these Institutes, have the difficulty and darkness both of the matter and of the terms and words of art in the beginning of his study, facilitated and explained unto him, to the end he may proceed in his study chearfully and with delight; and therefore I have termed them Institutes, because my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the national laws of England.

Wherefore called Institutes.

Wherefore published in English.

This Part we have (and not without precedent) published in English, for that they are an introduction to the knowledge of the national law of the realm; a work necessary, and yet heretofore not undertaken by any, albeit in all other professions there are the like. We have left our author to speak his own language, and have translated him into English, to the end that any of the nobility or gentry of this realm, or of any other estate or professon whatsoever, that will be pleased to read him and these Institutes, may understand the language wherein they are written.

Regula.

I cannot conjecture that the general communicating of these laws in the English tongue can work any inconvenience, but introduce great profit, seeing that *Ignorantia juris non excusat,*

* In this Edition several material passages of the author are restored, by collating the text as published by lord Coke with the more ancient printed copies by Lettou and Machlinia, Pynson, Redman, &c. as also with several ancient MSS.

excusat, Ignorance of the law excuseth not. And herein I am justified by the wisdom of a parliament; the words whereof be, "That the laws and customs of this realm the rather 36 E. 3. cap. 5
"should be reasonably perceived and known, and better
"understood by the tongue used in this realm, and by so
"much every man might the better govern himself without
"offending of the law, and the better keep, save and defend
"his heritage, and possessions. And in divers regions and
"countries where the king, the nobles, and other of the said
"realm have been, good governance and full right is done
"to every man, because that the laws and customs be learned
"and used in the tongue of the country:" as more at large by the said act, and the purview thereof may appear: *Et* *Regula.*
seminem oportet esse sapientiorem legibus, No man ought to be wiser than the law.

And true it is, that our books of reports and statutes in ancient times were written in such French as in those times was commonly spoken and written by the French themselves. But this kind of French that our author hath used, is most commonly written and read, and very rarely spoken, and therefore cannot be either pure, or well pronounced. Yet the change thereof (having been so long customed) should be without any profit, but not without great danger and difficulty: for so many ancient terms and words drawn from that legal French are grown to be *vocabula artis*, vocables of art, so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed. Our author's kind of French.

In school divinity, and amongst the glossographers and interpreters of the civil and canon laws, in logick, and in 36 E. 3. ub. supra.
other liberal sciences, you shall meet with a whole army of words, which cannot defend themselves *in bello grammaticali*,

in

the grammatical war, and yet are more significant, compendious, and effectual to express the true sense of the matter, than if they were expressed in pure Latin.

Wherefore called the First Part.

This work we have called, "The First Part of the Institute, for two causes: First, for that our author is the first book that our student taketh in hand: Secondly, for that there are some other Parts of Institutes not yet published, viz. The Second Part, being a Commentary upon the statute of *Magna Charta*, Westm. 1, and other old statutes. The Third Part treateth of criminal causes and pleas of the crown: which Three Parts we have by the goodness of Almighty God already finished. The Fourth Part we have purposed to be of the jurisdiction of courts: but hereof we have only collected some materials towards the raising of so great and honourable a building. We have, by the goodness and assistance of Almighty God, brought this twelfth work to an end: in the Eleven Books of our Reports we have related the opinions and judgments of others; but herein we have set down our own.

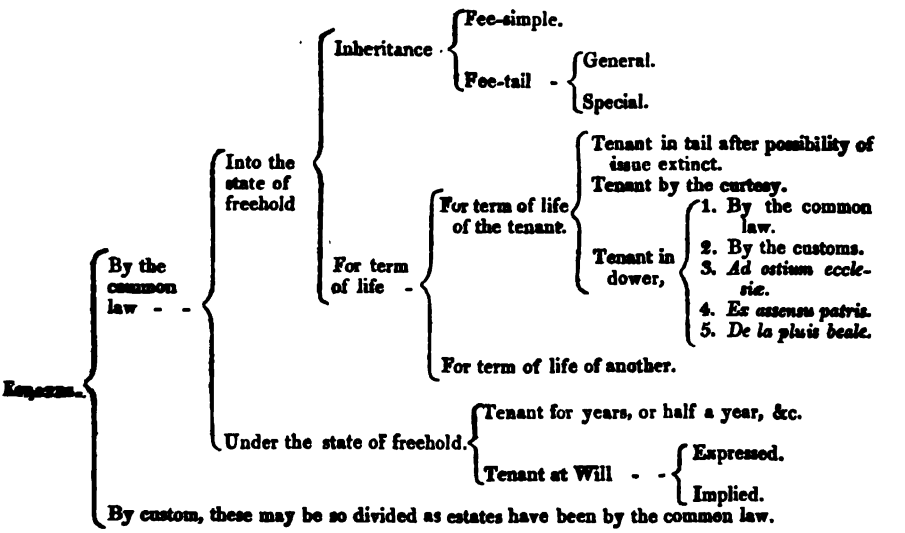
Before I entered into any of these Parts of our Institutes, I, acknowledging mine own weakness and want of judgment to undertake so great works, directed my humble suit and prayer to the Author of all goodness and wisdom, out of the Book of Wisdom; *Pater et Deus misericordiæ, da mihi fedium tuarum assistricem Sapientiam! Mitte eam de cœlis sanctis tuis et à sede magnitudinis tuæ, ut mecum sit et mecum laboret, ut sciam quid acceptum sit apud te!* "O Father and God of "mercy, give me wisdom, the assistant of thy seats! O "send her out of the holy heavens, and from the seat of "thy greatness, that she may be present with me, and "labour with me, that I may know what is pleasing unto "thee." *Amen.*

Lib. Sap. cap. ix. vers. 4. 10.

Our

Our author hath divided his whole work into Three Books. In his First he hath divided estates in lands and tenements, in this manner: for *res per divisionem melius aperiuntur.* Bracton.

A FIGURE of the DIVISION of POSSESSIONS.



Our author dealt only with the estates and terms above-said: somewhat we shall speak of estates by force of certain statutes, as of statute-merchant, statute-staple, and *elegit*, (whereof our author intended to have written) [*] and likewise to executors to whom lands are devised for payment of debts, and the like.

[*] See the first remark to the Preface.

I shall desire, that the learned reader will not conceive any opinion against any part of this painful and large volume, until he shall have advisedly read over the whole, and diligently searched out, and well considered of the several authorities, proofs and reasons which we have cited and set down for warrant and confirmation of our opinions throughout this whole work.

Regula. Incivile est parte una perspecta, tota re non cognita, de ea judicare.

Mine

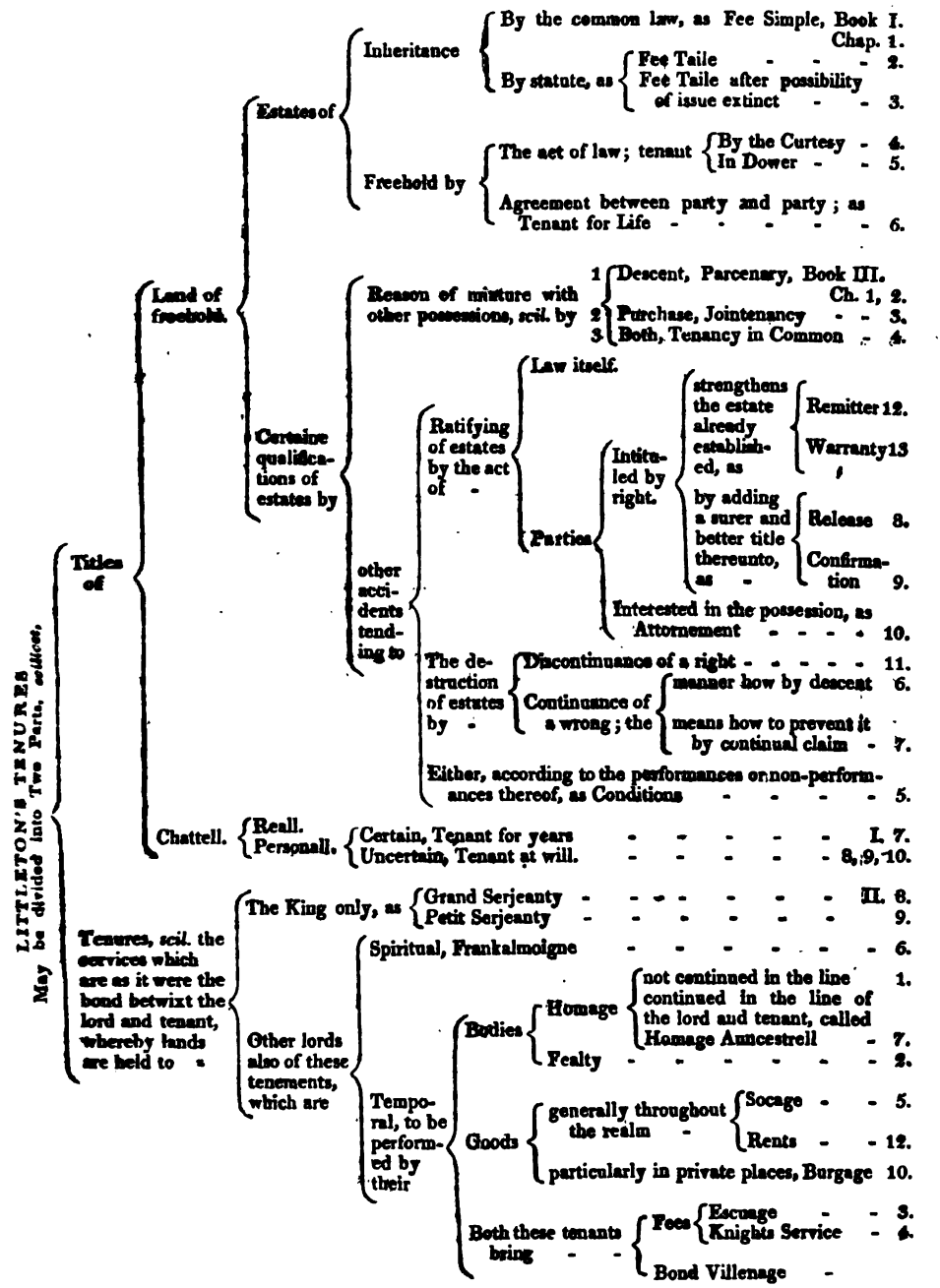
Mine advice to the student is, that before he read any part of our Commentaries upon any Section, that first he read again and again our author himself in that Section, and do his best endeavours, first of himself, and then by conference with others, (which is the life of study) to understand it, and then to read our Commentary thereupon, and no more at any one time than he is able with a delight to bear away, and after to meditate thereon, which is the life of reading. But of this argument we have, for the better direction of our student in his study, spoken in our Epistle to our First Book of Reports.

And albeit the reader shall not at any one day (do what he can) reach to the meaning of our author, or of our Commentaries, yet let him no way discourage himself, but proceed; for on some other day, in some other place, that doubt will be cleared. Our labours herein are drawn out to this great volume, for that our author is twice repeated, once in French, and again in English.

ANALYSIS of LITTLETON.

FEBRUARY 21, 1658—9.

Synopsis totius Littleton *Analyticè.*



Fee Simple. Lib. 1. Cap. 1.

FEE SIMPLE; in which note

- The nature of this estate in respect of
  - The name.
    - The reason of the denomination, *feodum simplex, hæreditas legitima*, §. 1.
    - The usual appellation thereof by this word fee without addition, 293.
  - The quality of the estate. It is the greatest a man can have, 11.
- The kinds thereof Fee simple.
  - Absolute, obtained by
    - 1 Purchase; where note
      - The first obtaining thereof.
        - The means how by one's own act, 12.
        - The words of force, *scil.* his heires, 1.
      - The continuing of it, being gotten by inheritance; in which note
        - The general rules thereof.
          - 1 The next heir collaterall of the whole blood shall inherit, §. 2.
          - 2 None of the half blood, as heir; and therefore the uncle or sister of the whole blood, if the brother had possession, shall be preferred before the brother of the half blood, 6, 7, 8.
        - The degrees thereof between
          - Brethren. The eldest. 5.
          - Others.
            - 1 Lands may lineally descend, but not ascend in the right line, as to father or other ancestor, but shall rather escheat to the lord, 3.
            - 2 The heir of the part of the father shall first inherit, and then on the part of the mother, 4.
    - 2 Descent, the inheritance whereof goeth as before of lands purchased, but that it shall always continue in the line of the ancestor from whom it did come; and for default of such issue shall escheat to the lord, 4.
    - 3 Suits; where observe the manner of pleading, that he was seised
      - Of things in manuall possession, occupation, or receipt, in his own demesne as of fee.
      - Of other things as of fee, 10.
  - Determinable upon contingency; as if a man have lands to him and his heire as long as Paul's standeth; but it is not so of chattells, for they go always to the executors, 740.

Fee Taile. Lib. 1. Cap. 2.

FEE TAILE; in which note

- The quality of this estate in
  - The reason of the name, *scil.* it is called fee taile, because entailed. 1. Limited how long it shall continue; for if the issue in taile faile, the donor or his heirs may enter as in their reversion, 18, 19.
  - The incidents necessary to this estate.
    - Their tenure, *scil.* the donees hold of the donors by such services as they hold of the lord paramount; but donees in frankmarriage hold by fealty only, untill the fourth degree be past, 19, 20. 138.
    - The conveyance to this estate, *scil.* by heirs entailed only.
- The divers sorts thereof; for some are
  - By expresse words of the stat. of West. 2. c. 1. §. 13. and these are
    - General.
      - When lands are given to a man or woman and the heirs of his or their body, 14, 15.
      - For if there be no certain body limited, it is fee simple, 31.
    - Speciall.
      - Expressly, when the body of the baron and feme is limited, 16.
      - Inclusively, when lands are given in frankmarriage, 17. And this estate was at common law, 271.
  - By the equity of the statute,
    - With a distinction to the sex; as to
      - Males only, 21. 23, 24, 25.
      - Females only, 22.
    - For the will of the donor is to be observed, 22.
    - Without; as
      - When lands are given to baron and feme and the heirs of the body of the baron, the feme hath an estate for life, and the baron in taile generall, 26; but if it were given to baron and feme and the heirs of the baron which he shall beget of the body of the feme, he hath taile speciall, and she an estate for life, 27.
      - When to a man and to the heirs which he shall engender on the body of his wife, he hath taile special, and she nothing, 29. 33. 53.
      - When a man hath issue a son, and dieth, and lands are given to the son and to the heirs of the father's body begotten, 30. and many such there be by equity of the statute, 30.

Tenant in Taile after Possibility of Issue extinct. Lib. 1. Cap. 3.

Is when lands are given in special taile, and one of the donees, or the man or woman of whose body the issue in taile is limited to proceed dieth, there being no issue in taile in life, then the surviving donee is thus called, because there is no possibility left of having issue inheritable to the land, § 32, 33, 34.

Tenant by the Curtesy of England. Lib. 1. Cap. 4.

Is when one taketh a feme inheritrix to wife, in whose right he was seised of lands, and by whom he hath or hath had issue born alive, which by possibility might inherit those lands after her death, for he is tenant by the curtesy of England, §. 35.

The reason of the denomination, *scil.* because used in no other country but in England, 35.

Dower. Lib. 1. Cap. 5.

There are five kinds of Dower, §. 51. whereof some are created.

- By the operation of the law.
  - Common; where note -
    - Of what lands a woman shall be endowed, *scil.* of the third part of all such which her husband had during the coverture, if he held them not jointly with others, 45. and if she were at the death of her husband of the age of nine years, 36. *Sed quære*, if this be necessary to the endowment *ad ostium ecclesiæ et ex assensu patris*, 42. If any issue which is or by possibility might have been begotten on her body, might by possibility have been heir, 36. 53, he shall be tenant by curtesy, if the issue might have been her heir, 52.
    - In what manner to hold.
      - In severalty, if the lands were not held in common, 36. 44.
      - By assignment, if it were not certain which she should have, 43.
  - Customary; where according to the custom she may be endowed of the whole, and sometimes of a moity, 37.
- By the act of parties, by matter
  - In suit, which is of two sorts, 38.
    - *Ad ostium ecclesiæ*, when one seised of lands in fee (for tenant in taile cannot thus endow his wife, but that the issue in taile or donor may defeat it, 46.) and being of full age, (otherwise the heir of the husband may put her out, 47.) endoweth his wife at the church door of a certain part of his land, 39.
    - *Ex assensu patris* is as the former, but that this is in the life of the father, the son being heir apparent, 42, in which case it is thought she had need of the deed of the father proving his assent to it, 40.

    These two a woman may refuse, if she never accepted them, and take her dower at the common law, 41.
  - Of record. This is dower *de la plus beale*, where the feme, at the praying of gardein in chivalry in court of record, doth endow herself in the presence of her neighbours of the best part of the land she holdeth as gardein in socage, in recompense of her dower of those lands which the lord hath as gardein in chivalry; and this is for saving the estate during the minority of the heir, 48, 49, 50.

Tenant for Term of Life. Lib. 1. Cap. 6.

Note the
- Kinds of this estate, *scil.*
  - Of the lessee's own life; this is properly called lessee for life.
  - Of another man's life; and this is properly called lessee for another man's life, 56.
- Quality thereof, in consideration.
  - Of the goodness of this estate, *scil.* it is in freehold, but yet in the lowest degree thereof.
  - Of the usual name in passing thereof from the one to the other. As in feoffments in fee they are called feoffor and feoffee, and in gifts donor and donee; so here he that granteth the estate is called lessor, and he to whom it is granted lessee, 57.

Tenant for Years. Lib. 1. Cap. 7.

Note the
- Name of this estate, viz. - - -
  - When one leaseth lands to another for a term of years, the lessee is thus called, 58.
  - So if the lease be but for half a year, or a quarter, for there is no other term to term him, 67.
- Nature of it,
  - How it passeth from the lessor to the lessee
    - By what circumstances.
      1. The lessee may enter when he will by force of his lease, by or without deed; and livery is not necessary, unless where freehold passeth in possession or remainder [then it is], 59, 60.

         Unless it be in exchanges, where if the lands be in one county it is good by parol, 62, 63.

         Note in exchanges,
         - That the estate of the exchanges must be equal [not the value], 64, 65.
         - That in both their deeds mention must be made of the exchange, 65.
      2. How many liveries there needs [when necessary], *scil.* but one in every county, if it be made in the name of all in the same county, 61.
    - At what time it taketh effect, *scil.* at the time prefixed, although the lessor die before the day; and yet the death of the feoffee is a countermand of a letter of attorney to deliver seisin, 66.
  - What inconveniences this estate is tied unto.
    1. To pay the rent reserved, else may the lessor distrain or bring an action of debt; but if the lessor were not seised at the time of the lease, the lessee may plead in barre, if it be not by indenture, 58.
    2. He must amove his household stuff, and come before his lease expire, or else after the lessor may take them, 68.
    3. The lessee for years is bound to repair the house, &c. 71.
    4. Liable to a writ of wast, if he commit any, 67.

Tenant at Will. Lib. 1. Cap. 8.

Note the
- Divers sorts of this estate; for it is created either - - - - -
  - Expressly; as when one letteth lands to hold at his will; and it is called so, because there is no certainty of the estate but only at will, 68. If therefore it be granted to the lessee and his heirs at will, this word (heirs) is void, 68. Yet if the lessor determine his will, the lessee shall have convenient time to carry away his corn and household stuff, as well as executors for the goods of their testator, 68, 69.
  - By implication; as when one having a deed of feoffment made unto him, and entereth before livery, 70.
- Necessary appendances to this estate. For - - - - - -
  - The services reserved.
    - They shall not do fealty, 94.
    - They must pay the rent reserved, else may the lessor distrain or bring an action of debt, 72.
  - The things he is not bound to reparations, yet is punishable for voluntary wast, as well as a bailee for goods lent him, 71.

Tenant at Will according to Custom. Lib. 1. Cap. 9, 10.

- Note the
  - Diversity of this estate; for it is by - -
    - Copy of court roll, 73, and so called, because the tenants have no other evidence but of their lord's court roll, 75. And it is when one holdeth land at the will of the lord; and although they have inheritance, yet if the lord oust them, they have no remedy but by petition, 77, according to the custom of the manor, 73.
    - The verge; which differeth from the former only in the use of the white rod in their surrenders, 78.
  - Condition of it; in regard of
    - The quality of it is a base tenure, for they have no freehold by course of common law, 81; although by custom they may have estates of inheritance, 81, 82.
    - The circumstance
      - In passing it from a man, which is by surrender; for if he alien by deed, it is a forfeiture, 74. And this
      - Surrender is
        - Into the hands of the lord, to the use of him who should have it by some custom, 78.
        - Into the hands of the bailiff or reeve, or of two honest men of the same lordship, and they to present it at the next court, 79. And generally all such customs not repugnant to reason are allowable, 80.
      - In continuing of it being passed by - - -
        - Fine, which must be by plaint in their lord's court, 76.
        - Sustentation of their houses by reparation, 83.
        - Service, *scil.* such a tenant must do fealty, 84. 132.

Homage. Lib. 2. Cap. 1.

- Homage.
  - The nature of this service; *scil.* it is the most honourable a tenant can do to his lord, 85.
  - The performance of it; where note
    - The persons which should
      - Make it. They must have a greater estate than for life; for no tenant for life can take or do homage; therefore one entitled to be tenant *per* curtesy during the life of his wife shall do homage; after her death not, 90.
      - Take it; none but the lord himself, 92.
    - The service itself.
      - The manner how it must be done, viz. the tenant be bare-headed, kneel on both knees, and hold both his hands between the hands of his lord, and shall say, if he hold
        - Of him only, "I become your man," &c. unless he be a man of religion, or feme sole, and they shall leave out these words, 85, 86, 87.
        - Of more lords, he shall say in the end, "saving my faith which I owe unto my sovereign lord the king and other lords," &c. 89.
      - The times how often it shall be done, viz.
        - One tender, if the lord refuse, excuseth the tenant of being distrained for it, until his lord demand it again, and it be denied, 150, 151.
        - Once doing of it excuseth him for his life against any that comes in by descent; but not against him that recovers by any title, 148, 149.

Fealtie. Lib. 2. Cap. 2.

- Fealtie.
  - What manner of service this is.
    - Fealtie, in English, is as much as *fidelitas* in Latin, 91.
    - It is incident to all tenures but frankalmoigne, 131.
  - How long it is to be performed; where note
    - The persons which should - - -
      - Make it; *scil.* for life or years, but not tenant at will, 93. 132.
      - Take it; the steward or bailiff of the lord's court, 92.
    - The forms of it, 88. 91. 94.

Escuage. Lib. 2. Cap. 3.

- **Escuage.**
  - The nature of this service in regard of
    - The nature of the name escuage, in Latin *scutagium, servitium scuti*, 95.
    - The performance thereof.
      - How it ought to be performed, viz. he that holdeth this, when the king makes a voyage royal out of the realme must go with him, and so continue after the rate of forty days, for a knight's fee; but how these forty days shall be accounted, *quære*, 95, 96.
      - If not performed.
        - How it shall be tried, viz. by certificate to the justice under the seal of the marshal of the king's host, 102.
        - How punished, viz. it hath been used to be assessed by parliaments how much kings tenants should pay after the quantity of the tenure; and there the mean lords shall either levy their duties by distress, or by a writ *de scutagio habendo*, 97. 100, 101.
  - The several kinds thereof; for it is either
    - Uncertain, as before; or if the tenants have a custom, to pay half, &c. if it be uncertain, and this kind is intended in speaking of escuage generally, which draweth to it homage, and homage draweth to it fealty, 98, 99.
    - Certain; as to pay 6 *s.* 8 *d.* at all times, this is but socage in effect, 98. 120.

Knights Service. Lib. 2. Cap. 4.

- **Knights Service.**
  - The kinds thereof. } Tenure by
    - Homage, fealty, escuage, is knights service, 103.
    - Castle-gard, 111. 121.
    - Cornage of a common person, 156.
  - The incidents thereunto. It draweth.
    - Wardship; where note the persons:
      - Of the heir,
        - When he shall be in ward, viz. during his nonage, after the death of any ancestor from whom he claims his descent, and shall not be in ward for his body during the life of his father, 114.
        - When out of ward at full age, *scil.*
          - Of an heir male at the age of 21 years, which is full age of male and female, except he enter into religion during his minority, 104. 203. 259.
          - Of an heir female.
            - By the common law at 14 years which is the age of discretion, 103
            - By the stat. Westm. 1. ch. 22 at 16, if the heir were under 14 and unmarried at the death of he ancestor, 103.
      - Of the gardian; which is gardein
        - *En droit*, by reason of the te nure, as before, 116.
        - *En fait*, where the other grant the ward over, 116.
    - Marriage; where note
      - How the lord shall take benefit of the marriage.
        - In what manner, viz. without disparagement.
          - How often, *scil.* but once; and thereupon if th lord marry his ward within the age of 14 years, an he then disagreeth, as he may, or that his wife di during his minority, he shall not be in ward, agai to him for his body, 104, 105, 106.
          - When the heir shall be said be married to his disparagemen 108. Of the kinds thereof, *quær* 109. But generally it cannot b if the ward be above the age 14 years at the time of his ma riage, 107.
        - What penalty if the gardian thus marry him.
          - The friends of t ward may ent upon the gardia 108. In their d fault it seems t ward himself ma 108.
      - What remedy, if the ward refuse to marry upon a lawful tender.
        - If he continue unmarried, he shall forfeit t single value of his marriage to his lord 11
        - If he marry himself during his minority, t double value, 110.
    - Relief of the heir, if he be at full age at the death of his ancestor, which after the rate of 100 sol. for a whole knight's fee, 112, 113.

Socage. Lib. 2. Cap. 5.

SOCAGE.
- The tenure itself; where note
  - The divers sorts thereof.
    - Where one holdeth lands by certain service for all manner of services, as homage and rent, or homage and fealty, or homage, fealty, and rent, 117.
    - By fealty only, if the lord refuse no other service, 118. 130, 131.
    - By escuage certain, 120, to pay a sum certain for guarding a castle, 121, and generally, by any service which is not knights service, 118.
  - The denomination, *socagium*, or *servitium socæ*; the name whereof remaineth, although for the most part the manner of the service by mutual consent be altered into an annual rent, 119.
- The incidents appertaining
  - To the lord of whom the lands are holden, relief after the death of such a tenant; where note
    - How much must be paid for relief, *scil.* the value of a whole year's rent to the lord, 126. 128.
    - When to be paid, *scil.* immediately, or else the lord may distrain for it, unless the services be of that quality that they cannot be gotten but at some certain time of the year, 127. 129.
  - To the gardian in socage.
    - Ward: for if such tenant die, his heir within the age of 14 years, his *prochein amy*, to whom the inheritance cannot come, shall always have such heir in ward until he be 14 years of age; but he must account for the profit, the reasonable expenses deducted, and so must any other that taketh upon him as gardian; but account will not lie against executors but for the profits after the age of 14 years. *Quære*, whether it shall be brought against him for profits after 14 as gardian or bailiff, 123, 124, 125.
    - Marriage doth not of right belong to the gardian; but if he do marry his ward, he must account for it, 123.

Frankalmoigne. Lib. 2. Cap. 6.

FRANKALMOIGNE.
- The commencement of this tenure.
  - To whom lands may be so given to be holden, *scil.* to a man of the holy church, or to be a special corporation, 133, 134.
  - By whom. By the king only, unless it be by prescription, or else before the statute of *quia emptores terrarum, an.* 18 *Ed.* 140.
- The continuance thereof.
  - How long, *scil.* so long as the privity continueth; for if - -
    - The tenancy to be alienated by tenant be in frankalmoigne, or that the reversion cometh to another than the donor and his heirs, this tenure is determined, 139. 141.
  - In what manner; where note
    - What service the tenant must do, *scil.* no terrene service, or other service certain, for then he is called tenant by divine service, 137; but in conscience he ought to make prayers for, &c. but is not compellable otherwise than by complaint to the ordinary visitor, 135, 136. 138.
    - What advantage this tenure hath, *scil.* it draweth to it acquittal, 142.

Homage Auncestrell. Lib. 2. Cap. 7.

HOMAGE AUNCESTRELL.
- When it shall be called homage auncestrell, *scil.* when it hath continued in the lineal descent of lord and tenant without alienation, 143. 147, and it may be either in socage or knights service tenure, 152.
- How it differeth from other services, *scil.* in
  - Acquittal, 144.
  - Warranty, if the lord then being hath received homage of the tenant or his ancestors, else may the lord disclaim, 143. 145. And upon disclaimer the seigniory is extinct, and the tenant shall hold of the lord next paramount, therefore an abbot or prior may not disclaime, 146.

Grand Serjeantie. Lib. 2. Cap. 8.

GRAND SERJEANTIE.
- The service wherein.
  - The several kinds thereof.
    - When one holdeth of the king to do some special service to the king (for the most part within the realm) 155. in proper person, 153, or by some other, 157.
    - When one holdeth of the king by cornage, 156.
  - The nature of it
    - Called grand serjeanty, *quasi magnum servitium*: can be held of none but of the king, 154. 156.
- The incidents thereto.
  - Ward, 158.
  - Marriage, 107, 108.
  - Relief, which is the value of the land for a year *ultra reprisas*, 154.

Petit Serjeantie. Lib. 2. Cap. 9.

This is to render some small thing touching the war, as bow, arrow, &c. 159, which although it be soca in effect, 160, yet it can be held of none but of the king, 161.

Burgage. Lib. 2. Cap. 10.

BURGAGE.

Where this tenure is, *scil.* where the inhabitants of some eminent borough so called heretofo (which now are cities and counties), from whence come the burgesses to the parliament, 164, do hu of the king, or some other spiritual or temporal lords by yearly rent, which is but socage, 162, 163

How it differeth from other places, *scil.* in their customs only; of which note,

- What customs good and allowable.
  - That the youngest son should inherit either solely as heir, as in borou English, 165. 211, or with all his other brothers, as in gavelkind, 210.
  - That the wife shall be endowed of the tenements of her husband, 166.
  - That a man may devise his land by testament, and that to his executor sell, or to his wife, 167, 168, 169.
  - And such generally as stand with reason, and have continued time out the memory of man, 170.
- What not, *scil.* such as are against reason, *quia malus usus abolendus est*, 212: as if one prescribes
  - To have for the marriage of the daughter of his ten being a freeman, 209.
  - To have amends at his own pleasure for damage done u him, 212.

Villenage. Lib. 2. Cap. 11.

VILLENAGE; of which note

The estate continuing in regard of

The manner of this tenure: When it is, viz. when a man that is villein, or a woman which is termed ni 186, hold lands of their lord at will to do villein service, which service a freem may also hold by; for the condition of a villein owner of lands altereth the nat of it, but *non è converso*, 172.

How many sorts there are thereof, viz.

- Villein
  - Regardant, which term is only proper to a villein, 184, whe man hath a manor to which a villein is regardant, 181.
  - In gross.
    - When a villein regardant is granted by deed to anot 181.
    - When one is seised of a villein by prescription, 175. 1 wherein, as in such like, one may not prescribe but showing a deed, &c. in him and his ancestors, whose l he is, 183.
    - When one confesseth himself to be a villein in cou record, 175. 185, as a bastard cannot be a villein ot wise, 188, and then his issue born before such confes is free, 176, born after is bond, although the mother v free, 187.

The mischiefs thereof

- To the person of the villein. The lord may seize his villein, although a chaplain secular, but if the lord maim his villein, the king it seemeth may punis 194.
- To his possessions.
  - His lands and goods are his lord's by seizure, not otherwise, unless the king be lord, *cui nullum tempus occurrit*, 178.
  - His reversions, 179, and his advowsons *plein d'incumbent* claim, 180.

The means how he may be free.

- Expressly by charter of manumission, 204.
- Implied. This is
  - For a time only.
    - When a villein entreth into religion, 202.
    - When a niefe taketh a baron a freeman, 202.
  - For ever.
    - By suit.
      - Of a villein against the lord; Where he shall be answered as in appeal of death, appeal of rape, 190, as executor, 191, 192, if the lord n not protestation that he is his villein, 193.
        Where he shall not; for in other actions villenage ir defence or plea is a good plea in abatement of the ac 195, 196, as also is outlawry, 197, attainder in *præmu* 199, profession in religion, 200. Excommunication ple by the letters of the ordinary a good plea till absolu 201.
      - Of the lord against the villein;
        - If the lord bring a *præcipe*, &c. or other actic debt, trespass, &c. 208.
        - Or an appeal of felony not grounded on an in ment, if it be found with the defendant, 208.
    - Otherwise.
      - If the lord make an obligation to his villein, or a lease, or ment, 205, 206.
      - But it seemeth a lease at will, for the uncertainty is no chisement, 207.

Rents. Lib. 2. Cap. 12.

- Rent service, which is reserved upon a tenure, where note,
  - How it hath beginning.
    - Wheresoever the tenant holdeth of his lord by certain rent, 213, whether it be upon a gift in tail, for life, or for years, 58. 214, or upon a feoffment in fee before the stat. *quia emptores terrarum*, 216, 217, for which a distress is incident of common right, and the tenant is not bound to tender it elsewhere than upon the land out of which it issueth, 341.
    - But then the reversion must remain in him who hath the rent, 215. 228. 346, for rent passeth as incident to the reversion, 572, but not the reverse, 229, for where no fealty is there can be no rent service, 227.
  - How a determination of it.
    - In part by the purchase of parcel of the land; for it is apportionable, unless it be so entire as it cannot be severed; and then such services as are annual are clearly extinct; such as are not, go out of the remnant that is left, 222, 223.
    - In all by disseisin.
      - By a stranger: as if one be disseised of a manor, and the tenants attorn by paying the rent to the disseisor and he die, and his heir be in by descent, 587, if it had been of another rent in gross, it had been a disseisin to me, but at mine election, 588, 589, but if I had given parcel of the manor in tail, before non-payment of the rent, tenant in tail continuing in possession, it could have been no disseisin to me, for that by the gift it is severed from the manor, 590, 591.
      - By the tenant himself; wherein note,
        - The divers kinds of disseisin; which are - - - Rescous, Replevin, Inclosure, Deniall, } 237. and, which is common to the others, Menacing of him which should demand it, 240.
        - The means to recover the rent, when any disseisin is, viz. by an assise, which is *vox æquivoca*, in this sense taken for a writ of assise, 234.

- Rent-charge, viz. when one granteth rent with a clause of distress, 218. or when rent is granted upon equality of partition; where note, 251, 252, 253.
  - How a grant of such a rent doth inure; *scil.* either
    - By distress and avowry in a court of record to charge the land, 219.
    - By a writ of annuity to charge the person of the grantor, 219, unless - - - -
      - There be a special proviso for not charging the person, 220.
      - Or that the grant be only that if such a rent be unpaid to *I. N.* that he may distrain in such a place, 221.
  - By what means such rent may be lost.
    - By purchase of parcel of the land charged, the whole rent is utterly extinct; but if parcel descend, the rent shall be apportioned, 224.
    - By disseisin it may be interrupted; the causes whereof are four: Rescous, Replevin, Inclosure, Denial, } 238

- Rent seck; in which consider,
  - How it hath the original.
    - By grant:
      - If one grant rent out of land without clause of distress, 218.
      - If one hold by fealty and rent, or by homage fealty and rent, and the lord grant the rent only, or grant the rest, reserving the rent, 225, 226.
    - By other accidents; as if there be lord mesne and tenant, the tenant holding over by 5 s. rent, the mesne holding over by 12 d. the lord purchaseth the tenancy, the mesnalty is extinct, yet shall the mesne have the surplusage of the rent, which is 4 s. as a rent seck, 231, 232.
  - How it may be recovered when it is lost.
    - Not by distress, for that were contrary to the name of rent seck, *quasi redditus siccus*, 218.
    - But if the grantee have had seisin thereof, if he be disseised of it, which is by denial, enclosure, 239, he may have an assise, 233. 235.

Parceners. Lib. 3. Cap. 1 and 2.

PARCENERS.

- The divers kinds.
  - By the common law are females, or the heirs of females, which come to their land by descent; so called, because they are compelled to make partition by a writ *de participatione faciendâ*, 241, 242. 254.
  - By custom are heirs in gavelkind, 265.
- Certain rules touching partition.
  - How it may be had.
    - By writ.
      - At whose suit, viz. not only of the parceners, but against others, as tenant by the curtesy, 264.
      - In what manner, viz. the sheriff, by the oath of twelve men, must set out the parts of all the parceners, as well parties to the writ as not, 276, and certify to the justices under his seal, and the seal of the jurors, their partition, 247, 248, 249.
    - Otherwise.
      - By agreement amongst themselves, either with or without deed, 250, 251, 252, in which the parts of all the parceners may be equally set out, or else the part only of one or more, and the rest to hold still in parcenary, 243. 276.
      - By help of friends, where the eldest must choose first, 244, unless herself set out the portions, then she must choose last, 245.
      - By allotment, 246.
      - By hotchpot, which hath only for the donee in frankmarriage, or her heirs; which is done by putting the land which was given her in frankmarriage to the rest which descended from the same ancestor to other coparceners in fee, and to take back so much as with that she had before doth amount unto a full purparty, 266, 267, 268, 269, &c.
  - How it may be defeated, being made
    - By those that were not parties to the partition;
      - If the purparty of his ancestor were unequally set out, 255.
      - If the lands in fee were allotted to one, to the other the lands in tail, and the tenant in fee hath aliened her part, 260.
    - By those that were parties,
      - For impediments annexed to their person at the time of the partition:
        - Infancy, if after his full age he doth not agree unto it, 258.
        - Coverture, if her purparty were not equal with the rest, 256, 257.
      - For eviction of that which was assigned by lawful title; for then he may enter and have a new partition made of the remnant, 262, 263.

Joyntenants. Lib. 3. Cap. 3.

JOYNTENANTS.

- How his estate hath its first creation.
  - Of what things,
    - Of lands and chattels real and personal, 281.
    - Of contracts and covenants; as an obligation, 282.
  - By what means.
    - By title, when one enfeoffeth divers of lands to hold jointly, 277, but baron and feme in such case are but one person in law, and shall have but one part, 291.
    - By sort, when divers disseise one, 278, which is when they put him out without title which was rightfully seised, 279.
- The nature of jointenants considered.
  - In the quality of this estate.
    - They are seised all of them of the entire, 288, and by the common law not compellable to make partition, 290.
    - The survivor shall have the whole, 280, which a devise by will cannot prevent, but only some act executed in the life of the joyntenant, and the survivor shall hold discharged of a rent charge; but not of a lease for years made by his companion, although it be to begin after the death of the lessor, 286, 289.
  - In the quantity; for either it is - -
    - A joint freehold and joint inheritance, 283.
    - A joint freehold and several inheritance, 283.
    - A several freehold and joint inheritance, - -
      - By the form of the gift of the giver, 283, 284, 285.
      - By the act of one of the jointenants; as if one make a lease for life, and die living lessee for life, by the he hath severed the freehold, but not the inheritance *Quære*, for the contrary seemeth the better opinion 302, 303.

Tenants in Common. Lib. 3. Cap. 4.

- Tenants in common.
  - Of what things a tenancy in common may be.
    - Of lands
      - By prescription.
      - By grant
        - To a common person.
          - If one of divers jointenants alien in fee, or in taile, the alienee is tenant in common with the others, 292. 294, 295, 296. 304.
          - If one parcener alien her part, it is so likewise, 309.
          - If *I. S.* enfeoffe *T. S.* of the moiety of his lands, not assigning it in severalty, 299, and generally when two or more hold land in fee, or taile, or for life, 300, 301, undivided, and by the common law not compellable to make partition, 318, by several titles, 292.
        - To two bodies politique, or a body natural and a body politique, for they cannot be jointenants, 296, 297.
    - Of chattels
      - Real, 319, 320.
      - Personal, 321.
  - How they shall maintain suit against - -
    - Strangers in action touching the realty they shall sever, unless the thing they sue for be so entire as it cannot be severed: touching the personalty, they shall join where jointenants and parceners join in both, 311, 312, 313, 314, 315, 316, 317.
    - One another.
      - They may maintain an *ejectione firmæ*, 322, and an ejectment *de gard*, 323.
      - But no action of trespass *quare vi et armis*, nor any action of chattels personal and real not severable, but in the first come first served, 323.

Estates upon Condition. Lib. 3. Cap. 5.

- Estates upon condition are of two sorts, *viz.* upon condition
  - *In fait*; the consideration whereof is double.
    - In the creation of them.
      - What conditions may be made.
        - For the manner of them.
          - Precedent; as if a man make a lease for years upon condition that if he do such an act within such a time, that then he shall have fee, 349, 350.
          - Subsequent, when the condition followeth in defeasance of the estate precedent, 350.
        - The matter.
          - Such as are against law are void; as that a man seised in fee should not alien at all, 360.
          - Such as agree with the law are good; as
            - Not to alien to such an one, 361.
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* For which *Vide* subsequent page. † For which also *Vide* subsequent page.

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Descents.

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A. For impediments.

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  - Compulsive; as if he were in prison, 436, for neither outlawry, nor recovery by default, shall bar such an one, which are matters of record, 437, 438.
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Continual Claim. Lib. 3. Cap. 7.

Continual Claim.

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Releases. Lib. 3. Cap. 8.

Releases.

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    - A release of real actions can be pleaded by none but the tenant of the land, 494.
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Confirmation. Lib. 3. Cap. 9.

CONFIRMATION.

The force of it,

The form of it, 515, in which these words *dedi et concessi* amount to as much as *confirmavi*, 531, which (as some others) inureth by way of extinguishment; as where the lord granteth his rent to the tenant, or the grant of a rent-charge, 543, 544.

How it inureth.

Where it inureth, viz. where there is such a possession before whereupon a confirmation may work; therefore if one take away my villein in gross, and I confirm his estate, it is void, 541, 542.

In what manner.

Expressly.

By implication; as if the heir of a disseisor being in by descent, the disseisee joineth with him in a feoffment, here is the confirmation only of the disseisee, and the feoffment of the other; but if the disseisee shall bring a writ of entry in the *per et cui* against the feoffee, *quære* how he shall plead this, 534.

To what purpose.

Merely to confirm an estate made before, which is the proper force of it; for *confirmare idem est quod firmum facere*; as when disseisee confirmeth the estate of the disseisor, 519, 520, 521, 522, or of a lessee to a disseisor, or a rent-charge granted by a disseisor, though he after enter into the land, *quære de hoc*, 527, or when the lessor confirmeth the grant, 529. 547, or the lessee of his lessee, 516, 517, or when the lord confirmeth the estate of the tenant of the land where the seigniory, rents, and common, remain notwithstanding, 535, 536, 537, or where the parson of a church chargeth his glebe by the confirmation of the ordinary or patron seised in fee, it is made perpetuall, 528. 648, *quære*, whether the patron and chaplain may not do the like, 530.

To confirm with some addition.

By enlarging the estate confirmed.

To commence presently, 524. 526. 535.

To take effect by way of remainder, 523, where it is necessary to have these words, *to have and to hold*, 525, but by neither of both a rent-charge can be enlarged by confirmation, but by new grant upon surrender of the old; but the rent *in esse* before may be, 548, 549.

By altering of it; as a lord by confirmation may diminish the services of his tenant, but not exchange them for other or reserve new, 538, 539, unless he alter it by frankalmoigne, which indeed is no corporal service, 540.

Attornment. Lib. 3. Cap. 10.

ATTORNMENT.

Where it needeth.

Wheresoever the lord, or he in reversion, grants the service of his tenant, or what lies in reversion by deed, 551. 568. Without attornment (which is nothing but a consent to the grant) made to the grantee in the life of the grantor, the grant is void; therefore if one make two several grants to two several persons, he to whom the attornment is first made shall have it, 552, and a reversion barely granted without attornment settleth not, 567. But if it be granted by fine, the reversion settleth without attornment; but the conusee cannot punish waste, or have relief, or other things lying in distress, without it, 579, 580, 581, 582. So they who claim by grant cannot avow without attornment, but such as claim by escheat, 583, 584, or by devise, may, 585, 586.

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The party which should attorn

Have sufficient before the grant; as,

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Be the same person which granteth; for then he cannot attorn to his own grant, 578.

Where services be granted to the tenant, who hath as great estate in the tenancy as the grantor hath in the seigniory; for there it inureth by way of extinguishment, 561.

How it is made.

By what person, viz. always by him who is tenant to the grantor; therefore

Upon grants of seigniories, the tenants of the manor must attorn, but not the tenants at will, 553. If it be in lease, he in the reversion must attorn, for he is tenant to the lord, 554. 562, but he in remainder must not, for then the particular tenant is tenant *as to make avowrie*, 557, and if there be mesne and tenant, the mesne must attorn, 555.

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Upon grant of a remainder, the particular tenant, 569.

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Implicatively;

By accepting of the grant

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Of a remainder; as where the estate of the tenant for life is confirmed with a remainder, 573.

By giving *a penny* as seisin of the rent, which includes an attornment, but not otherwise, 565.

By re-entering into his term; as if lessor enter upon his lessee for years, or life, and make a feoffment, and the lessee re-enter, 576, 577.

Discontinuance. Lib. 3. Cap. 11.

Discontinuance.

- What it is, viz. when by wrongful alienation of land, he which hath right cannot enter, but is driven to his action, 592.
- When it is; in which observe,
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    - May discontinue. They are either bodies
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        - Abbot,
        - Bishop,
        - Dean, if he alien
          - Part of his deanery, 652.
          - Part of the lands of the dean and chapter, it is not, 652.
        - Master of an hospital, 657.
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        - The husband, if he alien his wife's land, 594.
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A. For a time only, and that depending upon

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Remitter. Lib. 3. Cap. 12.

Remitter.

The reason of the name, viz. it is an ancient term in law when a man hath two titles unto land, and he cometh to possession by the later; and when he is in, the law supposeth him in by the former, which is the surer title, 659, and the cause hereof is, because he hath no man against whom to bring his action for his former title, 661.

When it happeneth.

To whom, *scil.* to none but such as have a freehold in deed or law cast upon them, 680, 681, 682, 683.

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By descent,

Natural; as if tenant in taile discontinue, and after disseiseth the discontinuee, and die, the issue in taile is remitted, 659. 662, notwithstanding a recovery by feigned title; which

If it be not executed, he shall bar his execution, 690.

If it be executed, he shall satisfy, 688.

Civil; as if an abbot or bishop alien, and the alienee enfeoffeth him again with license, his successor is remitted, and shall hold discharged of all mesne incumbrances, 686, 687.

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By act of law;

As if the heir in taile within age marry with the discontinuee, 665.

Or upon disclaimer of the discontinuee, which the demandant cannot hinder, but in such actions where dammages are to be recovered, 691, 692.

By the act of the party himself.

Where his entry is congeable: there the taking of any estate otherwise than by indenture, or matter of record, will not estop him of his remitter, 693, 694, 695, 696.

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A. Where his entry is not congeable, there his folly in taking any thing from the discontinuee must be excused,

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Baron and feme, although it were by fine, 669, for in taking any thing she shall not be examined, 670. Yet the baron cannot bar his lessor in an action of wast, 667, but the feme in default of her baron at the grand distress may, 668, 669, and she shall maintain an assise against him for entry afterwards, 679, and if this be but of a particular estate, they in reversion or remainder are remitted also, 673.

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Warranty. Lib. 3. Cap. 13.

Warranty.

- The several kinds of it; which are
  - Lineal, where a man maketh a feoffment with warranty, and this descends to his son; the cause of which name is not for the lineal descent of it, but because the land should have lineally descended if such warranty had not been, 703. 706. 715. The like is of the feoffment of the mother with warranty, 713, 714.
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    - If the father disseise the son, and after make a feoffment with warranty, 704.
    - If a man be disseised of lands in fee, and have issue two sons, the youngest releaseth with warranty, this is collateral to the eldest, 707, 708.
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A. What effect a warranty is of, viz. to bar or rebutt, &c.; where note,

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END OF THE ANALYSIS OF LITTLETON.

A

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OF THE

LAWS OF ENGLAND.

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Dedit Deus his quoque finem.

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END OF INDEX TO NOTES.

THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND.

Chap. 1. Fee simple. Sect. 1.

[1. a.] *TENANT in fee simple is he which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin,* feodum simplex, *for* feodum *is the same that inheritance is*(1), *and* simplex *is as much as to say, lawfull or pure. And so* feodum simplex *signifies a lawfull or pure inheritance.* Quia feodum idem est quò hæreditas, et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quòd hæreditas legitima, vel hæreditas pura. *For if a man would purchase lands or tenements in fee simple, it behooveth*

(1) Sir Thomas Smith and Dr. Cowell find fault with Littleton for this explanation of *fee*; but without the least reason. Though *fee*, in its *general* acceptation, signifies *land holden*, as distinguished from *land allodial*; yet in our law, it is most frequently used in a *particular* sense, to denote the *quantity* of estate in land, which is *always* the sense of the word when we say, that one is *tenant* or *seised in fee*. Therefore Littleton is not *merely* justified in writing, that *fee is the same as inheritance*; for if in describing who is *tenant in fee simple*, he had explained the word otherwise, he would have misled the student. The censure of Littleton would have been spared, if the difference between attempting to give the etymology of *fee* and its *general* sense, and professing only to explain a *particular* use of the word, had been attended to. See *Smith's Commonwealth of Engl.* b. 3. c. 10. *Cow. Interp.* verbum *Fee*, and Wright's Ten. 149. In this last book Littleton is well defended. Lord Coke's comment on *fee* is very full to the same purpose. See post. 1. b.

behooveth him to have these words in his purchase, To have and to hold to him and to his heires: for these words (his heires) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assignes for ever: in these two cases he hath but an estate for term of life, for that there lacke these words (his heires), which words onely make an estate of inheritance in all feoffments and grants.

Vide Sect. 85.

"TENANT," in Latin *tenens*, is derived of the verbe *teneo*, and hath in the law five significations. 1. It signifies the estate of the land: as when the tenant, in a *præcipe* of land, pleads *quòd non tenet, &c.* this is as much as to say, that he hath not seisin of the freehold of the land in question. And in this sense doth our author take it in this place: and therefore he saith, tenant in fee simple is he which hath lands to hold to him and his heires. 2. It signifieth the tenure or the service whereby the lands and tenements be holden; and in this sense it is said in the writ of right, *quæ clamat tenere de se per liberum servitium, &c.* And in this signification he is called a tenant or holder; because all the lands and tenements in England, in the hands of subjects, are holden mediately or immediately ☞ of the king (1). For in the law of England we have not, properly, *allodium*, that is, any subjects land that is not as it is holden; unlesse you will take *allodium* for *ex solido*, often taken in the Booke of *Domesday* (2): and tenants in fee simple are there called *alodarii* or *aloarii*. And he is called a tenant, because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a (3) tenant, because he hath no superior but God Almighty; *prædium domini regis est directum dominium, cujus nullus author est nisi Deus.* And, as Bracton saith, *Omnes quidem sub eo, et ipse sub nullo, nisi tantùm sub Deo.* The possessions of the king are called *sacra patrimonia*, and *dominica coronæ regis*. But though a subject hath not properly *directum*, yet hath he *utile dominium*. Of these tenants our author speaketh in his second booke. 3. Also, *tenere* signifieth performance, as in the writ of covenant, *quòd teneat conventionem*, that is, that he hold or performe his covenant. 4. And likewise it signifieth to be bound, as it is said in every common obligation, *teneri et firmiter obligari*. Lastly, It signifieth to deeme or judge; as in 38 E. 3. c. 4, it shall be holden for none; (that is) judged or deemed for none; and so we commonly say, it is holden in our bookes. And these several significations doe properly belong to our tenant in fee simple. For he hath the estate of the land, he holdeth the land of some superiour lord, and is to perform the services due, and thereunto

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8 H. 7. 12. 18 E. 3. 35. 24 E. 3. 65, 66. 44 E. 3. 5. 48 E. 3. 9. (2 Inst. 501.) (4 Inst. 192.) (12 Co. 9. Case of Stanneries) Mir. des Just. c. 1. sect. 3. Customs de Normandy, cap. 28. Le st. de 16 R. 2. cap. 5. 14 El. y. 313. a. 1 Co. 47, in Alton Wood's case. (Cro. Cha. 82.) Bract. lib. 1. cap. 8.

(1) Same doctrine, 50 Ass. pl. 1. post. 65. Plowd. 498. The origin and principle of this doctrine is well explained in Wright's Ten. 58, and 2 Blackst. Comm. 48. ed. 5. See also Wright's Ten. 137, and Mad. Baron. Anglic. 25.

(2) See post. 5. a. For particulars concerning *Domesday* Book, see the books cited in Wright's Ten. 56, in note p. and also an Account of Domesday Book, and an Account of Danegeld, both printed by order of the Antiq. Soc. in 1756.

(3) For examples and consequences of this doctrine, see Dy. 154. Plowd. 212. post. 16. a. 6 Co. 5. b. Finch, fol. ed. 7. 2. Ro. Abr. 513, 514. Post. 2. b. n. 4.

(4) For

thereunto he is bounden by doome and judgement of law. Of the severall estates of land our author treateth in his first booke: and beginneth with fee simple, because all other estates and interests are derived out of the same.

Brit. fo. 83. 207, 208. Fleta, lib. 5. cap. 5. & lib. 3. cap. 8. Bract. lib. 4. 263.

(4 Inst. 202.) Domesday. Mir. des Just. cap. 2. sect. 15. 17.

"*Fee simple.*" Fee (4) commeth of the French *fief, (i. e.) prædium beneficiarium*, and legally signifieth inheritance, as our author himselfe hereafter expoundeth it. And simple is added, for that it is descendible to his heires generally, that is, simply, without restraint to the heires of his body, or the like. *Feodum est quod quis tenet ex quâcunque causâ sive sit tenementum, sive redditus, &c.* In *Domesday* it is called *feudum*. [*a*] Of fee simple, it is commonly holden that there be three kinds, *viz.* fee simple absolute, fee simple conditionall, and fee simple qualified, or a base fee (5). But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, *viz.* simple or absolute, conditionall, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee. * Hereby it appeareth, that fee in our legall understanding signifieth, that the land belongs to us and our heires, in respect whereof the owner is said to be seised in fee; and in this sense the king is said to be seised in fee. [*b*] It is also taken as it is holden of another by service, and that belongeth onely to the subject; *Item dicitur feodum alio modo ejus qui alium feoffat, et quod quis tenet ab alio, ut si sit qui dicat, talis tenet de me tot feoda per servitium militare.* And Fleta saith, *Poterit unus tenere in feodo quoad servitia, sicut dominus capitalis, et non in dominico; aliis in feodo et dominico, et non in servitio, sicut liberè tenens alicujus.* [*c*] And therefore if a stranger claim a seigniory, and distreyne and avow for the service, the tenant may plead, that the tenancy is *extra feodum, &c.* of him, (that is) out of the seigniory, or not holden of him that claimeth it; but he cannot plead *extra feodum, &c.* unlesse he take the tenancy, that is, the state of the land upon him. Of fee in the first sense our author treateth in this first booke; and as it is taken in the second sense, in his second booke; and of the third you shall read in our author, Sect. 13. 643, 644, 645, and plentifully in our books quoted in the margent.

Bract. lib. 2. cap. 5, 6, 7. Brit. cap. 34. fo. 89. Flet. lib. 3. cap. 2. 8, & 9. & lib. 5. cap. 5. [*a*] Bract. fo. 263, & 207. Pl. Com. in Wals. Cas. 7 H. 4. 46. 8 H. 4. 15. 18 H. 8. 3. b. 27 Ass. 33. 18 Ass. 5. 18 E. 3. 46. 24 E. 3. 28. 9 E. 4. 18. 16 H. 7. 4. 10 E. 3. Account 56. 22. R. 2. Disc. 50. 12 E. 4. 3. 15 E. 4. 8. Dy. 8 El. 252, 253. 12 H. 8. 8. 4 H. 7. 2. The case of a person which hath a qualified fee, see in the title of Desc. * Vide Sect. 4. [*b*] Bract. lib. 4. fo. 263. Flet. lib. 5. cap. 5. Brit. fo. 205. 207. [*c*] 2 Ass. p. 4. 12 Ass. 38. 12 E. 3. tit.

Hors de son fee, 28. 28 Ass. 41. 7 H. 4. 30. 2 H. 6. 1. (9 Co. 20, & 34, b. 2 Inst. 296. Cro. Jam. 127. Hob. 108. Doctr. Plac. 132. 216.)

"*Lands or tenements.*" Here it is to be observed, that a man may have a fee simple in three kinds of hereditaments, (6) *viz.* reall, personall, and mixt. Reall, as lands and tenements, whereof our author here speaketh. Personall, as king Edward the first, in the thirteenth yeare of his raigne, *concessit Edmundo fratri suo charissimo, quòd ipse et hæredes sui habeant, ad requisitionem suam in cancellariâ nostrâ et hæredum nostrorum, justiciarios*

Rot. pat. 13 E. 1. (4 Inst. 314. Cro. Ja. 155.)

(4) For the derivation of the word *Fee*, see Wright's Ten. 3, and the books there cited.

(5) See the same division of fee in 10 Co. 97. b. 2 Inst. 96. Vaugh. 273. 2 L. Raym. 1148; and for instances of a qualified fee, see post. 27. Plowd. 557. 10 Co. 97. 7 E. 4. 12. a. Cro. Ch. 430. Hardr. 147.

(6) For the extent of the word *hereditament*, and the difference between *that* and *tenement*, see post. 6. a.

[2. a.]

justiciarios & ad placita forestarum, quas idem frater noster habet ex dono domini regis Henrici patris nostri, secundum assis. forestæ tenend,' &c. In this case the grantee and his heires had a personall inheritance in making of a request to have letters patents of commission to have justices assigned to him to heare and determine of the pleas of the forrests, and concerneth neither lands or tenements. And so it is if an annuity be granted to a man and his heires, it is a fee simple personall: (1) *et sic de similibus.* And lastly, hereditaments mixt both of the realty and personalty. As the abbot of Whitbye in the county of Yorke having a forrest of the gift of William of Percie founder of that abby, and by the charters of king John and of other his progenitors, king Henry the third did grant *abbati et conventui de Whitbye, quòd ipsi et eorum successores in perpetuum habeant viridarios suos proprios de libertate suâ de Whitbye eligend' de cætero in pleno com. Eborum, prout moris est, ad responsiones et præsentationes faciend' de transgressionibus, quas amodò fieri continget de venatione intra metas forestæ suæ de Whitbye, quam habent ex donatione Willi. de Percey et Alani de Percey filii ejus, et redditione et concessione domini Johannis quondam regis Angliæ patris nostri, et confirmatione nostrâ, coram justiciariis nostris itinerantibus ad placita forestæ in partibus illis et non alibi, sicut viridarii forestæ nostræ hujusmodi responsiones et præsentationes facere debent, et consueverunt. Et si contingat aliquos forensecos, qui non sunt de libertate prædictorum abbatis et conventûs, transgressionem facere de venatione intra metas forestæ prædictæ, quos prædicti viridarii attachiare non possunt, Volumus et concedimus pro nobis et hæredibus nostris quòd hujusmodi transgressores per justiciarios forestæ nostræ ultra Trentam attachientur, ad præsentationem viridariorum prædict. ad respondendum inde coram justiciariis nostris itinerantibus ad placita forestæ nostræ in partibus illis, cùm ibid. ad placitandum venerint prout secundum assisam et consuetudinem forestæ nostræ fuerint faciend'.* Which charter was pleaded upon the claime made by the abbot of Whitbye before Willoughby, Hungerford, and Hanbury, justices in eire in the forrest of Pickering, which eire began *anno* 8 E. 3. And these before them were allowed. And when the king created an earl of such a county or other place, to hold that dignity to him and his heires, this dignity is personall, and also concerneth lands and tenements. (2) But of this matter more shall be said in the next Chapter, Sect. 14, and 15.

Ro. Pat. an. 47 H. 3. Itin. Pickering, 8 E. 3 Ro. 42.

(7. Co. 33.)

Bract. lib. 4. cap. 9. fo. 263. Brit. cap. 32, & 79.

For interpretation of words and etymologies, vid. Sect. 9. 18. 95. 116. 119. 135.

"*And it is called in Latin, feodum simplex, for feodum is the same that inheritance is.*" Here *Littleton* himselfe teacheth the signification of *feodum*, according to that which hath been said, which only is to be applied to fee simple pure and absolute. And this and all his other interpretations of words and etymologies throughout all his three bookes (wherein the studious reader will observe many) are perspicuous and ever *per notiora, et nunquam ignotum*

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(1) An annuity of inheritance is held to be forfeitable for treason as an *hereditament*, 7 Co. 34, b. yet being only *personal*, it is not an hereditament within the statute of mortmain of the 7 E. 1. st. 2, nor is it intailable within the statute *de donis*. See post. 2. a. b. & 20. a.

(2) Therefore such dignity has been adjudged to be intailable within the statute *de donis*. See post. 20. a.

(3) For

ignotum per ignotius; and are most necessary, for *ignoratis terminis ignoratur et ars.* 154. 164. 174. 184. 186. 194. 204. 234. 267, 268. 332. 337. 424. 520. 592. 645. 689. 733.

"*Simplex is as much as to say, lawfull or pure.*" Hereof he treateth onely in this place. And *Littleton* saith well, that *simplex idem est quòd purum. Simplex enim dicitur quia sine plicis; et purum dicitur, quòd est merum et solum sine additione. Simplex donatio et pura est, ubi nulla addita est conditio sive modus; simplex enim datur, quòd nullo additamento datur.* Bract. lib. 2. cap. 39, fo. 92. 62, b. lib. 4. cap. 28. Fleta. lib. 3. cap. 8. Bract. lib. 2. cap. 5, &c. Britt. cap. 34.

"*A lawfull or pure inheritance.*" And therefore it is well said, *quòd donationum alia simplex et pura, quæ nullo jure civili vel naturali cogente, nullo precedente metu vel interveniente, ex merâ gratuitâque liberalitate donantis procedit, et ubi nullo casu velit donator ad se reverti quod dedit; alia sub modo, conditione, vel ob causam, in quibus casibus non propriè fit donatio, cùm donator id ad se reverti velit, sed quædam potiùs feodalis dimissio; alia absoluta et larga; alia stricta et coarctata, sicut certis hæredibus, quibusdam à successione exclusis, &c.* And therefore seeing fee simple is *hæreditas legitima vel pura*, it plainly confirmeth that the division of fee is by his authority rather to be divided as is aforesaid than fee simple. And he saith well in the disjunctive, *legitima vel pura*, for every fee simple is not *legitimum*. For a disseisor, abator, intruder, usurper, *&c.* have a fee simple, but it is not a lawfull fee. So as every man that hath a fee simple, hath it either by right or by wrong. If by right, then he hath it either by purchase or descent. If by wrong, then either by disseisin, intrusion, abatement, usurpation (3), &c. In this Chapter he treateth onely of a lawfull fee simple, and divideth the same as is aforesaid. Fleta, lib. 3. ca. 3. Plowd. 58. b.

"*For if a man purchase.*" Persons capable of purchase are of two sorts, persons natural created of God, as *I. S. I. N. &c.* and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, *viz.* either sole, or aggregate of many: again, aggregate of many, either of all persons capable, or of one person capable, and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 655, shall be shewed. Some men have capacitie to purchase, but not abilitie to hold: some capacity to purchase, and ability to hold or not to hold, at the election of them or others: some, capacitie to take and to hold: some, neither capacitie to take nor to hold: and some, specially disabled to take some particular thing. Persons capable of purchase. Who have ability to grant. Vide Sect. 57. 11 Eliz. Dier. 283. 11 H. 4. 20, & 26. 7 E. 4. 29. (1 Ro. Abr. 194.)

[2. b.] If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him ☞ and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold

(3) For the difference between such estates by wrong, see post. 277, a. and that they cannot be said to be by purchase, see post. 3. b. & 18. b.

(1) Therefore on a covenant to stand seised, an use will arise for an alien. Godb. 275. But by *act of law*, as by *descent*, he cannot even *take* for the benefit of the king. 7 Co. Calvin's case, 25. a. Post. 31. b. and 1 Ventr. 417. See in Dy. 283, b. the case of a feoffment to an alien and another to uses.

hold(2). For upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made a denizen and purchase land, and die without issue, the lord of the fee shall have the escheat, and not the king. But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods, and the like. For if he take a lease for yeares of lands, meadows, &c. upon office found, the king shall have it (6). But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as necessary to his trade or traffique, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9); and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of sir James Croft, Pasch. 29 of the raigne

32 Hen. 6. 23. Pl. Com. 483.

5 Mar. Br. tit. Denizen, 22.

Pasch. 29 Eliz. in Sir James Croft's case. 49 Ass. pl. 2. 49 E. 3. 11. (5 Co. 52. b.)

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(2) If the purchase is made with the *king's license*, it seems that he may hold. See 14 Hen. 4. 20. How the law is, where an alien purchases in the name of a trustee, see King and Holland, Styl. 20, &c. All. 14, and 1 Ro. Abr. 194. See also 13 Geo. 3. c. 14, which enables aliens to lend money on land, &c. in the West Indies.

(3) But not *before* office, except in case of the alien's death. Adj. 5 Co. 52. b. Before office, recovery by an alien tenant in tail will bar remainders. Adj. Gouldsb. 102. 4 Leon. 84.

(4) If an alien purchases a copyhold, it is said that it shall escheat to the lord. Dy. 2. b. in marg. but see 1 Mod. 17, and All. 14.

(5) See in Plowd. 229, several cases, in which, for a like reason, the king is entitled without office.

(6) Accord. 7. Co. Calvin's case, Dy. b. in marg.

(7) But 32 H. 8. c. 16, s. 13, makes void all leases of houses or shops to an alien being an *artificer* or *handicraftsman*. This law, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed; but in favour of aliens, it has been construed very strictly. See 1 Sid. 309. 1 Saund. 7. 2 Show. 135. 3 Mod. 94. 3 Salk. 29. In the latter book a lease to an *alien artificer* is said to be forfeitable to the king at common law; but for this extraordinary doctrine no authority is cited. As to the capacity of aliens to take personal chattels, see 2 Ro. Rep. 93.

(8) Contra 1 And. 25. N. Bendl. 36. See in Cro. Cha. 8, a case where administration to an intestate alien was granted to his nephews and nieces, who were also aliens, and part of the estate consisted of leases for years.

(9) If this be the common law, ought not its severity to be corrected by the legislature? To deny the right of taking a house for habitation to aliens not being *merchants*, is like forbidding all *other* foreigners to come and reside here. See 7 Co. Calvin's case, 17. a, where lord Coke seems to express himself without distinguishing between aliens being merchants and other aliens.

raigne of queene Elizabeth. Also, if a man commit felony, and after purchase lands, and after is attainted, he had capacitie to purchase, but not to hold it; for in that case the lord of the fee shall have the escheat (10); and if a man be attainted of felony, yet he hath capacitie to purchase to him and to his heires, albeit he can have no heire, but he cannot hold it; for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacitie to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king, no more than the alien-née hath. If any sole corporation or aggregate of many, either ecclesiasticall or temporall (for the words of the statute be *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacitie to take but not to retaine (unlesse they have a sufficient license in that (11) behalfe); for within the yeare after the alienation, the next lord of the fee may enter; and if he doe not, then the next immediate lord from time to time to have half a yeare; and for default of all the mesne lords, then the king to have the land so aliened for ever, which is to be understood of such inheritance as may be holden. But of such inheritances as are not holden, as villeines, rent charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. An annuity granted to them is not mortmaine, because it chargeth the person only. Some have said that it is called mortmaine, *manus mortua, quia possessio eorum est immortalis, manus pro possessione, et mortua pro immortali*, and the rather, for that by the laws and statutes of the realme, all ecclesiastical persons are restrained to alien. * Others say it is called *manus mortua per antiphrasin*, because bodies politique and corporate never die. Others say that it is called mortmaine by resemblance to the holding of a man's hand that is ready to die, for what he then holdeth he letteth not goe till he be dead. These and such others are framed out of wit and invention; but the true cause of the name, and the meaning thereof, was taken from the effects, as it is expressed in the statute itself, *per quod quæ servitia ex hujusmodi feodis debentur, et quæ ad defensionem regni ab initio provisa fuerunt, indebitè subtrahuntur, et capitales domini eschaetas suas amittunt*, so as the lands were said to come to dead hands as to the lords, for that by alienation in mortmaine they lost wholly their escheats, and in effect their knights-services for the defence of the realme, wards, marriages, reliefes, and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service.

Magna Charta, cap. 36. 7 E. 1. stat. 2. de Religiosis. W. 2. 13 E. 1. cap. 33. 15 R. 2. cap. 5. 23 H. 8. cap. 10. 39 El. cap. 5. 23 H. 3. Ass. 436. 29 Ass. p. 17. Brit. fo. 32. Fleta, lib. 3. cap. 4, & 5. 19 E. 2. tit. Vill. 34. 29 E. 3. Ibid. 13. 21 E. 3. 5. 4 H. 6. 9. 19 H. 6. 63. 65. 3 E. 4. 14. 19 E. 3. Mortm. 8. 34 H. 6. 37. 19 H. 6. 63. (Plowd. 502. a.) 7 E. 4. 14. * Pl. Com. 193. in Wroteslye's case. Le statut. de Religiosis. 7 E. 1. st. 2.

I passe over villeins or bondmen, who have power to purchase lands, but not to reteyne them against their lords, because you shall reade at large of them in their proper place in the Chapter of Villenage.

An infant or *minor* (whom we call any that is under the age of 21 yeares) hath, without consent of any other, capacity to purchase, for it is intended for his benefit, and at his full age he may

(Cro. Ja. 320. 1 Ro. Abr. 731.)

(10) Tenant in tail is guilty of murder, and before conviction levies a fine. It was a question, whether the fine should bar the issue for the lord's benefit; and the court inclined to think that it should; but no judgment was given. 1 Wils. 2. Part. 220.

(11) As to this, see post. 98. 2.

may either agree thereunto, and perfect it, or without any cause to be alledged, waive or disagree to the purchase; and so may his heires after him, if he agreed not thereunto after his full age.

A man of non-sane memory may, without the consent of any other, purchase lands, but he himselfe (12) cannot waive it; but if he die in his madnesse, or after his memory recover, without agreement thereunto, his heire may waive and disagree to the state, without any cause shewed; and so of an ideot. But if the man of non-sane memory recover his memory, and agree unto it, it is unavoydable.

If an abbot purchase lands to him and his successors without the consent of his convent, he himself cannot waive it, but his successor may upon just cause shewed; as if a greater rent were reserved thereupon than the value of the land, or the like; but he cannot waive it unlesse it be upon just cause, *et sic desimilibus, prælatus ecclesiæ suæ conditionem meliorare potest, deteriorare nequit.* And in another place he saith, *Est enim ecclesia ejusdem conditionis, quæ fungitur vice minoris.*

43 Ass. p. 23.

Bract. lib. 2. fo. 12, & 32.

☞But no simile holds in every thing, according to the ancient saying, *Nullum simile quatuor pedibus currit* [a]. An hermaphrodite may purchase according to that sexe which prevaileth. A feme covert cannot take any thing of the gift of her husband (1), but is of capacity to purchase of others without the consent of her husband. And of this opinion was *Littleton* in our books, and in this book, Sect. 677, but her husband may disagree thereunto, and devest the whole estate; but if he neither agree nor disagree, the purchase is (2) good; but after his death, albeit her husband agreed thereunto, yet she may without any cause to be alledged waive the same, and so may her heires also, if after the decease of her husband she herselfe agreed not thereunto.

[3. a.]

[a] 1 H. 7. 16. 7 H. 4. 17. 18 H. 6. 8. 9 E. 3. 30. 15 E. 4. fol. 1. b. 27 H. 8. 24. (Hob. 204. 5 Co. 119. b.

[b] A name of purchase. 2 H. 4. 25. 1 H. 5. 8.

[b] A wife (*uxor*) is a good name of purchase, without a Christian name; and so it is if a Christian name be added and mistaken, as *Em* for *Emelyn*, *&c.* for *utile per inutile non vitiatur.* But

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(12) Fitzherbert argues strongly, that a noncompos may plead his disability to avoid his own acts as well as an infant. Fitz. Nat. Br. 202. See post. 247, a & b, much curious learning on the subject, and also 2 Blackst. Com. ed. 5. p. 291, where the progress of the opinions on this subject is critically stated.

(1) Adjudged acc. in Chancery, 2 Vern. 385, and 3 Atk. 72. But the doctrine must be understood with various limitations.—1. Though the husband cannot convey to the wife *immediately*, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use. See post. 112. a. 4 Co. 29—2. According to some books, by custom of a particular place, as of York, the wife may take by *immediate* conveyance from the husband. Fitz. *Prescription* 61. Bro. *Custom* 56—3. The husband may give to his wife by *last will*; because such gift cannot take effect till his death, when the coverture is determined. Post. Sect. 168.—4. It seems, that a *donatio mortis causâ* by husband to wife may be good, because *that* is in the nature of a legacy. 1 P. Wms. 441. How the wife may give her separate personal property to her husband, see 2 Ves. 669.

(2) Acc. post. 356. a.

(3) See

But the queene, the consort of the king of England, is an exempt person from the king by the common law, and is of ability and capacity to purchase and grant without the king. Of which see more at large, Sect. 200.

46 E. 3. 22. 12 Ass. 18. 30 E. 3. 18. F. N. B. 97, a. 1 Ass. 11.

11 H. 4. 33. 9 E. 4. 49. 13 E. 3. Estoppel 231.

[c] The parishioners or inhabitants, or *probi homines* of Dale (3), or the churchwardens, are not capable to purchase lands; but goods they are, unlesse it were in ancient time when such grants were allowed (4).

[c] 12 H. 7 8. 37 H. 6. 30. 10 H. 4. 3, b. (4 Inst. 297.)

[d] An ancient grant by the lord to the commoners in such a waste, that a way leading to their common should not be straitened, was good; but otherwise it is of such a grant at this day [e]. And so in ancient time a grant made to a lord, *et hominibus suis, tam liberis quàm nativis*, or the like, was good; but they are not of capacity to purchase by such a name at this day. But yet at this day if the king grant to a man to have the goods and chattels *de hominibus suis*, or *de tenentibus suis*, or *de residentibus infra feodum*, &c. it is good: for there they are not named as purchasers or takers, but for another man's benefit, who hath capacity to purchase or take [f]. And regularly it is requisite, that the purchaser be named by the name of baptism and his surname, and that speciall heed bee taken to the name of baptism; for that a man cannot have two names of baptism as he may have divers surnames (5). [g] And it is not safe in writs, pleadings, grants, &c. to translate surnames into Latin. As if the surname of one be Fitzwilliam, or Williamson, if he translate him *Filius Willi.* if in truth his father had any other Christian name than William, the writ, &c. shall abate; for Fitzwilliam or Williamson is his surname, whatsoever Christian name his father had, therefore the lawyer never translates surnames. And yet in some cases, though the name of baptisme be mistaken (as in the case before put of the wife), the grant is good,

[d] 32 E. 3. barre, 261. (Hob. 86. 6 Co. 59.)

[e] 33 E. 3. grant 83. 18 E. 3. 50. 12 Ass. 35. 14 H. 6. 12. 34 Ass. p. 11. 40 Ass. p. 21.

[f] Bract. lib. 4. tract. 1. ca. 20. Britton, fol. 121, 122. 3 E. 3. 78. 25 E. 3. 43. 26 Ass. 61. 30 Ass. 16. 46 E. 3. 22. 39 E. 3. 17. 3 H. 6. 25. 19 H. 6. 2. 30 H. 6. 1. 34 H. 6. 19. 11 H. 4. 27. 9 E. 4. 29. 5 E. 4. 46. 65. 14 H. 7. 11.

20 Eliz. Dier 259. 8 E. 3. 436. 20 E. 3. 25. 1 H. 4. 5. 3 H. 6. 26. 19 H. 6. 2. 34 H. 6. 19. 5 E. 4. 55. 27 H. 8. 11. 1 H. 5. 5. 18 E. 3. 32. 27 E. 3. 85. 8 E. 3. 427. 7 H. 6. 29. 9 H. 5. 9. [g] 40 E. 3. 22. Fitzwilliam. 24 E. 3. 64. Fitzjohn. 39 E. 3. 24. Fitzrobert. 27 E. 3. 85. tit. grant, 67. 18 E. 3. 23, 24. 18 E. 4. 8. b. 14 H. 7. 31, 32. 13 E. 4. 8. 5 E. 3. Vouch. 179. 37 E. 3. 85. where the proper name is mistaken. (6 Co. 65. 10 Co. 132. b. Hob. 32. 2. Ro. Abr. 44. Mo. 232.)

So it is if lands be given to Robert earl of Pembroke where his name is Henry, to George bishop of Norwich where his name is John, and so of an abbot, &c. for in these and the like cases there can be but one of that dignity or name. And therefore such a grant is good, albeit the name of baptism be mistaken. If by licence lands be given to the deane and chapter of the holy and individed Trinity of Norwich, this is good, although the deane be not named by his proper name, if there were

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(3) See in Dy. 100, the case of a grant by the crown *probis hominibus de Islington*, rendering a rent.

(4) Acc. as to churchwardens, Finch's law, 8vo. ed. 178. See Keilw. 32, a. But by 9 Geo. 1. c. 7, they are enabled to purchase a workhouse for the poor; and by custom, in some places, as in London, the parson and churchwardens are a corporation to purchase lands. Cro. Jam. 532.

(5) See Cro. Eliz. 27. 222. 328. Cro. Jam. 558.

(6) But

were a deane at the time of the grant; but in pleading he must shew his proper name. And so on the other side, if the deane and chapter make a lease without naming the deane by his proper name, the lease is good, if there were a deane at the time of the (6) lease; but in pleading, the proper name of the deane must be shewed; and so is the booke of 18 E. 4, to be intended; for the same judges in 13 E. 4, held the grant good to a maior, aldermen, and commonalty, albeit the maior was not named by his proper name; but in pleading it must be shewed, as is there also holden (7). If a man be baptized by the name of Thomas, and after at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gawdie, late chiefe-justice of the court of common pleas, whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, in *anno* 36 Hen. 8, he did beare, and after used in all his purchases and grants (8).

[h] 22 R. 2. briefe 936. 12 R. 2. feoffments 58. 9 E. 3. 14. 46 E. 3. 21. 3 H. 6. 26. 34 H. 6. 19. 1 H. 7. 29. 5 E. 2. briefe 741. 14 H. 7. 11. [i] 17 E. 3. 29. 18 E. 3. 59. 30 E. 3. 18. 11 H. 4. 84. Pl. Com. 525. 21 R. 2. devise. 41 E. 3. 19. 15 E. 3. Counter-plea de vouch. 43. 35 Ass. 13. 37 H. 6. 30. 11 E. 4. 2. 7 H. 4. 5. 40 E. 3. 9. 37 H. 8. Bro. Nosme 40.

[h] And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names. And the court said, that it may be that a woman was baptized by the name of Anable, and 40 yeares after she was confirmed by the name of Douce, and then her name was changed, and after she was to be named Douce, and that all purchases, &c. made by her by the name of baptism before her confirmation remain good; a matter not much in use, nor requisite to be put in ure, but yet necessary to be knowne. [i] But purchases are good in many cases by a knowne name, or by a certaine description of the person without either surname or name of baptism, as *uxori I. S.* as hath been said, or *primo genito filio*, or *secundo genito filio*, &c. or *filio natu minimo I. S.* or *seniori puero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis seu exitibus* of *I. S.* or to the right heires of *I. S.*

[k] 15 H. 7. 14. [l] 8 E. 3. 437. 29 E. 2. 44. 19 E. 4. 11. 21 E. 4. 19. 7 H. 6. 29. [a] 39 E. 3. 11. 24. 17 E. 3. 42. 35 Ass. 13. 41 E. 3. 19. Vide Sect. 118.

[k] But if a man do infranchise a villein *cum totâ sequelâ suâ*, that is not sufficient to infranchise his children borne before, for the incertainty of the word *sequela*. [l] But regularly in writs, the demandant or tenant is to be named by his Christian name and surname, unlesse it be in cases of some corporations or bodies politique (9).

[a] ☞ A bastard having gotten a name by reputation may purchase by his reputed or knowne name to him and his heires, although he can have no heir but of his body. A man makes a lease to *B.* for life, remainder to the eldest issue male of *B.* and the heires males of his body. *B.* hath issue a bastard son, he shall not take the remainder, because in law he is not his issue; for *qui ex damnato coitu nascuntur inter liberos non computentur*. And as *Littleton* saith, a bastard is *quasi nullius filius*, and can have no name [3. b.]

(6) But not otherwise, post. 264. a. See 21 E. 4. 15. 16.

(7) See 1 Leon. 307. Dy. 86.

(8) Acc. 2 Ro. Abr. 135, A.

(9) As to naming of persons in writs and pleadings, see Thelo. Dig. Br. Orig. lib. 3, and 6, and the title *Abatement* in Com. Dig.

(1) The

name of reputation as soone as he is borne [b]. 'So it is if a man make a lease for life to *B.* the remainder to the eldest issue male of *B.* to be begotten of the body of *Jane S.* whether the same issue be legitimate or illegitimate. *B.* hath issue a bastard on the body of *Jane S.* this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had beene no other words, he could not take; and (as it hath been also said) a bastard cannot take, but after he hath gained a name by reputation (1), that he is the sonne of *B.* &c. [c]. And therefore he can take no remainder limited before he be born; but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder limited to him by the name of the son of his reputed father, is good; but if he cannot take the remainder by the name of issue at the time when he is borne, he shall never take it. And so it seemeth, and for the same cause, if after the birth of the issue *B.* had married *Jane S.* so as he became bastard eigne, and had a possibility to inherit, yet he shall not take the remainder.

[b] So it was resolved, M. 38 and 39 Eliz. in Bre. de errore, for land in Portington in com. Salop. (S. C. Cro. Eliz. 509. Noy 35. Mo. 430. 2 Ro. Abr. 43. 44.)

[c] 39 E. 3. 11. 24. 35 Ass. 13. 41 E. 3. 10. 17 E. 3. 42. (6 Co. 66.)

Persons deformed having human shape (2), ideots, madmen, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures, have power to purchase and retaine lands or tenements. [d] But the common law doth disable some men to take any estate in some particular things; as if an office either of the grant of the king or subject which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safetie of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely (3) void, and the partie disabled by law, and incapable to take the same, *pro commodo regis et populi;* for

[d] 5 E. 4. tit. office & officer. Bro. 48. Vinter's case, 5 Mar. Dier. fo. 150. b. and Scrogg's case, (Hob. 148.) (Cro. Jam. 17.)

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(1) The several reports of the case cited by lord Coke in the margin differ very much. According to Noy and Moore, it was held by all but Popham, that the remainder was good, though the bastard was not born till after creating it; and Rolle represents the case as if the opinion had been for the remainder. But Croke agrees with lord Coke, and writes, that a majority of the judges held the remainder void; though indeed it appears by his report, that the party at length claiming as *lawful issue*, it became unnecessary to decide what would be the effect of a remainder to an unborn bastard. The only modern case I meet with on the subject is one, in which lord chancellor Macclesfield inclined against such a remainder, even though to a child *en ventre sa mere.* 1 P. Wms. 529. However, the doctrine doth not seem fully settled. If the objection against the limitation to a bastard not *in esse* is *uncertainty of description*, it must certainly fail where he is described by the *mother only*; and even where the *father* is named, it may sometimes be possible to ascertain him also sufficiently, as well where the limitation precedes, as where it follows the bastard's birth. See Bro. Grant 17. 2 Ro. Abr. 43, 44. But if the objection is a *policy of law*, which, for the encouragement of marriage, creates a *disability* of providing for illegitimate children before they are born, then lord Coke's doctrine is true in its full extent. See Cro. Eliz. 510. Which of these is the true principle of objection, is left to the judgment of the learned reader.

(2) Who ought to be deemed such, see post. 7. b. 25. b.

(3) See acc. Godb. 391. Hard. 130. Scrogg's case, cited by lord Coke in the margin, is in Dy. 175.

(4) Acc.

for onely men of skill, knowledge, and ability to exercise the same are capable of the same, to serve the king and his people. [e] An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion (4). [f] No man, though never so skilful and expert, is capable of a judiciall office in reversion (5), but must expect untill it fall in possession. And see Sect. 378, where bargaining or giving of money, or any manner of reward, &c. for offices there mentioned, shall make such a purchaser incapable thereof; which is worthy to be knowne, but more worthy to be put in due execution.

[e] M. 40 & 41 Eliz. in the King's Bench between Scamler and Walters. (Contra March. 43. S. C. W. Jo. 310. Cro. Car. 279. 555.)

[f] 11 Co. 2. in Auditor Curle's case. (5 & 6 E. 6. c. 15, & post. 234, a.)

Some are capable of certain things for some special purpose, but not to use or exercise such things themselves; as the king is capable of an office, not to use but to grant, &c. (6).

A monster borne within lawfull matrimonie, that hath not human shape, cannot purchase, much lesse reteine any thing. [g] The same law is *de professis et mortuis sæculo*, for they are *civiliter mortui* (7); whereof you shall read at large in his proper place, Sect. 200.

Vide Sect. 378. 1 H. 7. 31. (Post. 7. b. 29. b.)

[g] Bract. lib. 5. fo. 421. 415. Britt. cap. 22. 39. Fleta. lib. 6. cap. 41. 1 E. 3. 9. 44 E. 3. 4. 3 H. 6. 24. 21 R. 2. judgement 263. 7 H. 4. 2. 14 H. 8. 16. Doct. & Stud. 141. Pl. Com. fo. 47. Brit. cap. 33. (Post. 76, a.)

"*Purchase*," in Latin *perquisitum*, of the verbe *perquirere*. *Littleton* describeth it in the end of this Chapter in this manner: *Also purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he commeth not by title of descent from any of his ancestors or of his cousins, but by his own deed.* So as I take it, a purchase is to be taken, when one cometh to lands by conveyance or title; and that disseisins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not said in law purchases (8), but oppressions and injuries.

Note, that purchasers of lands, tenements, leases, and hereditaments for good and valuable consideration, shall avoid all former fraudulent and covinous conveyances, estates, grants, charges, and limitations of uses, of or out of the same, [h] by a statute made since *Littleton* wrote (9), whereof you may plainly and plentifully read in my Reports, to which I will add this case: *I. C.*

[h] 27 Eliz. cap. 4. 13 Eliz. cap. 5. 3 Co. 80. 82, 83.

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(4) Acc. Scamler's case, and 1 Ro. Abr. 731. J. and Cro. Eliz. 636. But the case in March. 43, is *contra;* and there mr. justice Jones affirms, that Scamler's case was also *contra*. However, in Cro. Cha. 556, lord Coke's doctrine seems admitted where the office is not granted so as to be exerciseable by a *deputy*.

(5) Acc. 11 Co. 4. a. W. Jo. 264. 2 Lev. 245, and Cas. temp. Talb. 99.; but *contra* where it has been the usage so to grant, W. Jo. 311. Hardr. 257. 2 Ventr. 188; and it is said that the king may so grant without any usage. March. 42. 4. Mod. 280. Dy. 295.

(6) See as to this, Plowd. 381.

(7) But it seems, that this doctrine is now become inapplicable; for there is no longer any legal establishment for *professed* persons in *England*, and our law never took notice of *foreign professions*. See post. 132. b. 2 Ro. Abr. 43. C. Wright's Ten. 28. 1 Salk. 162.

(8) Accord. ante 2. b. and post. 18. b.

(9) For cases of fraudulent gifts before the 13 Eliz. c. 5, see Dy. 294, b. and 295, a.

(1) Since

I. C. had a lease of certaine lands, for 60 yeares, if he lived so long, and forged a lease for 90 years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease and all his interest in the land to *R. G.* It seemed to me that *R. G.* was no purchaser within the statute of 27 Eliz. for he contracted not for the true and lawfull interest, for that was not knowne to him; for then perhaps he would not have dealt for it, and the visible and knowne tearme was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for it. And of this opinion were all the judges in Serjeants-Inne, in Fleet-street.

Twine's case, 5 Co. 60. Gooche's case, 6 Co. 72. Burrel's case, 11 Co. 74. Pasch. 12 Ja. inter Jones pl. and Sir Rich. Groobham def. in ejectione firmæ in evidence al Jurie.

[*i*] In ancient time, when a man made a fraudulent feoffement, it was said, *quòd posuit terram illam in brigam;* where *brigam* doth signifie wrangle, contention, or intricacy, for fraud is the mother of them all. [*k*] And on the other side, purchases, estates, and contracts may be avoided, since *Littleton* wrote, by certain acts of parliament against usurie above ten in the hundred, in such manner and forme as by those acts is provided; which statutes are well expounded in my books of Reports, which may be read there. To them that lend money my caveat is, that ☞ neither directly nor indirectly, by art, or cunning invention, they take above ten (1) in the hundred; for they that seeke by sleight to creepe out of these statutes, will deceive themselves, and repent in the end.

[4. a.]

[*i*] Hil. 18 E. 3. coram rege in Thesaur.

[*k*] 37 H. 8. cap. 6. 13 Eliz. cap. 8. 5 Co. 69. Burton's case. Eodem, lib. 7. Claiton's case. (Lutw. 271.) (5 Co. 69.)

"*Purchase Lands.*" *Littleton* here and in many other places putteth lands but for an example; for his rule extendeth to seigniories, rents, advowsons, commons, estovers, and other hereditaments, of what kind or nature soever.

Lands and other things to be purchased.

"*Land,*" *Terra,* in the legall signification, comprehendeth any ground, soile, or earth whatsoever; as meadowes, pastures, woods, moores, waters, marishes, furses, and heath. *Terra est nomen generalissimum, et comprehendit omnes species terræ;* but properly, *terra dicitur à terendo, quia vomere teritur;* and anciently it was written with a single *r;* and in that sense it includeth whatsoever may be plowed; and is all one with *arvum ab arando.* It legally includeth also all castles, houses, and other buildings: for castles, houses, &c. consist upon two things, *viz.* land or ground, as the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith.

Pl. Com. 168. b. and 170. a. and 151. 4 Co. 87. b. Lutterel's case. 4 E. 3. 161. and 6 E. 3. 283. 8 E. 3. 377. Temps E. 1. Briefe 811. 28 H. 8. Dyer 47.

Land

(1) Since sir Edward Coke's time, the rate of interest has been gradually reduced to 5 per cent. See 21 Ja. 1. c. 17. 12 Cha. 2. c. 13, and 12 Ann. st. 2. c. 16. But a greater rate of interest is still allowable in Ireland and our Plantations. It has been doubted whether the 12 Ann. did not extend to money lent on lands in Ireland or our Plantations, where the mortgage is executed in Great Britain; but the 14 Geo. 3. c. 79, declares all such securities made previously to that act to be valid, notwithstanding the 12 Ann. where the interest is not more than the established rate of the particular place; and that all *future* securities of a like kind shall also be valid, where the interest is not more than 6 per cent. It is impossible in the compass of a note to cite the numerous cases on the statutes of usury. One of the most remarkable for the great learning and variety of the arguments is that of the earl of Chesterfield and Janssen, 1 Atk. 301, and 2 Ves. 325.

(2) Acc.

* Tr. 7 E. 3. coram Rege Northampt. in Thesaur.

* Land is anciently called *Fleth;* but land builded is more worthy than other land, because it is for the habitation of man, and in that respect hath the precedency to be demanded in the first place in a (2) *præcipe*, as hereafter shall be said. And therefore this element of the earth is preferred before the other elements: first and principally, because it is for the habitation and resting-place of man; for man cannot rest in any of the other elements, neither in the water, ayre, or fire. For as the heavens are the habitation of Almightie God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man;

Psal. 115. 16.

Cœlum cœli Domino, terram autem dedit filiis hominum: All the whole heavens are the Lord's, the earth hath he given to the children of men. Besides, every thing, as it serveth more immediately or more meerly for the food and use of man (as it shall be said hereafter), hath the precedent dignity before any other. And this doth the earth; for out of the earth commeth man's food, and bread that strengthens man's heart, *confirmat cor hominis*, and wine that gladdeth the heart of man, and oyle that makes him a cheerfull countenance; and therefore *terra olim Ops mater dicta*

Psal. 104. 15.

est, quia omnia hâc opus habent ad vivendum. And the divine

Chrisost. hom. 30.

agreeth herewith; for he saith, *Patriam tibi et nutricem, et matrem, et mensam, et domum posuit terram Deus, sed et sepulchrum tibi hanc eandem dedit.* Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *præcipe* (3); but the land whereupon the water floweth or standeth is demandable; as for example, *viginti acras terræ aquâ coopertas:* and besides, the earth doth furnish man with many other necessaries for his use, as it is replenished with hidden treasures; namely, with gold, silver, brasse, iron, tynne, leade, and other metals, and also with a great varietie of precious

(Plowd. 313.)

stones, and many other things for profit, ornament, and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad cœlum*, as is holden 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14 *Registrum origin.* and in other bookes.

Vid. Sect. 59. where in this case livery shall be made. (Post, 48. b. 7 Co. 5.)

And albeit land, whereof our author here speaketh, be the most firme and fixed inheritance, and therefore it is called *solum, quia est solidum*, and fee simple the most highest and absolute estate that a man can have; yet may the same at severall times be moveable, sometime in one person, and *alternis vicibus* in another; nay sometime in one place, and sometime in another. As for example, if there be 80 acres of meadow which have been used time out of mind of man to be divided betweene certaine persons, and that a certaine number of acres appertaine to every

Vide Sect. 648, how these 13 acres may be charged. (1 Ro. Abr. 829. Cro. Eliz. 421.) Hill. 34. Eliz. Rot. 489, in

of these persons; as for example, to *A.* 13 acres, to be yearely assigned and lotted out, so as sometime the 13 acres lie in one place, and sometime in another, and so of the rest; *A.* hath a moveable fee simple in 13 acres, and may be parcell of his manor, albeit they have no certaine place, but yearely set out in several places, so as the number only is certaine, and the particular acres or place wherein they lie after the year incertaine. And

(2) Acc. Fitzh. Nat. Br. 2. C. Post. 4 b. and 4 Co. 39. a.
(3) Acc. Yelv. 143. See post. 4. b.

(4) S. C.

And so it was adjudged in the king's bench upon an especiall verdict (4).

trans. inter Weldon & Bridgewater in Banco Regis.

If a partition be made betweene two coparceners of one and the selfe-same land, that the one shall have the land from Easter untill Lammas to her and to her heires, and the other shall have it from Lammas till Easter to her and her heires, or the one shall have it the first yeare, and the other the second yeare, *alternis vicibus, &c.* there it is one selfe-same land wherein two persons have severall inheritances at severall times. So it is if two coparceners have two severall manors by descent, and they make partition, that the one shall have the one manor for a year, and the other the other manor for the same yeare, and after that yeare then she that had the one manor shall have the other, *et sic alternis vicibus* for ever; and albeit the manors be severall, yet are they certaine, and therefore stronger than Bridgewater's case; so as this doth make a division of states of inheritances of lands, *viz.* certaine or unmoveable, whereof *Littleton* here speaketh, and incertaine and moveable, whereof these three cases for examples have beene put. Wherein it is to be noted, that the possession is not onely severall, but the inheritance also.

Temps E. 1. tit. partition. 21. F. N. B. 62. l. Vide 1 Co. 87. per Walmsl. F. N. B. 62. K. (Post. 167. a. 7 Co. 5.)

Vide Sect. 114, where advowsons, &c. may be appendant and in gros.

[4. b.] ☞ It is also necessary to be seene by what names lands shall passe. [*a*] If a man hath 20 acres of land, and by deed granteth to another and his heires *vesturam terræ*, and maketh livery of seisin *secundum formam chartæ*, the land itselfe shall not passe (1), because he hath a particular right in the land; for thereby he shall not have the houses, timber-trees, mines, and other reall things parcell of the inheritance, but he shall have the vesture of the land, (that is) the corne, grasse, underwood, swepage, and the like, and he shall have an action of trespasse *quare clausum fregit*. [*b*] The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausum fregit;* but by grant thereof and liverie made, the soile shall not passe, as is aforesaid. [*c*] If a man let to *B.* the herbage of his woods, and after grant all his lands in the tenure, possession, or occupation of *B.* the woods shall passe, for *B.* hath a particular possession and occupation, which is sufficient in this case; and so it was resolved.

By what names, &c. lands, &c. shall passe. [*a*] Vide Sect. 289. (Post. 186. b. Contra 1. Ventr. 393.) 14 H. 8. 6. 4 Hen. 7. 3. 10 H. 7. 24. 11 H. 7. 21. 14 H. 7. 4. 6. 21 H. 7. 36, 37. 9 H. 6. 52. 37 H. 6. 35. 22 E. 4. barre 116. 11 H. 4. 90. 18 E. 3. Execution 56. 4 E. 3. 48.

8 E. 3. 13. 9 Ass. p. 12. 38 E. 3. 24. [*b*] Bract. fo. 222. 17 E. 3. 75. 39 H. 6. 38. 11 Eliz. Dy. 285. (4 Leon. 43. Post. 47. a. Cro. Cha. 362. Noy. 54.) [*c*] Pasch. 12 Ja. inter Dockwray & Points in evidence al Jury in Banke le Roy.

[*d*] So

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(4) S. C. Mo. 302.

(1) Contra. Keilw. 118, and Palm. 174. Also in 1 Ventr. 398, it is argued by North attorney-general, that *vesture* of land means *all* the profits. But 4 Leo. 43, and Ow. 37, are with Sir Edward Coke. Indeed his interpretation is conformable to the use of the word in some ancient deeds, and seems warranted by 4 E. 1. st. 1. s. 4, and 13 E. 1. st. 2. c. 25. s. 10. It also appears most agreeable to the derivation of the word, which is from *vestio*. See Cow. Interpret. ed. 1727. voc. *Vestura* and *Vesture*. Note, the difference taken in Palm. 175, between *vesturam terræ*, *primam vesturam terræ*, and *primam vesturam terræ, from one quarter to another*; and between such grants by the *king*, and those by a *subject*. As to prescribing for *sola vestura*, see post. 122. a.

(2) Acc.

[d] Vide Sect. 279. Bract. fo. 208. 40 E. 3. 45. Pl. Com. 154. 10 H. 7. 24. 28. 7 H. 7. 13. 18 H. 6. 29. 34 H. 6. 43. 20 H. 6. 4. 18 E. 4. 4. 4 E. 3. 48. 1 E. 3. 4. 32 E. 3. Scir. fac. 100. 22 E. 4. barre 116. 12 H. 3. Ass. 427. 34 Ass. 11. 13 E. 3. tit. entrie 57. 20 E. 3. Briefe 685. W. 2. c. 24. (2 Ro. Abr. 2.)

[d] So if a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soile doth not passe (2), nor the water, for the grantor may take water there; and if the river become drie, he may take the benefit of the soile; for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ*, cannot enlarge the grant. [e] For the same reason, if a man grant *aquam suam*, the soile shall not passe, but the pischary (3) within the water passeth therewith. And land covered with water shall be demanded by the name of so many acres *aquâ* (4) *coopertas;* whereby it appeareth that they are distinct things. [f] So if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not passe, because but part of the profit is given, for trees, mines, &c. shall not passe. [g] But if a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartæ*, the whole land itselfe doth passe; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, and all whatsoever parcell of that land doth passe (5).

[e] Tr. 11. R. 2. in tresp. nient Imprimee ne abridg. 11 H. 7. 4. [f] 7 E. 3. 342. 5. Ass. 9, 10. 7. Ass. 9. [g] 45 E. 3. tit. feoffments et faits 90. 14 H. 8. 6. Pl. Com. 541. b. F. N. B. 8. 12 E. 3. Dower 90.

[h] Ass. p. 12. 9 E. 3. 443. 466. Domesday. 7 R. 1. int. fines in Thesaur. (1 Sid. 161.) [i] Int. Inquisit. apud Launcast. Anno 6. E. 1. in Thesaur. Mich. 1 H. 5. coram Rege Rot. 3, in Thesaur. [k] Tr. 7 Eliz. in banco regis. 5 Co. 11. Ive's case. 14 H. 8. 1. 46 E. 3. 22. 28 H. 8. Dyer 19.

[h] By the grant of the boillourie of salt, it is said that the soile shall passe, for it is the whole profit of the soile. And this is called *saliva*, of the French word *salure* for a salt-pit; and you may read *de saliva* in Domesday, and *selda* signifieth the same thing [i]; and where you shall reade in records *de lacertâ in profunditate aquæ salsæ*, there *lacerta* signifieth a fathom. A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods; not onely the woods growing upon the land passe, but the land itselfe, and by the same name shall be recovered in a *præcipe;* for *boscus* doth not onely include the trees, but the land also whereupon they grow. [k] The same law if a man in that case grant *omnes boscos suos crescentes, &c.* yet the land itselfe shall passe, as it hath beene (6) adjudged. * *Frassetum* signifieth a wood, or ground that is woodie. [l] If a man hath a wood of elder-trees containing 20 acres, and granteth to another 20 *acras alneti* (with an *n* not a *v*), the wood

32 H. 8. Bro. reservat. 39. 7 E. 6. Dyer 79. * Glanvil. lib. 8. cap. 3. [l] Domesday Regist. F. N. B. 2.

of

(2) Acc. post. 122. a, but see *contra* by lord ch. j. Holt, in 2 Salk. 637. The truth is, that the authorities on this subject are very numerous, and seem contradictory. Some agree with sir Edward Coke; according to others, one having a *several* fishery *must* be owner of the soil; and again some hold, that a *several* fishery and the soil *may* be in *different* persons, but that they shall be *presumed* to be in the same person till the contrary is pleaded. Besides the books cited in the margin, see 17 E. 4. 6. b. 10 H. 7. 26. Bro. Præcipe 33. and Dav. 55. b.

(3) Acc. Dav. 55. b. (4) See acc. Yelv. 143.

(5) Adj. acc. in the case of a devise. Cro. Eliz. 190.

(6) To know when *wood* will include the soil, and when not, see Bro. Grants, 167. Cro. Ja. 487. 524. 2 Ro. Abr. 455. U. Pl. 1. 3.

of elders and the soile thereof shall passe, but no other kinde of woods shall passe by that name. *Alnetum est ubi alni arbores crescunt* †. And *sullings* are taken for elders. [*m*] *Salicetum* doth signifie a wood of willowes, *ubi salices crescunt*. These trees in our bookes are called *sawces*. * *Selda* is a wood of sallows, willows, or withies. A brackie ground is called *filicetum, ubi filices crescunt*. A wood of ashes is called *fraxinetum, ubi fraxini crescunt*, and passeth by that name; and *lupulicetum*, where hoppes grow; and *arundinetum* where reeds grow. Some say that *dene* or *denne*, whereof *dena* commeth, is properly a valley or dale. *Dena silvæ*, and the like, [*n*] as *drofden*, or *drufden*, or *druden*, signifieth a thicket of wood in a valley; for *druf*, or *dru*, signifieth a thicket of wood, and is often mentioned in Domesday. And sometimes *dena* or *denna* signifieth, as *villa* and *denne*, a towne.

[*o*] *Cope* signifieth a hill, and so doth *lawe*; as *stanlawe* is *saxeus collis*. [*p*] *Howe* also signifieth a hill. And *hope, combe*, and *stow*, are valleys, and so doth *clough*. And *dunum* or *duna* signifieth a hill or higher ground, and therefore commonly the townes that end in *dun*, have hills or higher grounds in them, which we call downs. It commeth of the old French word *dun*.

[*q*] In our Latin a wood is called *boscus*. *Grava* signifieth a little wood, in old deeds, and *hirst* or *hurst* a wood; and so doth *holt* and *shawe*. *Twaite* signifieth a wood grubbed up, and turned to arable. *Stethe* or *stede* betokeneth properly a banke of a river, and many times a place, as *stowe* doth; and *wic*, a place upon the sea-shore, or upon a river. *Lea* or *ley* signifieth pasture.

[*r*] If a man doth grant all his pastures, *pasturas*, the land itselfe imployed to the feeding of beasts doth passe, and also such pastures or feedings as he hath in another man's soile. *Leswes* or *lesues* is a Saxon word, and signifieth pastures. [*s*] Between *pastura* and *pascuum*, the legall difference is, that *pastura* in one signification containeth the ground itselfe called pasture, and by that name is to be demanded. *Pascuum*, feeding, is wheresoever cattell are fed, of what nature soever the ground is, and cannot be demanded in a *præcipe* by that name.

[*t*] If a man grant *omnia prata sua*, all his meadowes, the land itselfe of that kinde passeth: *et dicitur pratum quasi paratum*, because it groweth *sponte* without manurance. [*u*] A man grants *omnes brueras suas;* the soile where heath doth growe passeth, and may be demanded by that name ☞ in a *præcipe*. It is derived from *bruyer*, a French word for heath; and it is called *ros* in the British tongue.

[5. a.]

Roncaria or *Runcaria* signifieth land full of brambles and briers, and is derived of *roncier*, the French word which signifieth the same, and as much as *senticetum*. [*a*] By the grant of *omnes juncarias* or *joncarias*, the soile where rushes do grow doth passe; for *jonc* in French is a rush, whereof *joncaria* commeth. [*b*] A man grants *omnes ruscarias suas*, the soile where *rusci, i. e.* kneholme, or butchers pricks, or broome doe growe shall passe, and so in the verse in the Register it is called; but in F. N. B. fol. 2, in the verse *pischaria* is put instead of *ruscaria*. And *jampna* commeth of *jonc* and *nower*, a waterish place, and is all one in effect with *joncaria*. He that granteth *omnes mariscos suos*, all his fennes or marish grounds doe passe. *Mariscus* is derived of the French word *mares* or *marets;* the Latin word for it is *palus*, or *locus paludosus*. *Mora* is derived of the English word moore, and signifieth a more barren and unprofitable ground than marshes,

[*m*] 8 E. 2. Wast. 111. 7 Ass. 18. 11 Ass. p. 13. 41 E. 3. Wast. 82.

† Hill. 14 E. 3. coram Rege Lanc. in Thesaur.

* Inter Inquisit. apud Lanc. in com. Cornubie coram Justic. Aud. anno 6 E. 1. in Thesaur. the B. of Excester's case.

[*n*] Domesday.

[*o*] Camden 460. 151.

[*p*] Pasch. 44 E. 3, coram Rege in Thes.

[*q*] Hill. 13 E. 2. Lanc. coram Rege in Thesaur. Camden Brit. 247. Rot. Par. 18 E. 1. 8. Evesque de Carlisle's case.

[*r*] Pl. Com. 169, a. 4 E. 2. Briefe 792, 793. 3 E. 3. 86. 4 E. 4. 1. 27 H. 8. 12.

[*s*] 20 Ass. pl. 9.

[*t*] Pl. Com. 169, a. 13 E. 3. Briefe 241. 33 E. 3. Entrie 80.

[*u*] Domesday. F. N. B. 2. Regist.

[*a*] Regist. 1 E. 3. 4. F. N. B. 2.

[*b*] 16 Ass. p. 9. Register.

Jampna, (Cro. Cha. 179.)

dangerous

dangerous for any cattell to go there, in respect of myrie and moorish soyle, neither serves it for getting of turves there. [c] You shall reade in records, that such a man *perquisivit trescent. acr. maretti, &c.* This word *marettum* is derived of *mare* the sea, and *tego*, and properly signifieth a moorish and gravelly ground, which the sea doth cover and overflow at a full sea, and lyeth betweene the high water marke and low water marke, *infra fluxum et refluxum maris*. By grant of these particular kinds, the lands of these particular kinds onely doe passe; but, as hath been said, by the grant of land in generall, all these particular kinds and some others doe passe. *Non mihi si centum linguæ sint oraque centum, Omnia terrarum percurrere nomina possem.* And therefore let us turn our eye to generall words, which doe include lands of several sorts and qualities. [d] By the name of an honor (1), which a subject may have, divers manors and lands may passe. So by the name of an isle, *insula*, many manors, lands, and tenements may passe.

[c] Pasch. 41 E. 3, coram rege Lincoln. Rot. 28.

[d] Mag. Chart. c. 31. Wallingford Nott. Bolon. Lanc. &c. Trin. 33 E. 1. coram rege in Thes. honor de Huntingdon. Mich. 9 E. 1. coram rege in Thes. 18 E. 2. Ass. 377. 26 Ass. p. 60. 6 E. 3. 56. 47 E. 3. 21, honor de Peverel. 49 E. 3, 324, honor de Egles. 9 H. 6. 27. 36 H. 8. Dyer 58, honor de Glouc. F. N. B. 265, honor Abbath. de Merle. 5 E. 4, 129. 7 H. 6. 39. 1 E. 3, 4, &c. 13 E. 3, jurisdict. 23. 4 Co. 88. Lutterel's case, 5 H. 7. 9. 14 H. 4, in recordo longo. 8 H. 4. Pl. Com. 168. 8 H. 7. 1. 4 E. 4. 16. (4 Inst. 294.)

Holme or *hulmus* signifieth an isle or fenny ground. * A commote is a great seigniory, and may include one or divers mannors. [e] By the name of a *castle*, one or more manors may be conveyed: *et è converso*, by the name of a manor, &c. a castle may passe (2). In Domesday I read, *Comes Alanus habet in suo castellatu* 200 *maneria, &c. præter castellarium habet* 43 *maneria*; and in that booke a castle is called *castellum*, and *castrum*, and *domus defensibilis*, and *mansus muralis*. [f] But note by the way, that no subject can build a castle or house of strength imbattled, &c. or other fortresse defensible, called in law by the names aforesaid, and sometimes *domus kernellatæ* or *carnellatæ, imbattellatæ, tenellatæ, machecollatæ, mese carnelet, &c.* without the licence of the king, for the danger which might ensue, if every man at his pleasure might do it. And they be called imbattlements, because they are defences against battels in assaults. *Tenellare*, or *tanellare*, is to make holes or loopes in walls, to shoote out against the assailants. *Machecollare* or *machecoulare*, is to make a warlike device over a gate or other passage like to a grate, through which scalding water, or ponderous or offensive things may be cast upon the assaylants (3). But to returne to the matter from whence upon this occasion we are fallen.

* 13 E. 3. jurisdict. 23.

[e] 26 Ass. 54. 29 E. 3. 15. 29 H. 6. travers 4. Bract. fo. 434. 1 E. 3. 4. 5 H. 7. 9. 3 E. 2. Avowry 188. 37 H. 6. 26. 18 H. 6. 11. Lib. rub. scac. fo. 18.

[f] In veter. Mag. Cart. cap. Escheatrise, fo. 162. Britton, cap. 20. Rot. Parliam. 45 E. 3, nu. 34. 6 H. 4. nu. 19. 1 E. 4. cap. 1. Rot. Parliam. 1 E. 3. 2, pars Alano Charleton 22 E. 3. 2, pars Thoma Barkley, &c. (3 Inst. 201.)

By the name of a towne, *villa*, a mannor, may passe. In Domesday, *alodium* (in a large sense) signifieth a free mannor (4), and *alodiarii*, or *alodarii*, lords of the same; and *lannemanni* there signifie lords of a mannor, having *socam et sacam de tenentibus et hominibus suis*. [g] And by the name of a mannor, divers townes may passe. *Quod olim dicebatur fundus nunc manerium dicitur.* By the name of a ferme or fearme (5), *firma*, houses, lands, and tenements

[g] Lamb. exposit. verb. Ferme. Pl. Com. 195.

(1) For the nature of a land honor or barony, see Mad. Bar. Angl. 2.

(2) Acc. 2. Inst. 31.

(3) See further as to castles, Mad. Baron. Anglican, 17, to 20. Discours. by Emin. Antiq. ed. 1773. v. 1. p. 100, 186, and 191.

(4) See ante, 1. b. (5) See 2 Inst. 145.

tenements may passe; and *firma* is derived of the Saxon word *feormian*, to feed or releeve; for in ancient time they reserved upon their leases, cattell and other victuall and provision for their sustenance. [*h*] Note, a fearme in the north parts is called a tacke, in Lancashire a fermeholt, in Essex a wike. But the word fearme is the general word, and anciently *fundus* signified a fearme, and sometime land. [*i*] Lands making a knight's fee (6), shall passe by the grant of a knight's fee *de uno feodo militis*.

[*h*] Pl. Com. 169. Regist. 227, b. Eject. Firmæ. [*i*] 17 E. 3. fo. 8.

5 E. 3. 213. 16 E. 3. bre. 165. 12 E. 2. bre. 814.

[*k*] *Unum solinum* or *solinus terræ* in Domesday booke containeth two plow-lands and somewhat lesse than an halfe; for there it is said, *septem solini*, or *solina terræ sunt* 17 *carucat'* (7). *Una hida seu carucata terræ*, which is all one as a plow-land, viz. as much as a plow can (8) till. *Sullerye* also signifieth a plow-land. *Una virgata terræ*, a yard-land (the Saxons called it *girdland*, and now the *g* is turned to a *y*), is in some countries 10, in some 20, in some 24, in some 30, &c. (9) [*l*] *Una bovata terræ*, an oxgange, or an oxgate of land, is as much as an ox can till (10). [*m*] But *carucata terræ* and *bovata terræ* are words compound, and may containe meadow, pasture, and wood necessary for such tillage. *Jugum terræ* in Domesday containeth halfe a plow-land. And by all these names, in the raigne of R. 1, lands were usually demanded, and long after (11).

[*k*] 4 E. 3. 161. 6 E. 3. 283. 2 E. 3. 5. 35 H. 6. 29. Pl. Com. 168. 7 Ass. 18. 11 Ass. 13. Lamb. Expos. verb. Hyda et Virgat. terræ. Glanvil. lib. cap. Domesday. Bract. lib. 2. cap. 26, 27, & lib. 5, fo. 434. Regist. 72. [*l*] 5 E. 3. fine 49. 13 E. 3. fine 67. 39 H. 6. 8. 4 E. 3. 159. 8 E. 3. 377. Bracton, fo. 180. 269. 431. 5 H. 3. Droit 66. Pl. Com. 168. [*m*] 13 E. 3. bre. 241. 2 E. 3. 57, temps E. 1, bre. 811. Pl. Com. 168.

[*n*] By the name of a grange, *grangia*, a house or edifice, not onely where corne is stored up like as in barnes, but necessary places for husbandry also, as stables for hay and horses, and stables and styes for other cattell, and a *curtilege*, and the close wherein it standeth, shall passe; and it is a French word, and signifieth the same as we take it (12).

[*n*] Pl. Com. 169. Linwood. 44 E. 3. 21. 4 E. 3. 32.

[5. b.] [*o*] *Stagnum*, in English a poole, doth consist of water and land; and therefore by the name of ☞ *stagnum* or a poole, the water and land shall passe also. [*a*] In the same manner *gurges*, a deepe pit of water, a gors or gulfe, consisteth of water and land; and therefore by the grant thereof by that name the soile doth passe, and a *præcipe* doth lie thereof, and shall lay his esplées in taking of fishes, as breames and roches. In Domesday it is called *guort*, *gort*, and *gors* plurally: as for example, *de* 3 *gorz mille anguillæ*.

[*o*] 4 E. 3, tit. Feoffments et Faits 79. 14 E. 3. Formedon 34. 34 Ass. pl. 11. [*a*] 13 E. 3. 4. 4 E. 3. 143. 8 E. 3. 381. 10 E. 3. 482. 13 E. 3, entry 57. F. N. B. 191. b. Domesday.

[*b*] So

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(6) As to the contents of a knight's fee, see post. 69.

(7) Some think, that *solinus terræ* was frequently synonymous with *carucata terræ*. See Somn. Rom. Ports 82. Cow. Interpr. ed. 1727, voc *solinus terræ*.

(8) See further as to this, post. 69, and 86, b.

(9) See post. 69.

(10) See post. 69.

(11) See further on the dimensions of land in England, post. 200, b. and 69. Crompt. on Courts, 222. and Disc. by Emin. Antiq. ed. 1773, v. 1. p. 39 to 50, and 107, 195. and 197.—By what names, and in what order, lands, &c. ought to be demanded, see post. 5. b. Fitzh. N. Br. 2 C. Hugh. Comment. on Orig. Writs 2, and Theloal's Dig. Br. Orig. l. 8. c. 1. p. 118, and particularly the latter book.

(12) *Grange* sometimes comprehends a whole *farm*. See 4 Co. 48. b.

[b] Temps E. 1. bre. 861. 4 E. 3. 5. 10 H. 7. 30. 44 E. 3, 12. 43 E. 3, 24. 35 H. 6. 55. coram rege p.

[b] So it is of a forest, parke, chase, vivarye, and warren in a man's owne ground, by the grant of any of them not onely the priviledge, but the land itselfe passes, for they are compound. In the booke of Domesday, that is called *lewad*, and *leuga*, and *lewed*, and *lewe*, which in Latin is called *leuca*.

3 H. 6. 2. Domesday. Bracton, lib. 4, fo. 235. Int. adjudicat. 39 E. 3. lib. 3, fo. 95, in Thesaur. (4 Inst. 289.)

[c] 40 Ass. 38. 4 H. 6. 14. 35 E. 1. ca. 6. Anno 10 R. 1. inter fines in Thes. Ferlingus terræ continet 32 acras. Domesday. Frustum, 16 E. 3. tit. Comon. 9. [d] Mich. 8 H. 3. incipien. 9, coram rege Warr. Ro. 6. [e] Virg. Eclog. 1, 2. [f] Bract. 211. 233. 22 E. 4. trans. 140. Pl. Com. 168. 171. 23 H. 8. Br. Feoffments 53. 9 Ass. p. 21. 35 H. 6. 44. Pl. Com. 169. (1 Sid. 309.)

[c] *Stadium*, or *ferlingus sive ferlingum*, or *quarentena terræ*, is a furlong of land, and is as much as to say, a furrow long, which in ancient time was the eighth part of a mile; and land will passe by that name. And some hold that by that name land may be demanded. And *de ferlingis et quarentenis*, you shall read divers times in the book of Domesday; and there you shall read, *in insulâ rex habet unum frustum terræ unde exeunt sex vomeres. Nota*, *frustum* signifieth a parcell. [d] *Warectum*, or *wareccum*, or *varectum*, doth signifie fallow; *terra jacet ad warectum*, the land lyeth fallow: but in truth the word is *vervactum*, *quasi verè novo victum seu subactum*, *terra novalis seu requieta*, *quia alternis annis requiescat* [e], *tam culta novalia*. [f] By the grant of a messuage, or house, *mesuagium*, the orchard, garden, and curtilage doe (1) passe; and so an acre or more may passe by the name of a house: it is derived of the French word *mese*. [g] In Domesday, a house in a city or burrough is called *haga*; other houses are called there *mansiones*, *mansuræ*, and *domus* [h]; and in an ancient plea concerning Feversham in Kent, *hawes* are interpreted to signifie *mansiones*. In Normans French it is called *mesiul*, or *mesuil*. *Bye* signifieth a dwelling, *bye*, an habitation, and *byan*, to dwell.

[g] Domesday. [h] Pasch. 30 E. 1, coram rege Banc. in Thesaur. Statut. de extent manerii. Domesday.

It is to be noted, that in Domesday there be often named *bordarii seu borduanni*, *cosces*, *coscet*, *cotucami*, *cotarii*, who are all in effect bores or husbandmen, or cottagers, saving that *bordarii*, which commeth of the French word *borde* for a cottage, signifieth there bores holding a little house, with some land of husbandry bigger than a cottage; and *coterelli* are meere cottagers, *qui cotagia et curtilagia tenent* (2).

Villani in Domesday (often named) are not taken there for bondmen, but had their name *de villis*, because they had fermes, and there did worke of husbandry for the lord: and they were ever named before *bordarii*, *&c.* and such as are bondmen are called there *servi*.

Domesday.

[i] *Coleberti*,

(1) *Contra* as to the garden, Keilw. 57. Mo. 24. Dal. in N. Bendl. 29. But see acc. post. 56, a, and b. Plowd. 171. 2 Co. 32. 2 Saund. 401. S. p. adj. acc. in case of a devise. 3 Leon. 214, and Cro. Eliz. 89. See acc. 2 Cha. Cas. 27. See further Litt. Rep. 6, where the court held that the devise of a messuage was not sufficient to pass two acres four miles distant from the messuage, though occupied with it. In Keilw. 57, a difference is taken between *messuage* and *domus*; and it is there said, that *messuage* extends to the *curtilage*, though not to the *garden*, but that *domus* only comprehends buildings. Also in some of the cases cited, particularly that from Plowden, the grant was of a *messuage* with the *appurtenances*; on which *latter* word some stress seems to have been laid.

(2) See as to *cottages*, 2 Inst. 736.

[i] *Coleberti*, often also named in Domesday, signifieth tenants in free socage by free rent; and so it is expounded of record. *Radmans* and *radchemistres* (*rad*, or *rede*, signifieth firme and stable,) there also often named; these are *liberi tenentes qui arabant et herciebant ad curiam domini, seu falcabant, aut metebant*, because their estates are firme and stable; and they are many times called *sochemans* and *sokemanni*, because of their plough service.

[i] Int. placita coram domino rege Mich. 10 E. 3. Rot. 26. Lamb. exposit verb. Thanus

Dreuchs signifieth free tenants of a mannor, there also named. *Taini*, or *thaini mediocres*, were freeholders, and sometime called *milites regis*, and their land called *tainland*; and there it is said, *hæc terra T. R. E. fuit tainland, sed postea conversa in reveland.*

[k] But *thainus regis* is taken for a baron; for it is said in an ancient author, *thainus regis proximus comiti est, et ibidem mediocris thainus, et alibi baro sive thainus* (3). *Berquarium*, or *bercaria*, commeth of *berc*, an old Saxon word, used at this day for barkes or rindes of trees, and signifieth a tan-house, or a heath-house, where barkes or rindes of trees are laid to tan withal: and *berquarii* are mentioned in Domesday. It signifieth also, and more legally, a sheep-cote, of the French word *bergerie*.

[k] Lib. Rub. cap. 15, & cap. 41 & 76. W. 2. c. 46. 7 H. 4. 38. Lib. d'Entries, tit. Ass. Corps Pol. 2. (4 Inst. 294.) Domesday.

[l] By *vaccaria* in law is signified a dairy-house, derived of *vacca*, the cow. In Latin, it is *lactarium*, or *lactitium*; and *vaccarius* is mentioned in Domesday. And Fleta maketh mention of *porcaria*, a swinestye.

[l] 7 H. 4. 28. Fleta lib. 2. cap. 35. Domesday. 10 R. 1 inter fines.

The content of an acre is known. The name is common to the English, German, and French. In legall Latin it is called *acra* which the Latinists call *jugerum*. In Domesday it is called *arpen prati, silvæ, &c.* 10 R. 1. *inter fines*. *Acra* in Cornwall *continet* 40 *perticatas in longitudine, et* 4 *in latitudine, et quælibet perticata de* 16 *pedibus in longitudine* (4).

[m] By the grant of a selion of land, *selio terræ*, a ridge of land which containeth no certainty, for some be greater, and some be lesser; and by the grant *de unâ porcâ*, a ridge doth passe. *Selio* is derived of the French word *sellon*, for a ridge.

[m] 9 E. 3. 39. Temps E. 1. Br. 866. Mich. 30 E. 1. coram rege Glouc. in Thesaur.

[n] By the grant *de centum libratis terræ, or* 50 *libratis terræ*, or *centum solidatis terræ, &c.* land of that value passeth, and so of more or lesse; and in ancient time by that name it might have been demanded. [o] And many things may passe by a name, that by the same name cannot be demanded by a (5) *præcipe*, for that doth require more prescript forme; but whatsoever may be demanded by a *præcipe*, may passe by the same name by way of grant.

[n] Bract. fo. 377. 431. 43 E. 3. 27. Regist. fo. 1. 94. 248, 249. F. N. B. fo. 87. F. l.
[o] Regula.

Frythe is a plaine betweene woods; and so is *lawnd* or *lound*. *Combe, hope, dene, glyn, hawgh, howgh*, signifyeth a vally. *Howe, hoo, knol, law, pen*, and *cope*, a hill. *Ey, ing*, and *worth*, signifieth a watry place or water. *Falesia* is a bank or hill by the sea-side; it commeth of *falaize*, which signifieth the same. Of all

7 R. 1, inter fines Sussex.

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(3) See further as to *thane* and *thane* land, in Reliq. Spelm. 11, &c. See also post. 6. a. n. 6.

(4) This differs from the common acre, because each perch usually contains 16 feet and an half. In some places the custom is to measure by a perch of 24 feet, and in others by one of 20 feet. See Crompt. on Courts, 222.

(5 See ante 5, a. n. 11.

all these you shall read in ancient bookes, charters, deeds, & and records: and to the end that our student should not be discouraged for want of knowledge, when he meeteth with them *(nescit enim generosa mens ignorantiam pati)*, we have armed him with the signification of them, to the end he may proceed in his reading with alacrity, and set upon, and know how to worke into with delight these rough mines of hidden treasure. [6. a.]

[m] 17 E. 3. 7. 43 E. 3. 35, b. Regist. 65. 10 H. 7, 21. Pl. Com. 191. 195.

[m] By the name of *minera*, or *fodina plumbi*, &c. the land itselfe shall passe in a grant, if livery be made, and also be recovered in an assise, *et sic de similibus*. Bract. 211. 326.

[n] 45 E. 3. Vouchee 72. 33 E. 3. grant. 102. 11 H. 6. 22. 27. 14 E. 4. 4. 20 Ass. p. 9. 3 E. 4. 19. 11 H. 7. 25. (Post. 19, b. 20, and 154.)

By the grant of a fouldcourse, or the like, lands and tenements may (1) passe [n]. *Tenementum*, tenement, is a large word to passe not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any franktenement, and whereof he is seised *ut de libero tenemento* (2). But *hæreditamentum*, hereditament, is the largest word of all in that kind; for whatsoever may be inherited is an hereditament, be it corporeall or incorporeall, reall or personall, or mixt (3).

[o] 1 Co. fo. 1, & 2, in Seignior Buckhurst's case. 44 E. 3. 11, b. 39 E. 3. 17, a. 19 H. 6. 65, b. 34 H. 6. 1, a. 10 E. 4. 9, b. 18 E. 4. 14, 15. 6 H. 7. 3, b. H. 7. 33, a. (2 Ro. Abr. 31.)

[o] A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only against him and his heirs, the purchaser shall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terræ*, to the end he may the better defend the land himself, having no warrantie to recover in value; for the evidences are, as it were, the sinewes of the land, and the feoffor not being bound to warrantie hath no use of them. But if the feoffor be bound to warrantie, so that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that case shall have no deeds that comprehend

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(1) Here *fold-course* seems to be understood for land used as a *sheep-walk*; but the word has various other senses. Sometimes it signifies land to which is appurtenant the sole right of folding the cattle of others. Sometimes it means merely *such* right of folding. It is also used to denote the right of folding on another's land, which is called *common* of *faldage*. See in W. Jo. 375, and Cro. Cha. 432, a case, in which *common* of *faldage* was claimed; and 2 Ventr. 139, one in which the right of folding the cattle of others is prescribed for.

(2) See further as to the extent of the word *tenement*, Perk. sect. 114, and 11 H. 6. 22.

(3) See further as to *hereditament*, ante 3 Plowd. 58. Mo. 176. 3 Co. 2. Dy. 323, b. pl. 30. With the word *hereditament* lord Coke ends his laborious inquiries about the names, by which things will pass in grants and other conveyances. His etymologies and explanations of the several words are certainly open to many observations, besides the few made by the editor of this edition. But the omission on his part proceeds from the nature of his undertaking, which confines him to narrow limits. To supply his unavoidable deficiencies in this instance, and for the sake of recommending assistances which are too much neglected, he refers the student to the Glossaries which are so peculiarly adapted for the libraries of such as study English law, history, and antiquities. Of these a good list is given in a tract by Dr. Thomas Barlow, intitled *Directions for the Study of the English History and Antiquities*, and published in 1742 by Dr. Taylor, with his Commentary on the Decemviral Law

prehend warrantie, whereof the feoffor may take advantage. Also, he shall have such charter, as may serve him to deraigne the warrantie paramount. Also, he shall have all deeds and evidences, which are materiall for the maintenance of the title of the land; but other evidences which concerne the possession, and not the title of the land, the feoffee shall have them (4).

"*To have and to hold.*" These two words do in this place prove a double signification, *viz. to have* an estate of inheritance of lands descendible to his heirs, and *to hold* the same of some superior lord.

There have beene eight formall or orderly parts of a deed of feoffment (5), *viz.* 1, the *premises* of the deed implied by *Littleton*; 2, the *habendum*, whereof *Littleton* here speaketh; 3, the *tenendum*, mentioned by *Littleton*; 4, the *reddendum*; 5, the *clause of warrantie*; 6, the *in cujus rei testimonium*, comprehending the sealing; 7, the date of the deed, containing the day, the month, the yeare and stile of the king, or of the yeare of our Lord; [*p*] lastly, the clause of *hiis testibus*; and yet all these parts were contained in very few and significant words [*q*], *hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt.*

Vide Sect. 40, & 370, 371. many things de cartis et factis. Fleta lib. 3, ca. 14. Britton 100, 101. Bract. lib. 5. fo. 396, a. 399. 38 H. 6. 33. 36. Pl. Com. Wrotesleye's case, fol. 96.

[*p*] Vid. Throgmorton's case, Pl. Com. Vid. Sect. 278. (2 Ro. Abr. 23.)

[*q*] 6 Co. 43, in sir Anthony Mildmay's case.

The office of the *premisses* of the deed is twofold: first, rightly to name the feoffor and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveied by the feoffment, either by expresse words, or which may by reference be reduced to a certaintie; for *certum est quod certum reddi potest.* The *habendum* hath also two parts, *viz.* first, to name againe the feoffee; and secondly, to limit the certaintie of the estate. The *tenendum* at this day, where the fee simple passeth, must be of the chiefe lords of the fee. And of the *reddendum* more shall be said in his proper place, in the Chapter of Rents. Of the *clause of warrantie* more shall be said in the Chapter of Warranties. *In cujus rei testimonium sigillum meum apposui* was added, for the seale is of the essentiall part of the deed. The date of the deed many times antiquity omitted; and the reason thereof

Brit. fo. 101.

Law *De inope Debitore in partes dissecando.* To this list of Glossaries should be added, Du Fresne's Glossary *ad Scriptores Med. et Infim. Latin ed. Par.* 1733, the *Glossarium Novum* by Charpentier, *ed Par.* 1766, the Glossary by Dr. Kennet, at the end of his Parochial Antiquities, that at the end of Wilkins's Leg. Anglo-Saxon. and Lye's Dict. Sax. & Gothic. Latin. ed. 1772.

(4) See Cro. Eliz. 347. Cro. Cha. 442. Noy 145. In all of these books it is said, that in the case of conveyances to uses the possession of deeds appertains to the *feoffee* or *covenantee*, and not to *cestui que use*; and the reason given is, that it was so at common law; and the statute of uses, though it transfers the legal estate to *cestui que use*, doth not transfer the deeds. But this doctrine seems questionable.

(5) See the observations on this part of the Commentary in Mad. Form. Angl. Dissert. p. 5. See also on the subjects of ancient deeds and charters, the whole of the same Dissertation, and Nich. Engl. Hist. Libr. 2d ed. 240. Seld. Jan. Angl. b. 2. c. 2, and 3, to which may be added Mabillon de Re Diplomatica.

thereof was, for that the limitation of prescription, or time of memory, did often in processe of time change; and the law was then holden, that a deed bearing date before the limited time of prescription, was not pleadable; and therefore they made their deedes without date, to the end they might alledge them within the time of prescription. And the date of the deedes was commonly added in the raigne of E. 2, and E. 3, and so ever since.

And sometime antiquitie added a place, as *datum apud D.* which was in disadvantage of the feoffee; for being in generall he may alleage the deed to be made where he will. And lastly, antiquitie did add *hiis testibus* in the continent of the deed after the *in cujus rei testimonium*, written with the same hand that the deed was, which witnesses were called, the deed read, and then their names entered. [r] And this is called charter land; and accordingly the Saxons called it *bockland*, as it were booke land (6); which clause of *hiis testibus* in subjects deeds continued untill and in the raigne of H. 8, but now is wholly omitted. And it appeareth by the ancient authors and authorities of the law, that before the statute of 12 E. 2, c. 2, processe should be awarded against the witnesses named in the deed, *testes in cartâ nominatos*; [s] and that the same statute was but an affirmance of the common law, which not being well understood, hath caused varietie of opinions in our books. But the delay therein was so great, and sometimes (though rarely) by exceptions against those witnesses, which being found true, they were not to be sworne at all, neither to be joined to the jury, nor as witnesses; [t] as if the witness were infamous: for example, if he be attainted of a false verdict, or of a conspiracie at the ☞ suite of the king, or convicted of perjury, or of a præmunire, or of forgerie upon the statute of 5 Eliz. cap. 14, and not upon the statute of 1 Hen. 5. cap. 3, or convict of felony, or by judgement lost his eares, or stood upon the pillory or tumbrell, or beene *stigmatious*, branded, or the like (1), whereby they become infamous for some offences, *quæ sunt minoris culpæ sunt majoris infamiæ.* [6. b.]

[r] Lamb. exposit. verb. terra ex scripto. Vid. Fortescue, cap. 32. See the Second Part of the Instit. cap. 38. 12 E. 2. c. 2. See the Second Part of the Institutes. Marlb. cap. 6, and cap. 14.

[s] Brit. fo. 65. 101. 11 E. 3. proces. 170. 6 H. 3. proces. 209. 8 H. 3. proces. 210. 4 E. 2. gard. 119.

[t] Mirror ca. 4. sect. de infamies et perjurie. Glanv. lib. 2. cap. 15. Bract. lib. 5. fo. 288. 292. Brit. fo. 134, 135. 101. Fleta lib. 5. ca. 21. 8 E. 2. Ass. 396. 2 E. 3. 22. 24 E. 3. 34. (5 Co. 99. Flower's case.) 43 E. 3. conspir. 11. 27 Ass. 59. 33 H. 6. 55. 21 H. 6. 36. (4 Inst. 279. 1 Sid. 51. Godb. 288. 2 Bulst. 154. Raym. 369. 1 Ventr. 349. 1 Kelynge 38. 18. 4 Inst. 279. T. Jo. 155. 2 Ro. Abr. 686.)

[a] If a champion in a writ of right become recreant or coward, he thereby loseth *liberam legem*, and thereby becomes infamous, and cannot be a witnesse; for regularly he that loseth *liberam*

[a] Fortesc. ca. 26. Pat. 55 H. 3. m. 3. Stanf. Pl. Cor. 174, a.

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(6) See further as to *bockland* and *folkland*. Reliq. Spelm. 12, 39, and Dalrymp. Feud. Prop. 9. In this last book the very spirited writer attempts a new distinction between the two kinds of land, and to show that *bockland* or *thane land* was *feudal*, and that *folk* or *reveland* was *allodial*.

(1) But according to the modern cases, it is the *infamy* of the *crime*, and not of the *punishment*, which disqualifies from being a witness; and therefore persons stigmatized by an *infamous* punishment, such as being set on the pillory, are admissible witnesses, unless the punishment was inflicted for forgery, perjury, or any species of the *crimen falsi*, or any other crime of an infamous nature. See further on this subject, Gilb. Law of Evid. 142, the Law of Nisi Prius, 1st ed. 413, and 1 Wils. part 2. p. 18.

liberam legem, becometh infamous, and can be no witnesse. Or if the witnesse be an infidell (2), or of non-sane memory, or not of discretion, or a partie interested, or the like. [*b*] But oftentimes a man may be challenged to be of a jury, that cannot be challenged to be a witnesse; and therefore though the witnesse be of the neerest alliance, or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous, or to want understanding, or discretion, or a partie in interest, though it be proved true, shall not exclude the witnesse to be sworne [*c*], but he shall be sworne, and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact; insomuch as some bookes have said, that though the witnesse named in the deed be named a disseisor in the writ, yet he shall be sworne as a witnesse to the deed. [*d*] A witnesse amongst others named in a deed was outlawed, and no process was awarded against him by the statute, because he was *extra legem*; and an outlawed person cannot be an auditor. And the court in some bookes have said, that they have not seene witnesses challenged, which is regularly to be understood with the limitations abovesaid; but such as are returned to be of a jurie are to be challenged for the causes aforesaid for outlawry, and divers other causes (for the which a witnesse cannot be challenged), and such process against witnesses (3) is vanished. But seeing the witnesses named in a deed shall be joyned to the inquest, and shall in some sort joyne also in the verdict (in which case if jurie and witnesses finde the deed that is denied to be the deede of the partie, the adverse partie is debarred of his attaint, because there is more than 12 that affirme the verdict) (4), it is reason, that in that case of joyning such exception shall be taken against the witnesse as against one of the jury, because he is in the nature of a juror. [*e*] And therefore to put one example, if he be outlawed in a personall action, he cannot be joined to the jury; but yet that is no exception against him to exclude him to be sworne as a witnesse to the jury. And the reason of all this is, for that if he with others should joyne in verdict with the jurie in affirmance of the deed, the partie should be barred of his attaint. But note, there must be more than one witnesse that shall be joined to the inquest. And albeit they joyne with the jury, and finde it not his deed, notwithstanding this joyning, the partie shall have his attaint; for it is a maxim in law, [*f*] that

[*b*] Fortescu. ca. 25.

[*c*] 22 Ass. 12. and 41. 23 Ass. 11. 19 E. 2. tit. Ass. 409.

[*d*] 34 E. 1. proces. 208.

[*e*] 34 E. 1. tit. Proces. 208. 11 Ass. p. 19, 20. 12 Ass. p. 1. 12. 41. 18 Ass. p. 11. 22 Ass. 15. 23 Ass. 15. 40 Ass. 23. 48 Ass. p. 5. 21 H. 6. 30.

[*f*] 48 E. 3. 30. 12 H. 6, fo. 6, a. 50 E. 3. 16. 43 E. 3. 32. 12 H. 4. 9. 19 E. 2. Ass. 408. Pasch. 14 E. 3, coram rege Devon. in Thesaur. Fleta, lib. 6, cap. 6. F. N. B. 106. h, and 97, c. (Post. 303.)

witnesses

(2) But now it is settled, that all persons professing to believe in a God, though neither believing in the Old or New Testament, may be witnesses, if sworn according to the ceremonies of their own religion. See in 1 Atk. 19. 2 Eq. Cas. Abr. 397, and 1 Wils. part 1. p. 84, the great case of Omichund and Barker, in which lord chancellor Hardwicke, assisted by the two chief justices and the chief baron, determined that the deposition of one who was of the *Gentoo* religion should be read in evidence.

(3) See further on this subject of joining with the jury the witnesses named in a deed, and the process for that purpose, 33 H. 6. 19, and in Vin. Abr. *Evidence*, H. a. and J. a.

(4) Acc. 1 Ro. Abr. 280, pl. 14, and 2 Inst. 662. See infra, n. 5.

witnesses cannot testifie a negative (5), but an affirmative. And if one of the witnesses named in the deed be one of the panell, he shall be put out of the panell: and all these secrets of law notably appeare in our bookes.

[g] Mirror ca. 3. Pl. Com. fo. 10. Bract. lib. 5, fo. 400. (Post. 373. a.)

To shut up this point, it is to be knowne, [g] that when a triall is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror and the like. But when the trial is by verdict of 12 men, there the judgment is not given upon witnesses, or other kinde of evidence, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict. And Bracton saith, there is *probatio duplex, viz. viva*, as by witnesses *viva voce*; and *mortua*, as by deedes, writings, and instruments. And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, *viz.* violent, probable, and light or temerary. *Violenta præsumptio* is manie times *plena probatio*; as if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seene to come out of that house with a bloody sword, and no other man was at that time in the house. *Præsumptio probabilis* moveth little; but *præsumptio levis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for a proofe, is continuall and quiet possession; for *ex diuturnitate temporis omnia præsumuntur solenniter esse acta*. Also the deed may receive credit *per collationem sigillorum scripturæ, &c. et super fidem cartarum mortuis testibus erit ad patriam de necessitate recurrendum*.

Fleta, lib. 6, ca. 33. 8 E. 3. 290. 39 E. 3. 21 b. Glanv. lib. 10, ca. 12. Fleta, lib. 6, ca. 33.

[h] Pasch. 10. Ja. in Com. Banco upon the stat. of bankrouts. (1 Brownl. 47. 2 Ro. Abr. 686. Hutt. 115. Raym. 1. 1 Vent. 248. 3 Keb. 198. 1 Sid. 431.)

Note, it hath been resolved by the justices, that a wife [h] cannot be produced either against or for her husband (6), *quia sunt duæ animæ in carne unâ*; and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience; but [i] in some cases women are by law wholly excluded to heare testimony; as to prove a man to be a villeine, *mulieres ad probationem statûs hominis admitti non debent*. It was also agreed by the whole court [h], that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witnesse against the usurer, for in effect he should be *testis in propriâ causâ*, and should avoyd his owne bonds and assurances, and discharge himselfe of the money borrowed; and though he commonly raise up an informer

[i] Fleta, lib. 2, ca. 44. 13 E. 1. tit. Vill. 36, 37. 19 E. 2. ibid. 32. (Post. 25.)

[h] Tr. 8 Ja. in Com. Banco. Smithe's case, in evidence upon an information upon the statute of usury. Brit. fo. 134. (Raym. 191. 7 Mod. 118.) (1 Sid. 51. 2 Ro. Abr. 685.)

to

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(5) Acc. 4. Inst. 279, and the references supra in n. 4. But see 1 Ro. Rep. 83. Comb. 18, 57. Gilb. Law of Evid. 157. Law of Nisi Prius, 1st ed. 422.

(6) There are many exceptions to this rule, as well at common law, as under acts of parliament. See Gilb. Law of Evid. 135. Law of Nisi Prius, 1st ed. 425. See further as to admitting or refusing the evidence of the wife or husband against each other, in Cas. B. R. temp. Hardwicke, 265. Rep. of Cas. B. R. temp. Hardw. 140. 1 Atk. 451. 2 Kel. 62.

[7. a.] to exhibit the information, yet *in rei veritate* he is the partie (7). And herewith in effect agreeth Britton that he that challengeth a right in the thing in demand, cannot be a witnesse, for that he is a party in interest (1). But now let us returne to that from the which by way of digression (upon this occasion) we are fallen.

And the ancient charters of the king, which passed away any franchise or revenue of any estate of inheritance, had ever this clause of *hiis testibus*, of the greatest men of the kingdome, as the charters of creation of nobility yet have at this day. When *hiis testibus* was omitted, and when *teste me ipso* came into the king's grants, you shall reade in the Second Part of the Institutes (2), *Magna Charta* cap. 38. I have learned the said parts of the deed formall or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without *premisses*, *habendum*, *tenendum*, *reddendum*, clause of *warrantie*, the clause of *in cujus rei testimonium*, the *date*, and the clause of *hiis testibus*, yet the deed is good. [*f*] For if a man by deede give lands to another and to his heires without more saying, this is good, if he put his (2 Inst. 77.)

[*f*] Mirror, cap. 1, sect. 6, & cap. 5, sect. 1. Glanvil. lib. 10, cap. 12. Bract. lib. 5, fol. 396. Flet. lib. 6, ca. 32. Brit. fo. 66.

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(7) But this objection fails where the debtor, previously to his examination, has paid the money borrowed, there being, as it is said, no remedy to recover the money back again; and therefore in such a case his testimony hath been received. See the addit. refer. supra in marg. letter [*k*], and Cas. B. R. temp. Hardw 266, and Gilb. Law of Evid. 127

(1) Besides the books already cited on the subject of evidence, see *Duncombe's Trials per Pais* in the chapter on evidence, the *Law of Evidence*, and the title *Evidence* in the several Treatises on the Pleas of the Crown, and in the several Abridgments of Law and Equity. As to the book intitled the *Theory of Evidence*, it is included in the *Law of Nisi Prius*. The writings of the civilians on evidence are very numerous; and the curious reader may see an account of them in *Buderus's* edition of the *Bibliotheca Juris selecta*, by *Struvius*. Amongst the most admired of their professed writers on the subject are *Menochius de Presumptionibus*, *Mascardus de Probationibus Everhardus de Testibus et Fide Instrimentorum*, and *Farinacius de Testibus*. Struvius's *Bibliotheca Juris* will be found very useful to the diligent student, by introducing him to a knowledge of the principal books on the law of nature and nations, the civil and canon law, and the laws of most of the countries in Europe, and of the characters of the several writers. It is to be wished, that we had a *Bibliotheca Juris Anglicani*, written on the same critical and enlarged plan. Such a work has been attempted by Mr. *Gatzert*, a German writer, who has lately published at Gottingen a book intitled *Commentatio Juris Exotici Historico-Litteraria de Jure Communi Angliæ*. But though Mr. Gatzert, when the disadvantage of his being a foreigner is considered, has really done wonders; yet it is not to be conceived that such a work can ever be executed with the requisite judgment, accuracy, and nicety, until the task is undertaken by one of our own country, who hath been regularly trained in the study of the English law, and is familiarly acquainted with all the writers on our laws, constitution, and history.

(2) In the second Institute, sir Edward Coke seems to think, that the clause of *teste me ipso* was first introduced into the king's grants in the time of Richard the *second*; but Mr. Madox dates the use of it much earlier, and gives an instance in the reign of Richard the *first*. See 2 Inst. 77, and Mad. Form. Anglic. Dissert. p. 32.

his seale to the deede, deliver it, and make livery accordingly. [g] So it is if *A.* give lands to have and to hold to *B.* and his heires, this is good, albeit the feoffee is not named in the (3) premisses. And yet no well advised man will trust to such deeds, which the law by construction maketh good, *ut res magis valeat*; but when forme and substance concurre, then is the deed faire and absolutely good. The sealing of charters and deeds is much more ancient than some out of error have imagined (4); for the charter of king Edwyn, brother of king Edgar, bearing date *anno Domini* 956, made of the land called *Jecklea*, in the Isle of Ely, was not only sealed with his owne seale (which appeareth by these words, *ego Edwinus gratiâ Dei totius Britannicæ telluris rex meum donum proprio sigillo confirmavi*), but also the bishop of Winchester put to his seale, *ego Ælfwinus, Winton. ecclesiæ divinus speculator, proprium sigillum impressi.* And the charter of king Offa, whereby he gave the Peterpence, doth yet remaine under seale. But no king of England before or since the Conquest sealed with any seale of armes before king R. 1, but the seale was the king sitting in a chaire on the one side of the seale, and on horsbacke on the other side in divers formes. And king R. 1. sealed with a seale of two lyons, for the Conqueror of England bare two lyons; and king John in the right of Aquitaine (the duke whereof bare one lyon) was the first that bare three lyons, and made his seale accordingly, and all the kings since have followed him. And king E. 3, in *anno.* 13 of his raigne, did quarter the armes of France with his three lyons, and tooke upon him the title of king of France, and all his successors have followed him therein.

[g] Vid. Tearmes of the Law, verb. Faits. Vid. Glanvil. lib. 10. c. 12. Mirr. c. 1, sect. 3, and c. 3. (2 Ro. Abr. 66, pl. 13. Cro. Eliz. 903.)

In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of seisin indorsed; for certainly the witnesses named in the deed were witnesses of both: and witnesses either of delivery of the deed, or of livery of seisin, by expresse tearmes was but of later times, and the reason was in respect of the notoriety of the feoffment. And I have knowne some ancient deeds of feoffment having livery of seisin indorsed suspected, and after detected of forgerie. As if a deed in the stile of the king name him *defensor fidei* before 13 H. 8, or *supreme head* before 20 H. 8, at which time he was first acknowledged supreme head by the cleargy, albeit the king used not the stile of *supreme head* in his charters, &c. till 22 H. 8, or *king of Ireland* before 33 H. 8, at which time he assumed the title of *king of Ireland*(5), being before that called lord of Ireland, it is certainly forged; *et sic de similibus.*

21 H. 8. cap. 16.

And

(3) The cases in 3 Leon. 33, and 2 Ro. Abr. 66. pl. 13, are *contra.* That in Cro. Eliz. 902, and 917, also seems *contra* on the first reading; though, on examination, the question appears to have been rather on the manner of pleading the deed, than on the operation of it. But in Car. Rep. 123, there is a case of the 21 and 22 Eliz. in which the two chief justices and the chief baron certified to the chancellor, that a lease was good in law, though the lessee was named in the *habendum* only; and the case in Allen 41, is also with lord Coke.

(4) See further as to the antiquity of sealing deeds, in Seld. Jan. Angl. b. 2. c. 2. Mad. Form. Anglic. Dissert. p. 27, and Nichols. Eng. Histor. Libr. 2d ed. 241.

(5) See post. 7. b. n. 1.

And some have observed that *grace* was attributed to king H. 4, *excellent grace* to king H. 6, *majestie* to king H. 8, and before, the king was called *soveraigne lord, liege lord, highness*, and *kingly highnesse*, which in Latin in legall proceedings is called *regia celsitudo*; as the beginning of the petition of right to the king is *humillimè supplicavit vestræ celsitudini regiæ, &c.* and the like. And upon this occasion it shall not be impertinent, seeing it is part of the formall deed, to set downe the several stiles of the kings of England since the Conquest.

Vid. 2 H. 4, c. 15, where royall majesty is attributed to the king, and crimen læsæ majestatis farr more ancient.

William the Conqueror commonly stiled himselfe *Willielmus rex*, and sometimes *Willielmus rex Anglorum*. And the like did William Rufus, and sometimes *Willielmus Dei gratiâ rex Anglorum*.

Henry the first, *Henricus rex Anglorum*, and sometimes *Henricus Dei gratiâ rex Anglorum*.

Mawde, the sole daughter and heire of H. 1, wrote *Matildis imperatrix Henrici regis filia et Anglorum domina*; divers of whose creations and grants I have seene.

King Stephen used the stile that king H. 1, did.

Henry the 2, *Fitz-Empress*, omitted *Dei gratiâ*, and used this stile, *Henricus Rex Angliæ, dux Normanniæ et Aquitaniæ, et comes Andegaviæ*, he having the duchy of Aquitaine and earledome of Poitiers in the right of Elianor his wife heire to both, and the earldome of Anjowe Tournie and Maine, as sonne and heire to Jeffery Plantagenet by the said Mawde his wife, daughter and sole heire of king H. 1. She was first married to Henry the emperor, and after his death to the said Jeffery Plantagenet. Which duchie of Aquitaine doth include Gascoigne and Guien.

King R. 1, used the stile that H. 2, his father did; yet was he king of Cyprus, and after of Jerusalem, but never used either of them.

[7. b.] ☞ King John used that stile, but with this addition, *dominus Hiberniæ*; and yet all that he had in Ireland was conquered by his father king H. 2, which title of *dominus Hiberniæ* he assumed as annexed to the crowne, albeit his father, in the 23 yeare of his raigne, had created him king of Ireland in his lifetime (1).

King H. 3, stiled himselfe as his father king John did, untill the 44 yeare of his raigne, and then he left out of his stile, *dux Normanniæ, et comes Andegaviæ*, and wrote onely *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ*.

King E. 1, stiled himselfe in like manner as king H. 3, his father did, *rex Angliæ dominus Hiberniæ, et dux Aquitaniæ*. And so did king E. 2, during all his raigne. And king E. 3, used the selfe same stile untill the 13 yeare of his raigne, and then he stiled himselfe in this forme, *Edwardus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ*, leaving out of his stile *dux Aquitaniæ*. He was king of France as sonne and heire of Isabel wife of king E. 2, daughter and heire of Philip le Beau king of France. He first quartered the French armories with the English in his great seale, *anno domini* 1338, *et regni sui* 14.

King R. 2, and king H. 4, used the same stile that king E. 3, did. And king H. 5, untill the 8 yeare of his raigne continued the same

(1) See further as to the deduction and change of the king's title in respect to Ireland, in Seld. Tit. Hon. b. 1. c. 4. s. 2.

same stile, and then wrote himselfe *rex Angliæ, hæres et regens Franciæ, et dominus Hiberniæ*, and so continued during his life

Vid. Rot. Parliam. anno 1 H. 6. nu. 16. he was stiled rex Franciæ et Angliæ, et dominus Hiberniæ.

King H. 6, wrote *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ.* This king being crowned in Paris king of France used the said stile 39 yeares, till he was dispossessed of the crowne by king E. 4, who after he had raigned also about ten yeares, king H. 6, was restored to the crowne againe, and then wrote, *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ, ab inchoatione regni sui* 49 *et recaptionis regiæ potestatis primo.*

King E. 4, R. 3, and H. 7, stiled themselves, *rex Angliæ et Franciæ, et dominus Hiberniæ.*

King H. 8, used the same stile till the tenth yeare of his raigne, and then he added this word *(octavus)*, as *Henricus octavus Dei gratiâ, &c.* In the 13 yeare of his raigne he added to his stile *fidei defensor* (2). In the 22 yeare of his raigne, in the end of his stile he added, *supremum caput Ecclesiæ Anglicanæ* (3). And in the 23 yeare of his raigne he stiled himself thus, *Henricus octavus, Dei gratiâ Angliæ Franciæ et Hiberniæ rex, fidei defensor, &c. et in terrâ ecclesiæ Anglicanæ et Hiberniæ supremum caput* (4).

King E. 6, used the same stile, and so did queen Mary in the beginning of her raigne, and by that name summoned her first parliament, but soone after omitted *supremum caput.* And after her marriage with king Philip, the stile notwithstanding that omission was the longest that ever was, *viz. Philip and Mary, by the grace of God, king and queene of England and France, Naples, Jerusalem, and* (5) *Ireland, defenders of the faith, princes of Spaine and Sicilie, archdukes of Austria, dukes of Millaine Burgundy and Brabant, countees of Hasburgh Flanders and Tyroll.* And this stile continued till the fourth and fifth yeare of king Philip and queene Mary, and then Naples was put out, and in place thereof both the Cicilies put in, and so it continued all the life of queene Mary.

I need not mention the stile of queene Elizabeth, king James, nor of our soveraigne lord king Charles, because they are so well knowne; and I feare I have beene too long concerning this point, which certainly is not unnecessary to be knowne for many respects. But to shew the causes and reasons of these alterations would aske a treatise of itselfe (6), and doth not sort to the end that

(2) This title was given to Henry by Pope Leo X. in consequence of the king's publishing his book, in defence of the seven sacraments, against Martin Luther, and dedicating it to the pope. Coll. Eccl. Hist. v. ii. p. 11 to 17.

(3) See Burn. Hist. Reform. v. 1. p. 136.

(4) See the 35 H. 8. c. 3. which ratifies the king's stile.

(5) Though Henry the 8th and Edward the 6th had both used the title of king of Ireland, yet pope Paul the 4th, dissembling notice of it, conferred the same title as a new one upon Philip and Mary, in order that the world might deem their use of the title merely the effect of his power. Heyl. Hist. Reform. 69, 70.

(6) See further concerning the stiles of the kings of England, and also of Great Britain, since the union of the two kingdoms, in Nichols. Eng. Histor. Libr. 2d ed. p. 248, and the several Treatises which have been published on the English Coins.

that I have aimed at. And now let us returne to the learning of charters and deeds of feoffments and grants.

Very necessary it is that witnesses should be underwritten or indorsed, for the better strengthening of deeds, and their names (if they can write) written with their owne hands. For livery of seisin see hereafter, Sect. 59, and for deeds, Sect. 66, and of conditionall deeds see our author in his Chapter of Conditions. And now let us proceed to the other words of our author.

Livery of seisin incident to a feoffment. Vid. Sect. 59.

"*To him and to his heires.*" *Hæres*, in the legall understanding of the common law, implyeth, that he is *ex justis nuptiis procreatus*; for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood do descend of some estate of inheritance. For *solus Deus hæredem facere potest, non homo: dicuntur autem hæreditas et hæres ab hærendo, quòd est arctè insidendo, nam qui hæres est hæret; vel dicitur ab hærendo, quia hæreditas sibi hæret, licèt nonnulli hæredem dictum velint, quòd hæres fuit, hòc est, dominus terrarum, &c. quæ ad eum perveniunt.*

Mirr. cap. 2. sect. 15. Bract. lib. 2, fo. 62, b. Flet. lib. 6, cap. 1, & 54, & lib. 1, cap. 13. Glanvil. lib. 7, ca. 1, and ca. 12 and 13. (Post. 237, b.)

A monster, which hath not the shape of mankind, cannot be heire or inherit any land, albeit it be brought forth within marriage; [*a*] but although he hath deformity in any part of his body, yet if he hath human shape he may be heire. *Hii qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa, inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter (ut si sex digitos vel nisi quatuor habuerit) bene debet inter liberos connumerari.* ☞ *Si imitilia natura reddidit, ut si membra tortuosa habuerit, non tamen is partus monstrosus.* Another saith *ampliatio seu diminutio membrorum non nocet.* [*b*] A bastard cannot be heire, for (as hath beene said before) *qui ex damnato coitu nascuntur inter liberos non computentur.* Every heire is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile. *Hermaphrodita, tam masculo quàm fœminæ comparatur, secundum prævalescentiam sexûs incalescentis.* And accordingly it ought to be baptized. See more of this matter Sect. 35.

[*a*] Bract. lib. 5, fol. 437, 438. Brit. ca. 66, fol. 167, and ca. 83. Fleta, lib. 1, ca. 5. (Post. 29, b.)

[8. a.]

[*b*] Vid. Sect. 188. 399. Bract. lib. 2, fo. 92. Brit. fo. Fleta lib. 1, ca. 5, and l. 6, c. 8. Fleta ubi supra. 3 R. 2, entr. cong. 38. (1 Ro. Abr. 625.)

[*c*] A man seised of lands in fee hath issue an alien that is borne out of the king's ligeance; he cannot be heire, *propter defectum subjectionis* (1), albeit he be borne within lawfull marriage. If

[*c*] Mirror, ca. 1. ca. 3; sect. ca. 5, sect. Bract. lib. 5, fo. 415. 427. Brit. fo. 29. Fleta, lib. 6, ca. 47. 13 E. 3. Br. 677. 25 E. 3, de natis ultra mare. 31 E. 3. Cousinage 5. 42 E. 3. 2. 11 H. 4. 26. 14 H. 4. 19, 20. 3 H. 6. 55. 22 H. 6. 38. 9 H. 4. 7. 7 Co. 1, in Calvin's case. (Cro. Jam. 539. Godb. 275. 1 Sid. 195. 201. Noy 158. T. Jo. 10. Vaugh. 274. 2 Sid. 28. Hardr. 224. 2 Ventr. 1.) 1 Ed. 3. 4. 6 Ed. 3. 55. 27 E. 3, 77. 3 E. 2, dilcent. Br. 64. 31 E. 1, discent. 17. 46 E. 3. Petition 20. 26 Ass. p. 2. 49 Ass. pl. 4. 29 Ass. pl. 11. 9 H. 5. 9.

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(1) If the *father* in this case is to be supposed a *natural-born* subject at the birth of the issue, the child would now be also a *natural-born* subject by force of the 7 Ann. c. 5, and 4 Geo. 2. c. 21. But the children of persons attainted of, or liable to the penalties of treason, or in the service of a foreign state in enmity with Great Britain, are excepted from the benefit of this provision. See the 25 Ed. 3, st. 2, which declares, that at common law, the children of the king,

made denizen by the king's letters patent, yet cannot he inherit to his father or any other. But otherwise it is, if he be naturalized by act of parliament; for then he is not accounted in law *alienigena*, but *indigena*. But after one be made denizen, the issue that he hath afterwards shall be heire to him, but no issue that he had before. If an alien cometh into England and hath issue two sonnes, these two sonnes are *indigenæ*, subjects borne, because they are borne within the realme. And yet if one of them purchase lands in fee, and dyeth without issue, his brother shall not be his heire(2); for there was never any inheritable blood betweene the father and them; and where the sonnes by no possibility can be heire to the father, the one of them shall not be heire to the other. See more at large of this matter Sect. 198.

If a man be attainted of treason or felony, although he be borne within wedlocke, he can be heire to no man, nor any man heire to him, *propter delictum*, for that by his attainder his blood is corrupted. And this corruption of blood is so high, as it cannot absolutely be salved and restored but by act of parliament; for albeit the person attainted obtaine his charter of pardon, yet that doth not make any to be heire whose blood was corrupted at the time of the attainder, either downward or upward. [*d*] As if a man hath issue a sonne before his attainder, and obtaineth his pardon, and after the pardon hath issue another sonne, at the time of the attainder the blood of the eldest was corrupted, and therefore he cannot be heire. But if he die living his father, the younger sonne shall be heire; for he was not *in esse* at the time of the attainder, and the pardon restored the blood as to all issues begotten afterwards. But in that case if the eldest sonne had survived the father, the younger sonne cannot be heire; because he hath an elder brother which by possibilitie might have inherited: but if the elder brother had been an alien, the younger sonne should be heire, for that the alien never had any inheritable blood in him (3). See more plentifully of this matter Sect. 746, 747.

[*d*] Stanf. pl. cor: 196, 196. Bract. lib. 3, fo. 132, 133. 276, and lib. 5, fo. 374. Britton, fo. 215. b. Fleta, l. 1, ca. 28. (Noy 170. Finch, 8vo. ed. 207. Ante 2. b. Post. 129. Cro. Cha. 543. 1 Sid. 195. 202. 1 Ro. Abr. 625. Cro. Jam. 539.)

If a man hath issue two sonnes, and after is attainted of treason or felony, and one of the sonnes purchase land and dieth without issue, the other brother shall be his heire; for the attainder of the father corrupteth the lineall blood onely, and not the collaterall

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king, wherever born, may inherit. The same statute enables children born abroad to inherit, if at their birth *both* their parents are within the king's allegiance, and their mothers pass the sea with the licence of their husbands. Amongst the MSS. in Lincoln's-Inn library, there is a very learned dialogue between two serjeants on the 25 E. 3. See lib. no. 80. See also post. 128. b. 129, and Chro. Cha. 601.

(2) In the case of Collingwood and Pace, the court denied this to be law; and held, that the sons of aliens were inheritable to each other. See in 1 Sid. 193, and 1 Ventr. 413, the very elaborate speech by lord chief justice Hale, on giving the judgment of the court. Also now by the 11 and 12 W. 3. c. 6, natural-born subjects may derive a title by descent through their parents, though aliens; but the 25 Geo. 2. c. 40, confines the benefit of the former statute to such heirs as shall be living and capable of taking at the death of the person last dying seised, unless such heirs happen to be daughters, and there is afterwards a son or another daughter, for which cases the statute makes a special provision.

(3) Besides the authorities in the margin, see W. Jo. 34.

laterall blood between the brethren, which was vested in them before the attainder, and each of them by possibility might have been heire to the father; and so hath it been adjudged (4). * But otherwise in the case of the alien-née, as hath been said. [e] But some have holden, that if a man after he be attainted of treason or felony have issue two sonnes, that the one of them cannot be heire to the other, because they could not be heir to the father, for that they never had any inheritable blood in them (5).

* In the Exchequer, Mic. 40 & 41 Eliz. in le case de Hobby.

[e] Bract. lib. 3, fol. 130. Brit. fol. 15. 1 Ventr. 414.)

Fleta, lib. 1, cap. 58. (1 Sid. 193.. 1 Lev. 60. Vaugh. 274.

[f] One that is borne deafe and dumbe may be heire to another, albeit it was otherwise holden in ancient time. And so if borne deafe dumbe and blinde, for *in hoc casu vitio parcitur naturali.* But contract they cannot., Ideots, leapers, madmen, outlawes in debt, trespasses or the like, persons excommunicated, men attainted in a *præmunire*, or convicted of heresie, may be heires.

[f] Bract. lib. 5, fo. 421. 430. 434. lib. 2, fo. 12. Fleta, lib. 6, ca. 39. 47. 14 H. 3. bre. 877. 32 E. 3. Age 8.

10 E. 3. 535. 18 E. 3. 53. 13 E. 3. Ley 49. (1 Ro. Abr. 626.)

[g] If a man hath a wife, and dyeth, and within a very short time after the wife marrieth againe, and within 9 months (6) hath a childe, so as it may be the childe of the one or the other, some have said, that in this case the childe may choose (7) his father, *quia in hoc casu filiatio non potest probari*, and so is the booke to be intended; for avoiding of which question and other inconveniences, this was the law before the Conquest, *Sit omnis vidua sine marito duodecim mensibus, et si maritaverit perdat dotem* (8).

[g] 21 E. 3. 39. Panciroll. nova rep. 485, &c. Opus eximium 48. b. Lambard de priscis Anglorum legibus, 120, 72. acc. (1 Ro. Abr. 357. Cro. Jam. Godb. 281.)

541. 3. S. C.

[h] A man by the common law cannot be heire to goods or chattels, for *hæres dicitur ab hæreditate.* [i] If a man buy divers fishes, as carps, breames, tenches, &c. and put them in his pond, and dyeth, in this case the heire shall have them, and not the executors,

[h] Bract. lib. 4, ca. 9, fo. 265. lib. 2, fo. 62. b. Fleta, lib. 6, ca. 1. 8.

Co. 54, Sym's case. [i] Mich. 36 and 37. El. Rot. 25, inter Gray and Paulet in the king's bench. Stanford 25 b. 18 E. 4. 8. 22 Ass. 25. 18 H. 8. 2.

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(4) S. p. acc. Noy 158. 4 Leon. 5.

(5) The principle, on which it has been adjudged that the children of an alien may be heirs as between themselves, though not to their father, seems to reach the case of children born after their father's attainder. See the cases cited in n. 2. supra.—[Note 38.]

(6) See post. 123, b. where this is said to be the utmost time the law supposes a woman to go with child, and the authorities which the reader will find there cited on the subject.

(7) Brooke questions this doctrine; from which it seems as if he thought it reasonable, that the circumstance of the case, instead of the choice of the issue, should determine who is the father. See Bro. Abr. Bastardy, pl. 18, and Palm. 10.—[Note 39.]

(8) See 11 and 12 W. 3. c. 4, which disables persons educated in the popish religion, or professing it, from inheriting, but in respect of themselves only, if they do not conform within six months after the age of 18; and provides, that till they do conform, their protestant next of kin shall enjoy. By the same statute papists are disabled from taking lands by *purchase*, which should have been mentioned before. For cases on the construction of this statute, see 1 Stra. 267. 2 P. Wms. 3. 6; and 132. 3 P. Wms. 46. 1 Atk. 526. 548. 2 Atk. 210. 3 Atk. 155. 457. 2 Ves. 398. 1 Wils. part. 1. p. 176. Rep. Cas. B. R. temp.

executors, but they shall goe with the (9) inheritance; because they were at libertie, and could not be gotten without industrie, as by nets, and other engines. Otherwise it is, if they were in a trunke or the like. Likewise deere in a parke, conies in a warren, and doves in a dove-house, young and old, shall goe to the (10) heire. [*k*] But of ancient time the heire was permitted to have an action of debt upon a bond made to his auncestor and his heires; but the law is not so holden at this day, *Vid.* Sect. 12.

[*k*] 13 E. 3. det. 135. 139, 140. 47 E. 3. 23. 25 E. 3, fo. 48. 26 E. 3, fo.

Vid. for an heirelome hæreditarium or principalius, Sect. 12.

[*l*] Mirror, ca. 1, sect. 3.

[*l*] ☞ It is to be noted, that one cannot be heire till after the death of his auncestor. Before he is called *hæres apparens*, heire apparent. [8. b.]

In our old bookes and records there is mention made of another heire, *viz. hæres astrarius*, so called of *astre*; that is, an harth of a house; because the auncestor by conveyance hath set his heire apparent, and his family, in a house and living in his life-time, of whom Bracton saith thus, [*a*] *Item esto quòd hæres sit astrarius, vel quòd aliquis antecessor restituat hæredi in vitâ suâ hæreditatem, et se dimiserit, videtur, quòd nullo tempore jacebit hæreditas, et ideo quòd nec relevari possit, nec debeat, nec relevium dari.* [*b*] For the benefit and safety of right heires *contra partus suppositos*, the law hath provided remedie by the writ *de ventre inspiciendo*, whereof the rule in the Register is this: *Nota, si quis habens hæreditatem duxerit aliquam in uxorem, et postea moriatur ille sine hærede de corpore suo exeunte, per quod hæreditas illa fratri ipsius defuncti descendere debeat, et uxor dicit se esse prægnantem de ipso defuncto cùm non sit, habeat frater et hæres breve de ventre inspiciendo.* It seemeth by Bracton, and Fleta which followed him, that this writ doth lie, *ubi uxor alicujus in vitâ viri sui se prægnantem fecit cùm non sit, vel post mortem viri sui se prægnantem fecit cùm non sit, ad exhæredationem veri hæredis, &c. ad querelam veri hæredis per præceptum domini regis, &c.* which is to be understood according to the rule of the Register. When a man having lands in fee simple dieth, and his wife soone after marrieth againe, and faines herself with childe by her former husband, in this case though she be married, the writ *de ventre inspiciendo* doth lie (1) for the heire. But if a man seised

[*a*] Bract. lib. 2, fo. 85. Heref. p. 8. E. 1. Ro. 80, de Banco. Mirror, cap. 2, sect. 18. Britton 151. b.

[*b*] Registr. fo. 227. Bracton, lib. 2, fo. 69. Britton, fo. 165. Fleta, lib. 1, ca. 14. (Cro. Eliz. 566. Cro. Jam. 685.)

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temp. Hardw. 149. Cas. B. R. temp. Hardw. 91. and Vin. Abr. *Devise*, l. 7. pl. 4, and 5.—[Note 40.]

(9) Acc. Cro. Eliz. 372.

(10) It is said, that though the party has only a term of years, still such things will go as accessary to the land. See Wentw. Off. Ex. ed. 1676. c. 5. p. 75.—[Note 41.]

(1) But in such a case the manner of proceeding on the writ *de ventre inspiciendo* is not the same, as where the party remains a widow. In the case in Cro. Jam. 685, the wife was married to a second husband, when the writ *de ventre inspiciendo* was sued. Therefore, instead of ordering her into the sheriff's custody, and to be kept by him till delivered of the child, as the practice is if the party is a widow, the court permitted the wife to remain with her husband, on his entering into a recognizance, that she should not remove from the house they then inhabited, and that some of the women returned by the sheriff should see her every day, and that three or more of them should be present at her delivery.—[Note 42.]

seised of lands in fee (for example) hath issue a daughter, who is heire apparent, she in the life of her father cannot have this writ for divers causes. First, because she is not heire, but heire apparent; for, as hath been said, *nemo est hæres viventis*; and this writ is given to the heire to whom the land is descended. And both Bracton and Fleta say, that this writ lyeth *ad querelam veri hæredis*, which cannot be in the life of his auncestor; and herewith agreeth Britton and the Register. Secondly, the taking of a husband in the case aforesaid being her owne act, cannot barre the heire of his lawfull action once vested in him (2). Thirdly, the law doth not give the heire apparent any writ, for it is not certaine whether he shall be heire, *solus Deus facit hæredes*. Fourthly, the inconvenience were too great, if heires apparent in the life of their auncestor should have such a writ to examine and trie a man's lawfull wife in such sort as the writ *de ventre inspiciendo* doth appoint; and if she should be found to be with childe, or suspect, then she must be removed to a castle, and there safely kept untill her delivery, and so any man's wife might be taken from him against the lawes of God and man.

Britton, fo. 165. b. Regist. ubi supra.

The words of the writ *de ventre inspiciendo* make this evident. *Rex vic. salutem. Monstravit nobis A. quòd cum R.* quæ fuit uxor *Clementis B. prægnans non sit, ipsa falsò dicit se esse prægnantem de eodem Clemente*, ad exhæredationem *ipsius A. desicut terra quæ fuit ejusdem C.* ad ipsum *A.* jure hæreditario descendere debeat *tanquam* ad fratrem et hæredem *ipsius se si prædict. R. prolem de eo non habuerit, &c.* But this rather belongs to the treatise of originall writs, and therefore thus much herein shall suffice (3).

Vid. Bracton, Britton & Fleta ubi supra. Registr. ubi supra. Bracton and Fleta ubi supra have (ad exhæredationem.)

And it is to be observed, that every word of Littleton is worthy of observation. First (Heires) in the plurall number; for if a man give land to a man and to his heire in the singular number, he hath but an estate for life, for his heire cannot take a fee simple by descent, because he is but one, and therefore in that case his heire shall take (4) nothing. Also observable is this conjunctive *(et)*. For if a man give lands to one, To have and

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(2) This is a reason, why the *actual* heir should *have* his writ notwithstanding the wife's marrying a second husband, but is foreign to the *heir apparent's not having* the writ; and therefore I presume has been placed here by mistake.—[Note 43.]

(3) See further on the writ *de ventre inspiciendo* Aiscough's case, Mos. 391, & 2 P. Wms. 591, in which the lord cha. King, on a petition, granted the writ, though the persons applying were only tenants in tail; and note the special manner in which he ordered the writ to issue, and what he said as to the execution of it. In Moseley's report, a case of *personal* estate is cited, in which the then master of the Rolls, in conformity to the reason of the common law, directed that the master should appoint two matrons to inspect a woman. Some perhaps may think this a great stretch of power. I cannot conclude this note, without suggesting the necessity of an act of parliament to regulate the proceedings on the writ *de ventre inspiciendo*. If the writ was to be strictly executed, it would be an *intolerable grievance*. On the other hand, if our courts of justice should, without authority from the legislature, change the established form for the sake of softening its rigour, it would be a *dangerous precedent*, and something very like the exercise of a dispensing power.—[Note 44.]

(4) According to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both in the same manner as *heirs* in the *plural* number.

and to hold to him *or* his heires, he hath but an (5) estate for life, for the uncertaintie. *(His, suis)* If a man give land unto two, To have and to hold to them two *et hæredibus* [c], omitting *suis* (6), they have but an estate for life, for the uncertainty; whereof more hereafter in this Section. But it is said, if land be given to one man *et hæredibus*, omitting *suis*, that notwithstanding a fee simple passeth; but it is safe to follow Littleton.

[c] 10 H. 6, 7. 22 H. 6. 15. Pl. Com. 28. b. 22 E. 4. 16. 2 H. 4. 13. 20 E. 3, bre. 377.

[d] 5 Co. 96, 97. Brit. fo. 28. H. 8. Dyer. Pl. Com. 287, 288. (Post. 22. a. 5 Co. 112.)

[d] "*And his assignes.*" Assignee cometh of the verb *assigno*. And note there be assignes in deed, and assignes in law; whereof see more in the Chapter of Warrantie, Sect. 733.

[e] Bract. lib. 2, cap. 39, fo. 92. b. Br. ca. 39, fo. 99. b. Fleta, lib. 6. ca. 1, 2, & lib. 3, cap. 2. 20 H. 6. 35. 36. 19 H. 6. 17, 22. 74. 22 E. 4. 16. b. 4 E. 6. Pl. Com. 26. [f] Vid. Sect. 413. [g] 7 E. 3. 25. Vid. Sect. 686. 25 E. 3. 35. Bract. lib. 2, fo. 62. b. Vid. Sect. 413. (5 Co. 112. 1 Leon. 2.) [h] Pl. Com. 242. Seignior Berkley's case. [i] Vid. Brit. fo. 86. 121, & 130. 17 E. 3. 25, b. 33 H. 6. 22. 18 H. 7. 13, 14. 9 H. 7. 11. 16 H. 7. 9. 15 E. 4. 13. 14 H. 6. 12. 35 H. 6. 34. 24 Ass. 14. 40 Ass. 21. (Post. 94.) Tr. 5 E. 3. Rot. 4, in Scaccario. 3 E. 3. 32. 7 E. 3. 40. 11 H. 4. 84. 12 H. 4. 12. 18 E. 3. Conusans 39. b. 5 E. 4. 121. 38 E. 3. 4. Co. 9. 28, in case de Abb. de Strata Marcella. [k] Hil. 21 Eliz. Dyer's manuscript, inter Analey and Johnson in Com. Banco. (4 Co. 65.)

[e] "*These words (his heires) which words onely make an estate of inheritance in all feoffments and grants.*" [e] *Si autem facta esset donatio, ut si dicam, do tibi talem terram, ista donatio non extendit ad hæredes sed ad vitam donatori, &c.* [f] Here Littleton treateth of purchases by naturall persons, and not of bodies politique or corporate; [g] for if lands be given to a sole body politique or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there to give him an estate of inheritance in his politique or corporate capacitie, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance (7); for as the heire doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. [h] But it appeareth here by Littleton, that if a man at this day give lands to *I. S.* and his successors, this createth no fee simple in him; for Littleton speaking of naturall persons saith that these words (his heires) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors). [i] And yet if it be an ancient grant, it must be expounded as the law was taken at the time of the grant. [k] A chantry priest incorporate took a lease to him and his successors for a hundred yeares, and after tooke a release from the leasor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease in his naturall [9. a.]

capacity,

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number. See 2 Ro. Abr. 253. See also 1 Ro. Abr. 832. K. pl. 1, 2. Godb. 155. T. Jo. 111. Cro. Eliz. 313. Robins. Gavelk. 95, 96. Burr. 4. part. v. 1. p. 38, & Vin. Abr. *Devise*, U. a. pl. 13, & *Parols*, H.—[Note 45.]

(5) See 5 Co. 112, post. 214, & Plowd. 286. 289, in which last book it is particularly considered, where the *disjunctive* shall be construed as the *conjunctive*.

(6) See 2 Ro. Abr. 833. M. & Vin. Abr. *Estate*, M.

(7) But a fee will pass to a corporation *aggregate* without the word *successors*, and sometimes to a corporation *sole*. See post 94. b. and Vin. Abr. *Estate*, L.—[Note 46.]

capacity, for it could not go in succession (1), and (his successors) gave him no estate of inheritance for want of these words (his heires). [*l*] If the king by his letters patent giveth lands *decano et capitulo, habendum sibi et hæredibus et successoribus suis*; in this case, albeit they be persons in their naturall capacity to them and their heires, yet because the grant is made to them in their politique capacity, it shall enure to them and their successors. And so if the king do grant lands to *I. S. habendum sibi et successoribus sive hæredibus suis*, this grant shall enure to him and his heires.

[*l*] 18 H. 6. 11. b. &c. adjudge.

[*m*] *B.* having divers sonnes and daughters, *A.* giveth lands to *B. et liberis suis, et a lour heires*, the father and all his children do take a fee simple joyntly by force of these words (their heires); (2) but if he had no childe at the time of the feoffment, the childe borne afterward shall not take (3).

[*m*] 15 E. 3. tit. Counterplea de Voucher 43. 37 H. 6. 30. 11 E. 4. 2. (Cro. Jam. 374. 6 Co. 16. b. 1 Leon. 287.)

These words (his heires) doe not onely extend to his immediate heires, but to his heires remote and most remote, borne and to be borne, [*n*] *sub quibus vocabulis (hæredibus suis) omnes hæredes propinqui comprehenduntur, et remoti, nati, et nascituri.* And

[*n*] Fleta, lib. 3. cap. 8. Pl. Com. 163.

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(1) The reason is, because a chantry priest was a corporation *sole*, which regularly could not take in succession chattels *real* or *personal*, in *possession* or *action*, though a corporation *aggregate* may. Acc. post. 46. b. 4 Co. 65. Hob. 64. But by *custom*, some chattels will go in succession to a *sole* corporation, as in London, where the chamberlain is a special corporation for taking bonds, which has been frequently adjudged a good custom. Cro. Eliz. 464. 682. 4 Co. 64. b. Also in some instances, particularly of chattels in *action*, the law is the same *without* a custom. See 1 Ro. Abr. 515. pl. 3. 5, and Vin. Abr. *Corporation*, L. As to the king's taking the ancient jewels of the crown, which are a kind of *heir looms*, it is not to be considered as an instance of a *sole* corporation's taking *chattels* in succession, but rather as one of a personal chattel's descending like a thing of inheritance. See post. 18. b.—[Note 47.]

(2) But in this case, the children must be understood to be parties to the grant; for it is said, that otherwise they can only take where the limitation is to them by way of remainder. Cro. Eliz. 10.—[Note 48.]

(3) Acc. Cro. Eliz. 121. 334. Ow. 152. Lord C. J. Hale adds, *that the father takes the whole fee simple.*—Hal. MSS. But if the limitation to the children be a remainder, then the children born *after* may take. See Wild's case, 6 Co. 18. b. where will be found several other distinctions on this subject. See further 1 Ro. Rep. 254. See also Vin. Abr. *Devise*, Y. a. I am the more frequent in my reference to mr. Viner's Abridgment, because it tends to facilitate the use of that immense body of law and equity; which, notwithstanding all its defects and inaccuracies, must be allowed to be a necessary part of every lawyer's library. It is indeed a most useful compilation, and would have been infinitely more so, if the author had been less singular and more nice in his arrangement and method, and more studious in avoiding repetitions. These faults, in great measure, proceeded from the author's error of judgment, in attempting to engraft his own very extensive Abridgment on that of mr. serjeant Rolle, whose work, though most excellent in its kind, and in point of method, succinctness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of law, was by no means calculated for the excessive enlargement from 2 vols. to 23 vols. in folio. It is not to be wondered at, that an incorporation of works so widely different in *proportion* as well as *execution*, should produce much confusion and disorder in the *effect*. Mr. Viner's labours would probably have advanced his reputation as a compiler much higher, if he had not attempted an union so unnatural.—[Note 49.]

And *hæredum appellatione veniunt hæredes hæredum in infinitum*. And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion.

There be many words so appropriated, as that they cannot be legally expressed by any other word, or by any periphrasis or circumlocution. Some to estates of lands, &c. as here and in [a] other places of our author. In this place these words, *tantsolement* (†), not *solcment*, alone, but *tansolement*, all onely, i. e. *solummodo* or *duntaxat*, are to be observed. [b] Some to tenures; [c] some to persons; [d] some to offences; [e] some to forms of original writs, either for recovery of right, or removing, or redresse of wrong; [f] some to warrantie of land. These have I touched for examples. I leave others to the studious reader to observe, and add, holding this for an undoubted verity, that there is no knowledge, case, or point in law, seeme it of never so little account, but will stand our student in stead at one time or other, and therefore in reading, nothing to be pretermitted.

[a] Sect. 17. 62. 133.
[b] Sect. 156. 161.
[c] Sect. 184.
[d] Sect. 190. 194. 746.
[e] Sect. 9. 67. 194. 204. 254. 236. 241. 405. 485. 478. 651. 655. 646. 620. 614. 637. 674. 692.
[f] Sect. 733.

"*Make an estate.*" *Status dicitur à stando*, because it is fixed and permanent. The Isle of Man, which is no part of the kingdom, but a distinct territory of itselfe, hath beene granted by the great seale to divers subjects and their heires. [g] It was resolved by the lord chancellor, the two chiefe justices and chiefe baron, that the same is an estate descendible according to the course of the common law; for whatsoever state of inheritance passe under the great seale of England, it shall be descendible according to the rules and course of the common law of England (4).

[g] Tr. 40. Eli. in le Count de Derby's case, by the Lo. Chancellor, les 2 chiefe Justices, & chiefe Baron.

"*In all feoffments and grants.*" Here it giveth the feoffment the first place, as the ancient and the most necessary conveyance, both for that it is solemne and publike, and therefore best remembered and proved, [*] and also for that it cleareth all disseisins, abatements, intrusions, and other wrongfull or defeasible estates, where the entry of the feoffor is lawfull, which neither fine, recovery, nor bargaine and sale by deede indented and inrolled doth. And here is implyed a division of fee, or inheritance, viz. [h] into corporeall, as lands and tenements which lie in livery, comprehended in this word feoffment, and may passe by livery by deed, or without deed, which of some is called *hæreditas corporata*, and incorporeall, (which lie in grant, and cannot passe by livery, but by deede, as advowsons, commons, &c. and of some is called *hæreditas incorporata*, and, by the delivery of the deede, the freehold, and inheritance of such inheritance, as doth lie in grant, doth passe) comprehended in this word Grant. And the deed of incorporeate inheritances doth equall the livery of corporeate. And therefore *Littleton* saith, in all feoffments and grants, *hæreditas, alia corporalis, alia incorporalis*:

[*] Vide Sect. 59, and 66.

[h] Mirror, c. 2. sect. 15, & c. 5. sect. 1. Bract. lib. 2, fo. 53. 366. 368. Fleta, lib. 3. ca. 1, 2. 15. Britt. 84. 87. a. & fol. 63. 101, 102. 141, 142. agreeth herewith. Pl. Com. 171. Hill & Grange. Mirror, ca. 5, sect. 1. Britton, cap. 34.

corporalis

† *tansolement* (in the original) is translated *onely*, by lord Coke; see sect. 1.

(4) S. C. 4 Inst. 284, and 2 And. 115. See further concerning the Isle of Mann in Pryn. on 4 Inst. 201. 384. Hale's Hist. Com. L. 183. Palm. 344. 1 P. Wms. 329. 1 Ves. 202. 2 Ves. 337. 1 Blackst. Comment. 5th ed. p. 104. and Camp. Polit. Surv. of Brit. v. 1. p. 524.

corporalis est, quæ tangi potest et videri; incorporalis, quæ tangi non potest, nec videri.

Feoffment is derived of the word of art *feodum, quia est donatio feodi*; for the antient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the aptest word of feoffment (5). And that word Ephron used*, when he enfeoffed Abraham, saying, I give thee the field of Machpelah over-against Mamre, and the cave therein I give thee, and all the trees in the field and the borders round about; all which were made sure unto Abraham for a possession, in the presence of many witnesses.

For the antiquity of Feoffments, see the Second Part of the Institutes, Marlbridge, ca. 9. 8 E. 3. 24. 18 H. 6. 14. 39 H. 6. 39.

* Genesis 23.

By a feoffment the corporeate fee is conveyed, and it properly betokeneth a conveiance in fee, as our author himselfe hereafter saith, † in his Chapter of Tenant for Life. And yet sometime improperly it is called a feoffment when an estate of freehold onely doth passe: *done est nosme generall plus que n'est feoffment, car done est generall a touts choses moebles et nient moebles, feoffment est riens forsque del soyle.* And note, there is a difference *inter cartam et factum*; for *carta* is ☞ intended a charter which doth touch inheritance, and so is not *factum*, unless it hath some other additions (1).

† Vide Sect. 57. Britton, cap. 34. 44 E. 3. 41. See more of Feoffments, Sect. 60. See of Factum, Sect. 259.

[9. b.]

Grant, concessio, is properly of things incorporeall, which, (as hath been said) cannot passe without deed. And here it is to be observed, (that I may speak once for all) that every period of our author in all his three books containes matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words *(his heires)* make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implyeth, that this rule extendeth not,

3 Co. 63, in Lincolne Colledge case. (1 Ro. Abr. 833. 6 Co. 16. b.)

First, to *last wills* and *testaments*; for thereby, [*i*] as he himselfe after saith, an estate of inheritance may passe without these words (his heires). [*k*] As if a man devise 20 acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor (2), albeit it be not to the value of the land. [*l*] So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or in *feodo simplici*, or to him and to his assigns for ever. In these cases a fee simple doth passe by the intent of the devisor. But if the devise be to a man and his assigns without saying (for ever), the devisee hath but an estate for life. [*m*] If a man devise land to a man *et sanguino*

[i] Litt. lib. 3. c. de Attorn. Sect. 5. 8. 6. 4 E. 6. Estates Br. 78. 29 H. 8. Testaments 18 22 Eliz. Dier 371. Temps H. 8. tit. Conscience, Br. 25. (3 Co. 21.) [k] 21 E. 3. 16.

34 H. 6, 7. 19 H. 8. 9. 3 Co. 21. In Boraston's case, 6 Co. 16, 17. 10 Co. 67. [l] Vide Sect. 585. [m] Mich. 40 & 41 Eliz. in Error int. Downhall & Catesby adj. Brooke, tit. Taile, 21.

(5) See more as to the word *feoffment*, in Mad. Formul. Angl. Dissert. p. 3. 2 Inst. 110.

(1) See further as to the distinction between *charters* and *deeds*, and the various other names of writings before and since the Conquest, in Mad. Form. Angl. Dissert. p. 2, and Mad. Hist. Exch. Pief. Ep. p. 8.

(2) The reason is, because the devisee is to pay the money at all events, and he may die before he repays himself out of the estate; in which case, he would be a loser by the devise, if he was not to have a fee. But if the will directs the payment to be out of the profits of the land, then the devisee cannot lose by the will, and therefore only an estate for life passes. Chro. Cha. 157. Most of the cases relative to this point are abridged or referred to in Vin. Abr. *Devise*, S. a.—[Note 50.]

guino suo, that is a fee simple; but if it be *semini suo*, it is an estate taile (3).

[n] 1 Co. 100. Shellye's case. 42 E. 3. 7. 19 H. 6. 17. b. 22. b. Pl. Com. 248.

[n] Secondly, that it extendeth not to a *fine sur conusans de droit come ceo que il ad de son done*, by which a fee also may passe without this word (heires) in respect of the height of that fine, and that thereby is implyed that there was a precedent gift in fee.

[o] Litt. lib. 2. ca. Tenant in Common. Sect. 304, 305, cap. Attorn. Sect. 374. Dier. 9 Eliz. 263.

Thirdly, nor to *certain releases*, and that three manner of waies. [o] First, when an estate of inheritance passeth and continueth; as if there be three coparceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (heirs), by *Littleton*'s own opinion they have a fee simple, as appeareth hereafter. 2. By release [p], when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, &c. release to the tenant of the land generally all his right, &c. hereby the seigniory, rent, &c. are extinguished for ever, without these words (heires). 3. [q] When a bare right is released, as when the disseisee release to the disseisor all his right, he need not (saith our author in another place) speake of his heires. But of all these, and the like cases, more shall be treated in their proper places, 4. Nor to a *recovery*. *A.* seised of land suffereth *B.* to recover the land against him by a common recovery, where the judgment is, *quòd prædictus B. recuperet versus præd. A. tenementa prædicta cum pertin'*; yet *B.* recovereth a fee simple without this word (heires); for regularly every recoverer recovereth a fee simple. 5. Nor to *a creation of nobilitie by writ*; for when a man is called to the upper house of parliament by writ, he is a baron and hath inheritance therein without the word (heires). (4) Yet may the king limit the generall state of inheritance created by the law and custome of the realme to the heires males, or generall, of his body by the writ; as he did to *Bromflete*, who in 27 H. 6, was called to parliament by the name of the lord *Vescye*, &c. with the limitation in the writ to him and the heires males of his bodie. But if he be created by patent, he must of necessitie have these words (his heires) or the heires males of his bodie, or the heires of his body, &c. otherwise he hath no inheritance. The first creation of a baron by patent that I find was of *John Beauchampe* of *Holte*, created baron by patent in 11 R. 2 (5), for barons before that time were called by writ. And it is to be observed, that of ancient times earles, &c. were created by girding them with a sword, and nominating him earle, &c. of such a countie or place; and this, with a calling of him to parliament by writ by that name, was a sufficient creation of inheritance.

[p] Litt. lib. 3. c. Releases. Sect. 479, 480. 20 H. 6. 17. 19 H. 6. 17. 22.

[q] Litt. cap. Releases, Sect. 467.

(27 H. 6. Lo. Vescie's case, (7 Co. 33. b.)

But out of this rule of our author the law doth make divers exceptions *(et exceptio probat regulam)*; for sometime by a feoffment a fee simple shall passe without these words (his heires). For example, first, [r] if the father infeoffe the sonne, to have and to hold to him and to his heires, and the sonne infeoffeth the father

[r] 39 Ass. 12. 41 E. 3. tit. Feoffments & Faits, 254. 14 H. 4. 13. 34 E. 3. Avowry, 258.

as

(3) As to the passing of an estate of inheritance in *last wills*, without the word *heirs*, see the title *Devise*, in the several Abridgments of Law and Equity, and Gilb. Law of Devises.

(4) See as to this, mr. serj. Rolle's argument in Coll. Proc. on Claims of Baronies, 209. 221.

(5) Acc. post. 16. b. Seld. Jan. Angl. b. 2. c. 15, and Seld. Tit. Hon. 2d ed. p. 747, which latter book contains the form of the letters patent to lord Beauchamp.

as fully as the father infeoffed him, by this the father hath a fee simple (6), *quia verba relata hoc maximè operantur per referentiam ut in esse videntur.* [s] Secondlie, in respect of the consideration, a fee simple had passed at the common law without this word (heires), and at this day an estate of inheritance [in] tayle. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (heires); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posteritie. [t] Thirdly, if a feoffment or grant be made by deed to a mayor and commonaltie, or any other corporation aggregate of manie persons capable, they have a fee simple without the word (successors); (7) because in judgment of the law they never dye. [u] Fourthly, in case of a sole corporation a fee simple shall sometime passe without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him *in liberâ eleemosinâ*, a fee simple doth passe without this word (successors). [w] And so if a man give lands to the king by deede inrolled, a fee simple doth passe without these words (successors or heires); because in judgment of law the king never dieth.

[s] Vide Sect. 17. 12 H. 4. 19. in Formedon.

[t] 8 E. 3. 27. 11 H. 7. 12. 22 E. 4. 11 H. 4. 84. 2 H. 4. 13.

[u] 19 H. 6. 74. 20 H. 6. 36. (1 Ro. Abr. 43.)

[w] Pl. Com. Lo. Berkleye's case.

[10. a.] Fifthly, in grants sometimes an inheritance shall passe without this word ☞ heires. [x] As if partition be made betweene coparceners of lands in fee simple, and for owelty of partition the one grant a rent to the other generally, the grantee shall have a fee simple without this word (heires) (1); because the grantor hath a fee simple, in consideration whereof he granted the rent: *Ipsæ etenim leges cupiunt ut jure regantur.* Sixthly, by the forrest law if an assart be granted by the king at a justice seat (which may be done without charter) to another, *habendum et tenendum sibi in perpetuum*, he hath a fee simple without this word (heires) [y]; for there is a speciall law of the forest, as there is a law marshall for wars, and a marine law for the seas [z].

[x] 29 Ass. 23. 15 H. 7. 14. 2 H. 7. 5. 11 H. 4. 3. 21 E. 3. 1. 21 Ass.

[y] 40 H. 7. 7. (4 Inst. 314.)

[z] 22 E. 3. 3. 45 E. 2. 20. 6 E. 3. 22. 4 Co. 1. Bustard's case, Vide Sect. 465. 469. 610. 19 H. 6. 17. 22. 19 E. 2, garr. 85.

And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases, or confirmations that enure by way of enlargement of estates, warranties, bargaine and sales by deed indented and inrolled, and the like, in which this word (heires) is also necessary; for they do tantamount to a feoffment or grant, or stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus* (2). And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example; for so our author himselfe in another place* explaineth it, saying, *and memorandum, that*

* Sect. 301.

(6) Adj. contra 39. lib. Ass. pl. 12, but Rolle abridges the case with a *quære*. See 1 Ro. Abr. 833. pl. 7.

(7) Acc. post. 94, b. But according to some authorities it is otherwise, if only the head of the corporation is capable, and the body is dead in law, as in the case of an abbot and convent. Post. 94, b. See, however, contra 1 Ro. Abr. 832. pl. 1.—[Note 51.]

(1) Acc. Plowd. 134. b.

(2) For other instances in which a fee will pass by deed or grant without the word *heirs*, see Vin. Abr. *Estate*, K. 2, and L. To the cases in Viner, add 8 H. 4. 4. 16. b. 19 H. 6. 17. 20 H. 6. 36. 27 H. 8. 8. b. Dy. 169, which I do not see cited by him. See also Ash. Repertor. tit. *Estate*.

that in all other [such] like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law. And here our author is to be understood to speak of heires when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to *B.* and his heires, having issue divers sons, all his sons after his decease shall inherit (3); but if a lease for life be made, the remainder to the right heires of *B.* and *B.* dieth, his eldest son only shall inherite, for he only to take by purchase is right heire by the common law (4). So note a diversity betweene a purchase and a descent. But where the remainder is limited to the right heires of *B.* it need not be said, and to their heires; for being plurally limited

(Post. 10. b. Dy. 133. b. Hob. 31. 1 Co. 101. 103.)

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(3) Here *heirs* being a word of limitation, none can take under it but by *descent*; and the land being *gavelkind*, the descent is to all the sons, who are as much heirs to *such* land, as the eldest son is heir to land descending according to the common law. The custom of *gavelkind* extends to estates tail; and so irresistible is the customary descent both of *gavelkind* and *borough-english* land, according to some authorities, that even in the case of estates tail, it cannot be changed by express words directing a descent *secundum cursum communis legis*. Dy. 179. b. pl. 45. See Robins. Gavelk. 94. Mr. Robinson's book on *Gavelkind* is a very excellent *law-treatise*, and *generally* comprehends every thing relative to his subject; but in this part of it he is rather short in his explanation; for though he takes notice of the custom's applying to estates tail, yet he neither mentions the case from Dyer, nor hints whether *express* words are as insufficient to exclude the custom from estates tail, as they certainly are to control the descent of estates in fee. Perhaps the author's silence might proceed from his doubts on the subject. See further the case of *tanistry*, Dav. 31. a. & 36. b. In that case it was resolved, that the customary descent was interrupted by the grant of an estate tail; but then the judges proceeded on a principle quite consistent with the *general* doctrine in Dyer. They held, first, that the custom of *tanistry* only applied to lands going with the *chiefry* or *seigniory*, from which the lands in question had been severed by the grant of the estate tail; and secondly, that the custom of *tanistry* was not *inherent in the land*, like the customs of *gavelkind* and *borough-english*, but merely *personal to the eldest and most worthy*, and therefore became extinguished for ever, when the land was conveyed to *another* person, that is, the heir at common law.—[Note 52.]

(4) Acc. Rob. Gavelk. 117, 118, and the authorities there cited. The reason seems to be, that though the *subject* of the gift is *customary* land, the heir at *common law* is presumed to be meant, unless words are added to describe the *customary* heir. But if *such special* words are used, the presumption fails; and then it is said, that though the *subject* of the gift is *common-law land*, yet the *customary heir* shall be preferred. On this principle, lord ch. Cowper, in a case before him, declared, that if one, having *borough-english* land and also lands at *common law*, devises the latter to his heir by the custom of *borough-english*, this will be a sufficient description of the youngest son, though not heir at common law, and though the devise is not of the *customary*, but of the *common-law* land; and that a like devise to *gavelkind* heirs would entitle all the sons. 2 Vern. 732, and Prec. in Ch. 464. But see further on this latter subject, post. 24. b. where lord Coke writes, that to take by *purchase* under a limitation to the *heirs female*, the person claiming must be both *heir* and *female*. See also the note, in which it is attempted to justify lord Coke for that doctrine, and to explain the qualifications with which it ought to be understood.—[Note 53.]

limited it includeth a fee simple, and yet it resteth but in one by purchase.

Out of that which hath beene said it is to be observed, that a man may purchase lands to him and his heires by ten manner of conveyances (for I speake not here of estoppells). First, by feoffment. Secondly, by grant (of which two our author here speaketh). Thirdly, by fine, which is a feoffment of record. Fourthly, by common recovery, which is a common conveyance, and is in nature of a feoffment of record. Fifthly, by exchange, which is in nature of a grant. Sixthly, by release to a particular tenant. Seventhly, by confirmation to a particular tenant, both which are in nature of grants. Eighthly, by grant of a reversion or remainder with attornment of the particular tenant, of all which our author speaketh hereafter. Ninthly, by bargaine and sale by deede indented and inrolled, ordained by statute since *Littleton* wrote. Tenthly, by devise by custome of some particular place, as he sheweth hereafter, and since he wrote, by will in writing, generally by authority of parliament.

27 H. 8. ca. 16.
32 H. 8. ca. 2.
34 H. 8. ca. 5.

What words are apt words for a feoffment or grant *vide* Sect. 531. Our author speaketh of feoffments and grants, whereby is implyed lawfull conveyances; and therefore this rule extendeth not to disseisins, abatements, or intrusions into lands or tenements, or to usurpations to advowsons, &c. in which cases estates in fee simple are gained by the act and wrong of the disseisors, abators, intruders, and usurpers (5); and if a disseisin, abatement, or intrusion be made to the use of another, if *cestui que use* agreeth thereunto in *pays*, by this bare agreement he gaineth a fee simple without any livery of seisin or other ceremony.

Sect. 531.
37 Ass. p. 8.
38 Ass. p. 9.
1 E. 4. 9, &c.

Sect. 2.

AND if a man purchase land in fee simple and die without issue, he which is his next cousin collaterall of the whole blood, how farre so ever he be from him in degree, (de quel pluis long degree qu'il soit (6)), *may inherite and have the land as heire to him.*

LITTLETON showeth here who shall be heire to lands in fee simple; for he intendeth not this case of an estate taile, for that he speaketh of an heire of the whole blood, for that extendeth not to estates in taile, as shall be said hereafter in this Chapter, Section 6. (Plowd. 444.)

"*Next cousin collaterall.*" Neither excludeth he brethren or sisters, because he hath a speciall case concerning them in this Chapter, Sect. 5, and in his Chapter of Parceners; but this is intended where a man purchaseth lands and dieth without issue, and having neither brother nor sister, then his next cousin collaterall shall inherite (1). So as here is implyed a division of heires, viz. lineall (whoever shall

[10. b.]

(5) See ante 3. b, and post. 18. b. (6) de lui, *L. and M. Reb. Red.*

(1) In the preceding page, lord Coke begins his comment on that part of Littleton which describes the course of descent by the common law of England; and

Glanvill. lib. 7. ca. 3, 4. Bract. lib. 2. c. 30, fo. 65. Britton, c. 119. Fleta, lib. 6. cap. 1 & 2. (Plowd. 444.) Bract. lib. 2, cap. 30, fo. 64. Fleta, lib. 5, cap. 5, & lib. 6. cap. 1 & 2. Britton, c. 119. Mirror, 11. cap. 1, sect. 3. 30 Ass. p. 47. (3 Co. 40. 42.)

shall first inherite) and collaterall (who are to inherite for default of lineall). For in descents it is a *maxime* in law, *quòd linea recta semper præfertur transversali.* Lineall descent is conveyed downward in a right line; as from the grandfather to the father, from the father to the sonne, &c. Collaterall descent is derived from the side of the lineall; as grandfather's brother, father's brother, &c. *Next cousin collaterall shall inherite* doth give a certain direction to the next cousin to the sonne, and therefore the father's brother and his posterity shall inherite before the grandfather's brother and his posterity. *Et sic de cæteris*; for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem.*

19 R. 2. tit. Garr, 100.

Upon this word *(next)* I put this case. One hath issue two sonnes, *A.* and *B.* and dieth; *B.* hath two sonnes, *C.* and *D.* and dieth. *C.* the eldest sonne hath issue and dieth. *A.* purchaseth lands in fee simple, and dieth without issue. *D.* is the next cousin, and yet shall not inherite, but the issue of *C.*; for he that is inheritable is accounted in law next of blood. And therefore here is understood a division of *next*, viz. next *jure repræsentationis*, and next *jure propinquitatis*; that is, by right of representation and by right of propinquity. And *Littleton* meaneth of the right of representation, for legally in course of descents he is next of blood inheritable. And the issue of *C.* doth represent the person of *C.*; and if *C.* had lived, he had been legally the next of blood. And whensoever the father, if he had lived, should have inherited, his lineall heire by right of representation shall inherite before any other, though another be *jure propinquitatis*, neerer of blood. And therefore *Littleton* intendeth his case of next cousin of blood immediately inheritable. So as this produceth another division of next blood, viz. immediately inheritable, as the issue of *C.*; and mediately inheritable, as *D.* if the issue of *C.* die without issue; for the issue of *C.* and all that line, be they never so remote, shall inherit before *D.* or his line; and therefore *Littleton* saith well, *how farre so ever he be from him in degree.* And here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase. And therefore in the case before mentioned, if a lease for life were made to *A.* the remainder to his next of blood in fee; in this case, as hath been said, *D.* shall

(2 Inst. 7.)

30 Ass. p. 47.

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and this seems to be a proper place for referring the student to some valuable writings published since lord Coke's time on the same subject. See Hal. Hist. C. L. c. 11. Wright's Ten. 174. Gilb. Ten. 2. Dalrymp. Feud. Prop. 4th ed. c. 5. p. 159, and Blackst. Law of Descents. To the first and last of these books it is that we principally call the attention of the student; though it must be confessed, that in all of them, the history of the law is so learnedly and critically traced, and the feudal principles, on which it chiefly depends, are so clearly unfolded, that a subject in itself dry and abstruse, becomes not only plain and intelligible, but even agreeable and interesting. Mr. R. Robinson's *Discourse concerning the Law of Inheritances in Fee simple* is another treatise on the same subject, which should not be passed over without notice. Many parts of it are ingeniously written: but unfortunately the author has chiefly exerted his talents in inventing a *new* kalendar of consanguinity, the explanation of which employs a very considerable part of the work; and by always referring to this, and by introducing a number of arbitrary terms, which are only intelligible as he explains them, he involves his subject, before too much embarrassed with difficulties, in still greater perplexity.—[Note 54.]

D. shall take the remainder, because he is next of blood and capable by purchase, though he be not legally next to take as heire by descent(2).

Sect. 3.

BUT if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is neerer of blood; because it is a maxime in law, that inheritance may lineally descend, but not (3) *ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heire to the sonne (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heire to the uncle, and not as heire to his sonne, for that he commeth to the land by collateral discent and not by lineall ascent.*

"*YET the father is neerer of blood.*" And therefore some do hold upon these words of *Littleton*, that if a lease for life were made to the sonne, the remainder to his next of blood, that the father should take the remainder by purchase, and not the uncle, for that *Littleton* saith the father is next of blood, and yet the uncle is heire. As if a man hath issue two sons, and the eldest sonne hath issue a sonne and die, a remainder is limited to the next of his blood, the younger son shall take it, yet the other is his heire.

5 E. 6. tit. Administr. Br. 47. Ratcliffe's case ubi sup. See after in the Chapter of Socage.

(Hob. 33.)

(3 Co. 40.)

"[*p*] *It is a maxime in law, that inheritance may lineally descend, but not ascend.*"

[*p*] Pl. Com. 293. b. Osborne's case (Post. 67.)

[11. a.] *Maxime*, i. e. a sure foundation or ground of art, and ☞ conclusion of reason, so called [*q*] *quia maxima est ejus dignitas et certissima authoritas, atque quod maximè omnibus probetur*, so sure and uncontrollable as that they

[*q*] Pl. Com. 27, b. (3 Co. 40.)

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(2) *Harpur having a son and 4 daughters, viz. A, B, C, and D, devises to the son in tail, remainder to B. and C. for life, remainder* proximo consanguinitatis et sanguinis *of the devisor; and Easter* 17 *Jan. by two justices against one, the remainder vests in all the daughters when the son dies without issue. But afterwards Mich.* 10 *Jam.* per totam curiam, *it vests in the eldest daughter only, and not in all the daughters*; 1, *because* proximo; 2, *because an express estate is limited to two of the daughters.—Periman and Pierce*—Hal. MSS. See S. C. in Palm. 11, and 303. 2 Ro. Rep. 256. Bridgm. 14. O. Bendl. 102. 106.—Lord chief justice Hale also gives a note on the words *proximus de sanguine vel consanguinitate*; in which, after citing from Ratcliffe's case, 3 Co. 40, that on the stat. 21 H. 8, the father or mother shall be preferred in administration to the son, as next of blood before the brother, he adds, *Nota, ruled that in administration, the sister of the half blood should be preferred in administration before the son of the sister of the whole blood; but when they are* in æquali gradu, *the sister of the whole blood shall be preferred before the sister of the half blood.* M. 23. *Cha. and M.* 1650. *B. R. Brown's case.* Hal. MSS. See further as to *proximus de sanguine* in Dy. 333. b.—[Note 55.]

(3) *lineally*—P. and Red.

they ought not to be questioned. [r] And that which our author here and in other places calleth a maxime, hereafter he calleth a principle; and it is all one with a *rule*, a *common ground*, *postulatum*, or an *axiome*, and it were too much curiositie to make nice distinctions betweene them. And it is well said in our bookes, [s] *n'est my a disputer l'ancient principles del ley.* I never read any opinion in any booke old or new against this maxime, but only in *lib. rub.* where it is said, [t] *si quis sine liberis decesserit, pater aut mater ejus in hæreditatem succedat, vel frater et soror si pater et mater desint; si nec hos habeat, soror patris vel matris, et deinceps qui propinquiores in parentelâ fuerint hæreditariò succedant; et dum virilis sexus extiterit, et hæreditas abinde sit, fœmina non hæreditat.* But all our ancient authors and the constant opinion ever since do affirme the maxime.

[r] Sect. 90. 648.

[s] 12 H. 4. Glanvill. lib. 7. cap. 1. Bract. lib. 2, cap. 29.

[t] Lib. Rub. cap. 70.

By this maxime in the conclusion of his case, onely lineall ascention in the right line is prohibited, and not in the collaterall. [u] *Quælibet hæreditas naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam quidem naturaliter ascendit. Descendit itaque jus quasi ponderosum, quod cadens deorsum rectâ lineâ vel transversali, et nunquam reascendit eâ viâ quâ descendit post mortem antecessorum, à latere tamen ascendit alicui propter defectum hæredum inferius provenientium*; so as the lineall ascent is prohibited by law, and not the collaterall (1). And in prohibiting the lineall

[u] Brit. cap. 119. Fleta, lib. 6, ca. 1. Numb. ca. 27. Ratcliff's case ubi supra. (3 Co. 40.)

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(1) In Ratcliffe's case, 3 Co. 40, the reasons given for excluding lineal ascent, are, *first*, that fathers and mothers are not of the blood of their children; *secondly*, that the exclusion is agreeable to the Jewish law, as prescribed to Moses by God himself; and, *thirdly*, that it tends to avoid that confusion and diversity of opinions in the case of descents, of which the allowance of lineal ascension by the *civil* law is said to be the occasion. Lord Coke himself controverts the *first* of these reasons, by the words of Littleton in the Section here commented upon, and by the case of administration, in which the father or mother is preferred as *nearest of blood* to their children, and also by the case of a remainder to the son's *nearest of blood*, under which description the father is entitled to take by purchase. But as to the two other reasons, lord Coke rather appears to adopt them. However, neither of them seems satisfactory. The inference from God's precept to Moses is unwarranted, unless it can be shown, that it was promulgated as a law for mankind in *general*, instead of being, like many other parts of the Mosaical law, a rule for the direction of the Jewish nation *only*. Besides, by the Jewish law, the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him. See Blackst. Law Tracts, v. 1. p. 182. 8vo. ed. and Seld. de Succes. Ebræor. c. 12, there cited. The argument from the supposed confusion and uncertainty, which might arise, if lineal ascent should be permitted, is not less liable to objection; because lineal *ascent* might be governed by the same rules as lineal *descent*; and what is the difference between the two, that should create more confusion and uncertainty in the one case than in the other? Our modern writers account for our law's disallowance of lineal ascent in a very different way; and according to them, it in a great measure originated from the nature of ancient feudal grants, which, like estates taile, being confined to the first feudatory and his descendants, necessarily excluded his father and mother, and all paramount them and also his collateral relations. How this rule in *practice* became extended so as to exclude lineal ascent *universally*, without confining it to the cases to which the feudal reason for the rule is applicable, and yet at the same time is so construed, as to let in all collateral relations,

lineall ascent, the common law is assisted with the law of the 12 tables (2).

Here our author for the confirmation of his opinion draweth a reason and a proofe (as you have perceived) from one of the maximes of the common law. Now that I may here observe it once for all, his proofes and arguments, in these his three books, may be generally divided into two parts, viz. from the common law and from statutes, of both which, and of their several branches, I shall give the studious reader some few examples, and leave the rest to his diligent observation.

For the common law his proofes and arguments are drawn from 20 several fountaines or places.

[a] First, from the maximes, principles, rules, intendment and reason of the common law, which indeed is the rule of the law, as here and in other places our author doth use.

[b] Secondly, from the bookes, records, and other authorities of law cited by him *ab authoritate, et pronunciatis.*

[c] Thirdly, from originall writs in the Register, *à rescriptis valet argumentum.*

[d] Fourthly, from the forme of good pleading.

[e] Fifthly, from the right entrie of judgements.

[f] Sixthly, *à præcedentibus approbatis et usu*, from approved precedents and use.

[g] Seventhly, *à non usu*, from not use.

[h] Eighthly, *ab artificialibus argumentis consequentibus et conclusionibus*, artificiall arguments, consequents and conclusions.

Ninthly, [i] *à communi opinione jurisprudentum*, from the common opinion of the sages of the law.

Tenthly, [k] *aù inconvenienti*, from that which is inconvenient.

Eleventhly, [l] *à divisione*, from a divison, *vel ab enumeratione partium*, from the enumeration of the parts.

Twelfely, [m] *à majore ad minus*, from the greater to the lesser, or [n] from the lesser to the greater [o] *à simili* [p] *à pari.*

13. † *Ab impossibili*, from that which is impossible.

14. [q] *A fine*, from the end.

15. [*] *Ab utili vel inutili*, from that which is profitable or unprofitable.

[a] Sect. 5. 8. 90. 96. 52, 53. 57. 59. 65, 99. 130. 146. 156. 169. 178. 231. 293. 302. 352. 360. 376, 377. 396. 410. 440. 441. 346, 347. 462. 43.

[b] Sect. 20, where a number of others are quoted.

[c] Sect. 67. 132. 170. 234. 241. 263. 613, 614. (Plowd. 228.)

[d] Sect. 58. 170. 183. 369.

[e] Sect. 248, 249.

[f] Sect. 88. 74. 76. 145. 332. 371, 372. 445.

[g] 108. 733.

[h] Sect. 170. 264. 283. 302. 429. 464. 629. 633. 686. 340. 418. 613. 686. 739.

[i] Sect. 697. 59. 104. 266. 332. 478.

[k] Sect. 87, where many others are quoted.

[l] Sect. 13, where many more are quoted; but see chiefly Sect. 381.

[m] Sect. 438, 439. 441.

[n] Sect. 18.

[o] 301, &c.

[p] 291. 298. 409, &c.

[†] 129. 440.

[q] Sect. 46. 194.

[*] Sect. 360.

16 [r] *Ex*

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and even the father himself collaterally, and by the medium of others, is not now very easy to explain, though this has been attempted. See Wright's Ten. 180, and Blackst. Law Tracts, v. 1. p. 183. 8vo. ed. See also a learned note on the subject in *Littleton avec Observat. par M. Houard.* This edition of Littleton is in 2 vol. 4to. and was published at Rouen in 1766.—[Note 56.]

(2) See *Tab. 5. l. de successione ab intestato;* but neither in this, nor in any other part of the 12 Tables, do I see any thing to exclude lineal ascent; and as I have not met with any book on the Roman law in which such an exclusion is mentioned, I conclude, that lord Coke is mistaken in his idea of our laws conforming to the law of the 12 Tables. The mother was indeed excluded; but it was not because the law of the 12 Tables did not permit lineal ascent, but on account of her sex, that law preferring the *agnati*, or those related through males, and excluding the *cognati*, or those related through females. See Inst. 3. 3 Princ.—[Note 57.]

Sect. 722. 16. [r] *Ex inconvenienti* for that thereupon shall follow an absurditie, *quia ex inconvenienti præsumitur*, because it is repugnant to understanding and reason.

Sect. 17. [s] *A naturâ et ordine naturæ*, from nature, or the course of nature.

Sect. 18. [t] *Ab ordine religionis*, from the order of religion. [11. b.]

Sect. 440. 19. [u] *A communi præsumptione*, from a common presumption.

Sect. 481. 20. [w] *A lectionibus jurisprudentium*, from the readings of learned men of law.

From statutes his arguments and proofes are drawne,

[r] Sect. 13, &c. Sect. 731. 692. 633. 633. 441. 103. 193. 154. 140. 2. (Plowd. 57. b. 49. b.)

1. [s] From the rehearsall or preamble of the statute.

2. By the bodie of the law diversly interpreted.

Sometime by other parts of the same statute, which is *bene dicta expositio, et ex visceribus causæ*.

[y] Sect. 464. (Cro. Ja. 474.)

[y] Sometime by the reason of the common law. But ever the generall words are to be intended of a lawfull act, [2] and such interpretation must ever be made of all statutes, that the innocent or he in whom there is no default may not be damnified (1).

[z] Sect. 731. 685. (Plowd. 105.)

"*In law.*" There be divers lawes within the realme of England. As first, [a] *Lex coronæ*, the law of the crowne.

[a] 17 E. 3. Rot. Parl. nu. 19. 25 E. 3. cap. 1. Regist. inter Jura regia 61, &c. (Post. 360.)

2. [b] *Lex et consuetudo parliamenti. Ista lex est ab omnibus quærenda, à multis ignorata, à paucis cognita.*

[b] Commonly spoken of in Parliament Rolls. (4 Inst. 14. Post. 15. b.)

3. [c] *Lex naturæ*, the law of nature.

[c] 13 E. 4. 9. 7 Co. Calvin's case. Pl. Com. Sharington's case. (Dr. and Stud. Dial. 1. c. 2.)

4. [d] *Communis Lex Angliæ*, the common law of England, sometime called *lex terræ*, intended by our author in this and the like places.

[d] This law appeareth in our bookes and judiciall records.

5. [e] Statute law. Lawes established by authority of parliament.

[e] These are of record in Rolls of Parliament.

6. [f] *Consuetudines*, Customes reasonable.

[f] Whereof you shall read in our author, and in our bookes.

7. [g] *Jus belli*, the law of armes, war, and chivalrie, *in republicâ maximè conservanda sunt jura belli.*

8. [h] Ecclesiastical or canon law in courts in certaine cases.

9. [i] Civil law in certaine cases not onely in courts ecclesiastical,* but in the courts of the constable and marshall, and of the admiraltie, in which court of the admiraltie is observed *la ley Olyron, anno* 5 of Richard the first, so called, because it was published in the isle of Olyron.

10. [k] *Lex forestæ*, forest law.

11. [l] The law of marque or reprisal (2).

* *For an elementary introduction to the Civil and Canon Law, see Mr. Butler's Horæ Juridicæ Subsecivæ, oct.* 1804, *and* 1807.

[g] Rot. Parl. 2 R. 2, nu. 3. 13 R. 2, ca. 2. (Post. 249.)
[h] 7 Co. Caudrie's case, articul. super cartas, &c. [i] 37 H. 6. 21. Fortesc. ca. 32. 13 H. 4. 4. 28 H. 8. ca. 15. [k] Carta de Foresta, &c. the eires of the Foresta.
[l] 27 E. 3. ca. 17. Wi. ca. 23. 4 H. 5. ca. 7.

12. [m] *Lex*

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(1) As to the construction of statutes, see lord ch. Hatt. Treat. on Stat.—Ash. Expos. Stat. by Eq.—Vin. Ab. *Statutes*, E. 6.—Com. Dig. *Parliament*. R. 10.

(2) Besides the books more generally known, see Lee's Capt. in War, which is a Treatise on this subject.

12. [m] *Lex mercatoria*, merchant, &c.

13. [n] The lawes and customes of the isles of Jersey, Guernsey, and Man.

14. [o] The law and privilege of the Stannaries.

15. [p] The lawes of the east, west, and middle Marches, which are now abrogated.

But hereof this little taste for our student, that he may be capable of that which he shall reade concerning these and others in records, and in our books, and orderly observe them, shall suffice.

[m] Mirror des Just. c. 1. Bract. 334. 444. Fleta lib. 2. ca. 51. 52, &c. 5 E. 3. 11. 38 E. 3. 7. 27 E. 3, cap. 8. Fortescue 32. F. N. B. 117. 13 E. 4. 9. Rot. Parl. 6 H. 4. nu. 43. 10 H. 7. 16. 47 E. 3. 22. 30 E. 1. Account 127. Carta Mercatoria. 31 E. 1. Rot. Patent. (4 Inst. 237.) [n] Mich. 41 E. 3, coram rege in Thesaur. 12 E. 3. 5, b. 12 H. 8, fol. 5. Rot. Pat. an. 20 E. 1. 7 Co. Calvin's case, fol. 21. Regist. fol. 22. [o] 50 E. 3, Rot. Parl. 50 E. 3, Rot. Patent, &c. [p] 31 H. 6, ca. 3. 4 Ja. c. 1.

"*And his uncle enter into the land.*" For if the uncle in this case doth not enter into the land, then cannot the father inherite the land: for there is another maxime in law herein implied, [q] that a man, that claimeth as heire in fee simple to anie man by descent, must make himself heire to him that was last seised of the actuall freehold and inheritance (3). And if the uncle in this case doth not enter, then had he but a freehold in law, and no actuall freehold, but the last that was seised of the actuall freehold was the sonne to whom the father cannot make himselfe heire; and therefore *Littleton* saith, *and his uncle enter into the land (as by law he ought)* to make the father to inherite, as heire to the uncle. [r] Note, that true it is that the uncle in this case is heire, but not absolutely heire; for if after the descent to him the father hath issue a sonne or daughter, that issue shall enter upon the uncle (4). [s] And so it is if a man hath issue a sonne and a daughter, the sonne purchaseth land in fee and dyeth without issue, the daughter shall inherite the land; but if the father hath afterward issue a sonne, this sonne shall enter into the land as heire to his brother, and if he hath issue a daughter and no sonne, she shall be coparcener with her sister.

[q] 11 H. 4. 11. 10 Ass. 27. 34 Ass. p. 20. 19 E. 2, quar. imped. 177. 45 E. 3. 13. 40 Ass. p. 6.

[r] 11 Ass. p. 6. Doct. and Stud. 12. b. 32 H. 6. 35.

[s] 19 H. 6. 61.

"*As*

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(3) *Grandfather, father, and son; grandfather dies; father is bound in an obligation or warranty, and dies before entry. Held, that the son is not liable, because he shall make himself heir to the grandfather.* 24 E. 3. Hal. MSS.—[Note 58.]

(4) Here lord Coke is silent as to the right to the intermediate profits from the death of the father. In the case of *Basset* and *Basset*, lord ch. Hardwicke held, that a posthumous son, claiming under a remainder in a settlement, was, by construction of the 10 and 11 W. 3. c. 16, which preserves remainders for posthumous children, where no estate is limited to trustees, for that purpose, intitled to the mean profits. See 3 Atk. 203. But in the same case, lord Hardwicke seems to have taken it for granted, that on a *descent* the mean profits belong to the uncle; for he directed, that the profits of the *estate descended* should be accounted for by the uncle, only from the birth of the posthumous son. See post. 55. b, where lord Coke puts the case of a daughter's being entitled against a posthumous brother to corn sowed before his birth; which seems to shew, that lord Coke did not consider the posthumous child as intitled to any mean profits on a descent. See also Wils. Rep. vol. 2. p. 526, where lord ch. j. De Grey, in delivering the opinion of the court of C. P. on a question whether a *posthumous* son was *actually seised*, denies that the posthumous son in the case of a descent, can be intitled to any profits received before his birth, and cites 9 H. 6. 25, as an authority in point.—[Note 59.]

"*As by law he ought.*" These words as a key doe open the secrets of the law; for hereupon is concluded, that where the uncle cannot get an actuall possession by entrie or otherwise, there the father in this case cannot inherit. And therefore if an advowson be granted to the sonne and his heires, and the sonne die without issue, and this descend to the uncle, and he die before he doth or can present to the church, the father shall not inherit, because he should make himselfe heire to the sonne, which he cannot doe. And so of a rent and the like. But if the uncle had presented to the church, or had seisin of the rent, there the father should have inherited. For *Littleton* putteth his case of an entry into land but for an example. If the sonne make a lease for life, and die without issue, and the reversion descend to the uncle, and he die, the reversion shall not descend to the father, because in that case he must make himself heire to the sonne. *A.* infeoffes the son with warrantie to him and his heires, the sonne dies, the uncle enters into the land and dies, the father if he be impleaded shall not take the advantage of this ☞ warrantie, for then he must vouch *A.* as heire to his sonne, which he cannot doe(1); for albeit the warrantie descended to the uncle, yet the uncle leaveth it as he found it, and then the father by *Littleton's (ought)* cannot take advantage of it. For *Littleton* Sect. 603, saith that warranties shall descend to him that is heire by the common law; and Sect. 718, he saith that everie warrantie which descends, doth descend to him that is heire to him which made the warrantie by the common law; which proveth that the father shall not be bound by the warrantie made by the sonne, for that the father cannot be heire to the sonne, that made the warrantie. And a warrantie shall not goe with tenements, whereunto it is annexed, to any especiall heire, but alwaies to the heire at the common law(2). And therefore if the uncle be seised of certaine lands, and is disseised, the sonne release to the disseisor, with warrantie, and die without issue, this shall bind the uncle; but if the uncle die without issue, the father may enter, for the warrantie cannot descend upon him. So if the sonne concludeth himselfe by pleading concerning the tenure and services of certaine lands, this shall bind the uncle; but if the uncle die without issue, this shall not bind the father, because he cannot be heire to the sonne, and consequently not to the estoppell in that case; but if it be such an estoppell as runneth with the land, then it is otherwise(3).

[12. a.]

Vid. Sect. 603. 718. (Post. 329.)

Vid. Sect. 735, 736, 737.

35 H. 6. 33. John Crook's case. (6 Co. 79.)

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(1) Quære *of this case of warranty; for though the lien of warranty descends from him who makes the warranty, to the heir at common law, and it cannot descend to the special heir, because it is a thing in gross, yet the benefit of a warranty, being once annexed to land, shall go in divers cases as incident to the land to the special heir or assignee. Thus a gift of* borough-english, *with a warranty, shall go to the youngest son with the land.* Hal. MSS.—See acc. 2 Ro. Abr. 743, where it is said, that the father may vouch on such a warranty to the uncle. In Gilb. Ten. 18, there is a reference to lord ch. j. Hale's note on this part of lord Coke, from which it appears that lord ch. bar. Gilbert had seen lord Hale's MSS. notes.—[Note 60.]

(2) See acc. both as to estoppels and warranties, Hob. 31. 8 Co. 54. But observe what is said by lord Hale in the preceding note.

(3) *The son makes lease for life, and dies; the uncle releases to the lessee for life in tail on condition, and dies.* Quære, *who shall enter for the condition broken, as the reversion in fee doth not descend to the father?* Hal. MSS.—[Note 61.]

Sect. 4.

AND in case where the sonne purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherite as heires to him, before any of the blood on the mother's side: but if he hath no heire on the part of his father, then the land shall descend to the heires on the part of the mother (4). *But if a man marrieth an inheritrix* (Mes si home prent (5) enheretrix) *of lands in fee simple, who have issue a sonne, and die, and the sonne enter into the tenements, as sonne and heire to his mother, and after dies without issue, the heires of the part of the mother ought to inherit, and not the heires of the part of the father. And if he hath no heire on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheate.* (1) † *In the same manner it is, if lands descend to the sonne of the part of the father, and he entreth, and afterwards dies without issue, this land shall descend to the heires on the part of the father, and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden shall have the land by escheate. And so see the diversity, where the sonne purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.*

BY this it appeareth, that our author divideth heires into heires of the part of the father, and into heires of the part of the mother. [*a*] And note, it is an old and true maxime in law, that none shall inherite any lands as heire, but only the blood of the first purchaser, for * *refert à quo fiat perquisitum.* As for example, *Robert Coke* taketh the daughter of *Knightley* to wife, and purchaseth lands to him and to his heires, and by *Knightley* hath issue *Edward*, none of the blood of the *Knightleys*, though they be of the blood of *Edward*, shall inherite, albeit he had no kindred but them, because they were not of the blood of the first purchaser, viz. of *Robert Coke* (6).

Vid. Sect. 354, an excellent point.

[*a*] Pl. Com. Sir Edward Clere's case 447.

[*] Fleta, lib. 6, ca. 1, 2, &c. Bracton, lib. 2, fol. 65. 67, 68, 69, &c. Britton, ca. 119. 24 E. 3. 50.

39 E. 3. 29, 30, 38. 49 E. 3. 12. 49 Ass. p. 4. 12 E. 4. 14. Pl. Com. 445 & 450. 7 E. 6. Dyer 6. 24 E. 3. 24. 37 Ass. 4. 40 E. 3. 9. 42 E. 3. 10. 45 E. 3. Releases, 28. 7 H. 5. 3, 4. 8 Ass. 6. 35 Ass. 2. 5 E. 4. 7. 3 H. 5. 21 H. 7. 33. 40 Ass. 6. Ratcliff's case, 3 Co. 42. (Post. 220, b.)

[*b*] "*They*

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(4) *And this was the opinion of all the justices, M. 12 E. 4. But it was there held, if land descend to a man on the part of his father, who dies without issue, that his next heir, on the part of his father, shall inherit to him, that is to wit, the next who is of the blood of the father on the part of his grandfather: and for default of such heir, those who are of the blood of the father on the part of the mother of the father, viz. the grandmother, shall inherit. And if there is no such heir on the part of the father, then the lord shall have the land by escheat.* Red. But this passage is not in any edition prior to Redman's, and seems an addition to Littleton by another hand, and to be an opinion extracted from 12 E. 4. 14, pl. 12, which is indeed cited in the margin of Redman.

(5) feme, *L. & M.—Roh.—P.—Red.*

(1)† All between *In the same*, and *so see*, omitted in Red.

(6) *And therefore if the heir of the part of the father be attainted, the land shall escheat.* 49 *Ass. p.* 4. Hal. MSS.

[b] Bracton ubi supra. Fleta ubi supra. Britton, c. 118, 119. Pl. Com. 444. Clere's case. Tr. 19 E. 1, in Banco rot. 25. Lincoln Will. Seel's case.

[c] Britton, fol. 15. Fleta, lib. 1, c. 18. Pl. Com. 445, 446, &c. Clere's case. (1 Sid. 200.) (Plowd. 444.)

[d] 19 R. 2, garr. 100.

[b] "*They of his blood on the father's side.*" Here it is to be understood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother (7). Both these bloods are of the part of the father. [c] And this made ancient authors say, that if a man be seised of lands in the right of his wife, and is attainted of felony, and after hath issue, this issue should not inherit his mother, for that he could derive no blood inheritable from the father. And both these bloods of the part of the father must be spent ☞ before the heire of the blood of the part of the mother shall inherit, wherein ever the line of the male of the part of the father, (that is) the posteritie of such male, be they male or female, (who ever in descents are preferred) must faile before the line of the mother shall inherit. [d] And the reason of all this is, for that the blood of the part of the father is more worthie, and more neere in judgement of law, than the blood of the part of the mother.

[12. b.]

Britton, cap. 118, 119. Fleta, lib. 6, cap. 2.

"*Before any of the blood on the mother's side.*" And it is to be observed, that the mother hath also two immediate bloods in her, (viz.) her father's blood and her mother's blood. Now to illustrate all this by example, *Robert Fairefield*, sonne of *John Fairefield* and *Jane Sandie*, takes to wife *Ann Boyes*, daughter of *John Boyes* and *Jane Bewpree*, and hath issue *William Fairefield*, who purchaseth lands in fee. Here *William Fairefield* hath foure immediate bloods in him, two of the part of his father, viz. the blood of the *Fairefields*, and the blood of the *Sandyes*, and two of the part of his mother, viz. the blood of the *Boyses*, and the blood of the *Bewprees*, and so in both cases upward *in infinitum*. Now admit that *William*

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(7) But sometimes a man can only have immediate inheritable blood from one parent, as where his father or mother is an alien or person attainted; and this it seems suffices to enable children to inherit from the parent, who confers the inheritable blood, and also to inherit to each other. See acc. ante 8. a. n. 2, and the following note by lord Hale on lord Coke's next passage, where he mentions, that according to ancient authors the issue of an attainted father cannot inherit to the mother. *This seems not to be law. A female heretrix takes an alien to husband, and they have issue: the issue shall inherit to the mother. Post. Sect.* 114, *and fol.* 33, *a. for dower of wife being alien or attainted.* Hal. MSS. To the same purpose is what follows, being a note on fol. 8. a. ante, where lord Coke asserts that the children of an alien cannot inherit to each other, though he allows that the children of one attainted, if born before the attainder, may. Quære *of this; for it seems the blood of the mother suffices to make them inheritable one to the other, and this was the principal reason in Hobby's case.* Hal. MSS. Also lord Hale, in another note in fol. 8. a. ante, abridges the case of *Bacon* and *Bacon* from Cro. Cha. and cites *Stephens*'s case in the *dutchy* as another case of the same kind, and then there is the note following. *Yet note that he cannot be heir to his mother, because she is an alien. Husband denizen takes wife an alien, or wife takes husband an alien, and they have issue. It seems the issue shall inherit to the father in the first case, to the mother in the second.* Ergo videtur, *that if alien hath issue by denizen two sons, one son shall inherit to the other, because the mother is a denizen; and so in the case of a person attainted, having issue after attainder; and this was one of the reasons of Hobby's case.* Hal. MSS. This doctrine is agreeable to lord Hale's argument when he gave judgment in *Collingwood* and *Pace*, cited ante, fo. 8. a. n. 2, and also confirms the observation hazarded in n. 5. fol. 8. a.—[Note 62.]

William Fairefield die without issue, first the blood of the part of his father, viz. of the *Fairefields*, and for want thereof the blood of the *Sandyes* (for both these are of the part of the father) if both these faile, then the heires of the part of the mother of *William Fairefield* shall inherit, viz. first the blood of the *Boyses*, and for default thereof the blood of the *Bewprees*.

It is necessary to be knowne in what cases the heire of the part of the mother shall inherite, and where not. If a man be seised of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh backe an estate to him and to his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherite (2). If a man so seised maketh a feoffment in fee upon condition, and dye, the heire of the part of the father, which is the heire at the common law, shall enter for the condition broken, but the heire of the part of the mother shall enter upon him, and enjoy the land. [*m*] A man so seised maketh a feoffment in fee reserving a rent to him and to his heires, this rent shall goe to the heires of the part of the father; but [*n*] if he had made a gift in taile, or a lease for life reserving a rent, the heire of the part of the mother shall have the reversion, and the rent also as incident thereunto shall passe with it; but the heire of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion, nor can passe therewith. [*o*] If a man had been seised of a mannor as heire on the part of his mother, and before the statute of *Quia emptores terrarum*, had made a feoffment in fee of parcell to hold of him by

9 H. 7. 24. (Plowd. 57. Post. 202.)

[*m*] 7 H. 6. 4. 1 Co. 100. Shelley's case.

[*n*] 5 E. 2, tit. Avowry, 207. (Hob. 31.)

[*o*] 5 E. 3, Avowry, 207. (3 Co. 54. 3 Co. 32, b.)

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(2) But here lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completeiy divesting the feoffor of all interest in the land; and the *second* regranting the estate to him. For if in the first feoffment, the use had been expressly limited to the feoffer and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase. Adj. acc. 3. Lev. 406, and 2 Salk. 59, and see acc. post. 13. a, and 22. b. What shall be a *purchase*, and break the *descent*, so as to entitle the *paternal* heir to a preference over the *maternal* heir, particularly in the case of a devise to the heir, the student may inform himself by the authorities cited in Vin. Abr. *Heir*, W. 1, 2, to which add Battey and Trevillian, Mo. 278. Hinde and Lyon, 3 Leon. 64. 70, and Dy. 124. Hainsworth and Pretty, Cro. Eliz. 833. 919. Brown and Taylor, Cro. Cha. 38. Clark and Smith, 1 Salk. 241, and 1 Lutw. 793. Smith and Trig, 8 Mod. 23, and 1 Stra. 487. Ratcliffe's case, 1 Stra. 267. Martin and Strachan, 1 Wils. Part 1. p. 66, and Hurst and the earl of Winchelsea, Bur. 4. pt. v. 2. p. 879. In this last case, a feme covert by force of a power appointed by *will* to her heir in fee, but charged the land with debts and legacies; and it was adjudged in B. R. that the heir took by *descent*, and that the appointment had no other operation than making the estate subject to the debts and legacies. One leading principle, which this and the other authorities seem clearly to establish, is, that whenever a *devise* gives to the heir the same estate in *quality* as he would have by *descent*, he shall take by the *latter*, which is the title most favoured by the law; and that merely charging the estate with debts or legacies will not break the descent. This is only one of the many useful propositions, which might be extracted on the subject as the result of the long list of cases before cited, if this was the proper place for a discussion so nice and difficult.—[Note 63.]

by rent and service, albeit they be newly created, yet for that they are parcell of the mannor, they shall with the rest of the mannor descend to the heire of the part of the mother, *quia multa transeunt cum universitate quæ per se non transeunt.* If a man hath a rent secke of the part of his mother, and the tenant of the land ☞ granteth a distresse to him and to his heires, and the grantee dieth, the distresse shall go with the rent to the heire of the part of the mother, as incident or appurtenant to the rent, for now is the rent secke become a rent charge (1). [13. a.]

[p] 5 E. 4. 4. 1 Co. 100. Shelley's case. 27 H. 8. Dyer. Buckenham's case. 32 H. 8, gard. Brooke 93. 13 H. 7. 6. (2 Ro. Abr. 780. Post. 23, a. 271, b. 1 Co. 127. Hob. 31. 2 Co. 58.)

[p] A man so seised as heire on the part of his mother maketh a feoffment in fee to the use of him and his heires, the use being a thing in trust and confidence shall ensue the nature of the land (2), and shall descend to the heire on the part of the mother. [q] A man hath a seigniory as heire of the part of his mother, and the tenancy doth escheat, it shall go to the heire of the part of the mother. If the heire of the part of the mother of land whereunto a warranty is annexed is impleaded and vouche, and judgment is given against him, and for him to recover in value, and he dieth before execution [r], the heire of the part of the mother shall sue execution to have in value against the vouchee, for the effect ought to pursue the cause, and the recompence shall ensue the losse.

[q] 16 E. 3, age 46.

[r] Pl. Com. 292 and 515. See more of this in the Chapter of Warranties.

If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are voide, as in the case that *Littleton* putteth in this Chapter. If a man giveth lands to a man to him and his heires males, the law rejecteth this word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.

(Post. 27, a.)

A man hath issue a sonne, and dieth, and the wife dieth also, lands are letten for life, the remainder to the heires of the wife, the sonne dieth without issue, the heires of the part of the father shall inherite, and not the heires of the part of the mother, because it vested in the sonne as a purchaser. And the rule of *Littleton* holdeth as well in other kind of inheritances, as in lands and tenements. [s] And therefore if there be lord, *feme mesne*,

[s] 38 E. 3. 12.

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(1) Acc. 8 Co. 54, a.

(2) The better reason seems to be, that the use being the same as it was before the feoffment, it is the old use which continues. As to an use's ensuing the nature of the land, see 1 Co. 127. 2 Co. 58, and Bac. Read. on Stat. Uses, 8vo. ed. 308, in which latter book the author controverts the *generality* of the doctrine, which certainly ought to be understood with many restrictions, and considers at large the differences between *uses* and the *land* itself, or rather, as he expresses himself, between uses and cases of possession. Lord Bacon's Reading on the Statute of Uses is a very profound treatise on the subject so far as it goes, and shews that he had the clearest conception of one of the most abstruse parts of our law. What might we not have expected from the hands of such a master, if his vast mind had not so embraced within its compass the whole field of science, as very much to detach him from professional studies? It may be proper to observe, that all the editions of lord Bacon's Reading on Uses are printed with such extreme incorrectness, that many passages are rendered almost unintelligible, even to the most attentive reader. A work so excellent deserves a better edition.—[Note 64.]

mesne, and tenant, and the mesne bind herselfe and her heires by her deed to the acquittall of the tenant, the mesne takes husband, the tenant by his deed granted to the husband and his heires, that he or his heires shall not be bound to acquittall, the husband and wife have issue, and die, this issue, being bound as heire to his mother, shall not take benefit of the said grant of discharge, for that extends to the heires of the part of the father, and not to the heires of the part of the mother, and therefore the heire of the part of the mother was bound to the acquittall (3). And thus much for the better understanding of *Littleton's* cases concerning the heire of the part of the mother shall suffice (4).

"*But if a man marrieth an inheritrix, &c.*" Here there is another maxime, [*t*] that whensoever lands do descend from the part of the mother, the heires of the part of the father shall never inherit. And likewise when lands descend from the part of the father, the heires of the part of the mother shall never inherit (5). *Et sic paterna paternis, et è converso, materna maternis.* For more manifestation hereof, and of that which hereafter shall be said touching descents, see a Table in the end of this Chapter.

[*t*] 39 E. 3. 29. 49 E. 3. 12.

"*Shall have the land by escheate.*" [*u*] *Escheate* (6), *eschaeta*, is a word of art, and derived from the French word *escheat* (*id est*) *cadere*, *excidere* or *accidere*, and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentiæ* or *terræ excadentiales* [*w*]. *Dominus verò capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi.* And Ockam (who wrote in the raigne of Henry the second) treating of tenures of the king, saith, *porro eschaetæ vulgò dicuntur, quæ decedentibus hiis qui de rege tenent, &c. cùm non existit ratione sanguinis hæres, ad fiscum relabuntur.* [*x*] So as an escheat doth happen two manner of wayes, *aut per defectum sanguinis*, i. e. for default of heire, *aut per delictum tenentis*, i. e. for felonie, and that is by judgment three manner of waies, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est.* And therefore, they which are hanged by martiall law *in furore belli* forfeit no lands: and so in like cases escheats by the civilians are called *caduca*.

[*u*] Vide Sect. 130. Glanvill. lib. 7, cap. 17. Bract. lib. 3, fol. 118. Fleta, lib. 5, cap. 5, & lib. 3, cap. 10. Britton, cap. 37, and cap. 119. F. N. B. 100. Tr. 19 E. 1, in Banco Rot. 25. (3 Inst. 21. 4 Inst. 225. F. N. B. 144, b.)

[*w*] Fleta, lib. 6, cap. 1. Ockam cap. quod non absolvitur, &c.

[*x*] Pl. Com. Dame Hale's case. (Post. 92, b.)

[*y*] The father is seised of lands in fee holden of *I. S.* the son is attainted of high treason, the father dieth, the land shall escheat to *I. S. propter defectum sanguinis*, for that the father dyed

[*y*] Pl. Com. in Nicholl's case.

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(3) *Nota, it was grant and release; but* ratio libri *is, because the husband was not charged, except during the coverture, and by reason of that the discharge doth not extend farther.* Hal. MSS.—[Note 65.]

(4) 7 *H.* 6. 3, *by Cottesmore. If lord takes tenant to wife, and dies having issue, which dies without issue, the seigniory is revived, and the tenancy shall go to the heir of the part of the mother.* Hal. MSS.—[Note 66.]

(5) *But if the eldest son purchases land, and it descends to the youngest son, and he dies without heir of the part of the father, it shall descend to the heir on the part of the mother; because they have one and the same mother.* Hal. MSS.

(6) See Wright's Ten. 115. Blackst. Law Tracts, 8vo. ed. v. 1. p. 236, and 2 Blackst. Comm. 5th ed. 241.—[Note 67.]

[x] 38 E. 3. f. 37. 30 H. 6. 5. Bract. l. 2. tit. de Forf. Stamf. Pl. Cor. 192; and according to this diversity was it resolved in 5 E. 6, as it appeareth by my lord Dier's Manuscript. (Post. 390, b.) (W. Jo. 217. Cro. Cha. 172.)

dyed without heire. And the king cannot have the land, because the sonne never had any thing to forfeit. But the king shall have the escheate of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden (7).

[z] In an appeale of death or other felony, &c. processe is awarded against the defendant, and hanging the processe the defendant conveyeth away the land, and after is outlawed, the conveyance is good (8) and shall defeat the lord of his escheat; but if a man be indicted of felony, and hanging the processe against him, he conveyeth away the land, and after is outlawed, the conveyance shall not in that case prevent the lord of his escheate. And the reason of this diversity is manifest: for in the case of the appeale, the writ containeth no time when ☞ the felony was done, and therefore the escheate can relate but to the outlawry pronounced. But the indictment containeth the time when the felony was committed, and therefore the escheate upon the outlawry shall relate to that time (1). Which cases I have added, to the end the student may conceive, that the observation of writs, indictments, processe, judgments, and other entries, doth conduce much to the understanding of the right reason of the law.

[13. b.]

(a) Mirror, ca. 1, sect. 5. 51 H. 3, statutum de Scac. Britton, fo. 33, 34. Flet. lib. 1, cap. 36, & lib. 2, cap. 34, 35. Regist. 301. his Oath, 18 E. 1. Ro. Parl. 21 E. 1. Rot. Parl. 1. 29 E. 1, stat. de Eschaetoribus. 14 E. 3, c. 8. 28 E. 1, ca. 18. F. N. B. 100, c. Stamf. Prær. 81. 1 H. 8. ca. 8. 3 H. 8. ca. 2. Capitula Eschaetriæ in Vet. Magna Carta, fo. 160, 161, &c.

Of this word *(eschaeta)* here used by our author, commeth [a] *Eschaetor*, an ancient officer so called, because his office is properly to look to escheats, wardships, and other casualties belonging to the crowne. In ancient time there were but two escheators in *England*, the one on this side of *Trent*, and the other beyond *Trent*, at which time they had subescheators. But in the

(7) *A. infeoffs B. attainted of treason, to the use of C. the king shall have the land discharged of the use.* Hal. MSS. and Pimb's case, M. 27 Eliz. is cited from Moore. See Mo. 196. But note, that according to Moore, *B.* at the time of the conveyance to him, had only *committed* treason, and was not attainted till *after;* and it was by *relation* to the time of committing the offence, that the case was construed to be the same as if the conveyance had been to a person actually attainted. The doctrine in Pimb's case sounds peculiarly harsh; for first the legal estate in the land was given to the queen by a *constructive relation*, and then she was deemed to hold the land discharged of the use, because the king cannot be a trustee. However, it is but justice to mention, that the case being represented to queen Elizabeth, she, much to her honour, granted the land to *cestui que use* by patent. As to the king's holding land discharged of all uses and trusts where the legal estate vests in him, and the sense in which that doctrine is to be understood, see Vin. Abr. *Uses*, C. where most of the authorities on the subject are stated or referred to.—[Note 68.]

(8) *But if the party appears on an appeal, and the plaintiff counts, and the defendant is convicted by verdict or confession, it is all one.* Hal. MSS.—[Note 69.]

(1) *Nota, if one be attainted by outlawry or confession of a felony, which is precedent to the feoffment of the party attainted, the feoffee may falsify the attainder by traverse to the felony or to the time of the felony. But if he be attainted by verdict, it seems that he cannot falsify by traverse to the felony; but he may traverse the time of the felony, for that is not material; for if he be guilty on another day, the jury ought to find him guilty.* Hal. MSS. which cites 3 Inst. 230.—[Note 70.]

the raigne of *Edward* the second, the offices were divided, and several escheators made in every county for life, &c. and so continued untill the raigne of *Edward* 3. And afterwards by the statute of 14 E. 3, it is enacted by authority of Parliament, that there should be as many escheators assigned, as when king *Edward* 3, came to the crown, and that was one in every county, and that no escheator should tarry in his office above a yeere, and by another statute to be in office but once in three yeares. The lord treasurer nameth him.

And hereof also commeth *eschaetria*, which signifieth the eschaetorship, or the office of the escheator. But now let us heare what our author will further say unto us.

"*And so see, &c.*" This kind of speech is often used by our author, and doth ever import matter of excellent observation, which you may find in the Sections noted in the margin *.

And it is to be well observed that our author saith, *if he hath no heire, &c. the land shall escheate.* In which words is implyed a diversity (as to the escheate) betweene fee simple absolute, which a natural body hath, and fee simple absolute, which a body politique or incorporate hath. [*b*] For if land holden of *I. S.* be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheat (2). And so if land be given in fee simple to a deane and chapter, or to a maior and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate. And the reason and the cause of this diversity is, for that in the case of a body politique or incorporate the fee simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his naturall capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath beene said) no writ of escheat lyeth but in the three cases aforesaid, and not where a body politique or incorporate is dissolved.

* Sect. 147. 149. 248. 289. 417. 667, &c. (2 Ro.Abr.816.)

[*b*] 7 E. 4. 11, 12. Fitz. N. B. 33. 9 E. 3. 26. 17 E. 2, stat. de templariis.

Sect. 5.

ALSO, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the

(2) *Vid. tamen Mich.* 20 *Jac. C. B. Johnson and Morris, that it shall escheat.* Hal. MSS. which also cites 21 E. 4. 1, and 21 H. 7. 9. See further on this subject, Godb. 211, and Mo. 283, which are with lord Coke. But the case of *Johnson* and *Norway*, in Win. 37, which seems to be the same as that cited by lord Hale, is against the donor, though it is not mentioned in Winch, that the judges *finally* decided the point. See also contra lord Coke, the case of Southwell and Wade, in 1 Ro. Abr. 816. A. pl. 1, and S. C. in Poph. 91.—[Note 71.]

the land by descent, and not the younger (3), *&c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.*

NOW commeth our author to the descent betweene brethren, which he purposely omitted before. *Discent, descensus*, commeth of the Latine word *descendo*; and, in the legall sense, it signifyeth, when lands do by right of blood fall unto any after the death of his ancestors: or a descent is a meanes whereby one doth derive him title to certain lands, as heire to some of his ancestors. And of this, and of that which hath been spoken doth arise another division of estates in fee simple, viz. every man, that hath a lawful estate in fee simple, hath it either by descent, or by purchase.

(Post. 237.)

☞ "*The eldest is most worthy of blood.*" It is a maxime in law, that the next of the worthiest blood shall ever inherit, as the male and all descendants from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c. because the female of the part of the father is of the worthiest blood. [*c*] And therefore among the males the eldest brother and his posterity shall inherit lands in fee simple as heire before any younger brother, or any descending from him, because (as *Littleton* saith) he is *most worthy of blood. Quod prius est dignius est*, and *qui prior est tempore potior est jure. Si quis plures filios habuerit, jus proprietatis primò descendit ad primogenitum, eò quòd inventus est primò in rerum naturâ.* In king *Alfred*'s time knights fees (1) descended to the eldest sonne, for that by division of them between males the defence of the realme might be weakened; but in those days socage fee was divided between the heires males, and therewith agreed *Glanvill.* * *Cùm quis hæreditatem habens moriatur, &c. si plures reliquerit filios, tunc distinguitur utrùm ille fuerit miles, sive per feodum militare tenens, aut liber sockmannus, quia si miles fuerit aut per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in toto, &c. si verò fuerit liber sockmannus, tunc quidem dividetur hæreditas inter omnes filios, &c.* (2). But hereof more shall be said hereafter in his proper place.

[14. a.]

[*c*] Britton, cap. 119. Bract. lib. 2, cap. 30. 277. 279. 3 E. 3. 26. 3 Eliz. Dyer 138. Stanford prær. 52. 58. 3 E. 1, tit. Avowry, 235. 32 E. 3, discent. 80. Bra. lib. 4, 211. Fleta, lib. 6, ca. 2. Glanvill. lib. 7, ca. 1. Mirror, cap. 1, sect. 3. * Glanvill. lib. 7, cap. 3, & ca. 1. Vid. Pl. Com. 229, b.

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(3) *But if the land purchased by the middle brother was holden of the elder brother, who accepts homage of him, the land shall descend to the younger brother by* 13 *E.* 1. *Avowry*, 235. Hal. MSS.—[Note 72.]

(1) Here lord Coke writes, as taking it for granted, that feudal tenures subsisted in England before the Conquest. But this is a controverted point amongst our best writers. See post. 64. a, where a note is given on this subject.

(2) See in Robins. Gavelk. an elaborate dissertation on the origin, antiquity, and universality of partible descents. The author pursues his subject amongst the Jews, Greeks, and Romans, and afterwards amongst most of the modern nations in Europe, and then proceeds to inquire into the state of our own law of descents before the Conquest. See page 20. See also lord Hale's learned researches into the history of the law of descents in his Hist. of the C. L. c. 11. p. 206.—[Note 73.]

Sect. 6.

ALSO, it is to be understood, that none shall have land of fee simple by descent as heire to any man, unlesse he be his heire of the whole blood. For if a man hath issue two sonnes by divers venters, and the elder purchase lands in fee simple, and dye without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cosin, shall have the same, because the younger brother is but of halfe blood to the elder (5).

NO man can be heire to a fee simple by the common law, [*d*] but he that hath *sanguinem duplicatum*, the whole blood, that is, both of the father and of the mother, so as the halfe blood is no blood inheritable by descent (3); because that he that is but of the halfe blood cannot be a compleat heire, for that he hath not the whole and compleate blood (4), and the law in descents in fee simple doth respect that which is compleat and perfect. And this maxime doth not onely hold where lands (whereof *Littleton* here speaketh) are claymed or demanded as heire, [*e*] but also in case of appeale of death: for if one brother be slaine, the other brother of the halfe blood shall never have an appeale (albeit he shall recover nothing therein either in the realtie or personaltie) because in the eye of the law he is not heire to him. Also this rule extends to a warranty, as our author himselfe elsewhere holdeth (6).

[*d*] Bract. lib. 4. Idem, lib. 2, fo. 65. Britton, ca. 119. Fleta, lib. 6, ca. 1. 1 E. 3. 19. John Gifford's case, 31 E. 3. Conterpl. de Voucher, 88. 40 Ass. 6. 4 E. 2. Formd. 49. Vid. Ratcliff's case, 3 Co. 40, 41. (1 Ro. Abr. 629.)

[*e*] 7 E. 4. 15. Sect. 737.

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(3) The exclusion of the half blood by our law is variously accounted for. Sir Martin Wright considers it as a consequence of the rules established for restricting the succession to the descendants of the first feudatory, in conformity to the strict notion of feuds. See Wright's Ten. 184, where the exclusion of lineal ascent is excused on the same principle. See also Blackst. Law Tracts, v. 1. p. 213. 8vo. ed. where the feudal reason is explained more at large, though the author admits that the practice goes much further than the principle will warrant. Others there are, who insist, that the true reason, why the brothers of different *venters* cannot inherit to each other, is the aversion our Saxon ancestors had to second marriages, which they are said to have deemed at best but a permitted fornication. But this unfavourable idea of the *vota iterata* was not peculiar to the Saxons, or any other descendants of the ancient Germans. See Tayl. Elem. Civ. L. 294.—[Note 74.]

(4) See what is observed on lord Coke's explanation of the meaning of the term *whole blood*, in 1 Sid. 200. See too 1 Vent. 424, and 2 P. Wms. 667.

(5) But daughters by different femes, though they cannot inherit to each other, may inherit together to their father, because the descent is *immediate* from the father. See R. Robins. Disc. on Inher. 2d ed. p. 37, and Bro. Abr. Descent, pl. 20, and 1 Ro. Abr. 627.—[Note 75.]

(6) *So brother of half-blood shall not have error on fine levied by the elder brother, though, if there had not been such fine, the land would descend to him.* Hal. MSS.—Nota, *if A. purchases a reversion expectant on an estate for life, and dies without issue, regularly his brother of the half-blood shall not be heir to him; because though when there is a mesne seisin, he ought to make himself heir to him who is last actually seised; yet when there is not such a mesne seisin, he ought to make himself heir to him in whom it first vests by purchase. Yet*

see

Sect. 7.

AND if a man hath issue a sonne and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heire to her brother (1), *and not the younger brother, for that the sister is of the whole blood of her elder brother.*

THIS is put for an example to illustrate that which hath been ☞ said, and needeth no explanation. And herewith agreeth *Britton*. [14. b.]

Britton, cap. 119.

Sect. 8.

AND also, where a man is seised of lands in fee simple, and hath issue a sonne and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heire to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heire to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because possessio fratris de feodo simplici facit sororem esse hæredem. *But if there be 2 brothers by divers venters, and the elder is seised of land in fee, and die without issue, [and his uncle enter as next heire to him, who also dies without issue* (1)†,] *now the yonger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.*

"*SEISED of lands in fee simple.*" These words exclude a seisin in fee taile, albeit he hath a fee simple expectant. [*f*] 24 E. 3. 24. 30. 31 E. 3. [*f*] (2) And therefore if lands be given to a man and his wife, Count. de Vouch. 88. 32 E. 3, tit. Voucher. 37 Ass. p. 4. 40 E. 3. 9. 42 E. 3. 10. 39 E. 3. fol. 13. 7 H. 5. 3. (1 Ro. Abr. 627.) (Cro. Cha. 411. Post. 281.) (3 Co. 40, 41.)

and

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see M. 1 *Car. C. B. Cro. no.* 16. *Hodgekinson and Wood. A. having issue B. a son by one venter, and C. by another, devises to B. and the heirs male of his body, remainder to the heirs male of the body of the devisor, and to the heirs male of their bodies, remainder to the devisor's right heirs, and dies. B. dies without issue. Ruled, that C. shall take as heir male of the devisor, because it is* quasi *an entail according to Littleton, sect.* 30. *But it seems, that the fee shall descend to him, since it is a void devise of the fee simple, and doth not vest by purchase in the eldest son, but by descent.* Hal. MSS.—[Note 76.]

(1) *to her brother*, omitted in L. & M. and Roh.

(1)† All between the brackets omitted in Roh. edit.

(2) 7 *H.* 4. 16. *Vid.* 38. *Ass.* 8. Hal. MSS.

and to the heires of their two bodies, the remainder to the heires of the husband, and they have issue a sonne, and the wife dyeth, and he taketh another wife, and hath issue a sonne, the father dieth, the eldest son entreth, and dieth without issue, the second brother of the halfe blood shall inherit; because the eldest sonne by his entry was not actually seised of the fee simple, being expectant but onely of the estate taile (3). And the rule is, that *possessio fratris de feodo simplici facit sororem esse hæredem*, and here the eldest son is not possessed of the fee simple but of the estate taile (4). And where *Littleton* speaketh onely of lands, [g] yet there shall be *possessio fratris* of an use (5), of a seigniory, a rent, an advowson (6) and of other hereditaments.

[g] 5 E. 4, fo. 7. Pl. Com. fo. 58, in Wimbishe's case.

"*And the eldest son enter.*" [h] These words are materially added when the father dies seised of lands in fee simple, for if the eldest son doth not in that case enter, then without question the youngest ☞ sonne shall be heire, because as it has beene said before regularly he must make himselfe heire to him that was last actually seised (or to the purchasor), and that was to the father where the eldest sonne did not enter. And therefore *Littleton* addeth, that the sonne is heire to the father. [i] But when the eldest sonne in this case doth enter, then cannot the youngest sonne being of the halfe blood be heire to the eldest, but the land shall descend to the sister of the whole blood. Yet in many cases albeit the sonne doth not enter into lands descended in fee simple, the sister of the whole blood shall inherit, and in some cases where the eldest sonne doth enter, yet the younger brother of the halfe blood shall be heire.

[15. a.]

[h] 10 Ass. 27. 34 Ass. 10. 31 E. 3. Count de Vouch. 88. 32 E. 3. tit. Vouch. 94.

[i] 11 H. 4. 11. 40 E. 3. 30. 45 E. 3. 13. 40 Ass. p. 6. Ratcliffe's case, 3 Co. 41.

[k] If the father maketh a lease for yeares, and the lessee entreth and * dieth, the eldest sonne dieth during the tearme before entry or receipt of rent, the younger sonne of the halfe blood shall not inherite, but the sister (2); because the possession of the lessee for yeares is the possession of the eldest sonne, so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heire (3). The same law it is if the lands be holden by knights service, and the eldest sonne is within age,

[k] 5 E. 4. 7, b. 3 H. 7. 5. 8 Ass. p. 6. 45 E. 3. tit. Releases, 28. (Post. 243. Mo. 125. 3 Co. 40, 41.)

* *The words,* the father, *seem wanting in this place, see* Mr. Ritso's Introduction, *p.* 117.

and

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(3) Acc. Bro. Abr. *Discent*, pl. 13, 14, and 30. *Scire Facias*, pl. 126, and Execution, 67. 1 Ro. Abr. 628, and see 1 Show. 245, and 3 Mod. 257.

(4) *Yet the remainder was in the elder brother to give or forfeit.* 24 *E.* 3, 30. Hal. MSS.—[Note 77.]

(5) See Dy. 10. b. 11. a. Finch, 8vo. ed. 21, and 2 And. 146. Note, that lord Coke must be understood to mean uses before the statute for transferring uses into possession, or uses not executed by the statute; for uses within the statute are legal estates.—[Note 78.]

(6) *So of a copyhold before admittance,* 4 *Co.* 22. b. Hal. MSS. See acc. Dy. 291. b. Finch, 8vo. ed. 21.—[Note 79.]

(2) Adj. acc. Mo. 125. But it is said to be otherwise, if the lease is of a copyhold, unless made by *surrender*. 3 Leon. 69, and 4 Leon. 38.—[Note 80.]

(3) *Yet in pleading, it shall not be said* seisin in demesne. *Defendant avows, because I. S. was seised in his* demesne *of fee and granted rent; plaintiff replies, that a long time before the said I. S. leased to him for years. It is not a plea without traversing the* seisin in demesne. *T.* 9 *Car. B. R. Weedon's case.* Hal. MSS.—[Note 81.]

and the gardian entreth into the lands. And so it is if the gardian in socage enter (4).

(Post. 191.) But in the case aforesaid, if the father make a lease for life, or a gift in taile, and dyeth, and the eldest sonne dyeth in the life of tenant for life or tenant in taile, the younger brother of the halfe blood shall inherit; because the tenant for life or tenant in taile is seised of the freehold, and the eldest sonne had nothing but a reversion expectant upon that freehold or estate taile, and therefore the youngest sonne shall inherit the land as heire to his father, who was last seised of the actual freehold. And albeit a rent had beene reserved upon the lease for life, and the eldest sonne had received the rent and dyed, yet it is holden by some* that the younger brother shall inherite, because the seisin of the rent is no actuall seisin of the freehold of the land. But 35 *Ass. pl.* 2, seemeth to the contrary, because the rent issueth out of the land, and is in lieu thereof (5), wherein the onely question is, whether such a seisin of the rent be such an actual seisin of the land in the eldest son as the sister may in a writ of right make herselfe heire of this land to her brother. But it is cleere, that [*l*] if there be bastard *eigne*, and *mulier puisne*, and the father maketh a lease for life or a gift in taile reserving a rent and die, and the bastard receive the rent and dye, this shall barre the *mulier*, for the reason of that standeth upon another maxime, as shall manifestly appeare in his apt place, Sect. 399.

* 7 H. 5. 34, per Halls & Logdington. 35 Ass. p. 2.

[*l*] 14 E. 2. Bastard 26. Vid. Sect. 399.

(Post. 244, a.)

[*m*] 7 H. 5. 2, 3, 4.

"*Seised of lands.*" [*m*] (6) But in this case, if the eldest sonne doth enter and get an actuall possession of the fee simple, yet if the wife of the father be indowed of the third part, and the eldest sonne dyeth, the younger brother shall have the reversion of this third part notwithstanding the elder brother's entry; because that his actuall seisin which he got thereby was by the endowment defeated (7). But if the eldest sonne had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life.

(8 Co. 35, b. Post, 191, b. 4 Co. 58, b.)

"*Enter.*"

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(4) *See accordingly, though the lord seize the land in socage as guardian in chivalry.* 11 *Ass.* 6. 34 *Ass.* 10. *See* 12 *Eliz. Dy.* 292, *so as to copyholder or tenant at will. Quære of tenant by sufferance.* Hal. MSS.—In Jenk. 242, it is said, that the entry of a devisee for years will make a *possessio fratris.* See Vin. Abr. *Descent*, K. pl. 34. See further on this subject in the case of Newman and Newman, Wils. vol. 2. p. 516.—[Note 82.]

(5) Nota, *M.* 24 *Car. B. R. between Ames and Cooke, ruled that in such case seisin of rent doth not make* possessio fratris. Hal. MSS.—See S. C. acc. All. 88.—S. p. adjudged acc. Trin. Term, 1657, between Piper and Masters, MS. Rep. by Glyn, J.—[Note 83.]

(6) See post. 31. a.

(7) *So it is, if father makes lease for life, and afterwards recovers against him by default, and dies, and the eldest son enters, against whom the lessee recovers* per quod ei deforceat. 8 *Ass.* 6. *If wife recovers dower by erroneous judgment against the elder brother and dies, the sister shall have error; and if she reverses the judgment, she shall hold against the brother.* 7 *H.* 5. 4. *Son barred by false verdict in mort d'auncestor; the sister shall have attaint and reverse the judgment; but afterwards the brother shall enter. Kelw.* 119. *b.* Hal. MSS.—[Note 84.]

"*Enter.*" Hereupon the question groweth, whether if the father be seised of divers severall parcels of land in one county, and after the death of the father the sonne entreth into one parcell generally, and before any actuall entry into the other dyeth, this generall entry into part shall vest in him an actual seisin in the whole, so as the sister shall inherit the whole. And this is a *quære* in 21 H. 7, 33 a. (8). 21 H. 7. 33, a.

[15. b.] ☞ And some doe take a diversitie when an entry shall vest, or devest an estate, that there must be severall entries into the several parcels, but where the possession is in no man, but the freehold in law is in the heire that entreth, there the generall entry into one part reduceth all into his actual possession. And therefore if the lord entreth into a parcel generally for a mortmain, or the feoffor for a condition broken, or the disseisee into a parcell generally, the entry shall not vest nor devest in these or like cases, but for that parcell. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heire, and the possesion in no man, there the entry into parcel generally seemeth to vest the actuall possession in him in the whole. But if his entry in that case be speciall, viz. that he enter only into that parcell, and into no more, there it reduced that parcell only into actuall possession. (Post. 252, b.) (1 Leon. 265.)

"*A man seised of lands.*" What then is the law of a rent, advowson, or such things that lie in grant? [*g*] If a rent, or an advowson, do descend to the eldest sonne, and he dyeth before he hath seisin of the rent, or present to the church, the rent or advowson (1) shall descend to the yongest sonne, for that he must make himselfe heire to his father, as hath been oftentime said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. [*h*] And this case differeth from the case of the tenant by the courtesie, for there if the wife dieth before the rent day, or that the church become voyd, because there was no laches or default in him, nor possibility to get seisin, the law in respect of the issue begotten by him will give him an estate by the courtesie of *England*. But the case of the descent to the yongest sonne standeth upon another reason, viz. to make himselfe heire to him that was last actually seised, as hath beene said. [*g*] 19 E. 2, quare imped, 177. 3 H. 7. 5. [*h*] 7 E. 3. 66, tit. Bar. 293. 3 H. 7. 5. (Post. 29, a.)

"*In fee simple.*" [*i*] For halfe blood is not respected in estates in taile, because that the issues doe claime in by descent, *per formam doni*, and the issue in taile is ever of the whole blood to the donee (2). [*i*] 8 E. 3. 11. 49 E. 3. 12. Ratcliffe's case. 3 Co. 41.

"[*k*] *Possessio fratris de feodo simplici facit sororem esse hæredem.*" Hereupon foure things are to be observed, every word almost being operative, and materiall. First, that the brother must be in actuall possession; for *possessio est quasi pedis positio.* Secondly, *de feodo simplici* exclude estates in taile. Thirdly, *facit sororem* [*k*] Bracton, lib. 2, fo. 65, & lib. 4, fo. 279. Britton, cap. 119. Flet. li. 6, c. 1. 24 E. 3. 30.

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(8) *Adjudged accordingly in the point P. 4 Eliz. B. R.* Hal. MSS.

(1) *If it was an advowson in* gross. *But seisin of a manor is good seisin of advowson, common, &c.* appendant *or* appurtenant. 18 *H.* 6. 24. Hal. MSS.— [Note 85.]

(2) 8 *E.* 3. 11. 12 *E.* 4. 19. 49 *E.* 3. 12. 4 *E.* 2. *Formedon* 49. Hal. MSS.

[l] Ratcliffe's case. 3 Co. 42.

sororem esse hæredem. So as [*l*] *soror est hæres facta*, and therefore some act must be done to make her heire, and the yonger sonne is

[m] Britton, cap. 119.

hæres natus [*m*] if no act be done to the contrary. And albeit the words be *facit sororem esse hæredem*, yet this doth extend to the issue of the sister, &c. who shall inherit before the yonger brother.

(Cro. Cha. 601.)

Fourthly, Of *dignities*, whereof no other possession can be had but such as descend (as to be a duke, marquesse, earle, viscount, or baron) to a man and his heires, there can be no possession of the brother to make the sister inherit (3), but the yonger brother, being heire (as *Littleton* saith) to the father, shall inherit the dignitie inherent to the blood, as heire to him that was first created noble.

6 H. 4. 1.

And you shall understand that concerning descents there is a law, parcell of the lawes of *England*, called *jus coronæ*, and differeth in many things from the generall law concerning the subject. As for example, the king in any suit for any thing that pertaines to the crown shall not shew in certaine his cosinage as a subject shall do, or as he himselfe shall do for things touching his dutchie.

[n] 34 H. 6, fol. 34. Pl. Com. fo. 245. 25 E. 3, ca. de natis ultra mare. (4 Inst. 206.)

[*n*] And in the case of the king, if he hath issue a sonne and a daughter by one venter, and a sonne by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands, nor any other fee simple lands of the crowne, but the yonger brother shall have them. Wherein note that neither *possessio fratris* doth hold of lands of the possessions of the crowne, nor halfe blood is no impediment to the descent of the lands of the crowne, as it fell out in experience after the decease of king *Edward* the sixth to the queene *Mary*, and from queene *Mary* to queene *Elizabeth*, both which were of the half blood, and yet inherited not onely the lands which king *Edward* or queen *Mary* purchased, but the ancient lands parcell of the crowne also.

Pl. Com. ubi supra.

A man, that is king by descent of the part of his mother, purchases lands to him and his heires, and dies without issue, this land shall descend to the heire of the part of the mother; but in the case of a subject, the heire of the part of the father shall have them.

(7 Co. 12, b. Calvin's case.)

So king *Henry* the eighth purchased lands to him and his heires, and died having issue two daughters, the lady *Mary*, and the lady *Elizabeth*; after the decease of king *Edward*, the eldest daughter queen *Mary* did inherit only all his lands in fee simple. For the eldest daughter or sister of a king shall inherit all his fee

(3) *Accordingly adjudged in parliament, H.* 16 *Car. Cro. n.* 4. *Lord Gray's case, which was a barony by writ; and there agreed, that where lord Gray being baron by writ is created earl of Kent to him and his heirs male of his body, and he has issue two sons by several venters, and the eldest has issue a daughter; the barony shall go to the daughter, and the earldom to the younger brother, and doth not draw the barony to it. But if it was a feudal title of honour, as of the earldom of Arundel or barony of Berclay, there* possessio fratris *should hold well; because the title is annexed to the land.—So of an office of dignity, and* eâ ratione *the office of high chamberlain of England descended to the earl of Linsey of the whole blood, and departed from the line male of the earl of Oxford; and adjudged accordingly in parliament.* Hal. MSS.—See lord Gray's case at large in Coll. Proc. on claims of Bar. 195, and the case about the office of lord chamberlain, in same book, 173, and W. Jo. 96.—[Note 86.]

fee simple lands. So it is if the king purchaseth lands of the custome of gavelkind, and die having issue divers sonnes, the eldest sonne shall only inherit these lands (4). And the reason of all these cases is, for that the qualitie of the person doth in these and many other like cases alter the descent, so as all the lands and possessions whereof the king is seised *in jure coronæ*, shall *secundùm jus coronæ* attend upon and follow the crowne, and therefore to whomsoever the crowne descend, those lands and possessions descend also, for the crowne and the lands [16. a.] whereof the king is seised *in jure coronæ*, are ☞ *concomitantia*. If the right heire of the crowne be attainted of treason, yet shall the crowne descend to him, and *eo instante* (without any other reversall) the attainder is utterly avoided, as it fell out in the case of *Henry* the seventh (1). [o] And if the king purchase lands to him and his heires, he is seised thereof *in jure coronæ*; *à fortiori*, when he purchases land to him his heires and successors (2).

But hereof this little taste shall suffice.

Pl. Com. fo. 247. (1 Sid. 138.) Pl. Com. 238. 1 H. 7, fol. 4. (Plowd. 105. 244, 245.)

[o] 43 E. 3, fol. 20.

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(4) Nota, *by the common law, the king is a corporation, and purchases made by him after assumption of the crown vest in a politic capacity. Hence, if an usurper purchases lands, and the right heir resumes the crown, he shall have the purchases*, et è converso, *an usurper shall have the purchases made by a rightful king so long as he has the crown. So it happened in the cases of H. 4. H. 5. H. 6. E. 4. R. 3. H. 7. But* nota, *purchases made before accession of the crown, or descents from collateral ancestors after accession of the crown, vest in a natural capacity; and therefore in the re-ademption of the crown by Edward 4, there was a special act to give to the king all the possessions of Hen. 6. But such lands are qualified and affected differently from those of other persons. They will pass by letters patent only, and without livery; and the grants of them shall not be avoided by nonage*, et similiter. *As to acquisitions by conquest by the king of England, they are annexed to his crown as his purchases are, as Ireland, Man, Berwick, Calais, and the New Plantations, the ancient territories of Normandy, Acquittaine, Anjou. And also many other lands, which descended in England from collateral ancestors, though in their original vested in a natural capacity, yet partly by attainder, partly by long continuance united to the crown, partly by occupation, were in some manner annexed to the crown, and will go with it. Yet see* Rot. Parl. 13 R. 2. n. 32, dux Lancastriæ creatus dux Aquitaniæ cum mero et misto imperio tenend. de rege ut rege Franciæ.—Hal. MSS.—[Note 87.]

(1) *So it is, though he be an alien, as happened in the case of king James. The reason is, because the king is a corporation.* Hal. MSS.—[Note 88.]

(2) See this subject very fully and learnedly considered in the case of the *dutchy of Lancaster*, Plowd. 212, in which it was held that a lease of dutchy land was not avoidable by reason of the nonage of Edw. 6, and in the case of Willion and Berkley, Plowd. 223, in which a remainder to the king and the heirs male of his body was held to be an estate tail within the statute *de donis*, in the same manner as if the limitation had been to a subject, and not to be a fee simple conditional. See further, 7 Mod. 78.—[Note 89.]

Sect. 9.

AND it is to wit, that this word (inheritance) *is not onely intended where a man hath lands or tenements by descent of inheritage, but also every fee simple or taile* (3) *which a man hath by his purchase may be said an inheritance, because his heires may inherit him. For in a writ of right which a man bringeth of land that was his owne purchase, the writ shall say,* quam clamat esse jus et hæreditatem suam. *And so shall it be said in divers other writs which a man or woman bringeth of his owne purchase, as appeares by the Register.*

Sect. 45. 46. 57. 59. 80. 100. 146. 164. 170. 184. 229. 243. 259. 274. 280. 293. 300. 305. 419, 420, 421. 489. 632. 697. 749.

"*AND it is to wit.*" This kinde of speech is used twice in this Chapter, and oftentimes by our authour in all his three bookes, and ever teacheth us some rule of law, or generall or sure leading point, as you shall perceive by reading, and observing of the same, which for the ease of the studious reader I have observed.

[a] Sect. 732. Bract. lib. 2, fo. 62, b. Fleta, lib. 6, cap. 1. (Post. 383, b.)

"*Quam clamat esse jus et hæreditatem suam.*" [a] Here our authour declareth the right signification of this word *(inheritance)*. And true it is that in the writ of right patent, &c. *quando dominus remittit curiam suam*, the words of the writ be, *quam clamat esse jus et hæreditatem suam.* And in the *præcipe in capite*, in a *cui in vitâ*, [b] when the defendant claimeth by purchase, the writ is, *quam clamat esse jus et hæreditatem suam.* And with *Littleton* agreeth the Register, fol. 4, & 232, and the booke in 49 E. 3. 22, against sodaine opinions 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. Pl. Com. *Wimbeshe's* case, 47. And yet in 7 H. 4. 5, which is the booke of the greatest weight, sir *William Thirning* chiefe justice of the common bench (as it seemeth doubting of it) went into the chancery to enquire of the chancery men of the forme of the writ in that case; and they said that the forme was bothe the one way and the other, so as thereby the opinion of *Littleton* is confirmed, and the booke in 6 E. 3, fo. 30, is notable; for there in an action of waste the plaintife supposed, that the defendant did hold *de hæreditate sua*, and it is ruled, that albeit the plaintife purchased the reversion, yet the writ should serve. And there it is said, it hath beene seene, that in a *cui in vita*, the writ was, *which the demandant claimed as her right and inheritance*, when it was her purchase. And so this point wherein there might seem some contrariety in bookes is manifestly cleared. But in the statute of W. 2, cap. 5, *de hæreditate uxorum* by construction of the whole statute is taken onely for the wives inheritance by descent, and not by purchase, as appeareth in 1 E. 2, *tit. Quare imped.* 43. 35 H. 6. 54. F. N. B. 34. b.

[b] Regist. fol. 1, 2. (F. N. Br. 193.) Regist. fo. 4, 232. 49 E. 3. 22. 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. 6 E. 3. 30. Pl. Com. Wimbeshe's case, 47, & 58, b.

6 E. 3. 30.

W. 2. ca. 5. 1 E. 2, tit. quare imp. 43. 35 H. 6. 54. F. N. B. 34, b.

[c] 6 Co. 52, 53, Countes de Rutland's case. 8 Co. 16, 17, the Prince's ca. (4 Inst. 126.)

There be some that have an inheritance [c], and have it neither by descent, nor properly by purchase, but by creation; as when the king doth create any man a duke, a marquesse, earle, viscount, or baron to him and his heires, or to the heires males of his bodie, &c. he hath an inheritance therein by creation. A man may have an inheritance in title of nobilitie and dignitie

(3) *or taile*, not in L. and M.

[16. b.] dignitie three manner of wayes, that is to say, by creation, by descent, and by ☞ prescription (1). By creation two manner of ordinary wayes (for I will not speak of a creation by parliament) by writ, and by letters patent. Creation by writ is the ancienter way; and here it is to be observed, that a man shall gain an inheritance by writ (2). King *Richard* the second created *John Beauchampe de Holte* baron of *Kedermister* by his letters patents, bearing date the 10th *October, anno regni sui* 11, before whom there was never any baron created by letters patent, but by writ. And it is to be observed, that if he be generally called by writ to the parliament, he hath a fee simple in the baronie without any words of inheritance. But if he be created by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. If a man be called by writ to the parliament, and the writ is delivered unto him, and he dieth before he cometh and sits in parliament, whether he was a baron or no? And it is to be answered that he was no baron, for the direction and deliverie of the writ to him maketh not him noble; for the better understanding whereof it is to be knowne that the words of the writ in that case are, *Rex, &c. E. B. de D. Chivalier salutem. Quia de advisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Angliæ, &c. concernentibus, quoddam parliamentum nostrum apud civitatem Westm. à 21 Octob. proxim. futuro teneri ordinavimus, et ibid. vobiscum et cum prælatis, magnatibus et proceribus dicti regni nostri colloquium habere et tractatum, vobis in fide et ligeanciâ quibus nobis tenemini firmiter injungendo mandamus, quòd consideratis dictorum negotiorum arduitate et periculis imminentibus, cessante excusatione quâcunque, dictis die et loco personaliter intersitis nobiscum et cum prælatis, magnatibus, et proceribus supradictis, super dictis negotiis tractatur' vestrumque consilium impensur', &c.* And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall, and thereupon a baron is called a peer of parliament. [d] And if issue be joined in any action, whether he be a baron, &c. or no, it shall not be tryed by jury, but by the record of parliament, which could not appeare unlesse he were of the parliament (3). Therefore a duke, earle, &c. of another kingdome, are not to be sued by those names here, for that they are not

(12 Co. 69. ante, 9. b.)

6 Co. 52, 53. Countesse of Rutland's case. 8 H. 6. 10. 48 E. 3. 30. 35 H. 6. 46. Pl. Com. 223.

[d] 35 H. 6. 46. 48 E. 3. 30, b. 48 Ass. p. 6. 22 Ass. p. 24. Regist. 287. 11 E. 3, breve 472. 20 E. 4. 6.

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(1) See 1 Bulstr. 196, where the earldom of Arundel is mentioned as an instance of an earldom by prescription. In this case many curious particulars concerning the *honour of Petworth* are mentioned.

(2) *Baron by writ takes grant of the same barony by patent. This determines his barony by writ. Otherwise it is, if the barony by writ was suspended.* 11 *Co. Lord Delaware's case.* Hal. MSS.—But the doctrine of extinguishing a barony by writ by acceptance of a patent-barony seems questionable; for it supposes a right to surrender the barony by writ. See in Show. Parliam. Cas. 1, Lord Purbeck's case, in which the house of lords adjudged, that the dignity of a viscount could not be surrendered by a fine.—[Note 90.]

(3) This doctrine is certainly true with respect to baronies by *writ*; because, as lord Coke observes, the blood of the person summoned is not ennobled, till he takes his seat in parliament. But the case of nobility by *letters patent* is different, for by them the creation is perfect, and the blood is ennobled without sitting; and therefore, in lord Banbury's case, the court of king's bench

(6 Co. 52, Countess of Rutland's case.)

not peeres of our parliament (4). And albeit the creation by writ is the ancienter, yet the creation by letters patent is the surer, for he may be sufficiently created by letters patent, and made noble, albeit he never sit in parliament.

[e] 6 Co. 52, 53, Countes de Rutland's case. 2 H. 6. 11. 22 Ass. 24. 12 E. 3, breve 254. 8 H. 4. 19. 11 H. 4. 15. Vid. Fleta, lib. 6, ca. 10.

[e] And it is to be observed, that nobilitie may be granted for term of life, by act in law without any actuall creation; as if a duke take a wife, by the intermarriage she is a duches in law, and so of a marquesse, an earle, and the rest, and in some other cases. And there is a diversitie betweene a woman that is noble by descent, and a woman that is noble by marriage. [f] For if a woman, that is noble by descent, marrie one that is under the degree of nobilitie, yet she remaineth noble still (5); but if she gaine it by marriage, she loseth it if she marry under the degree of nobilitie, and so is the rule to be understood, *Si mulier nobilis nupserit ignobili desinit esse nobilis.* [g] But if a duchesse by marriage marrieth a baron of the realme, she remaineth a dutchesse and loseth not her name, because her husband is noble (6), *et sic de cæteris.*

[f] 4 Co. 118, Actou's case, tempore Mariæ Reginæ. Brooke nosme de dignity 69. 14 H. 6. 18. 2 H. 6. 11.

[g] 22 H. 6. 52.

And as an estate for life may be gained by marriage, so may the king create either man or woman noble for (7) life [h] but not for yeares, because then it might goe to executors or administrators (8). The true division of persons is, that everie man is either of nobilitie, that is, a lord of parliament of the upper house, or under the degree of nobilitie, amongst the commons, as knights, esquires, citizens and burgesses of the lower house of parliament, commonly called the house of commons; and he that is not of the nobilitie is by intendment of law among the commons (9).

[h] 9 Co. 97, 98, Sir George Reynel's case.

"*As appears by the Register.*" Which booke in the statute of W. 2, ca. 24, is called *Registrum de cancellariâ*, because it containeth the formes of writs at the common law that issue out of the chancerie, *tanquam ex officinâ justitiæ.* There is a register of originall writs, and a register of judiciall writs; but when it is spoken

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bench held that a peerage claimed under letters patent is not triable by the record of parliament, but must be questioned by pleading *non concessit.* See the King and Knollys, 1 L. Raym. 10.—[Note 91.]

(4) Nota, *as to precedence of foreign dukes, earls, &c. it differs not, though they have not voice in parliament. But a Scotch or Irish earl summoned to parliament here is as an English earl, as the earl of Angus. See the case of the dutchess of Suffolk.* Hal. MSS.—See further as to precedency in general, 4 Inst. 361, and Prynn on 4 Inst. 323; and as to the precedency of Irish peers; see a tract by the late Earl of Egmont.—[Note 92.]

(5) See 14 H. 8. 42. Dy. 79.

(6) But in some books it is said, that if a woman noble by birth marries one of inferior nobility, she shall be styled by the dignity of her second husband. Dutchess of Suffolk's case, Ow. 82. See S. C. O. Bendl. 37.—[Note 93.]

(7) It has been supposed that a man may be noble during the life of another. 52 H. 6. 29, by Danby.—[Note 94.]

(8) *As to the degree of baronet, it is parcel of the name; and therefore capias against I. S. or I. S. knight, where he is baronet, cannot take I. S. baronet.* Noy, *n.* 38*2*. *Sir Richard Lucye's case. Tr.* 10 *Car. B. R. Cro. n.* 6. *Sir Henry Ferrer's case. The king cannot create a dignity with a mesne between baron and baronets.* 9 *Jac.* 12 *Co. n.* 51. Hal. MSS.—See Noy 87. Cro. Cha. 371, and 12 *Co.* 81.—[Note 95.]

(9) See 2 Inst. 29. 50.

spoken generally of the register originall. For the antiquitie and excellencie of this booke, see in my preface to the eighth part of my Commentaries. This excellent booke our author voucheth divers times in these bookes, and so doth he divers other authorities in law of several kinds, but with this observation, that he citeth no authoritie but when the case is rare, or may seeme doubtfull, which appeareth in this, that he putteth no case in all his three bookes but hath warrant of good authoritie in law. For he knew well the rule, that *perspicua vera non sunt probanda*. And the like observation is made of Justice *Fitzherbert* in his booke of *natura brevium*, that he never citeth authoritie, but when the case is rare or was doubtfull to him. The authorities which our author hath cited in his three bookes I have collected.

Vide Sect. 88. 94. 96. 101. 157. 231. 318. 383. 412. 420. 433. 514. 643. 644. 657. 660. 692. 702. 729.

[17. a.] ☞ Sect. 10.

AND of such things, whereof a man may have a manuell, occupation, possession or receipt, as of lands, tenements rents and such like, there a man shall say in his count countant and plea pleadant, that such a one was seised in his demesne as of fee. But of such things, which do not lie in such manuall occupation, &c. as of an advowson of a church and such like, there he shall say, that he was seised as of fee, and not in his demesne as of fee. And in Latine it is in one case, quòd talis seisitus fuit in dominico suo ut de feodo, *and in the other case,* quòd talis seisitus fuit, &c. ut de feodo.

IN his count countant." Count, i. e. *narratio*, cometh of the French word *conte*, which in *Latyne* is *narratio*, and is vulgarly called a declaration (1). The original writ is according to its name *breve*, briefe and short; but the count, which the plaintife or demandant makes, is more narrative and spacious and certaine both in matter and in circumstances of time and place, to the end the defendant may be compelled to make a more direct answer; so as the writ may be compared to *logicke*, and the count to *rhetoricke*: and it is that which the civilians call a *libell*. And in that ancient booke of the Mirror of Justices, lib. 2, cap. des loiers, *contors* are *serjeants* skilfull in law, so named of the count as of the principal part, and in *W.* 2, ca. 29, he is called *serjeant counter* (2).

(Doct. Pla. 83.)

Mirror des Justices.

W. 2, cap. 29.

" *In*

(1) As to the form of a *count* or *declaration*, and all other particulars concerning it, see Com. Dig. *Pleader* C. The whole of lord chief baron Comyns' work is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution; but the title *Pleader* seems to have been the author's favourite one, and that in which he principally exerted himself.—[Note 96.]

(2) See further on the antiquity and dignity of serjeants at law, Blackst. Com. 5th ed. v. 1. p. 24, and v. 3. p. 26, and the books there cited, particularly Fortesc. De Laud. Leg. Ang. c. 50. Spelm. Gloss. 335. Pref. to 10 Co. 2 Inst. 214. Dugd. Orig. Jurid. and a tract by the late mr. serjeant Wynn, which was printed in 1765. To these add Waterh. Comment. on Fortesc.

(Post. 303.) "*In his plea pleadant.*" *Placitum.* Here *Littleton* teacheth good pleading in this point, of which in his Third Booke and Chapter of Confirmation, Sect. 534, he thus saith, *And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy thy courage and care to learne this.* And for this cause this word *placitum* is derived *à placendo, quia bene placitare super omnia placet*; and it is not, as some have said, so called *per antiphrasin, quia non placet.*

Bract. lib. 4, fol. 263. Idem, lib. 5, fol. 372. Britton, fol. 205, 206. Flet. lib. 5. c. 5. Stanf. Prær. 8.

"*Seised*;" *Seisitus*, commeth of the *French* word *seisin*, i. e. *possessio*, saving that in the common law, *seised* or *seisin* is properly applyed to freehold, and *possessed* or *possession* properly to goods and chattels; although sometime the one is used instead of the other.

Pl. Com. fo. 191; Wrotesley's case.

"*In his demesne as of fee*, in dominico suo ut in feodo." *Dominicum* is not onely that inheritance, wherein a man hath proper dominion or ownership, as it is distinguished from the lands which another doth hold of him in service, but that which is manually occupied, manured, and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his houshold, and savoureth *de domo*, of the house, either *ad mensam*, for his or their board or sustentation, or is manually received, (as rents) for bearing and defraying of necessary charges publike or private. Of these, saith our author, he should plead, that he is seised *in dominico suo ut de feodo*, i. e. *de feodo dominicali, seu terrâ dominicali seu reddita dominicali*; which is as much as to say demeyne or demaine, of the hand, i. e. manured by the hand, or received by the hand; and therefore he calleth it manuall occupation, possession or receipt (3). And in *Domesday* demeane land is called inland; as for example, 4 *bovatas terræ de inland, et* 10 *bovatas in servitio.*

Domesday.

"*In such manuall occupation, &c.*" There is nothing in our author but is worthy ☞ of observation. Here is the first (*&c.*) and there is no (*&c.*) in all his three bookes (there being as you shall perceive very many), but it is for two purposes. First, it doth imply some other necessary matter. Secondly, that the student may, together with that which [17. b.]

136, 137, and 547, to 563, where the author is so full and explanatory on the same subject, that what he has collected may very well be deemed a treatise upon it. Mr. Waterhouse, though a very prolix as well as extravagant writer, one who too frequently exhausts himself, and disgusts his readers, by tedious, useless, and ill-timed digressions, appears to have been a man of considerable learning; and his collections, relative to the antiquities of our law, may sometimes be resorted to with great advantage, and may very much facilitate the labours of more judicious and able inquirers.—[Note 97.]

(3) Vide *the diversity between count and plea in some cases. In debt for rent the plaintiff shall count, that he leased without showing seisin or seisin in demesne.* 21 *H.* 7. 26. *So in Formedon*, quod I. S. dedit. 3 *E.* 3. 35. 5 *E.* 3. 16. 3 *E.* 3. 59. 15 *E.* 4. 17. *But in counting descent in writ of entry, he ought to plead seisin, and in pleading a gift in taile, he ought to allege seisin in demesne.* 18 *H.* 6. 24. 15 *E.* 4. 17. Hal. MSS. See further on pleading seisin in demeane, post. 17. b.—[Note 98.]

which our author hath said, inquire what authorities there be in law that treat of that matter, which will worke three notable effects; first, it will make him understand our author the better: secondly, it will exceedingly adde to the reader's invention: and lastly, it will fasten the matter more surely in his memory; for which purpose I have for his ease in the beginning set downe, in these Institutes, the effect of some of the principal authorities in law as I conceive them concerning the same. In this place the (*&c.*) implyeth possession or receipt, and such other matter as appeareth by my notes in this Section. As for the authorities of law, you shall find the effect of them in this Section, and the like of the rest of the (*&c.*) which you shall find in the Sections hereafter mentioned, omitting those (for avoyding of tediousnesse) that either are apparent, or which are explained in some other places, viz. Sect. 20. 48, 102. 108. 120. 125. 136, 137. 146. 149. 154. 164. 166, 167, 168. 177. 179. 183, 184. 194. 200. 202. 210, 211. 217. 220. 226. 233. 240. 242. 244, 245. 248. 262. 264. 269, 270, 271. 279. 320. 322, 323. 325, 326, 327. 329, 330. 335, 336. 341. 347, 348, 349, 350. 352. 355, 356. 359. 364, 365. 374, 375. 377. 381. 384. 389. 393. 395. 397. 399. 401, 402. 410. 417. 428. 433. 447. 449. 464. 470, 471. 477. 483. 489. 500, 501. 522. 532. 552, 553. 556. 558. 562. 578. 591, 592, 593, 594. 603. 613. 624, 625. 630. 632. 634. 637, 638. 648. 659, 660, 661. 669. 687. 693. 700. 718. 745. 748, 749. All which I have observed and quoted here once for all, for the ease of the studious reader (1).

"*Ut de feodo.*" Where (*ut*) is not by way of similitude, but to be understood positively that he is seised in fee. And so it is where one pleads a descent to one *ut filio et hæredi*, that is, to *Jo. S.* that is sonne and heyre, *et sic de cæteris*, where (*ut*) *denotat ipsam veritatem.*

Brit. 205, 206, optimè. Fleta, lib. 6, cap. 5. Idem. lib. 3, cap. 15.

"*As of an advowson.*" Of an advowson [*i*] wherein a man hath as absolute ownership and propertie as he hath in lands or rents, yet he shall not pleade that he is seised *in dominico suo ut de feodo* (2), because that inheritance, savouring not *de domo*, cannot either serve for the sustentation of him and his houshold, nor any thing can be received for the same for defraying of charges. And therefore he cannot say, that he is seised thereof in *dominico suo ut de feodo*, whereby it appeareth how the common law doth detest simony and all corrupt bargaines for presentations to any benefice, but that [*k*] *idonea persona* for the discharge of the cure should be presented freely without expectation of any thing: nay, so cautious is the common law in this point, that the pl. in a *quare impedit* should recover no damages for the losse of his presentation untill the

[*i*] 7 E. 3. 63. 24 E. 3. 74. 34 H. 6. 34. 19 E. 3, quar. imp. 154. Mirror, cap. 2, sect. 17.

(Doctr. Plac. 287. Post. 89. 388.)
[*k*] 6 Co. 51, Boswel's case.

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(1) See in fol. 22. a, the note in respect to lord Coke's observation on Littleton's use of *nota*, *&c.* and like expressions.

(2) And yet in 34 H. 6. 34, one pleads, that the king was seised in his demesne as of fee of an advowson in gross.—See also 26 E. 3. 64. b, where in a writ of right of advowson by an abbot against the countess of Ormond, the plaintiff counts, that one *R.* was seised in his demesne as of fee and right, and it was held good. If a church be impropriate, the impropriator may plead seisin in his demesne as of fee. Plowd. 503.—[Note 99.]

the statute of *W.* 2, cap. 5. (3) And that is the reason that gardian in socage [*l*] shall not present to an advowson, because he can take nothing for it, and by consequent he cannot account for it. And by the law he can meddle with nothing that he cannot account for. [*m*] And in a writ of right of advowson, the patron shall not alledge the explees or taking of the profits in himselfe but in his incumbent. And hereby the old bookes shall be the better understood, viz. *Bracton*, lib. 4, tract. 3, cap. nu. 5. *Est autem dominicum, quod quis habet ad mensam, et propriè, sicut sunt* Boordlands, *Anglicè*. And *Fleta*, lib. 5. ca. 5. *Est autem dominicum propriè terra ad mensam assignata. Dominicum etiam dicitur ad differentiam ejus quod tenetur in servitio.* But of an advowson and such like he shall plead, that he is seised *de advocatione ut de feodo et jure* (4).

[*l*] 8 E. 2. Presentment al Eglise 10. 7 E. 3. 39. 27 E. 3. 89. 29 E. 3. 5. 31 E. 3. Estopel 240. (Post. 89. 344, b.)

[*m*] 7 E. 3. 63. Bracton 263. 372. Fleta, lib. 5, cap. 5.

7 E. 3. 4.

"*Advowson*," *Advocatio*, signifying an advowing or taking into protection, is as much as *jus patronatûs*. Sir *William Herle* in 7 E. 3, fol. 4, saith, that it is not long past, that a man did know what an advowson was; but when a man would grant an advowson, he granted *ecclesiam* the church, and thereby the advowson passed.

45 E. 3. 5.

Vide 45 *E.* 3. 5. But surely the word is of greater antiquity; for in the Register there is an originall writ *de recto advocationis*, and in the originall writ of assise *de darreine presentment* the patron is called *advocatus*. [*n*] *Vide W.* 2, ca. 5. And so doth [*o*] *Bracton* call him. *Advocatus autem dici poterit ille, ad quem pertinet jus advocationis alicujus, ut ad ecclesiam præsentet nomine proprio et non alieno.* And [*p*] *Fleta* lib. 5, cap. 14, agreeth herewith almost *totidem verbis: Advocatus est ad quem pertinet jus advocationis alterius ecclesiæ, ut ad ecclesiam nomine proprio non alieno possit præsentare.*

[*n*] W. 2, ca. 5.

[*o*] Bract. lib. 4, fo. 240.

[*p*] Fleta, lib. 5, cap. 14.

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(3) *Advowson assets. Recovery in value for advowson shall be* 12*d. for every mark* [the church is worth by the year]. 8 *E.* 2. *Recovery in value*, 11. Hal. MSS. The words between the brackets are added from Fitzh. Abr. As to an advowson's being assets and valuable, see post. 374. b. and the note there given on the subject.—[Note 100.]

(4) *Office* de ballivâ parci vel hundredi *not demesne, yet the* esplees *shall be laid.* 7 *E.* 3. 63. 8 *E.* 3. 55. *Corody not demesne.* 17 *E.* 2. *Nuper obiit* 12. *Tithes whether demesne, Dy.* 85. *One grants a rent charge, the grantee brings annuity, and declares of a grant* virtute cujus fuit seisitus in dominico suo ut de feodo. *By some this is electing to have it as a rent charge,* 3 *E.* 6. *Dy.* 65. *But ruled* contra, *and the pleading good in substance. M.* 43, 44 *Eliz. B. R. Case of dean of Rochester. Noy, n.* 162. *M.* 11 *Car. B. R. Cro. n.* 24. *Sprint and Hickes,* 2 *Bulst.* 148. Hal. MSS. The dean of Rochester's case is in Noy 37. 2 And. 106, & Ow. 73.—A man entitled to a *road* pleads seisin of it *in dominico suo ut de feodo et in jure.* 3 H. 6. 7. In *nativo habendo* esplees alleged, and yet the count for the villein only *de feodo et jure.* 39 H. 6. 32.—Where a *reversion* depends on an estate for years, there pleading either seisin in demesne as of fee, or seisin as of fee, will be good; but if the reversion be on an estate of freehold, only seisin in demesne can be pleaded. Plowd. 191. a. See accord. Dy. 101, in Culpepper's case. It is said, that a reversion or remainder belonging to the king's tenant *in capite* formerly entitled the king to wardship, though the statute 17 E. 2. *de prerogativâ regis*, cap. 1, speaks of lands of which the tenant dies seised *in dominico suo ut de feodo.* Stanf. Prærog. 8. a. Plowd. 11. See further as to pleading seisin in demesne, ante, 17. a. n. 3. Stanf. Prærog. 8. a. 14. a. Doctrin. Plac. 287, & Com. Dig. *Pleader* C. 35.—[Note 101.]

præsentare. And [*q*] *Britton* cap. 92, the patron is called *avow*, and the patrons are called *advocati*, for that they be either founders or maintainers or benefactors of the church, either by building, dotation or increasing of it, in which respect they were also called *patroni*, and the advowson *jus patronatûs.* [q] Britton, cap. 92.

And it is to be understood that there is a great [*r*] diversity *inter advocationem medietatis ecclesiæ, &c. et medietatem advocationis ecclesiæ* (5), and of their severall remedies for the same. For the advowson of the moity is, when there be severall patrons and two severall incumbents in one church, the one of the one moity thereof, and the other of the other moity, and one [18. a.] ☞ part as well of the church as of the towne allotted to the one, and the other part thereof to the other; and in that case each patron if he be disturbed shall have a *quare impedit, quòd permittat ipsum præsentare idoneam personam ad medietatem ecclesiæ* (1). [r] 33 H. 6. 11, b. per Prisot. 14 H. 6. 15, per Newton. 31 E. 1, droit 68, 69. F. N. B. 31, b. 10 Co. 135, 136. R. Smithe's case. 45 E. 3. Fines 41. 45 E. 3. 12. 17 E. 3. 78.

17 E. 2. Dower 163. (4 Co. 75. 5 Co. 102. 2 Inst. 375.)

But if there be two coparceners, and they do agree to present by turne, each of them in truth hath but a moity of the church; but for that there is but one incumbent, if either of them be disturbed, she shall have a *quare impedit, &c. præsentare idoneam personam ad ecclesiam*, for that there is but one church and one incumbent, and so of the like (2). But in [*s*] the said case of two coparceners, one of them shall have a writ of right of advowson *de medietate advocationis*; for in truth she hath but a right to a moity; but in the other case, where there be two patrons and two incumbents in one church, each of them shall have a writ of right of advowson *de advocatione medietatis.* (10 Co. 135. F. N. B. 33.) [s] Britton, fo. 235. 31 E. 1, droit 68, 69. F. N. B. 31, b. and 33, a. 5 H. 7. 8. 17 E. 3. 38. 33 E. 3, quar. imp. 196.

75, 76. 7 E. 3. 327. 8 E. 3. 425. 22 Ass. p. 33. 14 H. 4. 10.

And as there may (as hath beene said) be two severall parsons in one church, so there may be two that may make but one parson in a church. [*t*] *Britton* saith, *si ascun esglise soit done a divers persons per un sole avowe, nul ne se pura pleadre per assise de juris utrum ne nul estre implede sans l'autre, &c.* And therewith agreeth *Fleta.* [*u*] *Item licèt aliqua ecclesia divisa fuerit inter duos, sive bona sua habeant communia sive separata, dum tamen unicum habeant advocatum, nullus eorum sine alio agere poterit vel implacitari.* And *Fitzh.* [t] Britton, fo. 235. [u] Fleta, lib. 5, ca. 19.

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(5) But note that this diversity doth not hold in the case of a rectory; for in Holland's case, 4 Co. 75, the pleading was *ad medietatem rectoriæ*, whereas it should have been *ad rectoriam medietatis*, and yet it was taken by the court to be the same in effect.—[Note 102.]

(1) Accordingly in Smith's case, 10 Co. 135. b. it was agreed, that *quare impedit præsentare ad medietatem ecclesiæ*, shall only be when there are two several patrons and two several incumbents of distinct parts of the same church; but in that case the court implied as much, because the count alleged a seisin *de advocatione medietatis.* In Windsor's case, Cro. Eliz. 686, where the count was of the *advowson of two parts*, the court held the declaration to be bad; but then it was, because by other parts of the declaration it appeared that the church was entire, and that there was but one incumbent, and consequently that the plaintiff's title was to *two parts of the advowson*, and not to *an advowson of two parts.*—[Note 103.]

(2) See further on this subject Doder. Advows. 21. 2 Leon. 36. Dy. 78. b. & 299. W. Jo. 446, & Wils. vol. 2. p. 225, & 231.

F. N. B. 49, o. *Fitzh.* saith, that two prebendaries may be one parson of a church, who shall joyne in a *juris utrum*, so as one rectory may be annexed to two severall prebends, and both of them make but one parson. But where one is parson of the one moity of a church, and another
F. N. B. 49, p. of the other moity, as hath been said, there one of them shall have a *juris utrum* against the other, and in the writ shall name him *persona medietatis ecclesiæ, &c.* But for avoyding of suspicion of curiositie if we should proceed any further herein, we will attend what *Littleton* will further teach us.

Sect. 11.

AND note, that a man cannot have a more large or greater estate of inheritance than fee simple.

THIS doth extend as well to fee simples conditional and qualified, as to fee simples pure and absolute. For our author speaketh here of the amplenesse and greatnesse of the estate, and not of the perdurablenesse of the same. And he, that hath a fee simple conditionall or qualified, hath as ample and great an estate, as he that hath a fee simple absolute; so as the diversity appeareth betweene the quantity and quality of the estate.

From this state in fee simple, estates in taile and all other particular estates are derived; and therefore worthily our author beginneth his First Booke with tenant in fee simple, for *à principalioribus seu dignioribus est inchoandum.*

" *Cannot have a more large or greater estate, &c.*" For this cause two [a] fee simples absolute cannot be of one and the selfe-same land. If the king make a gift in taile, and the donee is attainted of treason, in this case the king hath not two fee simples in him, viz. the ancient reversion in fee, and a fee simple determinable upon the dying without issue of tenant in taile, but both of them are consolidated and conjoined together (4). And

[a] Pl. Com. 349, and 248. 19 H. 8. Dier 4. 29 H. 8. Dier 33. 16 Eliz. Dier 330. 2 Marie, Dier 107.

Austen's case. Pa. 38 Eliz. rot. 108, in Quar. Imp. betweene the Queene, Pl. and the Bishop of Lincolne, Hussey and others, deff. 15 E. 4. 6. 8.

(4) See acc. Cro. Eliz. 519. Hob. 323, and W. Jo. 6.—*The king shall be said to be in, in point of reverter, and shall avoid leases by tenant in tail. Plowd.* 552. *Tr.* 2 *Car. Rot.* 730, *and adjudged H.* 3 *Car. Hutt. n. and Crook n.* 4, *sir Thomas Holt's case. A tenant for life, remainder to B. his son and heir apparent in tail, remainder to A's. right heirs. A. grants rent charge to C. and his heirs, A. and B. levy fine to the use of A. and his heirs, A. infeoffs D. and dies having issue B.; and ruled, that D. shall hold charged, for by the fine he has a fee consolidated in him; which* quære. *For M.* 10 *Jac. B. R. Bulstr. n.* 35, *in Errington's case. A. and B. his wife tenants in tail special, remainder to the right heirs of A. have issue a son and a daughter; the son by indenture makes lease for* 40 *years to commence after the mother's death, the father being dead; the son dies without issue; the daughter levies a fine to I. S. the mother dies; and although this lease is partly derived out of the fee simple, and by the fine I. S. had a consolidated fee, yet, because the daughter was not liable to the lease,*

so it is, if such a tenant in taile doth convey the land to the king his heires and successors, the king hath but one estate in fee simple united in him, and the king's grant of one estate is good, and so was it adjudged in the court of common pleas. And yet in several persons by act in law, a reversion may be in fee simple in one, and a fee simple determinable in another by matter *ex post facto*; as if a gift in taile be made to a villeine, and the lord enter, the lord hath a fee simple qualified, and the donor a reversion in fee (5). But if the lord infeoffe the donor, now both fee simples are united, and he hath but one fee simple in him. But one fee simple cannot depend upon another by the grant of the partie; as if lands be given to *A* (6), so long as *B.* hath heires of his body, the remainder over in fee, the remainder is voyde (7).

(Plowd. 559. Dy. 4, & 12. Cro. Jam. 590, Finch, 8vo. ed. 113. 1 Ro. Abr. 827. Dy. 156, b.

Sect. 12.

ALSO, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he commeth not by title of descent from any of his ancestors, or of his cousins, but by his owne deed.

PURCHASE in Latin is either *acquisitum*, of the verbe *acquiro*, for so I finde it in the original Register [18. b.] 234. *In terris vel tenementis, quæ ☞ viri et mulieres conjunctim acquisiverunt, &c. Bracton* calleth it *perquisitum*; and by [*b*] *Glanvill* it is called *quæstus* or *perquisitum*.

Bracton, lib. 2, fol. 65.

[*b*] Glanvill. lib. 7, cap. 1. Brit. c. 33, fo. 84, and 121. (1 Ro. Abr. 827.)

A purchase is always intended by title, and most properly by some kind of conveyance either for money or some other consideration, or freely of gift; for that is in law also a purchase (1). But a descent, because it commeth merely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament

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lease, consequently the conusee shall not be liable to the lease so long as the tail continues. Vid. M. 6 Jac. B. R. n. 22. Nedham's case. Tenant in tail, remainder to the king, is attainted of treason. The king shall not be in, in point of remainder, but as long as the tail continues shall be in under tenant in tail, and subject to his charges, and so it differs from Walsingham's case, where the king had the reversion. Paradine's case. Hal. MSS.—See sir Thomas Holt's case in Hutt. 96, and Cro. Cha. 103, and Errington's case in 2 Bulstr. 42. As to Nedham's case and Paradine's case, I take them to be the same, and the reader will find it reported by the name of Poole and Nedham, Yelv. 149.—[Note 104.]

(5) See acc. post. 117. a.

(6) The words *and his heirs* seem wanting here.

(7) Acc. 10 Co. 97. b. See an observation on this doctrine by lord ch. justice Vaughan, who seems to question it. Vaugh. 269, 270.

(1) In Plowd. 11. Saunders *arguendo* says, that one may have land by purchase three ways, by bargain or gift for money, by gift without any recompense, and by way of remainder.—[Note 105.]

Pl. Com. Wimbishe's ca. 47, b. 1 H. 5, cap. 5.

parliament in 1 H. 5, ca. 5, speake of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheate or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith (2). Like law of the state of tenant by the curtesie, tenant in dower, or the like. But such as attaine to lands by meere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglarie, pyracy, or the like, can justly be termed purchase (3).

(Cro. Jam. 366. Post. 27, a. 3 Inst. 202.)

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat armor and pennons with his armes, and such other ensignes of honour as belong to his degree or order, set up in the church, or if a gravestone or tombe be laid or made, &c. for a monument of him, [c] in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heire and his heires in the honour

[c] 9 H. 4. 24, Mich. 10 Ja. obiter in Com. Banc. in Pym's case.

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(2) *The abbot of Fountains of the order of Cistercians before the council of Lateran makes a feoffment, and the land escheats to him after the council of Lateran. It seems, that he shall not be charged with tithes, because it is not a purchase.* Quære, *M.* 7 *Jac. B. R. Dickson and Waller.* Hal. MSS. It was decreed by the general council of Lateran in 1215, that the privilege of exemption from tithes, enjoyed by the Cistercians and other religious orders, should not extend to lands *purchased after* that council. *Ne occasione privilegiorum suorum ecclesiæ ulterius prægraventur, decernimus, ut de alienis terris et* a modo acquirendis, *&c. decimas persolvant, &c.* Gibs. Cod. 1st ed. 2. v. p. 700, 701. This explains the case cited by lord Hale.—An escheat in appearance participates of the nature both of a *purchase* and a *descent;* of the *former*, because some act by the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters or brings his writ of escheat; of the *latter*, because it follows the nature of the seignory, and is inheritable by the same persons. But *strictly* speaking an escheat is a title neither by purchase nor descent. It should be considered, that though the lord must do some act to put himself into the *actual possession;* yet his *title* to take possession commences immediately on the want of a tenant, and this title is vested in him without waiting for his own deed or agreement, and as much by *mere act of law* as the title of an heir is in the case of a descent; and therefore both titles are equally excluded from being purchases. On the other hand, escheat is not a title by *descent;* for the lord takes in his capacity of *lord* of the seignory of which the land escheated was holden, and not as *heir*, or by right of blood. Nor is it any objection to this way of considering the title by escheat, that the land escheated will be inheritable in the lord as land by purchase, where he has the seignory by purchase, and as land by descent where he has the seignory by descent; for the reason of this is, not that the escheat is either a purchase or descent, but because the escheat follows the seignory, from which the right to it is derived, as an accessory to its principal. According to this view of the subject, instead of distributing all the several titles to land under *purchase* and *descent*, it would be more accurate to say, that the title to land is either by *purchase*, to which the act or agreement of the party is essential, or by *mere act of law*, and under the latter to consider first *descent*, and then escheat, and such other titles not being by descent, as yet like them accrue by mere act of law. See on this subject Blackst. Comment. ed. 5. v. 2. p. 241, and 201.—[Note 106.]

(3) See acc. ante 3. b.

honour and memory of whose ancestor they were set up (4). And so it was holden *Mich.* 10 *Ja.* and herewith agree the lawes [*d*] in other countries. Note this kind of inheritance. And some hold that the wife or executors that first set them up, may have an action in that case against those that deface them in their time (5). And note, that in some places chattels as heir-loomes (as the best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heire (6), and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiasticall court; but the heire-loome is due by custome and not by the common law (7). And the [*e*] ancient jewels of the crowne are heire-loomes, and shall descend to the next successor, and are not devisable by testament. An heire-loome is called *principalium* or *hæreditarium.*

[*d*] B. Cassanæus, fol. 13. Conc. 29. 30 E. 3. 2 & 3. 39 E. 3. 6. 9, 10. 1 H. 5, tit. Executors 108, tit. Descent. Br. 43. 9 E. 4. 15. Madam Wiche's case.

[*e*] Vide 28 H. 24. (12 Co. 104.)

Consuetudo hundredi de Stretford in Com' Oxon' est, quòd hæredes tenementorum infra hundredum prædictum existentium post mortem antecessorum suorum habebunt, &c. principalium, Anglicè, an heire-loome, viz. *de quodam genere catallorum, utensilium, &c. optimum plaustrum, optimam carucam, optimum ciphum, &c.*

Int. adjudicata coram Rege Tr. 41 E. 3, lib. 2, fo. 104, in Thesaur. Sect. 241, 242, &c.

Our author hath not spoken of parceners in this Chapter, for that he hath particular Chapters of the same.

Gradus Parentelæ, &c.

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(4) See Cro. Jam. 367. 2 Bulstr. 151. See too the several books cited in Vin. Abr. *Descent* E.

(5) See acc. 12 Co. 104, where it is said that afterwards the heir of the person, in honour of whom the tomb is erected, shall have the action.—[Note 107.]

(6) Heir-looms by custom cannot be alienated by *devise.* See post. 185. b, and 1 Vern. 273.—[Note 108.]

(7) However, personal property may be devised or limited in strict settlement to one for life, with remainder to sons and daughters in tail, so as to be transmissible like heir-looms; but the goods will be the absolute property of the first tenant in tail, and be conformable to all the other rules concerning executory devises, and cannot render the property unalienable longer than lives in being, and 21 years after. For cases of heir-looms by devise and settlement, see Gower and Grosvenor, Barnard. Ch. Rep. 54. Wyth and Blackman, 1 Ves. 196. Duke of Bridgewater and Egerton, 2 Ves. 121. Boon and Cornforth, 2 Ves. 277, and Trafford and Trafford, 3 Atk. 347.—See further on the subject of heir-looms, Blackst. Com. 5th ed. v. 2. p. 427, and Vin. Abr. *Heir-loom.*—[Note 109.]

CHAP.

Chap. 2. Of Fee taile. Sect. 13.

TENANT in fee taile is by force of the statute of W. 2, cap. 1, *for before the said statute, all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute, tenant in taile is in two manners, that is to say, tenant in taile generall, and tenant in taile speciall.*

(2 Inst. 331.) Mirror, cap. 2. sect. 15, & c. 1. sect. 5. (Post. 22, a.)

"*TENANT in fee tail.*" *Tallium*, or *feodum talliatum*, is derived of the *French* word *tailler, scindere*; for so *Littleton* himselfe in this Chapter, Sect. 18, saith.

"*The statute of W.* 2." This statute was made in 13 *E.* 1, and is called *West.* 2, because the parliament was holden at *Westminster*, and ☞ hath the name of the second, because another parliament was formerly holden at *Westminster* in the third year of the same king's raigne, which was called *Westminster* the first. And albeit manie parliaments were after holden at *Westminster* besides these, yet were they two onely, *propter excellentiam*, called the statutes of *Westminster*. And the act intended by *Littleton* is *W.* 2, ca. 1, upon which statute our author in the *Inner Temple* did learnedly read, whose reading I have. Of king *Ed.* 1, and of this statute, sir *William Herle*, chiefe justice of the court of common pleas, in 5 *E.* 3. 14, saith, that king *E.* 1. was the wisest king that ever was: and the cause of the making this statute was to preserve the inheritance in the blood of them to whom the gift was made. And in 9 E. 3. 22, he saith, that they were sage men that made this statute (1). See more of this in the Chapter of Warranties, Sect. 746.

[19. a.]

(2 Inst. 331.)

5 E. 2. 14.

9 E. 3. 22.

[a] Fleta, lib. 3, cap. 9. Bract. lib. 2. cap. 5, &c. Brit. ca. 24. & 36.

Of this estate taile it is said, [a] *Modus legem dat donationi, et tenenda est etiam conventio, quia modus et conventio vincunt legem: ut si alicui cum uxore fiat donatio, habendum et tenendum sibi et hæredibus quos inter eos legitimè procreabunt, ecce quòd donator vult tales hæredes in hæreditate paterna et materna succedant, aliis hæredibus eorum remotioribus penitùs exclusis: et quòd voluntas donatoris observari debet, manifestè apparet per hæc statuta. Quia autem dudum regi durum videbatur, &c.*

[b] Vid. Sect. 18. Brit. ca. 36, fol. 93. Pl. Com. 235. 562. Shelley's case, 1 Co. 103. (2 Inst. 333. 7 Co. 38.)

"*Before the said statute* [b] *all inheritances were fee simple.*" Here fee simple is taken in his large sense, including as well conditionall or qualified, as absolute, to distinguish them from estates in taile since the said statute. Before which statute of *donis conditionalibus*, if land had beene given to a man, and to the heires males of his body, the having of an issue female had beene no performance of the condition; but if he had issue male, and

(1) However lord Coke in other places finds great fault with the statute *de donis*. See post. 19. b.

and dyed, and the issue male had inherited, yet he had not had a fee simple absolute; [c] for if he had died without issue male, the donor should have entred as in his reverter. By having of issue, the condition was performed for three purposes: First, to alien: Secondly, to forfeit: Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue (2): for if the donee had issue and died, and the land had descended to his issue, [d] yet if that issue had dyed (without any alienation made) without issue, his collatterall heire should not have inherited, because he was not within the forme of the gift, viz. heire of the body of the donee. [f] Lands were given before the statute in franke-marriage, and the donees had issue and died, and after the issue died without issue; it was adjudged, that his collaterall issue shall not inherite, but the donor shall re-enter. So note, that the heire in taile had no fee simple absolute at the common law, though there were divers descents (3).

[c] 44 E. 3. 3. 30. E. 1. Formedon, 66. 7 E. 3. 6, 7. 7 H. 4. 31. 12 H. 4. 2.

[d] 18 E. 3. 46. 18 Ass. p. 5. 12 E. 4. 3.

[f] 4 H. 3. Formedon, 34. 18 Ass. 5. 12 E. 4. 3. Pl. Com. 247, b. 18 E. 2. tit. Formedon, 58, 59.

If lands had beene given to a man and to his heires males of his bodie, and he had issue two sonnes, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger sonne *per formam doni*. And so if land had beene given at the common law to a man and the heires females of his body, and he had issue a sonne and a daughter, and died, the daughter should have inherited this fee simple at the common

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(2) Where the gift was special to one of the heirs of his or her body by a particular person, the course of descent was in *some* degree changed by the having issue; for after issue had, by construction of law the land became descendible to all the heirs of the donee's body, whether they were the donee's issue by the person named in the gift, or by any other person, and also liable to the curtesy or dower of a *second* husband or wife. See acc. Pain's case, 8 Co. 35. b. and Berkley's case, Plowd. 247, and the next note. Lord Coke infers, that this was the common law from that part of the statute *de donis*, or of Westminster the second, which enacts, that *from thenceforth* neither the *second* husband nor the issue of a second marriage shall have any thing in the case of such a conditional gift. *Nec habeat de cætero secundus vir hujusmodi mulieris aliquid in tenemento sic dato per conditionem post mortem uxoris suæ per legem Angliæ, nec exitus de secundo viro et muliere successionem hæreditariam.* That at common law the having of issue thus enlarged the course of descent, where the gift was of an *express* conditional fee to a man and woman and the heirs of their two bodies, all the authorities agree; but it is said, that the issue of a second marriage could not inherit where the gift was in *frank-marriage*, which was an *implied* conditional fee to the donees and the issue between them: and yet at the same time we are told, that in this latter case the *second* husband might have curtesy. See 2 Inst. 356. It will be difficult to give a reason, why a gift to husband and wife and the issue between them should be so distinguished from a gift in frank-marriage, or why the husband should have curtesy, where the issue by him could not inherit. See the next note, where lord Hale seems to doubt this doctrine.—[Note 110.]

(3) *If gift be to husband and wife and the heirs of their bodies, the issue by the second marriage inherits. 8 Rep. Paine's case. It seems, that a gift in frank-marriage goes to the heirs between the donees only; but a gift to husband and wife, and to the heirs of their bodies, goes to the heir of the body of the survivor for want of issue between them. Vid. tamen Plowd. Comment. 251. Hal. MSS.*—Lord Hale must be here understood to speak of gifts at common law.—See the preceding note.—[Note 111.]

mon law (4); for the statute of *donis conditionalibus* createth no estate taile, but of such an estate as was fee simple at the common law, and is descendable in such forme as it was at the common law. If the donee in taile had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

(1 Ro. Abr. 840.)

[g] 30 E. 1. Formedon, 5. Temps, E. 1. ibidem, 62. 19 E. 2. Formedon, 61. Pl. Com. 246.

[g] If donee in taile at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to barre the possibilitie of the donor.

[h] 4 E. 2. Formedon, 50.

[h] But if feme tenant in taile had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute, yet the issue might have had a *formedon in descender* (5); for the alienation was not lawful: but otherwise it is, if it had beene by fine. And these things, though they seem ancient, are necessarie notwithstanding to be knowne, as well for the knowledge of the common law, as for annuities and such like inheritances, as cannot be intailed within the said statute, and therefore remaine at the common law.

(1 Ro. Abr. 837.)

[i] 6 E. 3. 56. Jo. of Eltham's case.

[i] If the king before the statute of *donis conditionalibus* had made a gift to a man, and to the heires of his bodie begotten, the donee *post prolem suscitatam* might have aliened as well as in the

[19. b.]

case

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(4) In 1 Ro. Abr. 841, it is said, that if land had been given to one and his heirs *males* of his body, and afterwards he had issue a male and a *female*, and afterwards the male died, the *female* should have inherited the land. 18 E. 3. 46. 18 Ass. 58, are cited as authorities to prove this to have been the common law in respect to fees conditional. But lord Coke's doctrine here is *contra*, and serjeant Rolle refers to it as being so; and in respect to estates in tail male it has been long settled, that a female cannot inherit by conveying her descent through a male. See post. 25. a, and b.—[Note 112.]

(5) In another book lord Coke says, that a *formedon in descender* lay not at *common law*. See 2 Inst. 33. But this seeming contradiction may perhaps be reconciled, by observing, that in the latter book lord Coke is commenting on that part of the statute *de donis*, which gives a *formedon in descender* notwithstanding alienation by the donees, where the gift was to husband and wife, and to the issue between them, or in frank-marriage. In such a case the alienation by the donees certainly bound the issue at common law, and consequently before the statute they could not have a *formedon in descender*. But in the case here put by lord Coke the wife *only* was the donee, and her alienation was merely by *deed*, which during coverture was insufficient to bind either her or her issue. However, it is proper to mention, that according to some authorities the writ of *mort d'auncestor* was the proper remedy for the issue at common law, and that the only case, in which the issue could have a *formedon in descender* before the statute, was, where by reason of some special circumstances he could not have an assise of *mort d'auncestor*. To illustrate this the following case has been given. A man hath issue a son by one wife, she dies, and he marries again, and land is given to him and his second wife, and the heirs of their bodies, and they have a son, and afterwards they both die, and then a stranger abates. Here it is said, that the son by the second wife could not have *mort d'auncestor*, because one point of that writ is to inquire who is next heir to the father, and the son by the first wife is the heir to the father; and therefore, that *formedon in descender* lay at common law for this special case, because otherwise the son by the second wife would have been without remedy for the freehold. See Plowd. 239.—[Note 113.]

case of a common person. [k] But if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the king, this should not have bound the king of his reversion without assets; but otherwise it was in the case of a common person (1). [l] Of the other side, if lands had beene given to the king and to the heires of his bodie, he could not before issue have aliened in fee, but onely to have barred his issue as a common person might have done, but not to have barred the reversion, for that should have beene a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater than the donor gave unto him; and it is a maxime in law, that the king can do no wrong. When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships and other profits of their seigniories: and for these and other like cases, by the wisedome of the common law all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, dailie experience teacheth us (2). But see more of this matter in the aforesaid Chapter of Warrantie, Sect. 746.

[k] 45 Ass. p. 6.

[l] Pl. Com. 246, b. (Post. 392. 370, b.)

10 Co. 38. in Port. case.

"*Common law.*" See for explication hereof, Sect. 170.

"*As appeareth by the rehearsall of the same statute.*" Here, by the authoritie of our author, the rehearsall or preamble of a statute is to be taken for truth; for it cannot be thought, that a statute, that is made by authoritie of the whole realme, as well of the king, as of the lords spirituall and temporall, and of all the commons, will recite a thing against the truth.

Doct. and Stud. lib. 2, ca. 55.

"*And now by this statute, tenant in taile is in two manners, that is to say tenant in taile generall, and tenant in taile speciall.*"

This division of an estate taile is perfect and sound; for the *membra dividentia*, viz. generall and speciall, are converted properly with the thing defined, and they are proved by many authorities of law, and approved of all learned men, and so are all the divisions through all his three bookes, which the studious and diligent reader will observe. And how excellent and difficult a thing it is to divide rightly and properly, especially in the law, the learned do know.

By this statute the land is as it were appropriated to the tenant in taile, and to the heires of his body; and therefore [r] if an estate be made, either before or since the statute of 27 *H.* 8, *cap.* 10, to a man and the heires of his bodie, either to the use of another and his heires, or to the use of himselfe and his heires, this limitation

(Plowd. 555. 2 Ro. Ab. 780.)

[r] 24 H. 8. tit. feoffments al uses 4. 27 H. 8. fo.

(1) But lord Coke in another book says, that though such alienation bound the issue, yet it did not bar the king's possibility of reverter, as it would that of common persons. See the earl of Cornwall's case cited post. 370. b. and in Holt's case, 9 Co. 132. b.—[Note 114.]

(2) Lord Coke in many other places is very strong in his representation of the inconveniencies produced by the statute *de donis*. See post. 370. b. and Mildmay's case, 6 Co. 40. a.

tation of use is utterly voyde. For before the said statute of 27 *H.* 8, he could not have executed the estate to the use; and so was it adjudged [*s*] in an *ejectione firmæ* between *John Cowper*, plaintife, and *Thomas Franklin*, &c. defendant (3).

[*s*] Pasch. 14 Jac. in the king's bench.

Sect. 14, 15.

TENANT in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue) yet everie one of these issues by possibilitie may inherit the tenements by force of the gift; because that everie such issue is of his bodie ingendred.

IN the same manner it is, where lands or tenements are given to a woman, and to the heires of her bodie; albeit that she hath divers husbands, yet the issue, which she may have by every husband, may inherit as issue in taile by force of this gift; and therefore such gifts are called generall tailes.

Vid. Sect. 1.

"*LANDS*," *terres, terra*, in his generall and legall signification, (as hath been said before) includeth not onely all kinde of grounds, as meadow, pasture, wood, &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground.

(Ante 6, a.)
[*t*] 7 E. 3. 363.
18 E. 3. 27.
7 H. 6. 8.
32 H. 6. 28.
5 E. 4. 3.
1 H. 7. 28.
4 H. 7. 9.
1 H. 5.
1 H. 8. fol. 3.
Nevil's case.
10 Co. 33, 34.
Pl. Com. in Manxel's case, fol. 2 & 3.
(7 Co. 33.
11 Co. 1.
1 Ro. Abr. 837-8.
10 Co. 87.)

"*Tenements*," *tenementa*. This is the only word which the said statute of *W.* 2, that created estates taile, useth; and it includeth, not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of ☞ those inheritances, or concerning, or annexed to, or exercisible within the same, though they lie not in tenure, therefore all these without question may be intailed. As [*t*] rents, estovers, commons or other profits whatsoever granted out of land; or uses, offices, dignities which concerne lands or certaine places, may be entailed within the said statute, because all these savour of the realtie. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certaine place, such inheritances cannot be intailed, because they savour nothing of the realtie. But examples will illustrate and make this learning cleere.

[20. a.]

[*u*] 7 Ass. p. 12. 7 E. 6. 1.

The writ of assise [*u*] was *De libero tenemento*, and made his pleint of the office of the fourth part of the serjeant of the com-

(Fitzh. N. B. 178. f.)

mon

(3) But in Godbolt's report of Franklin and Cooper, it is said to have been resolved, that tenant in tail might stand seised to an use expressed, but that an use could not be averred. Lord Bacon also gives it as his opinion, that an estate tail may be to uses *since* the statute for executing uses, and controverts the reasons for doubting it *before*. Bac. Law Tracts, 8vo. ed. 347. See a great number of authorities on this subject in Vin. Abr. *Uses* C.—[N.115.]

mon place, and the writ adjudged good; and seeing that a man hath a freehold, *liberum tenementum* in it, by consequent it may be intailed.

The office of the keeping of the church of our lady of *Lincolne* was intailed, and a *formedon* there brought upon that gift of the office by the issue in taile. The [*x*] office of the marshall of *England* intailed (1). The [*y*] office of one of the chamberlains of the exchequer intailed. 1 *H.* 7. 28. The office of a forrestership intailed. 4 *H.* 7. 10. 9 *E.* 4. 56. b. Charters intailed (2). 19 *H.* 8. 3. Use intailed. Nomination to a benefice intailed.

18 E. 3. 27.

[*x*] 5 E. 4. 3. 10 E. 4. 14.

[*y*] 11 E. 4. 1. 1 H. 7. 28. 4 H. 7. 10. 9 E. 4. 526. 19 H. 8. 3. 1 H. 5. 1.

Also a name of dignitie may be intailed within the statute, [*a*] as dukes, marquesses, earles, viscounts, barons; because they be named of some countie, mannor, towne, or place (3). If the issue in taile [*b*] in a *formedon* in the *descender* be barred by a false verdict, his release is no barre to his issue, albeit the action is at the common law.

[*a*] 7 Co. 33, 34, Nevil's case. 28 H. 6, Lord Veseye's case. (6 Co. 7, b. Post. 392. b. 1 Sid. 261.)

The like law is of a writ of errour. 3 *Eliz.* *Dyer* 188. If a gift in taile be made with warrantie, the donee releases the warrantie, this shall not bind the issue in taile; for to all these cases and the like the said statute doth extend.

[*b*] 14 Ass. 2. 3 Eliz. Dyer 188.

But if I grant to a man, and to the heires of his body, to be keeper of my hounds, or master of my horse, or to be my faulconer, or such like, with a fee therefore, yet these cannot be intailed

Pl. Com. in Manxel's case. (10 Co. 58. 1 Ro. Abr. 837.)

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(1) See in W. Jo. 96, and Collins's Claims of Bar. 183, an account of the original grant and intail of the office of *earl Marshall*, by Crew chief justice in his argument of the case about the office of *great chamberlain* of England. In this last case the right to the great chamberlain's office was contested between an *heir male* claiming under an intail 9 *Eliz.* by one of the *Vere* family, who was then seised of the office in fee, and the *heir general* claiming under the limitations of the original grant from the crown. Crew chief justice spoke in the house of lords for the *heir male;* but a majority of the other judges, amongst whom was Doderidge, gave their opinion for the *heir-general*, upon the principle, that this high office, like a title of honour, was inherent in the blood of the first grantee, and incapable of alienation.—[Note 116.]

(2) *But if the tail be barred by collateral warrantie, detinue will lie for the charters.* Hal. MSS.—See 9 E. 4. 52. b.—[Note 117.]

(3) *There are many titles of dignity without any place.* Hal. MSS.—In the King and Knollys, 1 L. Raym. 13, lord chief justice Holt says, that naming a place is not essential to the creation of a dignity, and mentions the earldom of *Rivers* as an instance. But it has been held, that if the king grants a dignity to one and the heirs male of his body, without naming any place, the grantee shall have a fee conditional, and not an estate tail, as he would have if a place had been mentioned. See 12 Co. 81, where this was adjudged in the case of a baronet. However, though dignities and titles of honour having relation to some place are intailable by the crown as tenements within the statute *de donis*, yet neither the donee nor his issue can bar the intail, by fine, recovery, or any other means, as may be done in the case of other intailable things. See lord Purbeck's case, Show. Parl. Cas. 1, and Collins's Claims of Bar. 293, in which it was adjudged, that the surrender of a dignity to the crown by fine was void.—Note, that in lord Purbeck's case his counsel distinguished between ancient honours, as being feodary and officiary and having relation to a place, from *modern* dignities, as being merely titular and personal, notwithstanding the formality of naming a place in the creation; and from thence infer, that the latter are not within the statute *de donis*.—[Note 118.]

tailed within the said statute, for that they be not issuing out of tenements, nor annexed to, or exercisible within, or concerning lands or tenements of freehold or inheritance, but concerning chattels, and savour nothing of the realtie. And so it is, if I by my deed for me and my heires grant an annuitie to a man, and the heires of his body, for that this only chargeth my person, and concerneth no land, nor savoureth of the realtie (4). In all these cases he hath a fee conditionall, as they were before the statute, and the grantee by his grant or release may barre his heire, as he might have done at the common law, for that in these cases he is not restrained by the said statute (5).

" *And*

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(4) See the case of the earl of Stafford and Buckley, 2 Ves. 170, in which lord chief justice Hardwicke held, that an annuity in fee, granted by the crown out of the $4\frac{1}{2}$ per cent. duties payable for exports and imports at Barbadoes, was merely a personal inheritance, and not intailable within the statute *de donis*. According to a manuscript note of the same case, lord Hardwicke, in giving his opinion, said, that an annuity out of the revenue of the *post-office* or *excise* savours no more of the realty than money.—[Note 119.]

(5) Two things seem essential to an intail within the statute *de donis*. One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore neither estates *pur auter vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie*, nor *terms for years*, are intailable any more than *personal chattels*; because as the latter, not being either interests in things *real* or of *inheritance*, want both requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur auter vie*, terms for years, and personal chattels, may be so settled, as to answer the purposes of an intail, and be rendered unalienable almost for as long a time, as if they were intailable in the strict sense of the word. Thus estates *pur auter vie* may be devised or limited in strict settlement by way of *remainder* like estates of inheritance; and such as have interests in the nature of estates tail may bar their issue and all remainders over by *alienation* of the estate *per auter vie*, as those, who are strictly speaking tenants in tail, may do by *fine* and *recovery*: but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur auter vie* limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different: for in them no *remainders* can be limited; but they may be intailed by *executory devise* or by deed of *trust*; as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and 21 years after, and perhaps in the case of a posthumous child a few months more: a limitation of time, not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the intail by fine or recovery for a longer space. It is also proper to observe, that, in the case of terms of years and personal chattels, the *vesting* of an interest, which in reality would be an estate tail, bars the issue and all the subsequent limitations, as effectually as fine and recovery in the case of estates intailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur auter vie*: and further, that if the executory limitations of personalty are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personalty, it is at length settled, that every species

"*And to his heires of his bodie begotten.*" In gifts in taile these words *(heires)* are as necessary, as in feoffments and grants; for seeing every estate taile was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words *(heires)*, and that an estate in fee taile is but a cut or restrained fee, it followeth, that in gifts in a man's life-time no estate can be created without these words *(heires)*, unlesse it be in case of frankmarriage, as hereafter shall be shewed. And where *Littleton* saith *(heires)*, yet *(heire)*

[20. b.] in the singular number in a speciall ☞ case may create an estate taile, as appeareth by 39 Ass. p. 20, hereafter mentioned (1). And yet if a man give lands to *A. et hæredibus de corpore suo*, the remainder to *B. in formâ prædictâ*, this is a good estate taile to *B.* for that in *formâ prædictâ* do include the other. If a man letteth lands to *A.* for life, the remainder to *B.* in taile, the remainder to *C. in formâ prædictâ*, this remainder is void for the incertaintie. But if the remainder had beene, the remainder to *C. in eâdem formâ*, this had beene a good estate taile; for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man, *et semini suo*, or *exitibus vel prolibus de corpore suo*, to a man, and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the statute provideth, that *voluntas donatoris secundùm formam in chartâ doni sui manifestè expressam de cætero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himselfe, as it appeared in his learned reading afore-mentioned upon this statute, where he holdeth, if a man

39 Ass. p. 20. 20 H. 6. 35. 5 H. 4. 7, b. 14 H. 4. 15. (Post. 385, b. 1 Ro. Abr. 839. 8 Co. 57. 1 Co. 103. Ante 9. b.

(Cro. Eliz. 121. Ow. 64. S. C. Mo. 103.) Vid. Shelley's case, 1 Co.

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species of property is in *substance* equally capable of being settled in the way of intail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the intail is circumscribed *almost* as nearly within the same limits, as the difference of property will allow. As to the intail of estates *pur auter vie*, see 2 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 324. 2 Atk. 259. 376. 3 Atk. 464, and 2 Ves. 681. As to the intail of terms for years and personal chattels, see Manning's case, 8 Co. 94. Lampett's case, 10 Co. 46. b. Child and Bailey, W. Jo. 15. Duke of Norfolk's case, 3 Cha. Cas. 1. a case in Carth. 267. and one in 1 P. Wms. 1. See also Fearne's Essay on Conting. Rem. and Exec. Dev. 2d ed. p. 122, to the end. Mr. Fearne's work is so very instructive on the dry and obscure subject of remainders and executory devises, that it cannot be too much recommended to the attention of the diligent student.—Note, it was resolved in the 40 Eliz. that the statute *de donis* doth not extend to the Isle of Man; because the statute is *general*, and the Isle of Man is not *specially* named. See 4 Inst. 284. 2 And. 115, and 2 Ves. 350. See also ante, 9. a, where the following note by lord Hale in respect to the case of the Isle of Man, there mentioned by lord Coke to have been adjudged in 40 Eliz. should have been introduced; though as it partly relates to the statute *de donis*, it may come in here without any impropriety.—Nota, *William earl of Salisbury got Man from the Scots, and granted it to William Scroop. Hen. 4. claimed it by conquest from him, granted it* comiti Northumbriæ, *and on his attainder granted it to sir John Stanley and his heirs; and in this case ruled, 1. That Man is not parcel of England. 2. That it is bound by statutes of England where specially named, otherwise not. Therefore the statutes* de donis, *of uses, of wills, not in force there; and it descends to the coheirs of Ferdinando, and not of his brother William earl of Derby.* Hal. MSS.—As to the intail of copyholds, see post. 60. a.—[Note 120.]

(1) See this case post. 22. a.

(1 Ro. Abr. 837.) man giveth land to a man *et exitibus de corpore suo legitimè procreatis*, or *semini suo*, he hath but an estate for life, for that there wanteth words of inheritance (2).

"*Of his bodie.*" These words are not so strictly required but that they may be expressed by words that amount to as much: for the example that the statute of *W.* 2, putteth hath not these words *(de corpore)* but these words *(hæredibus)* viz. *Cùm aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis.* If lands be given [c] to *B. et hæredibus quos idem B. de primâ uxore suâ legitimè procrearet*, this is a good estate in especiall taile (albeit he hath no wife at that time) without these words *(de corpore)*. So it is [d] if lands be given to a man, and to his heires which he shall beget of his wife, [e] or to a man *et hæredibus de carne suâ*, or to a [f] man *et hæredibus de se.* In all these cases these be good estates in taile, and yet these words *de corpore* are omitted.

(7 Co. 41.)

[c] 3 E. 3. tit. Breve 743. 3 E. 3, tit. Estates.

[d] 12 H. 4. 2.

[e] 37 H. 6. 15.

[f] 6 H. 5. 6. (7 Co. 41.)

[g] 12 H. 4. 2, per Horton. (Post. 27, a. 26, b. 220, a.)

It is holden [g] by some opinions, that if there be grandfather, father and sonne, and lands are given to the grandfather, and to his heires begotten by the father, the father dyeth, the grandfather dyeth, the sonne is in as heire to the grandfather begotten upon the body of his father, and the wife of the grandfather in that case shall be endowed. But certaine it is, that in some cases one shall have the land *per formam doni* that is not issue of the body of the donee, which see Section 30.

"*Begotten.*" This word may in many cases be omitted or expressed by the like, and yet the estate in taile is good: as, *hæredibus de carne, hæredibus de se, hæred' quos sibi contigerit, &c.* as is aforesaid; and where the word of *Littleton* is, ingendred, or begotten, *procreatis*, yet if the word be *procreandis*, or *quos procreaverit*, the estate in taile is good; and as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before (3).

18 E. 2, tit. Bre. 836. 24 E. 3. 28.

(7 Co. 41. Ow. 152.)

Sect. 16.

TENANT in taile speciall is, where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendred between

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(2) *But devise to one* et hæredibus legitimè procreatis *is tail. H.* 43 *Eliz. C. B. rot.* 1408. *Moor's case,* 711, *but* contra *by act executed* 7 *Rep.* 41. *b.* —*Dormer's case. If lands be limited by deed to the use of I. S. and* hæredum masculorum suorum legitimè procreatorum, *remainder over, it is a fee simple; but if it be* hæredum masculorum de se, *or in English,* the heirs of him lawfully begotten, *especially where there is a remainder over, it is tail.* 7 Rep. 41. *Bedell's case. Dormer's case, H.* 38 *Eliz. B. R. rot.* 739. Hal. MSS.—[N. 121.]

(3) 10 E. 3. 19. *Adjudged accordingly.* Hal. MSS. But it is held, that, where the words were *in posterum procreandis*, sons born *before* shall be excluded on account of the peculiar force of *in posterum.* Adj. M. 26 *Eliz.* B. R. 3 Leon. 87.—[Note 122.]

between them two. And it is called especiall taile, because if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherite by force of this gift, nor also the issue of the second husband, if the first husband die.

"*To a man and to his wife.*" [a] Then put the case that lands be given to a man and a woman unmarried, and the heires of their two bodies: for the apparent possibilitie to marry, they have an estate taile in them presently. [b] So it is where lands be given to the husband of *A.* and to the wife of *B.* and the heires of their bodies, they have presently an estate in taile, in respect of the possibilitie.

[a] 5 H. 7. 10. 11 E. 3. Formdon 30. Pl. Com. 35.

[b] 10 Co. 120. Chudley's case. 40 Ass. pl. 13. 34 Ass. pl. 1. Fleta, lib. 5, c. 34.

If a feme sole do enfeoffe a married man *causâ matrimonii prælocuti*, it is good for the possibilitie. But put the case that the premises and the *habendum* be in other manner than *Littleton* hath put, and let us see ☞ what the law is in these cases. [c] (1) As if a man in the premisses give lands to another and the heires of his bodie, *habendum* to him and his heires for ever; it hath beene holden that in this case he hath an estate taile, and a fee simple expectant. And so (it is said) *vice versâ*, if lands be given to a man and to his heires in the premisses, *habendum* to him and the heires of his bodie; that he hath an estate taile, and a fee simple expectant. But *vid.* lib. 8. fo. 154, b. otherwise resolved, *ut patet ibi* (2). [d] If lands be given to *B.* and his heires, to have and to hold to *B.* and his heires,

[21. a.]

(Plowd. 35. Post. 25, b. F. N. B. 205, b. Post. 204, a. 1 Ro. Abr. 419.)

[c] 21 H. 6. 7. (Perk. Sect. 18. 170. 2 Sid. 78. 8 Co. 56. b. 8 Co. 154. Plowd. 147. 2 Ro. Abr. 680.)

[d] 30 Ass. p. 47. 35 Ass. p. 14. 37 Ass. 15.

5 H. 5. 6. 2 Ro. Abr. 68. Cro. Jam. 595. 290. 427. 448.)

if

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(1) *Where the estate in the* premises *shall be corrected by the* habendum, *if there happen to be a clause of warranty*, 2 *E.* 2. *Feoffments*, 94. Dedi Adamæ de B. unam carncat. cum C. filiâ meâ in liberum maritagium, habendum Adamæ et hæredibus suis faciend. forinsecum servicium; *and warranty to Adam* et hæredibus suis in perpetuum. *After the death of Adam and his wife, their issue bring* mort d'auncestor; *and ruled, that it doth not lie, but* formedon, *because* taile, 10 E. 3. 25. Sciatis me dedisse Edmundo et Aliciæ filiæ meæ et hæredibus suis in liberum maritagium, habendum et tenendum dictis E. et A. et hæredibus suis in liberum maritagium. *If the gift be before the statute* de donis, *it is only frank-marriage; if after the statute, it is tail with fee expectant. Vid.* 10 *H.* 6. 16.—19 *H.* 6. 74. *Gift to A. and if he dies without heir of his body reverter to the donor, it is not tail; but if it was by devise, it is tail.*—Hal. MSS.—[Note 123.]

(2) The resolution in 8 Co. 54. b, is, that here the words *heirs of the body* in the *habendum* qualify the word *heirs* in the *premises*, and therefore that there shall be an estate tail without any fee expectant. See acc. Mo. 26. In the case in Cro. Jam. 476, and 2 Ro. Rep. 19. 23, such words were adjudged to pass tail and fee expectant. But the case was attended with circumstances particularly shewing an intention to pass *both:* for there was a reservation of tenure to the lord paramount, which could not be if only an estate tail passed to the donee, and the reversion had remained in the donor, for then the tenure must have been of the donor. Also there was a warranty to the grantee and his *heirs*. However, the court intimated, that their opinion would have been the same, if these special circumstances had not occurred. See further as to the operation of the *habendum* in explaining and qualifying the *premises*, post. 183, and the note on lord Coke's doctrine against *abridging* the latter by the former, post. 299. a. See also Vin. Abr. *Grants*, I, K, L, M, & N.—[Note 124.]

if *B.* have heires of his bodie, and if he die without heires of his bodie that it shall revert to the donor, this is adjudged an estate taile, and the reversion in the donor. [*e*] For *voluntas donatoris in chartâ doni sui manifestè expressa observetur*; and therefore in the case next precedent, if these or the like words be added (and if he die without heires of his bodie, that the lands shall revert to the donor), that then the *habendum* shall by authoritie of divers bookes be construed upon the whole deed, to be a limitation or a declaration, what heires are meant in the premisses to inherit, and that in that case the reversion is in the donor (3).

[e] W. 2. cap. 22.

[*f*] If a man make a charter of feoffment of an acre of land to *A.* and his heires, and another deed of the same acre to *A.* and the heires of his bodie, and deliver seisin according to the forme and effect of both deeds, in this case he cannot take a fee simple onely, as some hold, for that liverie was made according to the deed in taile, as well as to the charter in fee, neither can the livery enure onely to the deed of estate taile with a fee simple expectant, for that liverie was made as well upon the deed in fee simple, as the deed in taile. Therefore others hold, that in that case it shall enure by moities, that is, to have an estate taile in the one moitie, with the fee simple expectant, and a fee simple in the other moitie; and so the liverie shall worke immediately upon both deeds (4).

[f] 2 H. 6. 25. 45 E. 2. 20. (Vid. 5 Co. 25, where two fines are levied.)

Sect. 17.

IN the same manner it is, where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frankmariage (5), *the which gift hath an enheritance by these words (frankmariage) annexed unto it, although it be not expresly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heires betweene them two begotten. And this is called especial taile, because the issue of the second wife may not inherit.*

Vid. Sect. 19, 20. (2 Ro. Abr. 67.) 5 E. 3. 17.

"*TO a man with a wife.*" Albeit the gift is made of the land to the man with his daughter, &c. yet is the gift good to them both in speciall taile, and therefore that of *Stephen de la More*

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(3) In a note in 1 P. Wms. 57, lord keeper Wright puts the case of a gift by deed to one and his *heirs*, and if he die without *issue*, remainder over, and holds, that the latter words restrain the former, and convert the fee into a tail.—[Note 125.]

(4) 7 *E.* 3. 64. *Land given to husband and wife, and the heirs of the body of husband, and if the husband and wife die without heirs between them lawfully begotten, remainder over. It is only a tail general in the husband. Dy.* 171. *Devise to A. and the* heirs male of his body, *and if he die without* heirs of his body, *remainder over, it is only tail male.*—Vid. M. 9 Jac. inter *Walsop and Derby. Devise to A. in fee, and afterwards by the same will devise of the same land to B. in fee, they are joint-tenants.* Vid. 13 *R.* 2. *brief* 645. *Land given to the father and the heirs of his body, remainder to his son in tail. It seems, the son has election to claim by descent or purchase. (It seems the remainder is void, because included in the first estate.)* Hal. MSS.—[Note 126.]

(5) *Before or after marriage. Dy.* 147. Hal. MSS.—See acc. post. 21. b. and 176. a.

More in [g] 5 *E.* 3, is very remarkeable, where the case was, that *Robert* gave the reversion of lands which *Agnes* his wife did hold for her life to *Stephen de la More, habendum post mortem dictæ Agnetis in liberum maritagium cum Johannâ filiâ ejusdem Roberti*, and it is adjudged that it is a good estate taile. Wherein three things are to be observed: first, that *Joane* the daughter took with her husband an estate in especiall taile, albeit she were named but under a *cum*, viz. *cum Johannâ*, &c. (7). 2. That *cum* doth come after the *habendum*, for that it is all but one sentence. 3. That these words, *in liberum maritagium*, doe create an estate [21. b.] of inheritance in especiall taile, as ☞ *Littleton* saith, *the which gift hath an inheritance by these words (frankmariage) annexed unto it, although it be not expresly said, &c.* But this had need of some interpretation, for if lands be given by these words (in frankmariage), according to the rules of law, then do these words create an estate of inheritance in speciall taile: for the consideration of marriage is in that case more favoured in law, than any other consideration. But though the gift be in these words, yet if it be not consonant to the rules of law in other things requisite thereunto, there they create but an estate for life. And therefore to speak once for all, four things be incident to a frankmariage. First, that it be given for consideration of marriage either to a man with a woman, or, as some have held to a woman with a man. For in [h] 6 *E.* 3. 33, in *Piers de Saltmarsh* his case, a man gave land to his sonne in frankmariage; and *Fitz. N. B.* 172, taketh the law so also; and 7 *E.* 4. 12, *per Moyle* against a new opinion *in temps H.* 8 *Br.* tit. Frankmariage, the former bookes being not remembred. Secondly, that the woman or man that is the cause of the gift [i] be of the blood of the donor; but it may be made as well after marriage as before, and it may be made with a widow, &c. Thirdly, if the gift be made of such a thing as lyeth in tenure, that the donees hold of the donor at the time of the estate in frankmariage made. A rent service [k] may be given in frankmariage, because it may be holden. And so may a rent charge or rent secke, as *Fitz. N. B.* holdeth, and it appeareth in our bookes that a common was granted in frankmariage. (1) Fourthly, that the donees shall hold freely of the donor till the fourth degree be past. And therefore if land be given to a woman, with a sonne of the donor in frankmariage, there passeth an inheritance; but if the donee that is the cause of the gift be not of the blood of the donor, then there passeth but an estate for life if livery be made. Also if [l] lands be given to a man with a woman of the blood of the donor *in liberum maritagium*, the remainder in fee either to a stranger or to the donees,

[g] This case is vouched in Pl. Com. 168, to be in 4 E. 3, which being not found (6) in that yeare, it is there so left without any further reference, but you shall find it as above said in 5 E. 3. 17.

W. 2, ca. 1. 19 E. 3. tit. Taile 1.

(1 Ro. Abr. 840.)

[h] 6 E. 3. 33. Fitz. N. B. 172. 7 E. 4. 12. 15 E. 2. Cui in vita. Sect. 24.

[i] 4 E. 3. 8. 31 E. 1, taile 30. Bracton, lib. 2, cap. 7.

[k] 22 R. 2, tit. Descent 50. Fitz. N. B. 212. 9 H. 6. 35, b. W. 2, ca. 1, acc.

[l] Temps H. 8. Br. frankmar. 11. 13 E. 1. Formdon 63.

Vid. 32 E. 1, tail. 25. 2 E. 2. Feoffment and Faitz, 9. 17 E. 3. 5. a. 45 E. 3. 20. (1 Ro. Abr. 840.)

they

(6) *The case is* 4 *E.* 3, 4. Hal. MSS.

(7) Dedi et concessi Johanni White in liberum maritagium Johannæ filiæ meæ habendum dicto Johanni cum hæredibus suis in perpetuum de capitali domino feodi; *and warranty to him and his heirs. Ruled, that it is neither tail nor frank-marriage, but fee simple only in the husband, and nothing in the wife. M.* 23 *and* 24 *El. C. B. Webb and Porter.* Vid. contra 32 *E.* 1. *taile* 25, *but* 45 *E.* 3. 20, *agrees.* Hal. MSS.—See acc. the same case in Ow. 26, and Godb. 18. The same case is cited in Mo. 643. pl. 888.—[Note 127.]

(1) 14 *E.* 2. *Aiel.* 1. *Reversion granted by two in frank-marriage.* Vid. 4 *E.* 3, 4. 26 *E.* 3. *tail* 27. Hal. MSS.—[Note 128.]

they have no estate taile, because there is no tenure of the donor (2); but if [m] in that case, the remainder had beene limited to another in taile reserving the reversion in fee to the donor, there the said words *(in liberum maritagium)* create an inheritance, because the donees hold of the donor. And this is the cause that it is holden, that a man cannot devise land in frankmarriage because the donee cannot hold of the donor. And *cesty que use* before the statute of 27 *H.* 8, could not have made a gift in frankmariage, because the reversion was in the feoffees. [n] And if the donor doth give lands in *liberum maritagium* reserving a rent, this reservation shall take no effect till the fourth degree be past, but the frankmariage is good; for if the reservation should be good, then could not the donees have an estate taile for want of the words of the heires of their bodyes (3).

[m] 20 E. 2. aid 174. 31 E. 3. Gard. 216.

[n] Bract. lib. 2, cap. 7. 32 E. 1, taile 31. 13 H. 4. 74. 4 H. 6. 17. 26 Ass. 66. 31 E. 3. Gar. 29.

"*In frankmarriage.*" *Liberum maritagium*, free marriage. *Maritagium* is taken for fee taile, and divideth *maritagium* into *liberum et servitio obligatum:* and herewith agreeth *Bracton* [o] lib. 2, cap. 34, and 39. *Maritagium est aut liberum aut servitio obligatum*, and lib. 2, ca. 7, nu. 3 and 4. *Liberum maritagium dicitur, ubi donator vult quòd terra sic data quieta sit et libera ab omni seculari servitio.* And so, before *Bracton*, said *Glanvill*, lib. 7, ca. 18. *Maritagium autem aliud nominatur liberum aliud servitio obnoxium. Liberum dicitur maritagium, quando aliquis liber homo aliquam partem terræ suæ dat cum aliquâ muliere in maritagium, ita quòd ab omni servitio terra illa sit quieta, &c.* And after both of them *Fleta* that followeth them both, lib. 3, cap. 1, saith, *est autem quoddam maritagium liberum ab omni servitio solutum donatori vel ejus hæredi, &c. Et est similiter maritagium servitio obligatum et oneratum, &c.* And these words *(in liberum maritagium)* are such words of art, and so necessarily required, as they cannot be expressed by words equipollent, or amounting to as much. As if a man give lands to a man with his daughter *in connubio soluto ab omni servitio, &c.* yet there passeth in this case but an estate for life; for seeing that these words *(in liberum maritagium)* create an estate of inheritance against the generall rule of law, the law requireth that they should be legally pursued. But then it may be demanded, if a man had given lands at the common law, *in libero maritagio*, whether had the donees a fee simple without these words (heires), for that it appeareth by that which hath beene said before, that all gifts in taile were fee simple at the common law, and that the statute of *W.* 2, did not create any estate in fee taile, but out of an estate in fee simple. To this it is answered, that these words *(in liberum maritagium)* did create an estate in fee simple at the common law: and it is holden in 31 *E.* 3. gard. 116. *Par ceux parolx in frankmariage les donees averont les terres a eux et a lour heires perenter eux engendres, et ceo est dit especial taile.* But yet betweene donees in frankmariage and other

[o] Bract. lib. 2, cap. 34 & 39, & lib. 2, cap. 7. nu. 3 & 4. Glanvil. lib. 7, ca. 1, & ca. 18.

Fleta, lib. 3, cap. 1.

30 E. 1, tit. Formdon 66. adjudg. acc. (2 Inst. 336.)

31 E. 3, tit. Gard. 116. Mirr. cap. 2, sect. 15, acc.

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(2) *But see the contrary of this* Pasch. 40 Eliz. *C. B. lord Barclaye's case, n.* 11, *and all the books here cited prove, that it is at least an estate tail, although no tenure, and it is accordingly adjudged,* 17 *E.* 3. 65. Vid. *H.* 43 *El. B. R.* rot. 140, *betwecn lord Barclaye and the countess of Warwick.* Hal. MSS. —See S. C. in Mo. 643. Cro. Eliz. 635, and 1 Ro. Abr. 750, but the point of Frank-marriage is not reported in the two latter books.—[Note 129.]

(3) 13 H. 4. *Mesne,* 74. 30 *E.* 3. 24. *Gift in frank-marriage* salvo forinseco servitio *good, and the donee shall hold in chivalry.* Hal. MSS.—[Note 130.]

other donees in speciall taile there be many notable diversities. If the king give land to a man and a woman, and the heires of their two bodies, and the woman die without issue, yet shall the man be tenant in taile *apres possibilitie*. But if the king give land to a man with a woman of his kindred in a frank-mariage, and the woman dyeth without issue, the man in the king's case shall not hold it for his life, because the woman was the cause of the gift; but ☞ otherwise it is in the case of a common person, if lands be given to a man and a woman in especiall taile, and they are divorced *causâ præcontractûs*, both shall hold the lands for their lives; but in [p] case of frankmariage if they be so divorced, the woman shall enjoy the whole land, because she was the cause of the gift (1). If lands holden in socage [q] be given in especiall taile, and the donees die, the issue being within the age of 14 yeares, [r] the next of kinne of the part of the father, or of the part of the mother which can hap the custody shall have it, but in case of frankmariage the heire of the part of the mother shall have it, because as it hath been said she was the cause of the gift.

[22. a.]

9 H. 3, Dower 202. 7 H. 4. 16.

[p] 13 E. 3, tit. Ass. 19 E. 3. Ass. 83. 12 Ass. 22. 19 Ass. 2. 8 E. 3. Ass. 45. (F. N. B. 204.)

[q] Pl. Com. Carril's case.

[r] 17 H. 3, tit. Gard. 146. 27 E. 3. 79.

Sect. 18.

AND note, that this word (Talliare) *is the same as to set to some certaintie, or to limit to some certaine inheritance. And for that it is limited and put in certaine, what issue shall inherite by force of such gifts, and how long the inheritance shall indure, it is called in Latine,* feodum talliatum, i. e. hæreditas in quandam certitudinem limitata. *For if tenant in generall taile dieth without issue, the donor or his heires may enter as in their reversion* (3).

"*AND note.*" This in our author, throughout his three bookes, betokens some notable point of instruction worthy of more speciall observation, which is often [s] used by him, as you may perceive by the Sections noted in the margent (2).

(Ante, 17. b.)

[s] Sect. 18. 37. 42. 43. 49. 50. 64. 72. 89. 90. 104. 108. 114. 116. 147. 158. 161. 168. 170. 183. 254. 279. 346. 387. 452. 467. 618, 619. 637. 642. 670. 682. 684. 711. 717. 719. 738.

"*Feodum talliatum*, i. e. *hæreditas in quandam certitudinem limitata.*" Here our author doth interpret what *feodum talliatum* is. Of all the estates taile most coarcted or restrained, that I finde

West. 2, cap. 3. Pl. Co. 251, a.

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(1) *Keilw.* 104. b. *Accord.* Hal. MSS. See also acc. Perk. Sect. 238.

(3) *The issue in tail attainted in* vitâ patris; *after the death of the father the donor cannot enter, but the issue if pardoned may enter, and hold as special occupant, subject to the charges of the father.* 29 *Ass.* 61. Hal. MSS.—[Note 132.]

(2) Lord Coke seems to lay too much stress on Littleton's use of *nota, &c.* and other words of a like kind. In the edition by Lettou and Machlinia, *&c.* is frequently omitted, and *item* is very often put where the other editions have *nota*, and *vice versa*. This shews, how very uncertain it is, whether any peculiar force ought to be attributed to such words. Indeed where they really come from Littleton himself, they must in general be too slight a foundation for any considerable inference.—[Note 131.]

39 Ass. pl. 20. (1 Co. 66. 104. Ante, 8, b. 1 Ro. Ab. 838.) finde in our bookes, is the estate taile in 39 Ass. pl. 20, where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only; this case being adjudged in the point is an exception (some say) out of the generall rule put before by *Littleton*, Sect. 13, that all estates taile were fee simple at the common law; for (say they) by this limitation *(hæredi)* in the singular number the donees had not had a fee simple at the common law. *Vide Registrum Judiciale*, fo. 6, a gift made to a man *et hæredi masculo de corpore suo* (4).

Sect. 13. Vid. Pl. Com. fo. 29, b.

Regist. Judic. fo. 6.

Sect. 19.

IN the same manner it is of the tenant in especiall taile, &c. For in every gift in taile without more saying, the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor, and to his heires the like services, as the donor doth to his lord next paramont, except the donees in frankmarriage, who shall hold quietly from all manner of service (unlesse it be for fealtie) untill the fourth degree is past, and after the fourth degree is past the issue in the fift degree, and so forth the other issues after him, shall hold of the donor or of his heires as they hold over, as before is said.

(2 Inst. 331. 333.) "*IN every gift in taile without more saying, the reversion of the fee simple is in the donor.*" This is wrought by the construction of the statute of *W.* 2, cap. 1, which hath turned the fee simple of the donee into a particular estate of inheritance, and the possibility of the donor, to a reversion in him expectant upon the estate taile, ☞ so as there be two inheritances of one land: yet this was doubted in our bookes [*t*], and there resolved according to *Littleton*. But I see no cause wherefore that point should be drawne in question, for at the same session of parliament (in which the statute *de donis conditionalibus* was made) viz. ca. 3, it is expressely said, *vel per donum in quo reservatur reversio*, so as by the judgment of the same parliament a reversion was settled in the donor.

[22. b.]

[*t*] 12 E. 4. 23. 5 H. 7. 14. West. 2, ca. 13. Pl. Com. 247, 248. 251, 262. 2 E. 2, tit. Receit 147. 33 H. 6. 27. 39 E. 3. 18. 45 E. 3. 20.

(Post. 142, b. Plowd. 151. 162. 196, 197. Cro. Cha. 400.) "*The reversion of the fee simple is in the donor.*" A reversion is (1) where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt.* Tenant in fee simple maketh gift in taile, so it is of a lease for life,

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(4) In the case of Richards and lady Bergavenny, 2 Vern. 325, the court held a limitation to lady Bergavenny and such heir of her body as should be living at her death, with a remainder over, to be an estate tail. But see further on this subject ante, fol. 8. b. n. 4, where several authorities are referred to in order to enable the student to find in what case *heir* in the singular number ought to be construed *nomen collectivum*.—[Note 133.]

(1) By what words a reversion will pass, see Vin. Abr. *Reversion* G. and Com. Dig. *Estates* B. 12.

life, or for yeares. If a man extend lands by force of a statute merchant, staple, recognizance or *elegit*, he leaveth a reversion in the conusor. But since *Littleton* wrote, the description must be more large upon the statute of [a] 27 *H.* 8, for at this day, if a man seised of lands in fee make a feoffment in fee, (and depart with his whole estate) and limit the use to his daughter for life, and after her decease, to the use of his sonne, in taile, and after to the use of the right heires of the feoffor: in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himselfe, yet hath he a reversion (2); [b] for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heires, the right heires shall not be purchasors. And here in this case when the limitation is to his right heires, and right heire he cannot have during his life (for *non est hæres viventis*) the law doth create an use in him during his life, untill the future use commeth *in esse*, and consequently the right heires cannot be purchasors; and no diversitie when the law creates the estate for life, and when the party. And all this was adjudged betweene [c] *Fenwicke* and *Mitford* in the king's beach: and if the limitation had been to the use of himselfe for life, and after to the use of another in taile, and after to the use of his owne right heires, the reversion of the fee had been in him, because the use of the fee continued over in him (3); and the statute doth execute the possession to the use in the same plight, qualitie, and degree, as the use was limited.

[a] 27 H. 8, ca. 10. (Cro. Cha. 24. 1 Ro. Abr. 625. 1 Co. 104, b. 2 Co. 91. 2 Ro. Abr. 417. 1 Leon. 182.)

[b] 38 E. 3. 26. 27 E. 3, Page 118. 24 E. 3. 36. 40 E. 3.

[c] Tr. 31 Eliz. inter Fenwicke & Mitford. 32 H. 8, gard 93. 28 H. 8. Dier 8, 9, 10, &c. Buckenham's case. 5 Marie. Dier 163. (1 Ro. Abr. 828. Mo. 284.)

[d] If a man make a gift in taile, or a lease for life, the remainder to his own right heires, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said, that *hæres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heires, all his heires are so totally in him, as he may give the lands to whom he will.

[d] 1 H. 5. 8. 4 H. 6. 20. 9 Eliz. Dier. Bromley's case.

[e] So it is if a man be seised of lands in fee, and by indenture make a lease for life, the remainder to the heires male of his owne body, this is a void remainder; for the donor cannot make his own right heire a purchaser of an estate taile without departing of the whole fee simple out of him (4): as if a man make a feoffment

[e] Dier 5. Marie 156. Groswold's case adjudge. Bendlowes Serjant in his report agreeth. (Hob. 30. 33. 1 Mod. 237, 1. 1 Ro. Rep. 240.)

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(2) Vid. 3 & 4 *P. & M. Dy.* 134, contra. Hal. MSS. But see the case cited by lord Hale in the next note, and also ante 12 b, and note 2. there.

(3) Casus Com. Bedford, M. 34, 35 Eliz. Poph. n. 8. *Feoffment to the use of the feoffer for 40 years, remainder to B. in tail, remainder to the right heirs of the feoffer. It is the old reversion, and the feoffer may devise it; for the use returned to the feoffer for want of consideration to retain it in the feoffee till the death of the feoffer.* Hal. MSS.—See the earl of Bedford's case in Poph. 3. Vid. 27 *E.* 3. 8. 4 *H.* 6. 20. 42 *Ass.* 2. 9 *E.* 3. 14. 10 *E.* 3. 48. *Lands granted by A. by fine for the life of A. remainder to A's, right heirs. It is a reversion in A. and he may grant it.* Hal. MSS. *Dy.* 237. *Fine to husband, as that which he and his wife have of his gift, which render to the conusor for life, remainder to the right heirs of the husband. It is a void remainder, and the wife survivor shall have it for life.* Hal. MSS.—[Note 134.]

(4) *Where heir shall be purchaser Vid. fol.* 9. *b.* 11 *H.* 6. 13. *Devise to B. for life, remainder to C. in tail, remainder to the next* heir *of the devisor and the heirs of his body, it is a purchase in the heir.* Quære *there if it had been* heirs —*Archer's*

ment in fee to the use of himselfe for life, and then to the use of the heires male of his body, this is a good estate taile executed in himselfe, and the limitation is good by way of use, because it is raised out of the state of the feoffees, which the feoffor departed with, and that is apparent, for a limitation of use to himselfe had without question beene good.

[f] 20 Eliz. Dier.

[f] If a man make a feoffment in fee to the use of himselfe in taile, and after to the use of the feoffee in fee, the feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate taile executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

[g] 13 H. 7. 6. 28 H. 8. Dier 12. (3 Co. 81, b. Cro. Jam. 201. Post. 271, b.)

☞ To conclude this point, [g] whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter. As if a man be seised of two acres, the one holden by knights service by prioritie, and the other by knights service holden by posterioritie, and maketh a feoffment in fee of both acres to the use of himselfe and his heires, the old use continues in him, and the prioritie and posterioritie remaine. So it is of lands of the part of the mother, the use shall goe to the heire of the part of the mother, which could not be, if it were not the old use, but a thing newly created. The like law of lands of the custome of Borough-English, Gavelkind, &c. (1).

[23. a.]

5 E. 4. 7. 1 Co. 76. 84, 85. 100, &c. Chudley, 2 Co. 56, 57, 58. 77, 78. 4 Co. 22. 6 Co. 34. 43.

" *The donees and their issue shall do to the donor, and to his heires the like services, as the donor doth to his lord next paramount.*" The reason of this is, that when by construction of the said statute there was a reversion settled in the donor, for that the donee had an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over (2): as if the tenant

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—*Archer's case*, 1 *Rep.* 66. *b. Devise or conveyance to A. for life, remainder to his* next heir male, *and to the heirs male of the body of such* heir male, *it is a purchase in the heir, because in the* singular *number, and the limitation is applied to it.*—*Vid.* 1 *Rep.* 104. *Shellie's case. Use limited for life to A. remainder to the heirs male of the body of A. and the heirs male of the body of such heirs male. It is a limitation, and A. has a tail executed. But if the ancestor takes estate for years, remainder limited to the heirs male of his body, it doth not vest in the ancestor. Accord.* hic *fol.* 13. *Hodgkinson's case.* Hal. MSS.—See Hodgkinson's case from lord Hale's MSS. at the end of n. 6. ante 14 a.—[Note 135.]

(1) See further on this subject the several books cited ante 12. b. in n. 2, to which add Prec. in Cha. 222. 319, and Plowd. 545, and note f, in the English translation of Plowden. It may be an useful hint to observe, that the English edition of mr. Plowden's Commentaries, which most deservedly bear as high a character as any book of Reports ever published in our law, has a great number of additional references and some notes; and that both of these are generally very pertinent, and shew great industry and judgment in the editor.—[Note 136.]

(2) *And therefore gift in tail saving the reversion* tenend' de capitalibus dominis feodi per servitia debita *is void, and the donee shall hold of the donor, as he holds over.* 6 *E.* 3. 28. 45 *E.* 3. 27. 2 *E.* 4, 5. 4 *H.* 6. 20. *Champernon's case.* Vid. 27 *H.* 8. 18. Hal. MSS.—[Note 137.]

tenant had made a feoffment in fee at the common law, the feoffee should have holden of the feoffor as he held over, and before the statute of *W.* 2, the donee had holden of the donor as of his person, and now of him as of his reversion: but if a man make a lease for life, or years, and reserve nothing, he shall have fealtie only and no rent, though the lessor hold over by rent, &c. And this, that *Littleton* saith, is regularly true, if the donor maketh no speciall reservation, for then the speciall reservation excludes the tenure which the law would create. As if tenant by knights service maketh a gift in taile reserving fealtie and rent, the donee shall hold in socage, by fealtie and rent, and not by knights service (3). But if a man hold land of the king in grand serjeantie, and maketh a gift in taile generally, in this case the donee shall not hold of the donor by grand serjeantie, because no man can hold by grand serjeantie, but of the king only, as hereafter shall be said; and therefore seeing grand serjeantie doth include knights service, he shall in that case hold of the donor by knights service. If a man seised of land in the right of his wife holden by knights service giveth the same lands in taile generally, the donee shall not hold of him by knights service, because his wife held the land, and he had nothing but in her right. And in that case the baron hath gained a new reversion by wrong, and therefore such a donee shall doe fealtie only (4).

(Post. 143. a.)

(2 Ro. Abr. 501.)

A. seised of two acres of land, holdeth the one of *B.* by knights service, and twelve pence rent, and the other of *C.* in socage and one pennie rent, and makes a gift in taile of both acres without any expresse reservation of any tenure. In this case the donor hath but one reversion. And yet he shall make several avowries, because there be severall tenures created by law in respect of the severall tenures over: and the avowrie is made in respect of the tenures.

(Doctr. Plac. 53.)

Lord, mesne and tenant, the tenant holdeth by four pence, and the mesne by twelve pence, the tenant makes a gift in taile without reserving any thing, by reason whereof he holdeth by foure pence, in respect of the tenure over. Afterwards the reversion escheats, now shall the donee hold by twelve pence, for the mesnaltie which was four pence is extinct, and the law reserved the tenure upon the gift in taile, in respect of the mesnaltie, and when the mesnaltie is extinct, the former rent between the donor and donee is extinct also; and then by the same reason that the donee shall take advantage, if the donor by release or confirmation had holden by lesser services, by the same reason he shall be prejudiced, when he holdeth by greater services (5).

(2 Ro. Abr. 501.)

49 E. 3. 10.

"*Except the donees in frankmarriage.*" It is to be understood, that although the land be given *in liberum maritagium*, in free marriage

Bracton, lib. 2. fo. 21. Britton, c. 119. Fleta, lib. 3, cap. 11, & lib. 6, cap. 2. Vid. Sect. 17. 20. (Ante 11. b. Post. 178. a.)

(3) *But if tenant by chivalry makes gift in tail rendering rent only, the tenure shall be chivalry, but the rent* accumulative. *Vid.* hic 52. *Dy.* 52. *Keilw.* 125. —Hal. MSS.—[Note 138.]

(4) Quære *of this case, for the new reversion is held in chivalry. Vid.* 4 *H.* 6. 21, *by Balth. B. holds of A. in chivalry, and gives in tail to C. who makes lease to R. for life and dies. The issue of C. shall be in ward to A. not to B. the donor.* Hal. MSS.—[Note 139.]

(5) Vid. *Keilw.* 125. 129.—Hal. MSS.

marriage generally, yet first the law doth make a limitation of this word (free), viz. till the fourth degree be past, for the reason that our author here yeeldeth (6). And 2. albeit it be free marriage, yet the donees and their issues untill the fourth degree be past shall do fealtie, for that it is incident to everie tenure (except frankealmoigne) and cannot be separated from it, and therefore the donees and their issues shall hold it as freely till the fourth degree be past as the donor can make it. See more of this in the Chapter of Frankalmoigne.

Sect. 20.

AND the degrees in frankmarriage shall be accounted in this manner, viz. from the donor to the donees in frankmarriage the first degree, beeause the wife that is one of the donees ought to be daughter, sister, or other cosen to the donor. And from the donees unto their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is, because that after every such gift, the issues of the donor, and the issues of the donees after the fourth degree past of both parties in such forme to be accounted, may by the law of the holy church entermarie (1). *And that the donee in frankmarriage shall be said to be the first degree of the foure degrees, a man may see in a plea upon a writ of right of ward,* P. 31, E. 3, *where the pl. pleadeth that his great grandfather was seised of certaine lands, &c. and held the same of another by knights service, &c. who gave the land to one* Raphe Holland *with his sister in frankmarriage, &c.*

[a] Vide Sect. 17. 19. 138. 268, 269. 271. 733.

WHERE *Littleton* saith [a] that the donees in frankmariage shall hold by fealtie only untill the fourth degree be past, and then the issue in the fift degree shall hold of the donor as the donor holdeth over, [b] *Vide Bracton ubi supra, Ita quod ille cui terra sic data fuit, nullum inde faciat servitium usque ad tertium hæredem, et* [23. b.]

[b] Glanvill. lib. 7, cap. 18. Bract. lib. 2, fol. 21. Britton, c. 119. Fleta. lib. 3, cap. 11, & lib. 6, cap. 2.

usque

(6) *And therefore after the fourth degree the issue shall have formedon and count of a gift in frank-marriage; but the warranty and acquittal are gone.* 12 *H.* 4. 9. Vid. 10 *E.* 3. 25. 4 *E.* 3. 5. *Attornment by donee in frank-marriage.*—Hal. MSS.—[Note 140.]

(1) Nota, *by the intent of Littleton in some cases before the fourth degree passes from the donor there may be intermarriage, and yet the land shall be holden quit till it be passed. A. gives land in frank-marriage with the daughter of his sister, the issue of A. and the donee may intermarry after the fourth degree, yet the fourth degree shall not be passed* quoad *the tenure.* Vid. pag. sequent. *A. gives to the daughter of N. in frank-marriage, C. and the issue of N. may intermarry, because they are in* quinto gradu consanguinitatis, *yet this is only the first degree* quoad *the privilege of tenure.* Hal. MSS. There is something apparently wanting in the state of lord Hale's latter case; for it is not expressed who *C.* is, and how *C.* and the issue of *N.* are related in the *fifth* degree. But this accidental omission may be easily supplied, and the doctrine will be equally intelligible by only supposing the consanguinity to be as lord Hale's case requires.—[Note 141.]

usque quartum gradum, ita quod tertius hæres sit inclusus. And herewith also agreeth *Fleta ubi supra.* And the [c] learning of degrees set out in the civil and canon law (wherein I find some difference) is worth the knowledge, to the end that *Littleton* and the law in this case may the better be understood, which I will divide into certain rules; whereof the first is, that a person added to a person in the line of consanguinitie maketh a degree. And it is to be understood, that a line is threefold, viz. the line ascending, descending, and collaterall. And first for example, of the ascending line, take the sonne and add the father, and it is one degree ascending; add the grandfather to the father, and it is a second degree ascending.

[c] Vid. 10 E. 3, tit. Avowry 157. 31 E. 3, cessavit 22. 31 E. 3, gard. 116. 21 H. 7. 30.

Rule 1.]

Rule 2.] So as how many persons there be, take away one, and you have the number of degrees. If there be foure persons it is the third degree, if five the fourth, for one must exceed, and then you have the degree. Likewise by the descending, take the father, and add the sonne, and it is one degree; then take the sonne and add the grandchild, and it is the second degree; and so likewise further. Wherein observe that the father, son and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree.

(Plowd. 444.)

Rule 3.] It is to be noted, that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civill law in the ascending and descending line (2); for those whom the civilians do reckon in the second degree, the canonists do reckon in the first (3); and those whom they place in the fourth, these place ☞ in the second. Therefore if we will know in what degree two of kindred do stand according to the civill law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then by

(Vid. Stat. 32 H. 8, cap. 38, of marriages. 2 Inst. 683. 25 H. 8, cap. 22.)

[24. a.]

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(2) The words *but in the collateral line there is* seem necessary to the sense of this passage; and though not to be found in any edition of lord Coke's Commentary, were probably omitted by mistake.

(3)
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      A
    ___
C . . . B . . . D
:       :       :
H . . . E . . . L
:       :       :
I . . . F . . . M
:       :       :
K . . . G . . . N
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G. and A. are in the fourth degree per utramque legem. *N. and K. are in the fourth degree by the canon law, but in the eighth degree by the civil law. N. and C. are in the fourth degree by the canon, in the fifth by the civil law.* Vide pro computatione graduum consanguinitatis juxta utramque legem Caus. 35. quæst. 5, pars 2, in Decret. *Juxta jura canonica.*—I. Ascendentium et descendentium quot sunt personæ, de quibus quæritur, computatis intermediis, primâ demptâ, tot sunt gradus inter eas. II. Pro collateralibus. Collateralium in lineâ æquali quoto gradu quis distat à stipite communi, toto distant inter se vel sibi attinent. Collateralium in lineâ inæquali quoto gradu remotior distat à communi stipite, toto inter se distant.—*Juxta jus civile.*—I. In lineâ rectâ ascendentium et descendentium quot sunt personæ, de quibus quæritur, computatis intermediis, unâ demptâ, tot sunt gradus inter eas. II. Collateralium. 1. In lineâ æquali, quoto gradu qui distat à communi stipite, toto duplicato distant inter se, vel sibi attinent; nam quælibet persona facit gradum. 2. In lineâ inæquali, quot sunt personæ, stipite dempto, tot sunt gradus.—Nota in contractibus matrimonialibus computatio canonica est recepta, et hoc per decretalem Innocentis tertii in concilio generali. Hal. MSS.—[Note 142.]

(Plowd. 444.) by descending to the other to whom we do count, and it will appeare in what degree they are. For example, in brothers and sisters sonnes, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his sonne, that is the third degree; then from his sonne to his sonne, that is the fourth. But by the canon law there is another computation, for the canonists do ever begin from the stocke, namely, from the person of whom they do descend; of whose distance the question is. For example, if the question be, in what degree the sonnes of two brothers stand by the canon law, we must begin from the grandfather and descend to one sonne, that is one degree; then descend to his sonne, that is another degree; then descend againe from the grandfather to his other sonne, that is one degree; then descend to his sonne, that is a second degree; so in what degree either of them are distant from the common stocke, in the same degree they are distant betweene themselves: and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stocke, in the same degree they are distant betweene themselves, and so the most remote maketh the degree. And albeit the donee be a cousin in the third or fourth degree from the donor, yet in this computation it maketh the first degree: *gradus dicitur à gradiendo, quia gradiendo ascenditur et descenditur.* And thus much of the civile and canon law is necessarie to the knowledge of the common law in this point (1): and herewith agreeth our author in the words following.

" *The issues of the donor, and the issues of the donees after the fourth degree past of both parties in such forme to be accounted, may by the law of the holy church entermarie.*" (Of the holy Church) [d] So as hereby it appeareth, that the computation of the degrees in this case, must be according to the canon law. But it is necessarie to be knowne concerning marriages betweene persons of kindred one to another, that it is enacted [e] by the statute of 32 *H.* 8, that no reservation or prohibition (God's law except) shall trouble or impeach any marriage without the Leviticall degrees (2).

[d] Brit. c. 119. Accord. Flet. lib. 3, ca. 11, & lib. 6, c. 2.

[e] 32 H. 8, ca. 38.

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(1) See further as to consanguinity and the manner of computing its degrees by the civil and canon law, Blackst. Law Tracts, 8vo. ed. v. 1, p. 14, and 173, and the annotations in the edit. of the *Corp. Jur. Canon.* by the *Pithæi* on that part of Gratian's *Decretum* cited by lord Hale, and Inst. lib. 3, tit. 6, et Dig. 38, tit. 10, and the commentators on those titles.

(2) *The following passages from the canon law are in* Hal. MSS.—Extrav. de consang. et affin. c. 9. Vir qui à stipite quarto gradu mulieri, quæ ex alio latere distat quinto, licitè copulatur.—Nota antiquitus usque ad septimam generationem nullus de suâ cognatione ducat uxorem. Decret. 2. Causa 52. quæst. 2. can. 11. Sed in concilio generali sub Innocentio 3° prohibitio copulæ conjugalis quartum consanguinitatis et affinitatis non excedat, viz. in collateralibus; sed in directè ascendentibus prohibetur contractus matrimonialis in infinitum. Extrav. de consanguinitat. &c. can. 8.—See further as to the prohibition of marriages for affinity or consanguinity in Tayl. Elem. Civ. L. 314. Inst. lib. 1. tit. 10. Dig. lib. 23. tit. 2. Cod. lib. 5. tit. 4. Nov. 74. Gibs. Cod. Jur. Ecclesiast. Anglican. 1st ed. v. 1. p. 494. Burn. Eccles. L. tit. *Marriage.* Vin. Abr. *Marriage E.*—[Note 143.]

The case vouched by *Littleton* in 31 *E.* 3, you shall finde abridged by *Fitz.* tit. gard. 116. And albeit this yeare of 31 *E.* 3, was never in print till *Fitzherbert* did abridge it and publish it in print *anno* 11 *H.* 8, and goeth under the name of broken yeares, yet here it appeareth by our author, that the same is of authoritie in law, as hereafter also in other places shall be observed.

Sect. 21.

AND all these entailes aforesaid be specified in the said statute of* W. 2. *Also there be divers other estates in taile, though they be not by expresse words specified in the said statute, but they are taken by the equitie of the same statute. As if lands be given to a man, and to his heires males of his bodie begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entailes aforesaid, it is otherwise.

"***AND all these entailes aforesaid be specified in the said statute of W.* 2." And so it appeareth by the said statute. "*Also there be divers other estates in taile, &c.*" And herewith agreeth *Carbonel's* case, 33 *Edw.* 3, *titulo taile* 5.

That the cases of the statute are set down but for examples of estates taile, generall and speciall, and not to exclude other estates taile. 3 *E.* 3. 32. 18 *Ass.* p. 5. 18 *E.* 3. 46. 1 *Mar. Dyer.* 46. Pl. Com. Seignior *Barkley's* case, fo. 251. For, *Exempla illustrant non restringunt legem.*

3 E. 3. 32. 18 E. 3. 46. 18 Ass. p. 5. 1 Mar. Di. 46. Pl. Com. 251.

[24. b.] ☞ "*Equitie*" is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the law-makers could not possibly set downe all cases in expresse terms: *Æquitas est convenientia rerum quæ cuncta coæquiparat, et quæ in paribus rationibus paria jura et judicia desiderat.* And againe, *Æquitas est perfecta quædam ratio quæ jus scriptum interpretatur et emendat, nullâ scripturâ comprehensa, sed solùm in verâ ratione consistens. Æquitas est quasi æqualitas. Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. Et jus respicit æquitatem* (1).

(5 Co. 99. 3 Co. 31.) Bract. lib. 4, fol. 186.

"*As if lands be given to a man, and to* [*f*] *his heires males of his bodie begotten; in this case his issue male shall inherit, and the issue female shall never inherit, &c.*" This shall be explained afterward, Sect. 24. (2).

[*f*] 18 Ass. p. 5. 18 E. 3. 46. 33 E. 3, tit. Taile 5. 3 E. 3. 32 pl. V. Sect. 24.

Com. Seignior Barkley's case. 1 Mar. Dy. 46.

(1) As to the construing statutes by equity, see Plowd. 9, 10. 17, 18. 36. 46. 53. 57. 59. 82. 88. 109. 124. 177. 204. 244. 363, 364. 366. 371. 464. 466. See also Vin. Abr. *Statutes, E.* 6.; Hatt. Treat. on Stat.; Ash. Exposit. of Stat. by Eq.; and Com. Dig. *Parliament*, R. 10.

(2) *And see such special heir is in by descent, and shall have his age,* 24 *E.* 3. 60.—Hal. MSS.—[Note 144.]

Sect. 22 & 23.

IN the same manner it is, if lands or tenements be given to a man and to his heires females of his bodie begotten; in this case his issue female shall inherit by force and forme of the said gift, and not his issue male. For in such cases of gifts in taile, the will of the donor ought to be observed, who ought to inherit, and who not.

AND in case where lands or tenements be given to a man, and to the heires males of his bodie, and he hath issue two sonnes, and dieth, and the eldest son enter as heire male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heire male. But otherwise it is in the other entailes, which are specified in the sayd statute.

THESE two Sections, or any thing therein, do need no explanation, in respect they shall be also explained hereafter in the next Section, saving onely these words *(who ought to inherit)* are verie observable, for they implie a diversitie betweene a discent and a purchase. For when a man giveth lands to a man and the heires females of his body, and dyeth, having issue a son and a daughter, the daughter shall inherit; for the will of the donor (the statute working with it) shall be observed. But in case [g] of a purchase it is otherwise: for if *A.* have issue a sonne and a daughter, and a lease for life be made, the remainder to the heires females of the bodie of *A.* *A.* dieth, the heire female can take nothing, because she is not heire (3); for she must be both heire

(Post. 164. 1 Co. 103, 104.) (Hob. 31.) [g] 9 H. 6. 24. 11 H. 6. 13, 14. 37 H. 8. Br. tit. Done. 42, tit. nosme 1, & 40. Dyer 23. El. 374. Shelly's case, 1 Co.

(3) *A. hath issue a son and a daughter. The daughter marries B. and has issue two daughters. A. devises to his son;* but if he die without issue my land shall go to my right heirs of my name and posterity, *and dies. The son dies without issue. Ruled, that the land shall not go to the uncle, for though of his name, he is not heir, for the issue of the daughter is heir. H. 11 Jac. C. B. Counder and Clerke, Mo.* 863, *and Hob.* 29. Hal. MSS.—See the same case in 1 Brownl. 129.—This case of Counder and Clerke is apparently cited by lord Hale in confirmation of lord Coke's position as to the necessity of being *heir* as well as *female*, in order to take by *purchase* under a limitation to the *heir female;* and it is observable, that there is not one word in lord Hale's note intimating the least disapprobation of the doctrine. However, it so happens, that in more modern times the propriety of this doctrine has been questioned by very respectable persons, who have treated it as equally unsupported by reason and authorities of law. But perhaps this censure of lord Coke may have been too hasty; and it may be doubted, whether there is a passage in all his works, more capable of standing the severest test of modern criticism. Therefore the remainder of this note shall be employed in the defence of lord Coke's doctrine, and in explaining the qualifications with which it ought to be understood; and for this purpose it shall be formally examined, first as a reasonable rule of construction, and secondly by the authorities and determined cases.

When land is given to the *heirs female of the body* of one, either not having *any* preceding estate, or not having a preceding estate of *freehold*, the words cannot be construed as giving an inheritable quality to an estate already vested and limiting the course of descent, but necessarily must operate on the first taker as a *descriptio personæ* and *name of purchase;* and lord Coke's doctrine mean

heire and heire female, which she is not, because the brother is heire, and therefore the will of the giver cannot be observed, because

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means nothing more, than that those claiming under such a description should *fully* answer to it, and consequently that such as have only *half* of the description should be excluded. Now it is to be considered, that the description consists of *two* parts, one requiring that the donee should be *heir*, the *other* that the donee should be *female;* and if being *heir* without being *female* will not give a title, why on the other hand should being *female*, without being also *heir*, be sufficient? It is not a solid objection to lord Coke to say, that his construction is strict, literal, and founded on a rigid adherence to the proper and technical sense of words; because it is reasonable to presume in favour of the established sense of all words, unless there are *other* words or some special circumstances to shew a *different* sense in the mind of the person using them, and lord Coke apparently intends to put a case in which *neither* occur. But it has been observed, that where *heirs female of the body* are words of *limitation*, a female may take by *descent* as *special heir*, though not *heir general;* and it is asked, why should not the same person be equally capable of taking by *purchase?* This objection is plausible, but not unanswerable. Where *heirs female of the body* are words of *limitation*, they are necessarily used to regulate the *succession* in a *special* manner, which object of the donor cannot be attained without a continual exclusion of *heirs general* when they happen to be males; and this establishment of a *new* kind of heirship is a ground for presuming that the donor by *heirs* means, not those who are so by the *general* law of descent, but those who are so according to the *special* course of descent he professes to introduce. But where *heirs female* are only words of *purchase*, they are used to describe who shall take the estate at *one* particular *time* and in *one instance*, and establishing a *new* course of succession is not the object in view; and it not being so, the ground of presumption, which governs the former case, is wanting. But it may be insisted, that, in the case put by lord Coke, *heirs female of the body* have a *double* effect, and after operating as words of *purchase*, operate a *second* time as words of *limitation*, and being allowed to point at an *heir special* in their *latter* application, ought to have the same construction in the *former;* for in *such* a case it would be strange to suppose, that *heirs female* were used in two different senses. This is refining on the objection made to lord Coke's doctrine, and placing it on a stronger light than it hitherto appears to have been urged. But even in this shape the objection would not prove any thing absurd in lord Coke's *general doctrine*, and would only shew that he had chosen an improper example for its illustration, and that he should have stated a case in which *heirs female* can only operate as words of *purchase*, as where a gift is made *to the heirs female of the body of A. and their heirs*, or *the heirs of their bodies*. So much for the propriety of lord Coke's doctrine independently of authorities; but if it is compared with them, it will appear still more defensible, and by them it is even applied to the same sort of case as is stated by him. The necessity of being *actually heir* in the strict sense of the word, to take by *purchase* under that description, appears by authorities of three kinds.—The first order of cases consists of those, by which it has been settled, that if land is given to *A.* for life, with remainder to the *heirs*, or *heirs of the body* of *B.* and *A.* dies before *B.* or *B.* is attainted of felony and afterwards dies before *A.* the remainder becomes void. In the former case it is so, because *B.* being living at the determination of the particular estate, no person can *then* answer to the description of his heir, for *non est hæres viventis*. In the latter case it is so, because *B's.* attainder, by corrupting his blood, prevents his having an heir. Now in *both* these cases there is as much reason for departing from the rigid sense of the word *heirs*, and presuming in favour of an *heir apparent* in the *first* case, and of such person *as would be heir* if there was not an attainder in the *second*, as there is for presuming in favour of an *heir special* in the case of a gift to the *heirs female;*

cause here is no gift, and therefore the statute cannot worke thereupon. And so it is if a man hath a sonne and a daughter, and

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and yet the doctrine is so fixed by authorities, that the judges of modern times have not yet deviated from it even in the case of *last wills*, except when induced to adopt a less strict construction by some *additional* words strongly expressive of using *heirs* in a *special* sense, as where land is devised *to the heir male of A. now living*. See post. 378. Hussey's case, Bro. Abr. *Done*, 61, the case of James and Richardson, Pollexf. 457, that of Burchett and Durdant, 2 Ventr. 311. Darbison and Beaumond in Vin. Abr. *Devise* U. b. pl. 5, but more accurately in 1 P. Wms. 229, and Fortesc. Rep. 18, and that of Frogmorton and Wharrey, Wils. vol. 2, part 3, page 125, and 144. See further Vin. Ab. *Remainder* I. —Another series of authorities, conformable to lord Coke's doctrine, consists of cases, in which it has been agreed, that where *heir* is a word of *purchase*, the *heir* at *common law* shall take *Gavelkind* or *Borough English* land, unless the *customary* heir is *expressly* mentioned, though if used as a word of *limitation*, the *customary* heir shall take without being named. See Bro. Abr. *Discent* 59. See also ante, 10. a, and n. 4, there, and the case of Starkey and Starkey, Trin. 19 G. 2, in the Exch. 5 N. Abr. 404. This rule in respect to *customary* land is a very cogent argument for lord Coke in point of authority; for the property, which is the *subject* of the gift, furnishes a very colourable pretence for preferring the *customary* heir; and the peculiar descent of the land by *force* of the *custom* in the person who thus takes by purchase is precisely the same sort of argument for the *customary* heir, as those who differ from lord Coke draw from the special descent by force of the gift where *heirs female of the body* are words of *limitation*. On a nice comparison it will be found, that the analogy between the gift of the *customary* land to *heirs*, and the gift of *common law* land to *heirs female of the body*, is almost perfect; for in both cases the words operate first as words of *purchase* and then as words of *limitation;* and as in the latter case the heir female by *purchase* must be the *heir at common law*, and the heir by *descent* must be a *special* heir, according to the course of descent prescribed by the donor, so in the former case the heir by *purchase* is the heir at *common law*, and the heir by *descent* is the heir special according to the *custom*.—But the authorities of the *third* kind are those, which occur in respect to gifts to heirs *male* or *female*, and therefore apply more closely. Of these the earliest is John Farringdon's case, 9 H. 6. 23, and 11 H. 6. 12, in which one question was, whether a great grandson could take by purchase under a remainder devised to the testator's *next heir male and the heirs male of his body*, the great grandson's mother, who was the testator's *heir general*, being alive when the estates precedent to the remainder determined. The case was argued twice, but there is an *adjornatur* in the Year Book, and what was the opinion of the court is not any where mentioned; but there is reason for supposing, that it was against the remainder; for in 20 H. 6. 44, Newton, *then* a judge, though he had before argued as counsel for the remainder in Farringdon's case, lays it down as clear law, that if land is given to *A.* for life, remainder to the right heirs *male* of the body of *B.* to hold to them and their heirs for ever, the son of a daughter of *B.* being his heir, may take notwithstanding he makes out his description through a *female;* and Fortescue, chief justice, assents to the position. This construction of *heirs male of the body* as words of purchase, being attended to, will be found almost necessarily to be a clear authority with lord Coke; for it shews, that as words of *purchase* they describe *males* being also *heirs general*, whereas as words of *limitation* it is agreed they have a different import, and signify such males as shall be *heirs special* according to the particular course of descent marked out by the donor, though they do not happen to be *heirs general;* which distinction is the whole amount of lord Coke's doctrine. But the next authority, which is in Bro. Abr. *Done* 61, applies more directly. There lord Brooke, after mentioning the difference taken by Ellerker in Farringdon's

case,

and dieth, and lands be given to the daughter, and the heires females of the bodie of her father, the daughter shall take nothing ☞ (Post. 26, b.)

case, between *descent* and *purchase*, adds in confirmation of it, that *by* Hare, master of the Rolls, an antient apprentice, *there is a difference between a gift in possession to a man and his heirs female, &c. and a gift to a stranger the remainder to the heirs females of another, for there heirs* in deed *must be when the remainder falls, and otherwise the remainder is void for ever.* The same doctrine is in Plowd. Quær. 87, and 133, and the very learned author illustrates it by a case, the same as that stated by lord Coke. In *Quære* 87, the words of the book are, *If a remainder is appointed to the right heirs female of the body of* I. S. *who dies, having a son and daughter, the remainder shall be void; because the daughter cannot have it, in regard that she is not heir, though she be female.* The next authority is Shelley's case, which arose between the second son of Edward Shelley and a *posthumous* son of Edward's deceased eldest son. One point was, whether the second son could take by *purchase*, under a remainder *to the heirs male of Edward's body, and the heirs male of the bodies of such heirs male*, in which case his estate would not have been devested by the birth of the posthumous son of his brother, the eldest son having left a daughter, who at Edward's death was his *heir general.* Judgment was given against the second son; but from the report of lord Coke and More, it seems not to have been absolutely requisite to have decided whether the second son could take by *purchase;* for the judges held, that on account of the preceding use for life to Edward, the remainder operated as words of *limitation*, though Edward died before the use to him could arise, and that so the second son took in course and nature of a *descent*, till the birth of his brother's posthumous son, who then became entitled. See Mo. 140, and 1 Co. 106. However, lord Dyer in his report of the case places the remainder in *both* points of view, and besides observing that by *descent* the second son could only take the remainder till the birth of his elder brother's posthumous son, also says, that *he could not have it as a purchaser, because he was not heir of the body of his father, for the daughter of the eldest son was heir general, and the second son was not heir male of the body of his father unless he was heir as well as male.* These words from lord Dyer, when it is considered that he was one of the judges on whose opinion Shelley's case was decided, and that they are introduced to explain the reason of the judgment, are very strong evidence, that the judges in Shelley's case gave their sanction to lord Coke's doctrine in the *full* extent of it, that is, in the case of a gift where *heirs male of the body* were both words of purchase and of limitation; and lord Dyer's authority ought to have the greater weight, because he is not contradicted by any other report of the same case; not even by lord Anderson, who was counsel for the second son, for he only takes notice of lord Coke's account of the reasons of the judgment, by observing that they were not mentioned in court. See 1 And. 71. Accordingly mr. serjeant Rolle cites Shelley's case as having determined the point. See 2 Ro. Abr. 416. F. pl. 5. Ashenhurst's case, Mich. 7 Jam. is the next authority, and in that land was devised to executors till 900*l.* should be raised for the preferment of the testatator's three daughters, and afterwards to his right heirs males for ever, and one Beard was found by special verdict to be the *heir male;* but the court of king's bench held that he could not take the remainder, because the three daughters were the *heirs general*, and in Easter 17 James the judgment was affirmed in the exchequer chamber. This case is the stronger, because it arose on a will, and the testator, in the devise to his *heirs male*, mentions his *heirs general*, which no doubt was urged as a circumstance to shew that the testator meant a *special* kind of heir, and might have warranted a departure from the strict sense of *heir* without overturning lord Coke's general rule. See Hob. 34, and Palm. 50. *Counden* and *Clerke* already stated from lord Hobart at the beginning of this note, is another case where a *devise* to *heirs male* could not take effect, because the *heirs*

☞ nothing but an estate for life, because there is no such person, she being not heire. But where a gift [25. a.] is

general were *females*; and this judgment appears to have been also affirmed on error in B. R. See Jenk. Cent. 294. There are several modern determinations to the same purpose. In Southcott and Stowell, which was adjudged about the 29 of Cha. 2, one having two sons covenanted to stand seised to the use of the eldest in special tail male, remainder to the heirs male of the covenantor, or according to one report of the case the heirs male *of his body*, and for want of such issue to his own right heirs. The eldest son dies leaving a son and daughter; the covenantor dies, and then the son of the covenantor's eldest son; and the question was, whether the second son or the daughters of the eldest son should have the estate. The court determined in favour of the second son, because the grandson survived the grandfather, and being *heir general* as well as *male* could take either by *purchase* or *descent* on his death, and therefore it was immaterial whether an estate for life arose to the covenantor by implication or not; but it was agreed by the whole court, and even by the counsel for the second son, that if the grandson had not survived, the second son could not have taken by *purchase*, because his nieces would have been *heirs general*, and consequently he could not have been complete heir. See 1 Freem. 216. 225. 1 Mod. 226. 237. 2 Mod. 207, and 3 Kebl. 704. In 1695 lord keeper Somers, in the case of *Starling* and *Elrick*, decreed against one, who claimed to take by purchase under a devise to *heirs male*, because a *female* was the *heir general*. See Prec. in Chanc. 54. The case of Ford and lord Ossulston, which was determined in Mich. 7 Ann. by the king's bench, is still stronger; for in that one Ford having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male for ever, and the three sons being dead without issue, the whole court held, that the brother could not take as male heir, 1, because a devise to heirs male operates as a limitation to *heirs male* of the body, and the brother could not be heir male of the devisor's body: 2, because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law; and so jealous was lord chief justice Holt of departing from the established doctrine, that notwithstanding the special circumstances in the case of Pybus and Mitford, which will presently be stated, he doubted the authority of that case. See 3 Salk. 336. 11 Mod. 189, and Vin. Abr. *Devise* U. b. pl. 2, in marg. The doctrine was thought to be so firmly settled by this last case, that in 1722 lord ch. Macclesfield, in Dawes and Ferrers, which was a case similar to that of Ford and Ossulston, interrupted the counsel for the person claiming as *heir male*, by saying that *he would not suffer the bar to dispute what was the land-mark and foundation of the law*; adding, that in the case of *Ford* and *lord Ossulston* the point had been determined on *trials at bar in every court in Westminster Hall, and appeared to be so very plain a case, that in the king's bench the plaintiff's own counsel would not ask a special verdict.* See 2 P. Wms. 1, and Prec. in Chanc. 54. However it was not thought proper to acquiesce in this opinion of lord Macclesfield, and a bill of review being brought to reverse his decree, lord ch. Hardwicke directed a case for the opinion of the king's bench: but the four judges of that court followed lord Macclesfield, and the person under whom the claim was made not being *heir general*, they, in February 1743, certified, that *he could not take by the description of right heir male*. See the certificate in Vin. Abr. *Devise* W. b. in a note on pl. 13. Such is the list of grave authorities which confirm lord Coke's doctrine as to the necessity of being *very heir*, in order to take by *purchase* under the description of *heir male* or *heir female*, whether *of the body* or not; and if they wanted aid from his name, it will scarce be denied by the coldest of his admirers, that his private opinion on a point of law he had so fully considered, will even in these times, when

is made to a man, and to the heires female of his bodie, there the donee being the first taker is capable by purchase, and the heire female

when perhaps we are too apt to deery those ancient authors whose writings are still the grand sources of information and instruction, be no *mean* addition to their weight. However it must be confessed, that there are some cases, in which the doctrine has been deviated from; but all of them, except one, are determinations *since* his time, and besides, most of them may rather be deemed *exceptions* to lord Coke's *general rule*, than proofs of its *non-existence*. The earliest of these is a case in the time of Elizabeth, and cited by lord Hale in *Pybus* and *Mitford*, 1 Ventr. 381. A son of the testator's brother was admitted to take under a *devise* to the testator's *heir male*, though he left three daughters; but the reason was, because the testator introduced the devise with taking notice that his brother had left a son, and that he himself had three daughters who were his *right heirs*, and he also gave the daughters 2,000*l.* on condition not to trouble the *heir*. In this case the *special* intent of *heir male* is so marked by the *other* words, as clearly to take it out of the general rule; and that lord Hale meant to cite it as an *exception* appears from his saying, that it is not inconsistent with *Counden* and *Clerke*. See 1 Ventr. 382. *Bowman* and *Yates*, 1 Cha. Cas. 145, is another case which was determined on *special* circumstances; for the son of a second marriage was allowed to take a rent charge under a limitation to heirs male by a second wife, though not strictly heir, there being a son of the first wife, because the settlement was apparently made as a provision for the issue of the second marriage. The case of Pybus and Mitford, adjudged 36 Ch. 2. is liable to a similar observation. One, who had issue two sons by two different wives, covenanted to stand seised to the use of the heirs male of his body by his second wife. The point determined by three judges against one was, that an use arose to the covenantor for life, and that so the limitation to his heirs male on the body of his second wife being a remainder in tail special executed in him, his son by the second wife took by *descent* as *special* heir; but Hale, chief justice, held, that the son of the second wife, though not heir-general, might have taken by purchase, and according to Ventris, Wild, justice, was of the same opinion, though another book mentions, that in this respect all the three other judges differed from lord Hale. See 1 Freem. 370, 371. But the reasoning of lord Hale shews, that he did not mean to shake Coke's *general* doctrine, and that he founded himself on the special penning of the deed; and he distinguished it, by observing that the limitation was to the heirs by the second wife, and that the covenantor had taken notice in the deed that another was his *heir general*, there being a proviso, that if the son by the first wife should, after the death of the son by the second wife, and within five years after attaining 21, pay 1,200*l.* for the covenantor's younger children, the uses should cease; and for these two reasons he thought the deed sufficient to describe a *special* heir. See Pybus and Mitford, 1 Ventr. 372. 1 Freem. 351. 369. Raym. 228. 1 Mod. 121. 159. 3 Keb. 129. 239. 316. 338, and 2 Lev. 75, in which last book the case is most fully stated. In Wall and Baker Trin. 8, W. 3, the circumstances were still more special; for according to lord Cowper's state of the case the testator expressly directed, *that if his heir should be a female his heir male should pay to his heir female 12l. a year out of his lands*; words manifestly implying, that by *heir male* was meant a *special* kind of heir in contradistinction to the *heir general*. See 1 Stra. 41, 42. Hitherto lord Coke's general rule as to being both heir and female to take by purchase seems unimpeached. But it must be owned, that there is a case in which the doctrine, after a very solemn discussion, received a most severe attack from a judge of the highest authority. This happened in the famous case of Brown and Barkham determined by lord chancellor Cowper; who held a younger brother to be capable of taking as heir male under a devise to the heirs male of the body of the testator's great-grandfather,

female by descent (1), *secundum formam doni:* and therefore *Littleton* purposely added these words, *who ought to inherit.*

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grandfather, though the daughter of an elder brother was *heir general*, and instead of founding his decree on *special* circumstances, which were not wanting in the case, most expressly denied lord Coke's distinction between descent and purchase. See Prec. in Cha. 442. 461. Gilb. Rep. 116. 131, and 1 Stra. 35. But lord Cowper's decree, notwithstanding his high character, was not acquiesced in; for in November 1741 the same case was brought, by bill of review, before lord chancellor Hardwicke, who indeed decreed in favour of the same person, but was far from following lord Cowper in his reasons. He admitted lord Coke's distinction to have been long ago established, and professed to determine wholly on the special circumstances, without the least intention of impeaching the general rule. In giving judgment he divided the case into two questions: 1st, whether it was an established rule, that he who claims as heir male by purchase must be general heir as well as nearest male descendant; 2dly, whether the apparent intent of a testator to the contrary may not create an exception to the general rule. According to a very good note of the case lord Hardwicke's words on the first question were these: *As to the first of these questions, it cannot be denied, but that the distinction between an heir male of the body to take by descent, who is the nearest male descendant of the party claiming through males, and to take by purchase, who must be heir as well as a male descendant of the body, has been long ago established. The statute* de donis *established the first, and the second has been laid down by lord Coke in his Comment upon Littleton, and is taken from his argument in Shelley's case and Dyer's report of that case, and he has been followed by some later authorities. Lord Cowper argued strongly against this rule; but as his argument is well known and very common, I shall not now take notice of it. If this doctrine had been* res integra *at the time of his decree, or was so now, I am so fully convinced of the unreasonableness of it that I would never establish it. But when a rule of law has long prevailed, it ought to be supported, though it be not strictly agreeable to natural reason; for in many instances it is more material that the law is settled than how it is settled. But as I think that this case may be determined without determining this question, I shall leave the rule unimpeached, and found my decree on the second question.* He then proceeded to consider the second question, and after stating several authorities to shew there might be exceptions to the general rule, he pointed out the particular circumstances which he relied upon in the case before him, and on account of them only affirmed lord Cowper's decree. Lord Hardwicke's guarded manner of expressing himself on this last case amounts to a full acknowledgment of the general rule, and is the strongest authority to prove its existence, because he avowed his dislike of it.—Upon the whole, it is submitted to the learned reader, that the general rule of being *heir general* to take as heir male or female by *purchase* may be defended as a reasonable rule of construction, where the words merely operate as words of purchase, and more particularly if the superadded words of limitation are to heirs general, as where land is given to the *heirs female of the body of one and the heirs of their bodies;* that the authorities before and in the time of lord Coke fully warranted him in advancing the rule in its full extent, that is, where the words operate as words both of purchase and limitation; that the rule has been confirmed by many cases since lord Coke's time; and lastly, that as lord Cowper's opinion is the single direct authority in any printed book against the rule, and it has been acted upon and acknowledged in several subsequent cases, it ought still to be observed, where the construction rests singly on the words *heirs female*, and they stand unexplained by any other words or circumstances.—[Note 145.]

(1) It is very unusual to create an estate in tail *female*, and I have seen an argument, in which it has been attempted to prove, that the law of England will

Sect. 24.

ALSO, if lands be given to a man and to the heires males of his body, and he hath issue a daughter, who hath issue a sonne, and dieth, and after the donee die; in this case, the son of the daughter shall not inherit by force of the entaile; because whosoever shall inherit by force of a gift in taile made to the heires males, ought to convey his descent whole by the heires males. Also in the case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himselfe the descent by an heire male.

"*WHOSOEVER shall inherit by force of a gift in taile, &c.*" *Vide* Tr. [*h*] 28 *H.* 6. tit. Devise 18, (which is not in the booke at large, but written *verbatim* out of *Statham*). If a man devise lands to a man, and to the heires males of his body, and (2) hath issue a daughter, which hath issue a sonne, this sonne shall be inheritable, and notwithstanding in a gift in taile the law is otherwise, and that by the opinion of all the judges in the exchequer chamber. But I hold this case to be ill-reported, unlesse you will referre the opinion of the judges to the gift in taile last mentioned.

Vid. Sect. 719. [*h*] 1 H. 6. 24. 11 H. 6. 13, 14. 28 H. 6, tit. Devise 18. Statham, tit. Devise. Pl.Com. in Scholast. case 414, b. 20 H. 6. 43. 37 H. 8. Br. tit. Done & Rem. 61.

tit. nosme 1, & 40. (Hob. 33. Post. 377.)

For first, albeit a devise may create an inheritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law. Secondly, there is no intent of the devisor appearing, that the sonne of the daughter should, against the rule of law, inherit, and the statute provideth, that *voluntas donatoris, &c. observetur*. And I have heard this case often denied to be law, both in the king's bench and in the common pleas. *Vide* Pl. Comment. 414. b. And so it is [*i*] *mutatis mutandis*, when a gift in taile is made to a man, and to the heires females of his body, and he hath issue a sonne, who hath issue a daughter, this daughter shall never inherit, because she must convey by descent from females. And for the reason hereof see a notable case in 15 E. 2, tit. Corone 385, where it is adjudged (as before it had beene) that the sonne of a female should have an appeale of the death of a cosine, and yet the daughter herselfe should never have had it. But there it is agreed, that the sonne of a female [*k*] in a *libertate probandâ*, should be no witnesse or proofe against the issue of the male. And the reason of this diversity is very observable: for by the common law the female [25. b.] might have had an appeale as heire to any of her ancestors, as well as the male. But by the statute of *Magna Charta*, cap. 34, *Nullus capietur aut imprisonetur propter appellam fœminæ de morte alterius quàm viri sui*, which restraineth not the sonne of the female. And there *Scrope* saith,

(1 Rs. Abr. 841.)

[*i*] 11 H. 6. 13.

15 E. 2, tit. Cor. 385. (Ante, 6, b.)

[*k*] Mirror, c. 2, sect. 7. Vid. Glanvil. lib. 14, cap. 3.

(2 Inst. 68.) Vid. Seignior de la Ware's case, 11 Co. fo. 1.

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will not allow of a descent through females only, even in the case of estates tail; but other authors as well as Littleton and Coke mention *such* descents, nor did I ever hear any authority cited to support the contrary doctrine. See Plowd. Quær. 87, and 133.—[Note 146.]

(2) The word *he*, to describe *the devisee*, is wanting. See acc. Stath. Abr.

saith, *per touts le serjeantis d'Angleterre*, that is, by all the judges of the coife in *England*, it was awarded, that the issue of the female should have an appeale for the death of his cousin. But in a *libertate probandâ*, the issue of the blood female shall not be received to prove villenage in the issue of the blood male, for the mother was disabled by the common law, and the mother might be a neife *de eu et trene*, that is, of the water and whippe of three cords (meaning such a bond-woman as is used to servile workes and correction), and enfranchised by her husband. All which
17 E. 4. 1. appeareth in the said booke. And it is holden in 17 *E.* 4. 1, that if a man be slaine which hath no heire of the part of his father, that his uncle of the part of his mother shall have the appeale, and yet he must of necessity make his conveyance by a woman.
20 H. 6. 33. *Vid.* 20 *H.* 6, fo. 33, the question suddenly demanded and debated, and no consideration or mention had of the said former judgments and authorities. There it is compared to a gift in taile to a man and to his heires males of his body, that the heire male of the daughter shall not inherit; which hath no affinity to it; and yet the authority of the booke is great, for it is by the assent of all the justices of the one bench and the other in the exchequer chamber; and therefore I leave the learned and judicious reader to his owne judgment. [*l*] *Vide Stanford* 58. b. 15 *E.* 2. 384. If a man give lands to a man and to the heires males of his body begotten, remainder to him and to his heires females on his body begotten, the donee hath issue a sonne, who hath issue a daughter, who hath issue a son, this sonne is not inheritable to either of both these estates taile, because, as *Littleton* saith, the male must make his conveyance only by males, and so must the female by females. But in this case the land shall revert to the donor. And therefore the safest way, when a man will entail his lands to the heires males and females of his bodie, is to limit the first estate to him and the heires males of his body, the remainder to him and to the heires of his body, and then all his issues whatsoever are inheritable. But if *A.* hath issue a sonne and a daughter and dieth, and the sonne hath issue a daughter and dieth, and a lease for life is made, the remainder to the heires females of the body of *A.*; in this case the daughter of *A.* shall not take *causâ*
(Hob. 31.) *quâ suprà*. But albeit the daughter of the son maketh her conveyance by a male, she shall take an estate taile by purchase, for she is heire and a female: but if lands be devised to one for life,
11 H. 6. 13. the remainder to the next heire male of *B.* in taile, and *B.* hath
9 H. 6. 25. issue two daughters, and each of them hath issue a sonne, and the father and daughters die, some say this remainder is void for the uncertainty; some say that the eldest shall take it, because he is worthiest; and others say that both of them shall take, for that they both make but one heire (1). If lands be given to a man and to the heires males or females of his body, he hath an estate in generall taile in him.

(Post. 377.)

[*l*] Stanford 58. b. 15 E. 2, tit. Coron. 384.

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(1) Vid. hic fol. 10, b. *Harpur's case*, Hal. MSS.

Sect. 25.

IN the same manner it is, where lands are given to a man and his wife, and to the heires males of their two bodies begotten, &c.

"*TO a man and his wife.*" But what if tenements be given to a man, and to a woman being not his wife, and to the heires males of their two bodies? They have also an estate taile, albeit they be not married at that time (2). And so it is, if lands be given to a man which hath a wife, and to a woman which hath a husband, and the heires of their two bodies; they have presently an estate taile, [*m*] for the possibility that they may marry. But if lands be given to two husbands and their wives, and to the heires of their bodies begotten, [*n*] they shall take a joint estate for life and several inheritances, viz. the one husband and his wife the one moity, and the other husband and wife the other moity, and no crosse remainder or other possibility shall be allowed by law, where it is once settled and has taken effect. But if lands be given to a man and two women, and the heires of their bodies begotten, [*o*] in this case they have a joynt estate for life and every of them a severall inheritance, because they cannot have one issue of their bodies, neither shall there be by any construction a possibility upon a possibility (3), viz. that he shall marry the one first and then the other (4). And the same law it is, [*p*] when land is given to two men and one woman, and to the heires of their bodies begotten.

11 E. 3. Formedon 20. (Ante, 20. b.)

[*m*] 15 H. 7. 10. 1 Co. Dilon & Frein's case. 40 Ass. p. 13.

[*n*] 24 E. 3. 29, a. (Dy. 330.)

[*o*] 7 H. 4. 16. 16 E. 3. 78. Littleton, fo. 66. 15 Eliz. Dier 326.

[*p*] 44 E. 3, tit. Taile 13.

[26. a.] ☞ Sect. 26, 27.

26, 27. These two Sections need no explanation at all.

ALSO, if tenements be given to a man and to his wife, and to the heires of the bodie of the man, in this case the husband hath an estate in generall taile, and the wife but an estate for terme of life.

ALSO, if lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in especiall taile, and the wife but an estate for life.

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(2) *If husband and wife are divorced* à vinculo, *they are only tenants for life; for the law doth not presume that they will marry again.* 7 *H.* 4. 16. 3 *H.* 6. 43. Hal. MSS.—[Note 147.]

(3) As to the doctrine of not allowing possibility on a possibility, see post. 184.

(4) *Here it cannot be tail, for the uncertainty which of them he will marry first. But if a gift was to A. and B. a feme sole and to the heirs of their bodies, remainder to A. and C. a feme sole and to the heires of their bodies, it is tail.* Hal. MSS.—[Note 148.]

Sect. 28.

AND if the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in speciall taile, and the husband but for terme of life (1). *But if lands be given to the husband and the wife, and to the heires which the husband shall beget on the body of the wife, in this case both of them have an estate taile, because this word (heires) is not limited to the one more than to the other* (2).

19 H. 6. 75. a. Regist. 239. 17 E. 2, tit. Taile 23. 3 E. 3. 32. 4 E. 3. 43. 5 E. 3. 29, b. and 34. a. 21 E. 3. 43. 12 H. 4. 1. [q] 3 E. 3. 32. 21 E. 3. 43. 19 H. 6. 75, per Hody. Regist. 239. (1 Sid. 83.)

"*HEIRES.*" This word *(heires)* is *nomen operativum*. To which of the donees it is limited, it createth the estate taile; but if it incline no more to the one than to the other, then both doe take, as here *Littleton* putteth the case. And therewith accordeth the case of [q] 3 *E.* 3, where it appeareth, *quòd Robertus de S. dedit Johanni de Riparijs et Matildæ uxori ejus, et hæredibus quos idem Johannes de corpore ipsius Matildæ procrearet, &c.* and this adjudged to be an estate in especiall taile in them both, because the estate is equally tailed to the heires of the baron as to the heires of the wife. (3) If lands be given to the husband and the

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(1) In pleading seisin of such an estate in husband and wife, it shall be alledged, that they *were seised together and to the heires of the body of the wife in her right*; and not that they were seised *of the freehold or fee-tail*. Per Fitzherbert, 27 *H.* 8. 21. b.—[Note 149.]

(2) *And they have in such case the same estate, as where lands were given to them, and the heirs of their two bodies begotten.* L. and M.

(3) Vid. *Hob. case* 113, *page* 84. *Gift to husband and wife for their lives, and after their decease to the heirs of the body of the husband* procread' super corpus *of the wife, is tail only in the husband, and the wife hath only for life; and it is the same with* hæredibus *of the husband* de corpore *of the husband on the wife* procreand'. Skete and Oxenbridge. *So Tr.* 6 *Jac. B. R. Repps and Bonham. Land limited to husband and wife for their lives, and after their decease* hæredibus *of the body of the wife by the husband to be begotten; it is tail only in the wife. But it was agreed, that if it had been to the heirs which the husband should beget on the body of the wife, or to the heirs of the body of the wife and of the body of the husband to be begotten, it had been tail in both.*—8 *R.* 2. tail. 32. *Gift to the husband and wife and to the heirs of their bodies issuing, and if the wife* obierit sine hæredibus, *yet tail in both.* 12 *E.* 3. Variance 77. 9 *E.* 3. 64. ibid. 93. *Land given to husband and wife and to the heirs of the body of the husband, and if husband and wife* obierint sine hæredibus inter eos procreatis, *remainder over; yet it is tail general in the husband only.*—*Land given to the husband and wife and to the heirs of the husband of the body of his wife to be begotten; it is only tail in the husband.* Hic *sect.* 29. *Yet if gift be to the husband and wife and to the heirs of the body of the wife by the husband to be begotten, the tail is only in the wife.* His heirs *appropriate in the first case,* of the body *in the second case.*—Hal. MSS. But where the gift is to the wife *only*, and to the heirs of the body of the husband, then the tail is not in *either*, of which lord Hale gives the following case as an instance.—Nota *P.* 1651. *Sir Leventhorpe Franck's case. Land given to the wife for life, remainder to the heirs of the body of the husband on the body of the wife to be begotten.*

the wife, and to the heires of the body of the survivour, the gift is good, and the survivour shall have an estate in taile generall, but the estate taile vesteth not till there be a survivour. And hereby it appeareth [r] that a gift made to a man and to *the* heires of his body, is as good as to *his* heires of his body.

[r] 20 E. 3. Briefe 377.

[26. b.]

☞ Sect. 29.

ALSO, if land be given to a man and to his heires, which he shall beget on the body of his wife, in this case the husband hath an estate in speciall taile, and the wife hath nothing.

THIS is evident by that which hath been said, and needeth no explanation. But it hath beene said, [s] that if a man give land to another and to his heires of the body of such a woman lawfully begotten, that this is no estate taile for the uncertainty by whom the heires shall be begotten, for that the brother of the donee or other cousin may have issue by the woman, which may be heire to the donee, and estates in taile must be certaine. Therefore our author to make it plaine in all his cases added to these words (his heires) which he shall ingender. But that opinion is, since our author wrote, over-ruled, and that estate adjudged to be an estate taile, and begotten shall be necessarily intended begotten by the donee (1). †

20 H. 6. 36.

[s] 1 Co. fol. 140, b. Chudleigh's case adjudge. (7 Co. 41.)

† *This reference seems misplaced, as the note appears to relate to the concluding sentence in the commentary on sect.* 28.

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begotten. Ruled, that it is not tail executed omnino *in the wife, but a contingent remainder in the heir of the husband's body, it being limited to the heirs of the husband's body; and that as the wife died in the life of her husband, the remainder was void.* Hal. MSS.—The same case is reported by the name of Gossage and Tayler in Styl. 325, but there the remainder is differently expressed; for it is not to the heirs of the bodies of both in *direct* terms, but it is *to the use of the heirs to be begotten upon the body of Susanna by Leventhorpe her husband;* which most probably were the words of the remainder; for Glyn's argument in favour of the wife's having an estate tail appears to have been founded on the remainder's not pointing *expressly* to the heirs of *either*. —After sir Leventhorpe Franck's case, lord Hale puts a *quære*, and then adds —V. 3. E. 3. Formedon 8. *Land given to I. S.* et uxori suæ quam postea desponsaverit et hæredibus de corporibus eorum; *the wife takes nothing, because not known at the time; but it is a tail in the husband. Yet* nota, hæredibus de corporibus; *if the wife had taken an estate, it had been a tail in both.* Hal. MSS. According to this case the tail is in the husband, though the wife takes no estate and the tail is expressly to the heirs of the bodies of both. But this is more than was contended for by the counsel for the wife's estate tail in *Gossage* and *Tayler*, who admitted the contrary to have been settled by the case in Dy. 99. pl. 64, and by *Lane* and *Pannell*, which is in 1 Ro. Rep. 238. 317, and 438. See also contra post. Sect. 352, and the case of Progmorton on the demise of Robinson against Wharrey in Wils. vol. 2, page 125, and 144, where on a surrender of copyhold lands to *A.* whom the surrenderor intended to marry, and to the heirs of their two bodies, it was adjudged, that the wife took for life with a contingent remainder to the heirs of the bodies of her and her husband.—[Note 150.]

(1) *So gift to A. and* the *heirs* which her husband shall beget of her body *is tail in the wife; and yet it is not said* her *heirs nor heirs of* her *body.* 41 *E.* 3. 24. Hal. MSS.—[Note 151.]

Sect. 30.

ALSO, if a man hath issue a sonne and dyeth, and land is given to the sonne, and to the heires of the body of his father begotten, this is a good entaile, and yet the father was dead at the time of the gift. And there be many other estates in the taile, by the equity of the said statute, which be not here specified.

(Ante 20, b.)

"*IF a man hath issue a sonne and dyeth, &c.*" *John de Mandevile* by his wife *Roberge* had issue *Robert* and *Mawde*. *Michael de Morevill* gave certaine lands to *Roberge* and to the heires of *John Mandeville* her late husband on her body begotten, and it was adjudged that *Roberge* had an estate but for life, and the fee taile vested in *Robert* (heires of the body of his father being a good name of purchase), and that when he dyed without issue, *Mawde* the daughter was tenant in taile as heire of the body of her father, *per formam doni* (2), and the formedon which she brought supposed, *quòd post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis de præfatâ Robergiâ per præfatum Johannem procreat' præfat' Matildæ filiæ prædict' Johannis de præfatâ Robergiâ per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict'*. And yet in truth the land did not descend unto her from *Robert* (3), but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit *Robert* being heire took an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heire of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing but in expectancy, when she became heire *per formam doni*. But where a man by deede gave lands to *Emme* late wife of *John Master, habendum et tenendum prædict' Emme et hæredibus Johannis Master de corpore ejusdem Emme procreat'*; in that case the sonne and heire of *John Master* begotten on the body of *Emme* took no estate with *Emme* in the lands, because he was named after the *habendum* (4).

17 E. 2, Taile 23. 2 E. 3. 1. tit. Taile 7. 4 and 5 Ph. & Mar. Dier 156. 12 H. 4. 1. 15 H. 7. 10. (F. N. B. 213. E. 2. Leon. 25. Co. Entr. 254.)

(Post. 220.)

5 H. 4. 3, a.

(2 Ro. Abr. 67, 68.)

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(2) Nota, *in Littleton's case the son takes by purchase, and in Mandevile's case he takes by purchase jointly with the mother. But if the gift had been to Roberge and to the heirs of her body by the husband begotten, or to the heirs of her body and of the body of the husband begotten, it seems tail only in the wife.* Quære, *and* vid. 12 *H.* 4. 102, *by Thirninge, Litt. sect.* 352, *and* 1 *Rep. Shellie's case*, 104. Hal. MSS.—[Note 152.]

(3) *And therefore though Maud had been of the half blood, she should have taken.* Hic *Hodgkinson's case cited fol.* 14. *sect.* 6. *M.* 30, 31. *Eliz. B. R. Morris and Maule W.* Vid. *H.* 31, *W. n.* 23. Hal. MSS.—See ante fol. 14. a. n. 6.—[Note 153.]

(4) *Where one named after the* habendum *shall take.*—*H.* 13 Jac. *Brookes and Brookes. In customary grant by copy, one not named in the premises, being named in the* habendum, *may take a present estate.* Venit. L. S. et cepit de domino, habendum *to him and his wife is good. In frank-marriage a wife shall take*

If a man hath issue two daughters, and dieth seised of two acres of land in fee simple, and the one coparcener giveth her part to her sister, and to the heires of the body of her father, in this case the donee hath an estate taile in the moity of the donor's part, for the donee is not the entire heire, but the donor is heire with the donee, and she cannot give to the heires of her owne body, and the donee hath the other moity of her sister's part for life. If a man hath issue a sonne and a daughter, and dieth, and land is given to the daughter, and to the heires females [27. a.] ☞ of the body of the father, she taketh but an estate for life; because she is not heire female to take by purchase, as before hath been said. (Ante 24. b, 25. a.)

"*And to the heires of the body of his father.*" These words *(the heires)* are observable; for if they were *(his heires)* it cleerly altereth the case. And therefore, if lands be given to the sonne and to his heires of the body of his father, the sonne cannot take as heire of the body of his father, because the grant is to him and to his heires, &c. and consequently he hath a fee simple (1). But if

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take, though named only in the habendum. Hic *sect.* 17. 4 *E.* 3, 4. 5 *E.* 3. 17. Brief 703. —*So it seems in render by fine to B.* habendum *to B. and C. his wife.* 8 *E.* 3, 31. 24 *E.* 3. 58.—*So by a deed by way of remainder, a stranger to the deed, though not named in the premises, shall take.* Hic *fol.* 183, *sect.* 283. 8 *E.* 3. 50. *But otherwise regularly one shall not take a present interest jointly with another, unless he be party to the deed and named in the premises.* 8 *B.* 2. Feofments, hic fol. 378, *sect.* 721. 3 *H.* 6. 18. 27. 16 *E.* 2. Ass. 371. *Trin.* 16 Jac. rot. 1089. *Greenwood and Tyler. Hob.* 314. *But if by deed indented or poll A. grants the manor of S.* habendum *to B.* et hæredibus, *it is good though he was not named in the premises.* Hal. MSS.—See the case of Brookes and Brookes cited by lord Hale in Cro. Jam. 434, and 2 Ro. Abr. 66, 67, and Vin. Abr. *Grant*, K. a, in which two last books there are many other cases relative to the same subject. See further ante 7. a, where lord Coke writes, that if A. gives land to hold to B. and his heirs it is good, though he is not named in the *premises;* to which lord Hale adds—*But gift in the* premises *to A.* habendum *to A. and B. is void as to B. M.* 25 *Eliz. Ow. Vid. ante* 6. *a. Plowd. Comment.* 156. *Throgmorton's case.* Hal. MSS. See also ante where lord Coke describes the office of the *habendum*, on which lord Hale gives the following annotation—*It is not necessary to repeat the thing granted, it being sufficient that it is named in the* premises. *H.* 44 *Eliz. B. R. Hill and Giles adjudged. One not named in the* premises *shall not take by the* habendum, *unless,* First, *in case of frank-marriage, hic sect.* 17. Secondly, *in case of grant by copy. T.* 15 *Jac. B. R. Brooke's case. Cro. Jam.* 434. Thirdly, *in case of a remainder. Lease to husband and wife,* habendum *to the husband for* 10 *years; the wife takes nothing. T.* 31 *El. Mo. So lease of the site of a rectory and all tithes appertaining to it* habendum *the site* cum pertin' *for* 20 *years, the tithes pass only at will. H.* 28 *El. Mo.* 222. *Carye's case. Grant to A. and B.* habendum *to A. for years, remainder to B. for years, is good; but lease of two acres to A. and B.* habendum *one acre to A. for years, the other to B. for years, is bad. T.* 4 *Eliz.* Vid. *Hob.* 172. Hal. MSS.—See *contra* to this last case, Mo. 26, by *Brown arguendo.* For other instances of differences between the *premises* and *habendum*, particularly where the former has been *joint* and the latter *several*, see Mo. 43. 247, 880.—[Note 154.]

(1) *Yet gift to A. and* his *heirs of the body of B. his wife, who is dead, is tail.* 12 *H.* 4. 1.. Rationem diversitatis quære, *for the second son is his heir of the body of the father.* Hal. MSS.—[Note 155.]

if there be grandfather, father and sonne, and the father dieth, and lands be given to the sonne, and to the heires of the body of the grandfather, this is a good estate taile in the sonne; so as *Littleton* did put his case of the father but for an example (2).

(Ante 20. b. Post. 220. a.)

"*And there be many other estates in the taile, &c.*" This needeth no explanation.

Sect. 31.

BUT if a man give lands or tenements to another, to have and to hold to him and to his heires males, or to his heires females, he, to whom such a gift is made, hath a fee simple, because it is not limited by the gift, of what bodie the issue male or female shall be, and so it cannot in any wise be taken by the equitie of the said statute, and therefore he hath a fee simple.

"*LANDS or tenements.*" This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee simple in his armories or armes, yet is the same descendible to the heires males lineall or collaterall. For albeit a female be heire at the common law, yet the shield, armories and armes descend unto them that are able to beare them (farre exceeding the nature of Gavelkind, but with several differences). And all the females of that family in respect that they be of the same blood, may in a losenge or under a curtaine manifest of what family they be by expressing the armories and armes belonging to that family, and the husbands of them may impale them or quarter them with their owne, as the case shall require. And for distinction and better explanation hereof: If the king by his letters patents giveth lands or tenements to a man, and to his heires males, the grant is void, for that the king is deceived in his grant, in as much as there can be no such inheritance of lands or tenements as the king intended to grant. But if the king for reward of service granteth armories or armes to a man and to his heires males without saying (of the body), this is good, and, as hath been said, they shall descend accordingly (3).

(Ante 18. b. Post. 68. b.)

18 H. 8. tit. Patents. Br. 104. (1 Co. 43. b. 46. b. Mo. 424. Cro. Eliz. 478.)

27 H. 8. 27.

If a man by his last will devise lands or tenements to a man and to his heires males, this by construction of law is an estate taile, the law supplying these words (of his bodie) (4). *Vide* the Prince's [t] case, where it appeareth that an act of parliament may limit an inheritance of lands or tenements, otherwise than common law would doe, and create a new estate of inheritance, and many authorities in law there cited worthy of note and observation. *Rot. Parliam.*

[t] 8 Co. 1. The Prince's case. 21 E. 3. 4. 22 E. 3. 3. 24 E. 3. 53. 9 H. 6. 25. 9 E. 4. 15. 1 Marie Dier 94. (77 Co. 41.)

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(2) Vid. *Dy.* 24. 247. 274. 157. 394, *for the form of the writ.* Hal. MSS.

(3) See further as to the descent of *Arms*, p. 140, b. See also on the subject of *Arms* in general, Dugd. Ant. Usage in bearing of Arms, and several pieces in Hearn. Antiq. Disc. 2d ed. vol. 1.

(4) *Dy.* 116. Hal. MSS.—See further lord Ossulstone's case, 3 Salk. 336, and 11 Mod. 189. See S. C. cited 2 P. Wms. 2, and in Vin. Abr. *Devise* U. b. pl. 2, in marg.

Parliam. anno 1 *E.* 4, *nu.* 26. (5) †. The [*u*] duchie of *Lancaster* is entailed to king *Edward* the fourth and his heires kings of *England*. And king *Henry* the sixth did by his letters patents grant *Johanni filio Johannis Talbot, quòd ipse et hæredes sui domini manerij de Kingston Lisle in comitatu Berk. ex nunc domini et barones de Lisle nobiles et proceres regni habeantur, teneantur, et reputentur, &c.* By this he had a fee simple qualified in the dignity (6).

[u] Per literas patentes authoritate parliamenti.

2 *H.* 5. fol. 1. A grant was made to a man, and to his heires tenants of the manor of *Dale* (7). A man seised of lands in Gavelind gives or devises the same to a man and to his eldest heires. He cannot hereby alter the customary inheritance, but as in the case of our ☞ author, *ut res magis valeat*, the law rejecteth (males), so in this case the law rejecteth this adjective (eldest). And so it is if lands be given to a man, and to the eldest heires females of his body, yet all the daughters shall inherit, as it hath been resolved.

(3 Co. 20, 21.)

[27. b.]

Mich. 26, & 27. Eliz. in Com. Banco. Leonard Lovelace's case.

"*And so it cannot in any wise be taken by the equitie of the said statute, &c.*" For it is a certaine rule in law, that in every estate in taile within the said statute, it must be limited either by expresse words, or by words equipollent, of what body the heire inheritable shall issue. And it was [*x*] adjudged in parliament, that where lands were given to a man, and to his heires males, that this was a fee simple, and that as well the heires females as heires males should inherit, for the grant of a subject shall be taken most strongly against himselfe.

[x] 18 Ass. p. 5. 18 E. 3. 46. 6. (Not so in the King's case.) 9 H. 6. 23. 25. 8 Co. fol. 1, the Prince's case. Ancient tenures, fol. 3.

"*And therefore he hath a fee simple.*" *Littleton*'s reason being shortly collected is this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee taile; but where lands be given to a man and his heires males, he hath no estate taile, and therefore he hath a fee simple.

What actions tenant in taile may have and cannot have, *vide* Sect. 595. What great alterations have been made since *Littleton* wrote concerning not only leases to be made by tenant in taile, but barres also of the estate taile itselfe by force of certaine acts of parliament made since *Littleton*'s time, you shall read Sect. 56, and 708 (1).

† *Reference* (5) *appears to be misplaced, and, it seems, should come after the word* observation, *at the end of the preceding sentence.*

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(5) In the case on the title to the earldom of Oxford decided in parliament 1 Cha. 1, the judges held, that a limitation of the earldom to Aubrey de Vere and his heirs males, being by act of parliament, was sufficient to raise a fee simple descendible to males only. See W. Jo. 100.—[Note 156.]

(6) Lord Hale adds the following instances of *special* limitations. *King Henry the Third* dedit manerium de Penreth et Sourby Alexandro regi Scotiæ et hæredibus suis regibus Scotiæ; *and Alexander having daughters, of which one was married to the earl of Hunt. died, not having any heir king of Scotland,* et eâ de causâ *King* E. 1. *recovered seisin, and the coheirs of Alexander were excluded. Lib. parl. E.* 1. 134. 308. *The hospital of Saint Katharine was founded by queen Eleanor, wife of Hen.* 3, *reserving the patronage* sibi et reginis Angliæ pro tempore existentibus, et eo titulo regina Philippa uxor E. 3. habet patronatum. *Claus.* 7. *E.* 3. *parte* 2. *m.* 2. Hal. MSS.—[Note 157.]

(7) See further as to a qualified fee ante 1. b, and the books cited in n. 5, there.

(1) By what acts tenant in tail may prejudice his issue or those in remainder or reversion without fine or recovery, and where his acts shall not affect them, see Vin. Ab. *Estate* F. a, to I. a, and *Tayle* D. E. F.

Chap. 3. Sect. 32.

Tenant in Taile after Possibility of Issue extinct.

TENANT in fee taile after possibility of issue extinct is, where tenements are given to a man and to his wife in especiall taile, if one of them die without issue, the survivor is tenant in taile after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in taile after possibilitie of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the taile, then the surviving party of the donées is tenant in taile after possibilitie of issue extinct.

(Dr. and Stud. b. 2, c. 1.)

LITTLETON having spoken of estates of inheritance, viz. fee simple and fee taile, now he treateth of tenants of freehold *tantùm*, that is, for terme of life, and therein first of tenant in taile after possibility of issue extinct; and he giveth unto him the first place, because this tenant hath eight qualities and priviledges which tenant in taile himselfe hath, and which lessee for life hath not [*a*]. As first, he is dispunishable for waste (2). Secondly, he shall not be compelled to attorne. Thirdly, he shall not have ayde of him in the reversion. Fourthly, upon his alienation, no writ of entrie *in consimili casû* lyeth. Fifthly, after his death no writ of intrusion doth lie. Sixtly, he may joine the mise in a writ of right, in a speciall manner. Seventhly, in a *præcipe* brought by him he shall not name himselfe tenant for life. Eightly, in a *præcipe* brought against him he shall not be named barely tenant for life. And yet he hath four other qualities, which are not agreeable to an ☞ estate in taile, but to a bare lessee for life. [*b*] (1) First, if he maketh a feoffment in fee, this is a forfeiture of his estate (2). Secondly, if an estate in fee, or in fee taile, in reversion,

(4 Co. 63. 1 Ro. Abr. 896.)

[*a*] Temps E. 1, wast. 125. 39 E. 3. 16. 31 E. 3. aid 35. 42 E. 3. 22. 43 E. 3. 1. 46 E. 3. 22. 28 E. 3. 96. 46 E. 3. 13. 27. 2 H. 4. 17. 7 H. 4. 10. 11 H. 4. 15. 21 H. 6. 56. 10 H. 6. 1. 26 H. 6, aid 77. 3 E. 4. 11. 13 E. 2. Entre Conge 56. Fitz. N. B. 203. Lewes Bowles' case, 11 Co. fol. 8.

(Cro. Eliz. 671.)

[28. a.]

[*b*] 13 E. Entre Cong. 56. 45 E. 3. 22. 28 E. 3. 96. 27 Ass. p. 60. F. N. B. 159. 32 E. 3. tit. ag. 55. 55 E. 3. 4. 9 E. 4. 17. 2 R. 2, resceit 147. 41 E. 3. 12. 20 E. 3. resceit. 38 E. 3. 33. Lewes Bowles' case, ubi supra.

or

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(2) See acc. 2 Inst. 302. But yet he cannot have action of waste against another, for he cannot count *ad exhæredationem;* and it is said, that tenant in tail loses his action of waste, if he becomes tenant in tail *after possibility of issue extinct* pending the writ. See Bro. Abr. *Waste*, pl. 14. 69, 60. 2 Ro. Abr. 825. pl. 5. Mo. 18, and post. 53. b. Note also that it is said, that though such tenant is not punishable for waste, yet if he cuts down trees, they are not his property. 4 Co. 63. As to this difference between being dispunishable for waste in felling trees and having the property in them, see 1 P. Wms. 528. See also 2 P. Wms. 241, where it is said by the court, that if tenant for life cuts down timber, it belongs to those who at the time of its being severed were seised of the first estate of inheritance.—[Note 158.]

(1) 43 *Ass.* 24. Hal. MSS.

(2) *So if he mispleads*, 39 E. 3. 16. Hal. MSS.

or remainder, descend or come to this tenant, his estate is drowned, and the fee or fee taile executed. Thirdly, he in the reversion or remainder shall be received upon his default, as well as upon bare tenant for life (3). Fourthly, an exchange between a bare tenant for life and him is good, for their estates in respect of their quantity are equal; so as the difference standeth in the quality, and not in the quantity of the estate. And as an estate taile was originally carved out of a fee simple, so is the estate of this tenant out of an estate in especiall taile. And he is called tenant in taile after possibilitie of issue extinct, because by no possibility he can have any issue inheritable to the same estate taile. But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them be an hundred yeeres old, and have no issue, yet do they continue tenant in taile, for that the law seeth no impossibilitie of having children. But when a man and his wife be tenant in especiall taile, and the wife dieth without issue, there the law seeth an apparent impossibility that any issue that the husband can have by any other wife should inherit this estate. And let this tenant keep his estate, for he hath these priviledges in respect of the privity of his estate, and of the inheritance that was once in him. [c] For in the case of *Evens* (4), *Mich.* 28 & 29 *Eliz.* it was adjudged, that where tenant in taile after possibility of issue extinct granted over his estate to another, that his grantee was compelled to attorne in a *quid juris clamat* (5), as a bare tenant for life, and so be named in the writ; for by the assignement the privity of the estate being altered, the priviledge was gone; and this judgement was affirmed in a writ of error, and herewith agreeth 27 *H.* 6, tit. Aid. *Statham* 29 *E.* 3, 1. b. (6).

[c] 11 Co. fol. 83. Lewes Bowles' case. (Post. 316.) 27 H. 6, tit. aid. Statham. 29 E. 3. 1. b.

27 H. 6, tit. aid. 29 E. 3. 1. b.

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ALSO, if tenements be given to a man and to his heires which he shall beget on the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especiall taile. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in taile after possibility of issue extinct.

"*IF the wife die without issue.*" So as the estate of this tenancy must be altered by the act of God, and that by dying without issue; for if a feoffment in fee be made to the use of

Lewes Bowles' case, 11 Co. fol. 80. (1 Ro. Rep. 178. 2 Saund. 383. 387. Cro. Eliz. 315. 1 Co. 76. 2 Co. 61.)

(3) 28 E. 3. 96. Contra *as to receipt.* Hal. MSS.

(4) *M.* 26, 27 *Eliz. B. R. Leon. T.* 29 *Eliz. Clench.* 88. *Evans and Aprichard.* Hal. MSS. See Aprice's case, 2 Leon. 40. 3 Leon. 241, which seems to be the case referred to by lord Coke and lord Hale. The anonymous case in 1 Leon. 290, and 3 Leon. 121, seems also to be the same case.

(5) 28 *E.* 3. 96. *Grantee has the privilege.* Hal. MSS. But see the reasons for the judgment cited by lord Coke in the books cited in note 4.

(6) Quære *if punishable for waste.* Hal. MSS. See 2 Inst. 302.

of a man and his wife for tearme of their lives, and after to the use of their next issue male to be begotten in taile, and after to the use of the husband and wife, and of the heires of their two bodies begotten, they having no issue male at that time; in this case the husband and wife are tenants in speciall taile executed (7), and after they have issue a sonne, in this case they are become tenants for life, the remainder to the sonne in taile, the remainder to them in speciall taile (8); for albeit their estate taile is turned to an estate for life, yet they have but a bare estate for life; but if the issue die, and the husband die having no other issue, and then the sonne die without issue, the wife shall have the priviledges belonging to a tenant in taile after possibility of issue extinct, as it appeareth in *Lewes Bowles'* case *ubi supra*, where it is said, that the estate of this tenant must be created by the act of God, and not by limitation of the party, *ex dispositione legis*, and not *ex provisione hominis* [*d*]. If land be given to a man and to his wife, and to the heires of their two bodies, and after they are divorced *causâ præcontractûs*, or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life; and albeit they had once an inheritance in them,

[*d*] 7 H. 4. 16. 8 E. 1. Ass. 415. 12 Ass. 22. 19 Ass. p. 2, 13 E. 3. Ass. 91, in fine. (9 Co. 140, 141. 7 Co. 42. b. Kenne's case, and 4 Co. 29.)

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(7) Cordall's case, Cro. Eliz. 315, is to the contrary; for there land was devised to *A.* for life, remainder to his first and other sons in tail male, remainder to the heirs of *A's.* body, and according to Croke, who mentions the case as reported to him by lord Coke, it was resolved, that *A's.* estate tail was not executed for the possibility of the mean estate's interposing, but was so disjoined during *A's.* life, that his wife could not be endowed. But see Cas. B. R. temp. Hardw. 17, where lord Hardwicke says, that Cordall's case has been several times denied to be law.—[Note 159.]

(8) Sic nota *remainder supported, without particular estate, by the possibility that issue may be born. But if such tenant levies a fine, now this remainder is destroyed, because the estates are confounded.* Hal. MSS.—Here it is proper to add, that there is a difference between subjoining the inheritance to the particular estate by the *same* conveyance as limits the intermediate contingent remainder, and an accession of one to the other by a *distinct* and *subsequent* act or conveyance; for in the latter case the contingent remainder is destroyed, though not in the former. See acc. Purefoy and Rogers, 2 Saund. 380. It has even been adjudged, that in the latter case the *descent* of the inheritance on the person having the particular estate will destroy the contingent remainder, where the descent has been *subsequent* to the commencement of the particular estate. See *Kent* and *Harpool*, 1 Ventr. 306. T. Jo. 76. *Hooker* and *Hooker* Cas. in B. R. temp. Hardw. 13. But a descent of the fee on tenant for life will not hurt the contingent remainder, where the particular estate and the descent take place at the *same time*, and are derived from the *same person;* as where land is devised to *A.* for life, remainder over on a contingency, and at the devisor's death the reversion descends upon *A.* as his heir. See acc. Archer's case, 1 Co 96. Plunkett and Holmes, 1 Lev. 111, and Boothby and Vernon, 9 Mod. 147. The case of Wood and Ingersole, Cro. Jam. 260, seems *contra;* but see the observation on the last case in T. Jo. 79, and Pollexf. 481. It would be a great omission not to apprize the student, that the subject of this note is fully gone into by mr. Fearne in his Essay on Contingent Remainders. See page 111 to 118 of the second edition, where the author most learnedly and ingeniously states the several distinctions, explains the reasons on which they depend, and endeavours to reconcile all the cases on this nice subject.—[Note 160.]

[28. b.] them, yet for that the estate is altered by their owne act, and not by the act of God, viz. by ☞ the death of either party without issue, they are not tenants in taile after possibility of issue extinct (1). Lands are given to the husband and wife, and to the heires of the body of the husband, the remainder to the husband and wife, and to the heires of their two bodies begotten; the husband dies without issue; the wife shall not be tenant in taile after possibility, for the remainder in speciall taile was utterly void, for that it could never take effect; for so long as the husband should have issue, it should inherit by force of the generall taile, and if the husband die without issue, then the speciall estate taile cannot take effect, in as much as the issue, which should inherit the especiall, must be begotten by the husband, and so the generall, which is larger and greater, hath frustrated the especiall which is lesser. And the wife in that case shall be punished for waste. (1 Ro. Abr. 841.)

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AND note, that none can be tenant in taile after possibility of issue extinct, but one of the donees, or the donee in especial taile. For the donee in generall taile cannot be said to be tenant in taile after possibility of issue extinct; because alwaies during his life, he may by possibility have issue which may inherit by force of the same entaile. And so in the same manner the issue, which is heir to the donees in especiall taile, cannot be tenant in taile after possibility of issue extinct, for the reason abovesaid.

* *And*

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(1) *Husband and wife tenants in special tail; the husband was attainted of treason, or levies fine with proclamations; the husband dies having issue by the wife: the issue cannot inherit, and yet to many purposes the wife surviving is tenant in tail* after possibility, *for if she makes lease for* 21 *years according to the statute, it shall bind the conusee, or if it is for three lives, it shall not be a forfeiture. H.* 22 Jac. Rot. *Crocker and Kelsey. Hob. Rep. Melton's case. Vid.* 9 *Rep. Beaumont's case. It seems, she cannot suffer recovery after.* Quære, Vid. *this case of Beaumont afterwards debated. H.* 13 *Cha. B. R. in Baker and Willis, Cro. Cha.* 476. The case of Crocker and Kelsey is in W. Jo. 60. Hutt. 84. Cro. Jam. 688. Bridgm. 27. 2 Ro. Rep. 490. 498. 1 Ro. Abr. 843, pl. 3, and O. Bendl. 139. 143. Beaumont's case is in 9 Co. 138. b, and Melton's case is in Hob. 254. Note, that in the case of Crocker and Kelsey, the question was on the operation of a lease for 21 years *not* warranted by the 32 H. 8, the ancient rent not having been reserved; but the issue in tail having levied a fine during the wife's life, it was adjudged that the lease was good; but it seems to have been agreed, that the wife, notwithstanding the husband's death, was tenant in tail so as to be capable of making leases within the statute. Indeed this *latter* point had been adjudged in a former case, which is in Godb. 102. See too 4 Leon. 57. As to the *former* point, besides the books already cited, see 2 Sid. 62.—[Note 161.]

* *And note, that tenant in taile after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him,* 10 *H.* 6. 1. *But he in the reversion may enter if he alien in fee,* 45 *E.* 3. 22.

IF lands be given to a man with a woman in frankmarriage, albeit the woman (which was the cause of the gift) dieth without issue, yet the husband shall be tenant in tayle *after possibility, &c.* for that he and his wife were donees in especiall taile, and so within the words of *Littleton*. The residue of this Section is evident.

(Dr. and Stud. 61. 11 Co. 80.) * This, and that which follows, is not in the first (2) edition (which I have). And therefore (that I may speake it once for all), it was wrong to the authour to adde any thing (especially in one context) to his worke.

☞ CHAP. 4. *Curtesie of England.* Sect. 35. [29. a.]

TENANT by the curtesie of England is, where a man taketh a wife seised in fee simple or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife male or female borne alive (oyes ou vife)(1), *albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.*

And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard crie; for by the crie it is proved, that the childe was born alive. Therefore Quære (2).

"*TAKETH a wife seised.*" And first of what seisin a man shall be tenant by the curtesie. [*e*] There is in law a twofold seisin, viz. a seisin in deed, and a seisin in law, whereof more shall be said Sect. 468*, and 681. And here *Littleton* intendeth a seisin in deed, if it may be attained unto. [*f*] As if a man dieth seised of lands in fee simple or fee taile generall, and these lands descend to his daughter, and she taketh a husband and hath issue, and dyeth before any entry, the husband shall not be tenant by the curtesie, and yet in this case she had a seisin in law; but if she or her husband had during her life entred, he should have been tenant by the curtesie (3). [*g*] A man seised of an ad-

[*e*] F. N. B. 194. (Post. 153.)

[*f*] 1 Mar. Dyer 55.

(Post. 40.)

[*g*] 7 E. 3. 66. 3 H. 7. 5. (6 Co. 68. a. 1 Co. 97. b. 8 Co. 34. Ante 15. b.)

* *It should be* Sect. 448.

vowson

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(2) By the *first* edition, lord Coke means that printed at *Rohan*, as appears by the preface to this his Commentary on Littleton. But the edition of *Lettou* and *Machlinia*, which was really the first, is also without the addition here mentioned. It appears to have been first introduced into the edition by *Redman*.—See further as to the subject of *tenant in tail after possibility*, Vin. Abr. *Tayle* I.

(1) Instead of *oyes ou vife*, the words are *neez vife* in L. and M. This latter reading is conformable to lord Coke's translation.

(2) This *quære* is in L. and M, but not in Roh.

(3) But entry is not always necessary to give seisin *in deed;* for if the land is in lease for *years*, curtesy may be without entry, or even receipt of rent, the possession

vowson (4) or rent in fee hath issue a daughter, who is married, and hath issue, and dyeth seised, the wife, before the rent became due or the church became voyd, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attaine to any other seisin. *Et impotentia excusat legem*(5). But a man shall not be tenant by the curtesie of a bare right, title, use (6), or of a reversion (7) or remainder expectant (8 Co. 96.)

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possession of the lessee for years being deemed the possession of the husband and wife. See the case of De Grey and Richardson, 3 Atk. 469. Lord Coke's doctrine about seisin for a *possessio fratris* is the same. See ante 15. a. In n. 4, there the case of Newman and Newman is cited, from Wils. vol. 2. p. 516, but no hint being given of the point adjudged, it may be proper to add here, that in that case the court construed the possession of a mother to be a possession for an infant her son as his guardian by law, she being next of blood to whom the inheritance could not descend, and held it a sufficient seisin to exclude the daughters by a former *venter*.—[Note 162.]

(4) *Whether it be an advowson in gross or appendant. A. seised of a manor, to which an advowson is appendant, dies, having issue a daughter, who takes husband and dies before entry into the manor. It seems, that the husband shall not be tenant by the curtesy of the advowson, nor of the rents incident to the manor, because he had not seisin of the principal.* Hal. MSS. [Note 163.]

(5) According to Perkins, the husband shall have curtesy in an advowson, though he suffers the ordinary to present by lapse on an avoidance in his wife's life-time. Perk. Sect. 468. But such a case is not within lord Coke's reason for allowing curtesy of an advowson without seisin *in deed*: nor do I find any authority to support the doctrine, besides Mr. Perkins's name. *That* indeed, on account of the learning and ingenuity displayed in his *Profitable Book* on the laws of England, ought *in general* to have considerable weight; though one, who wrote soon after Mr. Perkins, describes him to be *a man that writeth of diverse titles of our law rather subtilly than soundly.* Fulb. Paral. 40. a. See also a more particular character of Mr. Perkins in Fulb. Prepar. 28. a.—[Note 164.]

(6) Here an use *before* or *not executed* by the 27 H. 8. must be meant; for an use within that statute is a legal estate. See acc. 2 And. 75. 147, and by lord Coke himself in Cro. Jam. 201. See also 1 New Abridgm. 660. But though in strictness of law there cannot be curtesy of *trusts*, yet since lord Coke's time our courts of equity have allowed curtesy both of trusts and of other interests, which, though in *law* mere rights and *titles*, are deemed *estates* in *equity*, and made to conform to many of the rules and consequences incident to estates in *law*. See 1 Atk. 603, the case of Cashborn and Inglish, in which lord ch. Hardwicke decreed curtesy of an *equity of redemption*. See S. C. more fully reported in Vin. Abr. *Curtesy* E. pl. 23. However, a *wife in point of benefit* may have a trust of inheritance, which may be so declared as to prevent curtesy, as by directing the profits during the wife's life to be paid for her *separate* use; for in such a case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 Atk. 715. It is also proper to remark, that though *curtesy* out of a *trust* is allowed, yet *dower* has been refused; a partiality not easy to be reconciled with reason, however settled by the current of authorities. But as to this see post. 31. b. [Note 165.]

(7) Mr. Perkins makes a *quære*, whether, if a woman seised in fee makes lease for *life*, reserving rent to her and her heirs, the husband shall not have curtesy in the rent during the lease; but he seems to admit, that the husband shall not have curtesy of the land itself, unless the lease determines before the wife's death. Perk. Sect. 467. See post. 32. a, where in a like case lord Coke

expectant upon any estate of freehold, unlesse the particular estate be determined or ended during the coverture.

[h] Process. Fact. ad. Coronationem R. 2. Anno regni sui primo Rot. claus. m. 45.

At the coronation of king *R.* 2, saith the record, [*h*] *Johannes rex Castiliæ et Legionis, Dux Lancastriæ, coram dicto domino rege et consilio suo comparens, clamavit ut comes Leicestriæ officium Seneschalciæ Angliæ, et ut dux Lancastriæ ad gerendum principalem gladium domini regis vocat' Curtana die coronationis ejusdem regis, et ut comes Lincoln' ad scindendum et secandum coram ipso domino rege sedente ad mensam dicto die coronationis; et quia fact' diligenti examinatione coram peritis de consilio regis de præmissis, satis constabat eidem consilio, quòd ad ipsum ducem tanquam tenentem per legem Angliæ post mortem Blanchiæ quondam uxoris suæ pertinuit officia prædict' prout superius clamabat exercere, consideratum fuit per ipsum regem et consilium suum prædictum quòd idem dux officia prædicta per se et sufficientes deputatos suos faceret, et exerceret, et feoda debita in* ☞ *hâc parte obtineret. Qui quidem dux officium Seneschalciæ prædict' personaliter adimplevit, &c.* And every man that claimed to hold by grand serjanty to do any service to the king at his coronation, exhibited his petition to the said duke as steward of *England*, who upon hearing the proofes either allowed or disallowed the same. [29. b.]

Rot. Patent. ann. 20 H. 6.

In letters patents made by king *H.* 6, to *Richard* earle of *Salisbury* you shall finde this clause, *Quod charissimus consanguineus noster Richardus, nunc comes Sarum, qui Aliciam filiam et hæredem Thomæ nuper comitis Sarum adhuc superstitem duxit in uxorem, et cum eâdem Aliciâ prolem tempore mortis prædictæ Thomæ habuit et habet superstitem de præsenti, eoque prætextû idem Richardus nunc comes Sarum nomen statum et honorem comitis Sarum, &c. habet, et pro tempore vitæ suæ de jure prætextû præmissorum habere debet* (1). The

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Coke says, that the wife shall not have dower. But if a rent is incident to a reversion expectant on an estate tail, the husband shall have curtesy of the rent till the tail determines. Post. 30. a.—[Note 166.]

(1) *So nota till issue the husband cannot use the title of his wife's dignity; but afterwards he may. So adjudged by Hen.* 8, *in the case of Wimby, who claimed the title of lord Talboys in right of his wife.* Hal. MSS.—This annotation shews, that in the opinion of lord Hale a title of honour admits of curtesy. But lord Coke, after stating *two* precedents, one of curtesy in a title of honour, and another of curtesy in an office of honour, avoids making the least inference, and professedly leaves the reader to his own judgment; from which reserve it may be conjectured that he had his doubts. In fact, the point had been several times controverted in lord Coke's time. About the year 1580 Richard Bertie claimed the barony of Willoughby in right of his lady Catherine, duchess of Suffolk, he having had issue by her. The claim was referred by queen Elizabeth to lord Burghley, and two other commissioners, as was also a claim of the same dignity by Peregrine Bertie, the son and heir of the duchess of Suffolk by Richard Bertie. At one time the precedents urged for the husband were thought to make an impression on the commissioners; but finally they made a report in favour of the son, who was accordingly admitted to the dignity in the life-time of his father. See Coll. Proceed. on Claims of Baron. 1 to 23. But notwithstanding this case, two other claims of a like kind were made within a few years after, the first about 1586 by sir Thomas Fane, in right of his wife Mary, the daughter and heir of Henry lord Bergavenny, and the second about 1604 by Sampson Lennard, in right of his wife Margaret lady Dacres. Of the event of the *former* claim, I do not find any account; but as to the *latter* it appears, that king James referred

The name of the issue which the said *Richard* earl of *Salisbury* had by the said *Alice* was *Richard*, who married with *Anne* the sister and heire of *Henry Beauchampe* earl of *Warwicke*, who was earle of *Warwicke* to him and to his heires, and duke of *Warwicke* to him and to the heires males of his body. And *Richard* the sonne having then no issue by his wife, king *H.* 6, in 27 yeare of his raigne granted to him that he should be earle of *Warwicke, licèt ipse et prædicta Anna exitum inter eos ad præsens non habent.* These and many more I have read concerning this matter, and only say to the reader, *Utere tuo judicio, nihil enim impedio.* Rot. Patent de anno 27 H. 6, m.

[*i*] If an estate of freehold in seigniories, rents, commons, or such like be suspended, a man shall not be tenant by the curtesie; but if the suspension be but for yeares, he shall be tenant by the curtesie. As if a tenant make a lease for life of the tenancie to the seignioresse, who taketh a husband, and hath issue, the wife dieth, he shall not be tenant by the curtesie (2), but if the lease had been made but for yeares he shall be tenant by the curtesie. [*i*] Vid 1 E. 3. 6. 5 E. 3. 26. (Post. 30.)

"*In fee simple or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife male or female.*" 2. Of what estate. If lands be given to a woman and to the heires males of her body, she taketh a husband, and hath issue a daughter, and dieth, he shall not be tenant by the curtesie; because the daughter by no possibilitie could inherit the mother's estate in the land; and therefore where *Littleton* saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. *Littleton* himself explaineth this by expresse words, Cap. Dower, fo. 40, Sect. 52. And therefore if a woman tenant in taile generall maketh a feoffment in fee, and taketh back an estate in fee, and take a husband and hath issue, and the wife dieth, the issue may in W. 2, ca. 1. Litt. ca. Dower, fol. 40, sect. 52. Paine's case, 8 Co. fol. 34.

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referred it to commissioners, and that lady Dacres dying before any decision, the affair was compromised in 1612 by the king's granting precedency to the husband as eldest son of lord Dacres. The letters patent giving this precedency recite, that the commissioners *had found baronies on the like right conferred on the husband in several families, and in this particular barony of Dacres three several precedents.* There are other expressions equally remarkable for a studied ambiguity, such as leave undecided whether the pretension to the wife's title was deemed a claim of *favour* or of *right* from the crown, and appear calculated to *avoid* an adjudication of the point; and in this unsettled state of things, it is not surprising, that lord Coke should be so cautious of advancing any positive doctrine on the subject. I cannot learn that there have been any claims of dignities by curtesy since lord Coke's time, and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against curtesy in titles of honour. However I have not yet discovered, whether this great question has ever formally received the judgment of the house of lords.—For the particulars of Wimby's case cited by lord Hale, see Coll. Claims of Bar. 11. 44, and 72.—[Note 167.]

(2) Lord Coke means, that the husband shall not be tenant by the curtesy of the *seigniory*, it being suspended during the *whole* time of the marriage by the lease of the *tenancy* to the wife. See further as to the effect of *suspension* on curtesy in Perk. sect. 459, 460, 461, 462.—[Note 168.]

in a *formedon* recover the land against his father, because he is to recover by force of the estate taile as heir to his mother, and is not inheritable to his father (3).

"*And hath issue.*" 3. The time of having the issue. 4. What kinde of issue. If a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enters, he [a] shall be tenant by the curtesie, albeit the issue was had before the wife was seised. And so it is albeit the issue had dyed in the life-time of her father before any descent of the land, yet shall he be tenant by the curtesie (4). If a woman [b] seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dyeth, and the childe is ripped out of her body alive, yet shall he not be tenant by the curtesie, because the childe was not borne during the marriage, nor in the life of the wife, but in the meane time her land descended, and in pleading he must allege, that he had issue during the marriage.

[a] Old Tenures 21 H. 3, tit. Dower 198.

[b] Vide Paine's case, ubi supra.

If the wife be [c] delivered of a monster, which hath not the shape of mankinde, this is no issue in the law; but although the issue hath some deformity in any part of his body, yet if he hath humane shape this sufficeth. *Hi, qui contra formam humani generis converso more procreantur, (ut si mulier monstrosum vel prodigiosum fuerit enixa) inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen superabundanter, ut si sex digitos vel nisi quatuor habuerit, benè debet inter liberos commemorari. Si inutilia natura reddidit membra, ut si curvus fuerit aut gibbosus vel membra tortuosa habuerit, non tamen est partus monstrosus. Item puerorum alii sunt masculi, alii fœminæ, alii hermaphroditæ. Hermaphrodita tam masculo quàm fœminæ comparatur secundum prævalescentiam sexûs incalescentis.*

[c] Bract. lib. 5, 437, 438. Brit. ca. 66, and ca. 83. Fleta, lib. 1, c. 5, and lib. 6, cap. 54. (Ante 3. b. 7. b. 8. a.)

If the issue be born deaf or dumbe, or both, or be born an ideot, yet it is a lawful issue to make the husband tenant by the curtesie and to inherit the land.

"*Borne alive.*" If it be borne alive [d] it is sufficient, though it be not heard cry; for peradventure it may be born dumbe. And this is resolved cleerly in Paine's case *ubi supra*. For the pleading (as hath beene said) is, that during the marriage he had issue by his wife, and upon that point the triall is to be had, and upon the evidence (5) it must be proved, that the issue was alive, for

[d] 28 H. 8. 25 Dyer. Paine's case, ubi supra.

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(3) The husband could not have curtesy in respect of the *fee*, because that was defeated by the son's recovery in the formedon; nor in respect of the *tail*, because the wife's feoffment *before* the marriage had discontinued the *tail*, and consequently there could be no seisin of it *during* the marriage. This seems to be the *rationale* of the case put by lord Coke.—[Note 169.]

(4) Yet in some cases the time of having issue is of consequence. See post 40.

(5) Vid. Pasch. 9 E. 1. rot. 4. Si habuit exitum, qui auditus fuit clamare seu vocem edere infra quatuor parietes; quia *puer* non fuit *visus* nec *auditus* clamare ab *hominibus masculis*, licet per fœminas nominatus fuit Johannes. *Therefore husband not tenant by the curtesy.* H. 5 E. 1. rot. 1. Wighorn. Hal. MSS.—I cannot guess what lord Hale's view could be in citing this record, unless it was to shew, that anciently in the case of curtesy the having *male* issue born alive could be proved by *men* only; which must be confessed to have been a most unaccountable peculiarity.—[Note 170.]

for *mortuus exitus non est exitus*, so as the crying is but a proofe that the childe was born alive, and so is motion, stirring, and the like. And it is said by an ancient author [*e*] that it was ordained in the raigne of King *H.* 1. *Que touts que* [30. a.] ☞ *survequissent lour fems dount ills usent conceive tenuissent les heritages lour fems pur lour vies.*

[*e*] Mirror, cap. 1, sect. 3.

By the custom of Gavelkind [*f*] a man may be tenant by the curtesie without having of any issue (1).

[*f*] 9 E. 3. 38. 16 E. 3, aid, 129. Stat. de Consuetudinibus Kanciæ.

"*Albeit the issue after dieth or liveth.*" And therefore [*g*] if a woman tenant in taile generall taketh a husband, and hath issue, which issue dyeth, and the wife dieth without any other issue, yet the husband shall be tenant by the curtesie, albeit the estate in taile be determined, because he was intitled to be tenant *per legem Angliæ* before the estate in taile was spent, and for that the land remaineth. But if a woman maketh a gift in taile, and reserve a rent to her and to her heires, and the donor taketh a husband and hath issue, and the donee dieth without issue, the wife dieth, the husband shall not be tenant by the curtesie of the rent, for that the rent newly reserved is by the act of God determined, and no state thereof remaineth. But [*h*] if a man be seised in fee of a rent and maketh a gift in taile generall to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesie of the rent, because the rent remaineth (2). The diversity appeareth.

[*g*] 21 H. 3, tit. Dower 198. Paine's case, ubi supra. (1 Leon. 167.)

(Post. 32. a.)

[*h*] Brooke, tit. per le Curtesie 86. 10 E. 3. 27.

"*If the wife dies, the husband shall hold the land, &c.*" Foure things doe belong to an estate of tenancy by the curtesie, viz. marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concurre together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesie. So if he hath issue which dieth before the * descent, as is aforesaid.

And albeit the state be not consummate untill the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

First, after issue had, he shall doe homage alone, and is become tenant to the lord, and the avowrie shall be made onely upon the husband in the life of the wife, as shall be said hereafter when we come to the apt place (3). Secondly, if after issue

(6 Co. 57. b. Post. 67. a. 124. b.)

* *Descent* is here inserted for *Disseisin*. See Mr. Ritso's Intr. p. 118.

the

(1) On the other hand, curtesy by the custom of Gavelkind is subject to several disadvantages; for it is only of a *moiety* of the wife's land, and it *ceases* if the husband *marries again*. See Robinson Gavelk. b. 2. c. 1, where the learned author suggests, that some have doubted, whether there is any such variance between the common law and the custom, and therefore undertakes to prove it by authorities on record.—[Note 171.]

(2) *So if it was a rent* de novo *granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy.* Hal. MSS.—[Note 172.]

(3) Hic *sect.* 90. 21 *E.* 3. 35. Hal. MSS.

[i] 34 E. 2. Cui in vita 13. 2 E. 2. Cui in vita 26. 10 E. 3. 12. Dier 21. Eliz. 363. 29 E. 3, fo. 27.

[*i*] the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heire of the wife shall not during his life recover it in *sur cui in vitâ*; for it could not be a forfeiture, for that the estate, at the time of the feoffment, was an estate of tenancy by the curtesie initiate (4) and not consummate. And it is adjudged in 29 *E.* 3, that the tenant by the curtesie cannot claime by a devise, and waive the state of his tenancy by the curtesie, because, saith the booke, the freehold commenced in him before the devise for terme of his life.

"*And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.*"

"*By the curtesie.*" In Latine *per legem Angliæ.*

"*In England onely.*" It is also used within the realme of *Scotland*, and there it is called *Curialitas Scotiæ.* And so it is in the realme of *Ireland* (5).

(8 Co. 34.)

"*And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard crie; for by the crie it is proved, that the childe was born alive.*" Our author having delivered his owne opinion before, viz. *born alive*, now he sheweth the opinions of others: for so is said in the [*k*] statute *De tenentibus per legem Angliæ:* and of that opinion is *Glanvill* [*l*] lib. 7, cap. 8. *Bracton* lib. 5, tract. 5, cap. 30. *Britton* cap. 50, fol. 132. *Fleta* lib. 6, cap. 50, &c. But the reason is against their opinion; for by the cry it is proved, &c. so as it is but an evidence to preve the life of the enfant.

[*k*] Vet. Mag. Car. part 2, fol. 70.
[*l*] Glanvill, lib. 7, cap. 8. Bract. lib. 5. tract. 5, ca. 30. Britton, cap. 50, fo. 132. Fleta, lib. 6, cap. 54.

"*Some have said.*" By these and the like speeches our author intendeth, that the point had been controverted, but thereby, except it be in this Section, where formerly he delivered his opinion, as hath been said, he tacitely insinuateth his owne judgement, which in all the rest holdeth for good law and warranted by good authority throughout his three bookes; which kinde of speech and the like I have collected together, as it appeareth by the Sections in [*m*] the margent.

[*m*] Sect. 40. 119. 132. 136, 137, 138. 141. 145. 148. 156. 170. 179. 192. 202. 227. 234. 269. 336. 339. 357. 400. 435, 436. 440. 443. 460. 462. 478. 501. 503. 506. 522, 523, 524. 534. 576. 601. 633, 634. 640. 642, 643, 644. 646. 658. 675. 689. 721. 723. 726. 730, 731. 733, 734.

"*Therefore*

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(4) 4 *E.* 2. Cui in vita 15. 34 *E.* 1. ibid. 30. 10 *E.* 3. 11. 22. *H.* 6. 24. *If husband intitled to be tenant by the curtesy aliens and retakes estate to him and his wife, by which the wife is remitted, he shall not be tenant by the curtesy.* Contra *if it was before issue had.* 9 H. 7. 1. Vid. *T.* 7 Jac. *Ley. n.* 11. *Sparrey's case.* Hal. MSS.—See Ley's Rep. 9.—[Note 173.]

(5) Pat. 11 H. 3. m. 3. Cùm consuetudo et lex Angliæ sit, quòd si aliquis desponsaverit aliquam hæreditatem habentem, et ex eâ prolem habuerit, cujus clamor auditus fuerit infra quatuor parietes, et vir supervixerit uxorem, habebit totâ vitâ suâ custodiam hæreditatis uxoris, licèt ea hæredem habuerit ex primo viro, qui plenæ ætatis est; præceptum est, quòd eadem lex observatur in Hibernià. Hal. MSS.—The same extract from the patent roll of 11 H. 3, is given in Hal. Hist. C. L. 180.—[Note 174.]

"*Therefore quære.*" This quære is not in the original edition of *Littleton*, and therefore to be rejected (6).

And some have said, that in divers cases a man shall by having of issue be tenant by the curtesie where a woman shall not be endowed. And therefore they say, if lands be given to two women and to the heires of their two bodies begotten, and one of them take husband and have issue and die, the inheritances being severall the husband shall be tenant by the curtesie, as it is adjudged 7 *E.* 3, and in other bookes [*n*] this judgment is cited and allowed. But certaine it is, that if land be given to two men and to the heires of their two bodies begotten, and the one taketh wife and dieth, she shall not be endowed, for no estate in the land is altered by that marriage. But I leave the reader to his owne opinion, or rather to suspend it until he come ☞ to the proper place in the next chapter. If lands holden of the king by knights service *in capite* descend to a woman, and after office found she intrude and taketh husband and hath issue, in this case the husband shall be tenant by the curtesie (1); and yet if the heire male after office in the like case intrudeth and taketh wife, his wife shall not be endowed, for so it is provided by the statute of *Prærogativa Regis*, cap. 13, that in that case there accrues to the heire no freehold, nor dower to the wife, which by interpretation is as much as to say, that the heire shall have no freehold as to this respect to give any dower to his wife. If a man marry the neife of the king by licence, and hath issue by her, and after lands descend to the niefe and the husband enter, the niefe dieth, he shall be tenant by the curtesie of this land, and the king upon any office found shall not evict it from him, because by the marriage the niefe was infranchised during the coverture. But if a free woman marry the villaine of the king by licence, and lands descend to the villaine, the villaine dieth, the wife shall not be endowed, but upon an office found the king shall have the land, for the villaine remained still a villaine to the king. A woman [*n*] taketh husband, and hath issue, lands descend to the wife, the husband enters, and after the wife is found an ideot by office, the lands shall be seised by the king (2), for the title of the tenancy by the curtesie and of the king begin at one instant, and the title of the king shall be preferred. A man shall be tenant by the curtesie of a castle [*o*] which serveth for the publicke defence of the realme,

[30. b.]

(2 Ro. Abr. 60, & Post. 183, contra.) 7 E. 3. 6. [n] 17 E. 3. 51. Prærog. Regis, ca. 13. 33 E. 3, tit. Travers 36. (4 Co. 55. 1 Leon. 47.) [n] Pl. Com. Dame Hales' case 263. (9 Co. 129.) [o] Magna Carta. 30 E. 1.

Dower 81. 17 H. 3. Dower. Bract. lib. 2, fol. 46, & 314. (Post. 32. a. Cro. Cha. 300. 1 Ro. Abr. 675.)

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(6) It appears by the various reading already given, that this *quære*, though not in the *Rohan* edition, which lord Coke thought the oldest, is in that by *Lettou* and *Machlinia*, which is really the original one. [*But see Editor's preface to the thirteenth Edition.*]

(1) 1 *H.* 7. 17. *Dy.* 95. Hal. MSS.

(2) Mr. serjeant Hawkins makes a *quære* of this, observing that the fee and freehold were in the wife, and that the wife of an ideot shall have dower. Hawk. Abr. of Co. Littl. 42. It has been also remarked, that there is not any concourse of titles between the king and the husband; the husband's title by curtesy not being *consummate*, till the death of the wife, when the king's title determines. See Plowd. 264. Engl. ed. in a note by the Editor. However, note the reasoning in Plowden. See also 8 Co. 170, where it is adjudged, that though in the case of idiotcy the office for *some* purposes has relation to the time when the idiot's estate commenced, yet the king is only entitled to the profits from the finding of the office; which, as it may have some influence on the point of curtesy, is proper to be attended to.—[Note 175.]

realme, but a woman shall not be endowed thereof, as shall be said more at large hereafter (3).

A man shall be tenant by the curtesie of a common *sauns nomber*, but a woman shall not be endowed thereof, because it cannot be divided. A man shall be tenant by the curtesie [*p*] of a house that is *Caput Baroniæ* or *Comitatûs:* (4) ‡ but it appeareth by 4 *H.* 3, Dower 180, that a woman shall not be endowed of it. For the law respecteth honour and order. A man is entitled to be tenant by the curtesie, and maketh a feoffment in fee upon condition, and entreth for the condition broken, and then his wife dieth, he shall not be tenant by the curtesie, because albeit the state given by the feoffment be conditionall, yet his title to be tenant by the curtesie was inclusively absolutely extinct by the feoffment, for the condition was not annexed to it (5). As if the lord disseise the tenant, and maketh a feoffment in fee of the land upon condition, and entreth for the condition broken, yet the seigniory is extinct, for that was inclusively extinct by the feoffment. See more of tenant by curtesie, Section 52 (6).

[*p*] 4 H. 3, Dower 180. Bract. fol. 93. Fleta, lib. 5, cap. 23. 2 E. 2, Dower 123. 3 E. 3, Dower 102. 9 H. 7. 1. 30 E. 3. (Hob. 338. Post. 278.)

Chap. 5. Of Dower. Sect. 36.

TENANT in dower is, where a man is seised of certaine lands or tenements in fee simple, fee taile generall, or as heire in speciall taile, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine yeares at the time of the death of her husband, [for she must be above nine yeares old at the time of the decease of her husband,] (1) † otherwise she shall not be endowed.

"*TENANT in dower.*" (7), *Tenens in dote. Dos*, dower, in the common law [*q*] is taken for that portion of lands or tenements which the wife hath for terme of her life of the lands or tenements of her husband after his decease, for the sustenance of

[*q*] Lib. Rub. cap. 70. Glanvill. lib. 6, cap. 1. Bract. lib. 2, fol. 92. Britt. cap. 101. Fleta, lib. 5, cap. 22.

‡ *The note here referred to does not all relate to this sentence of the Commentary, but seems meant to apply to the next sentence but one ending with* "annexed to it," *or to the subsequent one ending with* "feoffment." *The very case of lord Hale is mentioned by lord Coke post.* 266. a. *and therefore note* (5) *appears to be more a remark upon note* (4), *or a continuation of it, than a note upon the Commentary; yet fo.* 266 *elucidates, or is connected with, the cases here advanced by lord Coke.*

herselfe,

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(3) See post. 31. b.

(4) *If disseissee enters on disseisor's heir, and makes feoffment on condition, and enters for condition broken, and the heir enters, the right is revived.* Vid. 19 *H.* 6. 43. Hal. MSS.—[Note 176.] (5) Hic *fol.* 266. Hal. MSS.

(6) See also Wright's Ten. 193, and Vin. Abr. *Curtesy*, and the same title New Abr.

(1) † All between the brackets omitted in L. and M. and in Roh.

(7) Nota, *in tenancy in dower the wife shall be said to be in by the husband.* 36 *H.* 6. *Dower* 30. *But tenancy by the curtesy is in the* Post. 5 E. 2. *Entry* 66. Hal. MSS.—[Note 177.]

herselfe, and the nurture and education of her children (8). *Propter onus matrimonii, et ad sustentationem uxoris et educationem liberorum cùm fuerint procreati si vir præmoriatur: et hoc propriè dicitur dos mulieris secundum consuetudinem Anglicanam.*

[31. a.] And *dos* is derived *ex donatione, et est ☞ quasi donarium*, because either the law itselfe doth (without any gift) or the husband himself giveth it to her, as shall be said hereafter. And at this day *dos* or dower is not taken by the professors of the common law, either for the land which the wife bringeth with her in marriage to her husband, for then it is either called in frankmarriage or in marriage, as hath beene said, nor for the portion of money or other goods or chattels which she bringeth with her in marriage, for that is called her marriage portion. And yet of ancient time [r] *dos mulieris*, the dower or dowrie of the woman was also applied to them. But it is commonly taken for her third part, which she hath of her husband's lands or tenements.

[r] Britton, cap. 101. Bracton, lib. 2, fo. 92. Glanv. lib. 6, ca. 1, lib. 7, ca. 1. 2 Co. 93. Bingham's case. 4 H. 3, Dower 179.

In Domesday, *Dos* is called *Maritagium*

To the consummation of this dower three things are necessary; viz. marriage, seisin, and the death of her husband.

Dos [s], the very name doth import a freedome, for the law doth give her therewith many freedomes. *Secundum consuetudinem regni mulieres viduæ, &c. debent esse quietæ de tallagiis, &c.* And tenant in dower shall not be distreyned for the debt due to the king by the husband in his life time in the lands which she held in dower. And other privileges she hath; of all which *Ockam* yeelds the reason, *Doti ejus parcatur quia præmium pudoris est* (2).

[s] Claus. 11 H. 3, nu. 17. Regist. 142, 143. F. N. B. 150. Ockham fol. 40.

"*Where a man.*" If the husband be an alien [t] the wife shall not be endowed. So if the husband be the king's villaine, the wife shall not be endowed (as hath beene said); but if the husband be a villaine to a common person, the wife shall be endowed if she be intitled to dower before the entrie of the lord. And so if a free

[t] Bract. fol. 298. 19 E. 2, Dower 171. Dame Hales' case. 13 E. 3, dower Statham. 13 E. 1, tit. Dower. (Post. 392. b.)

man

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(8) The following note is by the editor of the eleventh edition of lord Coke's Commentary.—(The reason why the law gave the wife dower will appear, if we consider how the law stood anciently; for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates even of the richest were then very inconsiderable; and before trusts were invented, which is but lately, the husband could give his wife nothing during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Hen. 8.)—[Note 178.]

(2) Claus. 26 H. 3. m. 15. Mulier ratione tenuræ in dotem non debet venire coram justiciariis itinerantibus ratione communis summonitionis. *But yet she shall be attendant to the heir for a third part of the services, for which he is attendant over. Tenant in frank-marriage in the fourth degree dies; his issue endows his mother; she shall be attendant as the issue is, and shall not hold acquitted. So if A. gives to B. in tail rendering during his life 5s. and afterwards 10s. the wife of B. endowed shall hold of the heir by a third part of 10s. But if there be tenant by 5s. and mesne hold over by 10s. and tenant dies without heir, his wife shall be attendant to the mesne only for the third part of 5s. Keilw. 124. 129.* Hic *fol. 46, lease by tenant in tail, avoided by the issue, yet revived against tenant in dower.* Hal. MSS.—[Note 179.]

man take a niefe to wife, and dieth, she shall be endowed. The wife of an ideot (3), *non compos mentis*, outlawed, or attainted of felony or trespasse, attainted of heresie, *præmunire*, or the like, shall be endowed. But if the husband be attainted of treason, albeit it be treason done after the title of dower, she shall not be endowed, as shall be said hereafter.

"*Seised.*" Here this word (seised) extendeth itselfe as well to a seisin in law, or a civill seisin, as to a seisin in deed, which is a naturall seisin: but seised he must be either the one way or the other during (4) the coverture. For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry, he hath but a seisin in law, and yet the wife (Antè 29. a.) shall be endowed, albeit it be not reduced to an actuall possession, for it lieth not in the power of the wife to bring it to an actuall seisin, as the husband may do of his wife's land, when he is to be tenant by curtesie, which is worthy the observation. And yet of every seisin in law, or actuall seisin of lands or tenements, a woman [u] 43 E. 3. 32. 45 E. 3. 13. 5 E. 3. 4. F. N. B. 149. 8 E. 3, tit. Ass. 393. 19 E. 2, Dower 170. 43 E. 3, Dower 30. (Perk. sect. 315, 316. 4 Co. 122. 1 Ro. Abr. 677.) shall not be endowed. For example, if there be grandfather, father, and sonne, and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, this land descendeth to the father, who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed onely of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actuall) is defeated (5), and now upon the matter the father had but a reversion expectant upon a freehold, and in that case, *Dos de dote peti non debet:* although the wife of the grandfather dieth [w] 5 E. 3, tit. Voucher 249. Parr.'s case, 9 E. 3. 4. living the father's wife (6). And here note a diversity [w] betweene a descent and a purchase. For in the case aforesaid, if the grandfather had infeoffed the father, or made a gift in taile unto him, there in the case abovesaid, the wife of the father, after the decease of the grandfather's wife, should have been en- (4 Co. 122.) dowed of that part assigned to the ☞ grandmother, and the reason of this diversitie is, for that the seisin, that descended after the decease of the grandfather to the father, is avoyded by the indowment of the grandmother, whose title was consummate by the death of the grandfather; but in the [31. b.] case

(3) See ante 30. b. n. 2.

(4) *Lessee for life surrenders to him in reversion on condition, and enters for the condition broken; yet the wife of the reversioner shall be endowed. Noy, n. 284. Ormond's case.* Hal. MSS.—See Noy 66.—[Note 180.]

(5) Hic *sect.* 8. 8 *E.* 3. 13. 8 *Ass.* 6. *But by some the heir shall have mort d'ancester of such seisin.* Hal. MSS.

(6) 17 *E.* 3. 65. hic *fol.* 42. Vid. 6 *E.* 3. 43, contra. Nota *the case* 5 *E.* 3. *Vouch.* 249. *A. gives in tail to B. his eldest son who dies, the wife of B. is endowed of the third part of the whole. A. dies, his wife brings dower against the wife of B. she vouches the heir of her husband by reason of the reversion, and adjudged that he shall warrant.* But quære *if she shall recover in value the third part of the whole, or only the third part of two parts. It seems only the third part of two parts, by reason of the eviction. Therefore* quære *if in this case the seisin of B. be not fully avoided. Suppose that the wife of A. had first recovered, during her life the wife of B. cannot demand dower except of the two parts which were in the hands of the heir.* Hal. MSS.—[Note 181.]

case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is not defeated, but only *quoad* the grandmother, and in that case there shall be *Dos de dote*. And yet there is another diversitie [x] (1) where the wife of the father is first endowed, and where the wife of the grandfather; for in the same case after the decease of the grandfather and father the sonne entreth and indoweth his mother of a third part, against whom the grandmother recovereth a third part and dyeth, the mother shall enter againe into the land recovered by the grandmother, because she had in it an estate for terme of her life, and the estate for the life of the grandmother is lesser in the eye of the law, as to her, than her owne life. Also the husband [y] (2) may be seised in his demesne, as of fee absolutely, yet the woman shall not be indowed, as she shall not be indowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be indowed of which she will.

[x] 8 E. 3, tit. Ass. 393. 13 R. 2, Dower 55. 22 E. 3. 5. 8 E. 3. 3. 7 H. 6. 4. (Post. 42. a. 4 Co. 122.)

[y] 6 E. 3. 50. F. N. B. 149. (Cro. Cha. 190, 191. 1 Ro. Abr. 676. 474. Cro. Jam. 615. Doctr. Plac. 148. 2 Co. 77.)

Also of a seisin for an instant a woman shall not be indowed (3); as if *Cestuy que use* [z] after the statute of 1 *R.* 3, and before the statute of 27 *H.* 8, had made a feoffment in fee, his wife should not be indowed (3 a).

[z] 27 H. 8. 23. F. N. B. 17 H. 3, Dower 192.

Likewise if two joyntenants be in fee, and the one maketh a feoffment in fee, his wife shall not be indowed (4). And so if the conusee of a fine doth grant and render the land to the conusor, the wife of the conusee shall not be indowed, for it is not possible that the husband could have indowed his wife of such an estate, as the usual pleading is, *Lib. Intrat.* 225. *Quia dicit quòd W. quondam vir suus nunquam fuit seisitus de tenementis prædictis de tali statu ita quòd eandem A. inde dotasse potuit.*

"*Of lands or tenements.*" Of a castle that is maintained for the necessary defence of the realme a woman shall not be indowed, because it ought not to be divided, and the publique shall be preferred before the private (5). But of a castle that is onely maintained for the private use and habitation of the owner, a woman shall be indowed. And so it was adjudged in the court of [a] common pleas, where in a writ of dower the demand was, *de tertiâ parte Castri de Hilderker in Comitatu Northumb.* And

Vide Sect. 242. (Post. 165. a. Ante 30. b.)

[a] Pasch. 23 Eli. in Com. Banco.

Bract. fol. 96. Brit. ca. 103. Flet. l. 5, c. 23. 30 E. 1, tit. Dower 81. b. 30 E. 1, Vouch. 298. 17 H. 3, Dower 192. 8 H. 3, Dower 196. 8 H. 3, lb. 194.

the

(1) 8 *E.* 2. *Recovery in value* 10. Hal. MSS.

(2) Hic *sect.* 56 *fol.* 42. Hal. MSS.

(3) *If tenant for life makes a feoffment in fee and dies, the wife shall not be endowed.* 3 *H.* 4. 6. 14 *H.* 4. 13. *Yet if tenant at will makes feoffment and dies, his wife shall be endowed. Cited by Jones* 9 *Cha. to have been adjudged* 34 *Eliz. in Moseley and Taylor.* Hal. MSS.—See W. Jo. 317.—[Note 182.]

(3 a) That there cannot be dower of a *trust*, see Forrest. 138. 2 Atk. 525. See further 2 P. Wms. 700.—[Note 183.]

(4) S. p. acc. in *MSS. Common Place-book, supposed to be by judge Doderidge*, and 14 H. 4. 13 B. and P. 34 E. 1. Fitzh. Dower 178, cited.—See further Cro. Eliz. 502. Noy 64. Cro. Jam. 615. 1 Atk. 442, and 2 Blackst. Com. 132.

(5) Pat. 1 E. 1. m. 17. Præsertim cum hujusmodi mulieribus castra, quæ fuerunt virorum suorum, et quæ sunt de guerra, vel etiam homagia et servitia aliquorum, quæ sunt de guerra, in dotem non debuerunt, nec consueverunt assignari, ideo salvis nobis castris et homagiis prædictis, &c. Hal. MSS.—[Note 184.]

the statute of *Magna Charta*, cap. 7, whereby it is provided, *nisi domus illa sit Castrum*, is to be understood, a castle maintained for the necessary and publike defence of the realme. And this agreeth with ancient records, [*b*] (albeit in the argument of the said case they were not vouched) the effect whereof be, *Non debent mulieribus assignari in dotem castra quæ fuerunt virorum suorum et quæ de guerra existunt, vel etiam homagia et servitia aliquorum de guerra existentia.* Wherein it is to be observed, that the law is not satisfied with the names of things, or nominatives, but with things reall and substantiall. But of the principal mansion, or capitall messuage, the wife shall be indowed, [*c*] *si non sit Caput Comitatûs, sive Baroniæ* (6), for the honour of the realme, or (as hath beene said) a castle for the publique defence of the realme. And so are the old bookes to be intended, as it was resolved *Tr.* 17 *Eliz.* in the court of common pleas, which I heard and observed. And of an estate taile in lands determined, a woman shall be indowed in the like manner and forme as a man shall be tenant by the curtesie, *mutatis mutandis.*

(*b*) Pat. 1 E. 1, part 1, m. 17. Esch. 4 E. 1, nu. 88.

[*c*] Bract. l. 2. f. 93. Brit. c. 103. Flet. lib. 5, ca. 22. Trin. 17 El. in Com. Banco.

"*In fee simple, fee taile generall, &c.*" If a man be tenant in fee taile generall, [*d*] and make a feoffment in fee, and taketh back an estate to him and to his wife, and to the heires of their two bodies, and they have issue, and the wife dyeth, the husband taketh another wife and dyeth, the wife shall not be endowed, for during the coverture he was seised of an estate taile speciall, and yet the issue which the second wife may have by possibilitie may inherit (7).

[*d*] 41 E. 3. 30. 44 E. 3. 26. 30 H. 8. Dyer 41.

The same law it is, if in this case he had taken backe an estate in fee simple, and after had taken wife and had issue by her; yet she shall not be indowed, for that the fee simple is vanished by the remitter, and her issue hath the land by force of the entaile. But in that case the tenant cannot plead that the husband was never seised of such an estate whereof the demandant might be indowed, but he must plead the speciall matter (8).

30 H. 8. Dyer 41.

"*And taketh a wife.*" If a man so seised as is aforesaid, taketh an alien to wife, and dyeth, she shall not be endowed (9); but if

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(6) Vid. *a whole manor reseised, because it was* caput baroniæ, *though assigned by the husband.* Claus. 20 H. 3. m. 20, pro uxore Roberti Fitzwalter. Hal. MSS.—But this doctrine must be understood to be applicable only to *baronies by tenure*, of which it is said there is not any now remaining except Arundel; and therefore creating a person baron by a title taken from a principal mansion-house in his possession will not make the house *caput baroniæ*, and so exclude the wife from dower out of it, because such a barony is merely *titular*, and a titular barony cannot have *caput baroniæ*. Adj. in lady Gerrard's case, 1 L. Raym. 72, and other books. See Mad. Bar. Angl. 10.—[Note 185.]

(7) Vid. 24 *E.* 3. 28. 59. *Tenant in tail has issue A. and B. and leases to A. for years and releases to him and his heirs with warranty, and A. takes C. to wife and dies having issue D. tenant in tail dies, D. dies, and C. recovers dower against B. Adjudged.* Hal. MSS.—[Note 186.]

(8) 21 *E.* 3. 36. 3 *H.* 6. 55. Hal. MSS.

(9) Nota *anciently a woman alien was not dowable; but by special act of parliament not printed,* Rot. Parl. 8 H. 5. n. 15, *all women aliens, who from thenceforth* (desores ou avant) *should be married to Englishmen by licence of the king, are enabled to demand their dower after the death of their husbands, to whom*

the king take an alien borne, and dyeth, she shall be indowed by the law of the crowne. And *Edmond*, the brother of king *Edward* the first, married the queen of *Navarre*, and dyed, and it was resolved [*e*] by all the judges, that she should be indowed of the third part of all the lands whereof her husband was seised in fee (10).

(Doct. Plac. 148. Post. 33. a.)

[*e*] Rot. Parl. 26 E. 1, Rot. 1.

If a *Jew* born in *England* taketh to wife a *Jew* borne also in *England*, the husband is converted to the Christian faith, purchaseth lands, and infeoffeth another, and dyeth, the wife ☞ brought a writ of dower, and was barred of her dower, and the reason yielded in the record [*f*] is this, *Quia verò contra justitiam est quòd ipsa dotem petat vel habeat de tenemento quod suit viri sui, ex quo in conversione suâ noluit eum eo adhærere et cum eo converti* (1).

[32. a.]

[*f*] Dors. claus. 18 H. 3, m. 17.

" *Of the third part of such lands and tenements in severalty by metes and bounds.*" Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds, a woman cannot be endowed of the thing itselfe, yet a woman [*g*] shall be endowed thereof in a speciall and certaine manner. As of a mill a woman shall not be endowed by metes and bounds, nor in common with the heire, but either she may be endowed of the third tolle dish, or *de integro molendino per quemlibet* 3. *mensem.* And so of a villeine, [*h*] either the third dayes work, or everie third weeke or month. A woman shall be endowed of the third part of the profit of stallage, of the third part of the profits of a faire, of the third part of the profits of the office of the marshalsea, of the [*i*] third part of the profits of the keeping of a parke, of the third part of the profit of a dove-house, and likewise of the third part of a piscary, [*k*] *viz. tertium piscem vel jactum retis tertium*; of the third presentation to an advowson (2). A writ of dower lieth *de* 3. *parte exituum provenientium de custodiâ gaolæ Abathiæ Westm.* And herewith agreeth reverend antiquitie. *De* [*l*] *nullo, quod est suâ naturâ indivisibile et secationem sive divisionem non patitur, nullam partem habebit, sed satisfaciat ei ad valentiam.* Of the third part of profits of courts, [*m*] fines, heriots, &c. Also a woman shall be endowed of tithes; and the surest indowment of tithes is of the third sheafe; for what land shall be sowne is uncertaine (3).

(1 Ro. Abr. 682.)

[*g*] Bract. lib. 2. fo. 97, b. 23 H. 3, tit. Ass. 435. F. N. B. 149. 45 E. 3, Dower 50. (Post. 165. a.)

[*h*] 2 H. 6. 11. Bract. lib. 2, fo. 97. Brit. 247.

[*i*] 4 E. 2. Tr. 233. 26 E. 3. 58. 45 E. 3, Dower 50. (Cro. Jam. 621.)

[*k*] Bract. 93. 208. Brit. 247. Flet. lib. 5, ca. 23. 17 E. 2, Dower 104. 163.

[*m*] Lib. Intr.

But in some cases of lands and tenements, which are divisible,

19 E. 3, Quar. Imp. 154. 7 E. 3. 7. [*l*] Bract. 97. Brit. 146, 147. Judgme. 18, fo. 230. 11 Co. 25, 26, Harper's case.

and

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whom they should in time to come be married, in the same manner as English women. But this act did not extend to those married before, and therefore in Rot. Parl. 9 H. 5. n. 9, *there is a special act of parliament to enable Beatrice countess of Arundel born in Portugal to demand her dower.* Hal. MSS.—See acc. 1 Ro. Abr. 675.—[Note 187.]

(10) Yet Edmund the queen of Navarre's husband was only a subject, therefore *quære* the reason of the case.

(1) Nota placitum illud fuit coram justiciariis ad custodiam Judæorum assignatis. Hal. MSS.—See the record at length in Tov. Angl. Judaic. 230. See also Mol. de Jur. Marit. 8th ed. b. 3. c. 6. s. 11.

(2) See post. 32. b. n. 2.

(3) *But the assignment is good, though tithes of the third yard-land be assigned.* M. 9 Jac. C. B. *Kettleby's case.*—Hal. MSS.—[Note 188.]

and which the heire of the husband shall inherit, yet the wife shall not be endowed. As if the husband [n] maketh a lease for life of certaine lands, reserving a rent to him and his heires, and he taketh wife and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within this word tenements) because there was no seisin in deed or in law of the freehold nor of the rent, because the husband had but a particular estate therein, and no fee simple (4). But if the husband maketh a lease for yeares, reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the yeares (5). And herewith agreeth the common experience at this day. But if the husband maketh a gift in taile, reserving a rent to him and his heires, and after the donor taketh wife and dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibilitie may continue for ever.

[n] 28 Ass. 3. 8 R. 2. 2. Dower 184. 1 E. 6, Dow. 89.

Vid. 1 E. 6, Dow. B. 89. (Ante 30. a.)

Of a common certaine a woman shall be endowed, but of a common *sauns nomber en grosse* she shall not be endowed, as hath beene said before. And so of a rent service, rent charge, and rent secke, she shall be endowed (6): but of an annuitie that chargeth onely the person, and issueth not out of any lands or tenements, she shall not be endowed. But if the freehold of the rents, common, &c. were suspended before the coverture, and so continue during the coverture, she shall not be endowed of them. If after the coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her dower they in the eye of the law have continuance.

(Cro. Cha. 300. Ante 30. b. 2 Ro. Abr. 675. Ante 29. b.)

7 Co. 38, Lillingston's case.

If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, the heire by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time: for her title is to the quantitie of the land, viz. one just third part (7).

6 Co. 78, Seig. Aburganie's case. (Post. 56. a. 171. a. 179. a. Perk. sect. 326, contra.)

And the like law it is if the heire improve the value of the land by building: and on the other side, if the value be impaired in the time of the heire, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband (8).

(F. N. B. 149. C.) V. 30 E. 1. Vouch. 298.

"*Any*

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(4) 25 *E.* 3. 46. *But she shall be endowed of rent reserved in tail so long as the tail continues.* 10 *E.* 3. 27. hic *fol.* 30.—Hal. MSS.—[Note 189.]

(5) P. 8 Jac. C. B. n. 23. *Fulgeam's case, Noy, n.* 280. *Whitley and Best, a proviso in the writ of seisin* quòd tenens non expellatur. *But see* 27 *H.* 8. *If tenant for years be received and his term is allowed,* cesset executio durante termino. *Yet the law vests the actual possession in him who recovers; and* nota *here she shall recover damages according to the value of the rent.* P. 22 Jac. C. B. *P.* 16 *E.* 3.—Hal. MSS.—[Note 190.]

(6) *Yet demand of land and common* pro omnibus averiis, *without saying* eidem spectant', *is good after verdict, and shall not be intended common without number.* P. 9 Car. B. R. *Prewet and Drake Crook, n.* 3.—Hal. MSS. See Cro. Cha. 300. W. Jo. 315.—[Note 191.]

(7) *But she shall not have emblements. Dy.* 316.—Hal. MSS.—[Note 192.]

(8) Vid. 1 *H.* 5. 11. 17 *E.* 3. *If feoffee improves by buildings, yet dower shall be as it was in the seisin of the husband.* 17 *H.* 3. Dower 192. 31 E. 1. Vouch.

"*Any time during the coverture.*" For the better understanding whereof it is to be knowne, that (as hath beene said) to dower three things doe belong, viz. marriage, seisin, and the death of the husband. Concerning the seisin, it is not necessarie that the same should continue during the coverture, for albeit the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c. yet the woman shall be endowed. But it is necessary that the marriage doe continue, for if that be dissolved the dower ceaseth, *ubi nullum matrimonium, ibi nulla dos.* But this is to be understood when the husband and wife are divorced *à vinculo matrimonii,* as in case of precontract, consanguinity, affinity, &c. and not *à mensa et thoro* only, as for adulterie (9). And yet it is said, that if the assignment of dower *ad ostium ecclesiæ* be specified, viz. that notwithstanding any divorce shall happen yet that she shall hold it for life, that this is good.

Bract. 92. Brit. cap. 101. Brit.cap.eodem. (1 Ro. Abr. 681. Doctr. Plac. 148. Post. 33. b. 4 Co. 29. 5 Co. 9. b.

If the wife elope [*o*] from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer (10), she shall lose her dower until her husband willingly ☞ without coertion ecclesiasticall be reconciled unto her, and permit her to cohabit with him, all which is comprehended shortly in two hexameters, *Sponte virum mulier fugiens, et adultera facta, Dote suâ careat, nisi sponsi sponte retracta.* And [*p*] if she goeth willingly with or to the avowtrer, this is a departure and a tarrying, albeit she remaineth not continually with the avowtrer, or if she tarryeth with him against her will, or if he turne her away, or if she cohabit with her husband, by the censures of the church, in all these cases she loseth her dowrie. But see notable matter hereof in the exposition upon the statute of *W.* 2, cap. 34.

[32. b.]

[*o*] W. 2, ca. 34. Lib. Intr. 224. Fleta, lib. 5, c. 22. Br. c. 109. Mirror, ca. 5, sect. 5. F. N. B. 150. Perk. sect. 354. 1 Ro. Abr. 680. 1 Sid. 118.)

[*p*] 3 E. 3. 2. 6 E. 3. 29. 9 E. 3. 29. 19 E. 3, Dower 94. 43 E. 3. 19. Vid. Fits. N. B. 150. b. 8 E. 2, Dower 153.

"*In*

Vouch. 288. *For the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable.*—Hal. MSS. See further Hugh. Comment. on Orig. Writs, 196.—[Note 193.]

(9) 18 *E.* 4. 29. Vid. *acc. Noy, n.* 433, *and n.* 467. *Powel and Weeks in case of divorce* causâ adulterii. *Yet dower lies.* Vid. *acc.* 10 *E.* 3. 15, *in case of divorce* ex voto castitatis. *Yet this in some cases dissolves the marriage* extunc. 45 E. 3.—Hal. MSS. See Powel's case acc. Godb. 145. But according to Rolle's report it was adjudged, that the divorce for adultery was a bar of dower. 1 Ro. Abr. 681.—[Note 194.]

(10) *Dy.* 107. *Where issue is joined on reconciliation after elopement, advantage shall not be had except of one elopement.* Vid. Lib. Parl. 30 *E.* 1. *John Comoy's grant of his wife.* Noveritis me tradidisse et demisisse spontaneâ meâ voluntate domino Willielmo Paynell militi Margaretam uxorem meam; et concedo, quòd Margareta cum prædicto Willielmo remaneat pro voluntate ipsius Willielmi. *Afterwards William and Mary lived together, and John died. Ruled* 1, *that this was a void grant;* 2, *that it did not amount to a licence, or at least was a void licence;* 3, *that after elopement there shall not be any averment,* quòd non fuit adulterium, *though William and Mary after the death of John intermarried. So she was barred of dower.* Nota *they produced a sentence of purgation of adultery in the ecclesiastical court; yet not allowed against such presumption.* Hal. MSS. See Comoy's grant of his wife at length in 2 Inst. 435, and in marg. of Dy. ed. 1688, fol. 106. b. See S. C. cited in 1 Ro. Abr. 680. See further Vin. Abr. *Dower* P, and R. Hugh. Comment. Orig. Writs, 190.—[Note 195.]

" *In severalty by metes and bounds.*" And yet in some cases where the husband was sole seised, the wife shall not be endowed in severalty by metes and bounds (1). As for example, [*q*] if a man seised of lands in fee took a wife, and infeoffed eight persons, a writ of dower was brought against these eight persons, and two confesse the action, and the other six pleade in barre, and descend to issue, the demandant shall have judgement to recover the third part of two parts of the land, in eight parts to be divided, and after the issue being found for the demandant against the sixe, the demandant shall have judgement to recover against them the third part of sixe parts of the same lands, in eight parts to be divided, which is worthie the observation. But of this more shall be afterwards said in this Chapter.

[*q*] M. 2, & 3. Eliz. Dier 187. b. 10 Ass. p. 2. 17 E. 3. 4. Tr. 10 H. 5. Rot. 447.

But regularly *Littleton*'s words are to be intended, where the husband was sole seised, for where he was seised in common, there she cannot be endowed by metes and bounds, as it appeareth in this Chapter, Sect. 44. *Nota*, the endowment by metes and bounds, according to the common right, is more beneficiall to the wife, than to be endowed against common right, for there she shall hold the land charged, in respect of a charge made after her title of dower (2).

26 E. 3, Dower 133. 10 E. 3. 31. 17 E. 2, Dower 164. 19 E. 3, Quar. Imp. 154.

" *Whether she hath issue by her husband or no.*" Herein the tenant in dower, as in many other cases, is preferred before the tenant by the curtesie; but yet this great disadvantage the wife hath, that she cannot enter into her dower by the common law, but is driven to her writ of dower to recover the same, wherein sometimes great delayes are used, and therefore the well-advised friends of the wife will provide for a jointure to be made to her, as shall be said hereafter. For by the statute of [*r*] *Magna Charta*,

12 E. 4. 2. 18 H. 6. 27, per Paston.

[*r*] Magna Carta, cap. 7. Fleta, lib. 5. cap. 23. Bracton, lib. 2, fo. 96. Britton, ca. 103. (Post. 34. b.) 19 H. 6. 14. 6 E. 6. Dyer 76. F. N. B. 161. Regist. Orig. 175. 1 Marie Dower 101. 2 Inst. 17. F. N. B. 161. A.)

cap.

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(1) Nota *if the sheriff doth not return* per metas et bundas, *it is ill, unless certain closes are assigned by name. M.* 44, 45 *El. C. B. Husband makes lease for years and dies, the heir says to the wife,* I endow you of the third part of all the lands whereof your husband was seised. *Ruled,* 1. *This is a good endowment, though not by metes and bounds. Otherwise where the sheriff assigns dower.* 2. *This assignment shall bind the lessee, and they shall hold in common. Tr.* 1651. *B. R. Coush and Lambert.* Hal. MSS. See further as to assignment of dower post. 34. b.—[Note 196.]

(2) *Where the wife shall hold charged.* First, 19 *E.* 3. Quare Impedit, 154. *Husband seised of the manors of A. B. and C. to which several advowsons are appendant, grants the next avoidance of the three advowsons and dies. The heir assigns the manor of A. to the wife, with the advowson of A. which becomes void. The grantee shall present, for assignment of common right is of the third part of every manor, and the third presentment of every church. Otherwise if the dower had been assigned to her* ad ostium ecclesiæ. Secondly, *If the husband had granted a rent charge, then in the former case the wife shall hold it discharged, for she may distrain in the other two manors, and for the same reason the wife of the heir shall not have* dos de dote. *But* thirdly, *if he had granted a rent out of the manor of A. and this manor had been assigned, she should hold charged.* 5 *E.* 2. *Avowry* 206. *Husband feoffee grants rent charge to the wife, the husband dies, the third part of the land charged is assigned in dower. The rent shall be apportioned, and shall not issue wholly out of the residue.* Hal. MSS. See further Vin. Abr. *Dower* D. a.—[Note 197.]

cap. 7, she shall tarrie in the chiefe house of her husband but by the space of fortie dayes after the death of her husband, within which time dower shall be assigned unto her, unlesse it were formerly assigned, &c. but of little effect was that act, for that no penaltie was thereby provided if it were not done: which terme of 40 days is in law called *Quarentina*. But if she marry within the 40 dayes, she loseth her quarentine (3). But some have said that by the ancient law of *England* the woman should continue a whole yeare in her husband's house, within which time if dower were not assigned, she might recover it: and this certainly was the law of *England* before the Conquest[s], *Mulieres viduæ bis senos menses viduas exigunto, atque tum demum cui velint nubant, sin quæ ante annum nupserit dote mulctata fortunis omnibus à priore marito relictis privatur.* But for the reliefe of the widow it was provided by the statute of *Merton* made *Anno* 20 *H.* 3, cap. 1, (which by [t] *Bracton* is called *Nova constitutio*) that the wife shall recover damages in her writ of dower from the time of the death of her husband (4). But herein divers things are observable. First, in what kind of writ of dower she shall recover her damages. In a writ for a dower *ad ostium ecclesiæ*, or *ex assensu patris*, she shall recover no damages, because she may enter, and the words of the statute be, *et dotes suas habere non possunt sine placito.* Also I have read in an ancient and learned reading upon this statute, that it extendeth only to a writ of dower, *Unde nihil habet*, and not to a writ of right of dower, for in no writ of right damages are to be recovered. 2. She shall recover damages only when her husband dies seised, (that is) seised of the freehold and inheritance

[s] Lamb. Sect. 120. 71, and divers ancient manuscripts. See the 2d part of the Institutes, cap. 7.

[t] Bract. lib. 4, 312, & lib. 2, 96. Britt. cap. 103. Fleta, lib. 5, cap. 23.

(Cro. Jam. 621. 1 Leon. 56.)

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(3) See further as to *Quarentine*, 2 Inst. 17. Barringt. Ant. Stat. 2d ed. p. 9, 10. Hugh. on Orig. Writs 193; and Vin. Abr. *Dower* I. a.

(4) Vid. quoad *damages in dower*. First, What shall be said to be a dying seised. *Husband makes feoffment to the use of himself for life, remainder to his son in tail, and dies seised: the wife shall not have damages, because he doth not die seised of the inheritance, which descends to the son. T.* 6 *Car. And therefore finding that the husband dies seised without saying of what estate is ill. M.* 5 Car. *Bromley and Littleton.* Secondly, How the inquiry shall be of the dying seised and damages. *If judgment be by confession or default, a writ shall issue to deliver seisin and inquire of damages; but if it be by verdict, the same jury shall inquire of the dying seised and damages; but if it be omitted, it may be supplied by writ of inquiry.* Thirdly, what the damage shall be. Nota *before the statute of Merton no damages in dower, and by that statute the wife shall have damages,* viz. *the value of the third part* de tempore mortis usque judicium, *and by the statute of Gloucester,* 6 *E.* 1. *c.* 1, *costs as well as damages. Therefore the judgment* quoad *the land may be affirmed in writ of error and the judgment for damages be reversed, because they are several in their nature,* 22 *E.* 4. 46, *and eror lies after judgment for seisin and before judgment for damages. T.* 24 Car. B. R. *Dudney and Glyde. The damages in dower are* 1, *the value* de tempore mortis: 2, damna occasione detentionis dotis, *which are usually assessed severally. But if they are mixed together by the verdict, yet it is good. T.* 5 Car. C. B. *Hawes's case. Judgment to recover seisin by default, and writ to enquire of the value; the jury assess the value to the taking of the inquisition, and judgment given for them, and affirmed good in writ of error; so that the judgment intended by the statute of Merton is not the first judgment but the second. T.* 1649. *Thynne and Thynne.* Hal. MSS. See in Barn. Not. 2d ed. p. 234, Penrice's case, according to which damages should be computed only to the *awarding* of the writ of inquisition. But Walker and Nevil 1 Leon. 56, and the case cited by lord Hale, are *contra*.—[Note 198.]

inheritance [u], for albeit the husband before the title of dower had made a lease for yeares reserving a rent, the wife shall recover the third part of the reversion with a third part of the rent and damages, for the words of the statute be, *de quibus viri sui obierunt seisiti* (5). 3. Some say that the demandant in a writ of dower, that delayeth herselfe, shall not recover damages, therefore let the demandant take heed thereof. 4. It is necessary for the wife after the decease of her husband as soon as she can to demand her dower before good testimony, for otherwise she may by her owne default lose the value after the decease of her husband and her damages for detaining of her dower. For if she bring a writ of dower against the heire, and the heire cometh into the court upon the summons the first day, and plead that he hath been always ready and yet is to render dower, &c. if the wife hath not requested her dower, she shall lose the mean values and her damages; but if she hath requested her dower, she may plead it, and issue may be thereupon taken.

[u] Regist. Judic. 4. Origin. 173. Dyer 11. El. 284. Rast. pl. fo. 226, &c. 16 E. 3, tit. Damages 83. 8 E. 2, ibid. 1.

(Dr. and Stud. Dial. 2, c. 13.)

But it is holden in some bookes [w] that a request *in pays* is not sufficient, and that it is the folly of the wife that she brought not her writ of dower sooner. But the law and many [x] bookes be against it, and the words of the plea (that he hath beene always ready, &c.) prove the same, and the words of the statute also prove this, *et dotes suas habere non possunt sine placito.*

[w] 5 E. 3. 1. 41 E. 3, Dower 46, and not in the booke at large. (Doctr. Plac. 152.)

[x] 16 E. 3, Dower 59. 2 H. 4. 7. 9 H. 4. 4, tit. Issue 133. 11 H. 4. 40. 13 E. 4. 7. 14 H. 8. 25. b.

☞ And the reason why *tout temps prist* is a good plea in a writ of dower brought against the heire to barre her of the meane values and damages is, because the heire holdeth by title, and doth no wrong till a demand be made (1). But in a writ of aiel, cosinage, &c. where the land and damages are to be recovered, there such a plea is not good; for there the tenant of the land hath no title, but holdeth the land by wrong, and the feoffee of the heire cannot at the first day plead *tout temps prist*, because he had not the land all the time, since the death of the ancestor. 5. It is to be observed, that the mean values and damages are to be recovered against the tenant in a writ of dower, as it appeareth in a notable record [y] between *Belfield* and *Rowse* (2). The tenant as to parcell pleaded non-tenure, and for the residue deteynment of charters, upon which pleas they were at issue, and both issues found by the jury against the tenant, and found further that the husband died seised such a day and yeare, and had issue a sonne, and that the demandant and the sonne by 6 yeares together after the decease of the husband tooke the profits of the land, and after the sonne such a day and yeare died without

[33. a.]

(Doctr. Plac. 152.)

(S. C. Mo. 80. N. Benl. 153. 4 Leon. 198.

[y] Mich. 8 & 9 Eliz. Rot. 904, in Comm. Banc. (9 Co. 15, b. Bedingfield's case. 1 Ro. Abr. 679.)

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(5) *Damages in such case according to the value, not of the land, but of the rent.* P. 22 Jac. C. B. Hal. MSS.

(1) *If the tenant comes the first day, and acknowledges the action, and avers that he was at all times ready to render dower, the demandant may take judgment immediately, and then there shall only be recovery of seisin* et nihil de misâ quia venit primo die. *But if the demandant would have damages, she may aver, that she requested her dower, and the tenant did not endow her, and then the judgment for damages and value shall wait till the issue is tried. N. Entries Dower in Judgment* 4. Hal. MSS.—[Note 199.]

(2) Mich. 8 and 9 Eliz. Belford and Rows, Moor and Bendl. Hal. MSS. See Mo. 80, and N. Bendl. 153.

without issue, after whose decease the land descended to the tenant as uncle and heire to him, by force whereof he entred and took the profits untill the purchasing of the originall writ, and found the value of the land by the yeare, and assessed damages for the deteyning of the dower, and costs; and upon this verdict, after often debating, the demandant had judgment to recover her dammages for all the time from the death of her husband without any defalcation (3). In which case many things apparent therein are observable. Let the tenant therefore take heed how he plead false pleas. 6. That this statute of *Merton* doth extend to copiholds [z] where the custome is, that women be dowable (4). 7. That if the wife hath dower assigned unto her in chancery she shall have no damages [a], for the words of the statute be, *et viduæ per placitum recuperaverint, &c.* So it is if the heire or his feoffee assigne dower, and the wife accepteth it, she loseth her damages.

[z] Tr. 37 Eliz. 4 Co. 30. b. Shawe's case.
[a] 43 Ass. pl. 32. F. N. B. 263.)

A man seised of lands in fee taketh a wife and granteth a rent charge, and after maketh a feoffment in fee, and taketh backe an estate taile and dieth, the wife recovereth dower against the issue in taile by reddition, the wife maketh a surmise that her husband died seised, and prayeth a writ to enquire of the damages, and that is granted to her. In this case she holds the land charged with the rent charge, for by her prayer she accepteth herselfe dowable of the second estate (5), for of the first estate, whereof she was dowable, her husband died not seised, and so she hath concluded herselfe; wherefore if the rent charge be more to her detriment than the damages beneficiall to her, it is good for her in that case to make no such prayer (6).

14 H. 8. 28.

"*Of what age soever the wife be, so as she be past the age of nine years*(7) *at the time of the death of her husband.*" *Wife.* Here *Littleton* speaketh of a wife generally, and generally it is to be understood as well of a wife *de facto*, as *de jure*. Therefore if the wife be past the age of 9 yeares [b] at the time of the death of her

(1 Ro. Abr. 675. Doctr. Plac. 148.)
[b] 3 E. 1. Dower, 172.

Itin. North. 8 E. 2, Dower, 112. 7 E. 2, Dower, 147. 12 E. 2, ib. 159. 21 E. 3. 28. 15 E. 3, Dower 67. 12 R. 2, Dower, 54. 12 H. 4. 3. 35 H. 6. 40. 7 H. 6. 11, 12, 12 H. 4. Doctr. & Stud. Fitz. N. B. 149. b. 22 Eliz. Dower 369. Bract. fol. 92. Fleta, lib. 5, ca. 21. Lib. Intrat. fo. 123. (Post. 37. a. Ante 31. Cro. Jam. 539.)

husband

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(3) Ratio istius casus videtur, *because the wife ought to account to the heir for the whole. But if the heir be in ward in chivalry and the wardship is granted to the wife, or if the wife has estate for years, and after the years expired or the full age she brings dower, it seems that the heir shall not be charged* pro tempore, *because she has a good estate to her own use. The reason is, because the statute of Gloucester, that every one shall render for his time, doth not extend to this case.* H. 8 Jac. C. B. Casus Archiepisc. Ebor. Hal. MSS.—[Note 200.]

(4) Vid. Rot. Parl. 3 H. 6. n. 29, *special act of parliament for giving mesne values to the wife against the king,* in casu comitissæ Marche. Hal. MSS.

(5) Sic nota, *the wife has election to be endowed of the last seisin; and therefore if husband and wife levy fine and take back estate to the husband in fee, the wife shall have dower of the second seisin; but otherwise it is in the case of a husband intitled to be tenant by the curtesy,* ut videtur. Hic fol. 30. a.—Hal. MSS.—[Note 201.]

(6) See further as to damages in dower, Hugh. on Orig. Wr. 180. Treat on Dow. in Gilb. Law of Uses, 375. 2 L. Raym. 1384. New Abr. *Dower* I. Vin. Abr. *Dower* O. a. P. a. Say. Law of Dam. 16. and 17 Ch. 2. c. 8, sect. 3, and 4. Cas. B. R. temp. Hardw. 19. 50. 23.

(7) Vid. *Rast. Enter.* 228, novem annorum et dimid. *She ought to shew how much more she is than 9 years.*—Hal. MSS.

husband, she shall be endowed, of what age soever her husband be, albeit he were but 4 yeares old. *Quia junior non potest dotem promereri, neque virum sustinere; nec obstabit mulieri petenti minor ætas viri.* Wherein it is to be observed, that albeit *Consensus non concubitus facit matrimonium*, and that a woman cannot consent before 12, nor a man before 14, yet this inchoate and imperfect marriage (from the which either of the parties at the age of consent may disagree) after the death of the husband shall give dower to the wife, and therefore it is accounted in law after the death of the husband *legitimum matrimonium*, a lawfull marriage, *quoad dotem*. If a man taketh a wife of the age of 7 yeares, and after alien his land, and after the alienation the wife attaineth to the age of 9 yeares, and after the husband dieth, the wife shall be endowed: for albeit she was not absolutely dowable at the time of her marriage, yet she was conditionally dowable, viz. if she attained to the age of 9 years before the death of the husband, for so *Littleton* here saith, so that she passe the age of 9 yeares at the death of her husband, for by his death the possibility of dower is consummate.

And so it is if the husband alien his land, and then the wife is attainted of felony, now is she disabled, but if she be pardoned before the death of the husband, she shall be endowed. If the son indow his wife at the age of 7 yeares *ex assensu patris*, if she before the death of her husband attain to the age of 9 yeares the dower is good. But otherwise it is of an originall absolute disability; as if a man take an alien to wife, and after the husband alien the land, and after she is made denizen, the husband dieth, she shall not be indowed (8), because her capacity and possibility to be indowed came by the denization. Otherwise it is if she were naturalized by act of parliament, whereof see more in the Chapter of Villenage (9).

(See 1 Salk. 120. S. 3 Leo. 410.)

And the bishop upon an issue joyned in a writ of dower, *Quòd nunquam fuerunt copulati legitimo matrimonio*, ought to certifie that they were coupled in lawful marriage, albeit the man were under fourteene, or the wife above nine, and under twelve (10) So it is if

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(8) *Philips in his reading holds, that if the wife be attainted, and then the husband purchases land and aliens it again, and then the wife is pardoned, she shall have dower of the land which was purchased and aliened during the time she was not dowable. And he cited Mansfield's case adjudged 28 Elizabeth. In that case a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands and aliened them again and died, the land which the wife had in jointure was evicted, and the wife had dower of the land which was purchased and aliened by her husband at the time when she was barred of her action of dower. So if wife elopes, and husband purchases lands and aliens them, and then the wife is reconciled, she shall have dower of those lands.* MS. Comment. on Litt. penes editorem, supposed to have been written before the publication of lord Coke's Commentary.—See the list of readers of the Middle Temple in Dugd. Orig. Jurid. by which it appears that Mr. Philips was autumn reader in 38 Eliz.—See further Plowd. Quær. 181, and 204.—[Note 202.]

(9) Vid. supra fol. 31. b.—Hal. MSS. See Note 9, in 31. b.

(10) Vid. M. 9 and 10 E. 1, coram rege Rot. 24. Ebor. *A. contracts* per verba de præsenti *with B. and has issue by her, and afterwards marries C.* in facie ecclesiæ. *B. recovers A. for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D. and*

if a marriage *de facto* be voidable by divorce (11), in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have beene dissolved, and the parties freed *à vinculo matrimonij*, yet if the husband die before any divorce, then, for that it cannot now be avoyded, this wife *de facto* shall be endowed; [*c*] for this is *legitimum matrimonium* (as in the other case ☞ when the wife is *infra annos nubiles*) *quoad dotem*. And so in a writ of dower the bishop ought to certifie, that they were *legitimo matrimonio copulati*, according to the words of the writ. And herewith agreeth 10 *E.* 3. 35. And [*d*] *Bracton: quamdiu duravit matrimonium, duravit dotis exactio, eo deficiente deficit dotis petitio, &c. poterit tamen replicare contra exceptionem illam, quòd si aliquando fuit matrimonium propter consanguinitatem, &c. inter eos accusatum, nunquam tamen fuit in vitâ viri sui solutum nec divortium celebratum.* But if they were divorced *à vinculo matrimonij* in the life of her husband, she loseth her dower: otherwise it is if they were divorced [*e*] *causâ adulterij* (1), which is but *à mensâ et thoro*, and not *à vinculo matrimonij*, as it was adjudged. But some doe hold that a wife *de facto* shall not have an appeale of the death of her husband, but onely she that is a wife *de jure, in favorem vitæ* (2). *Vide* 50 *E.* 3, fol. 15. 28 *E.* 3. 92. 27 Ass. *Stamf. Pl. Cor.* 59, and that there *unques accouple in loyall matrimonie* shall be taken *de jure* strictly. And so in some cases a wife shall have dower where she cannot have an appeale, [*f*] and in other cases she shall have an appeale where she cannot have a writ of dower; as if she elope (3), &c. she is barred of her dower, but not of her appeale (4): and the reason is, for that the statute [*g*] barreth her of her dower, but not of her appeale. So if the husband be attainted of treason, &c. his wife shall not be endowed, and yet if any

[33. b.]

(5 Co. 98. b. Berrie's case.)

[*c*] 10 E. 3. 35. Fleta, lib. 5. cap. 22. Brit. cap. 107. (7 Co. 41. b.)

[*d*] Bracton, lib. 4, fol. 304. Britton, ibidem. Fleta, lib. 5, cap. 23. 32 E. 1. Dier, 156. (5 Co. 98. b. Ante 32. a. 1 Ro. Abr. 341. 681. Noy, 108.)

[*e*] Tr. 2. Ja. Rot. 1815, in Communi Banco, inter Stowell and Wikes in Dower.

[*f*] 50 E. 3, 15. b.

[*g*] W. 2, cap. 34. (1 Mod. Rep. 130. 2 Inst. 68.)

D. and then marries B. in facie ecclesiæ, *and dies. She brings dower against D. and recovers because the feoffment was* per fraudem *mediate between the sentence and the solemn marriage*, sed reversatur coram rege et concilio quia prædictus A. non fuit seisitus *during the espousals between him and B.* Nota, *neither the contract nor the sentence was a marriage.* Quoad *marriage* infra annos nobiles, nota infra Sect. 104. *It is only* sponsalia de futuro quoad *other purposes. Dy.* 105. 313. 369. 47 *E.* 3. Action sur le statute 37. *Whether husband shall have trespass* de tali uxore abducta. Hal. MSS.—[Note 203.]

(11) Nota obiter. *When A.* per judicium ecclesiæ recuperâsset aliquam in uxorem, vel in divortium celebratum inter A. & B. *his wife, and she is married to C.* et postea ad prosecutionem A. sententia divortii reversatur *by appeal, a writ directed to the sheriff shall issue out of chancery on the sentence there certified.* Claus. 19 H. 3. m. 1, pro Willelmo de Treyor. Claus. 20 H. 3. m. 9, pro Willelmo de Dauntesy. Claus. 21 H. 3. m. 17, pro Roberto de Halsted. *And* vid. M. 9 and 10 E. 1, ubi supra. Et cum eundem Willelmum, si in militiâ suâ ulterius perseverâsset, ad executionem dictæ sententiæ regia potestas tenebatur compulisse, si a loci diocesano fuisset super hoc requisitus. Hal. MSS. —[Note 204.]

(1) 10 E. 3. 15. Supra 32. Hal. MSS. See n. 9. in 32. a.

(2) Acc. 2 Hawk. Pl. C. b. 2, c. 23, s. 36, and the authorities there cited.

(3) To the books cited ante 32, a. n. 10, as to the effect of elopement on dower, add New Abr. tit. Marriage, E. 1. Treat. on Dower in Gilb. Law of Uses, 402.

(4) Acc. Bro. *Appeal* 17. Staund. Pl. C. 59. But see contra 2 Inst. 317, and 1 Mod. 130, by judge Hide.

any doe kill him, the wife shall have an appeale: the reason of the diversity shall appeare hereafter in this Chapter(5).

[h] Britton, cap. 106, Bracton, lib. 4. fol. 301. [i] 31 E. 3, tit. Collusion, 29.

"*After the decease of her husband.*" [h] *Mortuo viro hinc confirmatur dos.* This is intended of a naturall, not of a civill death. For if the husband entred in religion, [i] the wife shall not be endowed untill he be naturally dead(6).

And in this Chapter *Littleton* divideth dower into five parts, viz. dower by the common law. Secondly, dower by the custome. Thirdly, dower *ad ostium ecclesiæ*. Fourthly, dower *ex assensu patris*. And fifthly, dower *de la pluis beale*. And all these dowers were instituted for a competent livelihood for the wife during her life: [k] *Propter onus matrimonij, et ad sustentationem uxoris et educationem liberorum, cùm fuerint procreati, si vir præmoriatur.*

[k] Bract. lib. 2. cap. 39. fol. 92, &c. Fleta, lib. 5, cap. 22. Britton, cap. 101.

Sect. 37.

AND note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custome of some county, she shall have the halfe, and by the custome in some towne or borough, she shall have the whole; and in all these cases she shall be called tenant in dower.

[l] Glan. lib. 6, cap. 1. Bracton, ubi supra. Britton, ubi supra. Fleta, ubi supra. Mirror, cap. 1, sect. 3. Magna Carta, cap. 7.

"*NOTE, by the common law the wife shall have for her dower but* [l] *the third part, &c.*" This third part is called *rationabilis dos*, or *dos legitima*, because it is the dower that the common law giveth. *Rationabilis autem dos est cujuslibet mulieris de quocunque tenemento tertia pars omnium terrarum et tenementorum quæ vir suus tenuit in dominico suo ut de feodo, &c.*

Fitz. N. B. 150. O. [m] 21 E. 4. 53. 64. 7 H. 6. 26. 22 H. 6. 14. 21 H. 7. 17. 40 Ass. 27. 41. 26 E. 2, Prescription 53. 48 E. 3. 32. 45. tit. Dower 65.

"*But by the custome of some county* (7) *she shall have the halfe, and by the custome in some towne or borough, she shall have the whole.*" Such a [m] custome may extende to a county, city, or an ancient burgh without question; and so this custome, as here it appeareth by *Littleton*, may extend to upland townes, which are neither counties, cities, nor boroughs. But the surer pleading, in this and the like cases, is to lay the custome within a manor or seigniory, if the truth of the case will so beare it(8). By the

Ass. 8. Dier 363. 39 E. 3. 2. 10. 14 E. 3. Barre 277. 13 E. 3. (1 Ro. Abr. 558. 563.)

custome

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(5) See post. 37, a.

(6) *The reason is, because* post carnalem copulam *the husband cannot be professed without the consent of the wife.* Extrav. de conversione conjugatorum cap. 2, et per totum. Nec è converso. Hal. MSS. See New Abr. *Marriage* E. 3. Vin. *Dower* K. & Treat. on Dow. in Gilb. Law of Uses 401.—[Note 295.]

(7) Vid. 15 H. 3. *Prescription* 57. *Custom of the town of Salop, that the wife shall have a moiety of socage, but if the husband has socage and chivalry the wife shall have only a third part.* Hal. MSS.—[Note 296.]

(8) Nota, *the writ special.* Hal. MSS.

custome of Gavelkind [n] the wife shall be indowed of the moity, so long as she keepe herselfe sole, and without child, which she cannot waive and take her thirds for her life(9). For in that case, *Consuetudo tollit communem legem* (10).

And as custome may enlarge, (11) so may custome abridge dower, and restraine it to a fourth part, &c.

[n] Vide le statute de consuetud. Kancise, &c. Trin. 17 E. 3, coram rege Kan. in Thesaur. in which record Senentia signifieth Widowhood.

[34 a.]

☞ Sect. 38.

ALSO, there be two other kinds of dower, viz. dower which is called dowment at the church doore, and dower called dowment by the father's assent.

This shall be explained by that which shall be said in the two Sections next ensuing.

Sect. 39.

DOWMENT at the church doore is, where a man of full age seised in fee simple, who shall be married to a woman, and when he commeth to the church doore to be married, there, after affiance and troth plighted betweene them, he endoweth the woman of his whole land, or of the halfe, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignement of any.

IF this dower be made *ad ostium castri sive mesuagii* it is not good, but ought to be made *ad ostium ecclesiæ sive monasterii.*

Et sciendum est, [o] *quòd hæc constitutio fieri debet in facie ecclesiæ, et ad ostium ecclesiæ; non enim valet facta in lecto mortali*, vel in camerâ, vel alibi ubi clandestina fuêre conjugia.* For the law requires, that this and like matters be done publickly and solemnly.

10 H. 3, Dower 200.

[o] Bracton, lib. 2, cap. 39. Mirror, cap. 1, sect. 3, and cap. 5. 10 H. 3, Dower 201.

F. N. B. 150. m. n. Flets, lib. 5, cap. 22, &c. Britton, cap. 101. 108, &c. (Perk. sect. 306.)

" *Where*

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(9) See acc. Robins. Gavelk. 159.

(10) *Accordingly adjudged that she cannot waive. H.* 24 *Eliz. Rot.* 1515. *C. B. P.* 43 *Eliz. Davers and Selby T.* 30 *Eliz. C. B. Rot.* 157. *Hunt and Gilbert.* Hal. MSS.—See the former case in Cro. Eliz. 825, and the latter in Mo. 260. 1 Leon. 133. Gouldsb. 108. Cro. Eliz. 121, and Say. 91. See further on the subject in Robins. Gavelk. 179, and Hugh. on Orig. Wr. 160. —[Note 207.]

(11) By the custom of some places the wife shall have the *whole* of her husband's lands in dower. See Fitz. N. Br. 150. p.—[Note 208.]

* Quære, if this should not be read *lecto maritali.*

"*Where a man of full age.*" That is of one and twenty yeares. *Anno* 9 *H.* 3. Dower 197. A man of the age of eighteen yeares tooke a wife, and by assent of his guardian endowed her *ad ostium ecclesiæ*, and it was adjudged a good endowment, albeit the husband dyed before the age of one and twentie yeares; but I hold *Littleton*'s opinion to be good law.

9 H. 3, Dower 197. (Post. 38. a. 1 Ro. Abr. 682.)

"*There, after affiance between them.*" (1) *Affidare est fidem dare*, affiance or sponsalitie, and is derived of this word *spondeo*, because they contract themselves together; *et ideo sponsalia dicuntur* [*p*] *futurarum nuptiarum conventio, et repromissio* (2). But this dower is ever after marriage solemnized (3), and therefore this dower is good without deed, because he cannot make a deed to his wife. For no assignement of dower *ad ostium ecclesiæ* can be made before marriage, for that before marriage the woman is not intituled to have dower.

[*p*] Glanvil. lib. 6, ca. 1. 40 E. 3. 43. Vide Vernon's case, 4 Co. 1, 2.

"*Of his whole land or of the halfe.*" (4) In ancient time [*q*] as it appeareth by *Glanvill*, lib. 6, cap. 1, it was taken that a man could not have endowed his wife *ad ostium ecclesiæ* of more than a third part, but of lesse he might. But at this day [*r*] the law is taken as *Littleton* here holdeth. An assignement of dower, [*s*] where the husband was sole seised, cannot be made of the third or fourth part in common, but ought to be in severaltie (1). [34. b.]

[*q*] Glanvill, lib. 6, cap. 1. Bract. lib. 2, cap. 38, 39, and lib. 4. tract. 6, cap. 1, & 6. Britton, cap. 101, &c. Fleta, lib. 5, cap. 22, &c. (1 Ro. Abr. 682.) [*r*] F. N. B. 150. [*s*] 20 E. 3. Barre 132. 45 E. 3. 6. Fleta, lib. 5. 23.

"*And*

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(1) Post affidationem et carnalem copulam sunt quasi *husband and wife, and gift by him to the wife is void.* 16 *H* 3. *Feoffments* 117. 13 *E.* 1. ibid. 113. Hal. MSS.—[Note 209.]

(2) This explanation of *affiance* or *sponsalia* is conformable to the *strict* sense of the word amongst the civilians and canonists; but our law books, as Mr. Swinburne long ago observed, use *affiance* and *marriage* promiscuously for one and the same thing, and lord Coke apparently supposes Littleton by *affiance* to mean *marriage;* for lord Coke says that dower *ad ostium* ever is *after* marriage, without professing to contradict Littleton. See Swinb. on Spousals. 2 Perk. sect. 442.—[Note 210.]

(3) But though dower *ad ostium* cannot be till *after* marriage, yet it seems that such endowment cannot be made at any time after, but must be *immediately after*. See Perk. sect. 442, where the time of assigning dower *ex assensu patris* is so explained. But mr. Perkins adds a case, in which, according to some ancient books, dower *ex assensu patris* made 8 weeks after the marriage was held good. Perk. sect. 443. See further Hugh. on Orig. Wr. 167, and note p. in 2 Blackst. Comment. 5th edit. 134.—[Note 211.]

(4) Vid. 9 H. 3, *Dower* 190. *Dower* ad ostium ecclesiæ *of a moiety of all lands which he has or may have. He purchases lands afterwards, and the dower good for them.* Hal. MSS.—[Note 212.]

(1) Vide contra *adjudged* supra. Hal. MSS. See Lambert's case, ante 32. b. n. 1. See S. C. in 1 Ro. Abr. 682. X. pl. 3, and Sty. 276, in both of which books the case is so explained as to make it consistent with lord Coke's *general* doctrine as to the manner of assigning; for according to them the court held, that the assignment of the third part *in common* would have been bad, if the wife and heir had not by mutual assent waived the assignment by metes and bounds, and that it would have been error if the sheriff had so assigned.—[Note 213.]

"*And there openly*[t] *doth declare the quantity and the certainty of the land.*" Here be two things that the law doth delight in, viz. first, to have this and the like openly and solemnly done. Secondly, to have certaintie, which is the mother of quiet and repose. And this word (moitie) abovesaid is to be entended of the halfe in certaintie, and not of the moitie in common, which cleerly [u] appeareth in that here *Littleton* saith, the quantitie and certaintie of the land.

[t] Britton, cap. 101. Bracton, lib. 2, cap. 18.

[u] Vide 14 H. 3. Dower 189. 9 H. 3. Dower 190. 8 H. 3. Dower 195. F. N. B. 150. 40 E. 3. 43.

"*In this case the wife may enter into the said quantity of land.*" And afterwards *Sectione* 43, he saith, *Note, that in all cases, where the certaintie appeareth what lands or tenements the wife shall have for her dower, the wife may enter after the death of her husband.*" It was instituted in favour and reliefe of wives, that a man after marriage might assigne to his wife certaintie of dower, to the end that the widow should not be driven to a long and chargeable suit wherein delay might be used, and in the mean time her life spent, together with her money also. For albeit the [w] law hath provided, *quòd vidua post mortem mariti sui non det aliquid pro dote sud, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum mariti sui, infra quos dies assignetur ei dos sua, nisi prius ei assignata fuerit, &c. et habeat rationabile estoverium suum interim in communi*, yet because there was no penaltie or punishment inflicted, the tenant of the land may drive her to sue for her dower. And this continuance of the widow in the capitall messuage, is in law called a quarentine, *quarentina*, for that it is by the space of fortie days, as is aforesaid (2). And if the heire or other tenant of the land put her out, she may have her writ *De quarentinâ habendâ*. If the wife marry within the fortie dayes she loseth her quarentine, for her habitation in the house is personall to her, and only given to her in judgment of law during her widowhood, albeit the words of the law be generall. And therefore to the end that widowes might have certaintie of estate, and that they might enter (3) and not be driven to suit, the law hath provided dower *ad ostium ecclesiæ*, and, as it shall appeare hereafter, dower *ex assensu patris*. And lastly, by making of a joynture, of which (being no dower but made in satisfaction of dower either before or after marriage) it is necessary that something should be said hereafter in his apt place, for that this now falleth out to be the surest way.

[w] Magna Carta, cap. 7. See the Second Part of the Institutes, cap. 7. Fleta, lib. 5. cap. 23. Britton, cap. 103. Bract. lib. 2, cap. 40. Regist. 175. Vide Dyer 6 E. 6. 76. b. and 161. a. F. N. B. 161. 1 Maric. Br. 101. (Ante 32. b.)

Nota, surest way.

"*In all cases where the certaintie appeareth, &c. the wife may enter after the death of her husband.*" This is to be intended where the certaintie appeareth upon an assignement of dower *ad ostium ecclesiæ*, or *ex assensu patris*. For if a woman bring a writ of dower of sixe pound rent charge, and she hath judgement to recover the third part, albeit it be certain that she shall have fortie

(1 Ro. Abr. 681. 2 Inst. 678. 32 H. 8. cap. 5. of execution.)

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(2) See further as to *quarentine*, ante 32. b. and n. 3, there, and Treat. on Dow. in Gilb. Law of Uses, 372.

(3) 24 *H.* 3. *Dower* 189. *A man endows his wife of all the lands which his mother then had in dower; the mother and husband dye; the wife brings a writ of dower* ad ostium ecclesiæ *and recovers.* Sic nota, *that the wife may have action or enter.* MSS. Comm. on Litt.—See acc. post. 35. b.—[Note 214.]

[x] 45 E. 3. 26. 48 E. 3. 36. 22 Ass. 87. 39 E. 2. 12. 37 H. 6. 38. 39 H. 6. 25. 1 H. 5. 8. Brev. 199. 30 E. 3. 30. 21 E. 4. 3. Vide 1 Co. Shelley's case, 40 E. 3. 22.

fortie shillings, yet she cannot [x] distreine for 40 shillings, before the sherife doe deliver the same unto her: (4) for wheresoever the writ demands land, rent, or other things in certain, the demandant after judgement may enter or distrein before any seisin delivered to him by the sherife upon a writ of *habere facias seisinam*. But in dower where the writ demandeth nothing in certaine, there the demandant after the judgement cannot enter or distreine untill execution sued, by which execution the sherife is by the king's writ to deliver the third part in certaintie to the demandant. And so it is when the wife of one tenant in common demands a third part of a moitie, yet after judgement she cannot enter untill the sherife deliver to her the third part, albeit the deliverie of the sherife shall reduce it to no more certaintie then it was (5).

"*Without other assignment* (6) *of any*." For as concerning dower at the common law, there must be assignement either by the sherife, (as hath been said) by the king's writ, or else by the heire or other tenant of the land by consent and agreement between them. To a perfect assignement of dower eight things are to be observed: [a] First, regularly the assignement must be certaine, as our author here saith (7).

[a] 8 E. 2. Ent. 75. 40 E. 3. 22. 45 E. 3. 5. 6.

Secondly, (8) it [b] must be either of some part of the land whereof she is dowable, or of a rent or some other profit issuing out of the same, either before judgement or after, which rent may be assigned to her by parol. But an assignement of other land whereof she is not dowable, or of a rent issuing out of the same, is no barre of her dower (9).

[b] 1 Mar. Dyer 91. 1 E. 2. Dower 146. 28 H. 6. 2. Dyer 9. El. 263. 26 Ass. 41.

31 E. 3. Seir. fa. 99. 33 H. 6. 2. Vernon's case. 4 Co. 1. 5 E. 4. 22. (1 Ro. Abr. 628. 684. Cro. Eliz. 451. Noy 55. Mo. 59. Post. 169.)

Thirdly, the assignement must be absolute, and not conditionall, or subject to any limitation (10).

Fourthly, it must be made by him that is tenant of the land; but herein certaine diversities are to be observed (11).

If

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(4) 20 *E.* 4. 14. Hal. MSS.

(5) *If the sheriff reduces to certainty by metes and bounds, though the demandant refuses, yet she may afterwards enter.* 10 *Eliz. Dy.* 278. Hal. MSS. —[Note 215.]

(6) Nota, *P.* 38 *Eliz. Wentworth's case. It ought to be pleaded by the word* assignavit *not* dedit. Hal. MSS.—See Cro. Eliz. 452.

(7) Vid. ante 32. *b. Lambert's case.* Hal. MSS.—See n. 1. in. 32. b. and *supra* n. 1.

(8) 12 *H.* 4. 17. Hal. MSS.

(9) *But see* 2 *H.* 5. 12. *The heir assigns dower of lands of which the husband was seised; but the wife not dowable: she is tenant in dower.* 30 *E.* 1. *Briefe*, 884. *If wife be endowed, and afterwards exchanges with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband.* Per omnes justiciarios. Hal. MSS.—[Note 216.]

(10) *P.* 33 *Eliz. Wentworth's case. A conditional assignment of rent doth not bar dower.* Hal. MSS.—[Note 217.]

(11) *And this ought to be averred in pleading. Dy.* 264. Hal. MSS.—See S. C. in Cro. Eliz. 451, and Noy 55.

[35. a.] If two or more be jointenants of lands, [c] the one of them may assigne dower to the ☞ wife of a third part in certainty, and this shall binde his companions, because they were compellable to do the same by law (1). But if one of them assigne a rent out of the land to the wife, this shall not binde his companion, because he was not compellable by the law thereunto (2). If the husband make several feoffments of severall parcells, and dyeth, and the one feoffee assigne dower to the wife of parcell of land in satisfaction of all the dower which she ought to have in the land of the other feoffees, the other feoffees shall take no benefit of this assignement, because they are strangers thereunto, and cannot plead the same (3). But in that case if the husband dyeth seised of other lands in fee simple, and the same descend to his heire, and the heire endoweth the wife of certaine of those lands in full satisfaction of all the dower that she ought to have aswell in the lands of the feoffees as in his owne lands, this assignement is good, and the several feoffees shall take advantage of it (4). And therefore if the wife bring a writ of dower against any of them, they may vouch the heire, and he may pleade the assignement which he himselfe hath made in safety of himselfe, lest they should recover in value against him, [d] so as there is a privity in this respect betweene the heire and the feoffees, and by this meanes the same may be pleaded by the heire that made it (5). And so it is adjudged in our bookes, which is a notable case for many purposes.

[c] 7 H. 6. 34. 10 E. 2. Dower 169. 10 E. 3. 38. (2 Co. 67.)

(9 Co. 18. Mo. 26.)

[d] 33 E. 3. tit. Judgm. 254. 8 E. 3. 69. 17 E. 3. 58. b. 3 E. 3. tit. Dower 76. 3 E. 3. Vouch. 196. See the Second Part of the Institut. W. 1. cap. 49.

Fifthly, if assignement be made [e] by any disseisor, abator, intrudor, or any wrong doer, of lands or tenements, if they came to that estate by collusion and covin betweene the widow and them, albeit the widow hath just cause of action, and the assignment be indifferently made after judgment by the sherife of an equall third part, yet shall the disseissee, &c. avoyd it, for covin in this case shall suffocate the right that appertained to her, and so the wrongfull manner shall avoyd the matter that is lawfull (6).

[e] 25 Ass. p. 1, 44 Ass. 29. 44 E. 3. 46. 27 Ass. 74. 11 H. 4. 60. 15 E. 4. 4. 19 H. 8. 12. Litt. 83. 151.

Sixthly, An assignment by [f] (7) a disseisor, abator, intrudor, &c. if there be no covin, is good, unlesse it be prejudiciall to the

(2 Co. 67. 1 Ro. Abr. 549. 1 Sid. 21. Post. 357. 3 Co. 78. 6 Co. 58. a. 5 Co. 30. b.) [f] 12 Ass. p. 20. 21 E. 3. 12.

disseissee,

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(1) This case of assignment of dower by one of two or more jointenants must be understood to be, where the husband has been solely seised during the coverture, and afterwards conveys or devises the land to two jointly and dies; for the wife of a jointenant is not dowable. See post. Sect. 45.—[Note 218.]

(2) 9 *E.* 3. 38. *Husband and wife are jointenants of land, of which the wife of I. S. is dowable: the husband alone assigns; it is good, and shall bind the wife.* 7 *H.* 6. 33. Hal. MSS.—See Perk. sect. 399, and Keilw. 128. b.—[Note 219.]

(3) Vid. *the statute of Westminster* 1, *cap.* 48. 4 *E.* 3. 42. *M.* 8 Jac. C. B. n. 15. D. D. *adjudged accordingly in Throgmorton's case.* Hal. MSS.—However, mr. Perkins seems to think, that such an assignment by one feoffee may be pleaded in bar of dower by the other feoffees. Perk. sect. 402.

(4) 31 *E.* 3. *Scire facias*, 99. Hal. MSS.

(5) Vid. *if the heir by receit shall have the plea. Keilw.* 128. Hal. MSS.

(6) See further on this subject Hugh. on Orig. Wr. 199.

(7) 3 *E.* 3. 1. 50 *E.* 3. 7, 8. Hal. MSS.

[g] 3 E. 3. tit. Dower 77. 16 E. 2, tit. dower Statham. (Post. 357.)

disseisee, &c. As if the husband [g] infeoffeth the younger sonne with warranty, the eldest sonne disseise the yongest sonne, and endow the widow, in this case the yonger sonne shall avoyd this assignment (8), for otherwise he shall lose his warrantie: but a disseisor, abator, intrudor, &c. cannot assigne a rent out of the land to her for her dower, to bind the disseisee, &c.

Seventhly, No assignement can be made, but by such as have a freehold (9) (as hath beene said), or against whom a writ of dower doth lie, and therefore [h] an assignment by a gardian in socage is voyd (10); but a gardian in chivalry may assigne dower (11), as shall be said hereafter, because a writ of dower lieth against him, and not against a gardian in socage.

[h] 31 E. 1. Dower 151. 29 Ass. 68. 15 E. 3. Dower 69. (6 Co. 57.)

Eightly, And before the gardian in chivalry enter (12), the heir within age [i] may assigne dower, for the gardian may waive the wardship. And so briefly have you heard, of what, by whom, and to whom the assignment must be made (13). But there needeth neither livery of seisin, nor writing, to any assignement of dower, because it is due of common right.

[i] 7 R. 2. Admesurement 4. F. N. B. 148. f. (Post. 38. b.)

Sect. 40.

DOWMENT by assent of the father is, where the father is seised of tenements in fee, and his sonne and heire apparent, when he is married, endoweth his wife at the monastery or church doore, of parcel of his father's lands or tenements with the assent of his father, and assignes the quantity and parcels. In this case after the death of the son, the wife shall enter into the same parcell without the assignment of any. But it hath been sayd in this case, that it behooveth the wife to have a deed of the father to proove his assent and consent to this endowment. M. 44 E. 3. f. 45. (1).

Brit. ca. 109. Fleta, lib. 5. ca. 22, 23. Bract. lib. 5. 305. 6 E. 3. 34. F. N. B. 150. (1 Ro. Abr. 677.)

"*WHERE the father is seised of tenements in fee.*" Tenant for life of a carve of land, the reversion to the father in fee, the sonne and heire apparent of the father endoweth his wife of this carve, by the assent of the father, the tenant for life dieth, the husband dieth, the reversion was a tenement in the father, and yet this is no good endowment *ex assensu patris*, because the father at the time of the assent had but a reversion expectant upon a freehold, whereof he could not have endowed his owne wife;

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(8) 3 *E.* 3. 18. *By Herle, the assignment shall bar in such a case.* Hal. MSS.

(9) Acc. Perk. 404.

(10) A quære is made of this in 1 Ro. Abr. 682.

(11) And yet guardian in chivalry had only a chattel interest. See post. 38. b. where it is explained why a dower might be brought against him.

(12) *But not after entry of the guardian.* 9 *H.* 6. 6. Hal. MSS.

(13) See further as to assignment of dower, post. 39. b. Perk. sect. 393 to 423. Hugh. on Orig. Wr. 194 and 198. New Abr. *Dower* D. and Vin. Abr. *Dower* S. to A. a.

(1) No reference to the Year Book, in L. and M. Roh. or P. It was first inserted in Redman's edition. See the observation on this addition to Littleton, post. 36. a.

wife (14); and albeit the tenant for life died, living the husband, yet, *quod initio non valet, tractu temporis non* ☞ *convalescet.* And for the most part, dower *ad ostium ecclesiæ*, and *ex assensu patris*, ensue the nature of a dower at the common law. And for these the wife may have a writ of dower, albeit they be certaine, as for the third part at the common law (2). (1 Sid. 3. Post. 36. b.)

[35. b.]

"*And his sonne and heire apparent.*" It must be such a sonne and heire apparent, as must continue an heire apparent, and therefore the youngest sonne and heire apparent cannot endow his wife *ex assensu patris*, of lands whereof the father is seised in fee of the nature of Borough *English*, because the father may have another sonne, and then the husband is not heire apparent: and it is in respect of the constant and perpetuall apparance, that the sonne and heire apparent may endow his wife of his father's lands. And so it is of lands in Gavelkind: [*k*] and this is the reason that dower *ex assensu fratris*, or *consanguinei*, is not good, for that albeit he is heire apparent at that time, yet for the common possibility that he may have issue, and every issue that the brother or cosin should have afterwards shall exclude him, he is no such heire apparent as the law intendeth. [*l*] But an endowment *ex assensu matris*, is as good as *ex assensu patris*, because there is an apparance of a constant and perpetuall heire. And some have said, that if the father after his assent be attainted of treason or felony, that the wife in that case loseth her dower, because her husband doth not continue heire (3).

[*k*] 8 H. 3. Dower 193. 9 H. 3. Dower 191. 11 H. 3. Dower F. N. B. 150. l. 29 E. 3. Dow. 134. [*l*] F. N. B. 150. e. Flet. l. 5. cap. 22. Bract. lib. 4. 305. Ambr. Gorge's case, 6 Co. 22.

"*When he is married, endoweth his wife.*" [*m*] In this case, albeit the freehold and inheritance is in the father, yet in respect (as hath been said) of the constant and perpetuall apparance of the heire, the heire apparent doth endow, and the father doth but assent. And therefore where the father did endow the wife of his sonne and heire apparent, that endowment was holden void, because the husband in that case must endow, and the father assent.

[*m*] 2 H. 3. Dower 199. (Post. 38. a.) 6 E. 3. 34. 8 E. 2. Dower 154.

And it is holden in 2 *H.* 3. Dower 199 (4), That if the heire apparent be within age, yet the endowment *ex assensu patris* is good. Note, *Littleton* in the case of dower *ad ostium ecclesiæ*, doth put the husband of full age, but here of the dower *ex assensu patris*, he speaketh generally.

2 H. 3. Dower 199.

"*And assignes the quantity and parcels.*" So as both in dower *ad* [*n*] *ostium ecclesiæ, et ex assensu patris*, the certainty must be expressed. And therefore where books speake of a moiety, it is intended (as hath beene said) of an halfe in certaine (5).

[*n*] 9 H. 3. Dower 190. F. N. B. 150. m. 8 E. 2. Dower 154.

"*After the death of the son, the wife shall enter.*" In this case after the death of the husband the wife shall enter, or have a writ of dower albeit the father be alive.

"*That*

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(14) S. p. acc. Perk. 445.

(2) See acc. ante 34. b. n. 3.

(3) See Plowd. Quær. 181.

(4) *This book is not to the purpose.* Hal. MSS.

(5) *Dower good of a moiety in common in the said book.* Vid. ante. Hal. MSS. See acc. 9 H. 3. Dower 190, which is the book meant by lord Hale. See also ante 34. b. n. 1.

" That it behooveth the wife to have a deed of the father to prove his assent to this endowment."

[o] Bract. lib. 2. fo. 33, &c. & l. 5, fo. 396. Brit. fol. 34. 65, 66. 101. Flet. l. 3. ca. 14. & lib. 6. ca. 32. & lib. 3. c. 3, 4, 5, 6. (2 Co. 5. Post. 229. a. 2 Ro. Abr. 21.) (5 Co. 74. 76.)

[p] 4 E. 2. Fines 116. 14 E. 2. Ley 79. 4 E. 2. Ley 78. 27 H. 6. 10. 27 H. 8. 22. F. N. B. 122. I. (5 Co. 18.)

" *A deed,*" *factum.* This word (deed) in the understanding of the common law is an instrument written in parchment or paper, [o] whereunto ten things are necessarily incident: viz. First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloath, or the like, but onely upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted.

If a deed [p] be alledged in *count* or *plea*, regularly it must be shewed to the court (6), to the end the court may judge whether there be apt words to make it a good contract according to the rule of law, whereof more shall be said in the Chapter of Conditions. But if *non est factum* be pleaded (7), because thereby the

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(6) Where a deed ought to be shewn. *Vid.* 12 *H.* 7. 12. 9 *H.* 7. 15. 9 *E.* 4. 53. 4 *H.* 7. 10. 14 *H.* 8. 18. 18 *H.* 8, 9. *F. N. B.* 210. *E. in formedon. Dr. Leyfield's case* 10 *Rep. Where a thing cannot pass without deed in respect of the nature of the things, as herbage common in gross, &c. one ought to shew deed. So in respect of the quality of the lessor, as count or plea of demise of abbot with consent of convent T.* 36 *Eliz. Goffe and Thurston, mayor and commonalty* P. 5 Jac. B. R. *Garnons and Kenton, master and fellows of a college.* P. 9 Jac. *Lord Norris's case* B. R. *But yet count in ejectment of demise by husband and wife is good without shewing deed, though wife cannot demise without deed, as it seems. Dy.* 91. *when one declares on a deed, where it is not necessary. Count in* ejectione firmæ *on demise* per scriptum indentatum *without shewing, and yet good.* M. 42, 43 El. B. R. *Hall and Mather; and it seems that defendant shall not have oyer. Count in debt for rent on demise of the reversion* in scriptis hic in curia prolatis, *yet the other shall not have oyer of the testament.* 1651 *Fitton's case. A. covenants with B. to stand seised to the use of C. his son: the son may plead this deed without shewing it, because the estate is executed by the statute.* H. 11 Car. B. R. *Crook n.* 12. *Stockman and Hampson.* M. 5 Jac. C. B. *So it seems, if it was with the party himself.* M. 6 Jac. C. B. *Debt on obligation by commissioners of bankrupt good without shewing deed.* H. 6 Car. B. R. *Crook n.* 5. *Gay and Fielder.* Hal. MSS. See further on *shewing of deeds* and *oyer* in Com. Dig. *Pleader* O. P. Wils. vol. 1, part 1, page 121. vol. 2, page 1, and Sheph. Touchst. 73, but most fully in Vin. Abr. *Faits,* M. a, to M. a. 32.—[Note 220.]

(7) Where to plead *non est factum. Dy.* 112. *In case of* sigillum avulsum *before issue, one may plead* non est factum. 7 *H.* 6. 18. *If a deed be suspicious by rasure or avulsion of seal, the party on oyer of deed may demur, and put it into the judgment of the court, or plead* non est factum. T. 40 El. B. R. Rot. 202. *Obligation with condition to save harmless against Tracey with a blank: a stranger after delivery fills up the blank with a christian name by consent of the obligor; yet adjudged to avoid the deed, because material. But if the addition is not material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself it doth avoid it.* Vid H. 43 Eliz. Cam. Scacc. *the case of Fox and Markham.* Vid. *Noy fo.* 112. *n.* 487. *A. B. and C. are bound jointly and severally: the seal of A. is torn off; in debt against B. he may plead* non est factum. *But if A. B. and C. covenant severally, and the seal of A. is torn off, it will not avoid against the others.* 5 *Rep.* 23. *Vide* where by rasure of the deed the interest is lost. *Where a thing may pass without deed,*

as

the sealing, delivery, or other matter of fact is denied, it shall be tried by the country. Of deeds some be indented, and some be deeds poll. Of indented, some be bipartite, some tripartite, some quadripartite, &c. whereof more shall be said in the Chapter of Conditions. Also of deeds, some be inrolled, and some [q] be not inrolled. If it be inrolled according to the statute of 27 *Hen.* 8. cap. 10, it must be inrolled in parchment for the strength and continuance thereof, and not in paper, and so was it resolved in parliament ☞ by the judges in *anno* 23 *Eliz.* Now for the rest of the parts of a deed, you shall read thereof plentifully in our bookes, and in my Reports; which by this short instruction you shall easily understand (1).

[q] Brit. fol. 101. Bract. l. 2. fol. 33. Fleta, lib. 3, ca. 14. (2 Inst. 673.)

[36. a.]

"*A deed of feoffment.*" It is properly called *charta feoffamenti* (2), and yet if such a deed be denied, the plea is *non est factum*. So as of deeds some concerne the realtie, as here a deed of feoffement; some the personaltie, as a deed of gift of goods, obligations, bills, &c. And some mixt, whereof more shall be said in the Chapter of Releases.

If a man deliver a writing sealed, to the partie to whom it is made, as an escrow to be his deed upon certaine conditions, &c. this is an absolute deliverie of the deed, being made to the partie himself, for the deliverie is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is onely requisite, and then when the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur*. And hereof though there hath been [r] variety of opinions, yet is the law now settled agreeable to judgements in former times, and so was it resolved by the whole court of common pleas (3). But it may be delivered to a stranger, as an escrowe, &c. because the bare act of deliverie to him without words worketh nothing (4). And this is the ancient diversitie [s] in our bookes, the record whereof I have seene agreeable with the reason of our old bookes (5). And as a deed may be delivered to the partie

(2 Rol. Abr. 26. 9 Co. 137. Noy 50. 11 Cro. Jam. 85.) 35 Ass. Pl. 11. Tr. 29 H. 8. Dyer, 95. (1 Cro. El. 835. Hob. 246. Dy. 34. b. N. Ben. 75. 1 And. 4. Cro. El. 884. 1 Raym. 197. Ow. 95. Dy. 192. b. Dal. 104.)

[r] Tr. 43. Eliz. inter Haukesby & Lacher in the King's Bench. Hill. 12 Ja. R. in the Common-place. (5 Co. 119. b.)

[s] 13 H. 8. 19 H. 8. 8. 4 E. 3. 18. 13 H. 4. 8. (3 Co. 26. b. 1 Leon. 140. 2 Ro. Abr. 24.)

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as in case of feoffment or lease, though the deed be rased, the interest continues. H. 10 Car. B. R. *Crook, n.* 8. *Miller and Manwaring. But if lease by abbot and convent be interlined by lessee, the interest is destroyed.* H. 9 Eliz. rot. 1056. *Bendl. Arden and Michell.* Hal. MSS.—See further as to pleading *non est factum* to a deed, Sheph. Touchst. 74, and Vin. Abr. *Faits*, N. a, and as to rasure and alteration of deeds and breaking off seals, Sheph. Touchst. 68, 69. Vin. *Faits*, T. to Z, and Com. Dig. *Fait*, F.—[Note 221.]

(1) See further as to deeds, Perk. c. 2, ante 6. a, and n. 5, there. Sheph. Touchst. c. 4. Vin. Abr. tit. *Deeds*, and also tit. *Faits*. Com. Dig. *Fait*.

(2) For the formal parts of a deed of feoffment, see ante 6. a.

(3) In Mo. 697, there is an opinion of some judges in 39 Eliz. to the contrary; but the authorities since are with lord Coke. See acc. Mo. 642. Noy 6. Hob. 246. 9 Co. 137. Sty. 251. 6 Mod. 218.

(4) See Dy. 167. b.

(5) Nota, *if dean and chapter seal a deed, it is their deed immediately; but if at the same time they make letter of attorney to deliver it, this is not their deed till*

without words, so may a deed be delivered by words without any act of deliverie (6), as if the writing sealed lyeth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Goe and take up the said writing, it is sufficient for you, or it will serve the turne; or, Take it as my deed, or the like words, it is a sufficient delivery (7).

Of deeds and their distinctions you shall reade excellent matter in antiquitie. [t] *Cartarum, alia regia, alia privatarum, et regiarum, alia privata, alia communis, et alia universitatis. Privatarum, alia de puro feoffamento et simplici, alia de feoffamento conditionali sive conventionali, alia de recognitione purâ, vel conditionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni, non è contra, debent inservire.*

[t] Bract lib. 2. fol. 33. b. Fleta, lib. 3. cap. 14.

Carta non est [u] *nisi vestimentum donationis. Carta non est nisi vestimentum orationis. Nemo tenetur armare adversarium suum contra se. Scriptum est instrumentum ad instruendum quod mens vult. Carta est legatus mentis.* [w] *Benignæ sunt faciendæ interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quàm pereat. Nihil tam* [x] *conveniens est naturali æquitati, quàm voluntatem domini volentis rem suam in alium transferre ratam habere.*

[u] Fleta, lib. 6, ca. 28. Bracton, lib. 2, fo. 34.

[w] Bracton, lib. 2, fo. 94, 95.

[x] Idem, l. 2, fo. 18.

[y] *Re, verbis, scripto, consensu traditione,*
Junctura vestes sumere pacta solent.

[y] Pl. Com. in Throgmorton's case, fol. 161. b.

Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter est intelligendum. Verba debent intelligi secundum subjectam materiam. Carta de non ente non valet.

Note, the father may [a] make a deed to the wife of his sonne, and so is the law holden, for that the father's land by his assent is charged with a future freehold whereunto a deed is requisite; but to a dower *ad ostium ecclesiæ* no deed is requisite. And here it is not well done (of him that made the addition to our author) to vouche 44 *E.* 3. fol. 45, because the author himselfe vouched it not, for if he [b] meant to have vouched authorities, he would have vouched more than one in this case, and those that [c] he vouched he would have cited truly, but this case is mistaken both in the yeare and in the leafe, for whereas it is cited in 44 *E* 3, it is in 40 *E.* 3, and whereas he saith it is fo. 45, it is fo. 43.

[a] 3 E. 2. Dower 126. 8 E. 2. Dower 154. 6 E. 3. 34. 40 E. 3. 43.

[b] 11 H. 3. Dower 186. 14 H. 3. Dower.

[c] 2 E. 2. Dower 125. Vid. Stat. Wallix anno 12 E. 1, fol. 18, in veteri magna carta. 47 H. 3. Dower 174.

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till delivery. T. 21 Jac. B. R. rot. 662. *Hayward and Fulcher.* Hal. MSS. As to the former point, see acc. Dav. 44. 2 Leon. 97, and Cro. Eliz. 167, and as to the latter point the case cited by lord Hale in W. Jo. 170, and Palm. 504, according to which the court was divided in opinion—[Note 222.]

(6) *The obligor seals obligation, and throws it upon the table without other circumstances; this is not a delivery. But if he throws it towards the obligee, or if the obligee immediately takes it, and the obligor says nothing, it is a delivery.* M. 29 and 30 Eliz. Rot. 636. *Staunton and Chambers.* Hal. MSS.—See S. C. in Ow. 95. Cro. Eliz. 122. Dy. ed. 1688, fo. 192. b. in marg.—[Note 223.]

(7) Trin. 3 Eliz. *Gibson* vers. *Tenant, Bendl. n.* 140. Hal. MSS.—See S. C. in N. Bendl. 92, and Dy. 192.—See further as to the delivery of deeds, Sheph. Touchst. 57. Com. Dig. *Fait A.* 3 Vin. Abr. *Faits*, I and K.

An assignment of dower [d] either *ad ostium ecclesiæ*, or *ex assensu patris*, may be made of more than a third part. But the ancient law was that no greater assignment could be made in those cases but of a third part, but lesse might, as appeareth in *Glanvill.*

[d] F. N. B. 150. p. Glanvil. lib. 6. ca. 1, 2. 3.

Sect. 41.

AND if after the deuth of her husband she entreth, and agree to any such dower of the said dowers at the church doore, &c. then she is concluded to claim any other dower by the common law of any the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church dore, &c. and then she may be endowed after the course of the common law.

"*SHE is concluded to claim any other dower by the common law.*" (8) Wherein a diversitie is to be observed between a dower *ad ostium ecclesiæ*, or *ex assensu patris*, and a ☞ joynture or estate made to the wife in satisfaction of her dower, for one of those dowers being assented unto is a barre of the dower at the common law, but a joynture was no barre of her dower at the common law. For a right or title that one hath to a freehold cannot be barred by acceptance of collaterall satisfaction (1). But a woman cannot have a double dower, viz. *ad ostium ecclesiæ, &c.* and at the common law, for the wife of one husband can have but one dower. But since *Littleton* wrote, by the statute of 27 *H.* 8, if a joynture be made to [a] the wife, according to the purvieu of that statute, it is a barre of her dower, so as the woman shall not have both joynture and dower, and to the making of a perfect joynture within that statute sixe things are to be observed. First, her joynture by the first limitation is to take effect for her life in possession of profit presently after the decease of her husband. Secondly, that it be for the terme of her owne life, or greater estate. Thirdly, it must be made to herself, and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either

[36. b.]

(Doc. Pla. 149.) Vernon's case, 4 Co. 1. 1 Mariæ, Dyer 91. 31 E. 3. Scire fac. 99. 20 E. 4. 3.

(Dy. 248. a. 317. a.)

27 H. 8. cap. 10.

[a] 12 E. 2. Dower 158. 27 H. 8, cap. 10. versus finem.

(4 Co. 1. 3 Cro. Jam. 489.)

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(8) Vid. 32 *E.* 1. *Dower*, 126. 177.—Hal. MSS.

(1) *Rent granted by parol out of the same land of which she is dowable, bars; not if out of other land.* 1 *Mar. Dy.* 91. *Sturge's case.* Hal. MSS.—See Cro. Eliz. 128. But though a collateral satisfaction is not pleadable at law in bar of dower, yet acceptance of a term of years, or of a sum of money, or of any other kind of collateral satisfaction, in lieu of dower, is a good bar in equity. See Lawrence and Lawrence, 2 Vern. 365, and note that lord Somers's decree against the wife in that case, which was afterwards reversed by lord keeper Wright, and finally in the house of lords was objected to, not on account of any doubt of dower's being barrable in equity by a collateral satisfaction, but merely because the devise to the wife was not expressed to be in satisfaction of dower. See further as to bar of dower in equity by collateral satisfaction, 1 Eq. Cas. Abr. *Dower* B. and 9 Mod. 152.—[Note 224.]

either be expressed or averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage.

(1 Sid. 3.) Concerning the first, if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of *A.* for life, and then to the use of the wife for life in satisfaction of her dower, this is no joynture within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of her husband. And albeit in that case *A.* should die living the husband, and after the death of the husband the wife entreth, yet this is no barre of her dower, but she shall have her dower also (2), because it is not within the said statute, and (as it hath been said) by the common law it was no barre of her dower (3). 2. It must be either in fee taile, or for terme of her owne life, for an estate for life or lives of one or many other, or to her for a hundred or a thousand yeares, &c. if she lives so long, or without such limitation, is no barre of her dower, albeit they be expresly made in satisfaction of her dower, *causâ quâ supra* (4). 3. If an estate be made to others in fee simple, or for her life upon trust, so as the estate remaine in them, albeit it be for her benefit, and by her assent, and by expresse words to be in full satisfaction of her dower, yet is this no barre of her dower (5). The fourth is so plaine as it needeth not any example. 5. A devise by will cannot be averred to be in satisfaction of her dower, unlesse it be so expressed in the will (6). 6. If the joynture be made before

Leake & Randal's case, 4 Co. 4.

(3 Co. 25. 27.)

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(2) T. 26 Jac. *Sherwell's case. Hutt.* 51. *accord.*—Hal. MSS.

(3) But *quære* whether a court of equity will not confine her to one, and compel her to elect which she will have. See the references in note 1, *supra*, and the case of Visett and Longdon cited in Jordan and Savage, New Abr. *Jointure*, B. 6.—[Note 225.]

(4) Vid. M. 29 and 30 Eliz. C. B. Rot. 354. *Devise to the wife for 7 years.* Hal. MSS.

(5) But though this may be true at law, yet it is now settled, that a trust estate, being equally certain and beneficial as what is required at law, or even an agreement to settle lands as a jointure, is a good equitable jointure in bar of dower. See the case of Jordan and Savage reported in New Abr. *Jointure*, B. 5.—[Note 226.]

(6) 10 Eliz. *Dy.* 268. Hal. MSS.—But though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes our courts of equity have been induced by *special* circumstances to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should make her election to waive her dower and accept under the will, or to waive the will and take her dower. In Lawrence and Lawrence, 1 Vern. 463, lord chancellor Somers made such a decree; because he inferred an intention to give in bar of dower, from the testator's having devised the residue of his *whole* estate to another. But this decree was reversed by lord keeper Wright, and the reversal was afterwards affirmed in the house of lords, and this is said to have settled the doctrine. 1 Eq. Cas. Abr. *Dower*, B. pl. 2, and see acc. Prec. in Chanc. 133. Vin. Abr. *Devise*, T. c. pl. 45. 2 Atk. 427. 3 Atk. 8. 436. See also the case of Broughton and Errington adjudged in Dom. Proc. 8th March 1773. However, notwithstanding the doctrine on which the case of Lawrence and Lawrence was finally decided, and the frequent recognition of that case, devises have been since frequently deemed a satisfaction of dower, on account of very strong and special circumstances;

before marriage, the wife cannot waive it and claime her dower at the common law; but if it be made after marriage, she may waive the same, and claime her dower (7). I have touched these points the more summarily, because they are resolved at large with the reasons thereof in *Vernon's* case *ubi supra*. So as to comprehend all in few words, a joynture (which in common understanding extendeth as well to a sole estate as to a joynt estate with her husband) is a competent livelihood of freehold for the wife of lands or tenements, &c. to take effect presently in possession or profit after the decease of her husband for the life of the wife at the least, if she herselfe be not the cause of determination of forfeiture of it. Which see more at large in *Vernon's* case *ubi supra*. If a joynture be made to a wife of lands before the coverture, and after the husband and wife alien by fine those lands so conveyed for her joynture, she shall not be endowed of any of the other lands of her husband. But if the joynture had been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally waivable, and the time of her election came not till after the decease of her husband, she may claim her dower in the residue of his lands. But in the other case, the joynture of the wife made before marriage was not waivable at all. Now as the dower *ad ostium ecclesiæ* and *ex assensu patris*, is better for the wife, because in respect of the certainty she may enter, than the dower at the common law, where she is driven to her reall action, and therefore *Britton* calleth dower *ad ostium ecclesiæ*, and *ex assensu patris*

Vide Vernon's case, ubi supra, fo. 2. b.

Dyer, 19 Eliz. 358.

Brit. cap. 102, 103.

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as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will. On this latter principle lord chancellor Northington is said to have decided for a satisfaction of dower in the case of Arnold and Kempstead, which was heard in July 1764, and lord chancellor Camden in the case of Villareal and lord Galway, which was heard soon after the former case.—[Note 227.]

(7) *Though she be within age* ut videtur *she cannot waive.* Hal. MSS.—The important question, whether a jointure on an infant before marriage may be waived, was not quite settled till the case of Drury and Drury, which was heard before lord chancellor Northington in Hilary 1 Geo. 3. The points determined by lord Northington in that case were, 1, that the statute of 27 H. 8, which introduced jointures, extends to adult women only, infants not being particularly named; and therefore that notwithstanding a jointure on an infant, she may waive the jointure and elect to take dower: 2, that a covenant by the husband that his heirs, executors, or administrators shall pay the wife an annuity for her life in full for her *jointure* and in bar of dower, without expressing that it shall be charged on any *particular* lands, or be secured out of lands *generally*, is not a good *equitable* jointure within the statute: 3, that a woman being an infant cannot by any contract previous to her marriage bar herself of a distributive share of her husband's personalty in case of his dying intestate. From this decree by lord Northington there was an appeal to the house of lords, and after hearing the judges *seriatim* on the question, whether a jointure on an infant could be waived, on which they were divided in opinion, the decree was *wholly* reversed. See the printed cases in the house of lords of the year 1762. Before *Drury* and *Drury*, the only *judicial* opinions as to the effect of a jointure on an infant were sir Joseph Jekyll's in *Cray* and *Willis* against its barring, and lord Hardwicke's in *Says* and *Price*, and in *Harvey* and *Ashley* to the contrary. See Vin. *Dower*, Q. 4. pl. 18. Barnard. Ch. Rep. 117, and 3 Atk. 607.—[Note 228.]

patris establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertaine is established); so a joynture (that hath the force of a barre of dower by the said act of 27 *H.* 8.) is, as hath been said, more sure and safe for the wife than either dower ☞ *ad ostium ecclesiæ*, or *ex assensu patris*, for besides it is as certaine as those others, and she may enter into it, after the death of her husband, and not be driven to her action. She shall not be barred of her joynture albeit her husband commit treason or felonie, as she shall be both of her dower *ad ostium ecclesiæ* and *ex assensu patris* by the common law. But now at this day by the statutes of 1 *E.* 6, cap. 12, and 5 *E.* 6, cap. 11, a wife shall not lose any title of dower which to her was accrued, by the attainder of her husband by any manner of murder or other felony whatsoever. But [*a*] if the husband be attainted of high treason or petit treason she shall be [*b*] barred of her dower at this day, so long as that attainder standeth in force.

[37. a.]

Bract. 311. lib. 4. Britton, ca. 15.

1 E. 6, ca. 12. 5 E. 6, ca. 11. (Post. 40. b.)

[*a*] Stanford, 195. b.

[*b*] Vid. in the Chapter of Garranty, Sect. †

"*Concluded*," commeth of the [*c*] verbe *concludo*, which is derived of *con* and *claudo* to determine, to finish, to shut up, to estoppe or barre a man to plead or claime any other thing. *Vid.* Estoppel.

[*c*] Pl. Com. 276. b. per Walsh. Vide Sect. 693. 695. 667. 679.

Sect. 42.

AND note, that no wife shall be endowed ex assensu patris *in forme aforesaid, but where her husband is sonne and heir apparant to his father.* Quære *of these two cases of dowment* ad ostium ecclesiæ, &c. *if the wife, at the time of the death of her husband, be not past the age of* 9 *yeares, whether she shall have dower or no.*

(Ante 33. a.) "*NO wife shall be endowed, &c.*" Of this sufficient hath beene said before.

"*Quære of these two cases of dowment ad ostium ecclesiæ, &c.*" And it seemeth, that these dowers being made by assent, &c. that the same are good albeit the wife be within the age of nine yeares, for *Consensus tollit errorem.* But without question, a joynture made to her under or above the age of nine yeares, is good.

Sect. 43.

AND note, that in all cases, where the certaintie appeareth what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without assignement of any. But where the certainty appeares not, as to be endowed of the third part, to have in severalty, or the moiety according to the custom to hold in severaltie, in such cases it behoveth that her dower be assigned unto her after the death of her husband; because it doth not appeare before assignement, what part of the lands or tenements she shall have for her dower.

† Probably sect. 747.

"*AND*

"*AND note, that in all cases, &c.*" In all cases, where the demand of the dower is certaine, as in case of dower *ad ostium ecclesiæ* or *ex assensu patris*, there the wife after the death of the husband may enter(1). But where the demand is uncertaine, as in writs of dower at the common law, there albeit the thing itselfe be certaine, yet shall she not take it without assignement. As if a woman bring a writ of dower of three shillings rent, albeit she ought to be endowed of one shilling, yet cannot she after judgment distrein for twelve pence before assignment (2), because the demand was ☞ uncertaine. And so it is if two tenants in common be, and the wife of one of them bring a writ of dower to be endowed of a third part of a moitie, and have judgement to recover, yet cannot she enter without assignement, albeit the assignement cannot give her any certainty, because her husband's state was incertaine. See more of this before Section 39.

40 E. 3. 22. 43. 45 E. 3. 4. 20 E. 3. barre 132. 8 E. 2. Entry 75. (Ant. 34 b.)

[37. b.]

Sect. 44.

BUT if there be two joyntenants of certaine land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, and after dieth; in this case the wife for her dower shall have the third part of the moitie which her husband purchased, to hold in common (as her part amounteth) with the heire of her husband, and with the other jointenant, which did not alien, for that in this case her dower cannot be assigned by metes and bounds.

Of this sufficient hath beene said before, and that in this case the wife cannot enter without assignement.

Sect. 45.

AND it is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth joyntly with another at the time of his death; but where he holdeth in common, otherwise it is, as in the case next abovesaid.

THE reason of this diversity is, for that the jointenant, which surviveth, claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower, and may plead the feoffment made to himselfe without naming of his compagnion that died, (1 Ro. Abr. 676.)

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(1) *It seems, that though it be assigned, the freehold is not in her till entry.* 9 *E.* 3. 5.—Hal. MSS.

(2) *But* videtur, *that after the third part set out by the sheriff she may enter immediately before the writ returned. Yet as to the damages the writ ought to be returned, because another judgment is to be given.* M. 19 Jac. B. R. *Howard* versus *Cavendish.* Vid. 10 *Eliz. Dy.* 272.—Hal. MSS.—[Note 229.]

died, as shall be said hereafter in his proper place; but tenants in common have several freeholds and inheritances, and their moities shall descend to their several heires, and therefore their wives shall be indowed.

☞ Sect. 46. [38. a.]

AND it is to be understood, that if tenant in taile endoweth his wife at the church doore, as is aforesaid, this shall little or nothing at all availe the wife, for that after the decease of her husband, the issue in taile may enter upon her possession; and so may he in the reversion, if there be no issue in taile then alive.

THE reason of this is, for that tenant in taile is restrained by the sayd statute of 13 *E.* 1, *de donis conditionalibus.*

And so did our author take the law in his learned reading. Here our author's reason is *à fine*, and therefore such an endowment is not to be made because it is to no end.

Vide Sect. 194.

Sect. 47.

ALSO, if a man seised in fee simple, being within age, endoweth his wife at the monasterie or church doore, and dieth, and his wife enter, in this case the heire of the husband may out her. But otherwise it is (as it seemeth) where the father is seised in fee, and the sonne within age endoweth his wife ex assensu patris, *the father being then of full age.*

THE reason of this diversitie is, for that in the first case the husband within age is seised, and therefore he being within age cannot by a voluntary act bind himself: otherwise it is, where he doth an act whereunto he is compellable by law, but in the latter case the father which giveth the assent is seised of the freehold and inheritance, and the sonne therein hath nothing, and therefore his heire shall not avoide it in respect of his infancy.

Vid. 9 H. 3, tit. Dower 197. (Ante 34. a.)

Sect. 48.

ALSO, there is another dower, which is called dowment de la pluis beale. *And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of the said forty acres, of one by knights service, and the other twenty acres of another in socage, and taketh wife, and hath issue a sonne, and dieth, his sonne being within the age of fourteene yeeres, and the lord of whom the land is holden by knights service entreth into the twenty acres holden of him, and holdeth them as gardein in chivalrie during the nonage of the infant, and the mother of the infant entreth into the residue, and occupieth it as gardein in socage: if in this case*

case the wife bringeth a writ of dower against the gardein in chivalry, to be endowed of the tenements holden by knights service, in the king's court, or other court, the gardein in chivalry may pleade in such case all this matter, and shew how the wife is gardein in socage, as aforesaid; and pray that it may be adjudged by the court, that the wife may endow her selfe de la pluis beale, *i. e. of the most faire of the tenements which she hath as gardein in socage, after the value of the third part which she claimes by her writ of dower, to have the tenements holden by knights service. And if the wife cannot gainsay this, then the judgement shall be given, that the gardein in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c.* (1)

AND the lord of whom the land is holden by knights service entreth into the twenty acres holden of him." For he is not possessed as a gardein against whom a writ of dower lieth, untill he doth enter. Of the wardship of the body he is possessed before seisure, ☞ because it is transitory, but he is not possessed of the land untill he enter, because it is permanent. And therefore if he doth not enter, the heire within age may assigne dower, as hath been said, and as it appeareth afterwards.

[38. b.]

(Ante 35.) Vid. le statut. de bigamis, cap. 3.

"*If in this ease the wife bringeth a writ of dower against the gardein in chivalry.*" Albeit [a] the gardein in chivalrie or the grantee of the king of a wardship hath but a chattel during the minority of the heire, and the woman shall recover a freehold in her writ of dower, yet after the gardein as is aforesaid hath entered into the land, that writ lieth against him, and not against the heire who is tenant of the freehold, because the law hath trusted the gardein to plead for the heire within age, and that is in his custody, and also for his own particular interest, and by this diversity all the bookes be reconciled (1) †.

[a] 44 E. 3. 13. 4 H. 6. 11. Stanf. prær. 13. 6 E. 3. 15. 16 E. 3, breve 657. Temps E. 1, breve 863. 11 E. 3, breve 473. 45 E. 3. 5.

17 E. 3. 70. 1 H. 7. 17. 4 H. 7. 1. 4 H. 7, aid le Roy 33. 38 E. 3. 13. 9 H. 6, 6. b. 39 E. 3. 8. 8 E. 2, Dower 169. 8 E. 2, breve 809. 22 E. 4, Dower 16. (9 Co. 17.)

So likewise if the gardein die, the wife shall have a writ of dower against his executors; and if there be two executors, and one of them alone take the profits, the writ of dower shall be maintained against him only. If a man be possessed of the wardship

8 E. 3. 52.

8 E. 3. 15. & 31. 38 E. 3. 37. 47 E. 3. 9. b.

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(1) *And that the wife may endow herself of the fairest part of the lands which she hath as guardian in socage, after the value, &c.* L. and M.

(1) † Nota Pasch. 1653. B. R. *Ruled*, 1. *Grantee of wardship of the body cannot assign dower; but grantee or committee of wardship of land may, though it be by court of wards.*—2. *Yet court of wards cannot assign dower by commission, but it ought to be by writ* de dote assignanda *out of chancery.* Accord. M. 35, 36 Eliz. C. B. *case of viscountess Boudon.*—3. *But lessee for years of land by the guardian cannot assign dower.*—4. *But if the king leases the land during minority of the heir rendering rent, whether he be a committee to assign dower* dubitatur. Videtur quod non, *but there ought to be* dedimus vel committimus custodium: 2 *E.* 3. 13. *Husband of ward in right of his wife, and dower against the husband only.* Nota H. 8 Jac. C.B. *Nicholson and Gower.* 1. *After full age and before livery, dower lies against the heir, and cannot be assigned by the king.* 2. *Judgment in dower against the heir in wardship shall bind the heir, but not the guardian.* Hal. MSS.—[Note 230.]

ship of certaine land, either joyntly with his wife or in the right of his wife, yet the writ of dower lieth against the husband onely. Gardein in socage shall not endowe herselfe *de la pluis bealé* without judgement, as shall be said hereafter.

"*The gardein in chivalry may pleade.*" The authority of *Littleton* is direct that the gardein may plead this plea. But hereof ariseth two questions. First, whether if the heire be vouched by the tenant in the writ of dower in the gard of the gardein (2), whether he coming in as vouchee may plead that plea. The second is, whether if the gardein in ☞ socage have not sufficient, as if the land holden by service of chivalry be thirty acres, and the lands holden in socage but five acres, whether she shall be endowed by parcels, viz. to recover five acres against the gardein in chivalry, and to retaine five acres. And as to the first, the gardein shall as well plead it, when he comes in as vouchee, as when he is tenant. And as to the second, some say that the demandant in the writ of dower must have assets in her hands to the value of her dower, so as she shall not be partly endowed against the gardein, and partly retaine in her owne hands. And they say, that the judgement should be in part, that is, as to the land in socage in severalty, and as to the land in chivalry to recover the third part, and compare it to the case in 8 *E.* 4. 3, that damages shall not be recovered, partly against the defendant in an appeale, and partly against the abettors, but entirely either against the one or the other. And *Littleton* here putteth this case that the gardein in socage hath assets in value, and seeing it is a dower against common right, they hold that she must be entirely endowed either by herselfe against common right, or against the gardein according to common right. But [*a*] yet by the booke in 25 *E.* 3. 52. b. and

[39. a.]

5 E. 3. 60.
2 E. 3. 31. Lib. Intrat. Dower, fol. 225. a.
18 E. 3. 4. b.
14 H. 7. 26. Keeble. (12 Co. 125, 126)
[a] 25 E. 3. 52. b. 4 E. 2, tit. disseisin. 10 Regist. Judic. 26. Lib. Intrat. 22. 16 E. 3, breve 657. 20 E. 3, judgment 175.

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(2) For voucher in wardship in dower.—1. *If the heir be in wardship of guardian in chivalry, though he be in wardship of many, there ought to be voucher of all having the heir in wardship, because every one may make defence, and every one shall lose proportionably. But several writs lie against several guardians.* 16 *E.* 3. Briefe 657.—2. *If the heir be in wardship of one or many guardians in socage, one may vouch the heir in wardship or may vouch at large as it seems, and not as in wardship, because the guardian has the land only to the use of the infant.*—3. *If the heir be in wardship of the demandant in chivalry he ought to vouch in wardship of the demandant; but if he be in wardship of the demandant in socage, there it is in the election of the feoffee to vouch in wardship of the demandant.* Registr. Judicial. 54. *But he may plead in bar, and pray that she shall be endowed* de pluis beale *as well as guardian in chivalry.* 21 *E.* 3. 28. 25 *E.* 3. 21.—4. *But if A having* 4 *acres in socage and* 2 *acres in chivalry makes feoffment of* 2 *acres of socage with warranty and dies, the heir within age, and dower is brought by the wife of A. against the feoffee,* dubitatur *if he may vouch the heir in wardship of the guardian in chivalry only, or ought to vouch in wardship of the demandant and of guardian in chivalry, or if he shall only plead in bar that she may endow herself* de pluis beale. *But whether the voucher be in wardship of guardian in chivalry only, or of guardian in chivalry and demandant guardian in socage, the guardian shall turn all the loss on the demandant as it seems.* Reg. Judic. 54. 21 *E.* 3. 28. 25 E. 3. 51.—Hal. MSS. There is an obscurity in the third part of this annotation by lord Hale, which the editor on translating found himself unable to remove. See further on the subject in Hugh. on Orig. Wr, 166.—[Note 231.]

and others it appeareth, that she may in this very case retaine for part, and recover against the gardein for part (2).

Gardein in chivalry [b] shall plead in barre of her dower, detainment, or eloigning of the body of the ward, because his marriage doth appertaine unto him: and if the heire come in [c] as vouchee, he shall plead the same plea. But he shall not plead detainment of the charters, [d] because the charters concerning the inheritance of the heire belong not to the gardein (3). The gardein in chivalry [e] may assigne dower of the lands and tenements he hath in ward, or if he assigne a rent out of those lands in allowance of her dower, it is good. If the gardein in chivalrie assigne too much for her dower, the heire shall have a writ of admesurement by the common law (4). And so [f] if the heire within age assigne, before the gardein enter, to the wife too much in the dower, the gardein shall have a writ of admesurement by the statute of *West.* 2, cap. 7. And if the heire within age, before the gardein enter into the land, assigne too much in dower, he himselfe shall have a writ of admesurement at full age: and some have said, that in that case he may have it within age. [g] But if the heire (before the gardein enter) endow the wife of more than she ought, and the gardein assigne over his estate, his assignee shall have no writ of admesurement, because it was a thing in action. Also, the heire shall have an [h] admesurement for the assignment in the life of his ancestor, by the common law, [i] and a writ of admesurement lyeth upon an assignment in chancery.

[b] 7 E. 3. 57. 8 E. 3. 71. (Doc. Pla. 149.)
[c] 17 E. 3. 58.
[d] 10 E. 3. 50. 6 El. Dy. 230.
[e] 3 E. 3, Dow. 75. 8 E. 2, Dower 155. W. 2. cap. 7. (F. N. B. 148, 149.) 2 Inst. 367.)
[f] Bract. li. 4, 314. Reg. origin. 171. Flet. li. 5, ca. 22.
7 E. 2. tit. Admes. 13. F. N. B. 149.
[g] 7 R. 2, Admes. 4. F. N. B. 148, i.
[h] 7 R. 2, ub.su. F. N. B. 149, a.
[i] 7 R. 2, sub. sup. 12 H. 6. Admes. 9. F. N. B. 149. 25 E. 3. 51.

"*Then the judgement shall be given, that the gardein in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c.*"

"*Judgement.*" *Judicium, quasi juris dictum,* the very voyce of law and right, and therefore *Judicium semper pro veritate accipitur.* The ancient words of judgement are very significant, *Consideratum est, &c.* because that judgement is ever given by the court upon due consideration had of the record before them: and in every judgement there ought to be three persons, *actor, reus,* and *judex.* Of judgements some be finall, and some not finall, whereof you shall read more hereafter. And now to returne to our author, it is materiall that these words *(et cætera)* be explained at large, viz. *Et quòd prædicta A.* (the demandant) *capiat de terris hæred' prædicti in custodiâ suâ existen' ad valentiam præd' 3. partis cum pertinen' tenend' nomine dotis suæ pro præd' 3. parte superius per eam petit* (5). Now some are of opinion, that upon this judgement the demandant may not in any sort endow herselfe of the land, because she cannot do an act to herselfe, but she shall recoupe the third part of the profits upon her

(1 Ro. Abr. 201. Cro. Cha. 422. Post. 168. a.)

22 E. 4. Dow. 16. 16 E. 3. Wast. 100. 45 E. 3. 6.

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(2) Vid. 2 *E.* 3. *Vouch.* 213. 13 *E.* 3. *Judgment* 165.—Hal. MSS.

(3) Vid. 9 *Rep.* 15. b. *Ann Beding field's case.*—Hal. MSS. See further as to pleading detainment of charters, Hugh. Orig. Wr. 183. Vin. Abr. *Dower* L. M. and N.

(4) See further as to admesurement of dower, Vin. Abr. *Dower* Q. a. and as to assignment in chancery, Hugh. Orig. Wr. 171. New Abr. *Dower* D. 3.

(5) 15 *E.* 3. *Dower* 69.—Hal. MSS.

her account, and be endowed against the heire at his full age (6). But observe what *Littleton* saith in the next Section: but before you come to that, observe what priviledge the common law ☞ giveth to the land holden by knights service, viz. that it shall not be dismembered, but the whole dower taken of the lands holden in socage; and the reason is, for that knights service is for the defence of the realm, which is *pro bono publico*, and therefore to be favoured. [39. b.]

Sect. 49.

AND note, that after such a judgement given, the wife may take her neighbours, and in their presence endow herselfe by metes and bounds of the fairest part of the tenements which she hath as gardein in socage (1), *to have and to hold to her for terme of her life; and this dower is called* dower de la pluis beale.

And the judgement, viz. *tenend' nomine dotis*, proveth, that she may have it for terme of her life, for every dower is for terme of life.

Sect. 50.

AND note, that such dowment cannot be, but where a judgement is given in the king's court, or in some other court, &c. (2), *and this is for the preservation of the estate of the gardein in chivalrie during the nonage of the infant.*

"*WHERE*

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(6) Where judgment shall be against heir and where against vouchee.—1. *Where the heir of the husband is vouched as having assets in the same county, and the demandant acknowledges it, judgment shall be for the demandant against the heir, and that the tenant shall go in peace if he has assets in the same county, and if not judgment against the tenant, and for him over in value. But if it is agreed that he has not assets in the same county, but only in a foreign county, then judgment shall be against the tenant, and for him over in value.* 6 *E.* 3. 11.—2. *If he has assets for part in the same county,* vide *conditional judgment for that part,* 2 *E.* 3. *Vouch.* 213. 25 *E.* 3. 52.—3. *If the tenant vouches the heir of the husband having assets in the same county, and the voucher is counterpleaded, or if the demandant* dedit *the assets, &c. then it seems judgment shall be for demandant immediately against the tenant, and for him over in value. But it seems, that the demandant may pray conditional judgment, if the heir counterpleads the assets with warranty.* Quære *and* vide 16 *E.* 3. *Vouch.* 85. 3 *E.* 3. *Judgment* 165. 18 *E.* 3. 38. 55.—4. *But if tenant vouch I. S. who vouches the heir of the husband having assets in the same county, still no judgment conditional shall be given.* 18 *E.* 3. 36. Contra 2 *E.* 3. *Vouch.* 213.—Hal. MSS. See further Hugh. Orig. Wr. 163.—[Note 232.]

(1) *Of the value of the third part of the tenements, which the guardian in chivalry has, &c.* L. and M.—Roh.—P. and Red.

(2) *That the wife can do this,* L. and M.—Roh.

"*WHERE a judgement is given, &c.*" For without such a judgement, as appeareth before, gardein in socage cannot endow herselfe, as likewise hath bin said before (3). 15 E. 3, Dower 69. 16 E. 3, tit. Wast. 100.

"*Or in some other court.*" That is, by writ of right of dower in the court of the heire, if he have any, or of the lord of whom the land is holden. Bract. lib. 5. 329. F. N. B. 7. 8.

"*And this is for the preservation of the estate of the gardein in chivalry during the nonage of the infant.*" For the heire (before the entry of the gardein) cannot plead the same plea, that the demandant should endow herselfe *de la pluis beale*. And the reason of this dower *de la pluis beale* to be all of the socage land, was for advancement of chivalrie for the defence of the realme (4).

Sect. 51.

AND so you may see five kinds of dower, viz. dower by the common law, dower by the custome (5), *dower* ad ostium ecclesiæ, *dower* ex assensu patris, *and dower* de la pluis beale.

This is manifest of itselfe, and therefore needeth no explanation.

[40. a.]

☞ Sect. 52.

AND memorandum, *that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heire to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, but otherwise not.*

"*MEMORANDUM.*" This word doth ever betoken some excellent point of learning, which our author hath used in other places, as appeareth in the margent. Sect. 234. 301. 335.

The matter hereof hath bin partly explained in the Chapter of Tenant by the Curtesie. If a man [*a*] taketh a wife seised of Ante 29. b. [*a*] 21 E. 3. 9. 11 H. 7.

3 H. 7. 17. Stamf. 195. 27 E. 3. 77. 46 E. 3. Petit 20. 26 Ass. p. 2. 13 H. 4. 8.

lands

(3) Dower *de la pluis beale*, being merely a consequence of tenures by knights service, is virtually abolished by the statute which converts such tenures into socage. See 12 Ch. 2. c. 24.—[Note 233.]

(4) Vid. 16 *E.* 3. 88. *She may recoup the third part of the profits on her own account*, ut videtur, *without judgment*. Hal. MSS.

(5) Besides the books cited ante 33. b. as to dower by custom, see Hugh. Orig. Wr. 160. Robins. Gavelk. cap. 2. New Abr. *Dower* K. Vin. Abr. *Copyhold* H. e. Com. Dig. *Copyhold* K. 2.

lands or tenements in fee, and hath issue, and after the wife is attainted of felony so as the issue cannot inherit to her, yet he shall be tenant by the curtesie, in respect of the issue which he had before the felonie, and which by possibility might then have inherited. But if the wife had been attainted of felonie before the issue, albeit he hath issue afterward, he shall not be tenant by the curtesie (1).

[b] 8 Co. 34, in Paine's case.

"*As heire to the wife.*" This doth implie [b] a secret of law, for except the wife be actually seised, the heire shall not (as hath been said) make himselfe heire to the wife (2): and this is the reason that a man shall not be tenant by the curtesie of a seisin in law.

Sect. 53.

AND also, in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibilitie it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath, as heire to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband takes another wife, and dieth, his 2. wife shall not be indowed in this case, for the reason aforesaid.

12 H. 4. 2.
7 H. 6. 11, 12.
(1 Ro. Abr. 675.)

"*So as by possibility it may happen that the wife may have issue by her husband.*" Albeit the wife be a hundred yeares old, or that the husband at his death was but foure or seven yeares old (3), so as she had no possibilitie to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attaine, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above threescore yeares old hath had a child, and *ideò non definitur* ☞ *in jure*. And for the husband's being of such tender yeares, he hath *habitum*, though he hath not *potentiam* at that time, and therefore his wife shall be endowed. [40. b.]

"*And*

(1) See ante 29. b. n. 4, and Vin. Abr. *Curtesy*, H.

(2) See 8 Co. 36. a. where 11 H. 4. 11, and 40 E. 3. 9, are cited to prove this doctrine. See also ante 11. b. where it is advanced as a general rule, that he who claims by descent, must make himself heir to the person last *actually* seised. See further ante 14. b. 15. b. and n. 3. in 11. b. W. Jo. 361, and Blackst. Law. Tr. 8vo. ed. vol. 1, p. 180.

(3) See ante 33. a.

"*And that the same issue may by possibilitie inherit the same tenements.*" A man seised of land in generall taile, taketh wife, and after is attainted of felony, before the said statute of 1 *E.* 6. the issue should have inherited, and yet the wife should not have bin endowed; for the statute of *W.* 2, ca. 1 relieveth the issue in taile, but not the wife in that case (1). But at this day, if the husband be attainted of felony, the wife shall be endowed, (Ante 37. a.) and yet the issue shall not inherit the lands which the father had in fee simple. If the wife elope from her husband, &c. she shall (F. N. B. h. be barred of her dower, as hath beene said (2), and yet the 150. issue shall inherit (3). Ante 32. a.)

Sect. 54.

You may easily perceive by the context that this shaft came never out of *Littleton*'s quiver of choice arrowes (4), and therefore I will leave it. Onely for students sake I will referre them to 5 *E.* 3. Voucher 249. 8 *E.* 3. *Ass.* 293. 4 *H.* 6. 24. *F. N. B.* 149.

5 E. 3. Voucher 249. 8 E. 3. Ass. 293. 4 H. 6. 24. F. N. B. 149.

NOTE, if a man be seised of certaine lands, and taketh wife, and after alieneth the same land with warrantie, and after the feoffor and feoffee dye, and the wife of the feoffor bring an action of dower against the issue of the feoffee, and he vouch the heire of the feoffor, and hanging the voucher and undetermined, the wife of the feoffee [41. a.] *brings her action of dower against the heire of the* ☞ *feoffee, and demand the third part of that whereof her husband was seised, and will not demand the third part of these two parts of which her husband was seised; it was adjudged, that she should have no judgment untill such time as the other plea were determined.*

Sect. 55. (1) †

AND note, Vavisor *saith, that if a man be seised of land and committeth felony, and after alieneth, and after is attaint, the wife shall have a good action of dower against the feoffee: but if it be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference, and inquire what the law is herein.*

THIS

(1) 12 *H.* 4. 3, *by Hankford.*—Hal. MSS. See further as to loss of dower by the husband's offences ante 37. a. post. 392. b. Hugh Orig. Wr. 156, and Vin. Abr. *Dower*, Q. 6.

(2) See ante 32. a.

(3) See another instance, where the issue shall inherit and yet the wife shall not be endowed, in Perk. sect. 317.

(4) Section 54 is neither in the edition by L. and M. nor in the Roh. edition. It appears to have been first added in the edition by P.

(1) † Section 55 is not in L. and M. nor in Roh. but is in P. and the subsequent editions.

THIS is also of the new addition, *et exploса est hæc opinio;* for it is cleare in law, that the wife at the common law should not have been endowed against the feoffee. For to deterre and restraine men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony. 1, He shall lose his life, and that by an infamous death of hanging betweene heaven and the earth, as unworthy in respect of his offence of either. 2, His wife, that is a part of himselfe, *(et erunt animæ duæ in carne unâ)* shall lose her dower. 3, His blood is corrupted, and his children cannot be heires to him, and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4, He shall forfeit all his lands and tenements; and 5, all his goods and chattels; and all this is included by the law in the judgement, *quòd suspendatur per collum.* But this is not intended of all felonies, but of felony by stealing of goods above the value of xii. pence, and not of *petit larceny* under the value (2). So as the woman shall lose her dower as well against the feoffee as against the lord by escheat. And so it was resolved in a writ of dower brought by *Mary Gates* late wife of *John Gates*, who after the coverture had infeoffed *Wiseman* in fee, and after committed high treason, and was thereof attainted, that the wife should not be indowed against the feoffee, and in that case it was resolved, that so it was at the common law in case of felony (3). And it is to be understood, that the wife shall not only lose her reasonable dower at the common law for the felony of her husband, but also her dower *ad ostium ecclesiæ*, and *ex assensu patris* (4), for felony

Vide Sect. 746. Vide Britton, cap. 109, l. 1. Bracton title Evidens, l. 4. fo. 397. 30. 311. Stanf. pl. cor. 194, 195. Britton, fol. 15, cap. 5.

(Post 392. b.)

Vide Sect. 746.

(1 Leon. 3.)

M. 3 & 4. Ph. & Mar. Ro. 760. in com. banco. 8 E. 3. 20. 12 H. 4. 30.

Bracton, lib. 4, fol. 311.

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(2) *But outlawry in trespass doth not bar.* 3 E. 3. 7. 41. Hal. MSS.

(3) S. C. acc. Dy. 140. b. and N. Bendl. 55. But Dyer observes, *yet nota that the land alienedbefore the treason committed was not subject to any forfeiture or escheat;* and adds, that Brown serjeant *fuit valde iratus propter judicium prædictum.* Also in Sav. 54, there is a case of attainder of the husband for treason, in which two judges for the reason mentioned in Dyer were inclined to Vavisour's opinion; but the case of sir John Gate's wife being cited, the court held that the demandant was not intitled to Dower. In this latter case the wife afterwards had dower; but then it was allowed to her on account of the reversal of her husband's attainder. See 3 Inst. 315.—[Note 234.]

(4) Here lord Coke expressly makes dower *ex assensu patris*, as well as the dowers at common law and *ad ostium ecclesiæ*, liable to be defeated at common law by the husband's treason or felony. Ante 37. a. But some have inclined to think, that the 5 & 6 E. 6, c. 11, which so far repeals the 1 E. 6, c. 2, and revives the common law as to take away the wife's dower in case of treason by the husband, doth not extend to dower *ex assensu patris.* This will appear from the following extract from a valuable manuscript, which has been already cited. —*It seems that dower* ex assensu patris *shall not be lost by the statute of 5 E. 6, by attainder of the husband for treason; for the wife is in by the father and not by the husband, and if action be brought for the land, it shall be against the husband and wife.* Contra *of dower* ad ostium ecclesiæ. Quære tamen *of the former case* ex assensu patris. MSS. Comment. on Littl. *pen. edit.*—In Plowden's Queries, 181, a like question is started as to the effect of the husband's attainder of felony on dower *ex assensu patris* before the 1 E. 6, c. 2, changed the common law, and saved the wife's dower; but mr. Plowden argues against the wife. See further ante 35. b. where lord Coke mentions, that according to some opinions the wife lost dower *ex assensu patris*, if after assent the father was attainted of treason or felony.—[Note 235.]

felony done after the dower assigned, and dower by custome also (5). And the reason of all this is yeelded by *Littleton* himselfe in the Chapter of Warranties, Section 746, to the end that men should be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath been said) shall be endowed by force of the statutes in that case provided.

Vide Sect. 746. Britton, cap. de Homicide, fo. 15. Bracton, lib. 4, fol. 308, & Fleta ubi supra, & Britton ubi supra.

And it appeareth by *Britton, que fem de homicide ne teigne nul dower de tenants que lour fuit assigne per lour barons*, so as the wife of a felon attainted by the common law was disabled to recover dower *ad ostium ecclesiæ*, and *ex assensu patris*, as well as her reasonable dower which the common law gave her. See in *Bracton* many barres of dower as the law was then held.

[41. b.] ☞ CHAP. 6. *Tenant for term of life.* Sect. 56.

TENANT for term of life is, where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life, and he which holdeth for terme of another's life, is called tenant for terme of another man's life (tenant pur terme d'auter vie).

"*OR for terme of the life of another man.*" Now it is to be understood, that if the lessee in that case dieth living *cesty que vie* (that is, he for whose life the lease was made), he that first entreth shall hold the land during that other man's life, and he that so entreth is within *Littleton*'s words, viz. *tenant pur auter vie*, and shall be [a] punished for waste as tenant *pur auter vie*, and subject to the payment of the rent reserved, and is in law called an *occupant* (1) *(occupans)*, because his title is by his first occupation.

(Cro. Ja. 200. 554.) Bract. lib. 2, ca. 5, & ca. 9, fol. 26. Fleta, lib. 3, ca. 12. Britton, fol. 83. Bracton, lib. 4, fo. 170.

Vide Sect. 381. [a] Vide le Deane de Worcest. case, 6 Co. 37. 27 Ass. 31. 39 E. 3. 1. 27 H. 6. Recognizance. Statham pl. ultimo. 38 H. 6. 27. Bracton, lib. 2, fo. 9. Britton, fo. 84, 85. Vaugh. 189, 190. (Cro. El. 407.)

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(5) In Winch 27, there is a loose note of a case, in which, notwithstanding the 1 E. 6, c. 2, for preserving dower in cases of treason or felony by the husband, Winch inclined to think, that attainder of the husband for felony prevented the wife's dower, where the wife of a copyholder for life was dowable by custom. But the reasons of this opinion, which seems strange, do not appear. —[Note 236.]

(1) Who shall be occupant.—*A. makes lease to B. for one hundred years, and afterwards ousts him and makes lease to C. for the life of D. B. re-enters, C. dies: B. shall not be occupant against his will, for so his term would be drowned.* H. 6 Jac. C. B. *Rawlin's case. Lessee for another's life makes lessee at will, who continues in possession after the death of his lessor: he is an occupant. If A. lessee for another's life makes lessee for years, who is possessed, and A. dies, it seems that lessee for years shall be occupant against his own will, though he doth not enter; but if the lessee for years makes lease at will, and then A. dies, lessee at will shall be occupant, though he claims to the use of the lessee for years, or though lessee*

occupation. And so if tenant for his owne life grant over his estate to another, if the grantee dyeth there shall be an *occupant*. In like manner it is of an estate created by law [*b*]; for if tenant by the curtesie or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an *occupant* (2). But against the king there shall be no *occupant*, because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no *occupant* of any thing that lyeth in grant (3), and that cannot passe without deed, because every *occupant* must claime by a *que estate*, and averre the life of *cesty que vie* (4). It were [*c*] good to prevent the incertainty of the estate of the *occupant* to adde these words (to have and to hold to him and his heires during the life of *cesty que vie*) and this shall prevent the *occupant*, and yet the lessee may assigne it to whom he will; or if he hath already an estate for another man's life without these words, then it were good for him to as-

[*b*] 27 Ass. p. 31. & Pl. Com. fo. 28. b. in Colthorst's case, tit. Barre 303. (Cro. Jam. 201. Mo. 394. Cro. Eliz. 57. Mo. 664. Cro. Jam. 282.)

[*c*] Littleton 167. 11 H. 4. 42. 17 E. 3. 48. 39 E. 3. 25. 7 H. 4. 46. 8 H. 4. 15. Dier. 8 Eliz. 253. (2 Ro. Abr. 150, 151. 1 Ro. Abr. 844. 1 Leon. 126. Post. 239. a.)

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for years enters on lessee at will and claims to be occupant. But riding over the ground to hunt or hawk doth not make an occupant. Vid. *Dy.* 328. H. 15 Jac. B. R. Rot. 356. *Stellicorn and Hayes, and* M. 10 Jac. *Bulstr. n.* 6. *Chamberlain and Ewer. A. lessee for life of B. makes lease to C. for* 20 *years, rendering* 5*l. C. makes lease to D. for* 10 *years, rendering* 3*l. A. dies: D. is occupant, yet he shall pay the rent of* 3*l. to C. and C. shall pay the rent of* 5*l. to D. for D's. term is prevented from merging by the intervenient reversion in C. but D. has the freehold in reversion expectant on C's. term and the rent incident to it.* Hal. MSS. See *Stellicorn and Hayes* in 2 Ro. Rep. 123, and Cro. Jam. 554, and *Chamberlain and Ewer* in 2 Bulstr. 11. 2 Ro. Abr. 151. E. pl. 3, 4, and Palm. 42. – [Note 237.]

(2) In some books it is asserted, that there cannot be an occupant of estates created by law, without distinguishing between a *general* and a *special* occupant. Cro. Eliz. 58. 1 Bulstr. 135. 2 Ro. Rep. 123. Probably the assertion was meant to be confined to the former, for as to the latter the authorities seem decisive in favour of the heir's taking as special occupant if named in granting over curtesy or any other estate created by law. See 27 Ass. pl. 31. Plowd. 28, and 556, and Palm. 32. But even the doctrine against *general* occupancy of estates created by law comes merely from persons arguing as counsel, who neither explain why it should not be, nor cite any authorities except 15 E. 3. Fitzh. Abr. *Scire facias* pl. 17, which appears foreign to the purpose.—[Note 238.]

(3) Lord Hale adds, *nor of a copyhold.* Hal. MSS.—See acc. 2 L. Raym. 1000, and the reason why in 6 Mod. 66. As to things lying in grant, lord Coke in mentioning them must be understood to mean *general* occupancy only; for he writes in another place, that if *heirs* are named in the grant of a rent *pur auter vie*, they shall take, though formerly this was doubted. See post. 388. Dy. 186. ed. 1689, in marg. 1 Bulstr. 155. Mo. 625. 664, and Godb. 172. —[Note 239.]

(4) Vid. M. 44, 45 Eliz. B. R. *Salter's case. Rent granted to one, his executors and administrators* pur auter vie, *and the grantee dies; it shall not go to the administrator as special occupant, but determines by the death unless there has been an assignment.* Hal. MSS. See S. C. in Cro. Eliz. 901. Noy 46. Yelv. 9, and Mo. 664. See also S. P. acc. 2 Ro. Abr. 151. G. pl. 3. However, some have thought that executors and administrators if named in the grant might take an estate *pur auter vie*, though a *freehold*, even before the 29 Ch. 2. c. 3, and 14 G. 2. c. 20, by which they are now intitled. See 3 Atk. 466. The authority relied on is Dy. 328. b.—[Note 240.]

signe his estate to divers men and their heires during the life of *cesty que vie* (5).

Note, that [*d*] to every tenant for life, the law as incident to his estate without provision of the party giveth him three kinde of *estovers*, (that is) *housbote* which is twofold, viz. *estoverium ædificandi et ardendi*, *ploughbote*, that is *estoverium arandi*, and lastly *haybote*, and that is *estoverium claudendi*, and these estovers must be reasonable, *estoveria rationabilia*. And these the lessee may take upon the land demised without any assignement, unlesse he be restrayned by speciall covenant (6), for *modus et conventio vincunt legem*. *Bote* in the *Saxon* tongue, and *estovers* in the *French*, in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. *Estovers* commeth of the *French* word *estover*. And the same estovers that tenant for life may have, tenant for years shall have.

[*d*] Bract. lib. 4, fo. 222, 231, 232, & vid. fo. 136, 137. Fleta, lib. 4, ca. 19. 25, 26, 27. 8 E. 3. 54, 55. 21 E. 3. 41. 48 E. 3. 31. 7 E. 4. 28. 21 H. 6. 46. 10 E. 4. 3. F. N. B. 180. 4 Co. 86, 87, in Luttrel's case. (11 Co. 46.)

You have perceived, that our author divides tenant for life into two branches, viz. into tenant for terme of his own life, and into tenant for terme of another man's life: to this may be added a third, viz. into an estate both for terme of his owne life, and for terme of another man's life. Vide Sect. 381.

As if a lease may be made to *A.* to have to him for terme of his owne life, and the lives of *B.* and *C.* for the lessee in this case hath but one freehold, which hath this limitation, during his owne life, and during the lives of two others. And herein is a diversity to be observed betweene several estates in several degrees, and one estate with several limitations. For in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not. As if *A.* be tenant for life, the remainder or reversion to *B.* for life, *A.* may surrender to *B.* ☞ for the estate of *B.* for terme of his own life is higher than an estate for another man's life: and therefore if tenant for life infeoffe him in the remainder for life, this is a surrender, and no forfeiture. And albeit an estate for terme of a man's own life be but one freehold, yet may severall freeholds in certaine cases be derived out of the same, whereof our bookes are very plentiful, and whereof you may disport yourselves for a time. As if tenant for life maketh a lease

Rosse's case, 5 Co. 13. (5 Co. 9. b.)

[42. a.]

(Ante 31. b. post. 273. b.) 24 E. 3. 32. & 68. 30 Ass. p. 47. 19 E. 3. Sur. 8. (1 Co. 76. b.)

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(5) The title by *general* occupancy is now universally prevented by the 29 Ch. 2. c. 3. s. 12, and the 14 G. 2. c. 20. s. 9. The first statute enacts, that estates *pur auter vie* shall be deviseable, and if not devised, chargeable in the hands of the heir as assets by descent, where the estate falls on him as special occupant; and if he is not intitled as such, shall go to the grantee's executors or administrators and be assets. On this statute a doubt arose, whether it operated further than by making such estates deviseable and assets for debts; and in one case it was adjudged, that the administrator took the surplus of such estates after payment of debts, if not devised, for his own benefit, as in the place of a *general* occupant. See 12 Mod. 103. This gave occasion to the second statute, which expresly makes the surplus in case of intestacy distributable as personal estate. See further as to occupancy 2 Blackst. Comment. 258, an elaborate argument by lord chief justice Vaughan, Vaugh. 187. Vin. Abr. *Occupancy* and *Estates*, R. a. 3 Com. Dig. *Estates*, F. and New Abr. *Estate for life*, B.—[Note 241.]

(6) *But affirmative covenants do not restrain.* 28 *H.* 8. *Dy.* 19. Hal. MSS.

13 R. 2. Dow. 95. 7 H. 6. 3. per Cur. 18 E. 3. 48. (2 Ro. Abr. 497. Post. 335. a.)

a lease by deed, or without deed, to him in the remainder, or reversion, in taile or in fee, for the term of the life of him in the remainder or reversion, and after he in the remainder taketh wife and dieth, his wife shall not be endowed, for tenant for life shall enjoy the land again; for forfeiture it cannot be, for he in the remainder was party; and surrender it cannot be, for that his whole estate was not given (1).

7 H. 5. 4.

The heire maketh a lease for life, reserving a rent, against whom the wife recovereth her dower and dieth, the lessee shall have the land againe for life, and the rent is revived.

49 Ass. p. 64.

So it is, if tenant for life take husband and by deed indented they make a lease to him in the reversion for the life of the husband, reserving a rent, this is neither forfeiture, nor absolute surrender, for the cause aforesaid, and the reservation is good.

8 E. 2. Ass. 393. 45 E. 3. 13.

B. seised of lands in fee, taketh to wife *Is.* and infeoffes *C.* in fee, who takes *Alice* to wife: *C.* dieth, *Alice* is endowed; *B.* dieth, *Is.* recovereth dower against *Alice* and dieth, *Alice* shall enjoy the land againe during her life (2).

[a] 2 H. 5. 7. 13 H. 7. 15. 18 E. 2. br. 835. F. N. B. 59. f.

A. and [*a*] *B.* joyntenants, *A.* for life, and *B.* in fee, joyne in a lease for life (3), *A.* hath a reversion, and shall joyne in an action of wast (4).

[b] 27 H. 8. 13. 13 H. 7. 15. 22 H. 6. 24. 17 E. 3. 9. b.

Tenant for [*b*] life and he in the reversion joyne in a lease for life, it is said, that they shall joyne in an action of wast, and that the lessee for life shall recover the place wasted, and he in reversion, damages (5).

[c] 37 H. 6. 27. 26 E. 3. 69. 14 E. 2. Grant 92. 3 E. 3. 15. 14 H. 8. 13. Bracton, lib. 4, fo. 207. Fleta, lib. 3, ca. 12. (1 Ro. Abr. 845.)

If a man grant [*c*] an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay xl. &c. or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as *Bracton* saith, is *tempus indeterminatum:* in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall alledge the lease, and conclude, that by force thereof he was seised generally for terme of his life (6).

(6 Co. 35. b.)

If a man make lease of a manor, that at the time of the lease made is worth xxl. *per annum*, to another until cl. be paid, in this case because the annuall profits of the manor are incertain, he hath an estate for life, if livery be made determinable upon the

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(1) 1 *E.* 3. 15. Vid. 41 *Ass.* 2. *A. tenant for life, remainder to B. in tail, remainder to C. in fee; A. enfeoffs B. and his wife and their heirs; B. dies without issue; now there is a forfeiture and C. may enter.* Hal. MSS.—[N.242.]

(2) Hic *fol.* 21. Hal. MSS.

(3) 13 *E.* 4. 4. *Dy.* 237. *So of a gift in tail.* 38 *E.* 3. 7. Hal. MSS.

(4) *And the writ ought to be* ad exheredationem *B.* 13 *E.* 2. *Brief* 835. Hal. MSS.

(5) 3 *H.* 7. 9. *P.* 43 Eliz. C. B. *D. D. n.* 4. *But if the lease be without deed it is a surrender.* 10 *H.* 7. 3. 1 *Rep. Bredon's case.* Hal. MSS.

(6) *A. leases to B. till A. makes I. S. baily of his manor: adjudged a freehold.* H. 37 El. *Butler and Ridgely.* Vid. 1 *Rep. Bredon's case. Rent granted to A. for life if B. or C. shall so long live. But if there be an estate with such conditional limitation, it ought to be pleaded with the limitation, and continuance shall be averred; for otherwise it fails.* Vid. *Dy.* 192. Hal. MSS. —[Note 243.]

the levying of the c l. (7). But if a man grant a rent of xx l. *per annum* until c l. be paid, there he hath an estate for five yeares, for there it is certaine, and depends upon no incertainty. And yet in some cases a man shall have an incertaine interest in lands or tenements, and yet neither an estate for life, for yeares, or at will (8). As if a man by his will in writing, devise his lands to his executors for payment of debts, and untill his debts be paid; in this case the executors have but a chattell, and an incertaine interest in the land untill his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattell, it shall go to the executors of executors for the payment of his debts: and so note a diversity betweene a devise and a conveyance at the common law in his life time. And tenant by statute merchant, by statute staple, and by *elegit*, have incertaine interests in lands or tenements, and yet they have but chattells, and no freehold, whose estates are created by divers acts of parliament, whereof more shall be said hereafter. And so have gardians in chivalry which hold over for single or double value incertaine interests, and yet but chattels.

33 Ass. p. 2. (Plow. 273.)

8 Co. 94. b. Manning's case, 3 H. 7. 13. 27 H. 8. 5. 14 H. 8. 13. 21 Ass. p. 8.

If one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and expresse or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life (9). The same law is of a declaration of a use (10). A man may have an estate for terme of life determinable at will; as if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for terme of his life, this is determinable upon the determination of the office.

Vid. Sect. 381. 7 Ass. Pl. 1. 13 El. Dyer 300.

7 E. 4. 23. (8 Co. 85. b. Post. 233. a.)

A. tenant in fee simple, makes a lease of lands to *B.* to have and to hold to *B.* for terme of life, without mentioning for whose life it shall be, it shall be deemed for terme of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath beene said an estate for a man's own life is higher than for the life of another (11). But if tenant in taile make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons.

Vide Sect. 381. (1 Ro. Abr. 846.)

First, when the construction of any act is left to the law, the law which abhorreth injury and wrong will never so construe it, as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate taile be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in taile, then no wrong is wrought.

(Post. 183.)

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(7) *But feoffment to the use of A. for life, remainder to the use of B. his executors and assigns, till ten pounds shall be levied out of the profits, ruled to be a chattel.* Hal. MSS.—[Note 244.]

(8) *Plowd. Comment.* 273. Hal. MSS.

(9) Hic *sect.* 283. *But if termor for years devises his house generally without shewing what estate, the whole term passes.* 14 *Eliz. Dy.* 307. Hal. MSS. —[Note 245.]

(10) 21 *H.* 8. 5. *by Shelly.* Hal. MSS.

(11) Vid. 8 *E.* 3. 3. *A. lessee for life makes lease to B. and C. on condition that if they die leaving A. then the land shall revert to A. without determining any estate certain in the grant. All the estate passes under the condition, for in* præcipe *A. was not received on default of B. and C.* Hal. MSS.—[Note 246.]

wrought. And it is a generall rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and ☞ right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken. [42. b.]

4 E. 2. Wast. 11. 17 E. 3. 7. (Mo. 258. 363. Post. 276. a.)

Secondly, The law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple, but if tenant for life die, now is his wrongfull estate in fee by judgment in law changed to a rightfull estate for life.

19 H. 6. 7 H. 4. 32. 6 E. 3. 17. 7 E. 3. 66. 18 E. 3. 60. 23 E. 3, c. 1, &c. 11 H. 4. 44. 38 E. 3. 23, 24.

If a man retaine a servant generally without expressing any time, the law shall construe it to be for one yeare, for that retainer is according to law. *Vid.* 23 *E.* 3, cap. 1, &c. (1). To shut up this point it hath been adjudged, that where tenant in taile made a lease to another for terme of life generally, and after released to the lessee and his heires, albeit betweene the tenant in taile and him a fee simple passed, yet after the death of the lessee † the entry of the issue in taile was lawfull; which could not be, if it had been a lease for the life of the lessee, for then by the release it had beene a discontinuance executed (2). But let us now returne to *Littleton*.

Sect. 57.

AND it is to be understood, that there is feoffer and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffes another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certaine lands or tenements to another in taile, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for terme of life, or for terme of years, or to hold at will, he which maketh the lease is called lessor,

† *It seems that* lessee *is here inserted for* lessor.

(1) Mr. Barrington calls this a *supposed* statute, because the intervention of the commons is not mentioned; and the introductory part seems to justify the observation; for the stile is like that of an ordinance of the king in council: the words being that the king *cum prælatis nobilibus et peritis et aliis sibi assistentibus deliberationem habuit et tractatum; de quorum unanimi consilio ordinavit.* See Observat. on Ant. Stat. 2d ed. 206. However, the 23 E. 3, appears to have been always treated as a statute, and Fitzherbert, in his commentary upon the writ founded upon it, calls it by that name. Fitzh. Nat. Br. 167. B.—[Note 247.]

(2) That is, if the lease was for the life of the lessee it would be a discontinuance for life, and the tenant in tail would thereby raise in himself a new reversion in fee, and the release by passing such new reversion in fee to the discontinuee, would merge his estate for life and make it a fee executed; which enlargement of the estate for life would proportionably enlarge the discontinuance for life, and so make it a discontinuance in fee as much as if the first conveyance by the tenant in tail had been for that estate. See further on this subject, post. Sect. 620.—[Note 248.]

lessor, and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his owne or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in taile hath a freehold, &c.

THIS and the rest that follow in this Chapter concerning the description of feoffor and feoffee, donor and donee, and lessor and lessee, are evident.

"*And it is to be understood, that there is feoffor and feoffee, &c.*" *Vide* Sect. 2, where a light touch is given who may purchase. Now somewhat is to be said, who have ability to enfeoffe, &c. and may be a feoffor, donor, lessor, &c. Whosoever is disabled by the common law to take, is disabled to infeoffe, &c. But many that have capacitie to take, have no abilitie to infeoffe, &c. as men attainted of treason, felony, or of a *præmunire*, aliens borne, the king's villaines, traitors, felons, &c. he that hath offended against the statutes of *præmunire*, after the offences committed (3) if attainders ensue, ideots, madmen, a man deafe dumbe and blinde from his nativity, a feme covert, an infant (4), a man by dures; for the feoffments, &c. of these may be avoyded. But an heretieke, though he be convicted of heresie, a leper removed by the king's writ from the society of men, bastards, a man deafe dumbe or blinde, so that he hath understanding and sound memory, albeit he expresse his intention by signes, villaine of a common ☞ person before entrie, or the like may infeoffe, &c.

Bricton, lib. 5, fo. 415. Britton, fo. 88. Fleta, lib. 3. ca. 3, and lib. 6, ca. 39, 40.

2 H. 5, ca. 7, which is repealed. Doct. and Stud. lib. 2, ca. 29.

[43. a.]

[*a*] All feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by the deane and chapter, by any of the colledges or halls in either of the Universities, or elsewhere, deans and chapters, master or gardian of any hospital, parson, vicar, or any other having spirituall or ecclesiastical living, are also to be avoyded; [*b*] and all the said bodies politique or corporate are by the statutes of the realm disabled to make any conveiances to the king, or to any other, as it hath been adjudged: which statutes have bin made since *Littleton* wrote (1).

[*a*] 32 H. 8. cap. 28. 1 El. not printed. 13 El. ca. 10. 14 El. ca. 11. 18 El. ca. 20. 1 Ja. cap. 3. [*b*] 4 Co. 76. 120. 5 Co. 6. 14. 6 Co. 37. 11 Co. 67. Magdalen Colledge case. Vide Lest. de W. 2, ca. 41.

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(3) As to conveyances made by felons or by offenders against the statutes of *præmunire* between indictment and attainder, see W. Jo. 217. Cro. Cha. 172, and Wils. vol. 1, part 2, page 219.

(4) There is an important difference between the deeds of femes covert and infants. Those of the former are always void; but those of the latter are sometimes void, and sometimes only voidable. As to the distinction between *void* and *voidable* in the case of deeds by infants, see a case in Burr. 4, part 3, fol. 1794, in which the court held a conveyance by lease and release by an infant to be voidable only. See further post. Sect. 259.—[Note 249.]

(1) *And in case of corporation aggregate, as dean and chapter, the lease is void against the dean who makes the lease.* M. 13 Car. B. R. *Lloyd and Gregory. But it is otherwise in the case of a sole corporation, for there it is void only against the successor.* M. 44 Eliz. C. B. *Saunders's case.* Hal. MSS.—See the observation on the case of Lloyd and Gregory, post. 45. a. As to conveyances by

[c] Magna Charta, cap. 32. Mirror, cap. 5. sect. 2. Glanvil. lib. 7. ca. 1. Bract. lib. 1. Brit. 88, &c. Fleta, lib. 3. cap. 3.

It is provided [c] by the statute of *Magna Charta, quòd nullus liber homo det de cætero amplius alicui de terrâ suâ quàm ut de residuo terræ suæ posset sufficient' fieri domino feodi servitium ei debitum quod pertinet ad feodum illud.* Upon which act I have heard great question [d] made, whether the feoffments made against that statute were voydable or no; and some have said that the statute intended not to avoyd the feoffment, but implicite to direct the tenure, viz. that the tenant should not infeoffe another of parcell to hold of the chief lord (that is of the next lord) but to hold of himselfe, and then the lord may distreine in everie part for his whole service without any prejudice unto him. But this opinion is against [e] the authoritie of our bookes, and against the said statute of *Magna Charta.* For first it is agreed in 10 *H.* 7, that as well before the statute as after, a tenant which held two acres might have aliened one of the acres to hold of him, and notwithstanding the lord might have distrained in which of the acres he would for his whole services: and reason teacheth that before that statute a tenant could not have aliened parcell to hold of the chiefe lord; for the seignory of the lord was entire, for the which the lord might distraine in the whole or in any part, and which the tenant by his owne act cannot divide to the prejudice of the lord to barre him to distraine in any part, for his services, as he should doe, if he should enfeoffe another of parcell to hold of the chiefe lord. But the tenant might have made a feoffment of the whole to hold of the chiefe lord, for there no prejudice ensued to the lord (2). Others have said, and they said truly, that the intention of the statute was, that the tenant could not alien parcell (which might turn to the prejudice of the lord) without his assent, and this appeareth cleerly by the *Mirror.* And by this statute the king tooke benefit to have a fine for his licence, before which statute no fine for alienation was due to the king. For it is [f] adjudged that for an alienation in time of *Henry* the second, no fine was due; and it appeareth in our bookes, that if an alienation had beene made before 20 *H.* 3, no fine was due to the king for alienation (3).

[d] Vide an excellent declaration hereof inter adjudicat' coram Rege, Trin. E. 1. fol. 2. in Thesaur. Nott. & Derb.

[e] Bract. lib. 1, 10 H. 7. fol. 10. b. 33 E. 3. Avowry 255. Stamf. prær. fo. 29. 8 E. 4. 12.

Mirror, cap. 5, sect. 2. Fleta, lib 3, cap. 3.

[f] 26 Ass. p. 37. 20 Ass. p. 17.

20 E. 3. Avowry 126. 34 E. 3, c. 15. Vide Stamf. 29, 30. Matt. Paris. Walsingham 37. 39. Vide 5 H. 3. Mordanc. 53. Magna Charta there vouched, which was the charter of King John, for it was cited before 9 H. 3.

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by corporations before the restraining statutes, see post. 44. a, and 103. a. —[Note 250.]

(2) This assertion has been controverted, as repugnant to the feudal notions of alienation, and inconsistent with any reasonable construction of the statute *quia emptores terrarum.* Wright's Ten. 155. Dalrympl. Hist. Feud. Prop. 80, and Sulliv. Lect. 418. In fact the history of our law with respect to the powers of alienation before the statute of *quia emptores terrarum* is very much involved in obscurity. See Bract. *lib.* 2. *cap.* 19, where the author inquires, *si ille, cui datum est, rem datam ulterius dare posset.* See also Bract. *lib.* 2, *cap.* 5, and Staundf. Prærog. cap. 7.—[Note 251.]

(3) Nota, *for seisure of serjeanties aliened without licence, it seems that it was the ancient law.* Vid. Roger Hoveden 783. *It was one of the articles* inter capitula coronæ R. 1, de serjantiis alienatis, *and so it still continues.* Claus. 7 Johann. m. 11. *precept to seise* serjantias theinagia et dengagia tent. de honore Lancaster alienat. post. primam coronation. H. 2. Vid. T. 7 E. 1. Coram rege Gilbertus de Clare comes Gloucester *impeached for alienation made to his father.* Vid. 24 E. 3. 71. *special custom to alienate without licence.* Videtur per Rot. Parl. 29 E. 3. n. 18. quoad *other tenures than serjanties the prerogative began*

Now it is to be observed, that oftentimes for the better understanding of our bookes, the advised reader must take light from historie and chronicles, especially for distinction of times. And therefore *Matthew Paris* (who in his Chronicle reciteth *Magna Charta)* (4) testifieth that king *Henry* the third by evill counsell (and especially, as the truth was, of *Hubert de Burgo* then chiefe justice) sought to avoyde the Great Charter first granted by his father king *John*, and afterwards granted and confirmed by himselfe in the ninth of *Henry* the third, for that as he the said king *John* did grant it by dures, and that he himselfe was within age when he granted and confirmed it. But forasmuch as afterwards the said king *Henry* the third in the twentieth yeare of his raigne, at what time he was nine and twentie years old, did grant and confirme the said Great Charter; for that cause, to put out all scruples, is the twentieth yeare of *Henry* the third named, albeit in law the king's charter granted in the ninth yeare of *Henry* the third was of force and validitie, notwithstanding his nonage, for that in judgement of law the king, as king, cannot be said to be a ☞ minor; for when the royall bodie politique of the king doth meete with the naturall capacity in one person, the whole bodie shall have the qualitie of the royall politique, which is the greater and more worthy, and wherein is no minoritie (1). For, *omne majus trahit ad se quod est minus.* And it is to be observed, that no record can be found, that either a licence of alienation was sued, or pardon for alienation was obtained for an alienation without licence at any time before

[43. b.]

20 Ass. pl. 17. by Skipwith.

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began in the time of Edward the first. Nota, *it seems, that the statute of* quia emptores *takes away licences and pardons of alienations in case of tenure of a subject. Yet see* 14 *H.* 4. 4. recordare longum *for custom of the honour of Gloucester, and* Rot. Parl. 38 H. 6. n. 29. pro ducatu Cornubiæ ubi *such a custom* Rot. Parl. 8 E. 2. m. 7. in scedula pendente dorso. "Accord est et "assensu per archevesques evesques abbes priores countes et barons et autres "du realme in parlement le roy summons a Westminster octab. Hill. 8 E. 2. "que eux desormes nul fine demandront ne prendront des frankhomes, pur "entrer terres et tenements que sont de leur fee, issint totes voyes que per "tiel feoffments ils ne soient pas eloignes de leur services ne leur services "dedits."—Hal. MSS. From lord Hale's observing, that the crown's right of seizure for alienation of serjanties without licence *still continues*, it seems, that his note on the subject was written before the 12 Cha. 2. c. 24, which converts tenures by knight service into socage and takes away fines of alienation. See post. 43. b. n. 2.—[Note 252.]

(4) Note pro carta de libertatibus.—Carta regis Johann. proclamata 19 Junii 17 Johann. apud Runimede, Pat. 17 Johann. m. 33. dorso. Carta de libertatibus sub H. 3. magna scilicet de libertatibus, et minor sive de foresta, proclamantur 8 Maii 9 H. 3, prima pars claus. 9 H. 3. m. 14. dorso interrupt. et cancell. Matth. Paris sub anno 1227. pag. 336, *but afterwards confirmed by H.* 3. Rex confirmat "omnes libertates, &c. contentas in cartis quas fecimus "cum minoris ætatis essemus tam in magna carta quam in carta de foresta." Cart. 21 H. 3. n. 4. confirmatur per stat. Marlbr. cap. 5, et tunc primum devenit statutum, viz. 52 H. 3. Hal. MSS.—See a most accurate history of the *magna charta* of king John and that of Hen. 3, in the introductory discourse to mr. justice Blackstone's valuable edition of the charters.—[Note 253.]

(1) See this subject considered at large in the case of the dutchy of Lancaster Plowd. 214, and in *Willion* and *Berkley* Plowd. 234.

before the twentieth yeare of *Henry* the third, and it is holden in the twentieth of *Edward* the third, that a licence for alienation grew by this statute.

Now in the case of a common person it was the common opinion, that if the tenant had aliened any parcell contrary to the said act, that he himselfe was bound by his owne act, but that his heire might have avoyded it; and in the king's case many held the same opinion. For *Britton* saith, *ne counts, ne barons, ne chivaler, ne serjeants, que teignont en chiefe de nous ne purr' my dismember nous fees sauns licence: que nous ne puissent per droit engettre les purchasors, &c.* And herewith agreeth *Fleta*, and our bookes. But now by the statute 1 *E.* 3, cap 12, & 34 *E.* 3, cap. 15, although the king's tenant in chiefe or by grand serjantie doe alien all or any part without licence, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid. And note, it appeareth by the preamble in 1 *E.* 3, that complaint was made that land holden of the king *in capite*, being aliened without licence, was seized as forfeited. And in the case of a common person, the statute of 18 *E.* 1, *De quia emptores terrarum* hath made it cleare, for this hath in effect as to the common persons taken away the said statute of *Magna Charta*, cap. 32, for thereby it is provided, *quòd liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita quòd feoffatus teneat, &c. de capitali domino.* And herein are divers notable points to be observed. First, that this word *liceat* proveth that the tenant could not, or at least wayes was in danger to alien parcell of his tenancy, &c. upon the said act of *Magna Charta*. Secondly, that upon the feoffment of the whole, the tenant shall hold of the chiefe lord. Thirdly, that the tenant might infeoffe one of part to hold *pro particula* of the chiefe lord. But this act (the king being not named) doth not take away the king's fine due to him by the statute of *Magna Charta* (2).

Brit. fo. 28. 88. 186, 187. 245-247. Prær. Regis, ca. 7. Fleta, lib. 6, cap. 29, acc. 20 E. 3. Ass 122. 29 Ass. pl. 19. 14 E. 3. quare imp. 45. 14 H. 4. 2, 3. 9 E. 3, fo. 26. 1 E. 3, ca. 12. 34 E. 3, ca. 15. 2 Co. 81, 82. in Seignior Cromwell's case. Regist. Int. les breves de onerand' pro rata portione.

(Plowd. 561. b. 562.) Bracton, lib. 4, fo. 224. Brit. cap. 32, & 47. Bracton, lib. 4, fo. 22. Regist. Judic. 68. 73. 28 Ass. p. 7. W. 2, ca. 18. Stat. de mercatoribus an. 13 E. 1. 27 E. 3, ca. 9. 23 H. 8, ca. 6. F. N. B. 178. (Ante 42. a.)

"*Freehold.*" Here it appeareth that tenant in fee, tenant in taile, and tenant for life, are said to have a franktenement, a freehold, so called, because it doth distinguish it from termes of yeares, chattels upon incertaine interests, lands in villenage or customary, or copyhold lands. *Liberum autem tenementum dicitur ad differentiam villenagii, et villanorum qui tenent villenagium, quia non habent actionem nec assisam, &c. item quòd sit suum et non alienum, hoc est, si teneat nomine alieno ut firmarius et ad terminum vel sicut creditor ad vadium.* And note that tenant by statute merchant, statute staple, or *elegit*, are said to hold land *ut liberum tenementum* untill their debt be paid; and yet in troth they (as hath beene said) have no freehold, but a chattle, which shall go to the executors, and the executors also if they be ousted shall have an assise. But *(ut)* is similitudinary, because they shall by the statutes have an assise as tenant of the freehold shall have, and to that respect hath a similitude of a freehold, but *nullum simile est idem.*

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(2) Fines for alienation are taken away as well from the king as from all others by the 12 Cha. 2. chap. 24. But the statute saves fines for alienation due by the customs of particular manors, other than fines for alienation of lands holden of the king *in capite*.—See further on the subject of alienation 2 Inst. 65. 501. Vin. Abr. tit. *Alienation*. Sulliv. Lect. page 159, and 418, and the book cited in fol. 43. a, note 2.—[Note 254.]

CHAP.

CHAP. 7. Tenant for terme of yeares. Sect. 58.

TENANT for terme of yeares is where a man letteth (lou home lessa) *lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. And when the lessee entreth by force of the lease, then is he tenant for tearme of yeares; and if the lessor in such case reserve to him a yearely rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behooveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plee for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plee lieth not for the lessee to plead.*

"*WHERE a man letteth* (lou home lessa) *lands, &c.*" Lessa and lease is [*a*] derived of the Saxon word *leapum*, or *leasum*, for that the lessee commeth in by lawfull meanes; [*b*] and *dimittere* is in *French laysser*, to depart with or forgoe.

[*a*] Mirror, cap. 2, sect. 17. Bracton, lib. 2, cap. 26, & lib. 4, fol. 220. Fleta, lib. 3, cap. 12, & lib. 5, cap. 34.

[*b*] For the word (dimitto) see Sect. 531.

When *Littleton* wrote, many persons might make leases for yeares, or for life, or ☞ lives at their will and pleasure, which now cannot make them firme in law. And some persons may now make leases for yeares, or for life or lives (observing due incidents), firme and good in law, who of themselves could not so doe when *Littleton* wrote, and this by force of divers acts of parliament [*c*]; as namely 32 *H.* 8. 1 *Eliz.* 13 *Eliz.* 18 *Eliz.* and 1 *Jac. Regis*, of which statutes one is enabling, and the rest are disabling. When *Littleton* wrote, bishoppes with the confirmation of the deane and chapter, master and fellowes of any colledge, deanes and chapters, master or gardian of any hospitall, and his brethren, parson or vicar with the consent of the patrone and ordinary, archdeacon, prebend, or any other body politique spirituall and ecclesiasticall *(concurrentibus hiis quæ in jure requiruntur)* might have made leases for lives or yeares without limitation or stint. And so might they have made gifts in taile or states in fee at their will and pleasure, whereupon not onely great decay of divine service, but dilapidations and other inconveniences ensued, and therefore they were disabled and restrained by the sayd acts of 1 *Eliz.* 13 *Eliz.* and 3 *Jac. Regis* to make any state or conveyance to the king at all, or to the subject; but there is excepted out of the restraint or disability, leases for three lives, or one and twenty yeares, with such reservation of rent, and with such other provisions and limitations, as hereafter shall appeare. Also, they may make grants of ancient offices of necessity with ancient fees, *concurrentibus hiis quæ in jure requiruntur*, for those grants are not within the statute of 32 *H.* 8, but by construction, they are not restrained by the statutes of 1 *Eliz.* or 13 *Eliz.*

[44. a.]

[*c*] 32 H. 8. ca. 28. 1 Eliz. not printed but in the abridgement. 13 Eliz. cap. 10. 18 Eliz. cap. 6. 1 Jac. cap. 3.

5 Co. 14, case de ecclesiastical persons. 11 Co. 66. Magdalen Colledge case. Levesque de Sarum's case, 10 Co. 60, 61. (1 Sid. 162.)

(Cro. Cha. 16, 47. 50. 10 Co. 58. Pollexf. 134. 4 Mod. 16. Cro. Jac. 173.)

Finch, 191, 192, 193. Cro. Cha. 48.

because these ancient offices be of necessity, and with the ancient fees, and so no diminution of revenue (1).

There be three kinds of persons that at this day may make leases for three lives, &c. in such sort as is hereafter expressed, which could not so doe when *Littleton* wrote, viz. First, any person seised of an estate taile in his owne right. Secondly, any person seised of an estate in fee simple in the right of his church. Thirdly, any husband and wife seised of any estate of inheritance in fee simple or fee taile in the right of his wife, or jointly with his wife before the coverture or after, viz. the tenant in taile, by deed to binde his issues in taile, but not the reversion or remainder, the bishop, &c. by deed without the deane and chapter to bind his successors, the husband and wife by deed to bind the wife and her and their heires (2), and these are made good by the statute of 32 *H.* 8. which inableth them thereunto. But to the making good of such leases by the said statute, there are nine things necessarily to be observed belonging to them all, and some other to some of them in particular.

6 Co. 6. Seig. Mountjoye's case. (3 Lev. 438. Cro. Ja. 94. 458.)

First, the lease must be made by deed indented, and not by deed poll, or by paroll (3).

Secondly,

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(1) Vid. 29 Eliz. *Case of the bishop of Chester, who had anciently used to have a counsel who had a fee. This grantable by the bishop with consent of dean and chapter.* Nota, *though it be not an office of time which, &c. yet grantable, if of necessity, as in the case of the bishop of Gloucester founded within time of memory.* M. 1 Car. C. B. *Crook n.* 8. *Cook and Young.* Vide *that it is holden, that though it be a new office, yet if necessary, and the fee is reasonable, being confirmed it shall bind the successor; and* vide *the grant of ancient office and fee, with the addition of a new fee, which notwithstanding seems good, because the office is antient.* M. 2 Car. C. B. *Crook n.* 7. *Gee's case. If it had been usual to grant an antient office to one only, a grant to two is not good. But if it has been once granted to two or granted in reversion before the statute* 1 Eliz. *then it shall be intended to have been usually so granted, and such grant to two or in reversion shall bind the successor.* T. 8 Car. B. R. *Crook n.* 2. *Walker and Lamb.* M. 8 Car. B. R. *Crook n.* 19. *Young and Steele concerning the official and commissary of the bishop of Lincoln and the register of the bishop of Rochester.* Hal. MSS. Ley 75, is contrary to Gee's case cited by lord Hale. —See further as to the grant of offices by ecclesiastical persons, New Abr. *Offices*, D See also in Burr. part 4. vol. 1. page 219, the case of sir John Trelawney and the bishop of Winchester, in which the court held, that an office and fee which existed before the 1st of Eliz. are not within the restraint of that statute, but that they may be granted as before the statute, and that the utility or necessity of the office is not more material since than it was before. —[Note 255.]

(2) Quoad *leases by husband and wife. Husband and wife seised to them and the heirs of the body of the husband make lease for three lives, rendering the antient rent; husband dies: this shall not bind the wife. Adjudged, because the statute speaks of the wife's inheritance.* H. 14 Eliz. C. B. n. 5. D. D. *Husband and wife jointly seised by purchase to them and their heirs; the husband alone during the coverture makes lease, rendering the antient rent:* dubitatur *if it shall bind the wife, because the proviso, which requires the wife's joining, speaks only of husband seised in right of his wife,* finitur per compositionem. M. 1 Car. C. B. Crook n. 15. *Smith and Trinden.* Hal. MSS.—[Note 256.]

(3) See New Abr. *Leases*, E. 2.

Secondly, it must be made to begin from the day of the making thereof, or from the making thereof (4.)

[44. b.] ☞ Thirdly, if there be an old lease in being, it must be surrendred (1) or expired, or ended within a yeare of the making of the lease, and the surrender must be absolute and not conditionall. 5 Co. 2. Elmer's case.

Fourthly, there must not be a double lease in being at one time; as if a lease for yeares be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease for life or lives according to the statute, nor *è converso;* for the words of the statute be, to make a lease for three lives, or one and twenty yeares, so as one or the other may be made, and not both (2).

Fifthly, it must not exceed three lives, or one and twenty yeares, from the making of it, but it may be for a lesser terme or fewer lives. (Cro. Cha. 95. Cro. Ja. 112. 173.)

Sixthly, it must be of lands, tenements, or hereditaments, manurable or corporeall, which are necessary to be letten, and whereout a rent by law may be reserved, and not [d] of things that lye in grant, as advowsons, faires, markets, franchises, and the like, whereout a rent cannot be reserved (3). [d] 5 Co. 3. Jewel's case. 17 E. 3. 75. 9 Ass. 24. 14 E. 3. Scire facias, 22. 10 H. 6. 2. 3 H. 6. 21. (1 Sid. 316, 317. 416. Cro. Eliz. 708.

Seventhly, it must be of lands or tenements which have most commonly beene letten to farme, or occupied by the farmers thereof by the space of 20 yeares next before the lease made, so as if it be letten for 11 yeares at one or severall times within those 20 years it is sufficient. A grant [e] by copy of court roll in fee for life or yeares is a sufficient letting to farme within this statute, for he is but tenant at will according to the custome, and so it is of a lease at will by the common law; but those lettings to farme must be made by some seised of an estate of inheritance, and [e] 6 Co. 37. Deane and Chapter of Worcester's case.

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(4) Vid. 7 Eliz. *Dy.* 246. *Lease for* 20 *years to begin at next Michaelmas seems good.* Hal. MSS.—See further as to the time when such leases should begin, and the difference between *from the day of making* and *from the making*, New Abr. *Leases*, E. rule 2, and post. 47. b.—[Note 257.]

(1) *Feme covert tenant for life; reversion in tail; husband surrenders; tenant in tail leases for three lives; the wife dies. Adjudged, that this is a good lease to bind the issue. Sydenham and Cops cited by Popham. Mo.* 783. Hal. MSS. —[Note 258.]

(2) M. 29, 30 Eliz. *Clench* 138. *Grindal's case.* Hal. MSS.—See S. C. 4 Leon. 78. 1, and 65, and Mo. 107, and the observations upon it New. Abr. *Leases*, E. rule 3.

(3) *But if tithes have been usually let to farm, they cannot be leased for life to bind the successor; but they may be leased for* 21 *years, rendering the antient rent, and it shall bind the successor. Mo.* 778. T. 2 Jac. B. R. *Adjudged in Denny's case, and the rent goes with the reversion.* Nota, *it was the case of the precentor of Paul's.* Hal. MSS.—See New Abr. *Leases*, E. rule 5, where many authorities are cited to prove this difference between leasing tithes for life and for years; and that in the latter case the lease will bind the successor because he may have debt for the rent, which will not lie for him on a freehold lease. But the distinction is no longer of any importance; for the 5 *G.* 3. c. 17, makes leases of tithes and other incorporeal hereditaments by ecclesiastical persons, whether for lives or for years, as good as if the leases were of corporeal hereditaments, and gives action of debt to the successor, for rent reserved on freehold leases.—[Note 259.]

and not by a gardian in chivalry, tenant by the curtesie, tenant in dower, or the like (4).

5 Co. 6. Seignior Mountjoye's case.

Eightly, that upon every such lease there be reserved yearly during the same lease due and payable to the lessors, their heires and successors, &c. so much yearly farme or rent, or more, as hath beene most accustomably yielded or paid for the lands, &c. within twenty yeares next before such lease made (5). Hereby first it appeareth (as hath beene said) that nothing can be demised by authority of this act, but that whereout a rent may be

(Cro. Jam. 76.)

lawfully reserved. Secondly, that where not onely a yearly rent was formerly reserved, but things not annuall, as heriots, or any

6 Co. 37, 38. Deane and Chapter of Worcester's case.

fine or other profit at or upon the death of the farmor, yet if the yearly rent be reserved upon a lease made by force of this statute, it sufficeth by the expresse words of the act. Thirdly, if he reserve more than the accustomable rent, it is good also by the expresse letter of the act; but if twenty acres of land have beene accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the

5 Co. 5. Seignior Mountjoye's case. 6 Co. 37.

accustomable yearely rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomable rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole. Fourthly, if tenant in taile let part of the land accustomably letten, and reserve a rent *pro rata*, or more, this is good, for that

Lord Mountjoye's case ubi supra.

is in substanee the accustomable rent. Fifthly, if two coparceners be tenants in taile of twenty acres every one of equall value, and accustomably letten, and they make partition, so as each have ten acres, they may make leases of their severall parts each of them,

(Cro. Cha. 16, 17.)

reserving the halfe of the accustomable rent. Sixthly, if the accustomable rent had beene payable at four daies or feasts of the yeare, yet if it be reserved yearely payable at one feast, it is sufficient, for the words of the statute be, reserved yearely.

Deane and Chapter of Worcester's case, ubi supra.

Ninthly, nor to any lease to be made without impeachment of wast. Therefore if a lease be made for life, the remainder for life, &c. this is not warranted by the statute, because it is dispunishable of waste. But if a lease be made to one during three lives, this is good, for the occupant, if any happen, shall be

Deane and Chapter of Worcester's case, ubi supra.

punished for waste (6). The words of the statute be (seised in the right of his church), yet a bishop that is seised *jure episcopatûs*, a deane of his sole possessions in *jure decanatûs*, an arch-deacon in *jure archidiaconatûs*, a prebendary and the like are within the statute, for every of them generally is seised in *jure ecclesiæ* (7).

But

(4) *Lease by the king during vacancy of bishoprick will not enable.* P. 19 Jac. B. R. *Denny's case.* Vid. *Dy.* 271. Hal. MSS.—[Note 260.]

(5) 6 *Rep.* 37. T. 3 Jac. *Crook n.* 6. Hal. MSS. See Cro. Jam. 76.

(6) *Prebend makes lease for years, reserving the running of a colt, rendering rent. A new lease, rendering the same rent, without reserving the running of a colt, adjudged good; because* quoad *this it is neither reservation nor exception. But if lease be of a manor except the woods rendering rent, and after the expiration of it there is a new lease rendering the same rent without such exception, the second lease is bad.* T. 18 Jac. B. R. *case of precentor of Paul's.* Hal. MSS.—[Note 261.]

(7) Vid. *for leases by bishop tenant in tail, &c.—A seised in tail of a manor, of which three acres parcel of the demesnes had been usually demised at 5 s. rent, and the residue not, demises the three acres and also the manor* habendum *for* 21 *years,*

But a parson and vicar are excepted out of the statute of 32 *H.* 8. and therefore, if either of them make a lease for three lives, &c. of lands accustomably letten, reserving the accustomed rent, it must be also confirmed by the patron and ordinary, because it is excepted out of 32 *H.* 8. (8), and not restrained by the statutes of *primo* or 13 *Eliz.* And what hath beene said concerning a lease for three lives, doth hold for a lease for one and twenty yeares. 3 E. 6. 1 Mar. tit. Leases. Bro. 62. (Finch. 191.)

Thus much shall suffice to have spoken of the inabling statute of 32 *H.* 8. the better to inable the reader to understand both this and that which followes. Now to speake somewhat of the disabling statutes of 1 *Eliz.* and 13 *Eliz.* (9), the words of the exception out of the restraint and disability of 1 *Eliz.* are, *other than for the terme of twenty one yeares, or three lives, from such time as any such grant or assurance shall be given, whereupon the old and accustomed yearely rent, or more shall be reserved:* and to that effect is the exception in the statute of 13 *Eliz.* First, it is to be understood that neither of these disabling acts, nor any other, do in any sort alter or change the inabling statute of 32 *H.* 8. but leaveth it for a pattern in many things for leases to be made by others. Secondly, it is to be knowne, that no lease made according to the exception of 1 *Eliz.* or 13 *Eliz.* and not warranted by the statute of 32 H. 8. if it be made

[45. a.] ☞ by a bishop, or any sole corporation, but it must be confirmed by the deanes and chapters, or others that have interest, as hath been said in the case of the parson (Cro. Eliz. 874.)

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years, rendering for the three acres and all other the premises therewith demised 5s. and for the manor 5l. This is good to bind the issue for the three acres, but not for the residue. H. 37 Eliz. *Tanfield and Rogers.—The bishop of G. seised of a manor, of which one tenement was usually demised for life at 5s. rent and the manor usually at 10s. rent, makes lease of the tenement for three lives, rendering 5s. and afterwards leases the whole manor for three lives to another rendering rent, and dies. Ruled,* 1. *That the reversion of the tenement passes by the lease of the manor.* 2. *And therefore that the lease of the manor* quoad *the tenement shall not bind the successor, because then there would be six lives in being for the tenement, and the lessee would be dispunishable of waste.* 3. *It seems, that the lease of the manor is also voidable, because the rent issues also out of the tenement.* (Quære *of this, for here the rent as well for the tenement as for the manor is reserved on the second lease, so that though the tenement should be evicted the intire rent for the manor would continue.)* 4. *But it was agreed, that the lease of a copyhold manor usually demised, or of a manor consisting of demesnes copyholds and services usually demised, is good to bind the successor.* 5. *The lease is only voidable by the successor; and therefore if he accepts the rent, it is good against him. M.* 20 Jac. C. B. *Bishop of Gloucester against Wood, M.* 5 Car. C. B. *Sheir and Penter on lease by the bishop of Exeter.* Hal. MSS.—[Note 262.]

(8) *Prebend simple or prebend with office, as is precentor, is enabled by the statute* 32 *H.* 8. *Adjudged Bro. Leases* 62. *M.* 36, 37 Eliz. *Watson and Major.* T. 18 Jac. *case of precentor of Paul's.* Hal. MSS.—[Note 263.]

(9) Nota, *these disabling statutes extend only to their own possessions. The archdeacon of Ely* 12 *Eliz. makes lease for* 50 *years, which after the statute* 13 *Eliz. is confirmed by the bishop and dean and chapter. Ruled, that this is a good lease to bind the successor, though after the statute* 1 *Eliz. and though confirmed after the statute* 13 *Eliz. H.* 37 Eliz. Rot. 882, *sir Edward Dennye's case.* Hal. MSS.—[Note 264.]

(1 And. 65.) parson and vicar, but examples doe illustrate. If a bishop make a lease for 21 yeares, and all those yeares being spent saving three or more, yet may the bishop make a new lease to another for twenty one yeares, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath beene said; and this concurrent lease hath been resolved to be good (1), as well upon the exception of 1 *Eliz.* in the case of (1 Leon. 59.) bishops, as upon 13 *Eliz.* (2) which extend to spirituall and ecclesiasticall corporations, aggregate of many, as deanes and chapters, &c. which 32 *H.* 8. did not: but in the case of the concurrent lease, in the case of the bishop it must be confirmed. Also the exception of 1 *Eliz.* and 13 *Eliz.* doth differ from the statute of 32 *H.* 8. for the leases for yeares to be made according to the exceptions of the statutes of 1 and 13 *Eliz.* must begin from the making, and not from the day of the making, but by force of 32 *H.* 8. from the day of the making. And although the statutes of the first or thirteenth of *Eliz.* doe not appoint the lease to be made by writing, yet must it therein and in the other eight properties or qualities before mentioned and required by 32 *H.* 8. follow the patterne thereof (the concurrent lease only except). (3) Although the exception in 1 and 13 *Eliz.* concerning the accustomed rent is more generall than that of 32 *H* 8. and there is not any provision for leases made dispunishable of waste, &c. yet must the patterne of 32 *H.* 8. be followed; for leases without impeachment of waste made by such spirituall and ecclesiasticall persons are unreasonable and causes of dilapidations. Thus much have I thought good to lead the studious reader by the hand, and to conduct him in the right way, and to put all these things together upon consideration had of all the statutes, which otherwise might have *primâ facie* seemed to him a diffuse and darke labyrinth. And albeit it be provided by the said acts of 1 and 13 *Eliz.* that all grants, &c. leases, &c. made, &c. (other than leases for three lives, or one and twenty yeares according to those acts) should be utterly voyd and of none effect, to all intents, constructions, and purposes, yet grants, or leases, &c. not warranted by those acts are not voyd, but good against the lessor, if it be a sole corporation: or so long as the deane or other head of the corporation remaine, if it be a corporation aggregate of many (4): for the statute

3 Co. 59, 60. Lincolne Colledge case, p. 39. Eliz. inter Hunt and Singleton ibidem.

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(1) *Accordingly adjudged, though the concurrent lease was to commence* a datu indenturæ. T. 21 Eliz. Rot. 124. *Fox and Collier.* M. 22, 23 Eliz. C. B. Rot. 2409. *Scot and Brewster.* H. 22 Jac. B. R. Rot. 11. *Evans and Ascu adjudged.* T. 3 Car. P. 33 Eliz. W. 14. *Southcot's case.* Hal. MSS.

(2) Nota, *the statute* 13 *Eliz. chap.* 10. quoad *tenements in cities is altered by the statute* 14 *Eliz. chap.* 11, *which permits leases of them for* 40 *years; and therefore it has been ruled, that covenants for renewing leases of messuages in cities are not prohibited by the statute* 18 *Eliz. chap.* 11, *which only restrains leases against the statute of* 13 *Eliz. Hob. case* 352. *Crane and Taylor.* Hal. MSS. See Hob. 269.—[Note 265.]

(3) H. 44 Eliz. C. B. n. 14. D. D. *Bishop of Hereford against Scory. Adjudged accordingly, where the land had not been usually demised.* Hal. MSS.

(4) Nota, *lease for three lives by bishop, not warranted by the statute, is not voidable against himself, but shall bind him.* M. 44, 45 Eliz. C. B., D. D. *n.* 32. *Saunders's case. And it is not void, but only voidable against the successor, for if he accepts the rent the lease is good against him.* M. 8 Car. C. B. *Crook n.* 21. *Owen*

statute was made in benefit of the successor (5). But let us now returne to our author.

"*A man letteth.*" Here *Littleton* putteth this case where one letteth, &c. It is therefore necessary to be seen what the law is where divers joyne in a lease. If the tenant of the land and a stranger which hath nothing in the land joyne in a lease for yeares by deed indented of one and the self same land, this is the lease of the tenant onely, and the confirmation of the stranger, and yet the lease as to the stranger workes by conclusion (6). (2 Ro. Abr. 64.) Vide Sect. 246. 11 H. 4. 1. 5 E. 4. 4. a. 27 H. 8. 16.

If two severall tenants of severall lands joyne in a lease for yeares by deed indented, these be severall leases, and severall confirmations of each of them, from whom no interest passeth, and worke not by way of conclusion in any sort, because severall interests passe from them (7). *B.* tenant for life of *C.* and he in the remainder or reversion in fee, having severall estates in the one and the same land, joyne in a lease for yeares by deed indented, this demise shall worke in this sort: during the life of *C.* it is the lease of *B.* and confirmation of him in the reversion or remainder, and after the decease of *C.* it is the lease of him in the reversion or remainder, and the confirmation of *B.*; for seeing the leasors have severall estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease onely of tenant for life, and the confirmation of him in the remainder or reversion, neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in the remainder in fee made a lease for yeares by deed indented, the lessee was ejected, and brought an *ejectione firmæ*, and declared upon a demise made by tenant for life and him in remainder, and upon not guilty pleaded, this speciall matter was found, and that tenant for life was living, and it was adjudged [*a*] against the pl', for during the life of the tenant (as hath been said) (1 Ro. Abr. 877. Mo. 72. 1 Leon. 177. Cro. El. 701. 6 Co. 15. Treport's case, Doc. Pl. 93.)

[*a*] 27 H. 8. f. 13. a. 13 H. 7. 14. (Post. 302. b.)

2 H. 5. 7. 1 Co. 76. Bredon's case.

Owen and App. Rees. But lease by A. dean of B. and his chapter not warranted is void immediately against A. himself. Adjudged so, because the corporation is aggregate. M. 13 Car. B. R. *Lloyd and Gregory.* Hal. MSS.—The case of Lloyd and Gregory is reported in Cro. Cha. 502. W. Jo. 405. 1 Ro. Abr. 728, and 2 Ro. Abr. 495. But none of these books mention the point to which lord Hale cites the case. See New Abr. *Leases*, H. where several authorities besides that of lord Coke are cited to shew, that a lease by a corporation aggregate, though not warranted by the statutes, is good for the time of the person who was head of the corporation when the lease was made. See also ante 43. a. n. 1.—[Note 266.]

(5) See further as to leases by tenants in tail, husband and wife, and ecclesiastical persons, in Vin. Abr. tit. *Estates* and tit. *Confirmation*, and New Abr. tit. *Leases*; which title in the latter book is generally attributed to lord chief baron Gilbert, and comprises a most copious and excellent treatise on a very difficult and extensive subject.

(6) 2 *H.* 5. 7. *by Asht.* Hal. MSS.

(7) *And therefore where the declaration in ejectment was of a joint demise of A. and B. and on the evidence it appeared that they were tenants in common, the plaintiff failed.* M. 3 Jac. *Blakasper's case. Noy n.* 43. Hal. MSS. See Noy 13.—[Note 267.]

said) it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder (8). [*b*] And the deed indented could be no estoppel in this case, because there passed an interest from them both. And whensoever any interest passeth from the party, there can be no estoppel against him, and [*c*] so it was adjudged. Hereby you shall understand your bookes the better which treat of those matters, and accordingly it was adjudged that where tenant in taile and he in the remainder in fee joyned in a grant of a rent charge by deed in fee, and after tenant in taile died without issue, the grantee distrained and avowed by force of a graunt from him in the remainder, and upon *non concessit*, the jury found the speciall matter, and it was adjudged for the avowant; for every one granted according to his estate and interest.

[*b*] Mich. 36 & 37 Eliz. in the King's Bench. Vide Mich. 6 & 7 Eliz. Dyer, 234, 235.

[*c*] Hill. 44 Eliz. Rot. 1459 in Communi Banco inter Ellice & Cowne.

Leases for lives or yeares are of three natures: some be good in law; some be voydable by entry, and some voyd without entry. Of such as be good in law, some be good at the common law as made by tenant in fee, whereof *Littleton* here putteth his case: some by act of parliament; as tenant in taile, a bishop seised in fee in the right of his church alone without his chapter, a man seised in fee simple or fee taile in the right of his wife together with his wife (as hath beene said) may by deed indented make leases for 21 yeares or three lives in such manner and forme as hath been said and by the statute [*d*] is limited, all which were voydable by the common law when *Littleton* wrote, and now are made good by parliament.

[45. b.]

(3 Co. 64. b.)

[*d*] 32 H. 8. cap. 28.

An infant seised of land holden in socage, may by custome make a lease at his age of 15 yeares, and shall binde him, which lease was voydable by the common law; (1) voydable, some by the common law, after the death of the leasor, as of tenant in taile, a bishop, &c. or after the death of the husband (intended of leases not warranted by the said statute of 32 *H.* 8.); some voydable by act of parliament, as by a bishop though it be confirmed by deane and chapter, if it be not warranted by the statute of 32 *H.* 8. and so of a deane and chapter after the death of the deane; some voydable at times by the lessor himselfe or his heires, as by an infant and the like. Some voyde *in futuro*, and some voyde *in præsenti*. *In futuro*, as if a tenant in taile make a lease for yeares and die without issue, it is voide, as to them in reversion or remainder, though it be made [*e*] according to the said statute. If a prebend, parson or vicar make a lease for yeares, it is voide by death, if it be not according to the statutes. Otherwise it is of a lease for life, for that is voidable, *et sic de similibus*.

(Plow. 264. b. Cro. Ja. 173.)

[*e*] 33 H. 8. Dier. 3 Co. 59, 60. in Lincolne Colledge case. Hunt's case vouched. (1 Ro. Abr. 848.)

Some voide *in præsenti*; as if one make a lease for so many yeares

(8) Intratur H. 34 Eliz. Rot. 72. *King and Beny.*—Hal. MSS.

(1) Heretofore some made a difference between leases by infants with reservation of rent and those without, and thought that the former were only voidable, but that the latter were absolutely void. New Abr. *Leases* B. But in a late case this distinction was denied, and it was said, that leases whether with or without rent, if made by *deed*, are voidable only. Burr. 4. part v. 3, page 1806.—[Note 268.]

yeares as he shall live, this is voide *in præsenti* for the incertainty. *Et sic in similibus*, whereof *Littleton* himselfe will teach you next and immediately, and I know you would now gladly heare him.

"*For terme.*" *Pro termino. Terminus* in the understanding of the law doth not onely signifie the limits and limitation of time, but also the estate and-interest that passeth for that time. As if a man make a lease for twenty-one yeares, and after make a lease to begin *à fine et expiratione prædicti termini* 21 *annorum dimiss.* and after the first lease is surrendered, yet the second lease shall begin presently; but if it had beene to begin *post finem et expirationem prædict'* 21 *annorum*, in that case although the first terme had beene surrendered, yet the second lease should not begin till after the 21 yeares be ended by effluxion of time: and so note the diversitie betweene the terme for 21 yeares, and 21 yeares; and [*f*] herewith agreeth the lord *Paget*'s case.

Pl. Com. Wrotesl. 198. 33 H. 8. tit. exposition des parols, 44. 8 Co. 145, in Davenport's case. (5 Co. 7. 1 Co. 154. 274. 1 Ro. Abr. 849.)

[*g*] Words to make a lease be, demise, grant, to fearme let, betake; and whatsoever word amounteth to a grant may serve to make a lease. In the king's case [*h*] this word *Committo* doth amount sometime to a grant, as when he saith *Commisimus W. de B. officium seneschalsiæ, &c. quamdiu nobis placuerit*, and by that word also he may make a lease: and [*i*] therefore *à fortiori* a common person by that word may doe the same.

[*f*] 1 Co. 154. in the Rector of Chedington's case.
[*g*] Vide. Sect. 531.
[*h*] Register F. N. B. 270. e.
[*i*] 8 H. 6. 34.

"*Of certaine yeares.*" For regularly in every lease for yeares the terme must have a certaine beginning and a certaine end; and herewith [*k*] agreeth *Bracton*, *terminus annorum certus debet esse et determinatus*. And *Littleton* is here to be understood, first, that the yeares must be certaine when the lease is to take effect in interest or possession. For before it takes effect in possesion or interest, it may depend upon an incertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certaine it sufficeth, *Quia id certum est quod certum reddi potest*. For example of the first. If *A.* seised of lands in fee grant to *B.* that when *B.* pays to *A.* xx shillings, that from thenceforth he shall have and occupie the land for 21 yeares, and after *B.* payes the xx. shillings, this is a good lease for 21 yeares from thenceforth. For the second, if *A.* leaseth his land to *B.* for so many yeares as *B.* hath in the manor of *Dale*, and *B.* hath then a terme in the mannor of *Dale* for 10 yeares, this is a good lease by *A.* to *B.* of the land of *A.* for 10 yeares. If the parson of *D.* make a lease of his glebe for so many yeares as he shall be parson there, this cannot be made certaine by any meanes, for nothing is more uncertaine than the time of death, *Terminus vitæ est incertus, et licèt nihil certius sit morte, nihil tamen incertius est horâ mortis* (2). But if he make a lease for three yeares, and so from three yeares to three yeares, so long as he shall be parson, this is a good lease for six yeares, if he continue parson so long, first for three yeares, and after that for three yeares; and for the residue uncertaine (3).

[*k*] 14 H. 8. 14. 3 Mar. leases Br. 67. 2 Mar. ibid. 67. Say and Fuller's case, Pl. Com. 273, and Welden's case, ibid. 4 H. 6. 12. 21 H. 7. 38. Vid. le case del evesque de Bathe. 6 Co. 34, 35. Bract. lib. 2. cap. 9. Vid. 1 Co. 155, 156. Rector de Chedington's case. (1 Ro. Abr. 848, 849.) Bract. lib. 2. cap. 9. So resolved Hill. 26 Eliz. Rot. 935. in com. banco.

If

(2) But if livery is made on such a lease, perhaps it may be sufficient to pass a freehold to the lessee during the life or incumbency of the leasor. See New Abr. tit. *Leases*, L. 2.—[Note 269.]

(3) *But* vid. *Noy fol.* 143, *n.* 635. *Lease from three years to three years till*

If a man maketh a lease to *I. S.* for so many yeares as *I. N.* shall name, this at the beginning is uncertaine; but when *I. N.* hath named the yeares, then it is a good lease for so many yeares.

Pl. Com. Say and Fuller's case. Mirror, ca. 2. sect. 17. & cap. 5. sect. 1.

A man maketh a lease for 21 yeares if *I. S.* live so long; this is a good lease for yeares, and yet is certaine in incertainty, for the life of *I. S.* is incertaine. See many excellent cases concerning this matter put in the said case of the bishop of *Bath* and *Wells*. By the ancient law of *England* for many respects a man could not have made a lease above 40 yeares at the most, for ☞ then it was said that by long leases many were prejudiced, and many times men disherited, but that ancient law is antiquated (1). [46. a.]

In the eye of the law any estate for life being, as *Littleton* hath said, an estate of freehold, against whom a *præcipe quòd reddat* doth lye, is an higher and greater estate than a lease for yeares, though it be for a thousand or more, which never are without suspicion of fraud; and they were the lesse valuable, for that at the common law they were subject unto, and under the power of the tenant of the freehold, the learning whereof standeth thus, and is worthy to be knowne. When *Littleton* wrote, if a man had made a lease for yeares by writing, and he that had the freehold had suffered himselfe to be impleaded in a reall action by collusion to bar the lessee of his terme, and made default, &c. the statute of *Glouc'* gave the lessee for yeares some remedy by way of receipt, and a triall whether the demandant did move the plea by good right or collusion; and if it were found by collusion, then the termor should enjoy his tearme, and the execution of the judgement should stay untill after the tearme ended (2). But this statute extended not to five cases. First, if the lease were without writing, for the words of this act are (so that the termor may have recovery by writ of covenant). 2. It extended not but to a recovery by default (3). 3. The termor could not be relieved by this statute, unlesse he knew of the recovery, and were received, &c. 4. By the better opinion of bookes, it extended not to tenants by statute merchant, statute staple, or *elegit*. 5. Not to gardian. [*l*] But now the statute of 21 *H.* 8. doth give remedy in all the said cases, saving the case of the gardian, and giveth them power to falsifie all manner of recoveries had against the tenants of the freehold upon fained and untrue titles, &c. Now

11 Co. 33.

[*l*] 21 H. 8. cap. 15.

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till the expiration of ten years shall be a lease for nine years, and the law rejects the last year, because not computed by three.—Hal. MSS. See New Abr. tit. *Leases*, L. 3, page 433.—[Note 270.]

(1) See 2 Blackst. Comment. 5th edit. p. 142. It is there observed, that it appears by mr. Maddox's collection of ancient instruments in his *Formulare Anglicanum*, that the law against leases for more than forty years, if it ever existed, was soon antiquated; and several instances of leases for a longer term, as early as the reign of Richard the second, are referred to.—[Note 271.]

(2) *Yet* videtur, *that the recoverer shall have wast.* 27 *H.* 8. 7. *Keilw.* 108. *But reversioner being received in default of tenant for life, no judgment against tenant for life, if a good bar pleaded.* Hal. MSS.—[Note 272.]

(3) *Or redditions.* 16 *H.* 7. 5. 21 *H.* 7. 25. 5 *H.* 7. 39. 8 *H.* 7. 6. 12 *H.* 8. 7. 27 *H.* 8. 7. 11 *E.* 4. 10. *or on* nihil dicit, *or disclaimer*, 9 *E.* 4. 37, *by Danby, or on default of the vouchee at the grand cape or* sequatur sub periculo. 9 *E.* 4. 38. Hal. MSS.

Now the [m] statute saith, that it was a doubt before that statute whether a termor for yeares might falsifie or no: but yet it seemeth by the better opinion of books in so great variety, that he having but a chattell, was not able by the common law to falsifie a covenous recovery of the freehold, because he could not have the thing that was recovered (4). [n] And *Thirning* and *Hankford* doe hold that a gardian is not within the statute of *Glouc'*.

[m] That a termor might falsifie at the Common Law, vid. 19 E. 3. Ass. 82. 21 E. 3. 1. 7 H. 7. 11. b. 1 H. 7. 9. b. Pl. Com. 83. 10 E. 3. 46. 19 E. 3. reseeit 112. That he could not, 30 H. 6. Fauxer recovery 9. 43 Ass. 41. 26 H. 8. 2. 9 E. 4. 38. F. N. B. 198. E. 14 H. 8. 4. 9 Co. fo. 135. Ascoughe's case.

If two coparceners be, and one of them let her part to another for yeares, and after upon a writ of partition brought against the lessor too little is allotted to the lessor, it is holden by some that the lessee cannot avoid it, for that it is made by the oath of men, and judgement is thereupon given that the partition shall remaine firme and stable. But if there be two coparceners of three acres of land, every one of equal value, and the one coparcener letteth her part, and after make partition, and one acre is allotted onely to the lessor, the lessee is not bound hereby, but he may enter and take the profits of another half acre, for that of right belongs unto him (5). Thus much have I thought good to set downe, for it sufficeth not to know what the law is in these cases, unlesse he understand the reason and cause thereof.

[n] 7 H. 4. 12. 33 H. 8. Dier. 32.

And albeit (as hath beene said) a lease for yeares must have a certaine beginning and a certaine end, yet the continuance thereof may be incertaine, for the same may cease and revive againe in divers cases (6). As if tenant in taile make a lease for yeares reserving xx. shillings, and after take a wife and dye without issue, now as to him in the reversion the lease is meerly void: but if he indow the wife of tenant in taile of the land, (as she may be though the estate taile be determined) now is the lease as to the tenant in dower (who is in of the state of her husband) [a] revived againe as against her, for as to her the estate taile continueth, for she shall be attendant for the third part of the rent services, and yet they were extinct by act in law. So it is if tenant in taile make a lease for yeares *ut supra*, and dyeth without issue, his wife enseint with a sonne, he in the reversion enter, against him the lease is void, but after the sonne be borne the lease is good, if it be made according to the [b] statute, and otherwise is voydable.

(7 Co. 9. a. 1 Ro. Abr. 842.) [a] 10 E. 3. 26. 34 Ass. 15. 23 E. 3. Dower 130. (7 Co. 8, b.) [b] 32 H. 8. ca. 28.

The king made a gift in taile of the manor of *Eastfarleigh* in *Kent*, to *W.* to hold by knights service; *W.* made a lease to *A.* for thirty-sixe yeares, reserving thirteene pound rent; *W.* died, his sonne and heire of full age. All this was found by office. As to the king this lease is not of force, for he shall have his *primer seisin*, as of lands in possession, but after livery, the lessee may enter; and if the issue in taile accept the rent, the lease shall binde him, for the king's *primer seisin* shall not take away the election of the issue in taile, for it may be that the rent was better than the land: [c] and so it was adjudged in *Austen's* case, as I

(1 Ro. Abr. 842.)

[c] Pasch. 2 & 3 Ph. & Mar. in an information of Intrusion in the Exchequer against Austen. Vid. Dier. Pasch. 2 & 3 Ph. & Mar. 115. 13 Eliz. ca. 10.

had

(4) Vid. 27 *H.* 8. 7. 21 *H.* 7. 25. *Grantee of rent charge for years might falsify recovery against terre-tenant.* Hal. MSS.—[Note 273.]

(5) Vid. 24 *E.* 3. 54. *If parceners be of two acres, and one leases one acre, which on writ of partition is allotted to the other, the lease is wholly avoided.* Hal. MSS.—[Note 274.]

(6) Vid. 7 *Rep. the earl of Bedford's case.* Hal. MSS.

had it of the report of master *Edmond Plowden*, a grave and learned apprentice of law.

If tenant in fee take wife, and make a lease for yeares, and dieth, the wife is endowed, she shall avoid the lease, but after her decease the lease shall be in force againe. But if the patron grant the next avoydance, and after parson, patron, and ordinary, before the statute, [*d*] had made a lease of the glebe for yeares, and after the parson dieth, and the grantee of the next avoydance had presented a clerke to the church, who is admitted, instituted, and inducted, and dieth within the terme; the patron presents a new clerke, and he is admitted, instituted, and inducted, albeit he commeth in under the patron that was party to the lease, yet because the last incumbent, who had the whole state in him, avoyded the lease, it shall not revive againe, no more than if a feme covert levy a fine alone, if the husband enter and avoyd the fine, and dye, the whole estate is so avoyded as it shall not binde the wife after his death (7).

[d] 6 E. 6. Dier 72. (Cro. Car. 552.) 17 E. 3. 52. 17 Ass. p. 17. 2 R. 3. 20. 9 H. 6. 33. (Hob. 7.)

(Hob. 225. 10 Co. 43.)

☞ If a woman be endowed of an advowson which is appropriated, and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent die, yet is the appropriation wholly dissolved, because the incumbent, which came in by presentation, had the whole state in him; and so it was adjudged, as the case is to be intended (1). [46. b.]

2 E. 3. 8. per Scroope. (1 Ro. Abr. 240, 241.

Tenant in taile make a lease for forty yeares, reserving a rent, to commence ten yeares after; tenant in taile dye; the issue enter and enfeoffe *A.*; ten yeares expire, the lessee enter: if *A.* accept the rent, the lease is good, for he shall have the same election that the issue in taile had, either to make it good, or to avoid it, so as it could not be precisely affirmed, whether by the entry of the issue this executory lease was avoided, but it dependeth incertainly upon the will of the feoffee (2). But now I know you are desirous to heare *Littleton*, who is speaking to you.

Pl. Com. 437. a. (1 Ro. Abr. 831. 842, 843. 1 Sid. 260. 261.)

(2 Ro. Abr. 403. Cro. Car. 110. 400.)

"*And when the lessee entreth by force of the lease, then is he tenant for terme of yeares.*" And true it is, that to many purposes he is not tenant for yeares until he enter: as a release made to him is not good to him to increase his estate, before entry; but he may release the rent reserved before entry, in respect of the privity. Neither can the lessor grant away the reversion by the name of the reversion, before entry. *Vide* Sect. 567. But the lessee before entry hath an interest, *interesse termini*, grantable to another. *Vide* Sect. 319. And albeit the lessor dye before the lessee enters, yet the lessee may enter into the lands, as our author himselfe holdeth in this Chapter. And so if the lessee dyeth before he entred, yet his executors or administrators may enter, because he presently by the lease hath an interest

V. Sect. 454, 455. (Cro. Ja. 60. 5 Co. 124.)

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(7) *Adjudged accordingly* Cro. Cha. *Plowden* v. *Oldford*, 582. *But in* Hill. 10 Eliz. C. B. E. 238, *adjudged that the lease revived. Polydore Virgil's case.* Hal. MSS.

(1) Vid. 21 *E.* 3. *Grants* 58. *Appropriation without licence, and* eâ de causâ *it seems a disappropriation.* Hal. MSS.—[Note 275.].

(2) *But if it was lease* in præsenti *by tenant in tail, and the issue before entry levies fines, the conusee shall not avoid the lease, for the lease was only voidable, and the land passes in degree of reversion.* Vid. *Dy.* 51. 7 *Rep.* 9, *earl of Bedford's case.* Hal. MSS.—[Note 276.]

interest in him: and if it be made to two, and one dye before entry, his interest shall survive. *Vide* Sect. 281.

He that hath a lease for yeares, hath it either in his owne right, whereof *Littleton* hath here spoken, or in another's right, and that in divers manners; as a man may have a terme for yeares in the right of his wife, whereof the husband hath power to dispose at any time during his life, and if he surviveth his wife, the law doth give the lease to him. But if he make no disposition thereof, and his wife survive him, it remaineth with the wife: but of this in another place more fully. V. Sect. 665, more fully of this matter. (Hob. 3.)

If a man be possessed of a terme of forty yeares in the right of his wife, and maketh a lease for twenty yeares, reserving a rent, and die, the wife shall have the residue of the terme, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease (3). So note, a disposition of part of the terme is no disposition of the whole. But if the husband grant the whole terme, upon condition that the grantee shall pay a summe of money to his executors, &c. the husband die, the condition is broken, the executors enter, this is a disposition of the terme, and the wife is barred thereof, for the whole interest was passed away (4). (1 Ro. Abr. 344. 345. Plow. 191.)

If a lease be made to a baron and feme for terme of their lives, the remainder to the executors of the survivor of them, the husband grant away this terme and dieth, this shall not bar the wife, for that the wife had but a possibility, and no interest. Hil. 17 El. in the king's bench. (Post. 351. 10 Co. 51. Hutt. 17.)

If the husband and wife be ejected of a terme in the right of his wife, and the husband bring an *ejectione firmæ* in his owne name (5), and have judgement to recover, this is an alteration of the terme, and vesteth it in the husband (6). 37 Ass. p. 11. Pl. Com. 418. b. (1 Ro. Rep. 359.)

If a lease for yeares be made to a bishop and his successors, yet his executors or administrators shall have it *in auter droit*, for regularly no chattell can goe in succession in a case of a sole corporation, no more than if a lease be made to a man and his heires it can goe to his heires. But let us returne to *Littleton* (7).

Touching the time of the beginning of a lease for yeares, it is to be observed, that if a lease be made by indenture, bearing date 26 *Maii*, &c. to have and to hold for twenty-one yeares, from the 5 Co. 1. Clayton's case. 12 Eliz. Dyer 286.

(2 Ro. Abr. 520. Cro. Ja. 135. Post. 255. a.) 14 El. Dy. 307. 5 El. Dy. 218.
(1 Ro. Abr. 849, 850. Cro. Cha. 78.)

date,

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(3) Vid. tamen *one Evans's case, in which it was adjudged that the wife shall have the rent. Cited by Houghton.* 16 Jac. Quære and vid. 7 H. 6. 2. T. 16 Jac. *Blaxton and Heath.* 2 *Poph. n.* 38. Hal. MSS.—By 2 Poph. lord Hale means the additional cases at the end of Popham's Reports. See Poph. 125. For Blaxton and Heath, see Poph. 145.—[Note 277.]

(4) *If part of a term be granted by husband on condition, it seems that the condition is gone by his death.* Quære. *A ward changes the property of such a term. Dy.* 183. Hal. MSS.—See the case in Marg. Dy. 183.—[Note 278.]

(5) Vide *Husband of wife termor may have petition of right alone.* 37 *Ass. pl.* 11. *If husband is guardian in right of his wife, dower lies against the husband alone; for there can be no voucher there against the ward's right.* 2 *E.* 3. 13. 15. 47 *E.* 3. 9. Hal. MSS.—[Note 279.]

(6) Vid. 50 *E.* 3. *Judgment for husband in* quare impedit *for the wife's advowson; the husband dies; the wife presents.* Hal. MSS.—[Note 280.]

(7) Hic *fol.* 9. *a.* Hal. MSS.

date, or from the day of the date (8), it shall begin on the twenty-seventh day of *May* (9). If the lease beare date the twenty-sixth day of *May, &c.* to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth, take their first effect. But if it be *à die confectionis*, then it shall begin on the next day after the deliverie. If the *habendum* be for the terme of twenty one yeares, without mentioning when it shall begin, it shall begin from the deliverie, for there the words take effect, as is aforesaid. If an indenture of lease beare date which is void or impossible, as the thirtieth day of *Februarie*, or the fortieth of *March*, if in this case the terme be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all. [a] And so it is, if a man by indenture of lease, either recite a lease which is not, or is void, or misrecite a lease in point materiall which is *in esse*, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the deliverie thereof (10).

2 Co. 3. Goddard's case.

[a] Pl. Com. 148. 3 E. 6. tit. Leases Br. 62. 3 El. Dy. 195. 1 Mar. Dyer 116. (Cro. Car. 400.

2 Ro. Abr. 52. 1 Ro. Abr. 849. 1 Sid. 460.)

" *And*

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(8) Vid. *for* date *and* day of the date hic *fol.* 6. *a. and the note there.* Hal. MSS.—In fol. 6. a. lord Hale gives the following note. Date *and* day of the date *the same in point of computation.* 5 *Rep. But in point of interest date is taken* inclusive, *day of the date* exclusive *in many cases.* T. 9 Jac. B. R. *Bulstr. n.* 177. *A. on the second of August* 1 Jam. *makes an obligation to B. and afterwards on the same day B. releases all actions* usque datum scripti: *the obligation is discharged, because* date *is* delivery. *Otherwise, if it had been to the* day of the date. T. 9 Car. B. R. *Rooke and Richards. Condition of obligation to stand to an award, so that it be made within four days after the* date: *a good award may be made the same day; and so it seems if it be* day of the date. *M.* 1653. *Street's case. Stiles* 382. *Obligation dated* 2 *January; release dated* 1 *January of all actions* usque diem hujus præsentis temporis, *but delivered* 3 *January:* præsens tempus *is the* date, *and so the obligation stood.* P. 7 Jac. Hal. MSS.—See further as to the difference between *date* and *day of the date,* Com. Dig. *Estates,* G. 8. *Bargain and Sale,* B. 8. *Temps* A. and Vin. Abr. *Estate, Z. a. Time,* A. and Wils. vol. 1. part 2. page 165, and the next note.—[Note 281.]

(9) Vid. *for commencement of lease,* M. 10 Jac. Rot. 75. *Hob. case* 32. *Moor and Musgrave. A. by indenture dated* 4 *May* 10 Jac. *to hold* from the feast of the annunciation last past for the term of 21 years next ensuing the date hereof fully to be complete and ended. *In ejectment plaintiff counts on this lease, as a lease to hold* from the feast for 21 years extunc prox. sequent. *and agreed to be good. But see* T. 24 Car. B. R. *Cornish and Cawsey. Lease by indenture of* 25 *March* 15 Car. *to have and to hold* from and after the day of the date of these presents for the term and time of seven years from henceforth next and immediately ensuing, *shall commence in computation from the delivery, and in point of interest from the date. Stiles* 118. Hal. MSS.—[Note 282.]

(10) *For misrecital a lease shall commence immediately.* 6 *Rep. bishop of Bath's case.—The earl of Oxford by deed dated* 10 *Feb.* 27 *H.* 8. *demises to A. for* 21 *years; and afterwards by indenture reciting that he by indenture dated* 10 *Feb.* 28 *H.* 8. *had demised to A. for* 21 *years, demises the same land to B.* habendum *for* 31 *years from and after the expiration surrender or forfeiture of the said lease. It was ruled, that B.'s lease should commence in computation immediately, because A.'s lease was misrecited.* H. 10 Car. B. R. Crook. n. 8. *Miller and Manwaringe. But if in case of such a misrecital, the* habendum *be from*

" And if the lessor in such case reserve to him a yearely rent upon such lease, he may chuse for to distraine for the rent, or else he may have an action of debt for the arrerages."

[47. a.] ☞ *" Reserve to him a yearely rent, &c."* First, it appeareth [*b*] here by *Littleton* that a rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distreine, as *Littleton* here also saith, and therefore a rent cannot be reserved by a common person (1) out of any incorporeall inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, priviledges, franchises, and the like. [*c*] But if the lease be made of them by deed (2) for yeares, it may be good by way of contract to have an action for debt, but distreine the lessor cannot. Neither shall it passe with the grant of the reversion, for that it is no rent incident to the reversion (3). But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie (4). But if a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may distreine the cattell upon the land (5): and so a reversion, or a remainder of lands or tenements may be granted reserving a

[*b*] 7 Co. 23. But's case. 10 Co. 59, 60. (Cro. Ja. 173. Post. 142. a. 144. a. 5 Co. 3. 2 Saund. 303. 2 Ro. Abr. 446. 5 Co. Mountjoy's case, Noy 60.)

[*c*] 30 Ass. p. 5. 12 Ass. 20. 20 H. 4. 19. 1 H. 4. 1, 2, 3. 11 H. 4. 82. 19 E. 2. Fines 126. 44 E. 3. 45. 9 Ass. 24. 26 Ass. 60.

14 E. 3. Scir. fac. 102. 5 E. 3. 68. 17 E. 3. 75. 11 H. 4. 40. 3 H. 6. 21. 46. 10 H. 6. 12. 21 H. 6. 11. 5 H. 7. 39. 21 H. 7. 19. 17 E. 2. Ex. 112. 23 El. Dyer 377.

rent,

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from and after the demise and indenture made to A. and it is not said the said demise, then the second lease shall commence after the true lease notwithstanding the misrecital. M. 1 & 2 P. & M. Rot. 648. *Mount and Hodgken, Bendl. n.* 71. Hal. MSS.—See Cro. Cha. 397, and N. Bendl. 38. See further as to the commencement of leases and the effect of misrecitals in that respect, Sheph. Touch. 272. New Abr. *Leases*, L. and Vin. Abr. *Estate*, Z. a. and *Grant*, R. 4. —[Note 283.]

(1) Lord Coke confines the rule to common persons, because the king may reserve rent out of an incorporeal inheritance; the reason of which is, that he by his prerogative can distrain on all the lands of his lessee. 4 New Abr. 192 & 339.—[Note 284.]

(2) The case of a lease by *deed* is put, because in general things incorporeal will not pass without deed. Post. 48. a. 49. a. 169. a. and ante 9. a.—[Note 285.]

(3) 12 *H.* 4. 17. Vid. supra *fol.* 44. *b. the case of the precentor of Paul's, according to which rent on lease for years of tithes is incident to the reversion.* Hal. MSS. See ante 44. b. n. 3.—[Note 286.]

(4) That the common law did not allow debt for rent on freehold leases whilst they continued is certain, though the reason is not quite so clear. See 3 Blackst. 233. It has been accounted for by suggesting, that the remedies by *cessavit* and distress were deemed sufficient securities for the rent and services. See Gilb. on Rents 93, and Gilb. on the Action of Debt in his Cas. in L. and Eq. 379. But it may be proper to observe, that the *cessavit* seems to have been first given by the 6 E. 1. c. 4, though the lord's right of seizing the land for substraction of services, which continued till it was taken away by the 52 H. 3. c. 22, was a remedy in some respects similar, and furnishes occasion for the same observation. See 2 Inst. 295, and Wright's Ten. 197. Note that the 8 Ann. c. 14, now gives debt for rent on a lease for life; on which statute mr. serjeant Hawkins queries whether it doth not extend to leases of incorporeal hereditaments. Hawk. Abr. of Co. Litt. 73.—[Note 287.]

(5) Quære, *how assise shall be brought in case of herbage.* 17 E. 3. 75. Hal. MSS.

rent, for the apparent possibility that it may come in possession (6), and they are tenements within the words of *Littleton*.

[a] 40 E. 3. 47. 8 E. 3. 67. 21 E. 4. 62. 3 H. 6. 45.

[a] It appeareth by *Littleton*, that *reservando* is an apt word of reserving a rent, and so is *reddendo, solvendo, faciendo, inveniendo, dummodo*, and the like (7).

31 Ass. p. 30. 3 Ass. 9. 26 Ass. 66. 32 E. 3. Br. 291. 8 E. 4. 8. 10 El. Dy. 276. Pl. Com. en. Browning and Beeston's case, fo. 131, 132, &c.

[b] 50 E. 3. 12. 13 Ass. 9. 38 E. 3. 10. 21 E. 3, 4. 34 Ass. 11. 29 E. 3. 14. 3 H. 6. 45. 10 H. 6. 8. 41. 33 H. 6. 1. 35 H. 6. 34. 17 Ass. 14 H. 8. 1. 44 E. 3. 43. Pl. Com. 361.

[b] And note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*) for which, *exceptis, salvo, præter*, and the like, be apt words; and a reservation which is alwaies of a thing not in *esse*, but newly created or reserved out of the land or tenement demised. [c] *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* [d] But out of a generall a part may be excepted, as out of a mannor, an acre, *ex verbo generali aliquid excipitur*, and not a part of a certainty, as out of twenty acres one.

[c] Bract. li. 2, f. 32. b. & f. 249. [d] 9 El. Dy. 264. 38 H. 6. 38. 14 H. 8. 1. 22 E. 3. 8. 2 E. 3. 56. 5 E. 3. 66. 34 Ass. 11.

It is further to be observed, that the lessor cannot reserve to any other but to himselfe, for *Littleton* saith, *reserve to himselfe*.

[e] 5 E. 4. 4. 14 E. 3. bre. 282. 8 Co. 70, 71.

[e] If two jointenants be, and they make a lease for yeares by paroll, or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion.

[f] Vid. Sect. 214, 215, 216, &c. 10 E. 4. 18. 11 E. 3. Ass. 86. 27 H. 8. 19. 21 H. 7. 25. 30 H. 8. Dy. 45. [g] Mich. 5 Ja. in repl. inter Wootton & Edwin, Bank le roy. Hil. 33. El. Rot. 1431. in bank le roy, inter Richmond & Butcher. (Post. 215. b. 2 Ro. Abr. 450. 12 Co. 35. 2 Ro. Abr. 743.) Vid. for this word Distreine, Sect. 136.

[f] *Littleton* here is putting of a case, and not making a lease, for then he would not reserve the rent to him, but to him and his heires, for otherwise the rent shall determine by his death, if he die within the terme (8). [g] But if he reserve a rent generally without shewing to whom it shall goe, it shall go to his heires. If he reserve a rent to him and his assignes, yet the rent shall determine by his death, because the reservation is good but during his life. So it is if he reserve a rent to him and his executors it shall end by his death, because the heire hath the reversion, and the rent was incident to the reversion (9).

So

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(6) *And after the particular estate determined, distress may be made for all arrears.* 10 *E.* 4. 3. Hal. MSS.—[Note 288.]

(7) *Lease for years by indenture, and lessee covenants to pay 5l. a year; this is a reservation. Dy.* 276. *H.* 6 Car. B. R. *Crook n.* 1. *Drake and Munday. But if there be* reddendo *rent and the lessee covenants to pay two capons, there it seems to be only covenant.* M. 40, 41 Eliz. *Bruerton's case.* Hal. MSS.—See Cro. Cha. 207, and Hardr. 326.—[Note 289.]

(8) *Rent, reserved to him and his assigns during the term, or to him his executors and assigns during the term, determines by the lessor's death.* T. 2 Car. B. R. *Noy n.* 412. 12 *Co. n.* 20, and Hil. 32 Eliz. *Richmond's case.* Hal. MSS.—See Noy 96. 12 Co. 35, and Cro. Eliz. 217.—But notwithstanding the cases here cited by lord Hale, it was adjudged, whilst he was chief justice of the king's bench, that the words *during the term* are of themselves sufficient to carry the rent to the heir, if the lessor is seised in fee, and he concurred in the judgment. See the case of Sacheverell and Frogatt, East. 23 Cha. 2, in 2 Saund. 367.—[Note 290.]

(9) *Rendering rent to him his heirs executors and administrators good, and it*

So if a man warrant land to *B.* and his assigns, the assignee must vouch during the life of *B.* for the warrantie continues but only during the life of *B.* for the warranty is but for life, for want of words of inheritance. But if the warranty be to *B.* his heires and assignes, so as he hath an inheritance therein, then his assignee shall vouch after his decease. So if the rent be reserved to the lessor, his heires and assignes, so as it be incident to the inheritance, then shall all the assignees of the reversion enjoy the same.

"*Yearely rent.*" So it is if the rent be reserved every two or three or more yeares (10). Of rents *Littleton* doth excellently treat hereafter in his Chapter of Rents, and therefore in this place thus much shall suffice.

"*To distraine for the rent.*" Here it is necessary to be seene of what things a distresse may be taken for a rent, and how the distresse ought to be demeaned. [*h*] 1. It must be of a thing whereof a valuable propertie is in some body, and therefore dogs, bucks, does (11), conies, and the like that are *feræ naturæ* (12) cannot be distreyned. 2. Although it be of valuable propertie, as a horse, &c. yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time priviledged and cannot be distreyned (13). [*i*] 3. Valuable things shall not be distreined for rent for benefit and maintenance of trades, which by consequent are for the common wealth, and are there by authority of law; as a horse in a smithe's shop shall not be distreyned for the rent issuing out of the shop, nor the horse, &c. in the hostry, nor the materialls in the weaver's shop for making of cloth, nor cloth or garments in a taylor's shop (14), nor sacks of corne or meale in a mill, nor in

[h] 14 H. 8. 25. 2 E. 2. tit. Distress. 6 R. 2. Rescous 11. 7 E. 3. Avowr. 199. 15 E. 2. Avowr. 2. (1 Ro. Abr. 666. Cro. El. 552.)

[i] 22 E. 4. 49. b. 7 H. 7. 1. b. 22 E. 4. 36. 4 E. 6. tit. Dist. Br. 74. (Cro. El. 596. Noy 181.)

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it shall go to the heir. Drake's case supra. *Rendering rent to him or his successors good, and the successor shall have it. 5 Rep.* Hal. MSS.—[Note 291.]

(10) See further as to reservation of rent, Vin. Abr. title *Reservation*, and Gilb. Treat. on Rents.

(11) But deer kept in a private inclosure may be distrained. See 3 Blackst. Com. 8, where the case of Davis v. Powel C. B. Hil. 11 G. 2, is cited.—[Note 292.]

(12) Some have thought, that a horse, on which one is riding, may be distrained for *damage feasant*. 2 Keb. 596. 1 Sid. 440. But the opinion was extrajudicial, and may be questioned; for 1 Ro. Abr. 664. A. pl. 4, and the case of 7 E. 3. Fitzh. Abr. Avowry 199, are directly *contra*. See also n. 13, *infra*, and Cro. Eliz. 549. 596. Some also have inclined to think, that horses drawing a cart loaded with corn, though one is riding in the cart, may be distrained for rent, and for that purpose may be severed from the cart, if the person distraining doth not chuse to take the cart with the corn as well as the horses, all of which as it seems are equally liable to the distress. See 2 Keb. 529. 596. 1 Vent. 36, and 1 Sid. 422. 440, in which latter book the reporter makes a query, whether the man's being on the cart should not privilege the whole team.—[Note 293.]

(13) *If ferrets and nets in a warren be taken* damage feasant, *it is good. But if they are in the hands of a man, they cannot be distrained any more than a horse on which a man is; nor can they be distrained, if they are out of the warren. 2 E. 2. Avowry* 182. *7 E. 3.* ibid. 199. Hal. MSS.—See Vin. Abr. *Distress*, A.—[Note 294.]

(14) *If A. brings yarn to his neighbour's house to weigh, it cannot be distrained by the lord. Noy n.* 298. *Burley and Read.* Vid. 15 *E. Avowry* 216. Hal. MSS.

in a market, nor any thing distrayned for damage *fesant*, for it is in custody of law, and the like.

[k] 18 E. 3. 4. a. 11 H. 7. 14. a. 21 H. 7. 39. b. 22 E. 4. 50. b. 2 H. 4. 15. (1 Ro. Abr. 667.)

[k] 4. Nothing shall be distrayned for rent, that cannot be rendered againe in as good plight as it was at the time of the distresse taken (15); as sheaves or shockes of corne or the like cannot be distrayned for rent (16), but for damage *fesant* they may be distreyned (17). But charretts or carts with corne may be distreyned for rent, for they may be safely restored.

[l] Okeham 38, 39. Bra. lib. 4, f. 217. F. N. B. 90. a. Reg. 97. Flet. lib. 2, ca. 41. Mirr. ca. 2, Sect. 15, 16. 4 E. 3. 1. 29 E. 3. 17.

[l] 5. Beasts belonging to the plow (18), *averia carucæ*, shall not be distreyned (which is the ancient common law of *England*, for no man shall be distreined by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the bookes of a scholler) while goods ☞ or other beasts, which *Bracton* calls *animalia*, (or *catella*) *otiosa*, may be distrained. [m] 6. Furnaces, caudrons, or the like, fixed to the freehold, or the doores or windowes of a house, or the like cannot be distrained (1). [n] Lastly, beasts that escape (2) may be distrained for rent, though they have not been *levant* and *couchant* (3). [o] Note, that he that distraines any

[47. b.]

[m] 21 H. 7. 26. 3 E. 3. Ass. 46. 9. avowrie 219. (2 Leon. 7.)

[n] 7 H. 7. 1. b. 10 H. 7. 21. 11 H. 7. 4. a. 15 H. 7. 17. 18 E. 2. 6 E. 4. 22 E. 4. 49. 4 E. 3, distres. 18. 27 E. 3. 80. 2 H. 4. 16. Doct. and Stud. lib. 2, cap. 27.)

[o] Marlebr. cap. 4. W. 1. ca. 16. 2 & 3 Ph. and Mar. cap. 13. Fleta, lib. 2, cap. 20. 6 H. 3, avowrie 242. 30 Ass. 38. 1 H. 6. 9. 22 E. 4. 11. F. N. B. 89. Doct. and Stud. lib. 2, cap. 27. 5 H. 7. fol. 9.

thing

—See Noy 68, and S. C. in Cro. Eliz. 549, and 596. For other cases in which things the property of strangers are privileged from distress for the sake of trade and commerce, see *Francis* and *Wyatt*, 4 Burr. v. 3. p. 1498. In that case the question was, whether a person's chariot, which stood at a common livery stable, could be distrained for rent due from the keeper of the livery stable; and the court after two arguments appearing to be strongly inclined in favour of the distress, the owner of the chariot afterwards declined bringing the question to a third argument, which had been ordered by the court. —[Note 295.]

(15) 20 *H.* 7. 9. 13. 21 *E.* 4. 47. Hal. MSS.

(16) But now by the 2 W. and M. c. 5, sheaves, or cocks of corn, or corn loose or in the straw, or hay in any hovel, stack or rick, or otherwise on the land, may be distrained for rent on demise lease or contract.—[Note 296.]

(17) Sheep are equally privileged with *averia carucæ*, and cannot be taken, if any other distress can be found. See further 2 Inst. 133, 134, and the case cited in n. 18.—[Note 297.]

(18) But it has been adjudged, that beasts of the plow may be taken for the poor's rate under the 43 Eliz. because the remedy given by that and other statutes for compelling the payment of particular rates or sums of money, though called a distress, is in *effect* an *execution*. 4 Burr. v. 1. p. 579. See acc. Saund. on 22 Ch. 2, against conventicles 39, which is referred to in Com. Dig. *Distress*, C. but not cited in the case in 4 Burr.—[Note 298.]

(1) At common law corn growing could not be distrained, because it adheres to the freehold. 1 Ro. Abr. 666. H. pl. 4. But now by the 11 G. 2. c. 19, landlords are empowered to distrain all sorts of corn, grass, or other product growing on the estate demised, and to cut and gather them when ripe. —[Note 299.]

(2) *If they escape for want of inclosure by him who ought to repair, they are not distrainable. Adj.* 14 *Eliz. Dy.* 317. *The lord cannot distrain beasts which escape, when they are gone out of the land, though they are within view.* Vid. 41 *E.* 3. 26. 14 *H.* 7, 8. 20 *H.* 7. 10. 15 *H.* 7. 17. 2 *E.* 4. 6. Hal. MSS. —See the next note.—[Note 300.]

(3) This doctrine has been objected to as too general; and several distinctions

thing that hath life, must impound them in a lawfull pownd within three miles in the same county, and that is either overt or open, in a pinfold made for such purposes, or in his owne close, or in the close of another by his consent (4). And it is there called open, because the owner may give his cattle meat and drinke without trespasse to any other, and then the cattle must be sustained at the perill of the owner. [p] Or it is a pownd covert or close, as to impownd the cattle in some part of his house, and then the cattle are to be sustained with meat and drink at the perill of him that distraineth, and he shall not have any satisfaction therefore. But if the distresse be of utensils of houshold, or such like dead goods which may take harme by wet or weather, or be stolne away, there he must impownd them in a house or other pownd covert within three miles within the same county, for if he impownd them in a pownd overt he must answer for them.

[p] 33 H. 8. tit. distres. Br. 65. (1 Ro. Abr. 673.)

[q] If the distresse be taken of goods without cause, the owner may make rescous; but if they be distrained without cause, and impounded, the owner cannot breake the pownd and take them out, because they are then in the custody of the law.

[q] 4 E. 6. tit. distres. 74. F. N. B. 100 E. (Post. 160. b.)

[r] But if a man distraine cattle for damage *feasant*, and put them in the pownd, and the owner that had common there make fresh suite, and finde the door unlocked (5), he may justifie the taking away of the cattle in a *parco fracto*. [s] If the owner breake the pownd, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he find them, and impownd them againe.

[r] 3 E. 3. tit. trans. 11.

[s] 34 H. 6. 18.

It is called a writ *de parco fracto* of these words in the writ [t], *Parcum illum vi et armis fregit*. And the forme thereof appeares in the *Register* and *F. N. B.*

[t] Regist. F. N. B. 100, 101.

But it is to be observed, that for the rent due the last day of the tearme, the lessor cannot distraine, because the terme is ended (6); and therefore some use to reserve the last halfe yeare's rent

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tinctions are taken, the sum of which seems to be, that if a stranger's beasts escape into another's land by default of the owner of the beasts, as by breaking the fences, they may be distrained for rent immediately without being levant or couchant; but that if they escape there by default of the tenant of the land, as for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind till they have been levant and couchant, nor afterwards by a landlord for rent on a lease, unless on notice the owner of the beasts neglects to remove them; tho' it is said, that such notice is not necessary where the distress is by the lord of the fee for an ancient rent, or by the grantee of a rent charge. See this subject argued upon at large in the case of Kimp and Cruwes, 2 Lutw. 1573.—[Note 301.]

(4) And now by the 11 G. 2, c. 19, s. 10, persons distraining for rent may impound the distress on any convenient part of the land chargeable with the rent.—[Note 302.]

(5) Vid. 30 *E.* 26, *where defendant pleads that he found the cattle* sans nul manner de fermure ne serrure n'autre engine. Hal. MSS.—[Note 303.]

(6) *For one cannot distrain the same day the rent grows due; but it must be the day after.* 21 *H.* 6. 40. Vid. 14 *H.* 4. 31. Hal. MSS.—By the 8 An. c. 14, rent may be distrained for after determination of the lease in the same manner as before, if the distress is made within six calendar months afterwards,

rent at the feast of the nativitie of Saint *John Baptist* before the end of the terme, so as if the rent be not then paid, he may distraine betweene that and *Michaelmasse* following (7).

(Doct. and Stud. lib. 2, cap. 9.)

" *Action of debt.*" Note a diversitie betweene a rent reserved upon a lease for yeares, reserving a yearely rent: the lessor may have severall actions of debt for every yeare's rent. But upon a bond or contract for payment of several summes, no action of debt lieth till the last day be past (8). But otherwise it is of a recognizance, which see at large and the reason thereof cap. Releases, Sect. 512, 513. [u] Note, that the lord shall not have an action of debt for relief or for escuage due unto him, because he hath other remedie; but his executors or administrators shall have an action therefore, because it is now become as a flower falne from the stocke, and they have no other remedy. Neither shall the lord have an action of debt for aid *pur file marier*, or *faire fitz Chivaler*, for the cause aforesaid.

(1 Ro. Abr. 601. Post. 292. b.)

[u] 7 H. 6. 13. 4 Co. 49. 3 Co. 16. 34 E. 1. tit. Avowrie 233. 32 H. 8. Br. reliefe 11. F. N. B. 82, 83. Glanvil. lib. 9, cap. 35. Fleta, lib. 2, cap. 40, and lib. 3, cap. 14. Bracton, lib. 2, fol. 36. W. 1. cap. 35. 25 E. 3. cap. 11. Britton, fol. 57, & 70. (Post. 3. a. 1 Ro. Abr. 596.)

" *But in such case it behooveth, that the lessor be seised* (9) *in the same tenements at the time of his lease; for it is a good plee for the lessee to say, that the lessor had nothing in the tenements at the time of the lease.*" And the reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum;* and therefore if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead, that the lessor *non dimisit*, and give in evidence the other matter (10).

" *Except* [x] *the lease be made by deed indented, &c.*" If the

[x] 45 E. 3. 7. 20 E. 4. 10. 34 H. 6. 48. 35 H. 6. 34. 9 H. 6. 35. 14 H. 4. 22.

lease

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wards, and during the continuance of the landlord's title and the possession of the tenant from whom the arrears are due.—[Note 304.]

(7) See further as to distress 3 Blackst. Comment. 6 & 145, and in the several Abridgments titles *Distress* and *Replevin*, and also Gilbert's Treatise on the law of Replevins. See also 2 W. & M. c. 5. 8 An. c. 14. 4 G. 2. c. 28, and 11 G. 2. c. 19. These statutes have made great alterations in the ancient law of distress, particularly by empowering persons, who distrain for rent of any kind, to sell the distress for payment of the rent in arrear, if the tenant or owner fails to replevy with sufficient security within five days after taking of the distress and giving the tenant notice of the cause. This improvement of the remedy by distress was first introduced by the 2 W. & M. c. 5, with respect to rents due on demise or contract, and afterwards by the 4 G. 2. c. 28, was extended to rents seck, rents of assise, and chief rents. Before these two statutes, the remedy by distress was very imperfect; for the distress was merely taken *nomine pœnæ* to compel satisfaction, and could not be sold or used for the profit of the person distraining, except in case of the king and in some few other instances. Most of the other changes, made by the statutes since lord Coke's time, have been incidentally hinted at in the preceding notes. —[Note 305.]

(8) See New Abr. *Debt*, B. and Vin. Abr. *Debt*, O.

(9) Nota *this diversity. In pleading a lease one ought to say, that the lessor was* seised *and demised; but in count in debt for rent it is good without alledging seisin.* 20 *E.* 3. *Barr.* 132. 21 *H.* 7. 32. Hal. MSS.—[Note 306.]

(10) 18 *E.* 3. 16. *Brief* 747. *Dy.* 122. *Martyne and Hardye.* Hal. MSS.

lease be made by deed indented, then are both parties concluded, [y] but if it be by deed poll the lessee is not estopped to say, that the lessor had nothing at the time of the lease made. *A.* lessee for the life of *B.* makes a lease for yeares by deed indented, and after purchases the reversion in fee. *B.* dieth, *A.* shall avoid his owne lease, for he may confesse and avoid the lease which took effect in point of interest, and determined by the death of *B.* But if *A.* had nothing in the land, and made a lease for yeares by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say, that the lessor had nothing in the land (11); and here it worketh only upon the conclusion, and the lessor cannot confesse and avoid, as he might in the other case. [z] If a man take a lease of his owne land by deed indented reserving a rent, the lessee is concluded. [a] But if a man take a lease of the herbage of his owne land by deed indented, this is no conclusion to say, that the lessor had nothing in the land, because it was not made of the land itselfe: [b] but if a man take a lease for yeares of his owne land by deed indented, the estoppell doth not continue after the terme ended (12). For by the making of the lease, the estoppell doth grow, and consequently by the end of the lease, the estoppel determines (13), [c] and that part of the indenture which belonged to the lessee, doth after the terme ended belong to the lessor, which should not be if the estoppell continued.

[48. a.]

[y] 2 E. 2. Estop. 253. 39 E. 3. 13. Pl. Com. 434. 18 E. 3. 16. 15 E. 3. Estop. 236. 14 H. 4. 32. (Mo. 20.)

[z] 14 H. 6. 23. 8 H. 4. 7.

[a] Resolve Pasch. 2 Eliz. in Communi Banco. (Cro. Cha. 110.)

[b] Mich. 31 & 32 Eliz. in Communi Banco adjudge in London's case.

[c] 38 H. 6. 24. 30 E. 3. 21. (Post. 229. a.)

Sect. 59.

AND it is to be understood, that in a lease for yeares, by deed or without deed (1), *there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffements made in the country, or gifts in taile, or lease for terme of life; in such cases where a freehold shall passe, if it be by deed or without deed, it behoveth to have livery of seisin.*

"*LIVERY of seisin.*" (2) *Traditio*, or *deliberatio seisinæ*, is a solemnitie, that the law requireth for the passing of a freehold

18 E. 3. fo. 16. 41 E. 3. 17. 40 Ass. 10.

2 Ass. 1. 2 E. 3. 4. 43 E. 3. Feoff. 51. Pl. Com. 25. a. & 303. b. Vid. Sect. 66. (Post. 216.)

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(11) Et videtur, *that by purchase of the land, that is turned into a lease in interest, which before was purely an estoppel.* Vid. tamen P. 3 Car. C. B. *Crook n. 2. Isham and Morris.* Hal. MSS.—See Cro. Cha. 109.—[Note 307.]

(12) Vid. 4 *H.* 6. 7. *If disseisee makes lease for years by indenture to disseisor, he shall not have assise during this lease.* Hal. MSS.—[Note 308.]

(13) 30 *E.* 3. 21. Vid. 14 *H.* 6. 22, per curiam. *But if it be estoppel by matter of record, as by fine, &c. it continues after.* 2 *E.* 4. Hal. MSS.—[Note 309.]

(1) As to the distinction at common law between hereditaments lying in livery, which may be passed for any estate without deed or even writing, and those lying in grant, which could be transferred by deed only, and the alteration of our ancient law by the 29 Cha. 2. c. 3, which requires a deed or writing in most cases, see infra, n. 3. ante 9. a, and post. 49. a. 121. b. 169. a.

(2 For the origin and history of the transfer of lands by livery of seisin, see

[b] Bract. lib. 2, ca. 15.

freehold of lands or tenements by deliverie of seisin thereof. [b] *Intervenire debet solennitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis* (3).

[c] Bract. lib. 2, ca. 15 & 18. Brit. ca. 33, in fine fo. 87. Flet. lib. 3, cap. 15.

And there be two kinds of livery of seisin, viz. a liverie in [c] deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the doore, or turfe or twigge of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. *per hostium et per haspam et annulum vel per fustem vel baculum, &c.*

[d] 6 Co. 26. Sharp's case.

A. seised of an house in fee, and being in the house, [d] saith to *B.* I demise to you this house for terme of my life; this is a good beginning to limit the state, but here wanteth livery (4). A livery in deed may be done two manner of wayes. By a solemne act and words; as by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of the land, and with [e] these or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haspe, branch, twigge, or turfe; and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of

[e] See of this more Sect. 60. (2 Ro. Abr. 7.)

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see 2 Blackst. Comment. 311. Mad. Formul. Anglic. Dissert. 9, and Spelm. Gloss. and Du Fresn. Gloss. voce *Investitura*.

(3) But since the introduction of uses and trusts and the statute of 27 H. 8, for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments has been almost wholly superseded, and in consequence of it the conveyance by feoffment is now very little in use. Before the statute of uses *equitable* estates of freehold might be created through the *medium* of trusts without livery, and by the operation of the statute *legal* estates of freehold may now be created in the same way. Those who framed the statute of uses evidently foresaw, that it would render livery unnecessary to the passing of a freehold, and that a freehold of such things as do not lie in grant would become transferrable by *parol* only without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture inrolled. See 27 H. 8. c. 16. The objects of this provision evidently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances by substituting the more effectual notoriety of inrollment for the more ancient one of livery. But the latter part of this provision, which if it had not been evaded would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold though created without deed or writing. The inconveniences from this insufficiency of the statute of inrollments are now in some measure prevented by the 29 Ch. 2. c. 3, which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See post. 121. b. —[Note 310.].

(4) 9 *Rep.* 13. *Thoroughgood's case*, Hal. MSS.

of this deed; or by words without any ceremony or act (5); as, the feoffor being at the house doore, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed; *et sic de similibus:* or, Enter you into this house or land, and have and enjoy it according to the deed: or, Enter into the house or land, and God give you joy: or, I am content you shall enjoy this land according to the deed; or the like. For if words may amount to a liverie within the view, much more it shall upon the land (6). But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed: but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby it appeareth, that the delivery of any thing upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it beene resolved by all the judges; and so of the like.

41 E. 3. 17. b. 41 Ass. p. 10. 38 Ass. p. 2. 38 E. 3. 11. 39 Ass. p. 12. 26 Ass. 39. 27 Ass. p. 61. 18 E. 3. 16. 6 Co. 26. Sharp's case. (Post. 37. Cro. Jam. 80.)

43 E. 3. tit. Feoff. 51. 35 H. 8. Feoff. Br. (9 Co. 136. b. 1 Leon. 207.)

50 E. 3. Rot. Parl. nu. 30.

If divers parcels of land be conteyned in a deed, and the feoffor delivers seisin of one parcell according to the deed, all the parcels doe passe, albeit he saith not (in name of all, &c.) because the deed containeth all. And so if there be divers feoffees, and he make livery to one according to the deed, the land passeth to all the feoffees (7); and yet the plainer way is to say (in the name of the whole, or of all the feoffees) (8).

(Post. 50. a. 13 E. 3. Estop. 177.

If a man make a charter in fee, and deliver seisin for life *secundum formam cartæ*, the whole fee simple shall passe, for it shall be taken most strongly against the feoffor. Note, that these words *(secundum formam cartæ)* are understood according to the quantitie and quality of the effectuall estate contained in the deed. If a man make a lease for yeares by deed, and

[48. b.] ☞ deliver seisin according to the forme and effect of the deed; yet he hath but an estate for yeares, and the liverie is void, as *Littleton* saith. So if *A.* by deed give land to *B.* to have and to hold after the death of *A.* to *B.* and his heires, this is a void deed, because he cannot reserve to himselfe a particular estate, and construction must be made upon the whole deed; and if livery be made according to the forme and effect of the deed, the livery also is void, because the livery referreth to a deed that hath no effect in law, and therefore it cannot worke *secundum formam et effectum cartæ* (1). And so it was adjudged, *et*

Ibidem. (2 Co. 246. Post. 222.) 7 E. 4. 25. 29. Ass. 40. 10 Ass. 19. 43 Ass. 20. (Hob. 171. Plow. 155. 197. 1 Sid. 82. 2 Ro. Abr. 7. 1 Co. 127. 129. Cro. Ja. 376.) Mich. 33, & 34. Eliz. in the King's Bench inter Horge & Crosse for lands in London. Vid. Pl. Com. 395.

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(5) 43 *Ass.* 10. 18 *H.* 6. 16. *A. makes charter of feoffment to uses to B. and B. being on the land, A. says,* I am content you shall have this house and land according to the deed made to you; *it is not livery, because it imports only assent and is future.* H. 6 Jac. *Maund's case. Ley n.* 3. Hal. MSS.—See Ley 2.—[Note 311.]

(6) But Cro. Jam. 80, and Ley 2, seem *contra.*

(7) *But if it be without deed nothing passes to the others. Dy.* 14. 35. Hal. MSS.

(8) 15 *E.* 4. 18. 18 *E.* 4. 12. 18 *H.* 6. 9. 22 *H.* 6. 1. 40 *E.* 3. 40. Hal. MSS.

(1) *Charter of feoffment* habendum a die datus, *Ruled,* 1. *If livery be made the same day* secundum formam cartæ, *it is void.* 2. *If it was after the day by the feoffor himself, it is good.* 3. *If there be letter of attorney to deliver seisin in*

* See more of this Sect. 66. 11 H. 4. 71. 19 Ass. 9. 19 H. 8. 9. b. (2 Ro. Abr. 8. Post. 359. 2 Sid. 61.)

et sic de similibus. * And it is to be observed, that neither the feoffor being absent can make livery, nor the feoffee being absent can take livery, but by warrant of attorney, by deed, and not by parol, because it concerneth matter of freehold (2).

Bridgewater's case. (Ante 4. b. Post. 190. b.

Vide Sect. 1, in *Bridgewater's* case, where a man hath a moveable estate of inheritance, for example there put, in 13 acres: the question is, where livery shall be made. First, if they be parcel of a mannor, they may passe by the name of the mannor; but if they be in grosse, then the charter of feoffment must be of 13 acres lying and being in the meadow of 80 acres, generally, without bounding or describing of the same in certaintie; and livery of the seisin of any 13 acres allotted to the feoffee for a yeare *secundum formam cartæ* is a good livery to passe the content of 13 acres wheresoever the same lie in that meadow. In the second case, where one entire mannor is separate and divided, as is aforesaid, there is no question but the livery must be made of that mannor; but in the other case, where two mannors are separate, and divided *alternis vicibus*, there the charter of feoffment must be made of both, and liverie in that mannor which he is seised of in any one yeare *secundum formam cartæ*, and the next yeare in the other *secundum formam cartæ:* for there are two distinct mannors, and severall estates in them (3).

Vide Sect. 1.

38 E. 3. 11. 38 Ass. p. 2. 43 Ass. p. 20. Temps H. 8 tit. Feoffments Br. 70. 18 E. 3. 16. b. 28 H. 8. F. 18. 9 E. 4. 39, per Moyle. Bract. lib. 2, cap. 18, & lib. 4, fo. 225. a. (1 Co. 156. Post. 253. a.

A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land, (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly) and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur* (4). And herewith agreeth *Bracton: Item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere:* and in another place he saith, *in seisind per effectum et per aspectum.* But if either feoffor or the feoffee die before entry the livery is voyd (5). And livery within the view is good where there is no deed of feoffment. [*a*] And such a liverie is good albeit the land lie in another county. [*b*] A man may have an inheritance in an upper chamber, though

[*a*] 9 E. 4. 39. 38 E. 3. 11. 11 E. 3. Ass. 86.

[*b*] 9 E. 4. 28. 40. 5 H. 7. 9. 3 H. 6. tit. Pleint 1. 11 H. 4. 32.

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the deed, or it was at the same time, and it is delivered after the day, yet it is not good, because the authority was given at a time when it was a void charter. But 4. *If letter of attorney be made after the day, and livery is made according to the deed, it is good. Hob.* 314. *Greenwood and Tiler. T.* 3 Car. *Owen and Price.* C. B. H. 3 Jac. Rot. 216. B. R. *Hennings and Paucharden. So there is a diversity between this and a grant of a reversion* habendum *from a day to come, for attornment after the day doth not aid the grant.* 2 *Rep.* 55. *Buckler's case.* Hal. MSS.—See Cro. Jam. 563, and 153.—[Note 312.]

(2) *Adjudged, that feoffee being absent cannot take livery, nor feoffor being absent make livery, by attorney by* parol. *T.* 1659. *Gregory and Badbourne. But a lease for years may be delivered by attorney by* parol, *as has been often adjudged.* Hal. MSS.—[Note 313.]

(3) Vid. 8 *E.* 2. *Feoffments* 111. *Livery by the lord of any part of the manor without going to it; but* contra *if not parcel.* Hal. MSS.—[Note 314.]

(4) Nota *the case of* 38 *Ass.* 2. *A. makes feoffment to B. within the view, and afterwards marries her, and afterwards claims to the use of the wife; it is a good execution of the livery.* 38 *E.* 3. 11. Vid. 42 *E.* 3. *Feoffments* 54. *Livery good, though the land is not within view.* Hal. MSS.—[Note 315.]

(5) 1 *Rep. rector of Cheddington's case.* Hal. MSS.

the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery. [c] A man maketh a charter of feoffment and delivers seisin within the view, the feoffee dares not enter for feare of death, but claimes the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed nor in law, so as such a claime shall serve, as well to vest a new estate and right in the feoffee, as in the common case to revest an ancient estate and right in the disseisee, &c. as shall be said hereafter more at large in the Chapter of Continuall Claime. And so note a liverie in law shall be perfected and executed by an entry in law. [d] If a man be disseised, and make a deed of feoffment and a letter of attorney to enter and take possession, and after to make livery *secundum formam cartæ*, this is a good feoffment albeit he was out of possession at the time of the charter made (6), for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor. But if a man be disseised, and make a writing of a lease for yeares and deliver the deed, and after deliver it upon the ground, the second delivery is voyde, for the first delivery made it a deed, and for that the lease for yeares must take effect by the delivery of the deed, therefore the deed delivered when he was out of possession was voyde. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. But if the lessor had delivered it as an escrowe, to be delivered as his deed upon the ground, this had beene good.

[c] 38 Ass. p. 23.

[d] Hill. 37 Eliz. Rot. 620. in com. Banco, inter Browne & Terry adjud. Dyer 16. Eliz. 234. 3 Eliz. Dyer 131. (6 Co. 26.)

3 Co. 35. inter Jennings & Bragge.

(2 Co. 31. b.) (3 Co. 35. b.)

A man makes a lease for yeares and after makes a deed of feoffment and delivers seisin, the lessee being in possession and not assenting to the feoffment, this livery is voyd; for albeit the feoffor hath the freehold and inheritance in him, yet that is not sufficient, for a livery must be given of the possession also (7); but if the lessee be absent, and hath neither wife nor servants (though he hath cattell) upon the ground, the livery of seisin shall be good.

(2 Ro. Abr. 4 Dy. 33. a. Mo. 11.)

2 Co. 31, 32. Bettisworth's case.

If a man be seised of an house, and of divers severall closes in one countie in fee, and makes a lease thereof for yeares, and afterward maketh a feoffment in fee of the same, and makes liverie of seisin in the closes (the lessee or his wife or servants then being in the house) the livery is voyd for the whole: for the lessee cannot be

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(6) H. 22 Car. B. R. *Hinde's case.* M. 4 Jac. B. R. *Sparks and Darcy.* 37 Eliz. *Brown's case. Charter of feoffment of lands in the hands of the king with letter of attorney to make livery, and afterwards the feoffor sues* ouster maine, *and the attorney makes livery; it is good.* 25 Eliz. *Feoffment on condition which is broken; feoffor makes charter of feoffment and letter of attorney to deliver seisin, the attorney enters and makes livery; it is good. Dick's case.* Hal. MSS.—[Note 316.]

(7) P. 40 Eliz. B. R. *A. tenant for years; the reversion is granted to B. for life, remainder to C. in tail, remainder to D. in fee; D. by deed infeoffs A. and one E. and makes livery: it was ruled to be void, because there was not any surrender, and A. was in possession and could not take by livery. Edes and Knotsford. A. tenant for years, remainder to the king for years, remainder to B. in fee; B. enters and ousts A. and makes livery; it is good, notwithstanding the mesne remainder for years to the king; but it would have been otherwise, if the king's remainder had been for life.* Hal. MSS.—[Note 317.]

be upon every parcell of the land to him demised, for the preservation or continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole from being ousted or dispossessed (8).

7 E. 4. 20. a. pertouts les Just. 11 H. 4. 71. Pl. Com. 152. 10 E. 4. 3.

☞ Note a great diversity, when a man hath two waies to passe lands, and both of the waies be by the common law, and he intendeth to passe them by one of the wayes, yet *ut res magis valeat* it shall passe by the other. But where a man may passe lands either by the common law, or by raising of an use, and settling it by the statute, there in many cases it is otherwise (1). For example, if a man be seised of two acres in fee,

[49. a.]

(Mo. 99.)

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(8) *But* nota, *if lessee consents, livery is good, though he be upon the land.* Tr. 40 Eliz. *Shephard and Gray. A. makes lease for years, and afterwards makes charter of feoffment with letter of attorney to enter and take possession and seisin for him, and such seisin and possession to deliver; the attorney makes livery with the consent of the lessee, he being in the land; and it was ruled good.* P. 1651. *Wegg and Villers.—Lessee for years consents, that feoffor shall make livery, and afterwards goes out of the country, leaving servants on the land; the feoffor enters and makes livery; it was ruled good. But it was ruled, that if lessee be absent, livery by lessor by consent of servants is void, they being upon the land.* T. 7 Jac. C. B. *n.* 45. *D. D. Blackleach and Small. But if A. be lessee of* White Acre *by one demise and of* Black Acre *by another demise of the same lessor; or if there be lessee of* White Acre *and* Black Acre *by one demise, and he makes lease for years of* Black Acre, *and lessor enters on* Black Acre *and makes livery, though A. be on* White Acre *it is good.* 2 *Rep. Bettisworth's case.* Hal. MSS.—[Note 318.]

(1) Where land shall pass by one way or the other at common law.—*Termor for years makes charter of feoffment by the word* dedi, *with letter of attorney in the same deed to deliver seisin, and afterwards livery is made, yet it is a forfeiture, and the term shall not be said to pass first by the delivery of the deed, as it seems.* *Dy.* 362.—*Grant to a tenant at will shall enure as a confirmation.* *Dy.* 269.—29 Eliz. B. R. *Leonard's case. If A. makes lease for years to B. and afterwards makes charter of feoffment to B. being in possession with the words* dedi et concessi, *with letter of attorney to deliver seisin; before livery, he may use the deed as a confirmation in fee, and after livery as a feoffment. And there it was also agreed, that if by indenture in consideration of money A. bargains and sells to B. with letter of attorney, and the deed is inrolled, it is a good bargain and sale.*—17 Eliz. *Lessee for life and he in remainder in fee make charter of feoffment, and letter of attorney to make livery, which is made accordingly, it is good, and the remainder shall not be said to pass by delivery of the deed.*—Where one shall have election to take by statute or common law. Vid. *Dy.* 302. *Grant of reversion to a brother averred to be* pro fraterno amore.—2 *Rep. sir R. Heyward's case.* Demisi *or* concessi *taken either as lease or bargain and sale.* 7 *Rep. Bedell's case. Grant to a son.* T. 15 Car. B. R. *entered* H. 11 Car. Rot. 459. *Father gives and grants to his son and his heirs,* habendum *after the death of the father; and no consideration of blood or marriage is mentioned in the deed: an estate shall not arise by way of use.* Nota videtur, *that there was a letter of attorney in the deed.* P. 1657. *Jackson's case. A. by indenture for love and affection grants to B. a rent* in esse, habendum *to B. for life, remainder to the use of C. in tail, remainder to the use of A.'s right heirs, and attornment was made, but not till after the death of A.; and it being found that B. was cousin, it was ruled, that an estate should arise by way of use without attornment.*—Where one may elect one way or

fee, and letteth one of them for yeares, and intending to passe them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession, in name of both, onely the acre in possession passeth by the livery; yet if the lessee attorne, the reversion of that acre shall passe by the deed and attornement, for he is in by the common law, and in the *per* in both, and so in the like. But otherwise it is, if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made, yet no use shall rise to the son, because he should be in by the statute in another degree, viz. in the *post*, and the intention of the parties worke much both in the raising and direction of uses. So if *cesty que use* and his feoffees had joyned in a feoffment after the statute of 1 *R.* 3, &c. it had beene the feoffment of the feoffees, and the confirmation of *cesty que use*, for the state at the common law shall be preferred. So to conclude this point; of freehold and inheritances, some be corporeall, as houses, &c. lands, &c. these are to passe by liverie of seisin, by deed or without deed; some be incorporeall, as advowsons, rents, commons, estovers, &c. these cannot passe without deed, but without any liverie (2). And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornement of the lessee by the deed doth passe, which is in lieu of the livery. See *Bract.* lib. 2, cap. 18. *Et est traditio de re corporali de personâ in personam de manu, &c. gratuita translatio, et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo dicitur, quòd res incorporales non patiuntur traditionem sicut ipsum jus quod rei sive corpori inhæret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.*

2 Co. 35, 36. Sir R. Heyward's case. (1 Sid. 25, 26. 82. 8 Co. 94. 3 Leo. 371.) 1 R. 3. ca. 1. 21 H. 7.

This ancient manner of conveyance by feoffment and livery of seisin, doth for many respects exceed all other conveyances. For (as hath beene said) (3) if the feoffor be out of possession, neither fine, recovery, indenture of bargaine and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce cleerely the estate of the feoffee, and make a perfect tenant of the freehold, but onely livery of seisin upon the land: the other conveyances being made off from the ground, doe sometimes more hurt than good, when the feoffor is out of possession (4). And yet in some cases

2 Co. 55. Buckler's case.

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or the other by statute.—Vid. 7 *Rep. Bedell's case. If father in consideration of money bargains and sells to his son, there ought to be an inrollment. But if A. for natural love to his son, and also for money grants to the son, the land shall pass without inrollment, because the consideration of love is expressed.* M. 1649. *Wats and Dicks*, B. R. Hal. MSS.—See further as to electing in what way an estate shall pass, Yelv. 124, the case of Crossing and Scudamore, 1 Ventr. 137, and 1 Mod. 175, and Barker and Keat in 2 Mod. 249. See also Vin. Abr. *Uses*, B. a. and the observation in Hawk. Abr. of Co. Litt, 83.—[Note 319.]

(2) See ante 9. a. 47. a. 48. a. and post. 121. b. and 169. a.

(3) Ante 9. a.

(4) *For this see 2 Rep. 56, Buckler's case. Fine by disseisee extinguishes his right, and shall enure to the disseisor. But see this denied* M. 13 Car. B. R. *Crook n. 7. Fitzherbert's case.* Hal. MSS.—See Cro. Cha. 483, and S. C. W. Jo. 397. In this last book it is said, that the judges did not deliver any opinion on

1 H. 7. 28. 8 H. 7. 4. 31 H. 6. 16. 8 H. 7. 4. M. 31 E. 1. coram Rege. Ranulph. Huntingsel's case. (5) 3 E. 3. Coron. 310. 11 H. 4. 83. V. Sect. 74.

cases a freehold shall passe by the common law without livery of seisin; as if a house or land belong to an office, by the grant of the office by deed, the house or land passeth as belonging thereunto. So if a house or chamber belong to a corodie, by the grant of a corodie, the house or chamber passeth. A freehold may by custome be surrendred without livery, as hereafter shall be said (6): and so of assignement of dower *ad ostium ecclesiæ*, or otherwise, and by exchange a freehold may passe without livery, as hereafter shall be said in this Chapter.

Sect. 60.

BUT if a man letteth lands or tenements by deed or without deed for terme of yeares (per fait ou sans fait a (7) terme des ans), *the remainder over to another for life, or in taile, or in fee; in this case it behooveth, that the lessor maketh livery of seisin to the lessee for yeares, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termour in this case entreth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh liverie of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the forme of the grant and the will of the lessor.*

22 H. 6. 1. 10 E. 4. 1. 18 E. 4. 13. (Plow. 25. a.) (Post. 143. a. Vaugh. 269.)

"*BY deed or without deed.*" For seeing that the remainders take effect by livery, there needes no deed (8).

"*The remainder*" is a residue of an estate in land depending upon a particular estate, and created together with the same, and in law *Latine* it is called *remanere* (9).

"*Maketh livery of seisin to the lessee.*" This livery is not necessary in this case for the lessee himselfe, because he hath but a terme for yeares, but it is for the benefit of them in the rem', so as

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on the point. See further W. Jo. 317. Cro. Cha. 305, and Gouldsb. 162.—[Note 320.]

(5) Rot. 74. Hal. MSS.

(6) Vid. 5 *Rep. Peryman's case.* Hal. MSS.—See 5 Co. 84. In Peryman's case the Jury found, that in the manor of Portchester there was a custom, according to which all alienations of lands within that manor by writing feoffment or last will were void, unless presented to be a good custom. In the same case mention is made, that by the custom of Lidford Castle in Devonshire, a freeholder of inheritance cannot pass his freehold except by surrender into the lord's hands. As to this latter kind of custom, in consequence of which the estates subject to it have been called *customary freeholds*, see post. 59. b. and Blackst. Law Tracts, 8vo. ed. vol. 1, p. 144.—[Note 321.]

(7) un pur, *L. and M.*

(8) 12 *H.* 4. 20. Hal. MSS.

(9) *Sect.* 215. Hal. MSS.

[49. b.] as the livery to the lessee shall enure for the benefit of them in the rem': for the ☞ livery of the possession could not be made to the next in remainder, because the possession belonged to the lessee for yeares; and for that the particular terme and all the remainders made in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee. But if a lease for yeares without deed be made to *A.* and *B.* the remainder to *C.* in fee, and livery is made to *A.* in the absence of *B.* in the name of both; it seemeth the livery is good to vest the remainder: and there is a diversity between two joynt attornies to receive livery for another, and livery and seisin is made to one of them in the name of both, this is cleerly void, because they had but a meer and bare authority (1), and they both doe in law make but one attorney, unlesse the warrant be joyntly and severally (2), but the lessee for yeares hath an interest in the land. Againe, if *A.* is to make a feoffment to *B.* and *C.* and their heires without deed, and *A.* makes livery to *B.* in the absence of *C.* in the name of both, and to their heires; this livery is void to *C.* because a man being absent cannot take a freehold by a livery, but by his attorney being lawfully authorised to receive livery by deed, unlesse the feoffment be made by deed, and then the livery to one in the name of both is good (4).

(Post. 143. a.)

(5 Co. 94. b.)

10 E. 4. 1. 12 E. 4. 16. 15 E. 4. 18. 22 E. 4. 35. 40 E. 3. 10. 41. (3) Temps H. 8. Feoffments 72. 6 H. 4. 2. b. Litt. 153. 3 H. 7. 13.

Note, there is a diversity between livery of seisin of land, and the delivery of a deed; for if a man deliver a deed without saying of any thing, it is a good delivery, but to a livery of seisin of land words are necessary; as taking in his hand the deed, and the ring of the doore (if it be of an house) or a turffe or twigge (if it be of land) and the feoffee laying his hand on it, the feoffor say to the feoffee, Here I deliver to you seisin of this house, or of this land, in the name of all the land contained in this deed, according to the forme and effect of the deed (as hath been said); and if it be without deed, then the words may be, Here I deliver you seisin of this house or land, &c. to have and to hold to you for life, or to you and the heires of your body, or to you and your heires for ever, as the case shall require.

(Post. 359. a.) (Ante 36. a. 9 Co. 137.)

When the kinsman of *Elimelech* gave unto *Boas* the parcell of land that was *Elimelech's*, he tooke off his shoe, and gave it unto *Boas* in the name of seisin of the land (after the manner in *Israel*) in the presence and with the testimony of many witnesses. And when *Ephron* infeoffed *Abraham* of the field of *Machpelah*, he said to him, *Agrum trado tibi, &c.* I deliver this field to thee.

Ruth cap. 4. verse 7, 8. Deut. 25. 9, 10. Gen. 23. verse 11.

A man makes a lease for yeares to *A.* the remainder to *B.* in fee, and makes livery to *A.* within the view; this livery is void, for no man can take by force of a livery within the view, but he that taketh the freehold himselfe.

"*And if the termour in this case entreth before any livery of seisin made, &c.*" By the entry of the lessee he is in actual possession, and then the livery cannot be made to him that is in possession, for *quod semel meum est, amplius meum esse non potest.*

(Mo. 14.)

But

(1) See further as to the difference between a naked authority and an authority coupled with an interest, post. 52. b. 113. a. and 181. b.

(2) See post. note 1, in 52. b.

(3) 18 *E.* 4. 12.—Hal. MSS.

(4) *Dy.* 14. 35. 18 *H.* 6. 9. 22 *H.* 6. 1.—Hal. MSS.

But if the lessor and lessee come upon the ground, of purpose for the lessor to make, and for the lessee to take livery, there his entry vests no actuall possession in him untill livery be made; for [a] *affectio tua nomen imponit operi tuo* (5). And therefore if it be agreed betweene the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee entreth into the land, and delivereth the release to the disseisor upon the land, this is a good release, and the entry of the disseisee, being for this purpose, did not avoid the disseisin, for his intent in this case did guide his entry to a speciall purpose. And so was it resolved [b] by sir *James Dyer*, and the whole court of common pleas, *Pasch.* 18 *Eliz.* upon evidence which I myselfe heard and observed. But if the disseisor enfeoffe the disseisee and others, there albeit the disseisee came to take livery, yet when livery is made, the disseisee is remitted to the whole in judgment of law, as shall be said more at large in the Chapter of Remitter in his proper place.

[a] Bracton, lib. 1.

[b] P. 19 Eliz. in Communi Banc. Pl. Com. in Ass. de fresh-force 91. 29 Ass. 26. 43 Ass. p. 3. 3 H. 6. 19, in formedon. (6.)

☞ Sect. 61. [50. a.]

AND if a man wil make a feoffement, by deed or without deed, of lands or tenements which he hath in divers townes in one countie, the livery of seisin made in one parcell of the tenements in one towne, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in al other the townes in the same countie (1). *But if a man maketh a deed of feoffement of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin* (2).

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(5) Nota, *if the lease for years with the remainder over be by deed, the deed ought not to be delivered till livery made; for otherwise the livery is bad.* H. 2 Eliz. *Helyar's case.* Vide *Bendl. n.* 130. Hal. MSS.—See N. Ben. 85, and S. C. Mo. 14. 1 And. 8.—[Note 322.]

(6) 9 *H.* 7. 1. 41 *E.* 3. 17. Hal. MSS.

(1) Vid. 11 Eliz. *Dy.* 283. Cestui que use *of three acres by three several feoffments in one county makes charter of feoffment of all and livery in one of the acres, it is pursuant to the statute and passes all.* Hal. MSS.—The statute meant is the 1 R. 3. c. 1, which empowers *cestui que use* to make effectual feoffments and conveyances against his feoffees in trust; and the case cited was of a feoffment before the 27 H. 8, for transferring uses into possession. It is stated, that the livery was made by attorney, and that was the cause of the doubt; it being said, by some, that the statute of R. 3, ought to be construed strictly, and to be confined to conveyances made by the *cestui que use* in his own person. See Bro. *Feoffment to Uses*, 28.—[Note 323.]

(2) Vid. *Dy.* 246. 22 *H.* 6. 10. *If a manor extends into two counties, livery in that part of the manor which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin.* Hal. MSS.—But Mr. Perkins holds, that livery of parcel of such a manor in one county will pass the parcel in the other county. Perk. sect. 227. However, he admits, that if

"*IN one countie.*" A *countie* is fetched from the *French*, and *shire* from the *Saxon*. For *scyran* in the *Saxon* tongue signifieth *partiri*, because everie countie or shire is divided and parted by certaine metes and bounds from another, and in *Latine* is called *Comitatus*, *à comitando*, for accompanying together. And for as much as the men of one county doe not accompany together with men of another county at countie courts, turnes, leets, and other courts, therfore in judgement of law they shall take no notice of a liverie in another countie to passe any lands in their owne countie. But of this more shall be said hereafter. (Post. 253. a.) (2 Co. 31. b.) (Post. 168. a.) 45 E. 3. 21.

Sect. 62.

AND in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantitie of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin (1); *and such exchange made by paroll of tenements within the same county without writing is good enough* (2).

HERE *Littleton* putteth a case where freehold, &c. shall passe without liverie of seisin, and thereupon putteth the case of an exchange of lands in one countie that is good by deed or without deed, without any livery, but if it be in severall counties there must be a deed. Also of things that lye in grant, as advowsons, rents, commons, &c. an exchange of them, albeit they be in one countie, is not good, unlesse it be by deed; and therefore (4 Co. 121.) 45 E. 3. 21. 3 E. 4. 10. 9 E. 4. 21. 7 H. 4. 1. 8 H. 7. 4. 28 H. 6. a.

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one be disseised of two acres in different counties, entry into the acre in one of the counties, though made in the name of both acres, will not extend to the acre in the other county. Perk. sect. 229.—[Note 324.]

(1) It is observable, that Littleton expresses himself concerning an exchange as of a transaction between *two*; and in a late case the court held, that an exchange in the strict legal sense of the word cannot be between *three*, the principles of it not being applicable to more than two *distinct* contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, 1. The consideration of an exchange and of the implied warranty incident to it is the receiving something with warranty from the *same* person, to whom something with warranty is given; but if there could be *three* distinct parties, each would give to one and receive from another. 2. The implied condition of re-entry is, that re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title as well as of his own. See the case of Eton College in Wilson, v. 2. part 3, page 483, and post. n. 1, in 51. a. and n. 2, in 51. b.—[Note 325.]

(2) But now by force of the statute of 29 C. 2. c. 3, a writing is necessary, if the exchange is of freeholds, or of terms for years being for more than three years—[Note 326.]

fore *Littleton* putteth his case warily of land. And in case of a fine, which is a feoffment of record, of a devise by a last will, of a surrender, of a release or confirmation to a ☞ lessee for yeares, or at wil. In all these and some other cases a freehold, &c. (as hath beene said) may passe without livery. But this word *(exchange)* which our author here useth. is so appropriated by law to this case, as it cannot be expressed by any periphrasis or circumlocution (3).

Vide Sect. 1.

[50. b.]

"*In this case each may enter, &c.*" For by the exchange the parties, albeit the lands be all in one county, have no freehold in deed or law in them before they execute the same by entry; and therefore if one of them dyeth before the exchange be executed by entrie, the exchange is void; for the heire cannot enter and take it as a purchasor, because he was named onely to take by way of limitation of estate in course of discent.

9 E. 4. 38, 39.
45 E. 3. 20, 21.
45 E. 3. Exchange 10.

Sect. 63.

AND if the lands or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made betweene them of this exchange.

THIS is evident enough. But of what things an exchange may be made (which was a conveiance frequent in former times) is to be seene: and herein many things are to be observed.

(Hob. 41.)

First, that the things exchanged [*a*] need not to be *in esse* at the time of the exchange made. As if I grant a rent newly created out of my lands in exchange for the mannor of *Dale*, this is a good exchange (4).

[*a*] 30 E. 1. Esch. 15. 3 E. 4. 10. 9 E. 4. 21. 14 H. 8. 20.

(Post. 366. a.)

[*b*] Secondly, there needeth no transmutation of possession, and therefore a release of a rent, or estovers, or right to land, in exchange for land, is good (5).

[*b*] 6 E. 56. 30 E. 1. Es. 16. 16 E. 3. Esch. 2. 7 H. 4. 34. 3 E. 4. 11.

(1 Ro. Abr. 812.)

The things [*c*] exchanged need not be of one nature, so they concerne lands or tenements, whereof *Littleton* here speaketh. As land for rent or common, or any other inheritance which concerne lands or tenements, or spirituall things, as tythes, &c. for temporall, and tenure by a divine service for a temporall seigniory, &c. But annuities or such like which charge the person onely, and doe not concerne lands or tenements, cannot be exchanged for lands or tenements.

[*c*] 9 E. 4. 21. 9 E. 3. 56. 21 E. 3. 6.

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(3) See acc. post. 51. b. and Wils. vol. 2, part 3, page 491. 496.

(4) But in one of the books cited by lord Coke, the opinion is, that both of the things exchanged ought to be *in esse* at the time of the exchange. See 9 E. 4. 21.—[Note 327.]

(5) See as to this Fulb. Paral. 33. a. in the dialogue on exchanges.

Sect. 64, 65.

AND note, that in exchanges it behooveth, that the estates which both parties have in the lands so exchanged, be equall; for if the one willeth and grant that the other shall have his land in fee taile for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is voyde, because the estates be not equall.

IN the same manner it is, where it is granted and agreed betweene them, that the one shall have in the one land fee taile, and the other in the other land but for terme of life; or if the one shall have in the one land fee taile generall, and the other in the other land fee taile especial, &c. So alwaies it behoveth that in exchange the estates of both parties be equall, viz. if the one hath a fee simple in the one land, that the other shall have like estate in the other land; and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, &c. and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a farre greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equall. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.

Estates. Vide Sect. 650.

"*IN exchanges it behooveth, that the estates be equal, &c.*" Equality in lands is threefold, viz. First, equality in value: ☞ Secondly, equality in quantity of estate given and taken. Thirdly, equality in quality or manner of the estate given and taken. But as *Littleton* after saith, equality in value of lands in exchange is not requisite; neither equality in the quality or manner of the estate. And therefore if two jointenants give lands jointly to two men and their heires, and the other in exchange of other lands to them and their heires in common, this is a good exchange (1); and yet the manner of their estates is not equall, for the estate of one party is joynt, and the other in common. And so it is if two men give lands in exchange to *A.* and his heires for lands from *A.* to them two and their heires, though the one party have a joynt estate, and the other a sole estate, yet the exchange is good. The like is if the one

[51. a.]

(1) Here *four* persons are named as parties to an exchange. But this is not irreconcileable with the opinion mentioned in note 1. of fol. 50. b. that an exchange cannot be between more than *two distinct* parties; because though *four* persons are named, yet they constitute only *two distinct* parties; for in point of interest the two join-tenants are the conveying parties on the *one* side, and the two tenants in common are the conveying parties on the *other*, and consequently there is the same reciprocity as if the transaction was between *two* persons only. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange, as to make only *two distinct relative* parts.—[Note 328.]

one land be of a defeasible title, and the other of an undefeasible title, yet the exchange is good till it be avoyded.

[a] Bracton, lib. 5, fo. 389. 17 E. 3. 12. b. 4 H. 4. 2.

[a] An exchange with the king is good, and yet the king is seised in his politike capacity, and the subject in his naturall capacity (2). But equality of the quantity of the estate is requisite, as it appeareth clearly in the cases put by *Littleton*.

[b] 14 H. 6. 6 E. 2. Exch. 12. 8 E. 2. Cui in vita 28. 10 E. 2. Exch. 13. 16 E. 3. Exch. 2. 3 E. 3. 19. 12 H. 4. 12. 21 H. 6. 25. 13 E. 4. 3. (3)

[b] But therein it is to be observed, that it is not necessary that the parties to the exchange be seised of an equall estate at the time of the exchange made: for if tenant in taile, or a husband seised in the right of his wife, exchange lands, and both by the exchange give a fee simple, this is good untill it be avoyded by the issue in tail, or by the wife after the death of the husband; [d] so as *Littleton* saith, that in exchanges it behoveth that the estates which both parties have in the land so exchanged be equal, is as much as to say that the state reciprocally given in exchange ought to be equall. [e] But in a partition the estates allotted to either party need not to be equall, as shall be observed in his proper place.

(1 Ro. Abr. 811. 4 Co. 121.)

[51. b.]

[d] 44 E. 3. 20. 38 E. 3. 15. 39 E. 3. 1. 9 E. 4. 21. 7 H. 4. 17. 30 E. 1. tit. Bre. 884. 30 E. 1. tit. Exchange 15.

[e] F. N. B. 62. m. (Post. 172. b.)

To shut up this point, there be five things necessary to the perfection of an exchange. 1. That the estates given be equall (1). 2. That this word (*excambium* exchange) be used, [f] which is so individually requisite, as it cannot be supplied by any other word or described by any circumlocution (2): and herewith agreeth *Littleton* afterwards in this Section. In the booke of Domesday I finde, *Hanc terram cambiavit Hugo Briccuino quod modò tenet comes Meriton, et ipsum scambium valet duplum.*

[f] 9 E. 4. 21. 25 H. 6. 56. 19 H. 6. 27. 44 E. 3. 24. 50 Ass. Dorset. Wadon. Bedf. Sandeia.

Hugo de Belcamp pro escambio de Warres.

3. That there be an execution by entry or claime in the life of the parties, as hath bin said. [g] 4. That if it be of things that lye in grant, it must be by deed. [h] 5. If the lands be in severall counties, there ought to be a deed indented, or if the thing lye in grant, albeit they be in one county.

9 E. 4. 39. 15 E. 4. 3. 45 E. 3. 30. 45 E. 3. Eschange 1. (4 Co. 121.)

[g] 38 H. 6. 2.

[h] 45 E. 3. 20. 7 H. 4. 11.

[i] If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompence) but voidable (3).

[i] 4 E. 2. tit. Exch. 10. 12 H. 4. 12.

" *Although*

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(2) See 2 Inst. 269.—But if the king makes exchange, it seems that it should be by writing *recorded;* because he can neither give nor take land without matter of record. See Lane 31. 60. Vin. Abr. Z. c. A, d. B. d.—[Note 329.]

(3) 45 *E.* 3. 20. Hal. MSS.

(1) Vid. 22 *E.* 3. 3. Contra 38 E. 3. 15. Hal. MSS.

(2) See ante 50. b. n. 1, and 3, and the case of Eton College there cited. In that case one reason given, why an act of parliament was not suffered to operate as an exchange, was the want of that word in the act.—[Note 330.]

(3) Contra *in surrender or partition.* 11 *H.* 4. 61. Hal. MSS.—But see the case of Zouch against Parsons, 4 Burr. v. 3, page 1806, where lord Mansfield in delivering the opinion of the court seems to incline strongly in favour of construing an infant's surrender, if made by *deed*, as voidable only. In Zouch and Parsons it became necessary to consider what was the true ground for holding the acts of infants as *voidable* only, whether the *solemnity of the instrument*, or *the semblance of benefit* to the infant on the face of the deed. As to the

former

"*Although that the other agree to this, yet this exchange is voyde.*" The agreement of the parties cannot make that good which the law maketh void.

Sect. 66.

ALSO, if a man letteth land to another for term of yeares, albeit the lessor dieth before the lessee entreth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the forme of the lease. But if a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heire, or in some other.

"*IF a man letteth land to another for term of yeares, albeit the lessor dieth before, &c.*" The reason is, because the interest of the tearme (as hath beene said) doth passe and vest in the lessee before entry, and therefore the death of the lessor cannot devest that which was vested before. (Post. 270. a.)

"*Attorney*" is an ancient *English* word, and signifieth one that is set in the turne, stead, or place of another; and of these some be private (whereof our author here speaketh) and some be publike, as attorneys at law, whose warrant from his master is, *ponit loco suo talem attornatum suum*, which setteth in his turne or place such a man to be his attorney. (9 Co. 75. F. N. B. 156.)

[52. a.] ☞ "*And a letter of attorney to one to deliver to him seisin by force of the same deed.*" Here first it appeareth that the authority to deliver seisin (as hath bin said) must be by deed (1): for *letter of attorney* is as much as a warrant of attorney by deed, for *literæ* doe signifie sometime a deed, as *literæ acquietanciæ* doe signifie a deed of acquittance, and herewith [*a*] agreeth *Britton*. Vid. Sect. 198

[*a*] 24 E. 3. 27. 11 H. 7. 13. 2. *Littleton* Britt. 101. b.

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former ground, the court thought fit to approve of mr. Perkins's distinction, according to which all such grants, gifts, or deeds of an infant as do not *take effect* by *delivery of his hand* are *void*, and those which do are *voidable*. See Perk. sect. 12. But the court decided the case principally on the *latter* ground, and held a *lease* and *release* by an infant to be voidable, because the consideration of the conveyance and other circumstances shewed, that the act was right and proper, and apparently not in the least to his prejudice. See further as to the *deeds* of infants, ante 45. b. n. 1, and post. 171. b.—[Note 331.]

(1) Vid. 1 *Ass.* 16. 26 *Ass.* 29. 35 *Ass.* 1. 12 *H.* 7. 27. 13 *H.* 7. 14. 4 *H.* 7. 13. 13 *E.* 4. 8. Hal. MSS.

[b] 21 E. 4. 18. Br. feoffments 50. 21 H. 6. 30. 13 E. 3. Attorney 73.

2. *Littleton* here speakes generally *to one*, and few persons are [b] disabled to be private attorneyes to deliver seisin; for mounks, infants, fem coverts (2), persons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attorneyes. A fem may be an attorney to deliver seisin to her husband, and the husband to the wife, and he in the remainder to the lessee for life.

[c] 12 Ass. pl. 24. 26 Ass. 39. 14 H. 4. 3. 10 H. 7. 11 H. 7. 13. 40 Ass. 38. (9 Co. 76. b.)

3. It appeareth here that the attorney must [c] pursue his warrant, otherwise he doth not deliver seisin by force of the deed, as *Littleton* speaketh. Now his authority is twofold, expressed in his warrant, and implied in law, both which he must pursue. And first of his expresse authority. A man seised of *Black Acre* and *White Acre* makes a deed of feoffment of both, and a letter of attorney to enter into both *Acres*, and to deliver seisin of both of them according to the forme and effect of the deed, and he entreth into *Black Acre* and delivers seisin *secundum formam cartæ*, this livery and seisin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivereth seisin of one *secundum formam cartæ*, this is *tantamount* and implyeth a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of seisin to both, and the attorney make livery of seisin to one of the feoffees *secundum formam et effectum cartæ*, this is good to both, and yet in that case he that is absent may waive the livery (3). If lessee for life make a deed of feoffment and a letter of attorney to the lessor to make livery, and the lessor maketh livery accordingly, notwithstanding he shall enter for the forfeiture. But if lessee for yeares make a feoffment in fee and a letter of attorney to the lessor to make livery, and he make livery accordingly, this livery shall binde the lessor, and shall not be avoyded by him: for the lessor cannot make livery as attorney to

27 Ass. 61. 41 Ass. 10. 41 E. 3. 17. (2 Leon. 73.)

(Post. 310. a. 359. a.)

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(2) In another place lord Coke cites a passage from the Miroir, which excludes both infants and femes covert from being attornies. Post. 128. a. But that is quite reconcilable with the doctrine here; for there *publick* attornies for prosecuting suits at law are meant, whose office cannot be properly executed without considerable knowledge and discretion; but here lord Coke in the first part of the sentence confines himself to *private* attornies to deliver seisin, which is an act so merely ministerial that it may be done by the most ignorant. See the case of Earle and Greenough in 3 Atk. 695, and 1 Ves. 298. One question in that case was, whether a power of disposing of real estate could be well executed by an infant feme covert of the age of 19; and lord ch. Hardwicke determined against the execution of the power, 1, because he thought in general that *such* a power could not be well given to an infant, the disability of infancy being stronger than that of coverture; 2, because in the particular case it did not appear, that the power was intended to be given during infancy, the power being given *notwithstanding coverture*, without the least notice of *infancy*; and 3, because it was a power coupled with an interest, the infant having a trust in equity for life, together with the trust of the inheritance subject to the power.—[Note 332.]

(3) *Adjudged accordingly of livery to one feoffee.* T. 1651. B. R. *Trotman's case.* Vide M. 31, 32 Eliz. C. B. *Trevillian's case. A. seised of two acres makes lease of one acre to B. for years, and afterwards makes charter of feoffment of both acres and letter of attorney to B. and C.* conjunctim et divisim *to make livery; B. makes livery in one acre and C. in another, and adjudged good. Entered* M. 30, 31 Eliz. Rot. 2908. Vide *Bendl. n.* 15. M. 32, 33 Eliz. 1868. Hal. MSS.—[Note 333.]

to the lessee, because he had no freehold whereof to make livery, but the freehold was in the lessor (4). If the lessor make a deed of feoffment and a letter of attorney to the lessee for yeares to make livery, and he doth it accordingly, this shall not drowne or extinguish his tearme, because he did it as a minister to another (6) and in another's right, and is accounted in judgement of law the act of the other, and the feoffee claimeth nothing by him (7).

Tr. 7 Eliz. in com. banco (5). (Mo. 11 Cro. Ja. 177.)

If one as procurator or attorney to another present to his owne benefice, he puts himselfe out of possession, because he commeth in by the induction and institution of the ordinary. If the tenant devise that the lord shall sell the land, and dieth, and the lord selleth it, the seigniory remaines. But if the lord or a grantee of a rent charge had been also *cesty que use* of the land, and after the statute of *R.* 3. and before the statute of 27 *H.* 8. *cesty que use* had made a feoffment in fee of the land, albeit the land passeth from the feoffees, and his feoffment is warranted by the power given to him by the statute, yet the seigniory or rent charge is extinct by his feoffment, for that he hath not a bare authority as the attorney hath (8).

17 E. 3. 61. (F. N. B. 35. O.)

(1 Co. 111. Post. 265. b.)

If a man be disseised of *Blacke Acre* and *White Acre*, and a warrant of attorney is made to enter into both and to make livery, there if the atturney enter into *Blacke Acre* onely and makes livery *secundum formam cartæ*, there the livery of seisin is void, because he doth lesse than his ☞ warrant (9); for the estate of the disseisor in *White Acre* cannot be devested without an entry. But there is a diversity betweene an authority coupled with an interest, and a bare authority (1). For example, a custome within a mannor time out of mind of man used, was to grant certaine lands parcell

[52. b.]

(Post. 252. b.)

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(4) *Yet* vide *if lessee for years makes feoffment and livery, though lessor be on the land, it seems to be a forfeiture. Dy.* 362, 363. 14 *H.* 7. Hal. MSS.—[Note 334.]

(5) *Smith's case.* Hal. MSS.

(6) *If A. brings* præcipe *of C.'s land against B. and recovers, and C. is made sheriff, and* habere facias seisinam *comes to him, he may return the special matter on account of the mischief.* 13 *H.* 4. 15. 7 *H.* 6. 33. Hal. MSS.—[Note 335.]

(7) *So it is of livery by the lord.* H. 4 *E.* 6. *Mo. n.* 41. *Trevillian's case* supra. Hal. MSS.—See note 3.—By the case of livery by the lord, it is meant, that if tenant makes feoffment of his tenancy, and the lord as attorney makes livery, it shall not extinguish his seigniory. Mo. 11.—[Note 336.]

(8) See *supra* note 7.

(9) Vid. 11 *H.* 4. 3. *If there be feoffment on condition and letter of attorney to make livery accordingly, and livery is made absolutely, it is void and a disseisin. So* è converso, 12 *Ass.* 24. 26 *Ass.* 39.—H. 38 Eliz. B. R. *Poph. n.* 2. *Slaning's case. A. seised of the manors of B. and C. and also of a mill in possession of I. S. by force of a lease for years makes charter of feoffment, with letter of attorney to enter into the said manors,* and all other the said lands and tenements and seisin thereof to take, and after such possession and seisin taken, such seisin and possession to deliver, &c. according to the form and effect of the deed. *The attorney makes livery in the manors of C. and B. but not of the mill, nor doth I. S. attorn. Ruled, that the mill doth not pass, but that the livery of the manors was well executed.* Hal. MSS.—[Note 337.]

(1) See ante 49 b. and post. 115. a. and 181. b.

cell of the said mannor in fee simple, and never any grant was made to any, and the heires of his body, for life or for yeares; and the lord of the said mannor did grant to one by copie for life, the remainder over to another, and the heires of his body; and it was [k] adjudged, that the grant and remainder over was good; for the lord having authoritie by custome, and an interest withall, might grant any lesser estate: for in this case, the custome that enableth him to the greater, enableth him to the lesser, *Omne majus in se continet minus.* But he that hath but a bare authority, as he that hath a warrant of atturney, must pursue his authority (as hath beene said), and if he doe lesse, it is voyd (2).

(1 Ro. Abr. 511.)

[k] Hil. 36 El. Rot. 492, inter Stanton & Barnes, in ejectione firmæ, in the King's Bench. (Post. 265. b. 1 Sid. 6.)

2 & 3 Ph. & M. Dyer 131.

17 El. Dyer 340. (Mo. 91. 2 Sid. 65. 2 Leon. 19. Ante 48. b.)

A man make a lease for life, and after make a charter of feoffment, with a letter of attorney to deliver seisin, the atturney enters upon the lessee, this is sufficient to convey away the reversion; for (3) (that it may be said once for all) livery of seisin being to perfect the common assurance of lands, is alwayes expounded favourably, *ut res magis valeat quem pereat.* And all this was adjudged and [l] resolved by the court of common pleas, and after affirmed by all the judges of the king's bench, in a writ of error.

[l] Pasc. 31 El. Rot. 514. in Com. Banc. inter Carter pl. & Claypole & al. def. In ejectione firmæ & in briefe de error. Hil. 32 El. Rot. 791.

And it is to be knowne, that a deed of feoffement beginning *Omnibus Christi fidelibus, &c.* or *Sciant præsentes et futuri, &c.* or the like, a letter of atturney may be contained in such a deed; for one continent may containe divers deeds to severall persons; but if it be by indenture between the feoffor on the one part, and the feoffee on the other part, * there a letter of atturney in such a deed is not good, unlesse the atturney be made a party in the deed indented (4).

* Communis error facit jus (ut dicitur) in contrarium. (2 Inst. 673. 2 Ro. Abr. 8. Cro. Eliz. 905.)

Now the authoritie of an atturney implyed in the law, is, though the warrant be generall, to deliver seisin; yet the atturney cannot deliver seisin within the view, for his warrant is intendable in law of an actuall and expresse liverie and not of a liverie in law, and so hath it been resolved (5). See more hereof here next following.

Pasc. 3 El. in Com. Banc. in Yarham's case.

" *Yet*

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(2) Vide *these diversities. A. makes letter of attorney to B. C. and D.* conjunctim & divisim *to make livery. If two make livery it is void, because it is neither* conjunctim *nor* divisim. 27 *H.* 8. 6. *But if one makes livery in one parcel, and another in another parcel, it is good.* M. 31, 32 Eliz. *Trevillian's case. But if two make livery in presence of the third, he not saying any thing, it seems good. Dy.* 63. *But if authority be to six or any two of them to do an act, there if it be done by three it is good.* 5 *Rep.* 91. *Hoe's case. So where one devised, that his executors or any one of them might sell his land, and made three executors, and one died, and the other two sold, it was ruled good; for it is not so strict as* conjunctim et divisim. M. 37, 38 Eliz. C. B. *the case of Townsend and Whales. But if warrant be by sheriff to three bailiffs* conjunctim & divisim, *execution by two is good, because it is the execution of justice.* M. 44, 45 Eliz. *King and Hobbs.* Hal. MSS.—See ante 52, note 3, to which part this note more properly belongs. See also infra note 6.—[Note 338.]

(3) *So such attorney may deliver seisin with assent of lessee for years, he being on the land. Adjudged* P. 1651. B. R. *Wegg and Villers.* Hal. MSS.—See ante 48. b.—[Note 339.]

(4) *Adjudged* contra *between Dicker and Noland.* Hal. MSS.—See also another case *contra* in Cro. Eliz. 905. The case cited by lord Hale is in 2 Ro. Abr. 8. pl. 12.

(5) *Dy.* 233. *Sir Walter Deny's case.* Hal. MSS.

"*Yet if livery of seisin be not executed in the life of him which made the deed.*" Here albeit the warrant of atturney be indefinite, without limitation of any time, yet the law prescribeth a time, as *Littleton* here saith, in the life of him that made the deed; but the death not only of the feoffor, of whom *Littleton* speaketh, but of the feoffee also, is a countermand in law of the letter of atturney, and the deed it selfe is become of none effect, because in this case nothing doth passe before livery of seisin. For if the feoffor dieth, the land descends to his heire, and if the feoffee dieth, liverie cannot be made to his heire, because then he should take by purchase, where heires were named by way of limitation (6). And herewith agreeth *Bracton, Item oportet quòd donationem sequatur rei traditio, etiam in vitâ donatoris et donatorij.* Therefore a letter of atturney to deliver livery of seisin after the decease of the feoffor is voyd (7).

22 H. 6. 6.

Bracton, li. 2, fo. 16.
40 Ass. pl. 38.
29 H. 6. 7. a.
14 E. 4. 2.
18 E. 3. 16. b.
11 H. 7. 13, &c.

Fourthly, in all cases the atturney must pursue the warrant in substance and effect that he hath to deliver seisin.

Fifthly, all this is to be understood of sole persons, or of a corporation or body consisting of one sole person, or a bishop, parson, &c. But it holdeth not in a corporation aggregate of many persons capable (8). And therefore if a maior and commonalty make a charter of feoffement, and a letter of atturney to deliver seisin, the livery of seisin is good after the decease of the maior, because the corporation never dieth (9). The like of a deane and chapter, *et sic de similibus.*

18 H. 8. 3.
11 H. 7. 19.
(1 Sid. 162.)

Lastly, if the lessor by his deed license the lessee for life or yeares (which is restrained by condition not to alien without licence) to alien, and the lessor dieth before the lessee doth alien, yet is his death no countermand of the licence, but that he may alien, for the licence exempteth the lessee out of the penaltie of the condition, and it was executed on the part of the lessor as much as might be. And so it was resolved, *Michael.* 3 *Jacob. in Communi Banco.* As if the king doth license to alien in mortmaine, and dyeth, the licence may be executed after (10).

(4 Co. 119. b. Cro. Ja. 103. 6 Co. 38.) Mich. 3 Ja. in Com. Banc. F. N. B. 223. 2 E. 3. offi. de Court. 29. Stamf. Prær. 30. (1 Ro. Abr. 331, 332.)

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(6) *If A. and B. join-tenants in fee make charter of feoffment to C. and D. with letter of attorney to deliver seisin, and B. or C. dies, it is good as to the survivor.* M. 32, 33 Eliz. W. 68.—[Note 340.]

(7) Vid. *letter of attorney to deliver seisin after the feoffor's death in* 40 *Ass.* 38. Nota, *by devise or by special custom authority may be created executory after the party's death. Lease to A. for life, remainder to B. for life. A. dies,* videtur, *that livery cannot be made* to B. P. 31 Eliz. B. R. W. n. 4. *Pierce and Leversage.* Hal. MSS.—[Note 341.]

(8) 11 *H.* 7. 27. 12 *H.* 8. 12. 5 *H.* 7. 25. 21 *H.* 7. 1. Hal. MSS.

(9) *But it seems, that livery cannot be made till the new mayor is made.* Hal. MSS.—[Note 342.]

(10) Vid. *Plowd. Com.* 457. contra *in licence to the tenant to alien,* ut videtur. Hal. MSS.

Sect. 67.

ALSO, if tenements be let to a man for terme of halfe a yeare, or for a quarter of a yeare, &c. in this case, if the lessee commit wast, the lessor shall have a writ of waste against him, and the writ shall say, quod tenet ad terminum annorum; *but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.*

(F. N. B. Waste 55. Post. 355.)

IF the lessee commit waste." Waste, *Vastum, dicitur à vastando,* of wasting and depopulating: and for that wast is often ☞ alledged to be in timber, which we call in *Latine maremium*, or *maresnium*, or *maresmium*, it is good to fetch both of them from the original. First, *timber* is a *Saxon* word. Secondly, *maremium* is derived of the *French* word *marreim*, or *marrein*, which properly signifieth timber. [53. a.]

V. Marlb. ca. 23. 2. part of the Instit. (F. N. B. 55.)

An action of wast doth lie against tenant by the curtesie, tenant in dower, tenant for life, for yeares, or halfe a yeare, or gardian in chivalry (1), by him that hath the immediate estate of inheritance, for wast or destruction in houses, gardens, woods, trees, or in lands (2), meadows, &c. or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz. voluntary or actuall, and permissive. [*a*] Wast may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house are rotten (3). [*b*] But if the house be uncovered when the tenant commeth in, it is no wast in the tenant to suffer the same to fall downe. But though the house be ruinous at the tenant's coming in, yet if he pull it downe, it is wast unlesse he reedifie it againe (4). [*c*] Also if glasse windowes (tho' glased by the tenant himselfe) be broken downe, or carried away, it is wast, for the glasse is part of his house. And so it is of wainscot (5), benches, doores, windowes,

[*a*] 34 E. 3. Wast. 143. (4 Co. 62. Mo. 54. 2 Ro. Abr. 819.)
[*b*] 40 Ass. p. 22. 2 Mar. Dyer 117. 23 H. 6. 24. 10 H. 7. 2. 44 E. 3. 44. 29 E. 3. 33. 4 Co. 63. Herlakenden's case. 21 E. 4. 39. 10 H. 7. 2.
[*c*] 22 H. 6. 18. 12 H. 8. 1. 13 H. 7. 21. 22 E. 4. 18. Reg. Judic. 26.

furnaces,

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(1) Some of these were not punishable at common law. See post. 53. b. and 54. a.

(2) *On writ of waste in* lands, *one cannot assign waste for cutting of* trees, *because for that the writ should be* in boscis. Tr. 6 Eliz. *More, n.* 200. Hal. MSS.—[Note 343.]

(3) *But the bare suffering them to be uncovered, without rotting the timber, is not waste.* P. 9 Jac. C. B. *Knoll's case. Converting two chambers into one, or* è converso, *or converting an hand-mill into a horse-mill, is waste.* H. 4 Jac. C. B. *Graves's case* Hal. MSS.—[Note 344.]

(4) *But if an house built* de novo *was never covered in, it is not waste to abate it.* 40 *Ass.* 12. Vid. 21 *H.* 6. 46. 26 *E.* 3. 26. *Dy.* 36. Hal. MSS.—[Note 345.]

(5) It is said, that a tenant for years during his term may take away chimney-pieces and even wainscot if put up by himself. See 1 Atk. 477, and 3 Atk. 13, and note there the distinction taken as to fixtures between the several cases of heir and executor, of tenant for life and him in remainder, and of landlord and tenant.—[Note 346.]

furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

[d] Though there be no timber growing upon the ground, yet the tenant at his perill must keepe the houses from wasting. If the tenant doe or suffer waste to be done in houses, yet if he repaire them before any action brought, there lieth no action of wast against him, but he cannot plead, *quòd non fecit vastum*, but the speciall matter.

[d] 44 E. 3. 21. 38 Ass. 1. 4 E. 3. Wast. 22. 10 El. Dyer 276. 5 Co. 119. in Whelpdale's case. 19 E. 3. Wast. 30.

A wall uncovered when the tenant commeth in, is no wast if it be suffered to decay. [e] If the tenant cut downe or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste (6).

44 E. 3. 44. [e] 7 H. 6. 38. 44 E. 3. 44.

[f] If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste [g] If the house fall downe by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his comming in, and fall downe, the tenant may build the same againe with such materialls as remaines, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger then it was. If the house be discovered by tempest, the tenant must in convenient time repaire it (7).

[f] 42 E. 3. 21. 49 E. 3. 2. 9 H. 6. 52. 17 E. 2. Wast. 118. (Hob. 234. 2 Ro. Abr. 814, 815. 820. 1 Ro. Abr. 507. cont. Mo. 7.) [g] 4 Co. 63. Harlakenden's case. 43 E. 3. 6. 26 E. 3. 76. 11 H. 4. 32. 12 H. 4. 5. 22 H. 6. 18. 19 E. 3. Wast. 30.

[h] If the tenant of a dove house, warren, parke, vivary, estangues, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is wast; and to suffer the pale to decay, whereby the deere is dispersed, is waste (8).

[h] Temps E. 1. Wast. 128. Brit. fo. 34. 5 R. 2. Wast. 97. 12 H. 8. 1. Pl. Com. 322. 7 H. 3. Wast. 141. (2 Ro. Abr. 814.)

And it is to be observed, that there is wast, destruction and exile. Wast properly is in houses, gardens, (as is aforesaid) in timber trees, (viz. oak, ash, and elme, and these be timber trees in all places) either by cutting of them downe, or topping of them, or doing any act whereby the timber may decay. Also in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. [i] If the tenant cut down timber trees, or such as are accounted timber (10), as is aforesaid, this is wast; and if he suffer the young germins to be destroyed, this is destruction.

[i] 22 H. 6. 12. a. 9 H. 6. 1. 66. 11 H. 6. 1. F. N. B. 59. m.

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(6) 14 *H.* 4. 12. Hal. MSS.

(7) 12 *H.* 4. 5. Hal. MSS.—The 6 An. ch. 31, which was at first temporary, but is now made perpetual, enacts, that no action shall be prosecuted against any person, in whose house any fire shall accidentally begin, with the proviso that the act shall not defeat any agreement between landlord and tenant. See post. 53. b. and n. 5. there.—[Note 347.]

(8) *If B. lessee of warren by charter or prescription ploughs the land, it is waste.* Contra *if it be only land stored with conies, and not a legal warren.* P. 40 Eliz. C. B. *Moyle's case.* C. C. n. 21, and T. 40 Eliz. n. 11. Vid. *Noy, n.* 312. *Moyle's case. Stopping and digging coney-burrows not waste in a warren.* Hal. MSS.—See Noy 70.—[Note 348.]

(9) 7 *H.* 6. 38. *Dy.* 35. Hal. MSS.

(10) *Beech and white-thorn may be timber by the custom of the country, and it is waste to cut them.* M. 9 Jac. *Palmer's case.* Hal. MSS.—[Note 349.]

struction. [k] So it is, if the tenant cut down underwood, (as he may by law) yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction.

[k] 20 E. 3. Wast. 32. 10 H. 7. 2. 42 E. 3. 6. b. 5 E. 4. 100. 41 E. 3. Wast. 82. 20 E. 3. Wast. 32. 12 E. 4. 1. (9)

[l] Cutting down of willowes, beech, birch, aspe, maple, or the like, standing in the defence and safeguard of the house, is destruction. [m] If there be a quickset fence of white thorne, if the tenant stub it up, or suffer it to be destroyed, this is destruction (11); and for all these and the like destructions an action of wast lyeth. [n] The cutting of dead wood, that is, *ubi arbores sunt aridæ, mortuæ, cavæ, non existentes maremium, nec portantes fructus, nec folia in æstate*, is ☞ no wast; but turning of trees to coles for fewell, when there is sufficient dead wood, is wast. [53. b.]

[l] 40 E. 3. 15. b. & 35. 12 E. 4. 1. 12 H. 8. 1. b. 10 H. 7. 2. 8 E. 2. Wast. 111. 4 E. 6. Wast. Br. 136. (Cro. Ja. 126. 4 Co. 63, 64. 1 Ro. Abr. 569.) [m] 46 E. 3. 17. F. N. B. 59. m. 9 H. 6. 10. 12 H. 8. 1. [n] 16 El. Dy. 332. 20 E. 3. Wast. 32.

[o] If the tenant suffer the houses to be wasted, and then fell down timber to repaire the same, this is a double wast. [p] Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is wast; but the tenant may dig for gravell or clay for the reparation of the house, as well as he may take convenient timber trees (1).

[o] 44 E. 3. 44. 20 E. 3. Wast. 32. F. N. B. 59. b. 19 E. 3. Wast. 30. [p] 22 H. 6. 18. b. 9 E. 4. 35. 41 E. 3. Wast. 82. 17 E. 3. 7. 9 H. 6. 66. 2 H. 7. 24. F. N. B. 59. n. & 149. c. 20 E. 3. Wast. 32. (2 Ro. Ab. 815, 816.)

[q] It is wast to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by winde, tempest, or the like, without any default in the tenant, [r] this is no wast punishable (2). So it is, if the tenant repaire not the bankes or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable (3).

[s] If the tenant convert arable land into wood, or *è converso*, or meadow into arable, it is waste, for it changeth not onely the course of his husbandry, but the proofe of his evidence.

[t] The tenant may take sufficient wood to repaire the walls, pales, fences, hedges, and ditches, as he found them; but he can make no new (4): and he may take also sufficient plowbote, firebote, and other housbote.

[q] Anno 6 El. Of the report of justice Dalison in Griffin's case. 17 E. 3. 65. Brit. fol. 168. b. (Mo. 62. 69.) [r] 20 H. 6. 1. F. N. B. 59. n. 6 El. ubi supra. [s] 28 H. 8. Dyer 37. 22 H. 6. 24. 10 H. 7. 5. a. 44 E. 3. 44. (2 Ro. Ab. 814. Cro. Ja. 182.) [t] 16 El. Dy. 332. 21 H. 6. 41. 5 E. 4. 100. 12 E. 3. Wast. 28. 48 E. 3. 25. Temps E. 1. 123. 20 E. 3. Wast. 32. 19 E. 3. Wast. 30. (Cro. Ja. 292.)

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(11) *But cutting up of quick-sets is not waste, if it preserves the spring.* M. 9 Jac. C. B. Palmer's case. Cutting of ash under the growth of 20 years not waste. M. 41, 42 Eliz. C. B. Hal. MSS.—[Note 350.]

(1) Nota, *though mines be open at the time, one cannot take timber to use in them.* T. 16 Jac. *Darcye's case. Hutt.* 19. *Hob. n.* 298. Hal. MSS.—[Note 351.]

(2) See Call. on Sew. 2d. ed. 146.

(3) *Because he is bound to repair, though he doth hold the bank.* 46 *E.* 3. *Waste* 91. Vid. T. 6 Eliz. *Mo. n.* 173. Hal. MSS.—[Note 352.]

(4) *Tenant cannot make rails, where none were before. Dy.* 332. Hal. MSS. —[Note 353.]

The tenant cutteth downe trees for reparations and selleth them, and after buyeth them againe, and imploys them about necessary reparations, yet it is wast by the vendition: he cannot sell trees, and with the money cover the house: burning of the house by negligence or mischance is waste (5).

[u] If a man make a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of wast shall lye, for the place wasted cannot be recovered without a plea.

[u] 3 E. 3. Wast. 5. Bracton. lib. 4. fol. 315.

[x] *Bracton*, *Fleta*, and *Britton* doe use the same division as is aforesaid, viz. *vastum*, *destructio*, *et exilium*, in their proper signification.

[x] Bracton, fol. 168. Fleta, lib. 1. cap. 11. 16 H. 3. Wast. 135. 3 E. 3. tit. Wast. 2. 17 E. 2. Wast. 118. 10 H. 7. 2 H. 6. 11. 9 H. 6. 52. 11 E. 2. Wast. 113. F. N. B. 56 H. & 55. c. Regist.judic.25.

Now somewhat is to be spoken of exile or destruction of men: exile or destruction of villaines, or tenants at will, or making them poore, where they were rich when the tenant came in, whereby they depart from their tenures, is wast. [a] And yet the statute of *Glouc'* speaketh not of exile, but it is comprehended under the general word of wast. The statute of *W.* 1. hath *destructionem*, the statute of *Magna Charta* hath *vastum et destructionem*, the statute of *Merlebridge* hath *vastum, venditionem et exilium in domibus, boscis, vel hominibus, &c.*

But wast and destruction in their larger sense are words convertible. [b] *Item de hoc quod dicit vastum et exilium, sciendum est quòd non sunt referenda ad eundem intellectum, sed vastum et destructio ferè idem sunt, vastum idem est quod destructio, et è converso, et se habent ad omnem destructionem generaliter.*

[c] *Vastum autem et destructio ferè æquipollent et convertibiliter se habent in domibus, boscis, et gardinis; sed exilium dici poterit, cùm servi manumittantur et à tenementis suis injuriosè ejiciantur. Fortuna autem et ignis vel hujusmodi eventus inopinati omnes tenentes excusant.*

[a] Glouc. cap. 5. W. 1. cap. 21. Magna Charta, cap. 4. Merleb. cap. 23. [b] Bract. lib. 4. fol. 316 & 317. [c] Fleta. lib. 1. cap. 11.

[d] No person shall have an action of wast, unlesse he hath the immediate state of inheritance, but sometime another shall joyne with him for conformity. As if a reversion be granted to two, and to the heires of one; they two shall joyne in an action of wast: and in like sort the surviving coparcener and the tenant by the curtesie shall joyne in an action of waste: and if two joyntenants be, and to the heires of one of them, and they make a lease for life, they shall joyne in an action of waste (7). [e] If the estate tail determine, hanging the action of waste, and the plt. becomes tenant in taile after possibility, the action of waste is gone. [f] If the tenant doth wast, and he in the reversion dyeth, the heyre shall not have an action of waste for the waste done in the life of the ancestor; nor a bishop, master of an hospitall, parson,

[d] 7 E. 3. 54 b. 2 H. 5. 7. 22 H. 6. 24. 13 H. 7. 27 H. 8. 13. F. N. B. 59. f. 8 R. 2. Wast. 147. (6) (5 Co. 11.) [e] 2 H. 4. 22.

[f] 2 H. 4. 2. (8)

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(5) But now by the 6 Ann. c. 31, no action will lie against the tenant for such an accident. See the statute more fully stated in note 7, ante 53. a. Note also the passage from *Fleta* cited infra by lord Coke.

(6) 17 *E.* 3. 50. Hal. MSS.

(7) *Fine to the use of A. for life, remainder to B. in fee, with power for A. to make leases for three lives; A. makes lease accordingly, and the lessee commits waste; A. and B. shall join in waste.* T. 4 Car. C. B. *Sacheverell's case.* Hal. MSS.—[Note 354.]

(8) 21 *H.* 6. 46. 39 E. 3. 15. 42 *E.* 3. 22. Hal. MSS.

[g] 10 E. 4. 1. 49 E. 3. 25. 23 H. 8. tit. Wast. Br. 38 E. 3. 17. 44 E. 3. 8. 45 E. 3. 3. 46 E. 3. 31.

parson, or the like, in the time of the predecessor. [g] And so if lessee for yeares doth waste, and dyeth, an action of wast lyeth not against the executor or administrator for waste done before their time. But if two coparceners be of a reversion, and waste is committed, and the one of them die, the aunt and the neece shall joine in an action of waste (10).

11 E. 2. Wast. 115. 2 Mar. Wast. 117. 8 E. 2. Wast. 110. (9) (Ant. 42. a.)

[h] 24 E. 3. 27. 50 E. 3. 3. 8 H. 6. 13. (Post. 247. b. 5 Co. 75. 2 Ro. Ab. 834. Post. 218. b.)

[h] If lands be given to two and the heires of one of them, he that hath the fee shall not have an action of waste upon the statute of *Glouc.* for that they are joyn-tenants, but his heire shall have an action of waste against tenant for life.

Note, after wast done there is a speciall regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if after the waste he granteth it over, though he taketh backe the whole estate again, yet is the wast dispunishable. So if he grant the reversion to the use of himselfe and his wife, and of his heires, yet the wast is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone.

[i] Bract. lib. 4. fol. 315, 316, 317. Fleta lib. 1. cap. 11. Brit. fol. 168. Doct. and Stud. lib. 2. ca. 1.

[i] A prohibition of waste did lye against tenant by the curtesie (11), tenant in dower, and a gardian in chivalry, by the common law, but not against tenant for life or yeares, because ☞ they came in by their own act, and he might have provided that no wast should be done. [54. a.]

12 H. 4. 3. 10 H. 3. Wast. 142. 20 H. 6. 1. 4 H. 3. Wast. 140. 9 H. 3. ibid. 136. (10 Co. 116. b.) (2 Inst. 145. Post. 273. 299. b. 5 Co. 77. Stat. Glouc. c. 5.)

[i] F. N. B. 56. e. et. f. Temps E. 1. Wast. 122. 18 E. 3. 3. 30 E. 3. 16. 38 E. 3. 23. 11 H. 4. 18. 4 E. 3. 25. Regist. 72. 3 Co. 23. Walker's case. 9 Co. 142. Beaumont's case (1). (2 Inst. 303.

[i] A tenant by the curtesie or in dower can hold of none but of the heire, and his heires by descent, and therefore if they grant over their whole estate, and the grantee doth waste, yet the heire shall have an action of waste against them, and recover the land against the assignee: but if the heire either before the assignment had granted, or after the assignment doth grant the reversion over, the stranger shall have an action of waste against the assignee, because in both cases the privity is destroyed: in all other cases the action of waste shall be brought against him that did the waste (for it is in nature of a trespasse) unlesse it be in the case of a ward [k]; for there if the gardian doth waste and assigne over, the action lieth against the assignee [l]. A gardian shall not be

Dr. and Stud. lib. 2. c. 1.) [k] 27 E. 3. 81. 26 E. 3. Wast. 10. (2) [l] 12 H. 4. 3. Bract. lib. 4, 316. 317. Fleta lib. 1. c. 11. Brit. 168. 34 E. 3. Wast. 146. 44 E. 3. 27. F. N. B. 59. a. & 60 g. & T.

punished

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(9) 18 *E.* 4. 16. 10 *H.* 7. 5. 2 *E.* 3. 2. Hal. MSS.

(10) Waste amongst tenants in common.—*A. makes lease to B. for years of two parts of a messuage; B. commits waste. It was ruled that waste lies, and shall be assigned in the intirety, but that the recovery should be of only two parts of the damages and of two parts of the place wasted.* P. 35 Eliz. *Poph. n.* 2. *Warnford's case.* Hal. MSS.—[Note 355.]

(11) Some have thought, that at common law waste did not lie against tenant by the curtesy. See 2 Inst. 301.—[Note 356.]

(1) 7 *E.* 3. 34. Hal. MSS.

(2) 26 *E.* 3. *Waste* 10. *is* contra. Hal. MSS.

punished for waste done by a stranger, it is so penall unto him, for he shall lose the wardship both of the body and of the land (3), though the waste be but to the value of twenty shillings; and if that sufficeth not to satisfie for the wast, then he shall recover damages of the waste, over and above the losse of the ward. But tenant by the curtesie, tenant in dower, tenant for life, yeares, &c. shall answer for the waste done by a stranger, and shall take their remedy over. [m] But if there be two joyntenants of a ward, and one of them doe wast, both shall answer for it.

[m] 33 E. 3. Wast. 6. (4)

[n] If the gardian doth waste, and the heire within age bring an action of waste, the gardian shall lose the wardship, as is aforesaid; but if the heire bring an action of waste at his full age, then he shall recover treble damages, for then he cannot lose the wardship.

[n] 44 E. 3. 27. 48 E. 3. 10. F. N. B. 60. t. 12 H. 4. 3. 19 E. 2. Wast. 117.

41 E. 3. Wast. 81. 3 E. 2. Wast. 3. 7 E. 3. 12.

[o] An infant and baron and fem shall be punished for waste done by a stranger, and so shall the wife that hath the state by survivour for wast done by the husband in his life time, if she agree to the estate, though there hath beene variety of opinions in our bookes.

[o] 15 H. 3. Wast. 16. temps E. 1. Wast. 128. 2 H. 4. 3. a. 3 E. 3. 13. 76. 11 Ass. 11.

21 H. 6. 24. b. 33 H. 6. 31. a. 42 E. 3. 22. 19 E. 3. breve 246. 46 E. 3. 25. 7 H. 6. 2. b. 3 E. 3. 46. 10 E. 3. 17, 18. 9 E. 3. 42. 9 E. 3, breve 246. 17 E. 4. 7. 9 H. 6. 52. F. N. B. 36. b. Doct. & Stud. lib. 2, c. 1. 23 H. 8. Wast. 138. 8 Co. 44, Willingham's case.

[p] But if a fem tenant for life take husband, and the husband doth waste, and the wife dieth, no action of wast lyeth against the husband in the *tenuit*, for he was seised but *in jure uxoris*, and his wife was tenant of the freehold; but if a fem be possessed of a terme for yeares, and take husband, and the husband doth wast, and the wife dieth, the husband shall be charged in an action of waste, for the law giveth the terme to him.

[p] 5 Co. 75. Clifton's case. 49 E. 3. 25. 46 E. 3. Wast. Statham. 10 H. 6. 11, 12. (2 Inst. 301.)

[q] If tenant for life grant over his estate upon condition, and the grantee doth wast, and the grantor re-entreth for the condition broken, the action of wast shall be brought against the grantee, and the place wasted recovered.

[q] 30 E. 3. 16.

[r] If a leasc for life be made to a villeine, and waste is done, the lord entreth, he shall not be punished for the waste done before, but for waste done after, he shall.

[r] 48 E. 3. 19.

[s] An occupant shall be punished for waste; and so if an estate be made to *A.* and his heires during the life of *B.* *A.* dieth, the heire of *A.* shall be punished in an action of waste.

[s] 6 Co. 37, le Deane & Chapter of Worcester's case. 10 Co. 9. b. (2 Ro. Abr. 826.)

[t] If a lease be made to *A.* for life, the remainder to *B.* for life, the remainder to *C.* in fee, in this case where it is said in the *Register*, and in *F. N. B.* that an action of wast doth lie, it is to be understood after the death or surrender of *B.* in the meane remainder, for during his life no action of waste doth lie (5).

[t] 4 E. 3. 18. Cote's case. 3 E. 3. 18. F. N. B. 58. c. & 59 h. 50 E. 3. 3.

33 E. 3. Wast. 144. 11 E. 3. resceit 118. 10 E. 4. 9. Regist. 74. 2 Co. 92. inter Paget and Carie in Bingham's case. 5 Co. 76. Paget's case. 10 Co. 44. Jenning's case. F. N. B. 59. h. 4 E. 3. 18.

But

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(3) *Value of wardship not lost.* Vid. *Dy.* 35. 28 *H.* 8. *Bendl. n.* 33.—Hal. MSS.

(4) 3 *E.* 3. 18. Hal. MSS.

(5) But though action of waste doth not lie in this case on account of the intermediate remainder for life, yet a court of equity will interpose by injunction to prevent waste. See 3 Atk. 95, and 210.—[Note 357.]

But if a lease for life be made, the remainder for yeares, the remainder in fee, an action doth lie presently during the terme in remainder, for the meane terme for yeares is no impediment.

But if a man make a lease for life or yeares, and after granteth the reversion for yeares, the lessor shall have no action of waste during the yeares, for he himself hath granted away the reversion, in respect whereof he is to maintaine his action. [*] Otherwise it is, if he had made a lease in reversion, which had been but a future interest; for there an action of wast lieth during the terme, and so is the booke to be understood, and the terme shall be saved in that case.

[*] 4 E. 3. 18. F. tit. Wast. 18.

[u] Merlebridge cap. 17. 21 E. 3. 30. 16 E. 3. tit. Wast. 100. 14 E. 3. Wast. 107. 2 E. 2. Wast. 1. 28 H. 6. Wast. 9. 32 H. 6. 7. F. N. B. 59 E.

[u] No action of wast lieth against a gardian in socage, but an account or trespasse, nor against tenant by statute staple, &c. or *elegit* (6).

[w] 11 H. 6. cap. 5. 5 Co. 77. Boothe's case.

[w] If tenant for life or yeares or their assignee make a grant over, and notwithstanding take the profits, an action of wast lieth against him, by him in the reversion or remainder by the statute, *Nota* (7).

[x] 8 E. 3. Wast. 112. 4 E. 6. Wast. 136. 4 E. 3. 32. 15 H. 7. 11. 15 E. 3. Wast. 134. temps E. 1. Wast. 134. 18 H. 8. 1. (8)

[x] If wast be done *sparsim* here and there in woods, the whole woods shall be recovered, or so much wherein the wast *sparsim* is done. And so in houses so many rooms shall be recovered wherein there is wast done; but if wast be done *sparsim* throughout, all shall be recovered. It hath beene said that if the hall be wasted, the whole house shall be recovered, because the whole house is denominated of the hall: but later authority is to the contrary.

[y] Bract. lib. 4. fo. 316. 38 E. 3. 7. b. 34 E. 3. Wast. 146. 14 H. 4. 11. b.

[y] There is waste of a small value, as *Bracton* saith, *Nisi vastum ita modicum sit propter quod non sit inquisitio facienda.* Yet trees to the value of three shillings and foure pence hath beene adjudged wast, and many things together may make waste to a value (9). But let us now returne to our author (10.)

F. N. B. 60. c. temps E. 1. Wast. 124. 19 H. 6. 8. (11)

" *A writ*

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(6) Vid. *F. N. B.* 58. *Grantee of reversion shall have waste.* Hal. MSS.

(7) *F. N. B.* 59. *C.* Hal. MSS.

(8) 3 *E.* 3. 24. Hal. MSS.

(9) Vid. Hil. 40 Eliz. C. B. *n.* 9. *Thorne's case, C. C. Waste to the value of* 4 *d.* Hal. MSS.

(10) *It ought to be to the value of* 40*d. at least. Noy n.* 18. *Thore and Thomas.* Hal. MSS.—See Noy 4.—As lord Hale makes so frequent a reference to *Noy's Reports*, it may not be amiss to apprise the student, that though the book is known by the name of that very learned lawyer, yet there is not the least reason to suppose, that such a loose collection of notes was intended by him for the public eye. In an edition of Noy's Reports *penes editorem*, there is the following observation upon them in manuscript. *A simple collection of scraps of cases made by serjeant Size from Noy's loose papers, and imposed upon the world for the reports of that vile prerogative fellow Noy.* This account of Noy's Reports, which was probably written soon after the first publication in 1656, though expressed in terms inexcuseably gross, contains an anecdote not altogether useless.—[Note 358.]

(11) 9 *H.* 6. 66. Hal. MSS.

"*A writ of waste.*" See in the *Register* five severall writs of wast; two at the common law for wast done by tenant in dower, or the gardian; and three by speciall or statute law, for waste done by tenant for life, for yeares, and tenant by the curtesie.

[54. b.] ☞ "*The writ shall say.*" The writs originall of the *Register* [z] (as *Bracton* saith) were formed, and of course had their first authority by act of parliament; and therefore without an act of parliament they cannot be altered, or changed, which is proved by the statute of *W.* 2. cap. 24, whereby remedy is provided in many cases. But heare what *Bracton* saith, *Sunt quædam brevia formata in suis casibus, et quædam de cursu, quæ concilio totius regni sunt approbata, quæ quidem mutari non possunt, absque eorundem contrariâ voluntate. Magistralia autem sæpè variantur secundum varietatem casuum*, &c. And this is the reason that in this case of halfe a yeare the words of the writ shall be without change, *quod tenet ad terminum annorum*, and the pl' must make a speciall declaration according to his case, for otherwise he should he without remedy. In this particular case, the statute of *Glouc.* cap. 5, which giveth the action of waste against the lessee for life or yeares (which lay not against them at the common law) speaketh of one that holdeth for tearme of yeares in the plural number; and yet here it appeareth by the authority of *Littleton*, that although it be a penall law, whereby treble damages and the place wasted shall be recovered, yet a tenant for halfe a yeare being within the same mischiefe, shall be within the same remedie, though it be out of the letter of the law; for *Qui hæret in literâ, hæret in cortice*, which is an excellent example, whereupon in many like cases a man may settle a certaine judgment. You may observe in the said ancient authors, what remedie was given for wast at the common law, and against whom, and what was adjudged waste, destruction, and exile.

[z] Vid. Bract. lib. 5. f. 413. b. Fleta, lib. 2. cap. 12. See the Second Part of the Institutes. W. 2. cap. 24.

De vasto, Bract. li. 4. f. 315, 316. 317. Fleta, li. 1. c. 11. & li. 5. c. 33. Britton. fol. 162 & 168. 46 E. 3. 31. F. N. B. 60. c. 4 E. 4. 13. 37 H. 6. 26. b. 7 H. 7. 2. 14 H. 8. 12. 18 E. 3. 27. (Dr. & Stud. li. 1. cap. 23.) Vide Marlebridge, ca. 23. 2. Part of the Institutes.

In many cases a tenant for life or yeares may fell down timber to make reparations, albeit he be not compellable thereunto, and shall not be punished for the same in any action of waste. As [a] if a house be ruinous at the time of the lease made, if the lessee suffer the house to fall down he is not punishable, for he is not bound by law to repair the house in that case. And yet if he cut down timber upon the ground so letten, and repaire it, he may well justifie it; and the reason is, for that the law doth favour the supportation or maintenance of houses of habitation for mankind. And therefore if two or more joyntenants or tenants in common be of a house of habitation, and the one will not repaire the house, the other shall have by the law a writ of *de reparatione faciendâ*, and the writ saith, *ad sustentationem ejusdem domûs teneantur*. So it is if the lessor by his covenant undertaketh to repaire the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereunto (1). In the same manner, if a man make a lease of a house and land without impeachment of waste for the house, yet may the lessee with the timber upon the ground repaire the house, though he may utterly waste

[a] 12 H. 8. 1. (11 Co. 27. 79. b. Mo. 23.)

F. N. B. fo. 127.

(1) *But if lessee covenants to repair and doth not repair, waste will not lie.* 29 *E.* 3. 43. 21 *H.* 6. 6. *Dy.* 198. Hal. MSS.—[Note 359.]

(Hob. 234.)

waste it if he will; and so in many other cases. A man hath land in which there is a mine of coales, or of the like, and maketh [b] a lease of the land (without mentioning any mines) for life or for yeares, the lessee for such mines as were open at the time of the lease made, may digge and take the profits thereof. [c] But he cannot digge for any new mine, that was not open at the time of the lease made, for that should be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines onely, and not to any hidden mine (2): but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may digge for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be knowne of all men (3).

[b] 17 E. 3. 7. 9 H. 6. 66. 12 H. 6. 18. 9 E. 4. 35. 12 E. 4. 8. F. N. B. 149. c. & 59. n.

[c] 5 Co. 12. Sander's case. (1 Co. 46.)

Now hath *Littleton* spoken of an estate for life, and an estate for yeares in severall persons. Now let us see how they stand *simul* and *semel* in one person.

If a man letteth lands to another for life, the remainder to him for 21 yeares, he hath both estates in him so distinctly, as he may grant away either of them; for a greater estate may uphold a lesser, but not *è converso*; and therefore if a man make a lease to one for 21 yeares, the remainder to him for terme of his life, the lease for yeares is drowned.

[d] If a man make a lease for life to one, the remainder to his executors for 21 yeares, the terme for yeares shall vest in him (4); for even as ancestor and heire are *correlativa* as to inheritance; (as if an estate for life be made to *A.* the remainder to *B.* in taile, the remainder to the right heires of *A.* the fee vesteth in *A.* as it had been limited to him and his heires); even so are the testators and the executors *correlativa* as to any chattell. And therefore if a lease for life be made to the testator, the remainder to his executors for yeares, the chattel shall vest in the lessee himselfe, as well as if it had been limited to him and his executors.

[d] 19 E. 2. Covenant 25. 19 E. 3. Covenant 24. 32 E. 3. Quid juris cl. 5. 17 E. 3. 29. 46 E. 3. 31. 40 E. 3. 5. 11 H. 4. 34. 14 Eliz. Dyer 309. M. 40 & 41. Eliz. in Com. Banc. Rot. 2215, in tresp. inter Sparke & Sparke. Hill. 42 Eliz. Sir John Savage's case in Curiâ Wardorum. (2 Ro. Abr. 47. 418. Mo. 100. 339. 666. 2 Leon. 6. Yelv. 85.)

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(2) See ante 53. b. and n. 1, there.

(3) See further as to *waste* in the several Abridgments, title *Waste*, and Fulb. 2. part, Paral. Dial. 5. fol. 49. b.

(4) 50 *Ass.* 1. *And* per curiam *in Sparkes's case adjudged, that it shall go to the administrator.* Vide tamen M. 44, 45 Eliz. *Moore's Reports, n.* 911, contra. Vid. 4 & 5 P. and M. *Bendl. n.* 115. *Gravenor's case.* Hal. MSS.

[55. a.] CHAP. 8. Of Tenant at Will. Sect. 68.

TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for yeares, which knoweth the end of his terme, doth sow the land, and his terme endeth before the corn is ripe. In this case the lessor, or he in the reversion shall have the corne, because the lessee knew the certainty of his terme and when it would end.

"*TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, &c.*" (1) It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be onely at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the bookes that seeme *primâ facie* to differ, cleerly reconciled (3). Fleta, lib. 3. cap. 15. (1 Ro. Abr. 858.) 18 H. 6. 1. 38 H. 6. 21. 9 E. 4. 1. b. 10 E. 4. 18. b. 21 H. 7. 38. 13 H. 8. 16. 14 H. 8. 11. 14. (2)

"*Because he hath no certain nor sure estate, &c.*" *Alia possessio est præcaria, et alia pro prece concessâ, ut si quis sine scripto concesserit* Fleta, lib. 3, cap. 15.

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(1) 21 *H.* 6. 37. *Lease for years with proviso that lessor may enter at his will is a lease at will.* Per. Past.—21 *H.* 6. 37. *A. grants to B. that he may sow A.'s land, which is done accordingly; yet A. shall have the emblements, because B. hath not an interest.* Per. Past. Hal. MSS.—See acc. as to the former case, 14 H. 8. 12, and by Yelverton justice in Litt. Rep. 235, and Hetl. 128.—[Note 360.]

(2) 49 *H.* 6. 18. 20 *E.* 4. 9. Hal. MSS.

(3) See further as to the manner in which an estate at will may be created by *act of the parties*, or arise by *act of law*, Vin. Abr. *Estate*, S. b. and T. b. Com. Dig. *Estates*, H. 1. 2. In 4 Burr. v. 3. page 1609, it is said, that in the country leases at will in the strict legal notion being found extremely inconvenient, exist only *notionally*. But this observation I presume means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by *express* words, and that the judges incline strongly against *implying* them. See 2 Blackst. Comment. 147.—[Note 361.]

cesserit alicui habitationem vel usumfructum in re suâ tenenda ad voluntatem suam, hæc quidem possessio præcaria est et nuda, eò quòd tempestivè et intempestivè pro voluntate domini poterit revocari.

(5 Co. 85. a. 1 Sid. 339.)

" *Yet if the lessee soweth the land, and the lessor, after it is sowne, &c.*" (4) The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground (5) should be unmanured, which should be hurtfull to the common-wealth, he ☞ shall reape the crop which he sowed in peace, albeit the lessor doth determine his wil before it be ripe. And so it is if he set rootes, or sow hempe or flax, or any other annual profit, if (1) after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or yong oaks, ashes, elmes, &c. or sow the ground with acornes, &c. there the lessor may put him out notwithstanding, because they will yeeld no present annuall profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corne sowne, &c. but to every particular tenant that hath an estate incertaine, for that is the reason which *Littleton* expresseth in these words *(because he hath no certain nor sure estate)* (2). And therefore if tenant for life soweth the ground, and dieth, his executors shall have the corne, for that his estate was uncertaine, and determined by the act of God (3). And the same law is of the lessee

[55. b.]

18 E. 4. 18. (Cro. Cha. 515.) Temps E. 1. br. 25. 10 Ass. pl. 6. 10 E. 3. 29. 46 E. 3. 1. 7 H. 4. 17. 7 Ass. 19. 5 Co. 116. Oland's case. (2 Inst. 81. Hob. 132. 5 Co. 85. 1 Ro. Abr. 727.)

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(4) 9 *E.* 3. 24. *is according to Littleton's diversity, and so is the* 11 *H.* 4. 90. *But lessee at will in such case of entry of the lessor before sowing shall not have the costs of plowing and manuring.* Hal. MSS.—See S. C. acc. in Bro. Abr. *Emblements*, pl. 7, and *Tenant by Copie*, pl. 3.—[Note 362.]

(5) *But if lessor covenants that lessee for years shall have the emblements which are growing at the end of the term, there the property of the corn is well transferred to the lessee, though it be not severed during the term. Hob. case* 175. *Grantham and Hawley.*—Hal. MSS.—See Hob. 132.—[Note 363.]

(1) *If lessee for life of a hop-ground dies in August before severance of the hops, the executor shall have them, though growing on ancient roots. Adjudged* M. 13 Car. B. R. Crook n. 13. *Latham and Atwood.* Hal. MSS.—See Cro. Cha. 515.—[Note 364.]

(2) *A. seised in fee sows the land, and devises to B. for life, remainder to C. in fee, and dies before severance. Ruled,* 1. *The executor of A. shall not have the emblements.* 2. *If B. dies before severance, his executor shall not have them, but they shall go to him in remainder. But,* 3, *if the devise had been only to B. and B. had died, there the executor of B. should have had the corn, though B. did not sow.* M. 20 Jac. C. B. *n.* 22. *Spencer's case. Winch.* 51. M. 5 Jac. C. B. *Skele and Arnold.* Vid. *Hob.* 132. Hal. MSS.—See acc. as to the first point, Cro. Eliz. 61. Yet it seems agreed, that executors shall have the corn growing as against an *heir*. See Hob. 132. 3 Salk. 160. 1 Ventr. 187. 3 Atk. 16, the opinion of Saund. ch. j. in Lill. Pract. Reg. tit. *Emblements*, and the year-books cited in Com. Dig. *Biens*, G. 2. It is not easy to account for this distinction, which gives corn growing to the *devisee*, but denies it to the *heir*; though it has been attempted. See Gilb. Law of Evid. 250.—[Note 365.]

(3) *Whether executor of tenant in dower shall pay rent on the statute of Merton*, vid. *Keilw.* 125. Hal. MSS.—This annotation by lord Hale requires explanation. By the statute of Merton 20 H. 3. c. 2, the widow may devise the corn on the land she holds in dower, which, as some of our most ancient

lessee for yeares of tenant for life (4). So if a man be seised of land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corne, and if his wife die before him he shall have the corne (5). But if husband and wife be jointenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said, [a] that she shall have the corne (7). If tenant *pur terme d'auter vie* soweth the ground, and *cesty que vie* dieth, the lessee shall have the corne. If a man seised of lands in fee hath issue a daughter and dieth, his wife being *enseint* with a son, the daughter soweth the ground, the sonne is borne, yet the daughter shall [b] have the corne, because her estate was lawful, and defeated by the act of God, and it is good for the commonwealth that the ground be sowne (8). [c] But if the lessee at will sow the ground with corne, &c. and after he himself determine his will and refuseth to occupy the ground, in that case the lessor shall have the corne, because he loseth his rent. And if a woman that holdeth land *durante viduitate*

[a] 8 Ass. 21. 8 E. 3. 54. Dyer 316. (6) (Cro. Cha. 515.)

[b] 16 H. 6. 6.

[c] 5 Co. 116. Oland's case. (9) (1 Ro. Abr. 726.)

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writers have thought, she could not do before; but the statute saves customs and services due in respect of the land which the widow held in dower. Now in the case of Keilway it is asserted, that under this statute the wife's executors may retain the land till they can reasonably carry the corn out of the land; and this I apprehend gave occasion to the query, whether the executors shall not pay rent. See 2 Inst. 80, 81.—[Note 366.]

(4) See Gouldsb. 144.

(5) *But it is said, that if the land was sown before the marriage, the wife shall have the corn.* 1 *Ro. Abr.* 727, *pl.* 17.—[Note 367.]

(6) 7 *Ass.* 13. 10 *Ass.* 6. 7 *E.* 3. 57. Hal. MSS.

(7) *In Skele and Arnold*, M. 5 Jac. C. B. n. 5. D. D. *the court was divided on the point, whether the wife should have the emblements; but it was adjudged, that she should not. But in* P. 26 El. C. B. n. 4. E. E. *in Brewster's case it was adjudged, that the wife shall have them.* Hal. MSS.—See Skele and Arnold in 1 Ro. Abr. 727, pl. 16. Noy 149, and Dy. 316. a. in marg. and further on the subject in the books cited Vin. Abr. *Emblements*, pl. 16, and Com. Dig. *Biens*, G. 2.—[Note 368.]

(8) See ante 11. b. and n. 4, there in respect to intermediate profits, where an estate vested is devested by the birth of a posthumous child. To the observation in that note it may be useful to add, that there is an important distinction as to mesne profits between real estate and personalty. The law will not permit the freehold of land, except in certain special cases, to be in abeyance; and therefore where an estate is to arise on a contingency, the freehold must vest in some person in the *mean time*, either in the heir or some other person who takes subject to the contingency; and that person, whoever he is, has the right to the *mesne* profits for his own benefit, unless they are otherwise disposed of by *express* provision of the parties, as in the case of trustees to preserve contingent remainders, who are generally directed how to apply the profits they receive, or by act of parliament, as by the 10 and 11 W. 3. c. 16, which preserves contingent remainders for posthumous children, where there are no trustees for that purpose, and gives such children the estate *in the same manner as if* they were born in the life-time of the father, and is *therefore* construed to carry the profits from the father's death. But the case of personalty is different, for the right to that may be in suspense and contingency, and *generally* during the time it continues so the profits accumulate till the vesting of the capital happens, and then are added to that and belong to the same person. See 3 P. Wms. 305. 2 Atk. 473, and Fearn. on Conting. Rem. 2d ed. 173.—[Note 369.]

viduitate sud soweth the ground and taketh husband [*d*], the lessor shall have the emblements, because that the determination of her owne estate grew by her owne act. But where the estate of the lessee being incertaine is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c. [*e*] there he that hath the right paramount, or that entreth for any forfeiture, &c. shall have the corne (10).

[*d*] Oland's case ubi supra. (Dy. 31. 11 Co. 51. b.)

[*e*] 33 E. 3. tresp. F. 254. 42 E. 3. 25. Oland's case ubi supra.

If a disseisor sow the ground and sever the corne, and the disseissee re-enter, [*f*] he shall have the corne, because he entreth by a former title, and severance or remooving of the corne altereth not the case, for the regresse is a recontinuation of the freehold in him in judgment of law from the beginning (11).

[*f*] 27 H. 6. 1. 37 H. 6. 6. 12 E. 4. 45. 14 E. 4. 6. 15 E. 4. 31. 2 H. 7. 1. 5 H. 7. 17. 12 H. 7. 25. 10 H. 4. 1. 28 H. 8. 32. Dyer.

[*g*] If tenant by statute merchant soweth the ground, and then a sudden and casuall profit falleth by which he is satisfied, he shall have the embleaments (12).

[*g*] 44 E. 3. 15. Fleta, lib. 3, cap. 15.

[*h*] 35 H. 6. 24. 21 H. 6. 9. 1 E. 4. 3. 21 E. 4. 5. Pl. Com. parson de Honyland's case.

"*The lessor may put him out.*" There is an expresse *ouster*, and implied *ouster:* an expresse, as when the lessor commeth upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implyed, as if the lessor without the consent of the lessee enter into the land, and cut downe a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unlesse the trees were excepted, and then it is no determination of the will, for then the act is lawfull albeit the will doth continue. If a man leaseth a mannor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will (13). The lessor may by actuall entry into the ground determine his will in the absence of the lessee (14), but by words spoken from the ground

(1 Ro. Abr. 860.) Post. 245. b. 8 Co. 89. 5 Co. 90.) 14 E. 4. 6. 8 E. 4. 11, &c.

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(10) Vid. 20 *E.* 3. *Trespass* 194. 46 *Ass.* 2. Hal. MSS.

(11) According to *some* of the *antient* authorities, the disseisor shall have the emblements, if the disseisee's entry is *after* severance. See many books cited on this subject in Vin. Abr. *Emblements*, 54. The more modern cases are with lord Coke. See Dy. 31. b. Dal. 30. Mo. 24, and 11 Co. 51. b.—[Note 370.]

(12) See further on this subject infra, and also Perk. sect. 512 to 524. Vin. Abr. *Emblements* per tot. and *Executor*, U. Com. Dig. *Biens*, B. C. and G. New Abr. *Executors* and *Administrators*, H. 3, and Gilb. Law of Evid. 242 to 252.

(13) Vid. 11 *H.* 6. 28, *by Cottes. lessor's granting a rent charge doth not determine his will, nor are the lessee's cattle distrainable. Whether the will be determined, if lessor or lessee be outlawed, see* 9 *H.* 6. 20. 5 *Rep.* 116. Hal. MSS. —Rolle makes a *quære* on the case of the rent charge. The doubt seems reasonable, for the lease at will and the rent charge clash with each other. If the grantee has the remedy by distress, that makes the tenant's chattels liable to seizure for money not due by his contract. On the other hand, if the grantee of the rent charge cannot distrain, he is left without that remedy, which by the grant is expressly given to him. See 1 Ro. Abr. 860. As to the case of outlawry, see Vin. Abr. *Estate.* Z. b. pl. 1. In 2 Ventr. 248, one of the books cited, lord Hale says, that outlawry is not a determination till seizure.—[Note 371.]

(14) Nota, *if lessee at will is ousted by a stranger, he may re-enter and continue tenant at will; but if he accepts of a new lease from a stranger after such ouster, it has been holden, that his re-entry will not re-vest the estate in the antient lessor.* Hal. MSS. See Vin. Abr. *Estate*, A. c.—[Note 372.]

ground the will is not determined untill the lessee hath notice (15). No more than the discharge of a factor, attorney, or such like in their absence is sufficient in law untill they have notice thereof.

[a] If a woman make a lease at will reserving a rent, and she taketh husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will reserving a rent, and the lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt or distreine them for the rent. So if the husband and wife make a lease at will of the wife's land reserving a rent and the husband die, yet the lease continueth. In like manner if a lease be made by two to two others at will, and the one of the lessors or of the lessees die, the lease at will is not determined in neither of those cases; which are necessary points to be knowne (16).

[a] 5 Co. 10. Henstead's case. 10 Eliz. Dier 269. b.

"*After it is sowne and before the corne is ripe.*" Then put the case that the corne is ripe and ready to cut downe, and the lessor, before the lessee reapeth it, enter and put out the lessee, whether shall the lessee have the corne? And it is without all question that the lessee shall have it, for by the same reason that he shall have it when he is put out before ☞ it be ripe, he shall have it when he is put out when it is ripe. *Et ubi eadem est ratio, ibi idem jus.*

[56. a.]

"*And shall have free entry, egresse and regresse.*" [b] For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for the taking and enjoying of the same: *Quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa esse non potest* (1): and the law in this case driveth him not to an action for the corne, but giveth him a speedy remedy to enter into the land, and to take and carry it away, and compelleth not him to take it at one time, or to carry it before it be ready to be carried; and therefore the law giveth all that which is convenient, viz. free entry, egresse and regresse as much as is necessary.

[b] Temps E. 1. tit. Grant. 4. 9 E. 4. 35. 5 E. 3. tresp. 13. 21 H. 7. 14. b. 8 H. 6. 18. b. 2 R. 2. barre 237. 14 H. 8. 2. 27 H. 8. 18. b. (11 Co. 52.)

If the lessee be disturbed of this way which the law doth give unto him, he shall have his action upon his case, and recover his

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(15) *So if lessee says, that he will not hold any longer, it is not a determination of the will, unless he waives the possession.* 20 *H.* 7. *Keilw.* 65. Hal. MSS. —[Note 373.]

(16) *If there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent. But it has been holden, that if lessee at any day before the rent-day determines his will, yet lessor shall have the rent incurring the next day after such determination of the will.* Per *Fenner and Williams*; *Yelverton* contra M. 3 Jac. *Carpenter and Collins*, *Yelv.* 73. 20 *H.* 7. *Keilw.* 65, *is accord. if lessor doth not enter before the rent-day.* Hal. MSS.—See All. 4, in which book there is an opinion by Rolle conformable to that of Fenner and Williams. Also in 1 Sid. 339, it is said to have been agreed by the court, that if land be leased at will, and the rent is reserved half-yearly or quarterly, the lessee cannot determine his will two or three days before the rent day, because that would be a fraudulent determination.—[Note 374.]

(1) See further on this maxim Finch. Disc. on Law 63, and Finch. Descript. o Law 16. b.

his damages; and this action the law doth give unto him, for whensoever the law giveth any thing, it giveth also a remedy for the same. But here is to be observed a diversity betweene a private way, whereof *Littleton* here speaketh, and a common way. For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shal he not have an action upon his case; and this the law provided for avoiding of multiplicity of suites, for if any one man might have an action, all men might have the like. But the law for this common nusance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unlesse any man hath a particular damage: as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case (2); and all this [c] was resolved by the court in the king's bench. And in that case it was said, that it had beene adjudged in that court betweene *Westbury* and *Powell*, that where the inhabitants of *Southwarke* had by custome a watering place for their cattell which was stopped up by *Powel*, that in that case any inhabitant of *Southwarke* might have an action; for otherwise they should be without remedy, because such a nusans is not presentable in the leete or torne. Note the diversity.

(5 Co. 100. 104. b. 1 Ro. Abr. 88. Cro. Jam. 446. 491. F. N. B. 176. b. Cro. Jam. 158.)

[c] 27 H. 8. 27. 2 E. 4. 9. 5 E. 4. 2. Tr. 41 Eliz. betweene Finieux and Hovenden. Vid. 5 Co. 72. Williams's case.

There be three kinde of wayes, whereof you shall [d] reade in our ancient bookes. First, a foot way, which is called *iter, quod est jus eundi vel ambulandi hominis;* and this was the first way.

[d] Fleta, lib. 4, cap. 27. Bracton, lib. 4, fol. 232.

The second is a foot way and horse way, which is called *actus ab agendo;* and this vulgarly is called *packe* and *prime way*, because it is both a foot way, which was the first or *prime way*, and a *packe* or *drift way* also.

(1 Ro. Abr. 390.)

The third is *via* or *aditus*, which contains the other two, and also a cart way, &c. for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi:* and this is twofold, viz. *regia via*, the king's highway for all men, *et communis strata*, belonging to a city or towne, or betweene neighbours and neighbours. This is called in our bookes *chimin*, being a *French* word for a way, whereof commeth *chiminage, chiminagium*, or *chimmagium*, which signifieth a toll due by custome for having a way through a forest; and in ancient records it is some time also called *pedagium* (3).

32 E. 3. barre 261. 27 E. 3. 78. 6 E. 3. 23.

Carta de foresta, cap. 14.

If the lessee at will by good husbandry and industry, either by overflowing or trenching, or compassing of the meadowes, or digging up of bushes or such like, make the grasse to grow in more abundance, yet if the lessor put him out, the lessee shall not have the grasse, because that the grasse is the naturall profit of the earth. And the same law is if he doth sow hay-seed, and thereby encreaseth the grasse.

(F. N. B. 149. Ante 32. a. Post. 171. a. 179. a.)

"*Otherwise it is if tenant for yeares, which knoweth the end of his terme, &c.*" Well said *Littleton* (which knoweth the end of his terme) that is, where the end of the terme is certaine; but where

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(2) *On special damage action on the case lies for not repairing as well as for a nuisance in the highway.* P. 1657. C. B. *Adjudged* 18 *E.* 4. Hal. MSS.—[Note 375.]

(3) See further as to *ways* tit. *Chimin* in Com. Dig. and Vin. Abr. and tit. *Highway*, in New Abr. and Burn. Just.

where the lease for yeares depends upon an incertainty, as upon the death of tenant for life being made by him, or of a husband seised in the right of his wife, or the like, there it is otherwise.

Sect. 69.

ALSO, if a house (si un mese) *be letten to one to hold at will, by force whereof the lessee entreth into the house, and brings his household-stuff into the same, and after the lessor puts him out, yet he shall have free entrie egresse and regresse into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mese in fee simple, fee taile, or for life, hath certaine goods within the sayd house, and makes his executors and dieth; whosoever after his decease hath the house, his executors shall have free entry egresse and regresse to carrie out of the same house the goods of their testator by reasonable time.*

"*IF a house be letten to one to hold at will, &c.*" The reason of this is evident upon that which hath been said before.

[56. b.] "*House*," *Mese*, or *Maison* ☞ called in legall *Latine messuagium*, containeth (as hath beene said) the buildings, curtelage, orchard, and garden (1). (2 Co. 32. a.)

Cottage, *cotagium*, is a little house without land to it. [*a*] See 31 *Eliz.* cap. 1, and cottagers in Domesday booke are called *cotterelli*: and in ancient records *haga* signifieth a house. If a man hath a house neer to my house, and he suffereth his house to be so ruinous as it is like to fall upon my house, [*b*] I may have a writ *de domo reparandâ*, and compell him to repair his house (2). But a *præcipe* lieth not *de domo*, but *de messuagio*.

[*a*] 31 El. ca. 1, in Domesday.
[*b*] Reg. 153. F. N. B. 127. 4 E. 2. Vouch. 244. Six acres of land may be parcel of a house. (Post. 200. b.)

"*By reasonable time.*" [*c*] This reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customes, and services, upon the true state of the case depending before them: for reasonablenesse in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices [*d*] *Quàm longum esse debet non definitur in jure, sed pendet ex discretione justitiariorum.* And this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing that is contrary to reason, is consonant to law.

[*c*] 22 E. 4. 27. 34 H. 6. 40. (Cro. Jam. 335. 204. Hob. 69. 135. 2 Instit. 4. 6. 2 Ro. Rep. 143. 153. 1 Ro. Abr. 523. 2 Ro. Abr. 578. 5 Co. 100. a.)
[*d*] Bract. li. 2, ca. 52. b. (Post. 59. b. 62. a.)

[*e*] "*As if a man seised of a mese in fee simple, fee taile, &c.*" This is so evident, as it needeth no explanation.
[*e*] 2 H. 6. 15. 21 H. 6. 30.

Sect.

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(1) See ante 5 b. and note 1, where some authorities are cited to shew, how much will pass by the word *messuage*.

(2) Also an action on the case will lye for damages arising from the neglect to repair. See Fitzh. N. B. R. ed. 1730, p. 296, note a.—[Note 376.]

Sect. 70.

ALSO, if a man make a deed of feoffement to another of certaine lands, and delivereth to him the deed, but not liverie of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him, which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

(1 Ro. Abr. 859. 2 Co. 55. b.) HERE it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreth by the consent of the feoffor.

"*And delivereth to him the deed.*" Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of seisin of the land; for it hath its naturall effect to make it a deed.

(6 Co. 26. Ante 48. a.) [*f*] *Donationum alia perfecta, alia incepta et non perfecta: ut* ☞ *si donatio lecta fuerit et concessa, ac traditio nondum fuerit subsecuta.* But if the deed be delivered in name of seisin of the land, or if the feoffor saith to the feoffee, Take and enjoy this land according to the deed; or, Enter into this land, and God give you joy; these words do amount to a livery of seisin. [57. a.]

[*f*] Flet. li. 3. ca. 3. & ca. 15. 43 E. 3. tit. Feof. & Faits 51. 35 H. 8. Feof. Br. 27 Ass. 61. 38 Ass. 2. 39 Ass. 12. 41 E. 3. 17.

6 Co. 26. Sharp's case. (Ante 48. a.)

Sect. 71.

ALSO, if a house be leased to hold at will, the lessee is not bound to sustain or repaire the house, as tenant for terme of years is tyed. But if tenant at will commit voluntary wast, as in pulling downe of houses, or in felling of trees, it is said that the lessor shall have an action of trespasse for this against the lessee. As if I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending.

(5 Co. 13. b.) "*IF a house be leased to hold at will, the lessee is not bound, &c.*" For the statute of *Gloucester* above mentioned extends not to a tenant at will, and therefore for permissive wast, the lessor hath no remedy at all (1).

"*But*

(1) *Action on the case doth not lie for permissive waste.* 5 *Rep.* 13. b. Hal. MSS.—The case cited by lord Hale is that of the countess of Salop, who brought action on the case against her tenant at will for negligently keeping his fire, that the house was burnt; and the whole court held, that neither action on the case nor any other action lay; because at common law and before the statute of *Gloucester* action did not lie for waste against tenant for life or years, or any other tenant coming in by agreement of parties, and tenant at will is not within the statute. But the doctrine that no action lies should be understood

" *But if tenant at will commit voluntary waste, &c,*" [g] And true it is, that if tenant at will cutteth downe timber trees, or voluntarily pull downe and prostrate houses, the lessor shall have an action of trespasse against him, *quare vi et armis;* for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in

[g] 21 H. 6. 38. 28 E. 3. 25. 12 H. 4. 3. 22 E. 4. 50.

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stood with some limitation; for if tenant at will stipulates with his lessor to be responsible for fire by negligence or for other permissive waste, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life or years before the statute of *Gloucester;* for though the *law* did not make them liable to *any* action for waste, yet it did not restrain them from making themselves liable by *agreement.* It may be of use here to add something on the progress of the law as to the accidental burning of houses, so far as regards landlord and tenant. At the common law lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is expressed in *Fleta,* that *fortuna ignis vel hujusmodi eventûs inopinati omnes tenentes excusant;* and lady Shrewsbury's case is a direct authority to prove, that tenants are equally excusable for fires by *negligence.* See *Fleta, lib.* 1. *cap.* 12. Then came the statute of *Gloucester,* which, by making tenants for life and years liable to waste without any exception, consequeutly rendered them answerable for destruction by fire. Thus stood the law in lord Coke's time; but now by the 6 Ann. ch. 31, the ancient law is restored, and the distinction introduced by the statute of *Gloucester* between tenants at will and other lessees is taken away; for the statute of Anne exempts *all persons* from actions for *accidental* fire in any house, except in the case of special agreements between landlord and tenant. See ante 53. a, and note 7, there, and 53. b, and note 5, there. So much relates to tenants coming in *by act or agreement of parties.* As to tenants of *particular estates* coming in by *act of law,* as tenant by the curtesy, tenant in dower, and also before the statute for taking away military tenures, guardian in chivalry, these, or at least the two latter, being at common law punishable for waste, were therefore responsible for losses by fire; unless indeed they were answerable for waste *voluntary* only, and not for waste *permissive,* which is a distinction I have not yet met with in any book. If then tenant by the curtesy and tenant in dower were by the common law responsible for accidental fire, it may some time or other become necessary to determine whether they are within the statute of queen Ann. The statute in expression is very *general,* the words being, that no action shall be prosecuted against *any person* in whose house any fire shall *accidentally* begin; and it seems calculated to take away all actions in cases of accidental fire as well from *other* persons as from *landlords.* Note, that it has been doubted on the statute of Ann, whether a covenant to repair *generally* extends to the case of *fire,* and so becomes an agreement within the statute; and therefore where it is intended that the tenant shall not be liable, it is most usual in the covenant for repairing expressly to *except* accidents by fire.—Note also, that the distinction which is taken as to waste at common law between tenants coming in by *act of law* and tenants whose estates accrue by *act of parties,* will not universally hold; for tenants by statute-merchant and statute-staple, though they come in by *process of law,* are not punishable for waste. 6 Co. 37. Perhaps the reason of this may be, that it is in the power of debtors to prevent the commencement of these estates, or to determine them by paying the debts for which creditors have such estates, and also that the tenants of such estates are accountable for all profits they make beyond the amount of the debts due to them.—[Note 377.]

(1 Ro. Abr. 860. 2 Ro. Abr. 555.) in law to a determination of his will; [*h*] and so hath it beene adjudged (2).

[*h*] Mich. 28 & 29 Eliz. Rot. 318, in Com. Banc. inter Walgrave & Somerset. V. le Counte de Shrewsburie's case, 5 Co. 13. b.

[*i*] 27 H. 6. 3. 22 E. 4. 5. (2 Instit. 154. 1 Ro. Abr. 661. 663. 659. Post. 57. b. Cro. Cha. 303. Cro. Jam. 660. 4 Leon. 35.)

[*i*] If tenant at will granteth over his estate to another, and the grantee entreth, he is a disseisor (3), and the lessor may have an action of trespasse against the grantee; for albeit the grant was void, yet it amounteth to a determination of his will.

[*k*] V. 11 H. 4. 24. 1 E. 4. 9. b. 12 E. 4. 8. 21 E. 4. 19, & 76. 22 E. 4. 5. 3 H. 7. 4. 21 H. 7. 14.

"*As if I lend to one my sheepe to tathe his land, &c.* And the reason is, [*k*] that when the bailee having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespasse *sur le case* for this conversion, at his election (4).

Fleta. li. 2, ca. 1. (2 Ro. Abr. 556. Cro. Cha. 35.) (2 Inst. 183. 3 Inst. 20, 21.)

"*Trespass.*" *Transgressio derivatur à transgrediendo,* because it passeth that which is right: *Transgressio autem est, cùm modus non servatur, nec mensura: debet enim quilibet in suo facto modum habere, et mensuram. Nota,* in the lowest and the highest offences there are no accessaries, but all are principalls; as in ryots, routs, forcible entries, and other ☞ transgressions *vi et armis,* which are the lowest offences; and so in the highest offence, which is *crimen læsæ majestatis,* there be no accessaries; but in felonies there be accessaries both before and after. [57. b.]

Sect. 72.

NOTE, if the lessor upon a lease at will reserve to him a yearly rent, he may distreine for the rent behinde, or have for this an action of debt at his owne election(1).

"*HE*

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(2) *Yet if a stranger cuts trees, the tenant at will shall have action, as shall also the lessor, regard being had to their several losses.* 2 *H.* 4. 12. 19 *H.* 6. 45. Hal. MSS.—[Note 378.]

(3) *Lessee at will makes lease for years, and the lessee enters. Ruled on solemn argument,* 1. *That it is only a disseisin* at election, *and not* primâ facie. 2. *That admitting it to be a disseisin, the lessee at will is the disseisor, and has gained the freehold, and not the lessee for years,* Pasch. 9 Car. B. R. *Blunden and Baugh.* Hal. MSS.—See S. C. in W. Jo. 315. Cro. Cha. 302. Litt. 297. 372, and 1 Ro. Abr. 661. See also mr. Atkins's case in 4 Burr. vol. 1. p. 60, in which the curious doctrine of *disseisin by election* is most elaborately explained.—[Note 379.]

(4) *A. lessee for* 20 *years makes lease to B. for ten; B. continues in possession after expiration of the lease for ten years, and commits waste. A. may have either trespass or action on the case, because he is chargeable over in waste.* P. 6 Car. B. R. *Crook* n. 7. *West and Treade.* Hal. MSS.—See Cro. Cha. 187, and S. C. W. Jo. 224.—[Note 380.]

(1) *But in his count in debt against lessee at will, he ought to shew that he entered; but otherwise it is as to lessee for years.* 18 *H.* 8. 1 *Dy.* 14.—*Debt lies*

"*He may distreine for the rent behinde, or have for this an action of debt, &c.*" But if he impound the distresse upon the ground letten at will, the will is determined. Note, he may distreine for the rent, and yet it is no rent service, for no fealty belongeth thereunto, but a rent distreinable of common right.

21 H. 7. 39. b. 2 E. 4. 6. b. 7 E. 4. 27. a. 6 R. 2. Avowrie 86.

There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is alwaies by right, and tenant at sufferance entreth by a lawfull lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth in possession and wrongfully holdeth over (2). [*l*] As tenant *pur terme d'auter vie* continueth in possession after the decease of *Ce' que vie*, or tenant for yeares holdeth over his terme; the lessor cannot have an action of trespasse before entry. Now that a writ of entry *ad terminum qui præteriit* lyeth against such a tenant as holdeth over is rather by admission of the demandant, than for any estate of freehold that is in him, for in judgement of law he hath but a bare possession. But against the king there is no tenant at sufferance, but he that holdeth over in the cases abovesaid is an intruder upon the king, because there is no laches imputed to the king for not entring (4). [*m*] If tenant in taile of a rent grant the same in fee and dieth, yet the issue in taile may bring a *formedon*, and admit himselfe out of possession. The like law is it, if a man maketh a lease at will and dieth, now is the will determined; and if the lessee continueth in possession, he is tenant at sufferance, and yet the heyre by admission may have an assise of Mordancestor against him (5). [*n*] But there is a

(Post. 142. a.)

[*l*] Bracton, lib. 4, fol. 318. 4 E. 3. 39. 7 E. 3. 13. 24 E. 3. 24. 38 E. 3. 28. 7 R. 2. Saver de def. 30. 8 E. 4. 25. 4 H. 6. 30. 22 E. 4. 38. 18 E. 4. 25. F. N. B. 201. D. 203. 8 E. 2 entre 87. Temps H. 8. Br. 15. tit. Tenant a volunt. Pl. Com. 138. 4 H. 7. 3. (3) (Post. 270. b.

Cro. Cha. 187. Cro. Jam. 169. Ante 57. a.) [*m*] 13 H. 7. 10. a. 21 H. 6. 54. 5 E. 4. 3. 22 R. 2. tit. Discont. 48 E. 3. 23. Pl. Com. 435. 19 E. 3. bre. 468. 15 E. 4. Discont. 30. 6 E. 3. 56, 57. 21 E. 4, 5. 21 H. 7. 38. 10 E. 4. 18. Per Choke & Litt.

[*n*] Statute de Merlbridge, cap. 26. Abb. Ass. 120. b. F. N. B. 196. 11 E. 4. 10, & 11. Bract. lib. 4, fo. 262, 263. (Post. 271. 1 Ro. Abr. 663.)

diversity

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lies against copyholder for his rent. Adjudged M. 10 *Car. B. R. Hitcham's case.* Hal. MSS.—Hitcham's case is in 1 Ro. Abr. 374. P. pl. 1, and 374. Q. pl. 3. But from Rolle's report of the case, and from some subsequent authorities, it seems doubtful whether debt will lie for rent against a copyholder, particularly unless the lord has conveyed away the manor, and so lost the remedy by distress. See Carth. 92, and Gilb. Ten. 3d Lond. ed. 308.—[Note 381.]

(2) As to holding over, see 4 G. 2. c. 28, by which every tenant for life or years, or other person claiming under or by collusion with such tenant, who shall wilfully hold over *after* determination of the term, and *demand* made in writing of delivery of the possession by the landlord or him in reversion or remainder, is made liable to the payment of double the yearly value of the lands detained. This statute only took in cases in which the *landlord* gave notice to quit, and therefore the deficiency was supplied by the 11 G. 2. c. 19, which extends the provision for double rent to the holding over after the *tenant's* giving notice to quit. See a case on this latter statute in 4 Burr. v. 3. page 1603. See also 6 Ann. c. 18. s. 1, against holding over by guardians or trustees of infants, and by husbands seised in right of their wives, and by all others having particular estates determinable on any life or lives.—[N. 382.]

(3) Vid. 21 *H.* 6. 38. Hal. MSS.

(4) 4 *H.* 6. 12. Hal. MSS.

(5) *If the heir accepts rents from him, he is tenant at will to the heir.* 10 *E.* 4. 18. *Tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election. Dy.* 62. Hal. MSS.—[Note 383.]

diversity between particular estates made by the *terretenant*, as above is said, and particular estates created by act in law: as if a gardian after the full age of the heire continueth in possession, he is no tenant at sufferance, but an abator, against whom an assize of Mordancestor doth lye (6). *Et sic de similibus* (7).

Chap. 9. Tenant by Copie. Sect. 73.

TENANT by copy of court roll is, as if a man be seised of a mannor within which mannor there is a custome, (tenant per copie de court rol' est (8), deins quel manor il y ad un custome), *which hath beene used time out of minde of man, that certaine tenants within the same mannor have used to have lands and tenements, to hold to them and their heires in fee simple, or fee taile, or for terme of life, &c. at the will of the lord* (1) *according to the custome of the same manor.*

(3 Co. 7. Heydon's case. 1 Ro. Abr. 498.)

" *TENANT by copy, &c.*" *Tenens per copiam rot. Cur'. Copy* we call in *Latine copiam*, though *copia* in his proper signification signifieth plenty: but we have made a *Latine* word of the *French* word *copie:* and this is ancient; for in the *Register*, fol. 51, there is a writ *de copiâ libelli deliberandâ*, which is grounded upon the statute of 2 *H.* 4. ca. There is no tenant in the law that holdeth ☞ by copie, but onely this kinde of customary tenant, for no man holdeth by copie of a charter, or by copy of a fine, or such like, but this tenant holdeth by copy of court roll. [58. a.]

[a] Bracton, lib. 2, cap. 8, fol. 26, & lib. 4, fol. 209. Britton, 165. Fleta, lib. 1, ca. 8, & lib. 2, cap. 6. Item de custumariis. Ockham Cap. quid murdrum. F. N. B. f. 12. c.

[a] *Bracton* calleth copiholders *villanos sockmannos*, not because they were bond, but because they held by base tenure, by doing of villein services.

[b] 1 H. 5. 11. 14 H. 4. 34. 42 E. 3. 25.

And *Britton* saith, that some that be free of blood doe hold land in villenage; and *Littleton* himselfe in the next Chapter calleth them tenants by base tenure: and in *F. N. B.* fol. 12. C. *Et cest terme, que est ore a cest jour appel copitenaunts, ou copiholders, ou tenaunts per copie, est forsque un novel nosme trove, car d'ancient temps ils feur' appelles tenants in villenage, ou de base tenure, &c.* [b] And yet in 1 *H.* 5. 11, they be called copiholders; in 14 H. 4. 34, *tenant per le verge*; in 42 *E.* 3. 25, *tenant per roll solonque le volunt le seignior*; and in the statute of 4 *E.* 1, called *extenta manerii*, they are called *custumarii tenentes*, and so

Vid. 4. Co. 2. Browne's case.

doth

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(6) *And if guardian in such case dies seised, the entry of the heir tolls.* 7 *H.* 4. 42, per *Cul.* Hal. MSS.—[Note 384.]

(7) See further as to tenant by sufferance in title *Estate*, Vin. Abr. and Com. Dig.

(8) Si come un home soit seisie d'un maner, *L. and M.—Roh.—P. and Red.*

(1) Nota, *these words* ad voluntatem domini *are material to express copyhold; for if these words be omitted in pleading, it shall be intended, that the estate is a customary freehold.* M. 7 Car. B. R. *Crook n.* 7.. *Hughes's case.* Hal. MSS.—See Cro. Cha. 219.—See further as to *customary freehold*, post. 59. b. and note 1, there.—[Note 385.]

doth *Fleta* call them; and before him *Ockam* (2) (who wrote in the raigne of *H.* 2.) spake of them, and how, and upon what occasion they had their beginning.

[c] *Terra ex scripto Saxonicè Bockland. Fundum veteres aut ex scripto qui Bockland, i. bookland, aut sine scripto qui Folkland dicebatur, possidebant. Quæ fuit ex scripto possessio commodiore erat possessione, libera, atque immunis. Fundus sine scripto censum pensitabat annuum, atque officiorum servitute quâdam est obligatus. Priorem viri plerumque nobiles atque ingenui, posteriorem rustici ferre et pagani possidebant* (3).

[c] Lamb. verb. Terra ex scripto.

"*Court.*" *Curia*, court, is a place where justice is judicially ministred, and is derived *à cura, quia in curiis publicis curas gerebant* [d]. The court baron must be holden on some part of that which is within the mannor, for if it be holden out of the mannor it is voyd; unlesse a lord being seised of two or three mannors hath usually time out of mind kept at one of his manors courts for all the said manors, then by custome such courts are sufficient in law, albeit they be not holden within the severall mannors (4). And it is to be understood that this court is of two natures. The first is by the common law, and is called a court baron, as some have said, for that it is the freeholders or freemans court (for barons in one sense signifie freemen), and of that court the freeholders being suitors be judges, and this may be kept from three weekes to three weekes. The second is a customary court, and that doth concerne copiholders, and therein the lord or his steward is the judge. Now as there can be no court baron without freeholders, so there cannot be this kind of customary court without copiholders or customary holders. And as there may be a court baron of freeholders only without copiholders, and then is the steward the register, so there may be a customary court of copiholders onely without freeholders, and then is the lord or his steward the judge (5). And when the court baron is of this double nature, the court roll containeth as well matters appertaining to the customary court, as to the court baron.

(4 Inst. 268.)

[d] Vid. 4 Co. 24, inter Murrell & Smith. Eodem lib. fol. 27, inter Clifton & Molineux. (1 Ro. Abr. 527.)

4 Co. 26. Melwitche's case. Britton, fol. 274.

(4 Co. 26. b.)

And

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(2) This author, whom lord Coke cites on several occasions, according to sir William Dugdale, wrote a book on *tenures of the king*, but did not perfect it. Dugd. Orig. Jurid. 1st ed. 56. I imagine, that this book is the work referred to by lord Coke; but whether it is in print, or lord Coke cites it from a manuscript, I have not yet been able to learn.—[Note 386.]

(3) See ante 5. b, and note 1, there, and 6. a, and note 6, there.

(4) See acc. Cro. Cha. 367. But the lord may take a surrender out of the manor, because that may be done out of court; and so may the steward if there is a special custom, or according to latter authorities without. See 1 Salk. 184, and post. 59. a.—[Note 387.]

(5) *A steward* de facto *is sufficient.—The king constitutes A. and B. stewards of a manor by patent* sub sigillo scaccarii; *A. holds courts; and though the appointment ought to have been* sub magno sigillo, *and both ought to have holden the courts, yet it was ruled, that grant by one was good. So it is as to the lord's clerk or an under steward.* P. 22 Eliz. Scacc. Hal. MSS.—The doctrine in this case seems confirmed by the cases and authorities cited in Vin. Abr. *Steward*, F. G. J. K. and Com. Dig. *Copyhold*, C. 5. Note also particularly what is expressed in Co. Copyhold, sect. 45, in respect to the law's not being nice in examining the imperfections of the steward's authority, where his acts are *ordinary* and *necessary*, and not of a *judicial* kind.—[Note 388.]

And for as much as the title or estate of the copiholder is entred into the roll whereof the steward delivereth him a copie, thereof he is called copiholder. [e] It is called a court baron, because among the lawes of king *Edward the Confessor*, it is said: *Barones verò qui suam habent curiam de suis hominibus, &c.* taking his name of the baron who was lord of the mannor, or for that properly in the eye of law it hath relation to the freeholders, [f] who are judges of the court. And in ancient charters and records the barons of *London*, and barons of the Cinque Ports, do signify the freemen of *London* and of the Cinque Ports.

[e] Lamb. fol. 128, and 136. Cambden Brit. fo. 121. b. Britton, fo. 274.

[f] Mirror, cap. 1, sect. 3.

Domesday.

"*Seised of a manor.*" *Manerium dicitur à manendo secundum excellentiam sedes magna fixa et stabilis. Lageman, i. habens socam et sacam super homines suos, &c.* [g] *Et sciendum est, quòd manerium poterit esse per se ex pluribus ædificiis coadjuvatum sive villis et hamlettis adjacentibus. Poterit etiam esse manerium et per se et cum pluribus villis, et cum pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per se sed villæ sive hamlettæ. Poterit etiam esse per se manerium capitale, et plura continere sub se maneria non capitalia, et plures villas et plures hamlettas quasi sub uno capite aut dominio uno.* And afterwards, *Manerium autem fieri poterit ex pluribus villis vel unâ, plures enim villæ poterunt esse in corpore manerii sicut et unâ* (6). And in these [h] ancient authors you shall see the difference *inter mansionem, villam, et manerium*. Concerning the institution of this court by the lawes and ordinances of ancient kings, and especially of king *Alfred*, it appeareth ☞ that the first kings of this realme had all the lands of *England* in demeane (1), and *les grand manors et royalties* they reserved to themselves, and of the remnant they, for the defence of the realme, enfeoffed the barons of the realme with such jurisdiction as the court baron now hath, and instituted the freeholders to be judges of the court baron. And herewith agreed the aforesaid law of Saint *Edward*. And it is to be observed that in those ancient lawes under the name of barons were comprised all the nobility.

[g] Bracton, lib. 4, fo. 112. Fleta, lib, 4. c. 15, & lib. 6, cap. 49. Britton, fol. 124.

[h] Bract. lib. 5, fo. 434. Fleta, ubi supra. Mirror, cap. 1, sect. 3.

[58. b.]

There may be a customary manor granted by copy of court roll (2). So although the word be *(seised)* which properly betokeneth a freehold, yet tenant for yeares, tenant by statute merchant, staple, *elegit*, and tenant at will, gardian in chivalrie (3), &c. who are not properly seised but possessed, are *domini pro tempore*, not only to make admittance, but to grant voluntary copies of ancient copihold lands which come into their hands (4). And

(1 Co. 140. b. Cro. Jam. 260. Mo. 95. 8 Co. 63. b. 1 Ro. Abr. 499. 4 Co. 26. b. 23. b. Cro. Jam. 98.)

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(6) For other explanations of the word *manor*, see in Cow. Interp. voc. *Manor*, and the books there cited, particularly Fulb. Paral. part 1. fol. 18. a.

(1) See as to this ante 1. b. and the authorities in note 1, there.

(2) This is denied in Cro. Jam. 260, and is a point which has been much controverted. See Vin. Abr. *Copyhold*, E. and Com. Dig. *Copyhold*, C. 1.

(3) *Guardian in socage may grant copies in his own name, nor can the heir hold courts during the interest of the guardian.* T. 1 Jac. Rot. 883. C. B. *Shopland and Ridler. Noy n.* 372. *Clare's case.* Hal. MSS.—See the former case acc. in Cro. Jam. 55. 98. 1 Ro. Abr. 499. pl. 4. Ow. 115. Godb. 143. 4 Leon. 238. See also acc. 2 P. Wms. 122.—[Note 389.]

(4) *Custom to grant copies in reversion after estates for life. Ruled, that* dominus pro tempore *may make such grants; and they will bind, though the particular*

And therefore there is a diversity between disseisors, abators, intruders, and others that have defeasible titles; for their voluntary grants of ancient copihold lands shall not bind the disseisees or others that right have (5). And voluntary grants by copie, made by such particular tenants as is aforesaid, shall binde him that hath the freehold and inheritance, because all these be lawfull lords for the time being; but so is not a tenant at sufferance, because he is in by wrong, as hath been said; and so [i] was it adjudged *P. 29 Eliz. inter Rouse et Artois*, 4 *Co.* 24. But admittances made by disseisors, abators, intruders, tenants at sufferance, or others that have defeasible titles, stand good against them that right have, because it was a lawfull act, and they were compellable to doe them.

[i] 4 Co. 24. P. 29 Eliz. inter Rous & Artois.

[k] And yet in some speciall case an estate may be granted by copie, by one that is not *dominus pro tempore*, nor that hath any thing in the manor. As if the lord of a manor by his will in writing deviseth, that his executor shall grant the customary tenements of the manor according to the custome of the manor for the paiment of his debts, and dieth, the executor having nothing in the manor, may make grants according to the custome of the manor (6).

[k] Dier. Mich. 7 & 8 Eliz. Manuscript.

" *Within which manner there is a custome, which hath beene used time out of minde of man, &c.*" Of this custome here spoken of there be three supporters. The first is time, and that must be out of memory of man, which is included within this word (custome) so as copihold cannot begin at this day. [l] The second supporter is, that the tenements be parcell of the manor or within the manor, which appeares by these words of *Littleton, that certaine tenants within the same mannor, &c.* The third supporter is, that it hath beene demised and demisible by copie of court roll; for it need not be demised time out of mind by copie of court, but if it be demisible it is sufficient. For example: if a copihold tenement escheat to the lord, and the lord keepeth it in his hands by many yeares, during this time it is not demised but demisible, for the lord hath power to demise it againe (7).

[l] Vid. 4 Co. 24, inter Murrel & Smith.

" *At*

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particular estate doth not determine during his interest. P. 41 Eliz. B. R. n. 27. C. C. *Guy and Rey.* Hil. 26 Eliz. *Sir Peter Carew's case. More* 147. Vide tamen H. 14 Eliz. ibid. 95, *the case of Com. Oxon.* contra. Hal. MSS.—Accord. that the lord *pro tempore* may grant in reversion, where reversions are grantable by copy. See Cro. Eliz. 66. 2 P. Wms. 122, and the case of Lade and Barker in 2 New Abr. 684. See also the subject enlarged upon in Gilb. Ten. 3d Lond. edit. 204.—[Note 390.]

(5) *If copyholder surrenders to disseisor to the use of I. S. disseisor may admit him, if the surrenderor be a copyholder in fee; but otherwise it is, if he be only copyholder for life, as it seems, for it is a new grant.* P. 41 Eliz. B. R. *Martyn and Rew.* Hal. MSS.—See Gilb. Ten. 3d Lond. edit. 201.—[N. 391.]

(6) *If heir before assignment of dower grants copies, it will not bind the wife.* P. 28 Eliz. B. R. *Rous and Artois.* Hal. MSS.—See further as to the persons by whom copyhold estates may be granted, in Vin. Abr. *Copyhold*, G. and Com. Dig. *Copyhold*, C. 3.—[Note 392.]

(7) What thing destroys the custom of granting a copyhold. *One is lessee for life or tenant in tail of a manor; a copyhold escheats; and lessee or tenant in tail makes lease for years of the copyhold. Though* quoad *himself the custom is gone, yet* quoad *the issue or reversioner the custom is not gone. So it is in*

case

"*At the will of the lord according to the custome.*" So as he is not a bare tenant at will, but a tenant at will according to the custome of the mannor, as shall be spoken more hereafter in this Chapter.

(1 Ro. Ab. 498.) 11 Co. 17. Sir H. Nevill's case. 4 Co. 30, 31, inter Hoe & Tayler.

"*Certaine tenements.*" What things may be granted by copy, is necessary to be knowne. First, a manor may be granted by copy (8). Secondly, underwoods without the soile may be granted by copy to one and to his heires, and so may the herbage or vesture of land. Thirdly, generally all lands and tenements within the manor and whatsoever concerneth lands or tenements may be granted by copie: as a faire appendant to a mannor may be granted by copy, &c. (9).

Regist. F. N. B. 270. d. V. Mag. Carta in cap. Itin. fol. 151. Bract. lib. 3, 117. Fleta, lib. 1. cap. 20.

"*Consuetudines.*" This word *consuetudo* being derived *à consueto*, properly signifieth a custome, as here *Littleton* taketh it: but in legall understanding it signifieth also tolles, murage, pontage, paviage, and such like newly granted by the king; and therefore when the king grants such things, the words be, *Concessimus, &c. in auxilium villæ prædict' paviand', &c. consuetudines subscriptas, viz. de quolibet sunnagio, &c.*

And it was an article of the justices in eire to inquire *de novis consuetudinibus levatis in regno, sive in terrâ, sive in aquâ, et quis eas levavit et ubi;* where *consuetudo* is taken for tolles and such like taxes or charges upon the subject.

Sect. 74.

AND such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements

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case of a husband seised in right of his wife. P. 38 Eliz. B. R. *Conesby and Ruskey. And accordingly agreed* per curiam P. 1650, *in Cremer and Burnet. But* vid. contra M. 14 Car. B. R. *Crook n. 22, in Lee's case. Copyholder surrenders to the use of the lord, who makes a lease of the manor and of this tenement by name. Ruled, that the tenement is still grantable by copy; for it passes with the manor, and so continues demisable.* Tr. 10 Car. *Crook n. 4. Lee and Boothby.—The king is seised of a copyhold manor, the copyhold escheats, and the king makes lease for years. Ruled, that though the lease is good, yet after the term the copyhold is grantable by copy, because the grant doth not enure to a double intent in the case of the king.* P. 1650. *Cremer and Burnet.* Hal. MSS. —See Conesby and Ruskey in Cro. Eliz. 459. Cremer and Burnet in Sty. 266, and 2 Ro. Abr. 196. pl. 34. and Lee's case in Cro. Cha. 521. W. Jo. 449, and 1 Ro. Abr. 498. pl. 1. See also the observations on the two latter cases in Vin. Abr. *Prerogative*, G. c. pl. 3, 4. See further on the destruction of copyhold estates in Com. Dig. *Copyhold*, B. 3, and L. and Vin. Abr. *Copyhold*, R. —[Note 393.]

(8) See note 2. supra.

(9) *Tithes are grantable by copy.* P. 43 Eliz. B. R. *Sands and Drury* per curiam. Hal. MSS.—See as to the case here cited by lord Hale, Vin. Abr. *Copyhold*, E. pl. 1. See also as to things grantable by copy, Vin. Abr. *ubi supra*, and Com. Dig. C. 1.—[Note 394.]

ments in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this forme, or to this effect.

A. *of* B. *commeth into this court, and surrendreth in the same court a mease, &c. into the hands of the lord* (in manus domini), *to the use of* C. *of* D. *and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that commeth the aforesaid* C. *of* D. *and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heires, or to him and to his heires issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therfore the rents, services, and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.*

[59. a.] "*AND such a tenant may not alien his land, &c.*" And this is true in case of alienation (1), but when a man hath but a right to a copihold, he may release it by deed or by copie, to one that is admitted tenant *de facto* (2). (1 Ro. Abr. 509.) Lib. intrat. 131. 4 Co. 25 b. inter Kite & Queinton.

"*Alien by deed.*" Here it appeareth by *Littleton*, that there must be an alienation; for the making of the deed alone, unlesse somewhat passe thereby, is no forfeiture. As if he make a charter of feoffment, or a deed of demise for life, and make no livery, this is no forfeiture, because nothing passeth, and therefore no alienation (3); but otherwise it is of a lease for yeares (4).

"*Forfeited*

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(1) *Parceners of copyhold cannot make partition without the lord's licence* P. 41 Eliz. B. R. *Fuller and Terry.* Hal. MSS.—The same case is in 1 Ro. Abr. 509. pl. 1, 2, but the points there are different.—[Note 395.]

(2) *If copyhold is granted to A. and B. who are admitted, A. may release to B. without fine or surrender. Adjudged* P. 19 Jac. *entered* H. 16 Rot. 735. C. B. *Wase and Pretty. So he may release condition.* T. 2 Jac. *But if he release to disseisor, it is holden void; but he may release all his right to him who is admitted.* M. 5 Car. C. B. per curiam. Hal. MSS.—See acc. Wase and Pretty in Winch. 3, and s. p. acc. by the court in Hetl. 150. See further as to the effect of a release on a copyhold, Vin. Abr. *Copyhold*, Z. a. and Com. Dig. *Copyhold*, I. i.—[Note 396.]

(3) But according to Rolle, though livery is not made, the feoffment is a forfeiture, if there be a letter of attorney to deliver seisin, because then the feoffee may at any time perfect the conveyance: and he thinks, that lord Coke ought to be understood with this distinction. 1 Ro. Abr. 508. pl. 12, 13. However, the distinction in Rolle may be doubted, for the criterion of forfeiture of a copyhold by alienation seems to be the *actual passing* of an unlawful estate to the lord's prejudice, and in the case of the feoffment no interest can pass till livery; nor is it strictly true, that the feoffee may at any time perfect the conveyance, for it is possible, that before livery the feoffor may revoke the power of attorney, or the attorney may die or refuse to execute his authority. See further on this subject, 3 Leon. 109, and Godb. 269.—[No. 397.]

(4) The *plural* number is here significant; for a lease for *one* year is not a forfeiture, such lease by copyholder being, as lord Coke in another place writes, warranted by the *general* custom of the realm. 4 Co. 26. See also acc. 9 Co. 75. b. W. Jo. 249, and Litt. Rep. 233. See also 1 And. 192, and Mo. 272, and 679, by which it appears that it was once doubted, whether to warrant a lease for one year without the lord's licence a *particular* custom

" *Forfeited unto him.*" This adjective in *Latine* is *forisfactus*, the verbe is *forisfacere*, and the nowne *forisfactura*. They are all derived of *foris*, (that is) *extra*, and *facere*, *quasi diceret*, *extra legem seu consuetudinem facere*, to do a thing against or without law or custome; and that legally is called a forfeiture. *Littleton* useth this word but once in all his booke. What shall be said [*k*] forfeitures of copiholds you may read at large in my Reports (5).

[*k*] 4 Co. inter les copiholds cases 21. 23. 25. 27, 28. 8 Co. 92. 99, 100. 9 Co. 75, 107. 10 Co. 131.

" *In court.*" [*l*] This is the generall custome of the realme, that every copiholder may surrender in court, and need not to alleage any custome therefore. So if out of court he surrender to the lord himselfe, he need not alledge in pleading any custome. But if he surrender out of court into the hands of the lord by the hands of two or three, &c. copiholders, or by the hands of the bayliffe or reeve, &c. or out of court by the hand of any other, these customes are particular, and therefore he must plead them (6).

(1 Ro. Abr. 500. 9 Co. 76.)

[*l*] Bract. lib. 2, cap. 8, & lib. 4. 49. 15 H. 4. 34. 1 H. 5. 11.

[*m*] *Bracton*,

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was not necessary.—The following annotation is by lord Hale. Vid. *as to forfeiture by lease or alienation. A. is lessee of a manor for five years; copyholder grants bargains and sells his copyhold to A. and his heirs. Ruled, that this amounts to a full surrender; and if after the term he who hath the fee of the manor admits A. or his heir, it amounts to a new grant.* T. 21 Jac. C. B. *Hassel and Hamerton.—Copyholder in fee makes lease for a year, and so* de anno in annum *during the life of the copyholder* except one day at the end of every year; *and this was adjudged to be a forfeiture; and so if it was by covenant, for it amounts to a lease for two years, and the exception of a day doth not aid the case.* Vid. 10 Jac. B. R. *Bulstr. n.* 201. *Hamlen and Hamlen.* T. 10 Jac. ibid. *n.* 232. *Luttrell and Weston.—Copyholder makes lease by indenture for one year, and same day by another makes another lease for one year to commence after the former, and so a third lease by a third indenture for one year after the second, and then surrenders to the steward to the use of the lord. Ruled,* 1. *Though this be by several indentures, and two days interpose between the end of one lease and the beginning of another, it is a forfeiture.* 2. *The covin is apparent, though it was not found.* 3. *Though he surrenders to the lord not having notice, the lord shall be adjudged to be in point of forfeiture, and shall avoid the leases.* M. 7 Car. B. R. *n.* 15. *Matthew and Whetton.* Hal. MSS.—See the first case cited by lord Hale in Winch. 66. W. Jo. 41, and Hutton 65, though in these books the name is different. See the second case in 1 Bulstr. 189, the third in 1 Bulstr. 215, and the fourth in Cro. Cha. 233. W. Jo. 249, and 1 Ro. Abr. 508. pl. 10.—It is observable, that according to the third case cited by lord Hale a mere covenant that the lessee shall enjoy for a second year is a forfeiture; but the second case and other authorities are to the contrary; because, though *in general* a covenant amounts to a lease, yet it seems harsh to give such a construction, where a lease amounts to a forfeiture, and the intention of the parties may have effect by way of agreement. See Cro. Jam. 311, and 2 Keb. 267. See further as to leases by copyholders and forfeiture on that account, New Abr. tit. *Leases*, I. 6. Vin. Abr. *Copyhold*, G. c. H. c.—[Note 398.]

(5) See also tit. *Copyhold*, in Vin. Abr. D. c. to E. d. 2. New Abr. L. and Com. Dig. M.

(6) Nota, *by Rolle surrender into the hands of the stewards, though out of the court, is good without custom.* M. 24 Car. B. R. *Baker and Denham.* Hal. MSS.—See acc. 1 Ro. Abr. 500. pl. 3, 4. Leon. 111. 1 Salk. 184. Some

make

[m] *Bracton*, lib. 4, fol. 209, speaking of these kind of customary tenants, saith, *Dare autem non possunt tenementa sua, nec ex causâ donationis ad alios transferre non magis quàm villani puri; et unde si transferre debeant, restituant & ea domino vel ballivo, et ipsi ea tradant aliis in villenagium tenenda.* But although it be incident to the estate of a copihold to passe, as our author saith, by surrenders, [b] yet so forcible is custome, that by it a freehold and inheritance may also passe by surrender (1) (without the leave of the lord) in his court, and be delivered over by the baily to the feoffee, according to the forme of the deed, to be inrolled in the court or the like.

[59. b.]

[m] Bract. lib. 4, fol. 209, & lib. 2, cap. 8, ac. 14 H. 4. 34.

[b] Coram rege Mich. 31 E. 3. Ranulph. Huntingfield's case. 3 E. 3. Corona 310. 11 H. 4. 83. per Thorning.

"*A. B. commeth into this court, and surrendreth, &c.*" Here *Littleton* putteth an example of a surrender in court, and in this example three [c] things are to be observed.

First, that the surrender to the lord be generall without expressing of any estate (2), for that he is but an instrument to admit *Cesty a que use*, for no more passeth to the lord, but to serve the limitation of the use (3); and *Ce' que use*, when he is admitted, shall be in by him that made the surrender, and not by the lord (4).

[c] Vide 4 Co. inter les cases de copiholds.

Secondly,

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make a distinction between stewards by *deed* and stewards by *parol*, and think, that only the former can take surrenders out of court. Godb. 142, and 1 L. Raym. 159. But this distinction has been frequently denied, and indeed seems unsupported by any good reason. Cro. Jam. 526. Com. Rep. 85.—[Note 399.]

(1) M. 9 Jac. C. B. n. 5. D. D. *Wilde and Francis. Adjudged accordingly, and the admittance is* tenendum, *but not* ad voluntatem domini. Hal. MSS.—Vid. acc. ante 49. a, and note 6, there, and also the books cited in Blackst. Law Tr. 8vo. ed. v. 1. p. 144. From these authorities it appears, that estates held *by copy of court-roll*, but not *at the will of the lord*, have been deemed *freehold* estates as well by others as by lord Coke, and in order to distinguish them from the ordinary kind have been denominated *customary freeholds*. In consequence of the prevalence of this notion, a considerable number of *such* tenants some few years ago claimed a right of voting as *freeholders* at the election of knights of the shire. This gave occasion to a short but most excellent treatise on the subject, in which the learned author traces the origin of lands held in this peculiar way, and proves by the most clear and forcible arguments, that, though these tenures in some respects *resemble* freeholds, they are in *truth* nothing more than a *superior* kind of copyhold. Soon after the publication of this treatise, the doctrine inserted in it received confirmation from an act of parliament, declaring, that no person holding *by copy of court-roll* should be entitled to vote at the election of knights of the shire. See Blackst. Law Tr. 8vo. ed. v. 1. p. 105, and 31 G. 2. c. 14.—[Note 400.]

(2) *Copyholder for life surrenders to the use of D. the lord accepts the surrender and admits D. for his life who dies. Adjudged, that the surrenderor shall not have the land, but the lord, for he who surrendered had not any reversion. But if copyholder surrenders to the use of B. there on B's. death the surrenderor shall have, for he hath the remainder.* M. 6 Car. B. R. Crook n. 10. *King and Lord.* Hal. MSS.—See Cro. Cha. 204, and S. C. 1 Ro. Abr. 504. 2 Ro. Abr. 46g. See 9 Co. 107. Vin. Abr. *Copyhold*, P. 6 Mod. 68. 1 Salk 188, and Gilb. Ten. 3d Lond. ed. 257.—[Note 401.]

(3) See post. 62. a. and Jefferies's case cited from Wils. in note 1.

(4) Acc. by Wilmot justice in 4 Burr. vol. 3. p. 1543, and see further as to this Yelv. 223. 4 Co. 27. b. Com. Dig. *Copyhold*, F. 14, and Gilb. Ten. 3d Lond. ed. 257.

Secondly, if the limitation of the use be generall, then *Ce' que use* taketh but an estate for life, and therefore here *Littleton* expresseth upon the declaration of the use, the limitation of the estate, viz. in fee simple, fee taile, &c.

[d] Mich. 2 & 3 Ph. & M. in Com. Banco, by the whole court in Constable's case of Pickenham in Norfolke.

Thirdly, the lord cannot grant a larger [*d*] estate than is expressed in the limitation of the use. *Littleton* here putteth his case of one. If two joyntenants be of copihold lands in fee, and the one out of court according to the custome surrender his part to the lord's hands, to the use of his last will, and by his will deviseth his part to a stranger in fee, and dyeth, and at the next court the surrender is presented, by the surrender and presentment the joynture was severed, and the devisee ought to be admitted to the moitie of the lands, for now by relation the state of the land was bound by the surrender (5).

[e] Fleta, lib, 2. c. 65 & 71.

"*Into the hands of the lord* (in manus domini)." *Dominus manerii*, the lord of a mannor, is described [*e*] by *Fleta*, as he ought to be, in these words. *In omnibus autem et supra omnia decet quemlibet dominum verbis esse veracem, et in operibus fidelem, Deum et justitiam amantem, fraudem et peccatum odientem, voluntariosque, malevolos, et injuriosos contemnentem, et apud proximos pietatem vultumque motibilem et plenum; ipsius enim interest potiùs consilio quàm viribus uti, propriove arbitrio. Non cujuslibet voluntarii juvenis menestralli, vel adulatoris, sed jurisperitorum virorum fidelium et honestorum, et in pluribus expertorum, consilio debet favere. Qui bene sibi vult disponere et familiæ suæ, scire veram executionem terrarum suarum necessarium erit, ut perinde sciat quantitatem suarum facultatum et finem annuarum expensarum.* And the residue is fit for every lord of a mannor to know and follow, which were too long here to be recited; only his conclusion having spoken of the lord's revenue and expences, I will adde, *Quæ omnia distinctè scribantur in membranis, ut perinde sagaciùs vitam suam disponat et faciliùs convincat mendacia compostariorum.*

[f] See more of this 4 Co. the cases of copiholds. Trin. 1 Ja. Rot. 854. inter Shapland & Ridler in repl. in Com. Banco, the case of the gardian in socage adjudged. (Cro. Jam. 98. 6 Co. 60. b.)

[*f*] If the lord of the manor for the time being be lessee for life or for yeares, gardian, or any that hath any particular interest, or tenant at will of a manor, (all of which are accounted in law *domini pro tempore)* and doe take a surrender into his hands, and before admittance the lessee for life dyeth, or the yeare's interest or custody doe end or determine, or the will is determined, though the lord commeth in above the lease for life or for yeares, the custody or other particular interest or tenancy at will, yet shall he be compelled (6) to make admittance according to the surrender; and so was it holden in 17 *Eliz.* in the earl of *Arundel*'s case, which I my selfe heard.

"*And*

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(5) M. 3 Jac. B. R. *Crook, n.* 30, *Porter and Porter.* Hal. MSS.—See Cro. Jam. 100, by which the case appears to have been adjudged according to lord Coke's doctrine of relation. See further as to the relation of surrenders in Vin. Abr. *Copyhold*, T. b.

(6) Nota, *ruled, that action on the case doth not lie against the lord who refuses to admit, but the remedy is to compell him in chancery.* P. 13 Jac. B. R. Crook, n. 1. *Ford and Hoskins.* Hal. MSS.—See Cro. Jam. 368, and S. C. Mo. 842. 2 Bulstr. 336. But it is said to have been adjudged, that though *surrenderee* cannot have action on the case against the lord for refusing to admit, yet the *surrenderor* may. 3 Bulstr. 217.—[Note 402.]

"*And giveth the lord for a fine.*" For the signification of this word *(fine)*, *Vide* Sect. 174. 182. 194. 441.

Of fines due to the lord by the copiholder, some be by the change or alteration of the lord (7), and some by the change or alteration of the tenant. The change of the lord ought to be by the act of God, otherwise no fine can be due; but by the change of the tenant either by the act of God, or by the act of the party, a fine may be due: for if the lord doe alledge a custome within his manor to have a fine of every of his copiholders of the said manor at the alteration or change of the lord of the mannor, be it by alienation, demise, death, or otherwise; this is a custome against the law, as to the alteration or change of the lord by the act of the party, for by that meanes the copiholders may be oppressed by multitude of fines, by the act of the lord. But when the change groweth by the act of God, there the custome is good, as by the death of the lord. And this, upon a case in the chancery [g] referred to sir *John Popham* chiefe justice, and upon conference with *Anderson*, *Periam*, *Walmesley*, and all the judges of *Serjeants Inn* in *Fleetstreet*, was resolved, and so certified into the chancery. But upon the change or alteration of the tenant (8), a fine is due unto the lord.

[g] T. 39 Eliz. betweene the copiholders of the mannor of Guiltirns in the county of Northumberland, and Armestrong lord of the manor, in chancerie. (11 Co. 44. a. Cro. Cha. 196. 2 Ro. Abr. 578.)

Of fines taken of copiholders some be certaine by custome, and some be incertaine, but that fine, though it be *incertus*, yet must it be *rationabilis*. And that reasonablenesse shall be discussed by the justices upon the true circumstances of the case appearing unto them; and if the court where the cause dependeth, adjudgeth the fine exacted unreasonable, then is not the copiholder compellable to pay it (1). And so was it adjudged: [h] for all excessiveness is abhorred in law. See more concerning fines of copiholders in my Reports [i], which are so plainly there set downe, as they need not be rehearsed here.

[60. a.]

[h] Pash. 1 Jac. in com. banco rot. 1845. inter Stallon & Brady.

[i] 4 Co. the cases of copiholds.

Sect.

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(7) Vid. *for tallages in Wales on change of the lord.* 34 *H.* 8. *c.* 26. Hal. MSS. —See Sect. 93.

(8) See Vin. Abr. *Copyhold*, W. b. See also much curious learning on this subject in the case of the earl of Bath and Abney in 4 Burr. vol. 1, page 206. In that case the court held, that the executor of a copiholder, for a long term of years, was compellable to be admitted and to pay a fine. The great point of the case was, whether a fine became due on every *change of the tenant*, or on *change of the estate only*.—[Note 403.]

(1) *What shall be a reasonable fine. Two years and an half of racked rent adjudged unreasonable; and a year and an half is sufficient.* T. 6 Car. B. R. *Crook*, *n.* 8. *Dow and Golding. Two years value of racked rent adjudged unreasonable.* 2. *He, who would take advantage of a forfeiture for non-payment of a fine uncertain, ought to assess a reasonable fine, and prefix a day and place within the manor for payment of it. Otherwise non-payment is not a forfeiture.* 3. *If it be doubtful, whether the fine be reasonable or not, non-payment is not a forfeiture.* M. 6 Jac. C. B. *n.* 5. *D. D. Willowe's case.* Vide tamen, *for if in truth it be reasonable, non-payment at the day prefixed has been held a forfeiture.* M. 1650. *Parker's case.—Custom, that copyholder shall pay a fine of two years rent or under, held good.* M. 10 Jac. B. R. 2 *Bulstr. n.* 23. *Allen and Abraham. But* M. 36, 37 Eliz. *A. B. n.* 148, *in Green and Bury, it was ruled void for the uncertainty.* Hal. MSS.—See the first case in Cro. Cha. 196, the second in 13 Co. 3, the third in 2 Bulstr. 32, and the fourth in 2 Ro. Abr. 265, pl. 1.

Sect. 75.

AND these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but onely the copies of court rolles.

(4 Co. 25.) "*THEY have no other evidence.*" This is to be understood of evidences of alienation; for a release of a right by deed a copiholder (that commeth in by way of admittance) may have, and that is sufficient to extinguish the right of the copyhold, which he that maketh the release had (2).

Sect. 76.

AND such tenants shall neither implead, nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entered in the lord's court in this forme, or to this effect: A. *of* B. *complaines against* C. *of* D. *of a plea of land, viz. of one messuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of mordancester at the common law, or of an assise of novel disseisin, or formedon in the discender at the common law, or in the nature of any other writ, &c. Pledges to prosecute* F. G. *&c.*

"*SUCH*

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pl. 1. Note, that in the case in which two years rack rent was deemed an unreasonable fine, the admittance was on an *alienation* and not on a *descent*, and that on a *descent* two years value is generally understood to be reasonable. See Rep. temp. Finch 464. See further on the *quantum* of fines, tit. *Copyhold*, in Vin. Abr. X. b. Com. Dig. H. 4, and New Abr. I. 3, and the case of the earl of Bath and Abney in 4 Burr. vol. 1, page 206.—[Note 404.]

(2) Vid. hic *fol.* 59. *a. A. surrenders to the use of B. clearly the land is bound by the surrender, but B. hath nothing in the land till admittance.* M. 8 Car. B. R. *Burgoin and Spurling. But if the surrenderee dies, his heir shall be admitted. If the lord accepts rent of B. it is a good admittance.* M. 24 Car. B. R. *Baker and Denham. A. surrenders to the use of B. who before admittance surrenders to the use of C. and C. is admitted. Ruled, that C. takes nothing, for B. who surrenders hath not any interest to surrender till admittance.* 24 Eliz. *Alderman Dixe's case.* M. 6 Jac. B. R. *m. n.* 6. *Wilson and Woodhall. But yet it hath been ruled good, for the admittance of C. shall be implied to be an admittance of B. first, and so there shall be priority.* M. 24 Car. B. R. *Baker and Denham.* P. 41 Eliz. C. B. *Colchin and Colchin.* Vid. T. 15 Jac. B. R. 2 *Popl.* 5. Hal. MSS.—See the first case in Cro. Cha. 273, & 283, and 1 Ro. Abr. 473, & 500; the second in Sty. 145; the fourth case in Yelv. 144; the fifth in Cro. Eliz. 662, and 1 Ro. Abr. 499, pl. 1. See further as to the subject of the cases in this annotation, Com. Dig. *Copyhold*, F. 11, and Vin. Abr. *Copyhold*, U. W. Y. and Q. b.—[Note 405.]

"*SUCH tenants shall neither implead, nor be impleaded, &c.*" This is evident, and needs no explanation. 4 H. 4. 34. adjudged in parliament.

"*But if they will impleade others, they shall have, &c.*" Put the case that the demandant in a pleint in nature of a reall action recovereth the land erroneously, what remedy for the party grieved? For he cannot have the king's writ of false judgement in respect of the baseness of the estate and tenure, being in the eye of the law but a tenant at will. And the freehold being in another, he shall have a petition to the lord in the nature of a writ of false judgement, and therein assigne errors, and have remedy according to law. 14 H. 4. 34. 1 H. 5. 11. Vet. N. B. 18. 13 R. 2. tit. Faux judgment. 7 E. 4. 19. 21 E. 4. 80. (4 Co. 21. b.)

"*Formedon in the discender at the common law.*" By the opinion of *Littleton*, as there may be an estate taile by custome with the co-operation of the statute of *W.* 2, cap. 1, so may he have a *formedon in discender;* but as the statute without a custome extendeth not to copiholds (3), so a custome without the statute cannot create an estate tayle. Now it is not a sufficient proofe, that lands have been granted in taile; for albeit lands have antiently and usually beene granted by copie to many men and to the heires of their bodies, that may be a fee simple conditionall, as it was at the common law. But if a remainder have been limited over such estates and enjoyed, or if the issues in taile have avoided the alienation of the ancestor, or if they have recovered the same in writs of *formedon* in the discender, these and such like be proofes of an estate taile. [y] But if by custome copihold may be intailed, the same by like custome by surrender may be cut off(1); and so hath it beene adjudged. [z] Some have holden that there was a *formedon* in the discender at the common law (2). 3 Co. 8, 9. in Heydon's case. 4 Co. 22, 23. 15 H. 8. Br. tit. Taile. (3 Co. 8. b. 1 Ro. Abr. 838.) (1 Ro. Abr. 506. 1 Sid. 267. 314. Cro. Eliz. 717. [y] P. 29 Eliz. inter Hill & Upcheic. Custome deins le manor de Overhall in Essex. 21 Eliz. Dier 366. 23 Eliz. Dier 373. [z] 10 E. 2. Formedon 55. 21 E. 3, 47. Pl. Com. 240. 4 E. 2. Formedon 50.

[60. b.]

Sect.

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(3) *It has often been adjudged accordingly; and in such case surrender is not a discontinuance, but there may be a bar by custom either by surrender or recovery, but not without custom.* M. 2 Car. C. B. *Crook, n.* 4. P. 37 Eliz. *Clun and Turner.* P. 1651. B. R. *Franklyn and Mym.* Hal. MSS.—See the case of M. 2 Cha. in Cro. Cha. 42. See also post. 60. b. and note 1, & 2, there.—[Note 406.]

(1) See 2 Ves. 603, the case of Carr and Singer, in which three judges against Willes chief justice held, that where copyholds are intailable, and the custom has not prescribed any mode of barring, the intail may be barred by surrender. But Willes chief justice thought, that in such a case recovery was the proper mode. Note the three ways of barring intails of copyholds mentioned in this case; namely, recovery, surrender, and forfeiture and regrant.—[Note 407.]

(2) See further as to intails of copyhold in Vin. Abr. *Copyhold,* F. E. G. e.

Sect. 77.

AND although that some such tenants have an inheritance according to the custome of the manor, yet they have but an estate but at the will of the lord according to the course of the common law. For it is said, that if the lord doe oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they should not be said to be tenants at will of the lord according to the custome of the manor. But the lord cannot breake the custome which is reasonable in these cases (3).

But Brian *chiefe justice said, that his opinion hath alwaies been, and ever shall be, that if such tenant by custome paying his services be ejected by the lord, he shall have an action of trespass against him.* H. 21 Ed. 4. *And so was the opinion of* Danby *chiefe justice in* 7 Ed. 4. *For he saith, that tenant by the custome is as well inheritour to have his land according to the custome, as he which hath a freehold at the common law* (1).

13 E. 3. tit. Præscript. 10. 13 R. 2. faux judgement 7. 32 H. 6. tit. Subpena 2. 7 E. 4. 19.

"*FOR (it is said), that if the lord, &c.*" And here *Littleton* saith truly that it is said so, for so it is said in 13 *E.* 3. 13 *R.* 2. 32 *H.* 6. and 7 *E.* 4. 19.

But he setteth not downe his owne opinion, but rather to the contrary, as hereafter in this Chapter appeareth. But now *magistra rerum experientia* hath made this cleare and without question, that the lord cannot at his pleasure put out the lawful coppiholder without some cause of forfeiture, and if he do, the coppiholder may have an action of trespasse against him; for albeit he is *tenens ad voluntatem domini*, yet it is *secundum consuetudinem manerii* (4).

Vide Sect. 81, 82. 84. 132.

[b] Vid. 42 E. 3. 25. Brit. fol. 165.

[*b*] And *Britton* speaking of these kinde of tenants saith thus: *Et ceux sont priviledges en tiel maner, que nul de les doit ouster de ☞ tiels tenements, tant come ilz font les services que a lour tenements appendent, ne nul ne poet lour services acrestre ne change a faire autres services ou pluis.* [61. a.] And herewith agreeth sir *Robert Danby*, chiefe justice of the court of common pleas, *M.* 7 *E.* 4. 19, and sir *Thomas Brian* his successor, *M.* 21 *E.* 4. 80, viz. that the copyholder doing his customes and services, if he be put out by his lord, he shall have an action of trespasse against him.

CHAP.

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(3) What follows in this Section is neither in L. & M.—Roh.—nor P.—The addition first appears in Redm.

(1) This must be understood with exception of such copyholds, as by the custom are grantable for life only.

(4) *But trespass lies not against the lord for cutting trees.* Hil. 10 E. 1. Rot. 3. Casus prioris *of Anthony. But now the law is changed.* Hal. MSS.—[Note 408.]

CHAP. 10. Tenant by the Verge. Sect. 78.

TENANTS by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge, is, for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custome) in their hand, the which they shall deliver to the steward (al seneschall) *or to the bailife according to the custome of the manor, and he which shall have the land shall take up the same land in court, and his taking shall be entred upon the roll, and the steward or bailife according to the custome shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.*

"*TENANTS by the verge.*" This tenant *by the verge* is a meere copiholder, and taketh his name of the ceremony of the verge (2). Tenure in villenage, or by base tenure, is thus described by *Britton*: [a] *Villenage est tenure de demeines de chescun seigneur baille, a tener a son volunt per villeines services de enprover al opes le seignior, et liverie per verge et nient per title de escrit, ne per succession de heritage, dont gards de mariage ne auters services reals, come homage et reliefes, ne poient des amnones de demeines ne de villenage este demand.*

14 H. 4. 33. (Cro. Cha. 597.)

[a] Britton, fol. 165. a. F. N. B. fol. 12. Liberatio per Virgam.

"A le seneschal," (which we call *a steward*). *Seneschallus* is derived of *sein*, a house or place, and *schalc*, an officer or governor. Some say that *sen* is an ancient word for justice, so as *seneschall* should signifie *officiarius justitiæ*; and some say that steward is derived of *stewe* (that is) a place, and *ward*, that signifieth a keeper, warden, or governor; and others, that it is derived of *stede*, that signifieth a place also, and *ward*, as it were the keeper or governor of that place. But it is a word ☞ of many significations. In this place it signifieth an officer of justice, viz. a keeper of courts, &c. *Fleta* describeth the office and duty of this officer at large most excellently. *Provideat sibi dominus de seneschallo circumspecto et fideli, viro provido et discreto et gratioso, humili, pudico, pacifico, et modesto, qui in legibus consuetudinibusque provinciæ et officio seneschalciæ se cognoscat, et jura domini sui in omnibus tueri affectet, quique subballivos domini in suis erroribus et ambiguis sciat instruere et docere, quique egenis parcere, et qui nec prece vel pretio velit à tramite justitiæ deviare, et perversè judicare; cujus officium est curias tenere maneriorum; et de subtractionibus consuetudinum, servitiorum, reddituum,*

[61. b.]

Vide Sect. 92, & 379. Fleta, lib. 2, cap. 66. Vide statut. de extent. maner. 14 E. 1.

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(2) In Cro. Cha. 597, there is a case in which it was pleaded, that the custom was to surrender by a *knife*, and therefore that a surrender by the *verge* was void. This custom being alledged before the council of the marches of Wales, they proceeded to try it. On moving this matter in the king's bench, a prohibition was granted, because the custom was only triable at the common law; but it is not mentioned, what the court thought of the operation of the surrender.—[Note 409.]

dituum, sectarum ad cur', mercata, molendina domini et ad visus francpledg' aliarumque libertatum domino pertinentium inquirat, &c. The residue pertaining to his office is worth your reading at large.

Vide 4 Co. Cases de Copiholds, fo. 26, 27. 30.

Every steward of courts is either by deed or without deed (1); for a man may be retained a steward to keepe his court baron and leet also belonging to the mannor without deed, and that reteyner shall continue untill he be discharged. The lord of a mannor may make admittances out of court and out of the mannor also (2), as at large appeareth in my Reports.

Sect. 79.

AND also in divers lordshipps and mannors there is this custome, viz. if such a tenant, which holdeth by custome, will alien his lands or tenements, he may surrender his tenements to the bailife (a le baily), *or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee taile, or for terme of life, &c. And they shall present all this at the next court, and then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.*

"*TO the bailife* (a le baily)." This word bailie, as some say, commeth of the *French* word *baylife*, in *Latin ballivus*; but in truth baily is an old *Saxon* word, and signifieth a safe keeper or protector, and *baile* or *ballium* is safe keeping or protection: and thereupon we say, when a man upon surety is delivered out of prison, *traditur in ballium*, he is delivered into bayle, that is, into their safe keeping or protection from prison: and the sherife that hath *custodiam comitatûs* is called *ballivus*, and the county *ballivo sua*.

Vide Lamb. exposition of Saxon words.

"*Reeve*," is derived of the *Saxon* word *gerefa* or *gereve*; and by contraction or rather corruption *greve*, or *reve*, and is in *Latine præfectus* or *præpositus*. It signifies as much as *appruator*, a disposer or director, as wood-reeve, sheepe-reve, shire-reeve, &c. whereof more shall be said hereafter. Vide *Fleta*, lib. 2, cap. 67, where he treateth of the office of the bailife, and cap. 69, *de officio præpositi*, of & the office of the reeve, and what belongeth of duty and right to either of them, which words are too long here to be inserted. Only this I will take out of him. *Ballivus autem cujuscunque manerii esse debet in verbo veraz, et in opere diligens et fidelis, ac pro discreto appruatore cognitus plegiatus et electus, qui de communioribus legibus pro tanto officio sufficiens se cognoscat, et quòd sit ita justus, quòd ob vindictam seu cupiditatem non quærat versus tenentes domini nec alios, &c. Præpositus autem tanquam appruator et cultor optimus, &c. domino vel ejus senescallo palam debet præsentari, cui injungatur officium illud indilatè. Non ergo sit piger aut somnolentus, sed efficacitur*

Fleta, lib. 2, ca. 73. & 76.

[62. a.]

(1) But a patent is necessary to the making of stewards of the king's manors. See further title *Stewards of Courts* in Vin. Abr. F. and Com. Dig. *Copyhold*, R. 5.—[Note 410.]

(2) See ante 59. a. and note 6, there.

efficaciter et continuè commodum domini adipisci nitatur et exarare, &c. the residue concerning both the offices being worthy your reading.

"*To the bailife or to the reeve.*" *Littleton* intendeth into the hands of the lord by the hands of the bailiffe or the reeve.

"*Or to two honest men of the same lordship.*" The custome doth guide these surrenders out of court, and the custome must be pursued. Vid. 4 Co. 25. Kite and Quaintin's case.

"*And they shall present all this at the next court, &c.*" By the surrender out of court, the copihold estate passeth to the lord under a secret condition, that it be presented at the next court according to the custome of the mannor. And therefore if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good (1); and if it be presented at the next court, *Ce' que use* shall be admitted thereunto; but if it be not presented at the next court according to the custome, then the surrender becometh void (2); and so was it cleerly holden *Pasch.* 14 *Eliz.* in the court of common pleas, which I my selfe heard. (4 Co. 29. b.)

Sect. 80.

AND so it is to be understood, that in divers lordships, and in divers mannors, there be many and divers customes in such cases, as to take tenements, and as to plead, and as to other things and customes to be done; and whatsoever is not against reason may well be admitted and allowed.

"*THERE be many and divers customes.*" This was cautiously set downe, for in respect of the variety of the customes in most mannors, it is not possible to set down any certainty, only this incident inseparable every custome must have, viz. that it be consonant

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(1) But vide Trin. 7 Car. B. R. Rot. 373. *Adjudged* M. 8. *Crook* n. 27. *Burgoin and Spurling. A. surrenders to the steward out of court to the use of B. on condition, and before the next court surrenders to the steward to the use of C. in fee; the condition is performed, and then he surrenders to the use of D. in fee by the hands of the steward; and at the next court all are present. Ruled, that C. shall have the land, for by the surrender the interest is bound, but the estate doth not pass till presentment, but remained fully in A. and so the surrender to C. is good, when the surrender to B. is avoided by performance of the condition before the court.* Hal. MSS.—See note 2, in 60. a. See also as to the commencement of the surrenderee's estate Jefferey's case in Wils. vol. 1. part 2. page 13. In that case one having surrendered to the use of his will devised a copyhold to miss Jefferey in fee; and she being attainted of felony and hanged before admittance, the question was, whether her interest in the copyhold was such as to intitle the lord by forfeiture. The whole court inclined against the lord, but did not give an absolute opinion.—[Note 411.]

(2) See further as to the time of presenting surrenders, Vin. Abr. *Copyhold*, U. a. Com. Dig. *Copyhold*, F. 10.

(4 Co. 31. Cro. Cha. 220.) consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in law.

"*Against reason.*" This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law: *Lex est summa ratio.*

Sect. 81.

AND these tenants which hold according to the custome of a lordship or mannor, albeit they have an estate of inheritance according to the custome of the lordship or mannor, yet because they have no freehold by the course of the common law, they are called tenants by base tenure. [62. b.]

"*THEY are called tenants by base tenure.*" Of this sufficient hath been spoken before.

Sect. 82.

AND there are divers diversities between tenant at will, which is in by lease of his lessor by the course of the common law, and tenant according to the custome of the manor in forme aforesaid. For tenant at will according to the custome may have an estate of inheritance (as is aforesaid) at the will of the lord, according to the custome and usage of the manor. But if a man hath lands or tenements, which be not within such a mannor or lordship where such a custome hath beene used in forme aforesaid, and will let such lands or tenements to another, to have and to hold to him and to his heires at the will of the lessor, these words (to the heires of the lessee) are void. For in this case if the lessee dieth, and his heire enter, the lessor shall have a good action of trespasse against him; but not so against the heire of tenant by the custome in any case, &c. for that the custome of the mannor in some case may aid him to barre his lord in an action of trespasse, &c.

"*TENANT at will according to the custome may have an estate of inheritance, &c.*" Here note that *Littleton* alloweth, that by the custome of the manor the copiholder hath an inheritance, and consequently the lord cannot put him out without cause.

"*But if a man, &c. will let lands or tenements to another, to have and to hold to him and to his heirs at the will of the lessor, these words (to the heires of the lessee) are void. For in this case if the lessee dieth, and his heire enter, the lessor shall have a good action of trespasse against him, &c.*" By which it is proved, that by the death of the lessee the lease is absolutely determined; which is proved by this, that if the heire enter the lessor shall have an action of trespasse, *quare vi et armis*, before any entry made by the lessor.

10 E. 4. 18. 22 E. 4. 13. 2 R. 2, barre 237. 11 H. 7. 22. 21 H. 7. 12.

"*For*

[63. a.] " ☞ *For that the custome of the manor in some case may aid him to barre his lord in an action of trespasse, &c.*" Hereby it appeareth, that by the opinion of *Littleton* the lord against the custome of the manor cannot oust the copiholder.

Sect. 83.

ALSO, the one tenant by the custome in some places ought to repaire and uphold his houses, and the other tenant at will ought not.

" *BY the custome.*" For what a copiholder may or ought to doe, or not doe, the custome of the manor [*a*] must direct it, for *consuetudo manerii est observanda.* [*b*] But if there be no custome to the contrary, wast either permissive (1) or voluntary of a cophiholder is a forfeiture of his copihold (2).

[*a*] Bracton, lib. 2, fol. 76.
[*b*] Vid. 4 Co. 21, 22, &c. in Cases de Copiholds.

Sect.

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(1) Formerly it was a question, whether waste *permissive* was a forfeiture by the *general* law in respect to copyhold estates, and according to a case in Noy a *special* custom is necessary. Noy 51. But the principal authorities are with lord Coke. See Ow. 17. 1 Ro. Abr. 508. pl. 16, and the case of Eastcourt and Weekes in 1 Lutw. 799. 1 Freem. 516, and 1 Salk. 186. In this last case the causes of forfeiture were making a lease without licence and want of repairs, and it appears to have been agreed by all, that *permissive* waste was a forfeiture; and the great point was, whether after the death of one of two coparceners, who were seised of the manor at the time of the forfeiture, it was not too late to enter and take advantage of it. Three judges held, that it was, because according to them lease and waste do not operate like alienations by fine recovery or feoffment with livery, which are *immediate* forfeitures and extinguish the copyholder's estate without any act by the lord, but are only forfeitures at the election of the lord in whose time they happen, and unless he enters the copyholder's estate continues; and they thought, that the right of election was not in its nature either divisible or descendible, and therefore that in the case of coparceners all must join in the election, and if one of them dies it is too late to make it. But Powel justice differed. He assented to the distinction between forfeitures operating by immediate extinguishment of the copyhold and forfeitures at the lord's election, and agreed that waste *permissive* was of the latter kind; but then he thought, that the lease for years without licence was as much an extinguishment of the copyhold as an alienation for a greater estate; and he seemed to be of the same opinion as to waste *voluntary*. Note, that Powel took another distinction between waste *voluntary* and waste *permissive*, and said, that if waste *permissive* is repaired before the lord's entry, the forfeiture is purged, and advantage cannot be taken of it. Note also, that in the same case Treby ch. j. doubted, whether lord Coke's doctrine, that if there be two coparceners of a reversion, and waste is committed, and one of them dies leaving a daughter, the aunt and niece shall join in waste, is law. See ante 53. b. and 1 Lutw. 803. This observation of Treby ought to have been mentioned before.—[Note 412.]

(2) But the court of chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit, on receiving satisfaction for the injury he has sustained. Such relief is particularly given, where the waste is committed through ignorance, or where the waste is merely *permissive*, and there has not been an obstinate perseverance in neglecting to repair after notice

Sect. 84.

ALSO, the one tenant by the custome shall do fealty, and the other not. And many other diversities there be betweene them.

Vide Sect. 132.

"*THE one tenant by the custome shall do fealty, and the other not.*" And the doing of fealty by a copiholder, proveth that a copiholder, so long as he observes the custome of the manor and payeth his services, hath a fixed estate. For tenant at will, that may be put out at pleasure, shall not doe fealty. For to what end should a man sweare to be faithfull and true to his lord, and should beare faith to him which he claimeth to hold of him, and that lawfully he shall doe his customes and services, &c. when he hath no certaine estate, but may be put out at the pleasure of the lessor, or he himselfe may determine it at his pleasure. Of these kind of customary tenants, and of many things concerning them, you may read more in the Fourth Booke of my Reports, fol. 21, 22, 23, &c. Thus much, as I have here set downe, may suffice, for the understanding of such cases and opinions as *Littleton* hath expressed (3).

(Post. 93. b.)

4 Co. 21, 22, 23, &c.

Finis Libri Primi.

THE

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notice. 1 Cha. Cas. 95, and Prec. in Chanc. 568. Another instance, in which relief against forfeiture for waste is said to be proper, is where the lessee of a copyholder commits waste without his direction or privity. Toth. Cha. 237. But in this latter case it may be doubted, whether the waste is a forfeiture. See Mo. 49.—[Note 413.]

(3) See further on the subject of *copyhold* estates Kitchin on Courts, Coke's Copyholder and the Supplement, the book intituled the *Surveior's Dialogue*, Calthorp's reading on Lord and Copyholder, Hughes on Original Writs 247, to 259, the title *Copyhold* in the Abridgements, the *Lex Custumaria*, and the several other treatises on *copyhold* law, particularly those by Shepherd and Nelson.

☞ THE

[64. a.]

SECOND BOOK

OF THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

Chap. 1. Homage. Sect. 85.

HOMAGE is the most honorable service, and most humble service of reverence, that a franktenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shal kneele before him on both his knees, and hold his hands joyntly together betweene the hands of his lord, and shall say thus: I become your man (Jeo deveigne vostre home) (1)

* *The note below is part of* 64. *b. in the thirteenth and fourteenth editions. By comparing either of them with the present edition, the necessity of placing in* 64. *a. of the latter* the three notes *which are in* 64. *b. of the former, will obviously appear.*

from

(1) *Nota, *in ancient times by* hommes *or men,* homagers, *whom we now call* freeholders, *were intended; as in grants that he and his men should be free from toll.* 14 *H.* 6. 12. 12 *Ass.* 35. 33 *E.* 88. 31 *E.* 3. *Barr.* 261. Hal. MSS.—In the famous controversy, which began between Dr. Brady and others some few years before the Revolution about the origin of the House of Commons, one point in dispute was the sense of the words *homines* and *liberè tenentes* as used in writs of summons of parliament before the reign of Henry the third and in other ancient records; the doctor endeavouring to confine the word to the king's tenants *in capite*, and his competitors on the other hand being as strenuous to comprehend within the description of *homines* any free subjects of the king, and within that of *liberè tenentes* all freeholders in general, whether they held immediately of the king or not. See voc. *Liberi homines* in the Gloss. at the end of Brad. Introd. to English Hist. Tyrr. Biblioth. Politic. 300. 308. 322. 326. 352. 369. 537, and lord Lyttelt. Hen. 2. 8vo. ed. vol. 3. p. 337. However, mr. Tyrrel allows the word *homines* to be equivocal, and to vary in the sense according to the occasion on which it is used.—[Note 2.]

from this day forward of life and limbe, and of earthly worship(2), *and unto you shall be true and faithfull, and beare to you faith for the tenements that I claime to hold of you, saving the faith that I owe unto our soveraigne lord the king; and then the lord so sitting shall kisse him* (3).

OUR author having taught us in his former booke the several distinct estates of lands and tenements as most necessary to be knowne, for the understanding of these two other bookes, doth in this second book treat of the tenures (1) and services whereby

* † *These are notes* 2 *and* 3 *of* 64. *b. in the* 13*th and* 14*th editions.*

the

(2) * The words *of life and limbe, and of earthly worship* are not in L. and M. but the Roh. and subsequent editions have them.

(3) † Vid. in Rot. Parl. 18 H. 6. n. 58, *a special act of parliament to excuse the kissing in the case of homage made to the king by reason of pestilence.* Hal. MSS.

(1) It is scarce possible to have a just and proper idea of our law of tenures, the greater part of which is founded on principles strictly feudal, without the aid of some previous information concerning the origin of feuds in general, and the time and manner of their introduction into this country. This interesting subject seems to have entirely escaped the attention of lord Coke; for though he writes so learnedly and minutely in explaining the nature of each tenure, and its fruits and incidents, yet there is not any thing like an historical illustration with the least reference to the *general* doctrine of feuds, or to the means by which they were established in England; a silence the more unaccountable, because the subject exercised the pens of several cotemporary writers; and the great antiquary of our English laws, sir Henry Spelman, had actually published the first part of his Glossary, in which he discourses largely on feuds, near two years before the first edition of the Commentary on Littleton. To supply the deficiency here imputed to lord Coke, as far as the compass of an annotation will allow, it shall be attempted to state shortly some of the principal opinions which occur on the subject, and to refer to some of the books in which thay are respectively advanced or controverted.

As to the first institution of feuds, some writers deduce them from the earliest ages of the world, and suppose, that the idea of giving land on the terms of doing military service for it, which it must be confessed was the grand principle of the feudal system, must have been common to the most ancient nations, when they emigrated to form new settlements, and was the natural result of such a situation. See Niell. Disputat. Feud. cited in Voet. ad Pandect. lib. 38. Digres. de Feud. 1 Gen. 47. But this opinion has been generally disapproved of as fanciful, and founded on a narrow and incomprehensive notion of feuds, and depending on resemblances too faint and remote to warrant a just comparison. Itter. de Feud. Imper. c. 1. s. 2. Spelman. Posthum. 2.

Others think, that they discover the origin of feuds in the institution of *patron* and *client* by Romulus on the first founding of the Roman state. Zasius Epit. Feud. &c. cited in Itter. de Feud. Imper. c. 1. s. 3. But the slightest examination shews this connection to have been widely different from that between *lord* and *vassal;* the latter merely arising from *land*, and, according to the strict and pure notion of feuds, being ever accompanied with services of a *military* kind and also with a *jurisdiction;* which circumstances are quite foreign to the former, and seem of themselves so essentially to distinguish the two, as to render the labour of seeking for other differences wholly unnecessary. See Bodin. de Repub. lib. 1. c. 7. Crag. Jus. Feud. lib. 1. Dieges. 5. et Duck. de Us. Jur. Civ. c. 6.

Others again have suggested, that the grants of forfeited lands to the veteran soldiers

the said lands and tenements be holden; which he divideth into twelve parts, viz. *Homage; Fealty, Escuage, Knight Service, Socage, Frankalmoigne, Homage Auncestrell, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage*, and into *Rents*. Wherein his method is most excellent; for he beginneth with *Homage*, because it is the most humble service of reverence, expressing the duty of the tenant to his lord, and the affectionate love (4 Co. 8. a. Bevil's case.)

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soldiers of Sylla, Julius Cæsar, and the Triumvirs in the latter times of the Roman republick, gave rise to feuds. But it has been sensibly observed by a very ingenious writer, that such lands were given, not on the condition of *future* but as rewards for *past* military services, and after the donation of them were of the nature of other Roman estates. Sullivan's Lectures, 251. See also Clark. Connect. of Roman, Saxon and English Coins, 440.

Some compare the *coloni et glebæ adscriptitii*, of which there is such frequent mention both in the Theodosian code, and in that of Justinian, with feudatories. But nothing can be more strongly marked than the distinction between the two, for the former were adstricted to the soil, were employed in cultivating it, and in performing other *rural* services for the owner, and in short approached nearer to *slaves* than to *free-men soldiers* and *feudal tenants*. See Itter. Feud. Imper. cap. 1. sect. 3. 5.

One civilian of the first character seems to deduce fiefs from the *procuratores prædiorum*, the *emphyteuticarii*, and others of a similar description, who are well known to the Roman law. Cujac. Observ. lib. 8. c. 14, and De Feud. lib. 1. princip. But it should be recollected, that the *procuratores prædiorum* were properly only bailiffs and servants to the owners of the land, and that the *emphyteuticarii* were merely occupiers of land under contracts of hiring; and therefore one may differ from the great author of this opinion, without forgetting the respect justly due to so high an authority. In truth, the possessions of the *former* do not appear to have been like *any* fief, and those of the *latter* at the utmost only come near to a resemblance of fiefs of the *prædial* and *improper* kind, such as our *socage* tenure, and other deviations from the original feudal establishments. Consequently it is not in the least probable, that pure and genuine fiefs, which were the price of *military* service only, and gave rise to the great system of tenures, should be the offspring of such parents. —The same observation may be applied to the *prædia stipendiaria*, which some writers cite from the books of the Roman law as instances of fiefs, but which were, as I apprehend, only a species of the *emphyteusis*, or land let to hire. See Itter. de Feud. Imp. Cap. 1. sect. 3. 5. Heinecc. Syntagm. Antiq. Rom. lib. 3. tit. 3. s. 13, and the word *stipendiaria* in the Lexicons of the Roman Law.

As to the *soldarii*, who were the companions and followers of the princes and chieftains amongst the *ancient Gauls*, and are by some writers considered as feudal vassals, their attachment was independant of land; and this of itself is sufficient to shew, that the connection was not the same as that which is the result of *tenure*. However, it may be proper to observe, that a like sort of union between the princes of the *ancient Germans* and their *comites* is agreed by those who refer the origin of fiefs to a much later period, to have been one of the many causes which accelerated the progress of fiefs. Itter. de Feud. Imper. cap. 1. sect. 4, 5.

Another opinion as to the beginning of fiefs is, that the use of them may be dated from the time of the emperor Alexander Severus, who about the middle of the third century granted out large districts taken from the enemy on the frontiers of the Roman empire to the *duces limitanei* and others of his officers and soldiers, under the conditions of military service, and on those terms declared the land transmissible to heirs. Seld. Tit. of Hon. 2d ed. c. 1.

love and protection of the lord towards his tenant, as hereafter shall appeare. Secondly, *Fealty*, a sacred service, expressing by ☞ oath his fidelity to his lord.

[64. b.]

Thirdly, *Escuage*, which is *servitium scuti*, the service of the shield.

Fourthly, *Knights service*, for the defence of the realme against outward hostility and invasions, which the better might be effected, if such duty fidelity and love were betweene lords and tenants, as ought to be, and as the law expecteth.

Fifthly, *Socage*, the service of the plough, aptly placed next knights service, for that the ploughman maketh the best souldier, as shall appeare in his proper place.

Sixthly, *Frankalmoigne*, service due to Almighty God, placed towards the middest for two causes: first, for that the middest is the most worthy and most honourable place: and secondly, because the first five preceding tenures and services, and the other sixe subsequent, must all become prosperous and usefull, by reason of God's true religion and service; for *Nunquam prosperè succedunt res humanæ, ubi negliguntur divinæ*. Wherein I would have our student follow the advice given in these ancient verses, for the good spending of the day;

Sex horas somno, totidem des legibus æquis.
Quatuor orabis, des epulisque duas.
Quod superest ultrò sacris largire camœnis.

Seventhly, *Homage auncestrell*, ancient families enjoying, with their blood, the ancient inheritance of their forefathers, as a great blessing of the Almighty.

8, and 9. *Serjeanty grand et petit*, due to the king only, to whom the highest and most eminent honor, ligeance, and reverence of all kinde is due; which hath two notable effects. First, *imperii majestas est tutelæ salus*, according to the old rule; and secondly, it

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s. 23. p. 332. Duck. de Us. Jur. Civ. lib. 1. c. 6. Itter. de Feud. Imper. c. 1. s. 3, and Clarke's Connect. Rom. Sax. and Engl. Coins, 440. These grants and some few others of a like kind, which are attributed to succeeding Roman emperors, give the semblance of probability to the conjecture of those, who consider the feudal establishments, so common in the subsequent times, as mere imitations of these examples and extensions of the same policy; and it must be owned, that they at least seem to justify mr. Selden in observing, that *some* use of fiefs may very properly be referred to the time of Alexander Severus.

But that opinion which seems to have the most probability and is adopted by the generality of the best writers, particularly those of the present times, attributes the origin of the feudal establishments principally to the northern nations, which in the fourth and fifth centuries over-ran the western part of the Roman empire, and at length out of its ruins formed the principal of the various states and governments, into which we now see Europe divided. Many reasons might be adduced in favour of this opinion, and to evince that pursuing the history of these nations from their first successful irruptions into the Roman empire is the only true way of exploring the source of the feudal institutions; but this is not the place for a minute discussion of a subject so extensive and difficult.

☞ [*See this note continued at the commencement of Mr. Butler's notes, beginning* 191. a.]—[Note 1.]

it is an assured means of long continuance of houses and families in prosperous estate, whereof our author speaketh in the Chapter before.

10. Then followeth the tenure of Burgage, of ancient burghes and cities, &c. which are to be supported for the honour of the king, and for the maintenance of trade and traffique, the life of all commonwealths, especially of islands.

11. Villenage, for the performance of service, yet necessary service, for the clensing of cities, boroughes, mannors, &c. and for the better manuring of arrable grounds, and increase of husbandry.

12. And lastly, tenure by rents, which are called *vivi redditus*, because the lords and owners thereof do live by them; which they shall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and necessary, holden up and saleable at a reasonable value. And now understanding his method, let us peruse our author's words.

And as our author beganne his first booke with fee simple, which is the most principall and worthiest estate, so he beginneth his second booke with homage, which is the most honourable and humble service.

"*Homage*," is derived of [*a*] *homo*; and it is called *homage*, because when he doth this service, he saith, *Jeo deveigne vostre home; I become your man*. And in English homage is called manhood, so as the manhood of his tenant and the homage of his tenant is all one. *Mutua quidem debet esse dominii et homagii fidelitatis connexio, ita quòd quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio præter solam reverentiam.*

[*a*] Glanvil. li. 9. ca. 1. Bract. fo. 78. 30. Brit. fo. 170. 172, 173. Flet. li. 3, c. 16. Mir. c. 3. de Homage, et l. 5, sect. 1.

"*True and faithfull.*" These words are of great extent, for they extend to the observation of the lord's counsell in whatsoever is honest and profitable. [*b*] *Omnis homo debet fidem domino suo de vitâ et membris suis, et terreno honore, et observatione consilii sui per honestum et utile* (comprehended under these words *true and faithfull*) *salvâ fide Deo et terræ principi.*

[*b*] Lib. Rub. ca. 55.

[65. a.] ☞ "*Service.*" [*c*] *Servitium in lege Angliæ regulariter accipitur pro servitio, quod per tenentes dominis suis debetur ratione feodi sui.* But *servitium est duplex; spirituale*, whereof more shall be said in the Chapter of Frankalmoigne; *et temporale*, whereof our author here treateth. And he beginneth with homage, first, because it is most honourable, for *honor plus est in honorante, quàm in honorato*. 2. It is *most humble service of reverence*, and both of these for five causes on the part of the tenant. First, the tenant when he doth his homage is *discinctus*, disarmed or unguarded. Secondly, *nudo capite*, bare-headed. Thirdly, *ad pedes domini super genua projectus*. Fourthly, *ambas manus junctas inter manus domini porrigit*. Fifthly, *per verba omni supplici veneratione plena*, he saith, *I become your man, &c.* And for three causes on the part of the lord. First, the lord doth sit. Secondly, he incloseth his tenant's hands betweene his owne. Thirdly, the lord sitting kisseth the tenant. Prudent antiquity did, for the more solemnity and better memory and observation of that which is to bee done, expresse substances under ceremonies.

Nil sine prudenti fecit ratione vetustas.

[*c*] 2 H. 4. 6.

Glanvil. et Mir. ubi supra.

"*I become your man of life and limbe.*" And therefore he is *discinctus*, for that he must never be armed against, or opposite to his lord, but both life and member must be ready for the lawfull defence of his lord.

Bract. fol. 80. Britton, fol. 173. b. ac. Fleta, lib. 3, cap. 16.

2. "*Of earthly honor.*" Expressed by kneeling at the feet of his lord.

3. *Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio defensio et warrantia, et ex parte tenentis reverentia et subjectio.* So as the holding up of the tenant's hands betokeneth reverence and subjection, and the lord's inclosing of his tenant's hands between his own betokeneth protection and defence.

4. "*And unto you shall be true and faithfull, and beare to you faith, &c.*" This faith, *fides*, or *fœdus perpetuum*, this perpetuall league between the lord and the tenant is expressed by the lord's kissing of the tenant. And some say, that *fœdus dicitur à fide, quia fides interponitur.* And so firme and strong was this league between them, that by the ancient law of *England*, *nihil facere potest tenens propter obligationem homagii, quod vertatur domino ad exhæredationem, vel aliam atrocem injuriam. Nec dominus tenenti è converso. Quòd si fecerint, dissolvitur et extinguitur homagium omninò et homagii connexio et obligatio, et erit inde justum judicium cùm venerit contra homagium et fidelitatis sacramentum, quòd in eo in quo delinquunt puniantur, s. in personâ domini, quòd amittat dominium, et in personâ tenentis, quòd amittat tenementum.*

Bract. ubi supra. Brit. fol. 174.

"*For the tenements that I claime to hold of you.*" *Britton* saith, that [a] in doing of homage he must name the lands or tenements for which he doth homage in certaintie; and the reason is, *ne in captione homagii contingat dominum per negligentiam decipi vel per errorem.*

[a] Brit. ubi supra. Bract. ubi supra. Glanvil. lib. 9, cap. 1. Mir. cap. 3. de Homage.

For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in *England* in the hands of any subject (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before (1).

Secondly,

(1) According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the continent of Europe, where the feudal system has been established, and it seems, that there are some few portions of allodial land in the northern part of our own island. In France they still have their *franc-aleu*, which is the name by which *allodial* land is distinguished, as well as their *fiefs*; and in some provinces, such as Provence Languedoc and others, which not having any *coutume* or system of customary law, adopt the *written* or *Roman* law, the country is so far from being wholly feudal, that all inheritances are presumed to be quite free from feudal dependance till the contrary is proved, and therefore are called *franc-aleu sans titre*, that is, free without the possessors being obliged to prove them so. Instit. Droit. Franc. par Argou, l. 2, c. 3. Decis. Nouv. par Denisart, tit. *Franc-aleu* and *Droit-ecrit*. Even in Normandy, from which country our ancestors borrowed at least some parts of our law of tenures, and where the feudal policy with its utmost rigors is supposed to have been so early and so completely introduced, a remnant of allodial land is still

Secondly, all the lands [*b*] within this realme were originally derived from the crowne, and therefore the king is sovereigne lord, or lord paramont, either mediate or immediate of all and every parcell of land within the realme (2).

[*b*] 18 E. 3. 35. 44 E. 3. 5. 48 E. 3. 9. 8 H. 7. 12.

Thirdly, that in ancient time lords upon the creation of their tenures did not onely reserve rents, services, and profit, &c. for which they might distreine and have other remedy, but also tooke an humble submission of his tenant by promise and oath (for to homage fealty is incident), to be true and faithfull to him for the tenements holden of him, which submission is called homage and fealty, according to the tenure reserved.

"*Saving the faith that I owe unto our soveraigne lord the king.*" Both because there is *homagium ligeum*, which is due to the king onely, and also because he is sovereigne lord over all (3).

Glanvil. lib. c. 1. Mir. c. 3, de Fealty.

Bract. ubi supr. Brit. ubi supra. Inter Inquis. apud Lanceston. anno 6 E. 1. Cornub. in Thes.

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to be found, and their reformed *coutoumier* expressly divides their estates into *franc-aleu* and *tenures*. Littlet. par Houard, v. 1, p. 196, and Cout. Reform. Norman. par Berrault. Art. 102. The German and Dutch lawyers make the like distinction with respect to lands in their countries; and they must almost necessarily have a considerable proportion of allodial land, as the rule of their courts of justice is to presume in favour of it, whenever the quality of the land appears doubtful. Heinecc. Elem. Jur. Germ. lib. 2. tit. 1. s. 35. Dar. Inst. Jur. Priv. German. sect. 705, 706, and Voet. ad Pandect. lib. 38, Digres. de Feud. sect. 4. As to Scotland, lord Stair expresses himself rather ambiguously on the subject; for he says that there remains *little of allodial land in Scotland*, but in a few lines after observes, that the glebes of the clergy, which seem to come nearest to *allodials*, are more properly *mortified*, or, as we should call them, *mortmain fees*. Sta. Inst. b. 4, t. 3, s. 4. However, other respectable authors rank the manses and glebes of the Scotch clergy amongst things allodial; and write as if they thought, that the law of fiefs had not yet pervaded the Orkneys. Ersk. Princ. Law Scot. 126. Ess. Brit. Antiq. 19.—[Note 3.]

(2) See ante fol. 64. a. note 1, and fol. 1. b. note 1.

(3) Vid. *As to the homage by the king of England to the king of France for the dutchy of Aquitain, &c. It was doubted, whether the homage ought to be* liege; *but at length it was resolved, that it should be liege; and for that purpose writs patent were made by the king of England, settling it in this way, viz. that the king of England duke of Guyen should hold his hands between the hands of the king of France, and he who should speak for the king of France should address his words to the king of England duke of Guyen, and should say thus*, Do you remain a liege man of the king of France, my lord who is here, as duke of Guyen and peer of France, and promise to bear him faith and loyalty? say yes; *and that the said king duke and his successors dukes of Guyen should say* yes; *and that then the king of France should receive the said king of England and duke to the said homage and faith and with a kiss saving his right and the other's.* 1 Pars Pat. 5 E. 3. m. 19.—*For the homage done to the Pope by king John, see M. Paris* 237. Hal. MSS. —For a full account of the circumstances which attended Edward's homage for Guienne, &c. see 1 Tind. Rap. fol. ed. 412. See also Froiss. l. 1, c. 25, and 4 Rym. Fœd. 383, to 390, there cited, and Du Fresn. Glos. voc. *Homagium*. Mr. Tindal in a note on Rapin observes, that liege or full homage is done with head bare and sword ungirt, as if that was the thing which chiefly distinguished homage *ligeum* from homage *non ligeum*. But in truth that *formality* was incident to *both*, and the difference between the two was of a more *essential* kind, and Philip de Valois of France and our Edward the Third knew this, or probably

I have seene an ancient record in *Anno* 6. *Edw.* 1. in these words. *Michael de North, qui sequitur pro rege, queritur, quòd cùm dominus rex ratione regiæ dignitatis et coronæ suæ tale habeat privilegium quòd nullus in regno suo de aliquo qui sit in regno Angliæ alicui homagium facere debeat, vel aliquis hujusmodi homagium ab aliquo recipere debeat, nisi factâ mentione de homagio demino regi debito eidem domino regi fideliter observand' Walterius Exon' episcopus, in contemptu domini regis, et ad manifestam quoad privilegium prædictum ipsius domini regis exhæredationem, et at damnum et dedecus ipsius domini regis ad valentiam decem mill' librarum, de Henrico de Pomeray, Thomâ de Kanc,' Johanne de Bello Prato, Laurentio filio Ric' Johanne le Soer, Willielmo de Alex', & Eudone de Tranael, Rogero le Gros, Johanne le Lunge, Rado de Bevill, Guidone Novant, Willielmo de Rouskerrek, et Hen. Cannel, accepit servitia contra privilegium prædict', nullâ factâ mentione de homagio et fidelitate domino regi debitis.* And judgement in the end was given against the said bishop. [65. b.]

"*King.*" Our ancestors the *Saxons* termed him *Coning* or *Cyning*, a name signifying power and skill, which by way of contraction we now call King. This name the *Saxons* with a small alteration had from the *Brittaines*, who called him *Koningh* or *Koninckc*. In *French* he is called *Roy*, in *Italian Re*, in *Spanish Rey*, all derived from the *Latine (Rex)*, of the true signification whereof you shall read [*d*] plentiful matter in our old bookes.

So as homage is divided, first, *in homagium ligeum, et non ligeum* (1).

2. *In homagium antecessorium, et non antecessorium* (2). It is here necessary to be knowne what tenant, that holdeth by homage, shall do homage. [*e*] *Item videndum, quis potest homagium facere. Sciendum est, quòd quilibet liber homo, tàm masculus quàm fœmina, clericus et laicus, major et minor; dum tamen electi in episcopos post consecrationem homagium non faciant, quicquid fecerint ante, sed tantùm fidelitatem* (3). *Conventus autem homa-*

[d] Mirror, ca. 1, sect. 2, and ca. 2, sect. 1 & 2. Bract. fo. 5. 107. 368, 369. 340. Fleta, lib. 1, cap. 5. Fortescue, cap. 8, and 37. Stanf. pl. cor. 98, 99. and Prær. 65.

[e] Glanvil. lib. 9. ca. 1. Bracton, fol. 78. b. Britt. c. 68, fo. 170, 171. Fleta, lib. 3, cap. 16.

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probably there would not have been so much difficulty in adjusting the ceremony between them. Homage *ligeum* was without any saving or exception of the faith due to king or other lords; but homage *non ligeum* had such an exception. The former properly came from the *subject* to the *sovereign;* the latter from *one* subject to *another*. The former generally and in strictness included allegiance as a subject, and could not be renounced; though sometimes, when done by one who was himself a sovereign prince as a mark of feudal dependance in respect not of his *whole* dominions, but only of a *part* of them, it was not understood with so much latitude; but the latter never imported any thing more than a connection in the way of tenure, which the *homager* might at any time free himself from by renouncing the land he was invested with. See Du Fresn. Gloss. voc. *Hominium* et *Ligeus*, and Spelman. Gloss. voc. *Homagium* et *Ligantia*.—[Note 4.]

(1) See note 3. in 65. a.

(2) That is, *auncestrel* and *not auncestrel*, as to which see post. 109. b.

(3) *Homage done to the king by a bishop* salvo suo ordine. *M. Paris* 101. Hal. MSS.—See what is said by lord Coke *infra*.

gium non faciet de jure, sicut nec abbas, nec prior, eò quòd tenent nomine alieno, scilicet nomine ecclesiarum.

[*g*] One within the age of 21 yeares may doe homage; but *Bracton* saith he cannot doe fealtie, because in doing of fealty he ought to be sworne, which an infant cannot be (4). But some opinions be in our bookes to the contrary, viz. that an infant shall doe fealtie; but I take it to be meant of homage, and herewith [*h*] agreeth *Britton*, who saith, *et tout soit que enfant deins age fait homage, pur ceo ne volons nous my que il face serement de fealtie, jesque a taunt que il soit de pleine age; et tout soit ceo comon dit del people que fait de enfant fait deins age ne soit fait my a tener estable. Volons neque dent, que chescun home et chescun feme, de quel age que ils soient, facent homage a lour seigniour solonque l'estatut de la grand charter.*

Glanvill saith, [*i*] women shall not do homage; but *Littleton* saith that a woman shall doe homage, but she shall not say, *I become your woman, but I do to you homage;* and so is *Glanvill* to be understood, that she shall not doe compleate homage.

[*g*] Glanvil. lib. 9, cap. 1. Bracton, lib. 2. 78. Fleta, lib. 3. cap. 16. acc. 21 E. 3. 40. 24 E. 3. 63, 64. 32 E. 3. aye 80. & tit. per quæ servit. 9. 13 H. 4. 5. 33 H. 6. 16. 20 E. 3. per quæ servic. 24. [*h*] Britton, fol. 171. [*i*] Glanvil. lib. 9, c. 1. F. N. B. 157.

Regist. 296. Britton, ubi supra. Mirror, ca. 1, sect. 3.

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BUT if an abbot, or a pryor, or other man of religion, shall doe homage to his lord, he shall not say, I become your man, &c. for that he hath professed himselfe to be onely the man of God. But he shall say thus: I doe homage unto you, and to you I shall be true and faithfull, and faith to you beare for the tenements which I hold of you, saving the faith which I doe owe unto our lord the king.

NO man of religion when [*k*] he doth homage shall say, *I become your man;* because he hath professed himselfe the man of God; yet shall he doe homage, and shall say, [*l*] *I do to you homage, and to you shall be true and faithfull, &c.* And note, that here religion is taken largely, for it extends not only to regular persons, as abbots and the like, but also to all ecclesiasticall persons, as bishops, deanes, or any other sole ecclesiasticall body politike; and so it is the use at this day, which also appeares in our old books.

And it is to be observed, that in old bookes and records, the homage which a bishop, abbot, or other man of religion doth, is called fealty, for that it wanteth these words *(I become your man)*. But yet in judgement of law it is homage, because he saith, I doe to you homage, &c. and so of a woman.

[*k*] Glanvil. lib. 1, cap. 9, in fine. Britton, lib. 2. 78. Bracton, cap. 68. Fleta, lib. 3, ca. 16. [*l*] Vid. Sect. 96, & 133.

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(4) *Infant casts essoin of being in the king's service for another.* 21 *E.* 3. 33. *He shall do fealty.* 24 *E.* 3. 63, 64. Hal. MSS. In casting an essoin *de servitio regis*, the essoinor, that is, he who casts the essoin for the absent person, must swear to the truth of the essoin; which explains the object of the case cited by lord Hale. See 2 Inst. 314. See further as to the swearing of an infant, post. 158. a.—[Note 5.]

☞ Sect. 87. [66. a.]

ALSO, if a woman sole shall doe homage, she shal not say, I become your woman; for it is not fitting that a woman should say, that she will become a woman to any man, but to her husband, when she is married. But she shall say, I do to you homage, and to you shall be faithfull and true, and faith to you shall bear for the tenements I hold of you, saving the faith I owe to our soveraigne lord the king.

[m] For like reasons ab in convenienti, vid. Sect. 138, 139. 231. 269. 440. 478. 665. 722. 730. 21 H. 7. 13. F. N. B. 230. d. 16 H. 7. 9.

"*FOR it is not fitting, &c.*" By this it appeareth, [m] that *argumentum ab inconvenienti plurimum valet in lege*, as often shall be observed hereafter. *Non solum quod licet sed quid est conveniens est considerandum. Nihil quod est inconveniens, est licitum* (1).

Sect. 88. (2).

ALSO, a man may see a good note in M. 15 E. 3. *where a man and his wife did homage and fealtie in the common place, which is written in this forme. Note, that* I. Lewkner *and* Eliz. *his wife did homage to* W. Thorpe *in this manner: the one and the other held their hands joyntly betweene the hands of* W. T. *and the husband saith in this forme: We doe to you homage, and faith to you shall beare for the tenements which we hold of* A. *your conusor, who hath granted to you our services in* B. *and* C. *and other townes, &c. against all nations* (encountre touts gents)(3), *saving the faith which we owe to our lord the king, and to his heires, and to our other lords, and both the one and the other kissed him. And after they did fealtie, and both of them hold their hands upon the booke, and the husband said the words, and both kissed the booke.*

IN

(1) Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly on an equipoise ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist upon inconveniences; nor can it be true that nothing which is inconvenient is lawful, for that supposes in those who make laws a perfection which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law. —[Note 6.]

(2) In the Rohan edition, and in those of Pynson and Redman, this Section is transposed to the Chapter of Fealty.

(3) Lord Coke's translation of the word *gents* is erroneous; for as mr. Madox justly remarks, though the *Roman* word *gens* signifies sometimes a *nation*, and sometimes a *family*, and *gents* is *Romanick* or *bastard Roman*, and derived from *gens*, yet like many other *Romanick* words it acquired a new import, and according to that denotes *men* or *persons*. See Mad. Bar. Angl. 167, and Hist. Exchcq. in Pref. p. 13.—[Note 7.]

IN this [n] record three things are to be observed.

1. How necessary and profitable records and observations are, albeit they were not published in print; for at the time when *Littleton* wrote, this record was not printed.

[n] Mich. 15 E. 3. tit. Avowrie 109.

2. That the husband and wife doing homage, the husband shall speake the words for them both, viz. We doe to you homage, &c.

3. That the homage which the husband and wife doe, is the very homage which the wife should doe alone. But this joint homage, done by the husband and wife, is intended to be before issue had between them, whereof more shall be sayd hereafter. And it is to be observed, that very few cases ruled or resolved in the reigne of *Edward* the third, but the same or the like ☞ had been ruled or resolved in the raignes of *Edward* the second, *Edward* the first, or before, as for example for warrant hereof, *vide* Hill. 17 *E.* 2. Rot. Parl. &c.

[66. b.]

Hill. 17 E. 2. Rot. Parl. &c.

Sect. 89.

NOTE, if a man hath severall tenancies, which he holdeth of severall lords, that is to say, every tenancy by homage; then when he doth homage to one of his lords, he shall say in the end of his homage done, Saving the faith which I owe to our lord the king, and to my other lords (1).

"*AND to my other lords.*" This saving for other lords is good for explanation, albeit the homage is referred onely to the tenements which he holdeth of him to whom he doth the homage.

Sect. 90.

NOTE, none shal do homage but such as have an estate in fee simple, or fee taile, in his owne right, or in the right of another. For it is a maxime in law, that he which hath an estate but for terme of life, shal neither do homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee taile, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife

(1) This express saving of the faith due to the king was formerly of consequence, being calculated to prevent that entire dependance of the tenant on his immediate lord, the idea of which in times when the feudal institutions were in their full vigour, operated very strongly, and tended to depress the authority of the sovereign. See a sensible note on this subject in Litt. par Houard, v. 1, p. 114, and 121. In another place lord Coke cites an instance of an information on the part of the crown against a bishop, for receiving homage from his tenants without any saving of the faith due to the king; but it doth not appear by the extract which lord Coke gives of the record, how this contempt of the royal authority was punished. See ante 65. a.—[Note 8.]

wife shall doe homage (2), *because he hath title to have the tenements by the curtesie of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himselfe in as tenant by the curtesie, then he shall not doe homage to his lord, because he then hath an estate but for terme of life.*

More shall be said of homage in the tenure of homage ancestrell.

"*IN the right of another.*" As the husband and wife in the right of his wife, the bishop in right of his bishopricke, &c. the abbot or prior in right of his monastery, &c. But no corporation aggregate of many persons capable, [*p*] be the same ecclesiasticall or temporall, can doe homage, as a deane and chapter, maior and commonalty, and such like, albeit they be seised in fee of lands holden by homage, yet shall not they doe homage. And the reason is, because that homage must be done in person, and a corporation aggregate of many cannot appeare in person; for albeit the bodies naturall, whereupon the bodie politique consists, may be seene, yet the bodie politique or corporate itselfe cannot be seene, nor doe any act but by atturney, and homage must ever be done in person, &c. (3) And albeit an ☞ abbot and covent is a corporation aggregate of many, yet because the covent are all dead persons in law, the abbot alone in nature of a sole corporation shall doe homage. [67. a.]

[p] 33 H. 8. tit. Fealtie, Br. 15. 4 Co. 11. 7 Co. 10. 10 Co. 31.

(Ante 10. b. Post. 343. a.)

"*A maxime in law.*" A maxime is a proposition, to be of all men confessed and granted without proofe, argument, or discourse. *Contra negantem principia non est disputandum.* But of this somewhat hath beene said before.

"*He which hath an estate but for terme of life.*" [*q*] A parson or vicar of a church, that hath a qualified fee, [*r*] and yet to many intents upon the matter but an estate for life, can neither receive (1) homage nor do homage, as a bishop, an abbot, or any such like, that hath a fee absolute, may. [*s*] So if a man and his wife be seised in fee of a seigniorie in the right of his wife, the husband shall not receive homage alone, but he and his wife together. [*t*] But if the husband in that case hath issue by his wife, then he shall receive homage alone during the life of his

[q] Glanvil. lib. 9, cap. 2. Britton, fol. 170. Temps E. 1. tit. Juris utrum, 13. (Post. 341. b.)
[r] 8 E. 4. 28. 39 E. 3. 15. 3 E. 3. Avowrie 175.
[s] 2 E. 2. Avowry 183. F. N. B. 257. 13 E. 3. gard. 39. [t] 27 Ass. p. 51. F. N. B. 257. 13 H. 6. Avowrie 21. 43 E. 3. 13. 44 E. 3. 41. 3 E. 3. Avowrie 175. 13 E. 3. 2. gard. 39. 22 E. 3. fol. 19. gard. 44.

wife;

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(2) F. N. B. 257. *Husband alone doth fealty before the having of issue.* Nota, *before issue the avowry for homage shall be on the husband and wife, and not only on the wife.* 29 *E.* 3. 15. *But after issue the avowry for homage shall be on the husband. But till the lord have notice of the having issue, he may avow upon both.* 7 *E.* 4. 27. *The husband only shall do the homage,* quia si dominus adiret prælium, vir consecuturus esset eum, non mulier. 13 *E.* 1. *Avowry* 234. Hal. MSS.—[Note 9.]

(3) 2 *E.* 3. 10. *Accord.* Hal. MSS.

(1) Lord Coke in another place, where he explains for what purposes a parson hath a fee and for what an estate for life only, says, that he may receive homage, and cites Bro. Abr. tempe E. 1. Encumbent 19. But the book referred to agrees with the doctrine here.—[Note 10.]

wife; and the reason is, because he by having of issue is intitled to an estate for terme of his owne life, in his owne right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life. But if his wife dye, then he hath onely but an estate for life, and then he cannot receive homage. Yet tenant for life or years of a seigniory [u] shall have ward, mariage, and reliefe, and shall suppose that the tenant died in the fealty of the pl. [x] *Fieri possunt homagia libero homini tàm masculo quàm fœminæ, tàm majori quàm minori, tàm clerico quàm laico.*

[u] 6 E. 2, gard. 122. 13 E. 3, gard. 39. 22 E. 3, gard. 44.

[x] Glanvil, lib. 9, cap. 3. 18 E. 3. 7. 43 E. 3. 13. F. N. B. 257.

44 E. 3. 41. 13 H. 6. Avowrie 21. 8 H. 6. 13. 7 E. 4. 27.

"*And have issue, then the husband in the life of the wife shall doe hommage.*" The reason hereof is rendred before, and also that after the death of his wife he being but a bare tenant for life shall doe no homage; for regularly it is true, that he that cannot receive homage in respect of the weaknesse of his estate in the seigniory, shall not doe homage, if he hath a like estate in the tenancy.

If a man hold of the king, and hath issue divers daughters, and dyeth, the king shall have homage of every one of these daughters. And this [a] appeareth by the statute *De Hibernià anno 14 H. 3.* to be the common law; for that act saith, *In regno nostro Angliæ talis est lex et consuetudo, quòd si quis tenuerit de nobis in capite, et habuerit filias hæredes, ipso patre defuncto, antecessores nostri habuerunt et semper nos habuimus et cepimus homagium de omnibus hujusmodi filiabus, et singulæ earum tenent de nobis in capite in hoc casu.* And therefore where by the [b] statute *De Prærogativâ Regis*, it is provided, *Si una hæreditas, &c.* that is but an affirmance of the common law. [c] But this is to be understood where the coheirs be of full age; for if they be within age and in ward to the king, *Primogenita tantùm faciet homagium pro se et sororibus suis, et aliæ sorores, cùm ad ætatem pervenerint, facient servitia dominis feodorum per manum primogenitæ.* [d] And therefore if a man hold of a common person by the service of homage, and hath issue divers daughters and dyeth, the eldest daughter onely shall doe homage for her and all her sisters. And this appeareth also by the statute of *Hibernia. Primogenita tantùm faciet homagium domino pro se et omnibus sororibus suis.* And the reason is there rendered afterward, *Quia omnes sorores sunt quasi unus hæres de unâ hæreditate.* [e] But if the coparceners in that case make partition, then every one shall doe homage, because now it is not *una sed diversa hæreditas.* [f] And so it is if one make a feoffment in ☞ fee (which is a partition in law for that part) the feoffee shall do homage, for every tenant in common shall doe severall services. And it hath been adjudged [g] in our bookes, that if the eldest coparcener doe homage to the lord, and afterward the younger

[a] 14 H. 3, tit. Prærog. 5.

[b] Prærog. Regis, cap. 5.

[c] Statut. de homagio capiendo Temps E. 1. (2)

[d] Glanvil. lib. 7, cap. 3, & lib. 9, cap. 2. Bract. lib. 1, de homagio capiendo, & lib. 2, fo. 78. 80. Britton, fol. 168. b. 171, 172. Fleta, lib. 3, cap. 16, & lib. 2, ca. 60, & lib. 5, cap. 9. F. N. B. 161. 150. 259. Stanf. prær. 23, 24. (Post, 164. b.)

[e] F. N. B. 162.

[67. b.]

Vide 11 E. 3. Avowrie 101. [f] 45 E. 3. 23. 24 E. 3. 73. Marlbridge, cap. 9. F. N. B. 162. [g] 2 E. 2. Avowrie 179. 2 Ro. Abr. 514. F. N. B. 135.)

sister

(2) This seems to be the same as is now called 17 E. 2. st. 2, and is printed in our statute books by the title of *Modus faciendi homagium et fidelitatem.* But mr. Madox with reason observes, that it is not a statute, but only a precedent of the form of doing homage. Mad. Bar. Ang. 272. A like remark is made by mr. Barrington. See Observat. on Ant. Stat. 2d ed. p. 159.—[Note 11.]

sister maketh a feoffment in fee of her part, the lord shall have homage for the part of the younger sister; for that which was *una hæreditas*, one inheritance by law, by the alienation, which is her act, is (as hath beene said) divided and become in grosse, and the coparcenary defeated.

[h] 7 E. 4. 27, 28. 14 H. 4. 38. 1 H. 5. grant 43. 31 E. 3. gard. 116.

But if a tenant infeoffe divers men in fee joyntly, [*h*] all these jointenants shall joyntly doe their homage, and their fealty also.

[i] 48 E. 3. 8. 15 E. 4. 13. 5 E. 4. 3.

[*i*] if homage be due by the tenant, and he maketh a feoffment in fee, the feoffor shall not doe homage; because albeit he is supposed to be tenant in some cases, *quant al avowrie*, yet the feoffee is very tenant, and homage shall ever be done by the very tenant; but that very tenant needeth not to be very tenant of the land, and therefore the mesne because he is very tenant to the lord paramount (though he be not tenant of the land) shall doe homage. And so it is of the disseisee, and of tenant in taile, after a feoffment in fee, for in that case the donee is very tenant to the donor.

[k] 22 E. 4. 22.

If a tenant that holdeth by homage maketh a feoffment in fee of part, [*k*] that feoffee shall doe homage, and so shall every feoffee of what part soever.

[l] 3 E. 2. Avowrie 187. 13 H. 4. 5. 13 R. 2, tit. Avowrie 89. 8 H. 3, tit. Prescription 38. Hill. 22 E. 1, coram Rege Rot. 43. (Post. 73. a.)

If there be two coparceners or jointenants of a seigniory, if the tenant doth homage and fealty to one of them, [*l*] he shall be excused against the other.

If homage be parcell of a tenure, it is a presumption that the tenure is by knights service, unlesse the contrary be proved, but of itselfe it maketh not knights service. And yet by custome the heire of him that holds by homage onely may be in ward.

More shall be said of homage in the title of Homage Ancestrell (1).

CHAP.

(1) See post 100. b.—The statute of 12 Cha. 2. c. 24, which was made to free the subject from the burthen of *knights service*, and the oppressive consequences of tenures *in capite*, amongst other provisions wholly discharges all tenures from the incident of homage; not because homage itself was any grievance, but because, though not *wholly* yet it was more *properly* an incident to knights service, which the statute abolishes. But whilst homage continued, it was far from being a mere ceremony, for the performance of it, where it was due, materially concerned both lord and tenant in point of *interest* and *advantage*. To the lord it was of consequence, because till he had received homage from the heir he was not intitled to the wardship of him and of his land; unless the lord had the seigniory for life or years only, in which case he could not take homage, and therefore was allowed wardship without. *Dominus* (as Magna Charta expresses it) *non habeat custodiam ejus nec terræ suæ, antequam homagium ceperit;* which words it is said import, not that the lord could not have the wardship of the heir unless he had actually received homage from the ancestor, but only that he could not have it till it was received from the heir. See 9 H. 3, cap. 3, and 2 Inst. 10. To the tenant the homage was scarce of less importance; for anciently *every* kind of homage when received, but not before, bound the lord to acquittal or warranty, that is, both to keep the tenant free from distress, entry or other molestation for services due to the lords paramount, and to defend his title to the land against all others; though in subsequent times this implication of acquittal and warranty became peculiar to homage *auncestrel*. See post. fol. 100. a. 101. a. 2 Inst. 11. Such being the effect of homage, it was necessary to provide the means of compelling the tenant to *do* and the lord to *receive* it; and accordingly our law gave the remedy by *distress* for the *former* purpose, and the writ *de capiendo homagio* for the *latter*.

Chap. 2. Fealty. Sect. 91.

FEALTY is the same that fidelitas *is in Latine. And when a freeholder doth fealty to his lord, he shall hold his right hand upon a booke, and shall say thus: Know ye this, my lord, that I shall be faithfull and true unto you, and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do, at the termes assigned, so help me God and his Saints; and he shall kisse the book. But he shall not kneele when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.*

FEALTY in *French* is *feaulty*, and is [a] derived of the *Latin* word *fides* or *fidelitas*. [a] Bract. lib. 2, fol. 80. Britton, Regist. origin. 302. Mirror, cap. 3, de serement & de fealt. Statut. de 17 E. 2. tit. Homage.

"*And when a freeholder.*" Every freeholder except tenant in frankalmoigne shall doe fealty. [b] And yet some that are not tenants of any freehold shall do fealty, as a tenant for years shall do fealtie (2). *Bracton* saith, *De nullo tenemento quod tenetur ad terminum, fit homagium, fit tamen inde fidelitatis sacramentum.* [b] Bracton, lib. 2, fol. 80. a. Brit. fol. 173. Fleta, lib. 3, ca. 16. Littleton, fo. 29, nu. 132. 4 E. 3. 34. 9 H. 6. 43. 10 H. 6. 13. 5 H. 5. 12. 9 E. 4. 1. 21 E. 4. 29. 5 H. 7. 11.

"*That I shall be faithfull and true unto you, &c. and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services, &c.*"

[68. a.] [c] ☞ Fealtie is a part of homage (1), for all the words de fealtie. [c] Mirror, cap. 3, de ser. & (4 Co. 8. b.)

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latter. Post. 105. a. 2 Inst. 11. However, when it was settled, that *implied* acquittal and warranty were only incident to homage *auncestrel*, the writ *de capiendo homagio* fell into dissuse; for it did not lie in the case of other homage, the reason of the law, which gave it to the tenant that he might entitle himself to acquittal and warranty, having ceased with respect to *that*, and homage *auncestrel* being very rare, if not entirely worn out, in the time of lord Coke. See 2 Inst. 11.—See further on the effect of homage in Littlet. par Houard, v. 1. p. 519. Mad. Baron. Angl. 269, and Sulliv. Lect. 128, particularly the latter book. See also as to homage in general, Spelm. Gloss. voc. *Hominium*, and Du Fresn. Gloss. voc. *Hominium* et *Vassalaticum*, and post. 68. b.—[Note 12.]

(2) Tenant at will should be added to the exception. See post. 93. Also according to 5 H. 5. 12, and 10 H. 6. 13, tenant for years is not compellable to do fealty; but Littleton, Sect. 132, is expressly with lord Coke. See too the other authorities cited in the margin, and an observation on the 10 H. 6. 13, in Kitch. on Courts, ed. 1592. fol. 132. a.—[Note 13.]

(1) In some countries on the continent of Europe homage and fealty are blended together so as to form *one* engagement, being so *intire* that one cannot be without the other; and therefore foreign jurists frequently consider them as

words of fealtie are comprehended within homage (2), and therefore fealtie is incident to homage.

" *So help me God.*" As homage is the more honourable service, so fealtie is a service more sacred, because he is sworne thereunto. And the reason wherefore the tenant is not sworne in doing his homage to his lord is, for that no subject is sworne to another subject to become his man of life and member but to the king onely, and that is called the oath of allegiance, or *homagium ligeum* (3). And those words for that purpose are omitted out of fealtie, which is to be done upon oath. And *Littleton* said well (when a freeholder doth fealtie); [*d*] for the fealtie of him that holdeth in villenage, differeth from the fealtie of the freeholder. For the villeine holding his right hand upon the booke shall say thus to his lord: Hear you, my lord *A.* that I *A. B.* from this day forward shall be to you true and faithful, and shall owe you fealtie for the land that I hold of you in villenage, and shall be justified by you in bodie and goods, so help me God, &c. as by the act (4) appeareth.

(7 Co. Calvin's case.)

[*d*] Stat. de 17 E. 2. tit. Homage in le Abridgement.

Sect.

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as synonymous. But lord Coke, notwithstanding his saying that fealty is a *part* of homage, apparently doth not mean to confound them; for in our law, whilst *both* continued, they were in some respect distinct; and though fealty was an incident to homage and ought always to have accompanied it, yet fealty, as lord Coke himself tells us, might be by itself, being sometimes done where homage was not due and would have been improper; and in the two next Sections Littleton strongly marks the difference between the two. In short, by our law homage was inseparable from fealty, but fealty was not so from homage *. See ante 67. b. post. 150. b. 151. a. and Wright's Ten. 55. note (o) and Du Fresn. Gloss. voc. *Hominium* et *Fidelitas*.—[Note 14.]

(2) This is not strictly accurate; for the words *So help me God and the saints*, which constitute the oath, and are therefore of the essence of fealty, were not comprehended in the form of homage, nor were the words *I will lawfully do to you the customs and services which I ought to do to you at the terms assigned*. Another difference between the two in point of expression was, that the person doing fealty did not say, *I become your man*, words so significant of the nature of the engagement by homage. Also in fealty there is not any exception of faith to the king or other lords, which seeming to be intended as a qualification of the peculiar words of homage, *I become your man*, might perhaps on that account be thought unnecessary in fealty.—[Note 15.]

(3) See ante 65. a. and note 1, in 66. b. and post. n. 1. in 68. b.—In note 1 of 66. b. it is observed, that it doth not appear by the extract from the record of the bishop of Exeter's case, what punishment was inflicted on the bishop for receiving homage without the exception of faith to the king. But this was a mistake, for the extract mentions the suit to have been for 10,000l. and so dr. Sullivan states it to have been; though in his book no authority is vouched. See Sulliv. Lect. 129. It is observable, that there is a want of reference to authorities through the whole of the same ingenious book; a deficiency very much to be lamented, as it renders that work, which is particularly valuable for the copiousness of the author's historical deductions in respect to fiefs, much less useful than it would otherwise be.—[Note 16.]

(4) See the note on this supposed statute in 67. b. ante.

* *This is apparently a contradiction to part of the preceding sentence, and still more so to what is said by lord Coke in 150. b. viz. that,* fealty is an incident inseparable to homage. *Yet Mr. Hargrave's meaning is probably no more than this, that where there was homage the same was so far only inseparable from fealty, that the homage could not exist without the fealty; although the fealty might be separated from the homage by the extinguishment of the latter.*

Sect. 92.

AND there is great diversitie betweene the doing of fealty and of homage; for homage cannot be done to any but to the lord himselfe; but the steward of the lord's court, or bailife, may take fealty for the lord.

BRACTON, lib. 2. fo. 80, saith thus: *Sciendum est, quòd non per procuratores nec per literas fieri poterit homagium; sed in propriâ personâ, tam domini quàm tenentis, capi debet et fieri.* Bracton, lib. 2, fo. 80. 21 E. 4. 17. acc. 2 E. 3. 10. 32 H. 6. 23. 9 Co. 76.

"*But the steward* (le seneschal), *&c. or bailife, may take fealty.*" This is so evident, as it needeth no explanation. Vid. for the signification of Seneschal and Bailife, Sect. 78, 79. 248. & 379.

Sect. 93.

ALSO, tenant for terme of life shall do fealtie, and yet he shall not doe homage. And divers other diversities there be betweene homage and fealty.

THE tenant must doe fealtie in person; because he must be sworne unto it, and no man can sweare by the common law by attorney or proctor (5). 9 Co. 76.

Sect. 94.

ALSO, a man may see in 15 E. 3, *how a man and his wife shall doe homage and fealty in the common place, which is written before in the tenure of homage.*

More shall be said of fealtie in the tenure in socage, and in frankealmoigne, and in the tenure by homage auncestrell.

THIS

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(5) Vid. *fealty done by attorney*. Patricius de Graham miles regis Scotiæ sacramentum fidelitatis fecit regi Angliæ in nomine ipsius regis Scotiæ pro omnibus terris de Penreth Tindal et Sourby. Parl. E. 1. 137. Hal. MSS.—This amongst us is a singular instance of fealty by attorney, and certainly by our law was an irregularity; for even in Bracton's time, homage could not be done by attorney, and much less could an oath be taken in that way. See *supra*. However, in some countries they are not so strict, particularly in France, where both homage and fealty may be done by proxy, if the lord gives his consent, and by the custom of some of the French provinces without. See tit. *Foy et Homage*, in Denis. Nouvel. Decis.—[Note 17.]

THIS is evident, and appeareth before; and if lords knew what benefit they may reape by receiving of homage and fealty, they would not neglect them; [e] for by the receiving of either of them, it is a sufficient seisin of all manner of services, as by the words [f] of either of them appeareth (6). Now if it be demanded ☞ what difference is betweene the oath of fealtie, when it is done to the king in respect of a tenure, and the oath which everie subject ought to take in respect of his allegeance, *Littleton* here setteth downe the oath of fealtie. Now the [g] oath of allegeance is thus, You shall sweare, &c. (1) Then it may be demanded, Where and when is this oath to be taken? And it is answered, that whosoever is above the age of twelve yeares, is to be sworne in the tourne, unlesse he be within some leet, and then in the leet (2): and I reade amongst the lawes of Saint *Edward* (3), *Quòd hanc legem invenit Arthurus, qui quondam fuit inclitissimus rex Britannorum, et ita consolidavit et confœderavit regnum Britanniæ universum semper in unum. Hujus legis authoritate expulit Arthurus prædictus Saracenos et inimicos à regno. Lex enim ista diu sopita fuit et sepulta, donec Eadgarus rex Anglorum excitavit, et erexit in lucem, et illam per totum regnum observari præcepit.* Which law in some manner is observed at this day (4). But to return to *Littleton* (5).

[68. b.]

[e] 4 Co. 8. & 9 Co. Bevil's case. 13 E. 4, 5.

[f] Vid. Sect. 118. 130, 131. 138.

[g] Brit. ca. 29. Calvin's case. 7 Co. 6. b. 12 H. 7. 18.

Lambert 135.

CHAP.

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(6) Vid. *that seisin of fealty doth not estop the tenant from traversing the seisin of other services*, 41 *E.* 3. 25. 50. *John Lilburne's case.* Hal. MSS.—See further as to the advantages accruing from the receiving of homage and fealty, ante 67. b. and post. 92. a. and b. and note 3, in 68. b.

(1) The form of the *old* oath of allegiance may be seen in the books cited in the margin; but it has been changed by several statutes made since the Revolution, and these indulge quakers with signing a declaration of fidelity instead of taking the oath. See Burn's justice tit. *Oaths*, and Com. Dig. tit. *Allegiance*. In lord Hale's History of the Pleas of the Crown, there is a very learned dissertation on the old oath of allegiance, in which his lordship explains how it differs from the oath of fealty to the king by reason of tenure. He also discourses largely on the subject of homage, and points out the several distinctions between *homagium simplex*, *homagium ligeum*, and *homagium mixtum*. See 1 Hal. Hist. P. C. 61, to 75. This curious part of lord Hale's works did not occur, till it was too late to give the benefit of it to the notes in the Chapter of Homage.—[Note 18.]

(2) How the taking of the oaths of allegiance is regulated by modern statutes, see Com. Dig. tit. *Allegiance*, and Burn's Just. tit. *Oaths*.

(3) As to the laws of Edward the Confessor, the authenticity of those in print is controverted by the famous Dr. Hickes. See Hick. Thesaur. Ling. Septentrion. Dissert. Epist. 95.

(4) Mr. Lambard, who published the first edition of the Anglo-Saxon Laws, informs his reader, that those called Edward the Confessor's, were printed from two manuscripts, and that one of them was very ancient, but the other not so old; and it appears, that this strange tale, about king Arthur's consolidating the whole island of Britain into one kingdom, was not in the more ancient manuscript. See Lamb. Archaionom. 124. a. A learned writer on British Antiquities, who appears to have taken great pains to point out the real transactions of Arthur, though a warm advocate for great part of his history, doth not profess to vouch for this tradition concerning him. See Whitak. Manchest. 4to ed. v. 1. p. 31.—[Note 19.]

(5) The law with respect to fealty continues the same as when lord Coke wrote;

CHAP. 3. Escuage. Sect. 95. (6).

ESCUAGE is called in Latine Scutagium, *that is, service of the shield; and that tenant, which holdeth his land by escuage, holdeth by knights service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the halfe of a knight's fee. And it is sayd, that when the king makes a voyage royall into Scotland to subdue the Scots, then he, which holdeth by the service of one knight's fee, ought to be with the king fortie dayes, well and conveniently arrayed for the war. And he, which holdeth his land by the moitie of a knight's fee ought to be with the king twentie dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and so he that hath more, more, and he that hath lesse, lesse.*

"*ESCUAGE,*" [a] in *Latine Scutagium, (id est) servitium scuti,* service of the shield. Hereby it appeareth that right interpretations and etymologies are necessary: for, *ad rectè docendum oportet primùm inquirere nomina, quia rerum cognitio à nominibus rerum dependit.*

(Post. 86. b. 177. a.) *Nomina si nescis, perit cognitio rerum.*

And herewith agreeth that which is said, *Primò excutienda est verbi vis, ne sermonis vitio obstruetur oratio, sive lex sine argumentis.*

Scutum in *French* is *Escue,* and thereof commeth the *Escuer, (i.) Scutifer,*

[a] Mir. ca. 1. sect. 3. Br. fo. 162, &c. Ockam cap. Quid sit scutagium. (F. N. B. 83. C. 2 Ro. Abr. 507. 4 Inst. 192. Post. 87. a. 106. b.)

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wrote; for it is not varied as I apprehend by the 12 Ch. 2. c. 24, or any other statute made since his time. But it is no longer the practice to exact the performance of fealty. In the case of copyholders, it is become a thing of course on admitting them to enter a respite of fealty; but with respect to such as hold by other tenures, it is never thought of. However, it may not be amiss to remember, that the title to fealty still remains; that it is due from all tenants except tenants by frankalmoigne and such as hold at will or by sufferance, and if required must be *iterated* on *every* change of the lord, it differing in this respect from homage, which except in special cases is only due *once;* that the receiving of it is at least attended with the advantage of preserving the memory of tenures, which though perhaps sufficiently done in the case of *copyholds* by the admittances and by the payment of fines and quit-rents and continual render of other services, may be very necessary in cases where fealty is the only service due; and lastly, that the law for compelling the performance of fealty has provided the remedy by distress, which is an inseparable incident to all services due by *tenure,* and in the case of fealty cannot, as it is said, be *excessive.* See ante 68. a. and post. 103. b. 104. a. b 152. b. and Kitch. ed. 1592. fo. 70. b. and 131. b. 2 Inst. 107, and 4 Co. 8. b.—See further as to fealty, Sulliv. Lect. 68, where the oath of fealty is learnedly commented upon, and the words *fidelitas* et *sacramentum* in the Gloss. by Spelman and Du Fresne.—[Note 20.]

(6) Mr. Madox in his Baron. Angl. 227, animadverts upon this Section of Littleton; as to which see note 2, of 64. a. ante, and the note at the end of this Chapter of Escuage, post. 74. b.

Scutifer, which we usually call *Armiger*. [*b*] Of this *Bracton* saith, *Item scutagium dicitur, quòd talis præstatio pertinet ad scutum, quod assumitur ad servitium militare.* And *Fleta* saith, *Sunt quædam servitia forinseca, et dici possunt regalia, quæ ad scutum præstantur, et inde habemus scutagium et ratione scuti pro feodo militari reputantur:* and *Ockham* saith, *Hæc itaque summa, quia nomine scutorum solvitur, scutagium nuncupatur* (7).

[*b*] Bract. li. 2, fo. 36. a. Flet. l. 3, c. 14. Ockam ubi supr. 27 Ass. 52. 31 Ass. 38.

[*c*] ☞ "*And that tenant, which holdeth his land by escuage holdeth by knights service.*" [*d*] For as fealty is incident to homage, so homage and knights service be incident to escuage, and by the grant of services escuage passeth with the rest. Every tenure by escuage is a tenure by knights service; but every tenant that holdeth by knights service, holdeth not by escuage, as shall be said hereafter (1). But note here the wisedome of antiquity, [*e*] *Mavult enim princeps domesticos quàm stipendiarios bellicis apponere casibus*, that is, to be served in his warres by his owne subjects, rather than by stipendiary forainers.

[69. a.]

[*c*] Mirr. ca. 1, sect. 3. [*d*] 2 E. 3. 8. b. 19 E. 3. Avowry 294. 26 H. 6. 1. a. 20 E. 3. Per quæ servic. 11. 43 E. 3. 22. F. N. B. 83, 84. (4 Inst. 192.) (Post. 82. b.) [*e*] Lib. rub.

"*The service of one knight's fee.*" [*f*] There is great diversity

[*f*] 9 Co. 123, in Lowe's case.

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(7) In a former place, a doubt is expressed as to the book by Ockam to which lord Coke so frequently refers. See ante 58, note 2. But on looking into the Dialogue of the Exchequer I find the passage here attributed to Ockam *verbatim* in the chapter *quid sit scutagium*, which lord Coke himself cites a little above in this page: from which it seems very plain, that by Ockham's book lord Coke means that Dialogue. Mr. Madox, who first published the Dialogue of the Exchequer, thinks that it was written or finished soon after the 24th year of Hen. 2, and that Richard bishop of London, and son of Nigell, who was bishop of Ely and treasurer to Hen. 1, was the author; and this opinion he supports with his usual learning and accuracy. See Dissertat. Epist. ad. fin. Mad. Hist. Exch. What was lord Coke's reason for attributing this Dialogue to Ockam, it is not easy to guess.—Note, that there seems to be great confusion in most books, when the *Black Book* the *Red Book* and the *Dialogue of the Exchequer* are mentioned; and this proceeds from the want of a settled distinction between the *three*. Even bishop Nicholson, to whose labours all who study either our history or the antiquities of our laws are so greatly indebted, expresses himself with inaccuracy on the subject of these three books. He writes, as if he took the *Black Book* and the *Dialogue* to be the same; for writing of the former he says, *mr. Madox, who has given us a correct edition of this, treatise, is of opinion that Richard* Nigelli filius, &c. *was the author.* Nichols. Engl. Histor. Libr. 2d ed. p. 215. But this is a misconception of mr. Madox's words, the sum of his account being, that the *Dialogue* is both in the *Red* and *Black* Book, but is only a part of each, and that though Alexander de Swereford was *compiler* of the Red Book, not he, but Richard son of Nigel was author of the *Dialogue*. As to the name of the compiler of the *Black Book*, mr. Madox is wholly silent. Another thing proper to mention is, that it seems uncertain whether the *Black* and *Red* Book are not in point of contents the same. Mr. Hearne, who first published a copy of the *Black Book*, thinks, that they partly differ and partly agree in their contents, but he doth not write quite positively, or pretend to say, that he had seen the two originals in the Exchequer. Hearn. Lib. Nig. ed. 1771. Præf. 17. As to mr. Madox, he is silent on the subject.—[Note 21.]

(1) See as to this post. 82. b.

versity of opinions concerning the contents of a knight's fee, that is, how much land goeth to the livelyhood of a knight. For some say that a knight's fee consisteth of eight hides, and every hide containeth an hundred acres, and so a knight's fee should containe 800 acres. Others say, that a knight's fee containeth 680 acres. Others say, that an oxgange of land containeth 15 acres, and eight oxgangs make a plowland; by which account a plowland containes 120 acres; and that *virgata terræ*, or a yardland, containeth 20 acres. But I hold, that a knight's fee, an hide or plowland, a yardland or oxgange of land, doe not containe any certaine number of acres (2); but a knight's fee is properly to be esteemed according to the qualitie, and not according to the quantity of the land, that is to say, by the value, and not by the content (3). And therefore it is very true, which master *Camden* in his *Britannia*, page 136, saith, viz. *Subsequenti ætate ex censu ut colligitur facti fuerunt equites, &c.* And antiquity thought, that twenty pound land was sufficient to maintaine the degree of a knight, as appeareth in the ancient treatise *de modo tenendi parliamentum* (4) *tempore regis Edw. filii regis Etheldredi;* where it appeareth that *comitatus* (to wit), an earledome, *constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas; baronia constat ex* 13. *feodis, et* 3. *parte unius feodi militis* (5) *secundum computationem prædictam; unum feodum militis constat ex terris ad valentiam* 20*l.* Which antiquitie I cite, for that it concurreth with the act of parliament *anno* 1 *E.* 2, *de militibus* (6); by which act *Census militaris* the state of a knight is measured by the value of xx pound *per annum*, and not by any certaine content of acres; and with this agreeth the statute of *W.* 1. cap. 35, and *F. N. B.* fol. 82, where twenty pound of land in socage is put in equipage of a knight's fee; and this is the most reasonable estimate, for one acre may be better than many others, so as he which hath 680 or 800 acres of some barren land, had not according to the ancient account a sufficient revenue to maintaine the degree of a knight, and he which

Vide 7 Co. 33, 34. Nevil's case. (Sid. 128.)

(2) T. 21 E. 1. Rot. 26. Ebor. coram rege. *Eight acres make an oxgang in the fields of Doncaster.* Hic *fol.* 5. *a.* Vid. *Seld. Tit. Hon.* pars 2. *c.* 5. *s.* 4. *In Cranfield* 48 *acres make a yard-land, and* 4 *yard-lands make a hide; so that oxgang yard-land and hide or plow-land are altogether uncertain according to the diversity of places.* Hal. MSS.—See further infra and also ante 5. a. and note 11, there. In fol. 5, lord Hale gives the following note on the uncertainty of the word *oxgang*.—Breve de unâ bovatâ marisci *is ill*, 13 *E.* 3, *Briefe* 241. Hal. MSS.—See *infra* a like case as to the uncertainty of *virgata*. —[Note 22.]

(3) Mr. Selden insists, that a knight's fee was estimable neither by the value nor the quantity of the land, but by the services or number of knights reserved. Seld. Tit. Hon. 2d ed. part 2. c. 5. s. 26.

(4) See a note on this treatise post. 69. b.

(5) This notion of there being a certain number of knights fees in an earldom and barony is controverted by mr. Selden; and he cites instances of earldoms and baronies with a less as well as with a greater number than lord Coke mentions. Seld. Tit. Hon. 2d ed. part 2. c. 5. s. 26.

(6) Lord Coke in another place observes, that the 1 *E.* 2, *de militibus*, though called a statute, was only a writ granted by the king in time of parliament, and therefore entered of record. 2 Inst. 593.

(2 Ro. Abr. 515, 516. F. N. B. 82. c.)

which had a lease number of acres of some land of the value of xx pound *per annum*, had a sufficient livelihood in those daies for the maintenance of a knight (7). So antiquity thought that 400 markes of land *per annum* was a competent livelihood for a baron, and 400 pound *per annum ad sustinendum nomen et onus* of an earle, and of late time 800 markes *per annum* of a marqueese, and 800 pound *per annum* of a duke; so that their yearly revenue was estimated by the value and not by the content. And one plowland, *carucata terræ*, or a hide of land, *hida terræ*, (which is all one) is not of any certain content, but as much as a plow can by course of husbandry plough in a yeare. And therewith agreeth *Lambard verbo Hide.* And a plowland may containe a messuage, wood, meadow, and pasture, because that by them the plowmen and the cattell belonging to the plow are maintained. *Vide Temps E.* 1. tit. Briefe 860. 4 *E.* 3. 47. Pl. Com. in *Hill.* and *Grange's* case, fol. 168. *Vide* 6 *E.* 3. fol. 42, and 39 *H.* 6. 8. a. And the venerable *Beda* calleth a plowland *familiam*, a family; because it containeth necessary things for the maintenance of a family. And *Prisot* well saith in 35 *H.* 6. fol. 29, that a plow may till more land in a yeare in one country than in another; and therefore it stands with reason, that a plowland should be lesse in one place than in another. 41 *E.* 3. tit. Fine 40, and 13 *E.* 3. Fine 67. A fine shall not be received *de una virgatâ terræ* for the uncertainty, *vide* 39 *H.* 6. 8. But an acre of land is certaine by the statute *de terris mensurandis.* Note also (reader) that every plowland of ancient time was of the yearly value of five nobles *per annum*, and this was the living of a plowman or yeoman; and *ex duodecim carucatis constabat unum feodum militis*, which amounts to 20 pound *per annum.* And this you may see *Termino Pasch. anno* 3 *E.* 1, *coram Rogero de Seyton et sociis suis justitiariis apud* ☞ *Westm. Ebor. Ro.* 10. *Radolphus de Normanville petens in brevi de medio queritur contra Luciam de Kyme, quòd cùm ipsa teneat de ipso duas carectatas terræ in Coningston per hòmagium et servitium militare, unde duodecim carucatæ terræ faciunt unum feodum militis pro*

[69. b.]

(7) Nota quoad preceptum de militibus faciendis variatim se habet census communis militaris. Omnes laici qui tenent integrum feodum militis fiant milites. 1 pars Claus. 9 H. 3. m. 24. dors. Claus. 16 H. 3. m. 4, dorso. Postea fiant milites qui habent 15l. per annum vel feodum militis. Rotulo respect. militiæ 40 H. 3, tempore E. 1. Qui habent viginti librat. fiant milites. Rot hundredi 3 E. 1. Et sic continuavit usque 2 E. 2, et postea. Sed demum qui habent 40; librat. terræ fiant milites. Claus. 6 E. 2. m. 27. Et sic continuavit usque 17, regis Caroli. Vid. Rot. Parl. 18 H. 6. n. 43. 28 H. 6. n. 12, and Vid Claus. 6 E. 2. m. 27. 19 E. 2. m. . 9 E. 3. m. 17. Hal. MSS. —Before and in the time of Charles the first it was apprehended, that the king might lawfully compel all men, who were of full age and seised of lands to the value of 40l. a year, either to take upon them the order of knighthood, or to pay fines for being excused. An attempt to exercise this power, which lord Coke himself allows to have been a prerogative of the crown, was one of the many expedients used by that unfortunate prince to raise a revenue without the aid of parliament; and it terminated accordingly, for it was the occasion of a statute, which provided against the *future* exercise of any such power. See 16 Cha. 1. c. 20. 2 Inst. 593. Blackst. Comment. ed. 5. v. 1. p. 404. v. 2. p. 61, and Barringt. Ant. Stat. 2d ed. 144.—[Note 23.]

pro omni servitio, ipsa distrinxit ipsum ad faciendam sectam ad curiam suam de Thorneton in Craven, &c. (1).

And it is to be observed, that the reliefe of a knight and all above him which be noble, is the fourth part of their yearly revenue, as of a knight five pound, which is the fourth part of 20 pound. So *una baronia constat ex* 13 *feodis militum et de* 3. *parte unius feodi militis*, which amount to 400 markes, and therefore his reliefe is the fourth part of this, viz. 100 markes: and an earledome consists of twenty knights fees, which amount to 400 pound (as before it appeareth by the said ancient record *de modo tenendi parliamentum, &c.*) (2), and therefore his reliefe is 100 pound. And this also appeareth by the statute of *Magna Charta*, cap. 2, and by the equity of this statute, insomuch as a marquisdome, which consists of the revenue of two baronies, which (Post. 76. a. 83. b.)

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(1) 4 E. 2. Avowry 200. Viginti virgatæ terræ faciunt unum feodum militis. M. 13 & 14 E 1. Rot. 17. Glouc. Quadraginta carucat. terræ faciunt unum feodum militis. 8 E. 3. 49. Duodecim carucatæ et duæ bovatæ terræ faciunt unum feodum militis. Vid. apud Matth. Paris in Vitis 23. Abbatum fol. 131. Abbas Sancti Albani debet regi sex milites. Et ibi recensentur numeri hidarum ad quodlibet feodum militis. Alibi quinque, alibi sex, alibi septem hidæ faciunt feodum militis. Hal. MSS.—See further as to the contents of a knight's fee, post. 76. a. and 83. b. and 2 Inst. 596.—[Note 24.]

(2) Vid. Seld. Tit. Hon. parte 2. c. 5 s. 26, ubi authoritas authoris libri modi tenendi parl. et ista opinio de certâ proportione annui valoris feodi militaris, baroniæ, et comitatûs, optimè refutantur. Vid. infra 83. b. Hal. MSS. —The *modus tenendi parliamentum*, according to the title as given in lord Coke's preface to his ninth book of Reports, imports to be an account of the manner of holding the English parliaments in the time of Edward the Confessor, and that it was approved of by the first William, and conformed to in his time and in that of his successors. To this *modus* lord Coke frequently refers as to a most undoubtedly genuine piece of antiquity; and in his fourth Institute he tells us, that Henry the second after having conquered Ireland sent a transcript of this *modus* into that country as a model for parliaments there; and that in the reign of Henry 4, this transcript, which is known by the name of the *Irish modus*, fell into the hands of sir Christopher Preston, and was then exemplified by *inspeximus* under the great seal of Ireland. But notwithstanding all this, the reasons of mr. Selden and mr. Prynne, of whom the former supposes it to have been an imposture of the time of Edward the third, and the latter makes it an invention as late as the 31 H. 6, seem to furnish unsurmountable objections against the authority of the *English modus*; and so convinced of their force was an able advocate for the existence of the commons as a constituent part of parliament before the 49 Henry 3, that he candidly gives up its antiquity, though if it could have been defended, it would have decided the controversy in his favour, for it expressly mentions citizens and burgesses as well as knights of the shire. See 4 Inst. 12. Seld. Tit. Hon. 2d ed. part 2. c. 5. s. 26. Pryn. on 4 Inst. 1, and Tyrr. Biblioth. Polit. 270. 406. However dr. Dopping bishop of Meath, who in 1692 first published the *Irish modus*, feebly endeavours to defend the antiquity of the supposed transcript in the time of Hen. 2, and two other writers deservedly of great credit seem inclined the same way. See Molyn. Case of Ireland; and Harr. Edit. of Ware's Hist. and Antiq. of Ire. 84. Mr. Selden mentions, that in his time there were many copies of the *English modus*; but I am not aware, that any one is in print.—As to lord Coke's account of the computation of reliefs by the yearly revenue, which lord Hale observes to have been also refuted by Selden, see post. 83. b.—[Note 25.]

which amount to 800 markes, shall pay according to that just proportion for his reliefe 200 markes; and because a dukedome consists of the revenues of two earledomes, viz. 800 pound *per annum*, a duke shall pay 200 for a reliefe, which is also the fourth part of his revenue; and with this agree the records of the Exchequer.

Note (reader) at the time of the making of the statute of *Magna Charta*, 9 *H.* 3, there was not any duke, marquesse, or vicount in *England*, and therefore the statute could not make mention of them, and *Edward* the eldest sonne of king *E.* 3, called the Black Prince, was the first duke in *England* after the Conquest, and *Robert* earle of *Oxford* in the reigne of *R.* 2, was the first marquesse. *Sic enim inter ordines Angliæ in suâ Britanniâ testatur Camden ubi supra. Et titulus Marchionis seriùs ad nos devenit, nec ante R. 2. tempora cuiquam delatus; ille enim Robertum Vere Oxoniæ comitem delicias suas primum Marchionem Dubliniæ designavit, merumque erat honoris nomen. Hæc ille.* And before the reigne of *H.* 6. there was not any viscount. *Sic enim idem author ubi supra asserit. Post comites vicecomites ordine sequuntur. Viscounts nos vocamus. Hæc vetus officii sed nova dignitatis appellatio, et H. 6. tempore ad nos primùm audita. Hæc ille. Et dominus de Bello Monte* was the first viscount created by king *H.* 6. *Vide Cassianeum in gloriâ mundi parte* 4, *consid.* 55, that this dignity of a viscount is of great antiquity in other realmes.

7 H. 4. 9.
31 Ass. 30.
26 Ass. 66.
27 Ass. 52.
8 E. 3. 154.
7 E. 3. 29.
11 H. 4. 7.
F. N. B. 28. b. & 83. g.

Bracton lib. 2. 36. *Item sunt quædam servitia, quæ dicuntur forinseca, quamvis sunt in cartâ de feoffamentis expressa et nominata, et quæ ideo dici possunt forinseca, quia pertinent ad dominum regem, et non ad dominum capitalem, nisi cùm in propriâ personâ profectus fuerit in servitio, vel nisi cùm pro servitio suo satisfecerit domino regi, &c.*

3 H. 4. 16.
28 H. 6. 1. b.
39 H. 6. 38.
6. R. 2. Protection 46.
19 R. 2. Gard. 165.
17 H. 6. Protect. 56.
7 E. 4. 27.
11 H. 4. 7.
3 H. 4. 16. (F. N. B. 84. f.
2 Ro. Ab. 508.)

"*A voyage royall.*" A voyage royall is not onely, when the king himselfe goeth to warre, as *Littleton* here saith, but also when his lieutenant or deputy of his lieutenant goeth. And what shall be said a voyage royall shall be adjudged in this case by the judges of the common law as an incident to escuage, and not by the constable and marshall, or any other: *et sic de similibus.*

There is also another kind of voyage royall, viz. when one goeth with the king's daughter beyond sea to be maried, &c. for such a voyage is for the good of the whole realme (for more profit for the realme cannot be than to make alliance with another nation); but of this voyage royall *Littleton* speaketh not here, but onely of the voyage royall to warre; so as there is a voyage royall of warre, and a voyage royall of peace and amity. And it is to be observed, that he that holdeth by castle gard or cornage holdeth by knights service, and yet he shall pay no escuage, because he holdeth not to goe with the king to warre (3).

"*Into*

(3) Vid. sæpissimè temporibus H. 2. R. 1. Johann. H. 3. 1 E. 2. Scutagium pro exercitu regis *in Ireland, Wales, Poictou, Bretagne, Normandy, Gascony, &c. though territories of the king.* Quoad *escuage* nota. *Though in some cases the subject was chargeable for defence of the realm, yet clearly for foreign invasion none were chargeable but by tenure, and therefore service of chivalry was called* forinsecum servitium. Rot. parl. 20 *E.* 3. *n.* 13. 21 *E.* 3. *n.* 16. 44. 25 *E.* 3. *n.* 23. 5 *R.* 2. *n.* 67, *&c.* 1 *H.* 5. *n.* 17. 5 *H.* 5. pars 2. *n.* 9. *The first thing requisite*

"*Into Scotland.*" *In Scotiam.* This is put but for an example, for if the tenure be to goe *in Walliam, Hiberniam, Vasconiam, Pictaviam, &c.* it is all one. See an ancient record, *Rot. de finibus Termino Mich.* 11 *E.* 2. Sir *Rich. Rockesley* knight did hold lands at *Seaton* by serjeanty to be *Vantrarius regis*, that is, to be the king's fore-foot-man when the king went into *Gascoigne, donec perusus fuit pari solearum pretii* 4*d.* that is, untill he had worne out a paire of shoes of the price of foure pence. And this service being admitted to be performed when the king went to *Gascoigne* to make warre, is knight's service.

Lib. Rub. in Scacc. 47, 48. 19 R. 2. Gard. 95. 6 R. 2. Protection 46. 6 H. 3. Avowry 242. Vid. Rot. Claus. 8 H. 3. & Fin. 8 H. 3. & Patent. 9 H. 3. multi solverunt scutagium pro exercit. in Walliam, memb. 30. & ante Claus. 6 H. 3. memb. 3.

"*He which holdeth by the service of one knight's fee, ought to be with the king fortie dayes.*" But this is to be understood of a tenant that holdeth of the king immediately; for every man is bound by his tenure to defend his lord, and both he and his lord the king and his country; and therefore if the lord goeth not, his tenant is excused. But yet if the tenant peravaile goeth with the king, it excuseth all the mesnes.

And it is to be observed, that for every pound of the ancient value of a knight's fee accounting twenty pound land, the tenant must goe with the king two dayes, which commeth just to 40 dayes for a whole knight's fee. By the statute of *Magna Charta* it is provided, that *scutagium de cæter' capiatur sicut capi consuevit tempore Hen. regis avi nostri.*

Magna Charta, cap. 37. Fleta, lib. cap. 60.

Sect.

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requisite to escuage was the proclamation and summons of service, which prefixed the day and place of rendesvous of the army, and commanded the lords, &c. nominatim *and others by proclamation* quòd ad diem et locum veniant ad regem cum equis et armis et toto servitio regi debito, *which is called* summonitio servitii vel summonitio exercitus. Claus. 1 E. 2. m. 2. Claus. 3 E. 2. m. 1. Claus. 7 E. 2. m. 14, et sæpissimè alibi. Vide pro scutagiis captis occasione diversarum expeditionum. Tempore H. 2, scutagium bis assessum ante annum quintum, tertium scutagium 7 H. 2, pro exercitu Tholosæ duas marcas, quartum pro eodem exercitu unam marcam, quintum 18 H. 2, pro exercitu Hiberniæ 20s. sextum pro exercitu Galloway 20s. Tempore Richardi primi, primum scutagium pro exercitu Walliæ anno secundo ad 10s. secundum anno sexto ad 20s. pro quolibet feodo pro redemptione regis, tertium 8 R. 1, pro exercitu Normanniæ ad 20s. Tempore Johannis anno primo scutagium assessum ad duas marcas, secundum anno tertio pro exercitu Normanniæ ad duas marcas, tertium consimile pro consimili, quartum consimile pro consimili, quintum consimile pro consimili, sextum consimile pro consimili, septimum consimile, octavum anno duodecimo regis pro Hiberniâ duas marcas, nonum anno decimo tertio pro exercitu Walliæ ad duas marcas, decimum pro exercitu Scotiæ, undecimum anno decimo sexto Johannis pro exercitu Bretaniæ ad tres marcas sed non solutum. Nota temporibus Henrici tertii scutagium Ludowici duas marcas anno secundo, Byham 10s. anno quinto, Montegomery duas marcas anno octavo, Bedford duas marcas anno octavo, Kerry duas marcas anno decimo tertio, Bretanny 40s. anno decimo quarto, Pictaviæ 40s. anno decimo quinto, Elam 20s. anno decimo sexto, Gascoigny 40s. anno vicesimo secundo, Guyen 40s. anno vicesimo nono, Walliæ 40s. anno quadragesimo secundo. Hal. MSS.—For a more particular account of the scutages assessed in the several reigns mentioned by lord Hale, see Mad. Hist. Exch. chap. 16, where the whole subject of escuage is fully explained from the records. See also post 72. a. and b.—[Note 26.]

☞ Sect. 96. [70. a.]

BUT it appeareth by the pleas and arguments made in a plea upon a writ of detinue of a writing obligatorie brought by one H. Gray, *Tr. 7 E. 3, that it is not needfull for him which holdeth by escuage, to goe himselfe with the king, if he will finde another able person for him conveniently arrayed for the warre to goe with the king. And this seemeth to be good reason. For it may be, that he which holdeth by such services is languishing, so as he can neither go nor ride. And also an abbot or other man of religion, or a feme sole, which hold by such services, ought not in such case to goe in proper person. And sir* William Herle, *then chiefe justice of the common place* (de common bank), *said in this plea, that escuage shall not be granted but where the king goes himselfe in his proper person. And it was demurred in judgment in the same plea, whether the 40 dayes should be accounted from the first day of the muster of the king's host made by the commons* (per les commons)* *and by the commandement of the king, or from the day that the king first entred into Scotland. Therefore enquire of this* (1).

Tr. 7. E. 3. fol. 29. (9 Co. 130. 2 Ro. Ab. 509.)

TR. 7 *E.* 3. *&c.* This is the first booke at large that our author has cited. And it is to be observed, that this point is not debated in the said booke, but onely is there admitted, and yet is good authority in law; for our author saith, that it appeareth by this booke. Now both by *Littleton* himselfe, and by the booke of 7 *E.* 3, it is apparent, that albeit the tenure is, that he which holdeth by a whole knight's fee ought to be with the king, &c. to do a corporall service, yet he may finde another able man to do it for him

(4 Co. 88.)

By the statute of *Magna Charta*, cap. 20, it is provided, that no knight, that holdeth by castle-gard, shall be distreyned to give money for the keeping of the castle: *Si ipse eam facere voluerit in propriâ personâ suâ, vel per alium probum hominem faciet, si ipse eam facere non possit propter rationabilem causam.*

(6 Co. 20.)

Some have thought, that he that holds by escuage is taken by the equity of this statute, that speaketh onely of castle-gard. But it is holden, that this statute is but an affirmance of the common law. For where that act saith, *(propter rationabilem causam)* that reasonable cause is referred to the tenant's own discretion and choyce, and the cause is not materiall or issuable no more than in the case that *Littleton* here putteth, as hereafter appeareth. And I would advise our student, that when he shall be enabled and armed to set upon the yeare bookes, or reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched and applyed either in *Westminster-hall*, (where it is necessary for him to be a diligent hearer, and observer of cases of law) or at readings or other exercises of learning,

* commons *seems to be inserted for* commissioners, *see Mr. Ritso's Intr. p.* 115, *and lord Coke's commentary on the word* muster *post* 71. *a.*

(1) Mr. Madox observes, that sir William Herle's position, that escuage should not be granted but where the king goes to the war in person, is fallacious, Mad. Baron. Angl. 226.

[70. b.] learning, he may finde out and read the case so ☞ vouched; for that will both fasten it in his memory, and be to him as good as an exposition of that case. But that must not hinder his timely and orderly reading, which (all excuses set apart) he must bind himselfe unto; for there be two things to be avoyded by him, as enemies to learning, *præpostera lectio*, and *præpropera praxis*. But let us now heare what our author will say.

"*And this seemeth to be good reason, &c.*" Here *Littleton* sheweth three reasons wherefore the tenant should not be constrained to doe his service in person.

First, it may be the tenant is sicke, so as he is neither able to goe nor ride. And ever such construction must be made in matters concerning the defence of the realme, or common good, as the same may be effected and performed. To the former disability may be added where a corporation aggregate of many, as deane and chapter, maior and commonalty, &c. or an infant being a purchaser, for these also must finde an able man. But it may be objected, that in these particular cases the tenant might finde a man, but not when he himselfe is able without all excuse or impediment. To this it is answered, that *Sapiens incipit à fine*. And the end of this service is for defence of the realme, and so it be done by an able and sufficient man, the end is effected.

Secondly, seeing there are so many just excuses of the tenant, it were dangerous, and tending to the hindrance of the service, if these excuses should be issuable: *Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt.*

Lastly, both *Littleton*, and the booke in the seventh of *Edward* the third, giveth the tenant power, without any cause to be shewed, to finde an able and sufficient man, and oftentimes *jura publica ex privato promiscuè decidi non debent.*

"*An abbot or other man of religion.*" Note, that if the king had given lands to an abbot and his successors to hold by knights service, this had beene good, and the abbot should doe homage and find a man, &c. or pay escuage, but there was no wardship or reliefe or other incident belonging thereunto. And though the law saith, that this was a mortmaine, that is, that they held fast their inheritance, yet if the abbot, with the assent of his covent, had conveyed the land to a naturall man and his heires, now wardship and reliefe and other incidents belonged of common right to the tenure. And so it is, if the king give lands to a maior and communalty and their successors, to be holden by knights service, in this case the patentees (as hath beene said) shall doe no homage, neither shall there be any wardship or reliefe, onely they also shall find a man, &c. or pay escuage. But if they convey over the lands to any naturall man and his heires, now homage, ward, marriage, and reliefe, and other incidents belong thereunto. And yet this possibility was *remota potentia*: but the reason hereof is, *Cessante ratione legis cessat ipsa lex*; the reason of the immunity was in respect of the body politique, which by the conveyance over ceaseth, which is worthy of observation. (Post. 99. a.)

And it is to be observed, that every bishop in *England* hath a baronie

baronie (2), and that barony is holden of the king *in capite*, and yet the king can neither have wardship or relief.

If two joyntenants be of land holden by knights service, if one goeth with the king, it sufficeth for both, and both of them cannot be compelled to goe, for by their tenure one man is onely to goe.

6 H. 3. Avowry 242. F. N. B. 83, 84.

If the tenant peravaile goeth, it dischargeth the mesne; for one tenancy shall pay but one escuage.

"*Or other man of religion.*" Here this word (religion) is taken largely, viz. not onely for regular, or dead persons, as abbots, monkes, or the like, but for secular persons also, as bishops, parsons, vicars, and the like; for neither of them are bound to goe in proper person. For *nemo militans Deo implicetur secularibus negotiis.*

"*Languishing.*" So it may be said of an ideot, a mad man, a leper, a man maymed, blind, deafe, of decrepit age, or the like.

"*Or a feme sole.*" Seeing that a fem sole, that cannot performe knights service, may serve by deputy, it may be demanded, wherefore an heire male being within the age of 21 yeares may not serve also by deputie, being not able to serve himselfe. [71 a.]

To this it is answered, that in cases of minoritie, all is one to both sexes, viz. if the heire male be at the death of the ancestor under the age of one and twenty, or the heire female under the age of 14, they can make no deputy, but the lord shall have wardship as an incident to the tenure: therefore *Littleton* is here to be understood of a feme sole of full age, and seised of land holden by knights service either by purchase or descent.

"*Conveniently arrayed for the warre.*" So as here are foure things to be observed.

First (as hath been said), that he may find another.

Secondly, that he that is found must be an able person.

Thirdly, he must be armed at the costs and charge of the tenant: and herein is to be noted, *quod non definitur in jure*, with what manner of armor the souldier shall be arrayed with, for time place and occasion doe alter the manner and kind of the armour (1).

Fourthly,

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(2) Lord chief justice Hale in a manuscript treatise on the *Jura Coronæ*, gives it as his opinion, that the bishops do not hold their possessions *per baroniam*, and that they sit in the house of peers by *custom* and usage, and not as barons by *tenure*. But the propriety of this doctrine has been ably controverted by a writer of very great eminence now living. See Warburt. *Alliance between Church and State*, 4th edit. 149.—[Note 27.]

(1) Vide pro assisâ armorum.—27 H. 2. Quicunque habet feodum unius militis, habeat loricam cassidem clipeum et lanceam. Quicunque liber laicus habuerit in catallo vel redditu ad valentiam sexdecim marcarum, habeat loricam lanceam clipeum et cassidem. Quicunque liber laicus habuerit in catallo ad valentiam decem marcarum, habeat haubergellum et capelet ferri et lanceam. Omnes burgenses, et tota communia liberorum hominum, habeant wambais, et capelet ferri, et lanceam. Et si quis hæc arma habens obierit, arma sua remaneant hæredi; et fiat inquisitio de his, qui has habent facultates, et faciant eos jurare

Fourthly, he must have such armor as shall be necessary, and so appointed in readinesse.

Ferdwit is a *Saxon* word, *et significat quietanciam murdri in exercitu. Worscott* is an old *English* word, and signifieth *liberum esse de oneribus armorum.* Fleta, lib. 1, cap. 42.

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jurare ad ista arma habenda et ad ea tenenda in servitio regis. Hoveden 614. *This assise continued till the time of king John, and then was a little altered. And this assise made in the time of king John was repeated and again commanded, and men were compelled to be sworn to it.* Claus. 14 H. 3. m. 5. dorso. *Commissioners were assigned to cause men to be sworn and assised to arms, as they were sworn in the time of king John, in this form.* Quisquis habet feodum militis integrum, habeat loricam; qui habet dimidium feodi militis, habeat haubergellum; qui habet catalla ad valentiam quindecim marcarum, habeat loricam; qui habet catalla ad valentiam decem marcarum, habeat haubergellum; qui habet catalla ad valentiam decem librarum, habeat capellum ferreum perpunctum et lanceam; qui habet ad valentiam viginti solidorum, habet arcum et sagittas. In quâlibet villâ sit *unus* constabularius, in quolibet burgo *plures*, ad quorum summonitionem omnes ad arma jurati in wardâ suâ conveniant ad imbreviandum distinctè nomina et arma singulorum, ita quòd singuli habeant pronapta sua arma ad defensionem regni. *This assise, as it seems, continued till the* 26 *of Hen.* 3, *and then another assise was ordained. In* Claus. 26 Hen. 3. pars 2. m. 10, *many articles are ordained, which differ little from the statute of Winton. Amongst others there is this article.* Singuli vicecomites, cum duobus militibus ad hoc assignatis, faciant cives, burgenses, liberos homines, villanos, et alios à quindecim ad sexaginta annos, assideri et jurari ad arma secundum quantitatem terrarum et catallorum, scilicet, ad quindecim librata terræ, unam loricam unum capellum ferreum gladium cultellum et equum; ad decem librata terræ, unum haubergellum capellum ferreum gladium lanceam et cultellum; ad quinque librata terræ, unum perpunctum capellum ferreum gladium lanceam et cultellum; ad quadraginta solidos et amplius ad quinque librata, gladium arcus sagittas et cultellum; qui minus habet quàm quadraginta solidos, falcem gisarmas et cultellos et alia minuta arma; ad catalla sexaginta marcarum, unam loricam capellum gladium et equum; ad catalla quadraginta marcarum, unum capellum haubergellum gladium et cultellum; ad catalla decem marcarum, gladium cultellum arcum et sagittas; ad catalla quadraginta solidorum et infra decem marcas, falces gisarmas et alia minuta arma. Omnes item alii, qui possunt habere, arcus et sagittas habeant. In singulis civitatibus et burgis jurati ad arma sint intendentes majori, vel ballivis ubi non sunt majores. In singulis villis aliis constituantur unus vel duo constabularii secundum numerum inhabitantium. In singulis verò hundredis unus capitalis constabularius, ad cujus mandatum omnes jurati ad arma de hundredo conveniant, et ei sint intendentes ad faciendum ea quæ spectant ad conservationem pacis. Omnes verò constabularii capitanei intendentes sint vicecomiti et duobus militibus prædictis, ad veniendum ad mandatum eorum, et faciendum per præcepta eorum ea quæ spectant ad conservationem pacis nostræ, &c. *And so two knights were assigned in every county to perform the premises. The next assise of arms was in the* 13 *of Edw.* 1, *by the statute of* Winton, *which commands, that every one shall be sworn to armor according to the value of their lands and goods, viz. from lands of fifteen pounds and chattells of* 40 *marks,* ad haubergellum capellum ferreum gladium cultellum et equum; *from land of* 10*l. and goods of* 20 *marks,* ad haubergellum capellum ferreum gladium et cultellum; *from land of* 5*l.* ad gladium cultellum et capellum ferreum; *from* 40*s. to land of* 5*l.* ad gladium cultellum arcum et sagittas; et qui minus, juratur ad gisarmas cultellos et alia minuta arma; et qui minus habuerit quàm viginti marcas bonorum, habeat gladios cultellos et alia minuta arma; et omnes alii arcum et sagittas; et in

quolibet

Livius. It is truly said, *quòd miles hæc tria curare debet, corpus ut validissimum et pernicissimum habeat, arma apta ad subita imperia, cætera Deo et imperatori curæ esse.*

Vegetius. *Sapiens non semper it uno gradu, sed unâ viâ, non se mutat sed aptat. Qui secundos optat eventus, dimicet arte non casu. In omni conflictu non tam prodest multitudo, quàm virtus.*

Est

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quolibet hundredo duo constabularii eligantur ad faciendum visum armorum. *This assise was observed in the times of Edward the 1st and Edward the 2d. In 9 E. 2. the statute of Winton was put into execution* sub pœnâ forisfacturæ omnium bonorum et catallorum pro primâ vice, et secundâ vice sub pœnâ captionis terrarum in manus regis et imprisonamento corporum; *and it was also commanded,* quòd citra festum, &c. in formâ prædictâ armati parati sint ad proficiscendum cum rege versus Scotos cum victualibus necessariis pro quadraginta diebus, suorum et aliorum de partibus suis sumptibus providendis. Vid. Claus. 9 E. 2. m. 25, dorso. *This assise received some change about the 8 of E. 3, and in* Claus. 8 E. 3. m. 3. dorso, *there is the following precept.* Proclamationem facias, quòd omnes de ballivâ tuâ, qui habent quadraginta librata terræ vel redditus, licet milites non sunt, equitaturâ et armis competentibus juxta statum suum, viz. unusquisque eorum pro se et altero ad minus; et omnes, qui habent viginti librata terræ, cum equitaturâ et armis pro seipsis ad minus, faciant sibi provideri; et illi, qui minus habent, assideantur juxta statutum Wintoniæ. *But in progress of time the statute of Winton fell into disuse, and commissions issued to array men* juxta status sui exigentiam et facultates. Vid. Claus. 43 E. 3. m. 24. et sæpissimè. *This commission was afterwards regulated and confirmed in parliament.* Rot. Parl. 5 H. 4. n. 24. *And now the statute of Winton is repealed by the 21 Jam. chap. 28. But this doth not relate to military service, and is only a certain military provision for the peace of the kingdom, and concerned burgesses and sockmen as well as tenants by knights service. And according to this difference, the commission of array extended both to tenants by knights service, and others; but the writ which is called* summonitio servitii, *respected tenants by knights service only. And as to this latter,* 1. *It is to be observed, that the service was estimated by the number of fees; and so he, who held* per baroniam vel comitatum, *was attendant only according to the number of knights fees by which the barony or earldom was held, as clearly appears in Selden's Titles of Honour, part 2, cap. 5, sect. 26, where it is mentioned, that the barony* de Veteri Ponte *was holden by 5 knights fees, and that Clifford, who had married one of the coheirs, acknowledged the service of two knights and an half.* 2. *On summons of the army on service at a place and day certain, every knight by himself or his deputy came before the constable and marshal, and presented the number of his fees and the persons by whom they were to be performed and their names, which were registered before them.* 3. *He, who held by a whole knight's fee ought to perform his service by one knight, or by himself in person, or* per duos servientes sive armigeros, *who in value are equal to a knight. Seld.* ubi supra. *So he, who held by the moiety of a knight's fee, might perform all the service either* 40 *days* per servientem *or* 20 *days* per seipsum vel militem. *And so it was done by the abbot of saint Alban, who held six knights fees of the king, and performed the service* per duos milites galeatos et lege militari decenter armatos et octo armigeros, *four of whom were* equites cum lineis et ferreis armis muniti, *and two were* ballistarii; *and they were presented to the constable and marshal, and* in constabulariis positi, *that is, listed in their several companies. And note, that* hi milites et servientes *were at their own proper expences in going, staying for* 40 *days, and returning. Note also, that the* 40 *days are accounted from the day prefixed for the assembling of the army in the destined place, wherever it shall be, whether in the kingdom or out of the kingdom; and the day and place of the assembly of the army were prefixed in the writ* de summonitione servitii.

Observe,

Est optimi ducis scire et vincere, et cedere prudenter tempori. Multum potest in rebus humanis occasio, plurimum in bellicis. Polibius.

Quid tam necessarium est, quàm tenere semper arma, quibus tectus esse possis. Vegetius.

But I will take my leave of these excellent authors of art military, and referre them to those that professe the same, and will returne to *Littleton*.

"*Muster.*" I find this word in the statute of 18 *H.* 6. cap. 19. and the ancient military order is worthy of observation; for before and long after that statute, when the king was to be served with souldiers for his warre, a knight or esquire of the country that had revenues, farmors and tenants, would covenant with the king, by indenture inrolled in the exchequer, to serve the king for such a terme with so many men (specially named in a list) in his warre, &c. an excellent institution that they should serve under him, whom they knew and honoured, and with whom they must live at their returne. These men being mustered before the king's commissioners, and receiving any part of their wages, and their names

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Observe, that great fines were frequently imposed on those, who were deficient in doing their service on the summons of the army. Vid. Claus. 27 H. 3. parte 1. m. 12. *Thomas de Berclay was fined* 60 *marks for default of service* in transfretando cum rege. Claus. 16 E. 2. m. 36. *The barons of the exchequer were commanded to compound with the archbishops, bishops, religious men, and others, for the remission of their service in the next army summoned at Newcastle on the vigil of St. James next ensuing, and to take for a fine forty pounds for every fee, and so* pro rata. *By* Pat. 13 *E.* 2, *it was directed that twenty pounds should be taken for a fine on every fee of a knight who should make default. Vid. Fines* 7 E. 2. m. 4, 5. *On the summons of service for the army of Scotland, it was proclaimed, that ecclesiastical persons and women should do their service at the day, or come before A. and B. and pay a fine, viz. twenty marks for every fee. So observe, that they were not fines imposed, but voluntary fines.* Hal. MSS.— In reading the preceding annotation by lord Hale, it is very requisite to attend to the distinction between the two subjects of it. The *first* part of the annotation, which states the progressive changes in the assise of arms between the 27 of Hen. 2, and the 21 of Jam. 1, and refers to the commissions of array during the same period, is applicable to the *general* military service *all* the king's subjects are liable to for the internal defence of the realm. The *remainder* relates to the performance of that *particular* military service, which was due by reason of tenure, and might be required on *foreign* expeditions. With respect to the *latter* it may be sufficient to add, that military service by tenure was wholly abolished by the 12 Cha. 2, c. 24, which in *express* terms discharges all estates from services on *voyages royall*, and that long before this statute it had fallen into disuse, as appears from there not being any instance of assessing escuage since the reign of Edward the second. As to the *former*, lord Hale ends his historical deduction about the assise of arms and commissions of array with the 21 of James; but the reader will find the same subject very accurately continued to the present times, together with some particulars relative to the previous period not adverted to by lord Hale, in an admired work, to which we have such frequent occasion to refer. See 1 Blackst. Comment. 5th edit. 411. It is observable, that lord Hale avoids taking the least notice of the great contest between Charles the first and the long parliament about the king's power over the *militia*, which arose in consequence of some commissions of array issued by him, and was the immediate prelude to the civil wars in his reign. Of the arguments used by each party on this occasion, there is a very full account in Rushworth. See 4 Rushw. 655.—[Note 28.]

names so recorded, if they after departed from their captaine within the terme contrary to the forme of that statute, it was felony. But now that statute is of no force; because that ancient and excellent forme of military course is altogether antiquated; but later statutes have provided for that mischiefe.

(3 Inst. 86 Cro. Cha. 71.) 6 Co. 27, the souldiers case.

To muster is to make a shew of souldiers well armed and trained before the king's commissioners in some open field; *ubi se ostendentes præludunt prælio.* In *Latine* it is *censere, seu lustrare exercitum.*

(Lamb. fo. 135. b.)

By the law before the Conquest musters and shewing of armour should be *uno eodem die per universum regnum, ne aliqui possint arma familiaribus et notis accommodare, nec ipsi illa mutuò accipere, ac justitiam domini regis defraudere, et dominum regem et regnum offendere.*

Concerning the point in law, demurred in judgment, in the seventh of Edward the third, here mentioned by our author, the law accounteth the beginning of the fortie days after the king entreth into the foreine nation; for then the war beginneth, and till he come there, he and his host are said to goe towards the warre, and no militarie service is to be done till the king and his host come thither.

"*Sir William Herle.*" A famous lawyer, constituted chiefe justice of the common pleas by letters patents dated 2 *die Martii anno* 5 *E.* 3. It appeareth by *Littleton*, and by the records, that he was a knight, against the conceit of those, that thinke, that the chiefe justices of the court of common pleas were not knighted till long after.

Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding. He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you, the sages of the law in former times (whereof sir *William Herle* was a principall one) have had the deepest reach. And as the bucket in the depth is easily drawn to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keepe himselfe in his owne proper element.

Glanvile, lib. 2, cap. 6, &c.

☞ "*Justice.*" In *Glanvil* he is called *justitia in ipso abstracto*, as it were justice itselfe; which appellation remaines still in *English* and *French*, to put them in mind of their dutie and functions. But now in legall *Latin*, they are called *justiciarii tanquam justi in concreto*, and they are called *justiciarii de banco, &c.* and never *judices de banco, &c.* [71. b.]

"*The common place* (comon banke)." *Banke* is a *Saxon* word, and signifieth a bench or high seat, or a tribunall, and is properly applyed to the justices of the court of common pleas, because the justices of that court sit there as in a certaine place: for all writs returnable into that court are *coram justiciariis nostris apud Westmon.* or any other certaine place where the court sit; and legall records tearme them *justiciarii de banco.* But writs returnable into the court called the king's bench are *coram nobis (i. e. rege) ubicunque fuerimus in Angliâ*; and all judiciall records there are

are styled *coram rege*. But for distinction sake it is called the king's bench; both because the records of that court are styled (as hath beene sayd) *coram rege*, and because kings in former times have often personally sate there (1). For the antiquity of the court of common pleas, they erre, that hold that before the statute of *Magna Charta* there was no court of common pleas, but it had its creation by or after that charter; for the learned know, that in the sixe and twentieth yeare of *Edward* the third, the abbot of *B.* in a writ of assise brought before the justices in eire claimed conusance and to have writs of assise and other originall writs out of the king's court by prescription, time out of mind of man, in the raignes of Saint *Edmond*, and Saint *Edward* the Confessor before the Conquest. And on the behalfe of the abbot were shewed divers allowances thereof in former times in the king's courts, and that king *Henry* the first confirmed their usages, and that they should have conusance of pleas, so that the justices of the one bench or the other should not intermeddle. And the statute of *Magna Charta* erecteth no court, but giveth direction for the proper jurisdiction thereof in these words: *Communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco.* And properly the statute saith, *non sequantur*, for that the king's bench did in those dayes follow the king *ubicunque fuerit in Angliâ*, and therefore enacteth that common pleas should be holden in a court resident in a certaine place. In the next chapter of *Magna Charta* (made at one and the same time) it is provided; *et ea, quæ per eosdem (s. justiciarios itinerantes) propter difficultatem aliquorum articulorum terminari non possunt, referantur ad justiciarios nostros de banco, et ibi terminentur.* And in the next to that, *Assisæ de ultimâ præsentatione semper capiantur coram justiciariis de banco, et ibi terminentur.* Therefore it manifestly appeareth, that at the making of the statute of *Magna Charta* there were *justiciarii de banco*, which all men confesse to be the court of common pleas. And therefore that court was not erected by or after that statute (2). For the authority of this court,

26 Ass. p. 24. 4 E. 3. fol. 19. Bracton, lib. 3, fol. 105. b. Britton, fol. 1 and 2. Fleta, lib. 2, cap. 2. Mirror, cap. 5, sect. 1. Fortescue, cap. 51. See in the preface to the third part of my Reports.

Mirror, cap 5, sect. 2. Fleta, lib. 2, cap. 54.

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(1) But though formerly our kings did *actually* sit in the court of king's bench, and the law still intends that the king is present there, yet the *judicature* belongs to the judges *only*, as lord Coke elsewhere observes. 4 Inst. 73. See further on the subject 3 Blackst. Comm. 5th ed. 41, and Mad. Hist. Exchcq. fol. ed. 58. 64. 68. and 553.—[Note 29.]

(2) From the whole of lord Coke's observations here and in his preface to his eighth book of Reports, it seems to have been his opinion, that the *court of common pleas* was not only a *distinct* court at the time of making the Magna Charta of the 9th of Hen. 3, but also existed as such before the Conquest. But according to mr. Madox, whose inquiries into the subject were certainly more minute and particular, the origin of the *court of common pleas* is of a much later date. He so far agrees with lord Coke, as to admit, that the *Magna Charta* of Henry the 3d rather *confirmed* than *erected* the *bank* or *common pleas*, and that such a court was in being several years before the *Magna Charta* of the 17th of king John, though it was then first made *stationary*. But in other respects lord Coke and mr. Madox differ widely; for the latter thinks, that for some time after the Conquest there was *one* great and supreme judicature called the *curia regis*, which he supposes to have been of *Norman* and not *Anglo-Saxon* original, and to have exercised jurisdiction over *common* as well as *other* pleas; that the *common pleas*, and *exchequer* were gradually separated from the *curia regis*, and became jurisdictions wholly distinct

court, it is evident by that which hath beene said, that it hath jurisdiction of all common pleas. But let us returne to *Littleton*.

(Doct. Pla. 115. 5 Co. 114.)

"*Demurred in judgment.*" A demurrer commeth of the *Latine* word *demorari* to abide; and therefore he which demurreth in law, is said, he that abideth in law: *Moratur* or *demoratur in lege*. Whensoever the councill learned of the party is of opinion, that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgement of the court; and therefore well saith *Littleton* here, *demurred in judgment*; the words of a demurrer being, *quia narratio, &c. materiaque in eâdem contenta minus sufficiens in lege existit, &c.* and so of a plea, *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.* But if the plea be sufficient in law, and the matter of fact be false, then the adverse partie taketh issue thereupon. and that is tried by a jury; for matters in law are decided by the judges, and matters in fact by juries, as elsewhere is said more at large.

(5 Co. 69. Hob. 164.)

Now as there is no issue upon the fact, but when it is joyned betweene the parties, so there is no demurrer in law, but when it is joined; and therefore when a demurrer is offered by the one party, as is aforesaid, the adverse party joyneth with him, (for example) saith, *quòd placitum prædictum, &c. materiaque in eodem contenta bonum et sufficiens in lege existunt, &c. et petit judicium*, and thereupon the demurrer is said to be joyned, and then the case is argued by counsell learned of both sides; and if the poynts be difficult, then it is argued openly by the judges of that court, and if they or the greater part concurre in opinion, accordingly judgement is given; and if the court be equally divided, or conceive great doubt of the case, then may they adjourne it into the exchequer chamber, where the case shall be argued by all the judges of *England*; where if the judges shall be equally divided, then (if none of them change their opinion) it shall be decided at the next parliament by a prelate, two earles, and two barons, which shall have power and commission of the king in that behalfe, and by advice of themselves, the chancellor, treasurer, the justices of the one bench and the other, and other of the king's counsell as many and such as shall seeme convenient, shall make a good judgement, &c. And if the difficulty be so great as they cannot determine it, then it shall be determined by the lords in the upper house of parliament (1). See the statute, for it extends not onely to the case abovesaid,

Vid. Bract. lib. 5. fo. 352. b.

14 E. 3. cap. 5. Statut. 1.

Rot. Parlia. 14 E. 3. nu. 31, a proceeding in sir John Stanton's case upon difficulty in the court of common pleas.

[72. a.]

Vide Britton, fol. 41. 21 E. 3. 37, 38. 39 E. 3, fo. 1. 21. 35. 40 E. 3. 34. 13 H. 4. 3, 4.

but

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distinct from it; and that the separation of the *common pleas* began in the reign of the first Richard, or early in the reign of John, and was completed by Henry the third. See Mad. Hist. Excheq. fol. ed. 63, and the chapter on the division of the king's courts 539. See further 3 Black. Comment. 5th ed. 37. 4 Inst. 99. Lamb. Archeion, ed. 1635. p. 24 to 34, and the books cited in Pryn. on 4 Inst. 52.—[Note 30.]

(1) See further, as to the adjourning of causes into the exchequer chamber in order to have the opinion of all the judges, 4 Inst. 110. 118, and *Warraine* and *Smith*, 2 Bulstr. 146, in which case the court refused to grant a motion for such an adjournment.

but also where judgments are delayed in the chancery, king's bench, common bench, and the exchequer, the justices assigned, and other justices of oyer and terminer, sometime by difficulty, sometime by divers opinions of justices, and sometime for other causes. [a] Before which statute, if judgements were not given by reason of difficulty, the doubt was decided at the next parliament, (which then was to be holden once every yeare at the least) (2). [b] *Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponatur judicium in respectum usque ad magnam curiam, ut ibi per concilium curiæ terminentur.* But hereof thus much shall suffice. [c] He that demurreth in law confesseth all such matters of fact as are well and sufficiently pleaded. If there be a demurrer for part and an issue for part, the more orderly course is to give judgement upon the demurrer first; but yet it is in the discretion of the court to try the issue first, if they will. After demurrer joyned in any court of record, the judges shall give judgment according as the very right of the cause and matter in law shall appeare, without regarding any want of forme in any writ, returne, plaint, declaration, or other pleading, proces, or course of proceeding, except those onely which the party demurring shall specially and particularly set downe and expresse in his demurrer (3). [a] Now what is substance and what is forme you shall read in my Reports.

[a] 4 E. 3. ca. 14.

[b] Bracton, lib. 1. cap. 2, nu. 7. Brit. fol. 41. 1 E. 3. 7, 8. 2 E. 3. 6, 7.

[c] 17 E. 3. 50. b. 47 E. 3. 13, 14. 5 H. 7. 1. 13 E. 4. 7. b. Pl. Com. 85. 411. 172. (5 Co. 69. b. 1 Sid. 10. Post. 125. Hob. 232, 233. Doc. Pla. 115, 116.) 48 E. 3. 15.

2 R. 2. inquest. 2. 38 E. 3. 25. 11 H. 4. 5. 75. 3 E. 4. 2. Coll. case. 5 Co. 74. Wymek's case. 10 Co. 88. usque 98. (1 Leon. 178. Doc. Pla. 116, 117.)

[a] 3 Co. 57. Linc. Doctor Leyfield's case.

And in some cases a man shall alledge speciall matter, and conclude with a demurrer; [b] as in an action of trespasse brought by *I. S.* for the taking of his horse, the defendant pleads that he himselfe was possessed of the horse untill he was by one *I. S.* dispossessed, who gave him to the plaintife, &c. the plaintife saith that *I. S.* named in the barre and *I. S.* the plaintife were all one person, and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law, and the court did hold the plea and demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurrer upon counts and pleas, so there may be of aid prier, voucher, receit, waging of law, and the like. [c] By that which hath been said it appeareth, that there is a generall demurrer, that is, shewing no cause, and a speciall demurrer, which sheweth the cause of his demurrer. Also by that which hath beene said, there is a demurrer upon pleading, &c. and there is also a demurrer upon evidence. [d] As if the plaintife in evidence shew any matter of record, or deeds or writings, or any sentence in the ecclesiasticall court, or other matter of evidence by testimony of witnesses, or otherwise, whereupon doubt in law ariseth, and the defendant offer to demurre in law thereupon, the plaintife cannot refuse to joine in demurrer, no more than in a demurrer upon a count, replication, &c. and so *è converso* may the plaintife demurre in law upon the evidence of the defendant.

[b] 13 E. 4. 7. 31 E. 3. Estoppel, 244. 33 H. 6. 9, 10. 22 E. 4. 50. 1 H. 7. 21.

[c] 14 H. 4. 31. 37 H. 6. 6.

[d] 5 Co. 104. a. Baker's case.

But if [e] evidence for the king in an information or any other suit be given, and the defendant offer to demurre in law upon the evidence,

[e] 38 H. 8. Dyer 53. (Cro. Eliz. 752.)

(2) See 4 Inst. 9, and Com. Dig. *Parliament*, C.

(3) See 27 Eliz. c. 5, and 4 An. c. 16.

evidence, the king's counsell shall not be inforced to joyne in demurrer; but in that case, the court may direct the jury to finde the speciall matter.

"*In judgment.*" For the signification of this word, *Vide* Sect. 366.

Sect. 97.

AND after such a voyage royall into Scotland, it is commonly said, that by authority of parliament the escuage shall be assessed and put in certaine; scil. *a certaine summe of money, how much every one, which holdeth by a whole knight's fee, who was neither by himselfe, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case, that it was ordained by the authoritie of the parliament, that every one, which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord fortie shillings; then he which holdeth by the moitie of a knight's fee, shall pay to his lord but twentie shillings; and he which holdeth by the fourth part of a knight's fee, shall pay but x s. and he which hath more, more, and which lesse, lesse* (5).

"*AFTER a voyage royall, &c. it is commonly said, that by authority of parliament the escuage shall be assessed.*" *Nota*, here is a secret of law included, that albeit escuage incertaine be due by tenure, yet because the assessment thereof concerned so many and so great a number of the subjects of the realme, it could not be assessed by the king or any other but by parliament: [a] ☞ and this was by the common law (1). [72. b.]

[a] 13 H. 4. 5.

[b] 8 H. 3. Rot. Claus. & Rot. finium, memb. 30. & ante.

[b] No escuage was assessed by parliament since the reigne of *Edward* the second, and in the eighth yeare of his reigne escuage was assessed (2).

Staff. P. 14 E. 1. de banco.

If the tenant goeth with the king, and dyeth *in exercitu*, in the host or armie, he is excused by law, and no escuage shall be demanded.

And

* *This is note 5 of 72. b. in the 13th and 14th editions.*

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(5) * *It seems, that if A. held land of the king by 4 knights fees, and A. before the statute of* quia emptores *had created divers mesnalties and reserved 20 knights fees, and A. had done the king's service, he should have had the escuage of 20 fees. But if A. did not do the king's service, the king should have had the escuage of 4 fees, and also of 20 fees, or at least of* 16. Vid. Rot. Parl. 8. m. 4. dorso, et lib. Parl. 14 E. 2, petitiones magnatum inde. Claus. 16 H. 3. m. 17. Rex vicecomiti Cornubiæ præcepit, quòd nullum distringat nisi pro tot feodis, quod regi tenetur reddere. Hal. MSS.—[Note 34.]

(1) The Magna Charta of king John provides, that escuage shall not be imposed except by the consent of parliament; but some respectable writers think, that it was an arbitrary payment before. Blackst. Comment. 5th ed. v. 2. p. 74. Wright's Ten. 128. 133.—[Note 31.]

(2) See ante 69. b. note 3.

And it is to be observed, that if he, that holds of the king by escuage, goeth, or findeth another to goe for him with the king, &c. then he shall have escuage of his tenants that hold of him by such service (3), which must be assessed by parliament. F. N. B. 84. Bract. lib. 2, 36. a.

But if the king's tenant goeth not with the king, then he shall pay for his default escuage, and shall have no escuage of his tenants (4). *Richard* the second making a voyage royall into *Scotland*, at the petition of his commons pardoned the payment of escuage. F. N. B. 84. Rot. Parl. 9 R. 2. nu. 40.

Sect. 98.

AND some hold by the custome (6), *that if escuage be assessed by authoritie of parliament at any summe of money, that they shall pay but the moitie of that summe, and some but the fourth part of that summe. But because the escuage that they should pay is uncertaine, for that it is not certaine how the parliament will assesse the escuage they hold by knights service. But otherwise it is of escuage certain, of which shall be spoken in the tenure of socage.*

"*SOME hold by the custome, &c.*" *Nota*, that escuage is directed by custome. Vide Sect. 120. 15 E. 2. tit. Avow. 215. 29 Ass. 65. 30 E. 3. 23. b. 4 Co. 88, in Luttrel's case.

"*But otherwise it is of escuage certain.*" Here it appeareth, that escuage is two-fold, viz. escuage incertaine, whereof *Littleton* here speaks; and escuage certain, *Quemadmodum incertitudo scutagii facit servitium militare, ita certitudo & scutagii facit socagium.* But more of this in the [73. a.] Chapter of Socage, Sect. 120.

"*By parliament.*" Of the antiquitie and authoritie of this court, see Sect. 164.

Sect.

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(3) Vid. Claus. 26 H. 3. part 2. m. 10, dors. Rex vicecomiti. Præcipimus, quòd de omnibus feodis militum quæ tenentur de tenentibus de nobis in capite, qui brevia nostra non tulerint de habendo scutagio suo, et similiter de feodis militum quæ tenentur de wardis in manu nostrâ, scutagium nostrum colligi facias, ita quòd habeas ad satisfaciendum, &c. Hal. MSS.—[Note 32.]

(4) According to mr. Madox's account it seems, that the lord, though he did not go in person, or send a deputy, was entitled to escuage from his tenants, if he paid or was duly charged with escuage to the king; and perhaps lord Coke did not mean to intimate the contrary. Mad. Hist. Exchеq. fol. ed. 469. See however note 5, *ante*.—[Note 33.]

(6) The words in L. and M. and Roh. are *and some tenants hold, &c.* and the words *by the custome* are omitted.

Sect. 99.

AND if one speake generally of escuage, it shall be intended by the common speech of escuage incertaine, which is knights service. And such escuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of service, unlesse it be to the tenure in frankalmoigne, as shall be said afterward in the tenure of frankalmoigne (1). *And so he, which holdeth by escuage, holds by homage, fealty, and escuage* (2).

(2 Inst. 485. 6 Co. 20. Post. 78. b. 189. a. 381. b. 1 Sid. 265. 41 Co. 39. a.) Entendments en Ley. Sect. 100. 110. 367. 377. 393. 406. 462, 463. 5 E. 2. Receit 165. 20 H. 6. 23. 21 H. 6. 8. 37 H. 6. 29. 13 H. 4. 4. 6 El. Dyer 236. 10 E. 4. 11. 32 E. 3. Gard. 31. Brit. fol. 163.

"*AND if one speake generally of escuage, it shall be intended by the common speech of escuage incertaine.*"

Verba æquivoca et in dubio posita intelliguntur in digniori et potentiori sensu. Tenure *in capite ex vi termini* is a tenure in grosse, and it may be holden of a subject; but being spoken generally, it is *secundum excellentiam* intended of the king, for he is *caput reipublicæ*.

40 E. 3. 21. 8 H. 7. 4.

"*And such escuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of service, unlesse it be to the tenure in frankalmoigne.*" This is gathered by the effects of their tenure, for essences are found out by properties, fountains by rivers, and causes by effects: for amongst others, the lords shall have escuage of their tenants, &c. as it followeth.

Sect.

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(1) See acc. Mad. Baron. Angl. 166.

(2) From this and the next preceding Section it seems, that notwithstanding Littleton's expressing himself in other places as if *escuage* was a distinct tenure or service, he did not consider it as such. Escuage must be either *certain* or *uncertain*, and Littleton expressly writes, that being the *former* it is *socage*, and being the *latter* it is *knights service*. This tends to confirm the propriety of the observation by mr. Madox, who will not allow escuage to be a tenure or service of itself, and insists, that, wherever it was payable, like homage and fealty, it was a mere *incident* to tenure. See note 2, of fol. 64. a. However, a late learned judge was not satisfied with considering *escuage* in this limited way, and endeavours to shew, that though in general escuage uncertain was a fine or sum of money payable as a commutation for personal service; yet anciently a payment in money, bearing a certain proportion to the escuage assessed from time to time on tenants by knights service, and on that account called escuage, was sometimes a service originally reserved, and then escuage was itself the tenure, and so denominated to distinguish it from the genuine and proper tenure by knights service. See Wright's Ten. 121, to 127. But this distinction, it is allowed, is not hinted at by Littleton; and it is even conjectured, that in his time it might be lost in the *general* notion of escuage, to which only mr. Madox meant to apply his animadversion on Littleton and Coke for considering it as a tenure. See further 2 Blackst. Comm. 5th ed. 75. —[Note 35.]

Sect. 100.

AND it is to be understood, that when escuage is so assessed by authoritie of parliament, everie lord, of whom the land is holden by escuage, shall have the escuage so assessed by parliament; because it is [73. b.] *intended by the law, that at ☞ the beginning such tenements were given by the lords to the tenants to hold by such services, to defend their lords as well as the king, and to put in quiet their lords and the king from the Scots aforesaid.*

Sect. 101.

AND because such tenements came first from the lords, it is reason that they should have the escuage of their tenants. And the lords in such case may distreine for the escuage so assessed, or they in some cases may have the king's writs (briefe le roy) *directed to the sheriffs of the same counties, &c. to levie such escuage for them, as it appeareth by the Register. But of such tenants, as hold of the king by escuage, which were not with the king in Scotland, the king himselfe shal have the escuage.*

"*THE lords shall have the escuage, &c.*" This is evident.

F N. B. 84. Register 88, de Scutagio habendo.

"*The king's writs* (briefe le roy)." This commeth of the *Latine* word *Breve.*

Fitzh. in his preface to his *N. B.* saith of them, that they be those foundations, whereupon the whole law doth depend.

[a] *Bracton* describeth a writ thus: *Breve quidem, cùm sit formatum ad similitudinem regulæ juris; quia breviter et paucis verbis intentionem proferentis exponit, et explanat, sicut regula juris rem quæ est, breviter enarrat. Non tamen ita breve esse debeat quin rationem et vim intentionis contineat.*

[a] Bracton, lib. 5. fol. 413. Fleta, lib. 2, cap. 12. Britton, fol. 122. 227. (1 Sid. 187.)

Of writs some be original, *brevia originalia*, and some be judiciall, *brevia judicialia.*

(7 Co. 4. a. 4 Inst. 10.)

Also of originals, *quædam sunt formata sub suis casibus et de cursu, et de communi consilio totius regni concessa et approbata, quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum; et quædam sunt magistralia, et sæpe variantur secundum varietatem casuum, factorum et quærelarum;* as for example, actions upon the case, which varie according to the varietie of everie man's case, and the like; and these being not of course, the masters being learned men did make: *Item brevium originalium alia sunt realia, alia personalia, alia mixta: Item brevium originalium, alia sunt patentia sive aperta, et alia clausa.* Certaine it is, that the originall writs are so artificially and briefely compiled, as there is nothing redundant or wanting in them, of which an honourable secretary of state once said, that it was not possible to comprehend so much matter so perspicuously in fewer words. Of all these kinds of writs you shall read plentifully in the *Register*, whereof *Littleton* maketh mention in this place, and also in *Fitzh. N. B.*

(Plowd. 228. a. 4 Inst. 79.) Bractou, ubi supra. Britton, ubi supra. Regist. 88. F. N. B. 84.

"*As it appeareth by the Register.*" *Register* is the name of a most ancient booke, and of great authoritie in law, containing all the originall writs of the common law; of which booke see more in the preface to the ninth part of my Reports, and containeth also *brevia judicialia, quæ sæpiùs variantur secundum varietatem placitorum proponentis et respondentis* (1).

Also it appeareth by the *Register*, that the king shall have escuage of his tenants, which hold of him as of a mannor which he hath in ward (2), or by reason of a vacation of a bishopricke.

F. N. B. 84.

And so shall a common person, if he hath an estate for life or for yeares of a seigniory.

☞ Sect. 102. [74. a.]

ITEM, in such case aforesaid, where the king maketh a voyage royall into Scotland (1)†, *and the escuage is assessed by parliament, if the lord distraine his tenant, that holdeth of him by service of a whole knight's fee, for the escuage so assessed, &c. and the tenant pleadeth, and will aver, that he was with the king in* Scotland, *&c. by 40 dayes, and the lord will averre the contrary, it is sayd, that it shall be tryed by the certificat of the marshall of the king's host* (2) ‡ *in writing under his seale* (3) ‖, *which shall be sent to the justices.*

"*AND*

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(1) See further as to the Register of Writs, Nichols. Engl. Histor. Libr. 2d ed. 205.

(2) See ante 72. b. note 3.

(1) † It is very clear, that escuage was due for service *out of the realm*, which was the reason of its being called *servitium forinsecum*; but I do not find it precisely ascertained by any writer, whether it could be claimed on *all foreign* expeditions, or whether it was confined to expeditions into *particular* countries. When indeed on the creation of the tenure the personal service, in lieu of which escuage became payable, was *expressly* limited to *certain* places, there could be no room for doubt; but the difficulty is to know, what the construction of the law was, when knight's service was reserved *generally*. Littleton mentions only Scotland, other writers add Wales; but in general *both* are named merely as instances. Lord Coke observes as much, and says, that escuage was also due on expeditions into Ireland, Gascony, Poictou, &c. *if the tenure was to go into those countries:* but there is a shortness in this manner of expression, which leaves an obscurity; for the words do not explain what the rule of law was, when no place was named. See ante fol. 69. a. One ancient author *absolutely* restrains escuage to Scotland and Wales, and in direct terms excludes *all other* territories. Old Ten. tit. *Escuage*. But of this restriction it is sufficient to say, that the records concerning escuage, which mention Ireland, Normandy, Poictou, Bretagne, and Thoulouse, as well as Scotland and Wales, are full evidence to the contrary. See the records cited by lord Hale in note 3, of fol. 69. b. and also Seld. Notes on Hengham, 12mo. ed. 114.—[Note 36.]

(2) ‡ In L. and M. the words are *constable of the king's host.*

(3) ‖ In L. and M. there is an *&c.* after *seale*, and the words *which shall be sent to the justices* are omitted.

"AND *will aver, that he was with the king in* Scotland *by* 40 *days, &c.* [a] *it is sayd, that it shall be tryed by the certificat of the marshall.*" This is a tryall appointed by the law, *ne curia regis deficeret in justitiâ exhibendâ.* [b] Herewith agreeth the *Register*, where the marshall is called *constabularius exercitûs nostri.*

(6 Co. 21.)
[a] 2 E. 4. 11. 4 E. 4. 10. 21 E. 4. 10. F. N. B. 85. 11 H. 7. 5. 9 Co. 32. Case de Strat. Marc.

[b] Regist. 88. F. N. B. 84. 2 E. 4. 1. 4 E. 4. 10. 9 H. 4. 3. 11 H. 7. 5. 21. H. 6. 50. 33 H. 6. 1. 45.

"*The marshall of the king's host.*" *Mareschallus exercitûs*, in *Saxon Marischalk, i. e. equitum magister.* This word *Marshall* is either derived of *Mars*, or of *marc* an horse, and *schalc*, which signifieth in the *Saxon* tongue, a master or governor. [c] In the lawes before the Conquest it is said, *Mareschalli exercitûs seu ductores exercitûs Heretoches per Anglos vocabantur. Illi ordinabant acies densissimas in prœliis et alas constituebant, prout decuit, et prout ei meliùs visum fuerit ad honorem coronæ et ad utilitatem regni.* [d] And here it is to be observed, that his certificate in this case is a triall in law. I read of sixe kinds of certificates allowed for trials by the common law; the first whereof *Littleton* here speaketh of, in time of warre out of the realme. 2. In time of peace out of the realme. [e] As if it be alledged in avoydance of an outlawrie, that the defendant was in prison at *Burdeaux* in the service of the maior of *Burdeaux*, it shall be tryed by the certificate of the maior of *Burdeaux*. 3. For matters within the realme, [f] the custome of *London* shall be certified by the maior and aldermen by the mouth of the recorder. 4. By certificate of the sherife upon a writ to him directed [g] in case of privilege, if one be a citizen or a forreiner. 5. Triall of records by certificate of the judges in whose custody they are by law. All these be in temporall causes. 6. In causes ecclesiasticall, as loyalty of marriage, general bastardie, excommengement, profession; these and the like are regularly to be tried by the certificate of the ordinarie (4).

[c] Lamb. fol. 136.
[d] 2 E 4. 1. b. 4 E. 4. 10. 23 E. 4. 47. F. N. B. 85. (2 Inst. 428. Post. 261. a.)
[e] 4 E. 4. 10.
[f] 5 E. 4. 30. 21 E. 4. 16. (2 Ro. Ab. 579.)
[g] 10 H. 6. 10. (Fortesc. cap. 32.)
(12 Co. 67.)

And there be divers other trialls allowed by the common law, than by a jury of 12 men, which you may reade at large in the ninth booke of my Reports, fol. 30, 31, &c. in the case of the abbot of *Strata Marcella*, which are as plainly set downe there, as they can be here. And in this case, if the triall should not be by certificate, it should want triall, which should be inconvenient. Onely in this place I will adde something of a foreine triall which I finde not in any of the treatises lately published against single combats; because it may deterre men from that ungodly and unlawful kinde of revenge, whereupon many murders have ensued, and prevent all hope of impunity for default of triall in that case.

(4 Inst. 124.)

If a subject of the king be killed by another of his subjects out of *England* in any forreine country, the wife or he that is heire of the dead may have an appeale for this murder or homicide before the constable and the marshall, whose sentence is upon testimony

Stat. de 1 H. 4, cap. 14. 13 H. 4, fol. 5. Vid. Rot. Parliam. 8 H. 6. nu. 38. Stanf. Pl. Cor. fo. 65.

of

(4) See further as to trial by certificate, Com. Dig. tit. *Certificate*, and title *Trial* in Viner and the other Abridgments.

of witnesses or combate. And accordingly, where a subject of the king was slaine in *Scotland* by others of the king's subjects, the wife of the dead had her appeale therefore before the constable and the marshall. [74. b.]

[*] Anno 25 Eliz. (Post. 261. Hut. 3.)

And so it was [*] resolved in the raigne of queen *Elizabeth* in the case of sir *Francis Drake*, who strook off the head of *Dowtie in partibus transmarinis*, that his brother and heire might have an appeale. *Sed regina noluit constituere constabularium Angliæ, &c. et ideo dormivit appellum.*

If a man be mortally wounded in *France*, and dieth thereof in *England*, it is said that an appeale doth lie upon the said statute; for it is not punishable by the common law, and the proceeding there (as hath beene said) is upon witnesses or combate, and not by jurie, and the mortal wound was given out of the realme (1).

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(1) The office of high constable became extinct in the reign of Henry the eighth by the attainder of Stafford duke of Buckingham, in whom it was hereditary; and since his death there hath not been any permanent high constable, the practice having uniformly been to keep the office vacant except on particular occasions. In consequence of this it hath frequently been a subject of great controversy, whether during the vacancy of the office of high constable, the jurisdiction incident to the court of chivalry can be exercised by the earl marshal only. Lord Coke's manner of stating sir Francis Drake's case imports, that an appeal could not be prosecuted against him for want of a high constable; and dr. Duck, in his excellent treatise on the use and authority of the civil law, says, that the judges being consulted by Elizabeth were of that opinion. Duck lib. 2. cap. 8. pars 3. s. 16. In the reign of Charles the first the lord keeper and judges of the king's bench were advised with on a like occasion, and held that the earl marshal could not take an appeal without a high constable; and accordingly the king appointed the earl of Lindsey twice to the office; once to try an appeal by lord Rea against mr. Ramsey for treason committed in Germany: and a second time to try an appeal by the widow of William Wise against William Holmes for the murder of her husband in the island of *Terra Nova* in America. See Rushw. vol. 2. p. 106. 112, and Duck ubi supra. Hitherto only the right of the earl marshal to *criminal* judicature had been denied; but in 1640 the house of commons went further, for they resolved that the *earl marshal can make no court without the constable.* See Rushw. vol. 3. p. 1056. However, notwithstanding this declaration of the law by the house of commons, the court of king's bench soon after the Restoration distinguished between the several branches of jurisdiction belonging to the court of chivalry, and held, that as to matters relative to *arms* and *honour* the court may be before the earl marshal only, but that as to matters of ordinary justice touching *life* and *limb* there must be a high constable as well as an earl marshal. 1 Lev. 230. But in a subsequent case before the house of lords, the counsel arguing against the earl marshal insisted *generally*, that by himself he could not hold *any* court; though it doth not appear from the printed report whether the judgment, which was there given against the jurisdiction of the earl marshal, was founded on that proposition, or on the other points of the cause. Such is the state of the authorities against the judicature of the earl marshal without a high constable. See dr. Oldis's case, Show. Parliam. Cas. 58. On the other hand, many strong arguments, drawn from the practice immediately after the attainder of the last hereditary high constable down to the latter end of the reign of James the first, as well as from the opinions of judges and others of high name, have been urged in its favour. These are well

well digested in a letter written soon after the Revolution by dr. Plott to lord Somers whilst he was attorney general, and appear to have been collected by his desire. See Hearn. disc. of Emin. Antiq. 2d edit. vol. 2. p. 250. One authority much relied on by dr. Plott is an opinion of the lord keeper, the master of the rolls, and a great number of the privy council in the 20th of James the first, who after a solemn hearing declared, that the earl marshal had all the powers of judicature without the high constable during the vacancy of that office. Upon report of this to the king, he issued his commission under the great seal to Thomas earl of Arundel the then earl marshal, which, after reciting that the earl marshal had delayed to proceed in some causes before him on account of doubts of his authority, contains the following strong declaration of his judicial power. *We held it fit*, says the king, *in a case of so great weight to proceed with extraordinary deliberation, and having now both by ourself and the whole body of our council received ample satisfaction by many and clear proofs, that the constable and marshal were joint judges together, and several in the vacancy of either, we do hereby authorise will and command you our earl marshal, that from henceforth you proceed in all causes whatsoever, whereof the court of constable ought properly to take cognisance, as judicially and definitively as any constable or marshal of this realm, either jointly or severally, heretofore have done.* A more explicit recognition of the earl marshal's jurisdiction could not be penned, nor one more full and unreserved: for it declares his judicial power to extend to *all causes whatsoever of which the court of the constable and marshal ought properly to take cognisance*, without one exception. How it happened, that so soon after this solemn hearing and declaration concerning the earl marshal, the lord keeper and judges of the king's bench should advise the king that lord Rea's appeal could not be taken without a high constable, seems very extraordinary and unaccountable. To attribute their advice to that jealousy of jurisdictions conforming so much to the civil law, which our judges of the courts of common law sometimes may have indulged to an illiberal excess, would be unjust; because we are not now possessed of the reasons assigned for the opinion thus given to the crown; and on the other hand, the same want of information greatly lessens its weight and authority. Having thus exhibited a view of the controversy about the earl marshal's judicial powers, it may be proper to apprise the reader, that there is not the least intention of advancing any opinion in respect to it, further than by observing upon the distinction between the cases of *honour* and *arms*, and those of *life* and *limb*, so far as it is founded on the 1 Hen. 4. c. 14. Though that statute provides, that *all appeals to be made of things done out of the realm shall be tried and determined before the constable and marshal*, yet it is apparent from the other parts of the same statute, that it was made, not to declare or regulate by *whom* the judicature of the court of chivalry should be exercised, but *when* appeals should be brought *there* and *when* in the *courts of common law*, and further to put an end to the bringing appeals in parliament; and therefore it seems wholly unwarrantable to lay any stress on the statute's incidentally mentioning constable as well as marshal, who as all agree are *joint judges* when *both* offices are full. As to the mode of trial in the case of appeals in the court of chivalry, some have apprehended, that it is ever by duel, if the party appealed elects that mode, and the appellant is not privileged from the duel by age, sex or profession. But this, though it *may be* very true in respect to appeals in the courts of common law, is a mistaken notion as to appeals in the court military; for *there* duel is only the *ultimate* trial; and never resorted to unless there is a want of sufficient testimony to prove the offence, and even then it is said to be in the discretion of the court to grant or refuse the duel. See Rushw. v. 2. p. 113. In lord Rea's appeal against Ramsay in the 7 Cha. 1, being the last in which the *duel* was directed, the day of combat was prorogued; and in the mean time the king signifying his desire of not having the affair decided by duel, the court met and committed both the appellant and appellee

appellee till they should give security to the satisfaction of the king not to attempt any thing against each other, and immediately afterwards was dissolved by a revocation of the commission which had been granted for trial of the appeal. Rushw. v. 2. p. 127.—Before we leave this subject, it may not be amiss to hint the necessity of having the *criminal* jurisdiction of the court of chivalry, which is really of importance, duly regulated and reformed. From the preceding account it appears to be doubtful who can lawfully act as the judges; and besides, the want of a trial by jury may be deemed a reasonable objection to the form of proceeding; and in consequence of these two circumstances the *criminal* jurisdiction of the court of chivalry hath long been in a dormant state, and is likely to continue in it, unless the legislature applies a remedy. This it would be easy to effect; for nothing more would be necessary, than to ascertain who should constitute the court in cases of appeals, to abolish the present mode of trial, and to substitute in its room the trial by jury on a plan like that, which has already been adopted by statute in respect to the *criminal* jurisdiction of the admiralty court. However, it must not be taken for granted, that this court is the *only* jurisdiction for the trial of crimes committed in *foreign* countries, or that without resorting to it, there would be an absolute defect of justice in the case of *all* such crimes. For, 1. the 33 of Hen. 8. c. 23, provides, that treason misprision of treason and murder, in whatever place committed, whether *within the king's dominions or without*, shall be triable before commissioners of *oyer and terminer* to be appointed for that purpose; and this statute we are told, stands unrepealed as to murder, and hath accordingly been sometimes put into use. 2. As to treasons and misprisions of treason committed out of the realm, they by the 35 H. 8. c. 2, are triable either before the king's bench or commissioners. See 1 Hal. Hist. Pl. C. 283. It is also provided by the 26 of H. 8. c. 13, that the crimes made treason under that statute, or being so before, if committed *out of the realm*, shall be indictable before commissioners and tried in the king's bench; but it is doubtful whether this statute is now in force. See farther as to the high constable and earl marshal, post. 106. a. and 391. b.—Note as to *escuage*, it is *expressly* taken away by the 12 Cha. 2. c. 24, and had fallen into disuse long before; for there is no instance of parliament's assessing it since the reign of Ed. 2. See ante 72. b.—[Note 37.]

CHAP.

Chap. 4. Of Knights Service. Sect. 103.

Tenure by homage fealty and escuage is to hold by knights service (per service de chivaler), *and it draweth to it ward* (gard) *mariage and reliefe. For when such tenant dyeth, and his heire male be within the age of* 21 *yeares, the lord shall have the land holden of him untill the age of the heire of* 21 *yeares; the which is called full age, because such heire, by intendment of the law, is not able to doe such knights service before his age of* 21 *yeares. And also if such heire be not maried at the time of the death of his ancestor, then the lord shall have the wardship and mariage of him. But if such tenant dieth, his heire female being of the age of* 14 *yeares or more, then the lord shall not have the wardship of the land, nor of the bodie; because that a woman of such age may have a husband able to doe knights service. But if such heire female be within the age of* 14 *yeares, and unmaried at the time of the death of her ancestor, the lord shall have the wardship of the land holden of him until the age of such heire female of* 16 *yeares; for it is given by the statute of* W. 1. *cap.* 22, *that by the space of two yeares next ensuing the sayd* 14 *yeares, the lord may tender convenable mariage without disparagement to such heir female. And if the lord within the said two years do not tender such mariage, &c. then she at the end of the said* 2 *yeares may enter, and put out her lord. But if such heire female be married within the age of* 14 *yeares in the life of her ancester, and her ancester dieth, she being within the age of* 14 *yeares, the lord shall have only the wardship of the land untill the end of the* 14 *yeares of age of such heire female, and then her husband and she may enter into the land, and oust the lord. For this is out of the case of the said statute, insomuch as the lord cannot tender mariage to her which is maried, &c. For before the said statute of* W. 1. *such issue female, which was within the age of* 14 *yeares at the time of the death of her ancestor, and after she had accomplished the age of* 14 *yeares, without any tender of mariage by the lord unto her, such heire female might have entred into the land and ousted the lord, as appeareth by the rehearsall and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is alwayes intended by the words of the same statute, that the lord shall not have these two yeares after the* 14 *yeares, as is aforesaid, but where such heire female is within the age of* 14 *yeares, and unmaried at the time of the death of her ancestor* (1).

KNIGHTS

* *This is note* 1 *of* 75. b. *in the* 13*th and* 14*th editions.*

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(1) * In L. and M. and the Pap. MS. there is the following addition: *Item, if a man holds a manor of another by knights service, and he holds another manor of another man by the same service, but holds one manor by priority, &c. and the other manor by posteriority, and has issue a daughter, and dies, and the manors descend to the daughter then being within the age of* 14 *years, and the lord of whom one of the manors is held by priority, seizes the wardship of the body of the heir and of the manor held of him, and the other lord seizes the wardship of the other manor held of him, in this case, when the daughter comes to the age of*

(6 Co. 73. b.)

"KNIGHTS *service* (service de chivaler)." *Nota*, it appeareth by [*a*] the *Register*, that it is [*b*] said *unum feodem militis*, and not *feodum unius militis*, as it was said [*c*] by some of old; and so *duo feoda militis*, *&c.* and sometime these fees are called *feoda militaria* [*d*]. Our author, having before treated of homage fealty and escuage, now commeth to knight service itselfe. In *Domesday* it is thus recorded: *Episcopus Baiecensis, ille qui tenet de Modardo, reddit ei 50 s. et servitium unius militis.*

[a] Glanvil. lib. 7. cap. 10.
[b] Regist. 2. 30 E. 3. 24.
[c] Glanvil. lib. 7, cap. 14.
[d] Glanvil. lib. 7, cap. 9, &c. Fleta, lib. 1, cap. 8. diversis locis.

Bracton, lib. 2, fo. 85. Britton, fol. 162, & fol. 28, & 95. Ockam in Mirror, cap. 1, sect. 3. Sud. Diton.

"*Knight* (chivaler)," *i. e. eques*, is a *Saxon* word, and by them written *cnite*. *Chivaler* taketh his name from the horse; because they alwayes served in warres on horseback. The *Latines* called them *equites*, the *Spaniards cavalleroes*, the *Frenchmen chivaliers*, the *Italians cavallieri*, and the *Germanes reiters*, all from the horse. It is necessary to be seene by what names this service of a knight is called. It is called [*e*] *Servitium forinsecum, quia pertinet ad dominum regem et non ad capitalem dominum, nisi cùm in propriâ personâ profectus fuerit in servitio, et nisi cùm pro servitio suo satisfecerit domino regi, &c. Ideo forinsecum dici potest, quia fit et capitur foris, sive extra servitium quod fit* ☞ *domino capitali.* And it is called *scutagium*, as it appeareth [*f*] by *Littleton* and many authorities before recited; sometime *droit de espée*. Also it is called [*g*] *regale servitium, quia specialiter pertinet ad dominum regem. Ut si dicatur in cartâ, faciendo inde forinsecum servitium, vel regale servitium, vel servitium domini regis, quod idem est, &c.* And another saith: *Et sunt quædam servitia forinseca, quæ dici poterunt regalia, quæ ad scutum præstantur; et inde habemus scutagium, et ratione scuti pro feodo militari reputantur, &c.* So as in respect of him that doth it, it is called *servitium militis*; but in respect of him for and to whom it is done, viz. to the king, and for the realme, it is called *servitium regale* or *servitium domini regis, &c.* [*h*] In ancient time they which held by knights service were called *milites, qui per loricas, &c. defendunt et deserviunt, &c.* and sometime this service is called *servitium haubertieum.* And in ancient time, such as held by knights service for the defence of the realme had many privileges granted to them by law: as for example, they might have a writ *de essend' quiet' de tallagio*, the effect whereof was [*i*], *Si Tho. filius Ranulphi terram suam teneat per servitium militare, sicut domino regi monstravit, tunc nullum ab eodem Tho. capient tallagium nec pro eo dando*

[e] Bract. lib. 2, fo. 36, 37. Britton, fol. 164, 165. Fleta, lib. 3, cap. 14. 19 E. 2. Avowry 224. 26 Ass. 65. 31 Ass. 30. 30 E. 3. 23. 6 E. 3. 67. 7 H. 4. 19. (Ante 68. b.)
[f] Bracton, ubi supra. Fleta, lib. 3, cap. 14.
[g] Britton, fol. 187. Bracton, ubi supra.
[h] Carta Hen. prim. Mat. Paris, Mirror, cap. 2, sect. 17.
[i] Rot. Claus. 19 H. 3. m. 22.

[75. a.]

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of 14 *years, she shall enter on the manor held by posteriority, although she be then unmarried. For the words of the same stat. of Westm.* 1. *are in the form which followeth.—And of heirs females after they have accomplished the age of* 14 *years, and the lord (to whom the marriage belongeth) will not marry them, but for covetize of the land will keep them unmarried: it is provided that the lord shall not have nor keep by reason of marriage, the lands of such heirs females more than two years after the term of the said* 14 *years, &c. by which words it may be proved, that after the age of* 14 *years no one shall have the lands in such case, &c. except him to whom the marriage belongs, &c. such marriage does not belong to him of whom the land is held by posteriority, &c. such heir female, when she comes to the age of* 14 *years, may rightly enter on such land, which is so held by posteriority, &c.—See* 35 *H.* 6. 52.

dando ipsum distringant, vel homines suos qui per consimile servitium teneant. And this agreeth with the ancient charter of king *Henry* the first, before mentioned, which he made on the day of his coronation for the restitution of the ancient lawes. [k] *Militibus, qui per loricas terras suas defendunt et deserviunt, terras dominicarum carucat' suarum quietas ab omnibus gildis, et omni opere, &c. concedo:* and the reason thereof is there yeelded: *Sicut tam magno gravamine allevati & sint, ita equis et armis se bene instruant, ut apti et parati sint ad servitium meum, et defensionem regni mei.* But these priviledges and quittances are discontinued, and the charge remaineth.

[75. b.]

[k] Carta H. 1. in libro rub. fol. 41, in scaccario.

It is called commonly in [l] our bookes, *servitium militare, &c.* or *servitium militis.* And this service was created and provided for the defence of the realme, to performe which service the heires are not accounted in law able till the age of one and twenty yeares. Therefore during their minority, the lord shall have the custody of them, not for benefit onely, but that the lord might see, that they be in their young yeares taught the deeds of chivalry, and other vertuous and worthy sciences.

[l] Glanvil. lib. 7, ca. 9, 10. Fleta, lib. 1, ca. 8, & 9, & lib. 3, cap. 16, 17, &c. Bracton, lib. 2. cap. 16. Mirror, cap. 5, sect. 2. Britton, 162. (4 Inst. 192.)

[m] *Si hæreditas teneatur per servitium militare, tunc per leges infans ipse, et hæreditas ejus, &c. per dominum feodi illius custodientur, &c. Quis putas, infantem talem in artibus bellicis, quas facere ratione tenuræ suæ ipse astringitur domino feodi sui, melius instruere poterit, aut velit, quàm dominus ille, cui ab eo servitium tale debetur, et qui majoris potentiæ et honoris æstimatur, quàm sunt alii amici propinqui tenentis sui? Ipse namque ut sibi ab eodem tenente melius serviatur, diligentem curam adhibebit, et meliùs in hiis eum erudire expertus esse censetur quàm reliqui amici juvenis, &c. et reverâ non minimum erit regno accommodum, ut incolæ ejus in armis sint experti, nam audacter quilibet facit, quod se scire ipse non diffidit.*

[m] Fortescue, cap. 44.

[n] Amongst the laws of Saint *Edward* the Confessor, it is thus provided: *Debent enim universi liberi homines, &c. secundum feodum suum, et secundum tenementa sua arma habere, et illa semper prompta conservare ad tuitionem regni, et servitium dominorum suorum juxta præceptum domini regis explendum et peragendum.* And *William* the Conqueror confirmed that law in these words: *Statuimus et firmiter præcipimus, ut omnes comites et barones, et milites, et servientes, et universi liberi homines totius & regni nostri prædicti habeant et teneant se semper in armis et in equis ut decet, et oportet, et quòd sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cùm semper opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, &c.* Out of these two lawes the studious and learned reader will gather divers notable things. And therefore if after the lord hath the wardship of the body and the land, the lord doth release to the infant his right in the seigniorie, or the seigniorie descendeth to the infant, he shall be out of ward both for the body and the land; for he was in ward in respect he was not able to doe those services which he ought to doe to his lord, which now are extinct, and *cessante causâ cessat causatum.* And our author saith, that the tenure by knights service draweth unto it ward, marriage, &c. so as there must be a tenure continuing. As if the conusor in a statute merchant be in execution, and his land also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and

[n] Lamb. fol. 135. a.

[76. a.]

See W. 1. cap. 48. the Second Part of the Institutes. (6 Co. 22. Post. 248.)

20 Ass. p. 7. (2 Ro. Abr. 404. Dec. Pla. 106.)

of

of the continuance of it till the debt be satisfied, therefore the discharge of the debt which is the cause, dischargeth the execution which is the effect.

"*And it draweth to it ward, mariage, and reliefe.*" So as regularly there be sixe incidents to knights service, (viz.) two of honour and submission, as Homage and Fealtie; and foure of profit, viz. Escuage, whereof he hath treated before, Ward (*i. e.* wardship of the land), Mariage and Reliefe; of all which our author hath spoken. But there be other incidents to knights service besides these; [*a*] as *Aide pur faire fits chivalier, et aide pur file marier, &c.* which at the common law were uncertaine, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgment of the court where they were questioned, they ought not to be paide: but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certaintie, which are worthy your reading (1).

[a] Grand cust. de Norm. cap. 36. Regist. orig. fo. 87. Glanvil. lib. 9, ca. 8. 35. Fleta, lib. 2, cap. 40, & lib. 3, ca. 14. Mirror, ca. 1, sect. 3. Britton, fo. 55, & 70. F. N. B. 82. b. W. 1. ca. 35. 25 E. 3. ca. 11.

"*Ward* (or Gard)," in *Latine custodia*. And hereof the lord is called *gardian*, *custos*, and the *minor* is called a ward, or one in ward. [*b*] And albeit (as our author saith) knight service draweth with it ward, &c. yet by custome the heire of him that holdeth in socage, may be in ward.

11 H. 4. 34. 5 E. 3. 11. Vid. Sect. 110. [*b*] 8 H. 3. Prescript. 38. Pasch. 21 E. 1. Coram rege Rot. 43. Nota pro Hibernia Prior del St. Trinitie de Dublin's case.

"*Mariage*," *Maritagium*, betokeneth, not onely the copulation of man and wife in mariage, but also (as in this place here) the interest of the gardian in bestowing of a ward in marriage, which the law gave to the lord; not for his benefit onely, but that he should match him vertuously and in a good family without disparagement, as shall be said hereafter, which is the prineipall foundation of his estate.

[c] Vid. Sect. 112. [d] Bracton, lib. 2, ca. 36, fol. 84. Fleta, lib. 1, ca. 10, & lib. 3, ca. 16, 17. Britt. ca. 69, 70. Glanvil. lib. 9, ca. 4, and lib. 7, ca. 9. Ockam. de differentiis relevionum. (Ante 69. b. Post. 83. a.) [*] Ockam ubi supra. Bracton, lib. 2, fol. 85.

[*c*] "*Reliefe*," *Relevium*, is derived from the *Latine* word *relevare*; for so [*d*] ancient authors say, and give this reason: *Quia hæreditas, quæ jacens fuit per antecessoris decessum, relevatur in manus hæredum, et propter factam relevationem facienda erit ab hærede quædam præstatio, quæ dicitur relevium.* And in *Domesday* it is called *relevamentum* and *relevatio*.

The reliefe of a whole knight's fee is five pound, and so according to that rate. And this reliefe was as some hold certaine by the common law; [*] but the reliefes of earles and barons were incertaine, and therefore were called *relevia rationabilia*; but the statute of *Magna Charta*, cap. 2, limits them in certaine, and mentioneth only a knight's fee. But I reade in the book of *Domesday, quòd Tainus vel miles regis dominicus moriens pro relevamento dimittebat regi omnia arma sua, et equum unum cum sellâ et alium sine sellâ; quòd si essent ei canes vel accipitres, præstabantur regi, ut si vellet acciperit.*

Since

(1) The aids *pur faire fitz chivalier et pur file marier* are *expressly* abolished by the 12 Cha. 2. c. 24.—They were incident to socage as well as knights service. 2 Inst. 233. See further as to *aids*, Wright's Ten. 40. 145, and 2 Blackst. Comment. 63.—[Note 88.]

Since *Littleton* wrote [e] there is a good law made against fraudulent feoffments, gifts, grants, &c. contrived of fraud to hinder or defraud lords, &c. of their reliefes and heriots amongst other things, for the exposition of which statute reade the authorities quoted in the margent. And it is to be observed, that the words of the said act of 13 Eliz. are *(be it therefore declared, ordained, and enacted)* and therefore like cases, and in semblable mischief shall be taken within the remedie of this act by reason of this word *(declared)*, whereby it appeareth what the law was before the making of this statute (2).

[e] 13 Eliz. ca. 5. 17 E. 3. Reliefe 3. 7 E. 3. ib. 11. 3 Co. 80, &c. Twine's case. 5 Co. 60. Gooche's case. 6 Co. 18. Pakeman's case. 10 Co. 56. b. See also the statutes of 3 H. 7. c. 4, and 50 E. 3. ca. 6. Vide Mich. 12 & 13 Eliz. Dier 295.

"*His heire male.*" [f] For regularly by the common law the heire shall not be in ward, unlesse he claime as heire by descent. The statute of *Merton, de hiis qui primogenitos feoffare solent*, [g] did helpe feoffments by collusion in certaine cases. And *Britton* saith, that *Robert de Walrand* a sage of the law did advise the great lords of the realme to make the said statute, which when it was past, the same act tooke his first effect in the heire of *Walrand*'s own heire, whereof *Britton* maketh a speciall remembrance. But now [h] by the statutes of 32 and 34 *H.* 8. of wills, he which holdeth lands by knights service may by act executed in his life time, or by his last will in writing, dispose of two parts, as by the said acts appeareth. If he dispose all by act executed, then it shall stand good against the heire,

[76. b.] ☞ so as nothing shall descend unto the heire. But in case of a devise by his last will, a third part shall descend to the heire, though all be devised away: and if the tenant leave a third part to descend, then the devise is good for the residue. [i] But these things require so many diversities grounded upon evident reasons, and are so plainly expressed in my Commentaries, as they (being very long) shall not need to be repeated here. [k] And that the tenure by knights service draweth to it ward mariage and reliefe, is of great antiquity, for so it was in the time of king *Alfred* (1).

[f] Brit. 168. Fleta, lib. 1. ca. 9. [g] Mert. ca. 6. (11 Rep. 23.) Bract. fo. 85. Brit. fo. 65. 9 H. 4. 6. 4 H. 7. ca. 17. 27 H. 7. 89. Partridge's case. Pl. Com. 82. [h] 32 H. 8. ca. 1. 34 H. 8. ca. 5. (10 Co. 80.)

[i] 3 Co. 25, 26, in Butler's case. 6 Co. 75, in sir George Curson's case. 8 Co. 163. Might's case. Eod. lib. fo. 171, in Vigil Parker's case. [k] Mir. ca. 1, sect. 3.

"*When such tenant dyeth.*" Here *Littleton* speaketh not of a dying seised by the tenant, for in many cases the heire shall be in ward, albeit the tenant died not seised, &c. nor in the homage of the lord. As if the tenant maketh a feoffment in fee upon condition, and the feoffor dieth, after his death the condition is broken, the heire within age entreth for the condition broken, he shall be in ward, and yet the feoffor had no estate or right in the land at the time of his death, but onely a condition, and which was broken after his decease. [*] But because the condition restoreth the tenant to the land in nature of a descent, (for he shall be in by descent) by the same reason shall it restore the lord to the wardship, seeing now (as *Littleton* saith) the heire of

(1 Co. 99.)

[*] 39 E. 3. 36. tit. Gard. 92. 33 E. 3. Gard. 162. 11 H. 7. 12. 4 H. 6. 16. b. 19 E. 3. Gard. 114. 18 Ass. 18. 40 Ass. 36. 20 El. 362. F. N. B. 143. 6 H. 4. 4. a.

his

(2) See a note on the subject of *relief*, post. 83. a.

(1) This shews, that in lord Coke's opinion the feudal tenures were settled here before the Conquest. But as to this controverted point, see note 1. of 64. a.

his tenant is within age, and not able to doe him service, and no default in the lord to barre him of his wardship.

[l] 7 H. 4. 12. 1 H. 7. 12. 22 E. 4. 7. 6. 40 E. 3. 43. 4 M. 136. 15 E. 4. 10, 11.

[l] And so I doe take it, that if the heire within age recover in a *dum non fuit compos mentis*, or *formedon en discender*, or remainder as heire, or such like, the heire shall be in ward; for these be stronger cases than the former; for here a right doth descend to the demandant, which right being by course of law restored to the possession of the heire within age, by consequence the lord is to have the wardship of him, but in the case of the condition, no right at all descended to the heire, as hath beene said.

33 E. 8. Gard. 162. (2 Ro. Abr. 38.)

And so if tenant in tayle, the remainder in fee, maketh a feoffement in fee, and dyeth leaving the issue in taile within age, if the feoffee infeoffe the issue in taile, whereby he is remitted, he shall be in ward to the lord; for as he is restored to the title of the land as heire, so is the lord restored to his title of the wardship as lord of the fee. And as to this purpose herein I take no difference betweene a right of action and a right of entry descending, when by action the right of the land is lawfully recovered by the heire within age, to his tenant: and albeit he dyed not in his homage, yet there was a right of homage, and no default or laches was in the lord, or act done by him to prejudice himselfe thereof.

11 H. 7. 12.

But if one levie a fine executorie (as *sur grant et render*) to a man and his heires, and he to whom the land is granted and rendred, before execution dieth, his heire being within age entreth, he shall not be in ward, for his ancestor was never tenant to the lord, and so there is a manifest diversitie between this and the other cases. *Et sic de cæteris.*

13 El. Dyer 298.

But if the tenant maketh a feoffement in fee of lands holden by knights service to the use of the feoffee and his heires, untill the time that the feoffor pay to the feoffee or his heires a hundred pounds, for the which a time and place is limited; the feoffee dyeth, his heire within age, the lord shall have the wardship of the bodie of the heire, and of the lands of the feoffee, conditionally, for he cannot have a more absolute interest in the wardship, than the heire hath in the tenancie: therefore if the feoffor pay the money at the day and place, and entreth into the land, in this case both the wardship of the bodie and lands is devested, because the lord had no absolute interest in either of them, but doth depend upon the performance or not performance of the condition.

(Post. 248. a.)

[*] 12 H. 4. 16. per Thirning.

[*] So if the conusor of a fine executorie of lands holden by knights service dyeth, his heire within age, the lord shall have the wardship of the bodie and land: but if the conusee entreth, the heire is disherited, and the lord hath lost the whole benefit of his wardship.

[m] 41 E. 3. 225.

If the disseissee dyeth, his heire being within age, [m] the lord shall have the wardship of the heire of the bodie of the disseisee.

[n] 15 E. 4. 11.

[n] But put the case, that in that case the disseisor dieth seised, and his heire within age, the lord may seise the wardship of his heire also, and of the land also: but the doubt is, whether the heire of the disseisee shall, after the descent to the heire of the disseisor, continue in ward, for that after the descent the heire of the disseisor is become his lawful tenant, and the heire of the disseisee is not tenant unto him untill he hath recovered the land.

If *cestui que use* before the statute of 27 *H.* 8. had dyed, his heire

heire within age, the lord [o] should have had the wardship of his heire; and if the feoffee had dyed, his heire within age, the lord should have had the wardship of his heire also, and so a double wardship for one and the same land, the one by the statute of 4 *H.* 7. the other by the common law.

[o] 14 H. 8. 5. 4 H. 7. cap. 17.

[p] Tenant by knights service maketh a gift in taile, the remainder in fee, tenant in taile maketh a feoffement in fee, and dyeth, his heire within age, the lord shall have the wardship of him; and if the feoffee dieth, his heire within age, the lord shall have the wardship also of his heire and of the land.

[p] 41 E. 3. 26. tit. Avowrie 264. 20 H. 6. 9. 48 E. 3. 8. b. 10 E. 3. 26. 31 E. 3. tit.

Gard. 116. 18 E. 3. 7. 14 H. 4. 38. 1 H. 5. Grant 43. 5 E. 4. 3. 7 E. 4. 27. 15 E. 4. 13. 2 E. 2. Avow. 181.

[77. a.] ☞ If tenant by knights service maketh a gift in taile, and the donee maketh a feoffment in fee, and the donee dyeth, his heire within age, the donor shall have the wardship of him; because he is his tenant in right. [q] But if the feoffee dieth, his heire within age, the donor shall not have the wardship of his heire, but the lord paramount; because he is tenant *in fait* to him; neither shall the donor avow upon the feoffee or his heire for the services due unto him, because he must in his avowry shew the reversion in fee to be out of him by the feoffment, and consequently the services incident to the reversion are also out of him, but he shall avow upon the donee and his issues: [r] and thus are all the bookes that seeme to be at variance, either answered or reconciled.

(2 Ro. Abr. 38.)

[q] So was it holden Tr. 18. El. in Com. Banco, per Cur. which myselfe heard & noted, in sir Thomas Wyat's case.

[r] So was it resolved in sir Tho. Wyat's case ubi supra.

[a] "*The land holden of him.*" *Littleton* here speaketh of lands holden of a subject: for if a man hold land of the king by knights service *in capite*, and other lands of other lords, and dieth, his heire within age, the king shall have the wardship of all the lands by his prerogative: and this was due to the king by the common law, the fees of certaine excepted, as in the statute of *prærogativa regis*, cap. 1, appeareth.

[a] Glanv. lib. 7. cap. 10. Bract. lib. 2, fo. 85, 86, 87. Brit. l. 3, c. 2. Fleta, l. 1, c. 10. 9 H. 3. Prerog. 25. 21 H. 3. ib. 26.

Rot. Finium. 6 Johan. Stat. Prærog. Reg. c. 1.

But if a man holdeth lands of the king by knights service, as of an honor or mannor, &c. [b] in that case the king shall onely have the lands holden of him, and not of any other. Yet by reason of tenures of the king by knights service of certaine honours, (while they were in the king's hands) the king (as some have said) had (as it were by prescription) his prerogative, viz. *Raleigh hage net bonony* and *Peverel*, and so of lands holden by knights service of the duchy of *Lancaster* in the county palatine (1).

[b] Bract. ub. supra. Mag. Carta, ca. 31. 1 E. 6. ca. 4. 5 E. 3. 5. 47 E. 3. 21. 29 H. 8. Br. tit. Livery, 58. 28 H. 8. ibid. 55. (2 Ro. Abr. 503.)

When

(1) Rot. Parl. 11 H. 6. n. 57. Simile pro ducatu Cornub. Rot. Parl. 18 H. 6. n. 42. *Ryley's escheat* m. 4 and 5 E. 1. Rot. 20. Nota, *as to the ancient honor of Peverel, the tenure of that is* in capite, *but some new additions to the honor are not so.* P. 7 Jac. *Ley* 7. *Clarke's case.* Vid. tamen P. 17 Jac. Churche's case, *Ley* 52, *for there it was found, that tenure of the honor of Peverel is tenure* in capite, *as to the manor of Woodham Mortimer.* Hal. MSS. —By a tenure *in capite* in this note, lord Hale means a tenure of the king *ut de coronâ* in contradistinction to a tenure of him *ut de honore.* In the time of lord Coke it was the fashion to denominate the *former* a tenure *ut de personâ regis*; and as to the *latter*, it was not allowed to be a tenure *in capite.* But

[c] 8. Co. 172. Hale's case. 38 H. 8. Br. tit. Livery 60. Vid. Sect. 154. (F. N. B. 255 E.)

[c] When an heire hath bin in ward to the king by reason of a tenure *in capite*, after his full age he must sue livery, which is halfe a yeare's profit of his lands holden. But if he be of full age at the time of the death of his ancestor, then he shall pay for lands in possession a whole yeare's profit for *primer seisin*: but if it be of a reversion expectant upon an estate for life, as tenant in dower, tenant by the curtesie, or tenant for life, then he shall pay but the moiety of one yeare's profit.

[d] 1 El. Dier. 168.

[d] If the heire be in ward by reason of a tenure of an honour or mannor, (except as before) he shall not sue liverie, but an

[e] 32 H. 8. tit. Liv. Br. 62.

ouster le maine cum exitibus, albeit he never made tender. [e] And if he be of full age, the king shall have no *primer seisin*, but reliefe. But where the tenure is *in capite*, there the king shall have the meane profits untill the tender be made; and if the tender be made, and not duely pursued, the king shall also have all the meane profits.

[f] 38 H. 8. Liver. Br. 60. 45 E. 3. 11. 35 H. 6. 52. Stanf. 13. b.

[f] He that holdeth of the king by socage in chiefe, and dieth, his heire of full age, the king shall have livery and *primer seisin* onely of the lands so holden, and not of the lands holden of

[g] 20 El. Dy. 362. F. N. B. 250. b.

others. [g] But if the heire of such a tenant in socage in chiefe be within the age of fourteene at the death of his ancestor, he shall neither sue livery, nor pay *primer seisin*, either then or any time after: and the reason thereof is, for that the custodie of his body and lands in that case belong to the *prochein amy*, as gardian in socage.

[h] F. N. B. 263. 7 E. 4. 17. Stanf. Prer. 13 Br. tit. Liv. 64.

[h] Neither shall the king have *primer seisin* of lands holden in burgage, (as some have said) for that it is no tenure *in capite*.

Note, there is a generall livery, and a speciall livery. A generall livery hath two properties.

First, it is full of charge to the heire, for he must have an office in every county where he hath land, or else he cannot sue a generall livery, and he must sue out his writ of *ætate probandâ, &c.*

[i] 46 E. 3. 33. 47 E. 3. 21. 21 H. 6. 28. b. 33 H. 6. 50. 29 Ass. 8. Pl. Com. Count. of Leicester's case, 44 E. 3. 1. & 25. 12 R. 2. Liv. 28. 2 H. 7. fol. 14.

[i] The second property is, that it is full of danger: first, it concludeth the heire for ever after to denie any tenure found in the office: secondly, if livery be not sued of all and of every parcell which the king ought to have, whether it be found in the office or not found (for a generall livery could not be sued by parcels) the livery is void, and the king may receive the lands, and be answered of the meane profits. So it is if the office be insufficient, or the processe whereof the livery was made be insufficient,

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mr. Madox very justly animadverts on lord Coke and his cotemporaries, as well for calling any tenure of the king a tenure *ut de personâ* by way of distinction, as for not allowing a tenure *ut de honore* to be a tenure *in capite*. He observes, that *all* tenures of the king are *of his person*, and that in order to distinguish accurately between lands *originally* holden *immediately* of the king and those holden *immediately* of him in consequence of the escheat of an honor or barony, we should call the tenure of those of the *first* description a tenure *ut de coronâ* and that of the *second* a tenure *ut de honore*. Further he insists, that tenure *in capite* of the king is holding *immediately* of him without the interposition of any *mesne* lord, and consequently that a tenure of the king *ut de honore* is equally *in capite* with a tenure *ut de coronâ*, though in other respects there certainly are very important differences between the two, such as render it highly necessary to preserve a distinction. See Mada Baron. Angl. 168.—[Note 39.]

insufficient, or the like, the king shall reseise, as is aforesaid.

[a] Therefore for the ease of the heire, and for avoyding of such danger, the heire for the most part sueth out a speciall livery, which containeth a beneficiall pardon and saveth the said charges, and preventeth the said conclusion, and the other dangers; which being of grace, and not of right, as the generall livery is, the king may well and justly take more for a speciall livery, than for a generall, for the causes aforesaid, but ever with such moderation as the heire may cheerfully goe through therewith.

[a] 1 H. 4. 6. b. 37 H. 8. Estop. Br. 1. 218. 7 E. 6. ib. 222. Scurfield's case. Tr. 8 Ja. in cur. Ward. 23 El. Dier 377. 28 H. 8. Br. tit. Liv. 56.

Note, that a livery is in nature of a restitution, which is to be taken favourably: for if livery be made of a mannor *cum pertinentiis*, the heire shall thereby have the advowson appendant. Otherwise it is grants by letters patents.

41 E. 3. 5. 5 E. 6. 6. 27 Ass. 48. Pl. Com. 252. 20 El. Dyer 360. (20 Co. 64. a.)

Since the time that *Littleton* wrote [c] there is a court of wards and liveries erected by authority of parliament concerning the order of the king's wards, &c. to be holden before the master of the wards and the councell of that court appointed by those acts. This hath made such a manifold alteration, as were too long here to be inserted, and doth belong to another treatise mentioned in the Epistle of the Jurisdiction of Courts, where it were necessary, that the true jurisdiction of that court should be set downe, a matter of no great difficulty, seeing it began so late by authority of parliament.

[c] 32 H. 8. 46. 33 H. 8, cap. 21. (4 Inst. 188.)

[77. b.]

And since *Littleton*'s time, [d] there is a right profitable statute made concerning the finding of offices and other things, not onely concerning the king's wards, or their rights and possessions, but some other provisions very beneficiall for the subject, in all to the number of 12. [e] 1. That such persons as hold for tearme of yeares, or by copy of court roll, or have any rent common or profit *apprender* out of any lands found in any office, whereby the king is intituled to the wardship of the lands or tenements, or to the forfeiture of the lands or tenements upon attainder of treason, felony, *præmunire*, or any other offence, yet may they have, hold, enjoy, and perceive their several estates, interests, and profits, although they be not found in the office. And this being a beneficiall law, the estates of tenant by statute staple merchant and *elegit*, and executors that hold lands for payment of debts, are taken to be within the benefit of the clause: [f] and so is a doubt in 14 *El. Dier* cleered.

[d] 2 E. 6. ca. 8. (9 Co. 16.)

[e] 4 E. 4. 23. 33 H. 8. tit. Entre Congeabl. Br. 125.

[f] 14 Eliz. Dier, fo. 319.

2. Where it is found, that the heire is of fewer yeares than in truth he is, he shall not be concluded hereby, [g] but every such heire at his very full age may prosecute a writ of *ætate probandâ*, and sue his livery or *ouster le maine*: in which case he had no remedy by the common law.

[g] 5 Mar. Dier 156.

[a] 3. Where one person or more be found heire, where another person is heire, the partie grieved had no remedy.

[a] 24 E. 3. 31. 38. 9 H. 6. 18. 12 E. 4. 16. 30 Ass. 28.

4. Or where one person or more be found heire in one county, and another person or persons found heire in another county, there could have beene no interpleading.

4 Co. 56 & 60. Sadler's case. Stanf. Prærog. 58. b. 52.

5. Or if any person be untruly found by office lunaticke, or ideot, or dead, the party grieved may traverse the said offices; and you may reade in *Ken*'s case how the office shall be traversed upon this act.

5 E. 4. 4. 16 E. 4. 4. 1 H. 7. 14.

[b] 6. Where it is untruly found by office, that any person attainted of treason, felony, or *præmunire*, is seised of any lands, &c.

2 H. 7. 12. 4 H. 7. 15. 8 H. 7. 11.

F. N. B. 262. 12 R. 2. Livery 28. P. N. B. 238. 7 Co. 44. 45. Ken's case.

[b] 4 E. 4. 23. 10 H. 6. 19. 4 Co. 56, &c. Sadler's case. 32 H. 8. Entre Cong Br. 125. 14 E. 3. cap. 14.

the party grieved, having just title of freehold, shall have his travers or *monstrans de droit* (without being driven by this double matter of record to his petition of right as he was before this statute) which is much more speedy than the petition; for upon the petition there be foure writs of search, and every one must have 40 dayes before the serving, and now but two writs of search.

[c] Vide 6 Co. 6. Wheeler's case

[c] 7. Where an office is found by these words or the like, *quod de quo vel de quibus tenementa prædicta tenentur, juratores præd' ignorant*, or holden of the king *per quæ servitia juratores ignorant*, it shall not be taken for any immediate tenure of the king in chiefe, but in such cases a *meliùs inquirendum* to be awarded, as hath beene accustomed of old time. This branch hath beene well [d] expounded; for if the first office finde a tenure of the king *per quæ servitia, &c.* yet if upon the *meliùs inquirendum* the tenure be found of a subject, the first office hath lost his force *per sensum hujus statuti*, and need not be traversed, and the *meliùs, &c.* is in nature of the *diem clausit extremum* or *mandamus, &c.* And this was but a declaration of the ancient common law, as by the words of the statute *(as hath beene accustomed of old)* it appeareth; but if upon the *meliùs* it be found againe as uncertainely as before is said, then it is in judgement of law a tenure *in capite*, and so it was before the making of this act, and so are the bookes that speake hereof to be intended; but if upon the *meliùs* a tenure be found of the king *ut de manerio per quæ servitia, &c.* it shall be taken for knights service.

[d] 12 Eliz. Dier, fo. 292. a. 8 Co. 168. Paris Stoughter's case.

13 Eliz. Dier 306. 4 H. 6. 13. 19 H. 4, 2. b.

8. Where it is found that lands, &c. are holden of the king immediately, where in truth they are holden of a common person and not of the king immediately, and that the heire is within age, such heire within age shall have his traverse, &c. which he could not have had by the common law.

9. The meane lords of whom the lands are holden, which the king hath by his prerogative during the minority of the heire, shall receive and take such rents as are due unto them by the hands of such of the king's officers as receive the profits of the same lands, where before that act, the lords used to spare the rents due, &c. during the king's possession, and after livery sued charged the heire with all the arrearages.

10. There is a provision for offices found before the statute or before the 20th day of *March* next after the act.

11. A speciall clause is, that a *scire fac'* shall be awarded upon every travers by force of this act, and where the party was put to his petition, there upon the travers there shall be two writs of search granted.

12. And lastly, if judgement shall be given against the king upon a travers by vertue of this act, all former rights appearing of record are saved to the king. But albeit these points are most necessary to be knowne, yet let us now returne to *Littleton*.

15 E. 4. 12. 46 E. 3. 12. 21 H. 6. 11. 3 H. 7. 5.

Littleton warily and materially (treating of a common person) saith, *holden of him*, for he shall have nothing in ward but that which is holden of him. But the king by his prerogative shall not onely have such lands and tenements, which (as hath been said) the heire of his tenant by knight service *in capite* holdeth of others, but such inheritances also as are not holden at all of any, as rent charges, rent secke, fayres, markets, warrens, annuities, and the like; and so is the law cleerely holden at this day, as it hath beene resolved; and so experience teacheth, that the king by his

[78. a.]

his prerogative given to him by the ancient common law shall have those inheritances not holden, and so the *quære* made by [*o*] *Staundford* is cleered and made without question.

[*o*] Stanf. Prær. fo. 8.

The law is changed since *Littleton* wrote in many cases both for the mariage of the body, and for the wardship of the lands, and a farre greater benefit given to the lords than the common law gave them, and some advantage given to the heires, which before they had not, which shall be touched briefly.

If the father had made an estate for life or a gift in taile of lands holden by knights service to his eldest sonne, or other heire apparent within age, the remainder in fee to any other, and dyed, the heire should not have beene in ward; for this was out of the statute of *Merlebridge*. But at this day the heire shall be in that case in ward for his body, and a third part of his land.

Merlebridge, ca. 1. Pl. Com. 82. 27 H. 8. 10. 33 H. 6. 14.

[*a*] So if the father had infeoffed his eldest sonne within age and a stranger and the heires of the sonne, and died, the sonne should have beene out of ward; but at this day he shall be in ward for his body, and for a third part of his moity. [*b*] So if the father had infeoffed any of his younger sonnes or others for the making of his wife a joynture, or for the advancement of his daughters, or for the payment of his debts, and after infeoffe and convey the land to his heire and dyed, his heire within age, his heire should not have beene in ward; because he was bound by the law of nature and nations to provide for them; but now in all these cases the heire shall be in ward for his body, and a third part of the land, and all this groweth by construction upon the statutes of 32 and 34 *H.* 8. [*c*] But if either the eldest sonne, or any of the younger sonnes purchase lands of his father, which are holden by knights service, *bonâ fide*, for the reasonable value, this is out of those statutes, and the heire shall neither be in ward, nor pay *primer seisin*.

[*a*] 31 E. 3. Collusion 29. 33 H. 6. 14.

[*b*] 33 H. 6. 14. 27 H. 8. 7. 6 Co. 76, 77. Sir George Curson's case. 10 Eliz. 260. 3 Eliz. 193. 20 Eliz. 361. 19 Eliz. 276. 5 Mariæ 158.

[*c*] 10 Co. 83. Leonard Lovey's case.

And in all the cases abovesaid, (for example) if a feoffment be made to the use of his wife for life, or to the use of any of his younger sonnes for life, or to the use of some persons for life for payment of debts, and upon all these estates a remainder is limited over, if the wife or tenant for life dye in the life of the father, [*d*] or if it be conveyed to the use of the wife or younger children in fee, or fee-taile, or in fee for payment of debts, and these lands are conveyed away in the life time of the father, after the decease of the father no wardship, &c. accrueth by force of any of the said statutes, for such estates must continue till the title of wardship doe grow (1).

[*d*] 2 Co. 91. Bingham's case 6 Co. ubi supra 84. 8 Co. 165. Digbye's case.

[*e*] If the father convey his lands holden by knights service either of the king or of any meane lord to his middle sonne in taile, the remainder to the youngest sonne in fee, and dyeth, the eldest being within age, and the king or lord seize the body and two parts of the land, if the middle brother dye without issue, the king or the lord shall not have any benefit of the statute against him in remainder; for the statute was once satisfied, and the statute extendeth not to him in remainder.

[*e*] 14 Eliz. Dier 308. 3 Mariæ, Dier 130. 2 Co. 93. 94. Bingham' case, and Northcot's case. 10 Co. 80. b. Leon. Lovey's case.

[*f*] If there be a grandfather, father, and divers sonnes, and the grandfather in the life of the father convey his lands holden by knights service to any of the sonnes, this is out of the statute of 32 *H.* 8. and if the grandfather die, there is neither wardship nor

[*f*] 6 Co. 77. Sir George Curson's case. 2 Eliz. Dier 181. 8 Eliz. Dier 252.

(1) Vid. Trin. 8 Jac. *Ley* 21. *Allicock's case.* Hal. MSS.

nor *primer seisin* due; for the father hath the immediate care of his sons (2). But if the father be dead, then the care of them belongs to the grandfather, and then if the grandfather convey any of the lands to any of the sonnes, it is within the said statute: [g] and a conveyance to the use of any of his collaterall blood, which is not his heire apparent, is out of the said statute. And so are conveyances either by father or mother to or to the use of bastard children out of the statute; for *qui ex damnato coitu nascuntur, inter liberos non computentur.* And the preamble speaketh of lawfull generations. If a man seised of lands holden in socage convey them to the use of his wife, or of his children, or payment of his debts, and after purchase lands holden by knights service *in capite,* and dieth, his heire within age, the king shall have no part of the socage land. [h] But if in that case he had by his will in writing devised his socage lands in fee, and after purchased lands holden *in capite,* and dieth, the king shall have so much of the socage lands as will make a full third part of all. The benefits, that grew to the subject by those acts of parliament, were, that tenants in fee simple might devise their lands by their last wills in writing in such manner and forme, as by the said acts appeareth; also that the father might infeoffe his eldest sonne or other heire lineall or collaterall of his lands holden by knights service, and two parts of the lands shall be out of ward. And in * *Might's* case you shall reade excellent matter of estates made upon collusion (3).

[g] 10 Co. 83. Leon. Lovey's case. 18 Eliz. Dier 385.

[h] Leon. Lovey's case, ubi supra. Butler and Baker's case. 3 Co. 25, &c.

* 8 Co. 163. Might's case.

And both the statutes of 32 and 34 *H.* 8, concerning wills and wardships are many wayes prejudiciall to the heires; as, taking one example for many, if tenant by knights service make a feoffment in fee to the use of his wife and her heires, or to the use of a younger sonne and his heires, or wholly for the payment of his debts; in these cases, although nothing at all of the lands so holden descend to the heire, but he is disherited of the same, yet his body shall be in ward. But this for a little taste may suffice. More hereof you may reade in my Reports in the several cases noted in the margent.

[78. b.]

Leon. Lovey's case, ubi supra. 22 Eliz. Dier 367.

32 E. 3. Gard. 61. 2 H. 5. 4. (6 Co. 20. Ante 73. a. Post. 314. b.) 10 H. 6. 8. 21 E. 3. 33. a. 27 H. 8. fo. 10.

"*Full age,*" regularly is one and twenty yeares.

"*Intendment of the law.*" *Intendment, i. e. intellectus,* the understanding or intelligence of the law. Regularly judges ought to adjudge according to the common intendment of law.

By intendment of law every parson or rector of a church is supposed

(2) *Grandfather enfeoffs the father and his son in fee, and dies. The father being of full age shall sue livery of the third part of a moiety.* Trin. 8 Jac. *Ley* 21. *Crawley's case. But if feoffment be to daughter and her husband, they ought to sue livery of the whole, for both are* children *within the statute.* M. 9 Jac. *Ley* 41. *Bacon's case,* et ibid. 43. *Cleer's case.* Hal. MSS.—[Note 40.]

(3) *Lands are given to husband and wife and the heires of the husband. Husband and wife join in a fine* come ceo *to the use of the husband and wife, and to the heires of the body of the husband, remainder over. The husband dies. The wife shall not sue livery, because it was originally a purchase to the husband and wife, and she had not a greater estate afterwards.* T. 15 Jac. *Ley* 51. *Menfield's case.* Hal. MSS.—[Note 41.]

supposed to be resident on his benefice, unlesse the contrary be proved.

Of common intendment one part of a mannor shall not be of another nature than the rest.

Of common intendment a will shall not be supposed to be made by collusion. *In facto quod se habet ad bonum et malum, magis de bono, quàm de malo lex intendit. Lex intendit vicinum vicini facta scire. Nulla impossibilia aut inhonesta sunt præsumenda, vera autem et honesta, et possibilia. Lex semper intendit quod convenit rationi.* As in this case, the gardian shall have the custody of the land untill the heire come to his full age of one and twenty yeares; because by intendment of law the heire is not able to doe knights service before that age, which is grounded upon apparent reason. There note, that the full age of a man or woman to alien, devise, let, contract, &c. is one and twenty yeares, the civill law five and twenty yeares, for then the *Romanes* accounted men to have *plenam maturitatem*, and the *Lombards* at eighteene yeares.

"*If such heire be not married at the time of the death of his ancestor, &c.*" *Ancestor* is derived of the *Latine* word *antecessor*, and in law there is a difference between *antecessor* and *prædecessor*. For *antecessor* is applied to a natural person, as *I. S. et antecessores sui;* but *prædecessor* is applied to a body politique or corporate, as *Episcopus London. et prædecessores sui. Rector de D. et prædecessores sui, &c.* Vide Britton, fol. 169.

"*But if such tenant dieth, his heire female being of the age of 14 yeares, &c.*" And the reason, as I finde in antiquity, wherefore the law gave the mariage of the heire female if she were within the age of fourteene, and that she should not marry herself, was, *pur ceo que les heires females de nostre terre ne se marieront a nous enemies, et dount il nous coviendroit lour homage prendre, si eux se puissent marier a lour volunt.* This is a speciall age for an heire female to be out of ward, if she attaine unto it in the life-time of her ancestor; for at that age she may have a husband able to doe knights service. A woman hath seven ages for severall purposes appointed to her by law: as, seven yeares for the lord to have aid *pur file marier;* nine yeares to deserve dower; twelve yeares to consent to mariage; until fourteene yeares to be in ward; fourteene yeares to be out of ward if she attained thereunto in the life of her ancestor; sixteene yeares for to tender her mariage if she were under the age of fourteene at the death of her ancestor; and one and twenty yeares to alienate her lands goods and chattells. Glanvil. lib. 7. cap. 1. Mirror, cap. 5, sect. 2. Britton, fol. 168. b. 39 H. 6, cap. 2. 35 H. 6. 40. Bracton, lib. 2, cap. 37. (1 Ro. Ab. 342. 6 Co. 73. b.)

A man also by the law for severall purposes hath divers ages assigned unto him, viz. twelve yeares to take the oath of allegiance in the torne or leet; fourteene yeares to consent to mariage; fourteene yeares for the heire in socage to choose his gardian, and fourteene yeares is also accounted his age of discretion; fifteene yeares for the lord to have aid *pur faire fitz chivaler;* under one and twenty to be in ward to the lord by knights service; under fourteene to be in ward to gardian in socage; fourteene to be out of ward of gardian in socage; and one and twenty to be out of ward of gardian in chivalrie, and to alien his lands goods and chattels. 34 E. 1. Stat. 3. Glanvil. lib. 7. cap. 9. Dier 5. Marie 162. Bracton, lib. 2, cap. 37. F. N. B. 202. (1 Ro. Ab. 137. 138.)

35 H. 6. 52. tit. Gard. 71. Stanford. 3. b. F.N.B. 256.253. 35 H. 6. 40.

"*But if such heire female be within the age of* 14 *yeares, and unmarried, &c. the lord shall have the wardship of the land.*" But put case that the lord cannot have the wardship of the land, as if the lord before the age of fourteene granteth over the wardship of the body, in this case the grantee of the body cannot enjoy the benefit of the two yeares, because he cannot hold over the land, and the lord which hath the wardship of the land only should lose the benefit of the two years, because he hath the lands onely, and cannot tender any mariage; therefore in this case the heire female shall enter into her land at her age of 14 yeares. So if a tenant holdeth of one lord by priority, and of another by posteriority*, and dieth, his heire female within the age of 14 yeares, the lord by posteriority shall have the lands but untill her age of 14 yeares, because the marriage belongeth not to him. Also if the lord marrieth the heire female within the two yeares, her husband and she shall presently enter into the lands: for, *cessante causâ, cessat effectus; et cessante ratione legis, cessat beneficium legis.*

Britton, fol. 169. 35 H. 6. 52.

35 H. 6. 52. 35 H. 6. tit. Gard. 71. 6 Co. 71, the lord Darcie's case.

☞ If the lord tender a convenable marriage to the heire within the two yeares, and she marry elsewhere within those two yeares, the lord shall not have the forfeiture of the marriage; for the statute giveth the two yeares onely to make a tender. [79. a.]

"*And if the lord within the said two years do not tender such marriage, &c. then she at the end of the said two yeares may enter, and put out her lord.*" This is so evident, as it needeth no explication.

F. N. B. 143.

"*But if such heire female be married within the age of* 14 *years in the life of her ancestor, and her ancestor dieth, she being within the age of* 14 *years, the lord shall have only the wardship of the land untill the age of* 14 *years, &c.*" Note, albeit the heire female be married at the age of twelve yeares in the life of her ancestor, (at which age she may consent to matrimony) to a man of full age, that is able to doe knights service, yet if the ancestor die before her age of fourteene, the gardian shall have the land untill her age of fourteene, because (as hath beene said) that is the time appointed by the common law. And so if the heire male be married in the life of the ancestor at his age of fourteene yeares, and the ancestor dieth, the lord shall have the land untill the ward commeth to the age of one and twenty.

"*For this is out of the case of the said statute, insomuch as the lord cannot tender marriage to her which is married.*"

Natura non facit vacuum, nec lex supervacuum. The law doth never enforce a man to doe a vaine thing.

And where the said statute of *W.* 1. giveth unto the lord the said two yeares, thereby is implyed, that if he dyeth within the two yeares, his executors or administrators shall have the same. For when the statute vesteth an interest in the lord, the law giveth the same to his executors or administrators. Then put case, that a lord hath the wardship of the bodie and land of an heire female, and maketh his executor, and dyeth before her age of fourteene yeares, whether the executor shall have the two

27 H. 8. 3. 11 E. 3. Exec. 77. 4 E. 3. 55. 28 Ass. p. 7.

* *The words* priority *and* posteriority *appear to signify that the tenure of the* one *lord is of greater antiquity, or subsisted before, the tenure of the* other *lord. See ante* 23. *a.*

yeares,

yeares, because the executor is not lord. But I take it, the executor having the wardship of the body and land, shall in that case have the two yeares, for that they were vested in the lord (1).

It is further provided by the said statute, that if the lord tender a convenable marriage to the heire female within the said two yeares, and the heire female refuseth, then the lord shall hold the land untill her age of one and twenty yeares, and further untill he hath levied the value of her marriage. But if the lord doth not tender a marriage within the two yeares, he shall lose the value of the marriage, and content himselfe with the two yeares value.

31 Ass. p. 26. (Cro. Jam. 151.)

6 Co. 71. L. Darcie's case.

"*For before the said statute, &c. as appeareth by the rehearsall and words of the said statute.*" *Nota*, the rehearsall or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof (2). The tender of a marriage to an heire female before the age of fourteene is void, which must be understood where the lord may hold the land for the said two yeares, for then the statute appointeth the time of the tender; but where the lord cannot have the two yeares, he may tender a marriage to the heire female at any time after the age of twelve and before fourteene, for so he might have done at the common law.

35 H. 6. 52. Gard. 71.

35 H. 6. 52. Gard. 71. 6 Co. 71, lord Darcie's case. Britton 169.

Sect. 104.

NOTE, that the full age of male and female, according to common speech, is said the age of 21 *yeares. And the age of discretion is called the age of* 14 *yeares; for at this age, the infant which is married within such age to a woman, may agree or disagree to such marriage.*

OF full age, which is the age of one and twenty, and of the age of discretion, which is the age of fourteene (3), somewhat hath beene spoken before (4). But now to the point of agreement or

(Ante 78. b.)

6 Mar. Gard. Br. Pl. ultimo. 39 E. 3. 32, 33. Prær. Reg. c. 6. Tr. 24 Eliz Rot. 842, in Bank le roy Banister's case.

disagreement

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(1) See 6 Co. 74. a.

(2) Lord Coke's manner of expressing himself on the operation of the *preamble* in the construction of statutes is very observable. Instead of saying *generally*, that the preamble should control the *enacting* clauses, or of limiting precisely how far it shall have that effect, which would have been attempting to make a line where one cannot be drawn, he cautiously says, that it is a *good mean* to find out the intention. The authorities referred to in 4 New Abr. 645, will serve to explain by instances, what sort of influence the preamble ought to have in expounding statutes. See also Hatt. on Stat. 53.—[Note 42.]

(3) It seems more proper to consider *twelve* as the age of discretion for *women*; for lord Coke himself a few lines lower states *that* to be *their* time for agreeing or disagreeing to a marriage. See the note as to the age at which infants may make a will of personalty, post. 89. b.—[Note 43.]

(4) To lord Coke's account of the several ages of a man and woman, which is given in fol. 78. b. add 1 Hal. Hist. Pl. C. 17.

disagreement in this case. The time of agreement, or disagreement, when they marrie *infra annos nubiles*, is for the woman at 12 or after, and for the man at fourteene or after, and there need no new marriage, if they so agree; but disagree they cannot before the said ages, and then they may disagree, and marrie againe to others without any divorce; and if they once after give consent, they can never disagree after (1). If a man of the age of fourteen marry a woman [79. b.]

(1 Ro. Abr. 341. 3 Inst. 80.)

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(1) But now the agreement after *twelve* or *fourteen* would not be binding on the infant, if the marriage was without *banns*, or by *licence* and *without consent of parent or guardian*, and the infant was not a widow or widower; for the 26 Geo. 2. c. 33, makes all such marriages void. In reading this statute, it should be attended to, that the clause for annulling the marriages of infants without the consent of parents or guardians is restricted to marriages by *licence*; so that the marriage of an infant without such consent may still be good, where *banns* are regularly published, unless a dissent is openly declared by the parent or guardian in the church or chapel at the time of publishing, in which latter case the statute makes the banns void. As to marriages without either *licence* or *banns*, which are usually termed *clandestine*, they are *universally* annulled by the statute. Note that Scotland is excepted out of the 26 Geo. 2. c. 33. In consequence of this, so much of the act as was calculated to defeat the marriages of minors without the consent of parents or guardians, hath been frequently evaded by going into Scotland to be married there and returning into England immediately afterwards. Indeed the validity of such marriages was once questioned; and though in *general* marriages are governed by the law of the country in which they are celebrated, yet it was doubted, whether the *lex loci* ought to be applied to a case accompanied with circumstances so strongly marking the intent to evade the law of England. See Burr. 4 part. vol. 2. page 1079. But this point seems now fully settled in favour of the Scotch marriages by a late decision of the court of *arches*, which was afterwards confirmed in the court of *delegates*. However it may not be amiss to recollect, that there have been persons of authority who will not allow such cases of apparent evasion of the law of any country to fall within the principle of which the *lex loci* is indulged. There is a strong passage to this effect in the works of a Dutch author, whose writings on the *civil* law are much esteemed. *Ego ita existimo*, says Huber, after putting a case in which the law of one Dutch province against the marriage of minors without the consent of guardians was evaded by running away into another province having a different law, *hanc rem manifestè pertinere ad eversionem juris nostri, ac ideo non magistratus heic obligatos è jure gentium ejusmodi nuptias agnoscere et ratas habere. Multòque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii sub facilitate, jus patriis legibus contrarium, scientes volentes impertiuntur.* See the digression *de conflictu legum diversarum in diversis imperiis* in Huber. Prælect. Jur. Rom. page 538. In this digression the reader will find a very informing dissertation on the *lex loci*, and the principles by which the application of it ought to be regulated, expressed clearly and illustrated by a variety of cases, more particularly such as relate to testaments, marriages, and contracts in general. See also the printed Argument against Slavery in the case of Sommersett the Negro, which was determined in B. R. Trin. 11 Geo. 3. p. 67, to 75. It is there attempted to prove by principles of reason as well as by authorities, that the *lex loci* is not applicable in the instance of *slavery*, and that though a negro is brought from a country in which he was *legally* a slave, yet he ceases to be so and gains his freedom to all intents, the moment his master carries him into one where domestic slavery is not permitted.—[Note 44.]

a woman of the age of ten, at her age of twelve he may as well disagree as she may, though he were of the age of consent; because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so *è converso*, if the woman be of the age of consent, and the man under (2).

Sect. 105.

AND if the gardian in chivalrie doth once marrie the ward within his age of 14 yeares to a woman, and if afterward at his age of 14 yeares he disagree to the marriage, it is said by some, that the infant is not tied by the law to be againe married by his gardian, for that the gardian had once the marriage of him, and because he was once out of his ward as to the ward of his bodie. And when he had once the marriage of him, and he was once out of his wardship, he shall no more have the marrigge of him (3).

IT is a maxime in law, *Quòd dominus non maritabit minorem in custodiâ suâ nisi semel.* And another saith, *Si semel legitimè nupt' fuer', &c. postmodum non tenebuntur sub custodiâ dominorum esse.* Albeit this marriage is *de facto*, and not *de jure*, and though she disagreement dissolveth it *ab initio*, yet the lord shall never have the marriage of him. 13 E. 1. Gard. 137. Brit. fo. 169. acc. Glanvil. lib. 7, cap. 12. 27 H. 6. Gard. 118.

And

(2) See acc. Swinb. on Spousals 34. But though the rule, which where one of the parties is under the age of discretion makes the contract of marriage equally voidable by *both*, is admitted with respect to *actual* marriages, yet the civilians and canonists are not agreed, that it holds as to contracts of marriage *per verba de præsenti* without solemnization. Some think that such contracts have the full effect of a contract *per verba de præsenti* on the person who is of the age of discretion, and that it is only in the power of the *younger* party to assent or dissent on attaining the age of discretion. But according to others, *both* parties are in the same situation, and as it can only have the force of a contract *per verba de futuro* as to the younger party unless it is ratified at the age of discretion, so in the mean time it shall not have a greater effect on the *elder*, and consequently unless the contract is ratified by *both* when the *younger* party attains the age of discretion, it will not avoid the subsequent marriage of *either*. Swinburne adopts this last opinion. See Swinb. on Spous. 36. But this doctrine of reciprocity where one of the parties is an infant or under the age of discretion, however true it may be in its application to actual marriages or to contracts of marriage *per verba de præsenti*, must not be considered as extending to other contracts with an infant, not even contracts of marriage *per verba de futuro*; for in them the person of full age may, it is said, be bound at *all* events by our law, and yet as to the infant the contract may be *voidable*. Accordingly in the case of *Holt* and *Ward* the court held, that if a man of full age enters into a contract of marriage with a woman of 15 *per verba de futuro*, and afterwards marries another woman, an action on the case lies against him for breach of his promise. See 2 Stra. 850 & 937, & S. C. in Fitz-Gibb. 175. 275. 1 Barnad. 208. 247. 333. 2 Barnad. 12. 173. 176. As to the effect of the 26 of G. 2. c. 33, on *precontracts* of marriage, see note 4.—[Note 45.]

(3) In L. and M. the words *quære de hoc* are added.

27 H. 6. Gard. 118. And so if the gardian marrieth his ward to a woman, and after the marriage is dissolved by reason of a precontract (4), yet the gardian shall never have the marriage of the ward againe.

27 H. 6. Gard. 118. But if one ravisheth a ward from the lord and marrieth him within the age of consent; in that case, if the lord taketh again his ward, and he at the age of consent disagreeth to the marriage, the lord shall have the marriage of him, for he never had it before.

F. N. B. 243. So likewise, if the ancestor marrieth his heir apparent, *infra annos nubiles*, and dieth his heire within age, the ward disagreeth, the

7 H. 6. 11. gardian shall have the wardship of him. The same law it is in the same case, if the wife dyeth before the age of consent, the lord shall have the marriage of the heire.

[a] 30 E. 1. gard. 156. 12 E. 1. gard. 138. 21 E. 3. 19. 20 E. 3. gard. 41. Temps E. 1. ibidem 128. 35 H. 6. 45. 7 H. 6. 11. Vide Prær. Reg. cap. 6. 13 H. 3. gard. 147. Stanf. prær. 26, 27. And so note a diversity when the ward is married by the ancestor or by a ravisher, and when by the gardian himselfe. [*a*] For if the ancestor marrie his heire apparent *infra annos nubiles* and dyeth, in this case, if the marriage be dissolved by disagreement either of the ward or of his wife, the gardian shall have the marriage of him. [*b*] And so it is if a ravisher marry a ward *infra annos nubiles*, and the marriage is dissolved, *ut supra*, the gardein shall have the marriage. If the heire male in ward of the age of tenne yeares be married without the consent of the lord, he may tender unto the heire *infra annos nubiles* a marriage, albeit he be so married; and if he refuse, and agree to the former marriage, the lord shall have the forfeiture of his marriage, as it hath beene holden. But otherwise it is [*c*] (saith *Littleton*) where the gardian himselfe marrieth the ward, *ut supra*. And the reason of the diversitie is, because in this case the gardian had once the marriage of him, but so had not he in either of the other cases; and it is a maxim in law, *quòd dominus non maritabit pupillum nisi semel*.

[b] 27 H. 6. gard. 118. F. N. B. 143. m. 19 E. 3. judgement 123. 45 E. 3. 16.

[c] 47 E. 3. tit. Action sur le statute 38, and the bookes abovesaid.

☞ It appeareth upon consideration of all the bookes aforesaid, that where the ancestor marrieth his heire apparent within the age of consent, and dyeth, the infant still being within the age of consent, the lord may take the infant (if he will) into his possession, in respect the infant may disagree to the marriage; and if the infant be deteyned from him, he shall recover him in a writ of ravishment of ward, and thereupon have the infant delivered to him. [*d*] But if the ancestor marrieth his heire apparant *infra annos nubiles*, and dieth, his heire being *infra annos nubiles*, and after age of consent the heire agreeth to the

[80. a.]

[d] 7 H. 6. 11, adjudged in the booke at large.

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(4) It seems that *precontract* is now no longer a cause for dissolving a marriage in England; for it appears *impliedly* taken away by 26 G. 2. c. 33, which enacts, that there shall be no suit in the ecclesiastical court for compelling the celebration of marriage by reason of any contract, whether *per verba de præsenti* or *per verba de futuro*, entered into after the 25th of March 1754. It is observable, that the statute mentions contracts of marriage by *future* as well as those by *present* words; but notwithstanding this, it is far from being clear, that matrimony could ever be compelled in the ecclesiastical court on a contract of the former kind otherwise than by *admonition*, and probably it was included in the statute merely from caution. See 2 Stra. 938. —[Note 46.]

the marriage, neither the king nor the lord shall have the marriage, for now it is a marriage *ab initio*, and there neede no other marriage.

Sect. 106.

IN the same manner it is, if the gardian marry him, and the wife die, the infant being within the age of 14 *yeares or* 21.

THIS *Littleton* addeth, because he spake in the case next before of a disagreement by the infant. Here he saith, that if the wife dye, the infant being within the age of consent.

Sect. 107.

AND that such an infant may disagree to such marriage, when he comes to the age of 14 *yeares, it is proved by the words of the statute of* Merton *cap.* 6, *which saith thus:*

De dominis qui maritaverint illos quos habent in custodiâ suâ, villanis, vel aliis, sicut burgensibus, ubi disparagentur, si talis hæres fuerit infra 14 annos, et talis ætatis quòd matrimonio consentire non possit, tunc si parentes illi conquerantur, dominus amittat custodiam illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis infra ætatem existentis, secundum dispositionem parentum, propter dedecus et impositum. Si autem fuerit 14 *ans et ultra*, quòd consentire possit et tali matrimonio consenserit, nulla sequatur pœna.

And so it is proved by the same statute, that there is no disparagement, but where he which is in ward is married within the age of 14 *yeares.*

"*THE statute of Merton.*" So called because the parliament was holden at *Merton.*

"*And that such infant may disagree, &c. it is proved, &c.*" Note, the time of disagreement is set downe by act of parliament, and so observed by *Littleton*, who seekes no other proofe therein than by the law of *England.* Merton, ca. 6.

"*Ubi disparagentur.*" Disparagement, *disparagatio*, commeth of the verbe *disparago*, and that of *dispar* and *ago.*

Now it it is necessarie to be understood, what disparagements there be for the which the heire may refuse.

And of such disparagements there be foure kindes.

The first, *propter vitium animi*; as an ideot, *non compos mentis*, a lunatique, &c. (1).

The

(1) The 15 G. 2. c. 30, annuls the marriages of all persons, who, after being found lunaticks on inquisition by commission under the great seal, or after being

Bracton, lib. 2, fol. 91. Britton, fo. 169. Fleta, lib. 1, cap. 12. Mirror, ca. 2, sect. 17. Rot. Parl. 18 E. 1. fo. 9. The daughter of Nevil married to the sonne of Tho. of Weyland after his attainder.

The second, *propter vitium sanguinis;* as, 1. a villein: 2. *burgensis:* 3. the sonne or daughter of a person attainted of treason or felony, albeit pardoned, for the blood is corrupted: 4. a bastard: 5. an alien or the childe of an alien. *Burgensis* is a man of trade, as an haberdasher, a draper, or the like (and this agreeth with the civill law, *Patricii cum plebeiis matrimonia ne contrahant)*, whereof *Glanvill* speaketh thus: *Si verò fuerit filius burgensis, ætatem habere tunc intelligitur, quando discrete sciverit denarios numerare, et pannos ulnare, et alia paterna negotia similiter exercere.* [80. b.]

The third, *propter vitium corporis*; as, first, *de membris*, having but one hand, one foot, one eye, &c.; secondly, deformitie, as to looke asquint, a creeple, halt, lame, decrepit, crooked, &c.; thirdly, privation, as blind, deafe, dumbe, &c.; fourthly, disease horrible, as leprosie, palsie, dropsie, or such like diseases; fifthly, great and continuall infirmitie, as a consumption, and such like; sixthly, impotency to have children in respect either of age past children, or so tender yeares as there is too great disparitie, or for naturall disabilitie or impediment, or such like; seventhly, defloured of her virginity.

1 E. 6. cap. 12. [d] Vide Sect. 109. F. N. B. 149.

The fourth kinde of disparagement was *propter jactum privilegii, &c.* as to marry the heire to a widow, whereby he should by reason of the bigamie have lost the benefit of his clergie, whereby he might save his life; but now the exception of bigamie in that case is ousted by the statute (1). And *Littleton* saith, [d] that there

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being committed to the care of trustees by act of parliament, shall marry without the chancellor's declaring them of sane mind. Before this act there could be no doubt as to the validity of the marriages of lunaticks, where it could be clearly proved, that they were married in their lucid intervals. One should think, that there could be as little room to doubt their incapacity of contracting marriage whilst in an actual state of insanity, if our books were not remarkably silent on the subject, and it was not also said, that by our law an ideot *à nativitate*, in whom the general incapacity of making contracts appears to form as strong an objection as occurs in the case of a madman, may consent to marriage. This doctrine, as to ideots, however strange it may appear, is mentioned as a point adjudged in one case, and seems confirmed by allowing dower to the wife of an ideot, and by questioning the right of an ideot's husband to courtesy merely, where on account of an office finding the wife's ideotcy and the descent of land to her after the marriage, it is apprehended that there is a concourse of titles between the king and the husband. See 1 Ro. Abr. 357, and ante fol. 30. b. and note 2, there. By the Roman law, persons continually mad, lunaticks except during the intervals of sanity, and ideots, were all equally incapable of marriage. See Brouwer. de jur. connubior. lib. 2. cap. 4.—[Note 47.]

(1) The word *bigamy* is frequently used to describe the crime of marrying a second wife during the life of the first; but the proper name for this offence in our law is *polygamy*, and with us a *bigamist* is a man who either marries a widow or after the death of his first wife marries a second time, in consequence of which he formerly could not claim the benefit of clergy. This denial of the benefit of clergy to bigamists was in consequence of some ancient papal constitutions and canons of councils against admitting bigamists into holy orders; a prohibition, which, however speciously defended by texts of scripture, wholly originated from the injurious policy of the church of Rome in discouraging the marriages of the clergy, and led the way to the complete establishment of celibacy amongst them. See Levit. c. 21. v. 13, 14. 1 Tim.

c. 3.

there be many other disparagements which are not specified in the said statute, for these two mentioned are put but for examples. In a word, it must be *competens maritagium absque disparagatione.*

"*Si talis hæres fuerit infra* 14 *annos, et talis ætatis quod matrimonio consentire non possit, &c.*" Note, albeit the ward, where he is disparaged, may disagree at his age of fourteene yeares, yet the law doth so abhorre the odious dealing of the gardian, to whom the custody of the heire is committed, and his horrible profanation of honourable marriage, the only ligament of men's inheritances, as it inflicteth a great punishment upon the lord in this case, albeit the marriage be not perfect, but avoyable by disagreement.

"*Tunc si parentes illi conquerantur.*" *Littleton* in the next Section expoundeth these words in this manner, viz. *Si parentes conquerantur*, i. e. *si parentes inter eos lamententur, which is as much as to say, as if the cousins of such infant have cause to make lamentation or complaint for the shame done to their cousin so disparaged, which in manner is a shame to them. Parens est nomen generale ad omne genus cognationis.* See more of this in the next Section.

"*Dominus amittat custodiam illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit convertatur ad commodum hæredis, &c.*" Here followeth the penaltie.

First, *amittat custodiam*, that is, the whole benefit of the wardship. But in this case if the gardian hath granted the wardship of the land to another *bona fide*, and after, the heire is disparaged, the grantee shall not forfeit his interest; for the statute is, *dominus amittat custodiam.*

Secondly, *et omne commodum quod inde receptum fuerit convertatur ad commodum hæredis secundum dispositionem parentum.*

These

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c. 3. v. 12. Summa Concil. per Mirand. fol. 4. a. 119. a. 168. b. 230. b. Bingh. Antiq. Christ. Ch. b. 4. c. 5. Tayl. Elem. Civ. L. 295; and the word *Bigamus* in the index to the Corp. Jur. Canon. ed. Pithœor. However, the exclusion of bigamists from the benefit of clergy was not entirely accomplished till the council of Lyons ended the doubts which before prevailed, by positively declaring bigamists *omni privilegio clericali exuendos.* It appears, that this constitution was immediately received in England; for the statute of 4 *E.* 1, *de bigamis* takes notice of it, and explains how it should be construed, by directing that it should be understood to comprehend bigamists *before*, as well as those who became so *after*. See 4 E. 1. c. 5. 2 Inst. 273. 2 Hal. Hist. Pl. C. 372. 2 Hawk. Pl. C. b. 2. c. 33. s. 5, and Barringt. on Ant. Stat. 2d ed. 73. When the benefit of clergy, by being allowed to all who could read, was extended to laymen as well as persons in orders, the reason for ousting bigamists of clergy in great measure ceased; but notwithstanding this, the exception of bigamy continued till it was taken away by the statute of Edw. 6.—The pointing out exactly the appropriated sense of the word *bigamy* in our law was the more necessary, because very sensible writers have been inattentive to it. We find a remarkable instance of this in the quarto edition of the Statutes, the editor of which, in a note on the 4 E. 1. c. 5, refers to the 1 Jam. 1. c. 11, as making *bigamy* a felony.—[Note 48.]

These words are expounded by *Littleton*, which needeth no further explanation. Now where readers upon this statute have put a case, that if the tenant hath issue a daughter, his wife *enseint* with a sonne and dieth, the lord doth disparage the daughter before the age of twelve yeares, the sonne is borne, the daughter disagrees, the sonne dieth the daughter within the age of fourteene, she shall be in ward againe: This case is not warranted by this statute, for this statute extends not to the heires female.

Vide the Second Part of the Institutes. Merton, cap. 5, 6. 35 H. 6. 53. (9 Co. 127.)

If the tenant make a lease to *A.* for life, the remainder to *B.* in fee, the tenant for life surrenders upon condition, *B.* dieth his heire within age, the lord disparages the heire, tenant for life entreth for the condition broken and dieth, the heire shall be out of ward, for that he claimeth as heire to one man. But if after the disparagement lands descend from another ancestor to the ward so disparaged, he shall be in ward for those lands.

If two joyntenants be of a ward, and the one disparageth the heire, both shall lose the wardship, for the words be, *et omne commodum, &c.*

Britton, fol. 169. acc.

"*Si autem fuerit* 14 *annorum et ultra, &c. nulla sequatur pœna.*" By which it appeareth (as *Littleton* observeth), that there is no disparagement but where the ward is married within the age of fourteene.

Sect. 108.

NOTE, it hath beene a question, how these words shall be understood (Si parentes conquerantur). *And it seemeth to some, who considering the statute of* Magna Charta, *which willeth,* quòd hæredes maritentur absque disparagatione, &c. *upon which this statute of* Merton *upon this point is founded,* (1) *that no action can be brought upon this statute,* (2) *insomuch as it was never seene or heard, that any action was brought upon the statute of* Merton *for this disparagement against the gardian for the matter aforesaid* (3), *&c. and if any action might have beene brought for this matter, it shall be intended that at some time it would have beene put in ure* (il serra entendue ascun foits (4) estre mise en ure). *And note* (5), *that these words shall be understood thus,* Si parentes (Et nota, que ceux parolx serront entendes (6), *Si parentes)* conquerantur, id est, si parentes inter eos lamententur, *which is as much as to say (lamententur,* que (7) est taunt a dire), *as if the cousins of such infant have cause to make lamentation or complaint amongst themselves, for the shame done to their cousin*

* *All the notes below are in* 81. *a. of the* 13*th and* 14*th editions.*

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(1) * *that no action can be brought upon this statute,* not in L. and M.
(2) * *as it seems, &c.* in L. and M.
(3) * *for the matter aforesaid,* not in L. and M.
(4) * per comen presumption devaunt ceux heurez *instead of* entendue ascun foits, *in L. and M.*
(5) * *And note* not in L. and M.
(6) * en tiel maner, *in L. and M.*
(7) * *ou* instead of *que* in L. and M.

cousin so disparaged, which in manner is a shame to them, then may the next cousin, to whom the inheritance cannot descend, enter and ouste the gardein in chivalrie. And if he will not, another cousin of the infant may doe this, and take the issues and profits to the use of the infant, and of this to render an account to the infant when he comes to his full age. Or otherwise the infant within age may enter himself, and ouste the gardein, &c. Sed quære de hoc.

[81. a.] "*THE statute of Magna Charta.*" Though it be in forme of a ☞ charter, yet being granted by assent and authoritie of parliament *Littleton* here saith it is a statute. 9 H. 3. (2 Inst. 1.) Vide 8 Co. the Prince's case.

This parliamentarie charter hath divers appellations in law. Here it is called *Magna Charta*, not for the length or largenesse of it, (for it is but short in respect of the charters granted of private things to private persons now a dayes being *(elephantinæ chartæ,)* but it is called the great charter in respect of the great weightinesse and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme; and therefore it may truly be said of it, that it is *magnum in parvo.* It is in our bookes called *Charta Libertatum, et Communis Libertas Angliæ, or Libertates Angliæ, Charta de Libertatibus, Magna Charta, &c.* And well may the lawes of *England* be called *Libertates, quia Liberos faciunt. Magna fuit quondam Magnæ reverentia Chartæ.* Bracton, 414. and 291. Fleta, lib. 2. cap. 48, & lib. 3. cap. 3. Mirror, cap. 2. sect. 18. Brit fol. 177. b.

This statute of *Magna Charta* is but a confirmation or restitution of the common law, as in the statute called *Confirmatio Chartarum anno* 25 *E.* 1, it appeareth by the opinion of all the justices; and in 5 *H.* 3. tit. Mord. 53, *Magna Charta* is there vouched; for there it appeareth that king *John* had granted the like charter of renovation of the ancient lawes. 25 E. 1. 5 H. 3. Mord. 53. Matth. Paris, 246. 276. 248.

This statute of *Magna Charta* hath beene confirmed above thirty times, and commanded to be put in execution. By the statute of 25 *E.* 1. cap. 2, judgements given against any points of the charters of *Magna Charta*, or *Charta de Foresta*, are adjudged void. And by the statute of 42 *E.* 3. c. 1, if any statute be made against either of these charters it shall be void. 25 E. 1. ca. 2. 42 E. 3. ca. 1.

[81. b.] "*Upon the statute of Magna Charta the statute of Merton is founded upon* ☞ *this point, viz. Quòd hæredes maritentur absque disparagatione* (1)."

"*Founded.*" So as *Magna Charta* is the foundation of other acts of parliament. This act extended as well to females as to males.

"*No action can be brought upon this statute, insomuch as it was never seene or heard, &c. And if any action might have beene brought for this matter, it shall be intended that at some time it would have beene put in ure.*"

Hereby

(1) See 9 Hen. 3. c. 6.

Vide Petitiones coram domino rege in parliamento, fol. 3. 18 E. 1. 39 H. 6. 39. per Ashton. 6 Eliz. Dier 229. (Ante 11. a.) 23 Eliz. Dier. Nullum breve. de errore de judicio in 5. port.

Hereby it appeareth how safe it is to be guided by judicial presidents, the rule being good, *Periculosum existimo, quod bonorum virorum non comprobatur exemplo.* And as usage is a good interpreter of lawes, so non usage where there is no example is a great intendment that the law will not beare it; for, saith *Littleton*, if any action might have beene grounded upon such matter, it shall be intended, that sometime it should have been put *in ure* (2). Not that an act of parliament by non user can be antiquated or lose his force, but that it may be expounded or declared how the act is to be understood.

quia nullum breve repetitur. 3 E. 3. 50. 11 H. 4. 7. and 38. Vide le statute de Marlebridge, cap. 27. In custodia parentum.

"*Si parentes conquerantur.*" Of this sufficient hath beene said before.

"*If the cousins.*" Here *Littleton* expoundeth parents to be his cousins, under which name of cousins *Littleton* includeth uncles and other cousins, who when the father is dead are *in loco parentum.*

"*Have cause to make lamentation, &c.*" Note, if they have cause to make lamentation, it sufficeth, though they never complaine.

"*For the shame done to their cousin.*" For when their cousin is disparaged in his marriage, it is not only a shame and infamie to the heire, but in him, to all his bloud and kindred.

"*Then may the next cousin, to whom the inheritance cannot descend, enter and ouste the gardein in chivalrie.*"

This is worthy the observation, for the words of the statute are generall, *secundum dispositionem parentum*, and the construction thereof shall be according to the reason of the common law; for the next cousin, to whom the inheritance cannot descend, shall enter and ouste the gardian, and shall be in place of a gardian, as it is in case of a gardian in socage.

"*And*

(2) In the famous case of Ashby and White, in which the question was, whether an action on the case would lie against a returning officer for refusing a vote at the election of a member of parliament, one objection made to the action was, that it was of the first impression: and the words of Littleton, in explaining why any action could not be maintained on the statute of Merton against a guardian for disparagement, were much relied upon by judge Powys as an authority directly in point. But lord chief justice Holt answered this objection by citing many instances of allowing new actions; and therefore in this particular judge Powell concurred with Holt, though they differed on the principal question. See 2 L. Raym. 944. 946. and 957. It might also have been observed, that Littleton is only stating the opinion of others, and that he concludes with a *quære;* and further, that in the case put by him the question was merely, whether the proper remedy was by *action* or by *entry.* However, it must be confessed, that the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against its lying; more particularly, where the *right*, which is the foundation of the action, is admitted, and the *mode of relief* is the only thing controverted, as was the case in Ashby and White.—[Note 49.]

" *And if he will not, another cousin of the infant may doe this.*" Still pursuing the reason of the common law in case of gardian in socage.

" *And take the issues and profits to the use of the infant, &c.*" This is so evident as it needeth no explication.

" *Or otherwise the infant within age may enter himself, and ouste the gardein.*" If none of the cousins aforesaid will enter, then the heire himself may enter; in all which the reason of the common law is pursued. But what if the heire be disparaged, and the next of kin doth enter, and when the heire commeth to 14 he agreeth to the marriage; yet shall not this give any advantage to the lord, for that he had lost the wardship before.

[82. a.]

☞ Sect. 109.

ALSO, there be many and divers other disparagements which are not specified in the same statute. As if the heire which is in ward be married to one which hath but one foot, or but one hand, or which is deformed, decrepit, or having some horrible disease, or great and continuall infirmitie; and (if he be an heire male) if he be married to a woman past the age of childe-bearing. And there be other causes of disparagement; but inquire of them, for it is a good matter to understand. (Ante 80. a.)

Of this sufficient hath been said before.

Sect. 110.

AND of heires males which be within the age of 21 yeares after the decease of their ancestor and not married, in this case the lord shall have the marriage of such heire, and he shall have time and space to tender to him covenable marriage without disparagement within the said time of 21 yeares. And it is to be understood, that the heire in this case may chuse whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heire covenable marriage within the age of 21 yeares without disparagement, and the heire refuseth this, and doth not marrie himselfe within the said age, then the gardein shall have the value of the marriage of such heire male. But if such heire marrieth himself within the age of 21 yeares against the will of the gardein in chivalrie, then the gardein shall have the double value of the marriage by force of the statute of Merton *aforesaid, as in the same statute is more fully at large comprised.*

" *TO tender to him covenable marriage, &c.*" But it is in the election of the lord, whether for the single value the lord will 6 Co. 70. Lo. Darcie's case. Vid. Britton, fol. 169. (5 Co. 127.)

will tender a marriage or no, for he shall have the single value without any tender (1).

Merton, cap. 6. 18 E. 3. 18.

And of this there needeth no other explication. The value of the marriage of such an heire is according to the valuation by lawfull triall, or as much as another had before offered to give for the same without fraud and covyn.

"*The heire in this case may chuse whether he will be married or no, &c.*" And so on the other side, though there be a tender made of a covenable marriage without disparagement, yet the heire may refuse, for in everie marriage there must be a free consent. [82. b.]

"*If such heire.*" That is, if such an heire to whom a tender hath been made by the lord, and by whom a refusall hath beene made; if such an heire afterwards marrieth another within age, he shall forfeit double the value; but if he before any tender marrieth himselfe within age, he shall pay but the single value of the marriage.

Neither the single value nor the double value shall be recovered against the heire but after his full age; but for both these the lord hath a double remedie, viz. an action, as is aforesaid; or the lord may retaine the land after full age for his satisfaction of both, with this difference, that in the case of the single value the taking of the profits shall not be accounted parcell of the value, but as a gage or pledge till the heire do satisfy him of the single value; but in case of the double value, the perception of the profits shall be taken in satisfaction of the double value; for the statute of *Merton*, which giveth the forfeiture, saith, *Dominus teneat terram, &c. per tantum tempus quòd inde percipere possit duplicem valorem maritagii:* which words *(quòd inde, &c.)* prove that the taking of the profits shall go in satisfaction: but in case of the single value, untill the heire doth satisfie the lord of the same.

Stat. de Merton, cap. 6. 2 E. 2, acc. sur l'estat. 43. 3 E. 2. ibid. 27. 16 E. 3. ibid. 14. 18 E. 3. 18. Temps E. 1, acc. sur l'estat. 43 E. 3. 21. 27 H. 8. 4.

No forfeiture of marriage is given, by the said statute of *Merton*, of an heire female, as appeareth by the said act; neither at the common law could the lord have holden the land of the heire female after fourteene yeares for the value.

Statute de Merton, cap. 7. 35 H. 6. tit. Gard. 71. 6 Co. 71. Lord Darcie's case.

Sect. 111.

ALSO, divers tenants hold of their lords by knights service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a doore or some other place of the castle, upon reasonable warning, when their lords heare that the enemies will come, or are come in England. *And in many other cases a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as*

(1) This point, which before lord Coke's time appears to have been doubtful, was adjudged in the case of Palmer and Wilder, and again in lord Darcie's case. See the former case in 5 Co. 126. b. and the latter in 6 Co. 70. b.

as shall be said in the tenure by grand serjeantie. But in all cases where a man holds by knight's service, this service draweth to the lord ward and marriage.

BY castle-ward, wardum castri, seu castel-gardum, seu castri-gardum." He that holdeth by castle-gard, holdeth by knights service, but not by escuage; for escuage is due when the king maketh a voyage royall out of the realme (as hath beene said) and the tenant maketh default; but castle-gard is to be done within the realme, and without any voyage royall. 4 Co. 88, in Luttrell's case. 6 Co. 20. a. Gregorie's case. 29 E. 2. Gard. 195.

Also a certaine tearme is appointed for the service of the tenant that holdeth by escuage, but no certaine tearme by law for him that holdeth by castle-gard. *Vide* in the title of Grand Serjeantie, Sect. Hereof come ☞ *castellani*, or *constabularii castri*, for keepers or constables of a castle. Vide Mag. Chart. cap. 19. 20 W. 1, cap. 7.

[83. a.]

Bract. lib. 5, fol. 363. Fleta, lib. 2. cap. 43.

"*To ward a tower of the castle, &c.*" A tower, or a doore, or a bridge, or a sconce, or some other certaine part of the castle; for the tenure must be certaine. And this may be done by the tenant himselfe or his deputie. Magna Chart. cap. 20.

"*Of their lord.*" For it cannot be of a castle of another.

Lord and tenant by castle-gard, the lord granteth over his seigniory to another, [*a*] the castle-gard is gone, because the grantee hath not the castle. [*b*] For the same reason it is, that if one holdeth of me, as of my manor of *D.* by fealtie and suit of court, if I grant over the services of this tenant, the suit is gone, because the grantee hath not the manor. [*c*] But if the castle be wholly ruinated, *si castrum sit penitus dirutum*, yet the tenure remaineth by knights service, and it goeth in benefit of the tenant, as to the garding of the castle, untill it be reedified. But ward and marriage belongeth to the lord in the meane time. For *Littleton* in the end of this Section putteth it for a generall rule in all cases where a man holdeth by knight's service, it draweth ward and marriage. (2 Ro. Abr. 513.) [*a*] Temps E. 2, tit. Ass. 399. 31 E. 1, tit. Ass. 441. [*b*] 17 E. 3. 65. 72. 4 E. 3. 42. [*c*] 4 Co. 88. Luttrell's case. 3 H. 8. Bendloe's and Capel's case. 4 E. 3. 55.

If the tenant make default in garding of the castle, the lord may distreine for it, and recover satisfaction in dammages.

"*Upon reasonable warning.*" This warning must be given by the lord or some other for him, and the tenant need not to stirre until he have such warning.

"*Enemies.*" Which is to be understood of any manner of enemies whatsoever. And though *Littleton* speakes of enemies, yet it seemeth that to keep a castle in time of insurrection and rebellion (albeit in proprietie of speech rebels are no enemies) is a tenure by knight's service. *Vide* Hill. 8 *E.* 1. Midd. Rott. 86.

"*Will come.*" For preparation is to be made upon warning before the enemie be come indeed into *England*. This appeareth to be in time of hostilitie and warre, or for preparation therefore. But a tenure to keepe a castle in time of peace only is no knight's service.

If the tenant by castle-gard doe serve the king in his warre, he shall be discharged against the lord, according to the quantitie of the time that he was in the king's host. (2 Ro. Abr. 505.)

Fleta, lib. 1. cap. 42.* *Fleta* speaketh of an old word called *wardwite*, and (saith he) *significat quietanciam misericordiæ, in casu quo non invenerit quis hominem ad wardam faciendam in castro.*

* *It should be* cap. 47.

Sect. 112.

AND if a tenant which holdeth of his lord by the service of a whole knight's fee dieth, his heire then being of full age, scil. *of 21 yeares, then the lord shall have 100s. for a relieſe, and of the heire of him which holds by the moitie of a knight's fee, 50s. and of him which holds by the fourth part of a knight's fee, 25s. and so he which holds more, more, and which lesse, lesse.*

"*RELIEFE, relevium.*" This word is derived from the originall before (1).

Vide Sect. 103. [a] Temps E. 1. Reliefe 13. 41 E. 3. 22. 4 E. 2. Avowrie 210. 7 H. 6. 13. 22 H. 8. Rot. 528. 34 E. 1. Avowrie 233. (3 Co. 66. Ante 47. b.)

Nota, Reliefe [*a*] is no service, but an improvement of the service, or an incident to the service (2), for the which the lord may

(1) See ante 76. a. Lord Coke there cites a passage from Domesday-book, in which reliefs are mentioned; and from this early use of the word, and from the terms of a law of Edward the Confessor, and of two laws of Canute, some have inferred, that reliefs were known to the Saxons. This circumstance is much relied on by those who insist, that feudal tenures were established in England before the Conquest; and therefore sir Henry Spelman, who supports the contrary opinion, is very full in his observation on this part of the subject. The sum of what he advances is, that Domesday-book at the utmost only proves the use of reliefs after the Conquest, which is not denied; that the supposed law of Edward the Confessor is either not genuine or belongs to William Rufus; that *heriot*, which is the word used in the original language of the laws of Canute, is improperly translated *relief;* and lastly, that however it might suit with the policy of the Normans to assimilate *reliefs* to *heriots*, there were the most essential differences between the two. According to sir Henry Spelman, the heriot was paid out of the *goods* of the *deceased* possessor of the land, the relief by the *heir*, out of *his own purse;* the heriots at *all* events, the relief *only* in case of taking up the lands in succession. These two of the differences taken by Spelman are particularly stated here; because they apply to heriots and reliefs as they are now distinguishable. See the Treat. on Feuds in Spelm. Posthum. 31. It is observable, that Bracton marks the distinction between reliefs and heriots very strongly, and in terms partly corresponding with the idea of Spelman; for after treating at large on reliefs Bracton adds, *est quidem alia præstatio, quæ nominatur heriettum, et quæ nullam comparationem habeat ad relevium; scilicet, ubi tenens, liber vel servus, in morte sud dominum suum, de quo tenuerit, respici de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem; quæ quidem præstatio magis fit de gratiâ quàm de jure, et quæ hæreditatem non contingit.* See Bract. lib. 2, cap. 36, fo. 86. a. See further as to heriots, post. 185. b.—[Note 50.]

(2) See acc. Ley on Wards and Liv. fol. ed. 17. W. Jo. 133. The distinction is not merely *nominal;* for lord Coke in another place assigns it as a reason, why a relief is not within the limitation of 50 years prescribed by the 32 H. 8. c. 2, in the case of avowry or conusance for *suit* or *service*. 2 Inst. 95. Note, that in the book last cited *forty* years are mentioned as the limitation in the 32 H. 8. but mr. Ruffhead in his edition of the Statutes says, that in the *record* the time is *fifty* years.—[Note 51.]

may distreine (3), but cannot have an action of debt (4),
[83. b.] ☞ but his executors or administrators may have an action of debt, and cannot distraine (1).

And it [*b*] is to be understood, that *feodum militis*, a knight's fee, consisteth of twentie pound land (2), and he payeth for his reliefe for a whole knight's fee the fourth part of his fee, viz. five pound, and so according to the rate.

[*b*] Stat. del 1 E. 2. de militibus. Vide 9 Co. 124. Anth. Lowe's case. (2 Inst. 596 Ante 69. b.)

Baronia, a baronie, or a baron's fee, consisteth of thirteene knights fees and the third part of a knight's fee (3), which amounteth to foure hundred markes *per annum*; and the baron for an entire baronie payeth for his reliefe an hundred markes, which is the fourth part of the value of his baronie.

Comitatus, an earledome, or an earle's fee, consisteth of a baronie, and the third part* of a baronie, which includeth twenty knights fees, amounting to foure hundred pound land *per annum*, and he payeth for his reliefe for an entire earldome the fourth part of his revenue, and that is an hundred pound. All which appeareth by the statute of *Magna Charta*, cap. 2, made in the ninth yeare of *Henrie* the third, at which time there was neither duke, marquesse nor viscount in *England*, as before is said. But there be precedents in the exchequer, that a dukedome consisting of two earledomes, viz. eight hundred pound land by the yeare, payeth two hundred pound, and a marquesse consisting of two baronies, viz. eight hundred markes land *per annum*, and of an earledome and a halfe †, payeth two hundred markes for his reliefe. What the viscount should pay in certaine I have not heard. Before the making of the statute of *Magna Charta* the king had *rationabile relevium* of noblemen, and it was not reduced to any certaintie (4), yet ought it to have been reasonable and not excessive.

(2 Ro. Abr. 516.)

Glanvil. lib. 9, cap. 4. 6. Bracton, lib. 2, fol. 83. Britton, fol. 178. Ockam, 42.

F. N. B. 83. 256. Fleta, lib. 3, cap. 17. Magna Charta, cap. 2.

I have seene the record of a charter made in 20 *H.* 6. to *Henrie Beauchampe* earle of *Warwicke*, whereby he was created king of the Ile of *Wight*, to him and the heires males of his bodie. His reliefe was incertaine, and not limited by the statute of *Magna Charta*.

It is to be observed, that the words of the statute of *Magna Charta* be, *hæres comitis de comitatu integro, et hæres baronis de baronid integrâ, &c.* Now what an entire earldome and an entire baronie is, hath beene declared before.

Vide Bracton, fol. 84. 14 H. 4. in recordo longo. 10 H. 7. 19.

20 E. 3. Ass. 122. tit. Avowrie 126. 18 Ass. pl. ultimo. 23 E. 3. 8.

* *The words* third part *seem to be here inserted for* half *or* moiety; *for since a barony is said to contain* 13 ⅓ *knights fees, it follows that an earldom, which is* 20 *knights fees (Vid. supra & ante* 69. b.) *must consist* of a barony and a half.

† *The words* a halfe *seem to be here inserted for* the third part of an earldom. *See the note supra.*

It

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(3) But it is said, that if the relief is claimed, not by reason of tenure, but by *custom*, there must be a prescription for the distress to warrant it. See W. Jo. 133.—[Note 52.]

(4) Acc. ante 47. b. But there are some opinions to the contrary. See 2 Leon. 179. 2 Ro. Rep. 371.

(1) S. p. acc. ante 47. b. post. 162. b. and 1 Show. 36.

(2) See ante 69. a. and note 3, there.

(3) As to this notion of there being a certain number of knights fees in a barony and earldom, see ante 69. a. note 5.

(4) See 2 Inst. 7, 8, and Wright's Ten. 99.

It is also to be observed, that at and before the statute of *Magna Charta* all earledomes and baronies were derived from the crowne, and were holden of the king *in capite*, and the king would not suffer them to be divided, or severed. And such entire earledomes and entire baronies are within the statute, but at this day earles and barons are without such earledomes and baronies of the king's gift in chiefe. For at the creation of an earle, he hath sometimes an annuitie granted unto him (5), and sometimes nothing; so as such earles and barons so created are cleerely out of the statute of *Magna Charta*, and are to pay such reliefes as other men that hold of the king *in capite*. For as the heire of a knight shall not pay reliefe, unlesse he hath a knight's fee, &c. so neither the earle nor baron shall pay any reliefe by this statute, unlesse he hath an earledome, &c. or baronie, &c.

16 E. 3. Exchange 2. 46 E. 3. Forfeiture 18.

"*His heire of full age, scil. of* 21 *yeares.*" And yet in some case the heire shall pay reliefe when he was within age at the time of the death of his ancestor. As if a man holdeth lands of the king by knights service *in capite*, and of a common person other lands by knights service, and dieth his heire being within age, the king hath all in ward by his prerogative untill the full age of the heire. In this case the heire shall pay reliefe to the other lord, for that the king had the wardship of bodie and lands. And the lord upon everie descent ought to have either wardship or reliefe.

24 E. 3. 24. 26 H. 8. 32 H. 8. ca. 2. in fine.

But if there be lord and tenant by knight's service, and the tenant dieth his heire being within age, the lord wayveth his wardship, as he may, and taketh himselfe to his seigniorie; in this case the lord shall not have reliefe at his full age, because he might have had the wardship of the bodie and land. Lord and tenant of two manors by divers tenures by knight's service, the tenant is disseised of the one, and the disseisor dieth seised, and the tenant dieth seised of the other, his heire within age, the lord seised the body and lands of that manor, and after the heire at his full age recovereth the other manor against the heire of the disseisor, he shall pay reliefe for that manor, and so one lord of the heire of one tenant shall have both wardship during his minoritie and reliefe at his full age.

1 E. 3. 6. Pl. Com. 229. 33 E. 3. tit. Gard. Statham.

☞ "*His heire.*" [*k*] And yet the successor of a bishop or abbott may pay reliefe by prescription or grant. [84. a.]

[*k*] 3 E. 5. 13. 76. 8 R. 2. Reliefe 14. 3 H. 4. 2. 2 H. 3. Avowrie 124.

If

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(5) This annuity is therefore called *creation-money*, and the grant of it usually expressed, that it was assigned in order to enable the grantee the better to sustain his newly-acquired dignity. Mr. Madox gives us various instances of such annuities; and it appears, that they were not confined to earls; for one of the letters patent in his book is a grant of 10l. a year by Hen 6. out of the crown revenues in Cumberland to sir Thomas Percy on creating him baron of Egremont. See Mad. Baron. Anglic. 142. In Dyer 2. a. notice is taken of an annuity of this kind, and it is there said to be so annexed to the dignity as not to be alienable. See further as to creation-money, Camd. Britann. ed. 1772, p. 125.—[Note 53.]

If the tenant infeoffeth his heire apparent by collusion, and dieth [*l*] his heire of full age, it is a question in our bookes, whether he shall have reliefe either by the common law, or by the statute of *Marlebridge*, ca. 6. But now the statute [*m*] of 13 *Eliz.* ca. 5, hath cleered that question, and that the lord shall have reliefe where the conveyance is made to any person by collusion, &c.

[*l*] 39 E. 3. tit. Reliefe. 24 E. 3. Reliefe 11. Bracton, lib. 2. 85.

[*m*] 13 Eliz. cap. 5.

Sect. 113.

ALSO, a man may hold his land of his lord by the service of two knights fees; and then the heire, being of full age at the time of the death of his ancestor, shall pay to his lord x. pound for reliefe (1).

This is evident, and needeth no explanation.

Sect. 114.

NOTE, if there be grandfather father and sonne, and the mother dieth living the father of the sonne, and after the grandfather, which holds his land by knight's service, dieth seised, and his land descend to the sonne of the mother as heire to the grandfather, who is within age; in this case the lord shall have the wardship of the land, but not of the bodie of the heire, because none shall be in ward of his bodie to any lord living his father, for the father during his life shall have the marriage of his heire apparent, and not the lord (2). *Otherwise it is, where the father dieth living the mother, where the land holden in chivalrie descends to the son on the part of the father, &c.*

"*SONNE.*" Yet the father shall have the marriage of his daughter if she be his heire apparent; and *Littleton*'s reason extendeth to the daughter, for that (saith he) the father shall have the wardship of his heire apparent, within which words the daughter is included, so long as she continueth heire apparent.

Fleta, lib. 1, cap. 5. 16 E. 3. Disseisin 6. 31 E. 1. Gard. 154. 8 E. 2. Tresp. 235.

F. N. B. 243. Ambrosia Gorge's case. 6 Co. 22.

"*The lord shall have the wardship of the land.*" Note, that albeit in this case the law doth give the custodie of the body to the father, and barreth the lord thereof, yet the lord shall have the wardship of the land by force of the tenure at the first creation thereof. And so it is if the father marieth his heire within

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(1) See further as to reliefs, post. 85. a. at the end of the note there, 90. b. 91. a. and b, 92. a. 93. a. 106. a. Wright's Ten. 97, and Vin. Abr. *Tenures*, E. a. to O. a.

(2) *So in the case of the king, the father shall have the custody of the body and the marriage.* 7 Jac. Cur. Ward. *Ley n.* 2. *Unton's case.* Hal. MSS.—See Ley 1.—[Note 54.]

within age and dieth, yet the lord shall have the wardship of the land.

" *Living his father.*" This doth not extend to any collaterall heire, but only to the sonne or daughter being heire apparent; for albeit a man shall have an action of trespasse, *quare consanguineum et hæredem cæpit*, and albeit the words be *cujus maritagium ad ipsum pertinet*, because the well bestowing of his heire apparent in marriage is a great establishment of his house, yet that is to be understood as against a wrong doer, but not against a gardian in chivalrie, and the mother shall have the like writ for taking away of her sonne and heire apparent. And yet the mother shall not barre the lord by knight's service of his wardship of the bodie, as *Littleton* here saith:* *qui tamen, ex filiâ tuâ nascitur in potestate tuâ non est, sed patris ejus.*

[84. b.]

9 E. 2. 18 E. 3. 25. 29 Ass. 36. 29 E. 3. 37. 31 E. 3. Bar. 237. 32 E. 3. Gard. 32. 30 E. 3. 17. 31 H. 6. 55. 12 H. 4. 16. F. N. B. 143. 31 E. 3. Br. 357. (2 Ro. Abr. 39.)

9 E. 4. 53. * Vide Flet. lib. 1, cap. 6. See W. 2. c. 35.

" *To any lord.*" Put the case there is lord, and *feme* tenant by knight's service of a carve of land, the *feme* maketh a feoffment in fee upon condition, and taketh the lord to husband, and hath issue a sonne, the wife dieth, the issue entreth for the condition broken, the lord entreth into the land as gardeine by knight's service, and maketh his executors, and dieth; in this case, the executors shall have the wardship of the land during the minority of the heire, but not the wardship of the body: for albeit the lord seemeth to have a double interest in the wardship of the bodie, one as lord, and another as father, yet as father, and not as lord, in judgement of law, he shall have the wardship of the bodie of his son and heire apparent, in respect of nature, which was before any wardship in respect of seigniories by knight's service began, and that wardship by reason of nature cannot be waived, and claime made in respect of the seigniorie. And the executors of the father shall not have such a wardship which the testator had as father, neither can such a wardship be forfeited by outlawrie, because it is due to the father in respect of privitie of nature.

(3 Co. 39. a. Post. 88. b.) 33 H. 6. 55. 7 Co. 13. in Calvin's case. Vide Flet. lib. 1, c. 12. 4. Cum Patr. de feodo, &c. (Ante 8. a. 2 Ro. Abr. 39.)

" *Of his heire apparent.*" And therefore if the father be attainted of felonie, &c. then cannot the sonne or daughter be an heire apparent, because the bloud is corrupted betweene them, and consequently in the life of the father his sonne in that case shall be in ward.

A woman seised of lands in fee holden by knight's service taketh husband an alien, and hath issue, and the wife dieth, the issue shall be in ward, and the father shall not have the custodie of him, for that in the eye of the law he is not his heire apparent, as *Littleton* here speaketh.

Sect. 115.

NOTE, if a man be seised of land which is holden by knight's service, and maketh a feoffment in fee to his own use, and dieth seised of the use, his heire within age, and no will declared by him, the lord shall have a writ of right of the wardship of the bodie and land, as if the tenant had died seised of the demesne. And if the heire bee of full age at the time of the decease of his ancestor, in this case he shall pay reliefe, as if he had been seised of the demesne. And this is by the statute of 4 H. 7. *cap.* 17.

This Section is in addition to *Littleton* (1), and therefore I passe it over; and the rather, for that the said statute of 4 *H.* 7. is become of nō force, for that by the statute of 27 *H.* 8. cap. 10. all uses are transferred into possession.

[85. a.] ☞ Sect. 116.

NOTE, there is gardian in right in chivalrie, and gardian in deede in chivalrie. Gardian in right in chivalrie is, where the lord by reason of his seigniory is seised of the wardshippe of the lands and of the heyre, ut supra. *Gardian in deede in chivalrie is, where in such case the lord after his seisin grants, by deede or without deede, the wardship of the lands, or of the heire, or of both, to another, by force of which grant the grauntee is in possession. Then is the grantee called gardian* in fait, *or gardian in deed.*

HERE *Littleton* divideth gardein in chivalrie into gardian in right, and gardian *in fait*. And this is evident, and needeth nō explanation.

"*By deed or without deed.*" Here *Littleton* affirmeth, that the wardship of the body may be granted over without deed; and herein note a diversity betweene an originall chattell of a thing that properly lyeth in grant, and a chattell derived out of a freehold of any thing that lyeth in grant. As for example, if a man make a lease for years of a villeine, this cannot be done without deed, neither can the lessee assigne it over without deed, because it is derived out of a freehold that lyeth in grant. But the wardship of the body is an original chattel during the minority derived out of no freehold; and therefore as the law createth it without deed, so it may be assigned over without deed.

(2 Ro. Abr. 62.) 12 E. 3. tit. Grant 69. 7 E. 3. 63. 26 E. 3. 65. 28 E. 3. 96. 14 E. 3. Ass. sur le stat. 17. 25 E. 3. 40. 31 E. 3. Vouch. 5. 46 E. 3. 25. 36 H. 8. Br.

20 E. 4. 16. 12 H. 4. 19. 5 H. 7. 17. 3'. 22 El. Dyer 371. tit. Grant 85.

A corporation aggregate of many cannot make a lease for yeares without deed, in respect of the quality of the incorporation; but their lessee may assigne it over without deed.

36 H. 8. tit. Grant B. 125. 22 H. 6. 34. 19 H. 6. 33.

If (Post. 325. b.)

(1) It was first introduced in Red.

24 E. 3. 69, 70. 5 E. 3. 58. 43 E. 3. 15. 5 H. 7. 36. 14 H. 7. 16. 15 H. 8. 8. Bract. 366. 368. 246.

If an advowson be holden by knight's service, and the tenant dieth his heire being within age, the lord cannot grant the wardship of the advowson without deed; because it is derived out of an inheritance that lyeth in grant, and passeth not by livery; for *jus præsentandi est incorporale*, and so (albeit there be diversity of opinion in our bookes) is the law taken at this day (1).

43 E. 1. 6. 5 H. 7. 37. 11 H. 6. 4. 6 H. 7. 3. 18 H. 8. 16. El. Dyer 323.

☞ CHAP. 5. Of Socage. Sect. 117. [85. b.]

TENURE in socage is, where the tenant holdeth of his lord the tenancie by certeine service for all manner of services, so that the service be not knights service. As where a man holdeth his land of his lord by fealty and certaine rent, for all manner of services; or else where a man holdeth his land by homage, fealty, and certaine rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itselfe maketh not knights service.

"*TENURE*

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(1) By the 12 Cha. 2. c. 24, tenure by *knight's service*, whether of the king or of a common person, together with all its oppressive fruits and consequences, as also those of *socage in capite*, is wholly taken away; and every such tenure is converted into *free* and *common socage*. The same statute enacts, that all tenures which should afterwards be created by the king, should be in *free* and *common socage* only. Nothing can be more full in expression than this act; for besides *generally* abolishing tenure by knight's service, and the consequences peculiar to that tenure and *socage in capite*, it descends into *particulars* with a redundancy of words, which can only be accounted for by the extreme anxiety to extirpate completely the evils the legislature had under contemplation, for which purpose it might be deemed most safe to attack them in every shape. We have already observed in some former notes, that homage escuage and the aids *pur file marier*, and *pur faire fitz chivalier* are expressly mentioned. It remains to add, that the statute, after taking away the court of wards and liveries, enumerates wardships, liveries, primer seisins or ousterlemains, values and forfeitures of marriages, and fines seisures and pardons for alienation, and sweeps away the whole. But the act preserves rents certain, heriots, suits of court, and other services incident to common socage, and fealty; and also fines for alienation due by the customs of particular manors, unless such fines are for lands *in capite*. Reliefs for lands, of which the tenure is converted into common socage, are also saved in some instances; for the clause which preserves *rents certain*, provides that such relief shall be paid *in respect of such rents*, as is paid on the death of a tenant in common socage. From this clause it seems, that there can be no relief out of lands which the statute changed into *socage*, unless where a quit rent is also payable; and the reason of thus expressing the act will appear by considering, that a year's rent is the relief for lands holden by common socage, and consequently is never due out of lands which are not subject to a rent, unless by special custom, or express reservation. See post. Sect. 126.—[Note 55.]

"*TENURE in socage* (1)."

Agriculture or tillage is of great account in law, as being very profitable for the common wealth, wherein the goodnesse of the habit is best knowne by the privation; for by laying of lands used in tilth to pasture, six maine inconveniences do daily encrease. First, idlenesse, which is the ground and beginning of all mischiefs. 2. Depopulation, and decay of townes; for where in some townes 200 persons were occupied, and lived by their lawful labors, by converting of tillage into pasture, there have beene maintained but two or three heardsmen; and where men have beene accounted sheepe of God's pasture, now become sheep men of these pastures. 3. Husbandry, which is one of the greatest commodities of the realme, is decayed. 4. Churches are destroyed, and the service of God neglected by diminution of church livings (as by decay of tythes, &c.) 5. Injury and wrong is done to patrons and God's ministers. And 6. The defence of the land against forraine enemies is enfeebled and impaired, the bodies of husbandmen being more strong and able, and patient of cold, heat, and hunger, than of any other.

Mirror, ca. 1, s. 3. 4 H. 7. ca. 19. 4 Co. Tirringham's case, fo. 39, and 4 H. 7. ca. 12.

The two consequents that follow of these inconveniences, are, first, the displeasure of Almighty God; and secondly, the subversion of the polity and good government of the realm; and all this appeareth in our bookes. And the common law [a] giveth arable land (which anciently is called *hyde and gaine)* the preheminency and precedency before meadowes, pastures, woods, mynes, and all other grounds whatsoever; and [*] *averia carucæ*, the beasts of the plough, have in some cases more priviledge than other cattell have. And amongst the *Romans* agriculture or tillage was of high estimation, insomuch as the senators themselves would put their hand to the plough; and it is said, that never prospered tillage better, than when the senators themselves plowed (such force hath the example of superiors) whereof three famous *Romanes* in their several kindes spake.

[a] 20 E. 3. Admesurement 8. 14 Ass. 21. 24 E. 3. 25. [*] Mirror. Bracton, fo. 217. Fleta, lib. 2, ca. 41. Regist. Orig. 97. Ockam, 38, 39. 4 E. 3. 1. a. 18 E. 2. tit. Action sur le stat. 45.

Temps E. 1. Avoury 230. 29 E. 3. 16, 17.

Omnium rerum, ex quibus aliquid exquiritur, nihil agriculturâ melius, nihil uberius, nihil dulcius, nihil libero homine dignius. Cic. lib. 1. Offic.

O fortunatos nimium, sua si bona nôrint,
Agricolas! quibus ipsa, procul discordibus armis,
Fundit humo facilem victum justissima tellus. Virgil. lib. 2. Georg.

Nullum laborem recusant manus, quæ ab aratro ad arma transferuntur, &c. fortior autem miles ex confragoso venit; sed ille unctus et nitidus in primo pulvere deficit. But now let us peruse our author's words. Seneca in Epist.

[86. a.] ☞ "*Socagium.*" *Littleton* in this Chapter, Section 119, fetcheth this word from the originall. *Socagium idem est quod servitium socæ, et soca idem est quod caruca, s. a zoke, or a plough* (1).

And

(1) See Wright's Ten. 142, and 2 Blackst. Comment. 5th ed. 79.

(1) Mr. Somner disapproves of this etymology, as not large enough to comprehend *all* the services of the tenure by socage, which may be, and sometimes are, totally unconnected with the plough. According to him, socage is derived from

Bracton, lib. 2. fol. 77.
[b] Glanvil. lib. 7, cap. 9, & 11, & lib. 9, ca. 4. Fleta, lib. 1, ca. 8, & lib. 3, ca. 14, & 16. Britton, fol. 164.
[c] Domesday, Herefordsc. Vid. devant, Sect. 1. Sudru. Wendeford. Wescestersc.
* Mich. 10 E. 3. Coram rege Wilts in Thes.
[d] For etimologies vid. Sect. 96. 154. 164. 204. 234. 267, 268, &c.
[e] Fleta, lib. 3, ca. 14. Bracton, lib. 2, cap. 16. Britton, fol. 164.

And *Bracton* agreeth herewith. *Dicitur socagium* (saith he) *à socco, et inde tenentes dicuntur socmanni,* [b] *eò quòd deputati sunt tantummodo ad culturam.* And *Benerth* signifieth the service of the plough and cart. It is to be observed, that in the book of [c] *Domesday*, land holden by knight's service was called Tainland, and land holden by socage was called Reveland; which appeareth in that it is said there, *hæc terra fuit tempore regis Edwardi Tainland, sed postea conversa est in Reveland.* (2) And in that booke they that held in socage were called by severall names, as *Sochemanni*, or *Sokemanni*, which still continueth; sometimes * *Coleberti, i. e. qui tenent in liberum socagium per redditum*; and sometimes they are called *Radchenestres, i. e. liberi homines, qui tamen arabant, herciabant, falcabant, metebant, &c.* And here it appeareth how necessary it is, that words be fetched from their originals, and our author *est verus etymologus* both in this and in many other places in his [d] three bookes. And it is to be observed once for all, that the legall termination of *(agium)* in composition signifieth, service or duty; as *homagium*, the service of the man; *escuagium, servitium scuti;* [e] *socagium, servitium socæ*; *hidagium*, the duty to be paid for a hide or plough-land; and so of *cornagium, coragium, carnagium, cariagium, burgagium, villenagium*, and *guidagium*, (which one describeth thus) *quod datur alicui, ut tutò conducatur per loca alterius*, and the like.

[f] Mirror, ca. 2, sect. 18. Fleta, ubi supra.

"*So that the service* [f] *be not knights service.*" And in the next Section he saith, and every tenure that is not a tenure in chivalry is a tenure in socage. *Ex donationibus autem, feoda militaria, vel magnam serjeantiam non continentibus, oritur nobis quoddam nomen generale, quod est socagium.* Here *Littleton* speaketh of tenures of common persons; for grand serjeantie is not

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from the Saxon word *soc*, which signifies *liberty* or *privilege*, and with *agium* added to denote the *agenda* or service imported a free or privileged tenure; and this derivation is preferred by a writer of great judgment. Somn. Gavelk. 133. and 2 Blackst. Comment. 5th ed. 80. However sir Martin Wright, though he confesses the ingenuity of mr. Somner's derivation, endeavours to justify Littleton's, and thinks that the objection to it is obviated, when it is considered, that in the case of socage-tenures plough-service was the most ancient and usual reservation; to which observation one may add, that the propriety of a denomination is not always the proper test of etymologies. Wright's Ten. 143. It seems indeed, that both derivations have their share of probability, which is as much as can be expected on a subject so very uncertain.—[Note 56.]

(2) This explanation of *Thane-land* and *Reve-land* is opposed by sir Henry Spelman, who investigates the subject very minutely. See Spelm. Posthum. 38, 39. In a former note we had occasion to hint at sir John Dalrymple's opinion on the same subject, and on the nature of the difference between *bock-land* and *folk-land*. See ante 6. a. note 6. Since the writing of that note, a tract, intitled *A Discourse on the Bock-land and Folk-land of the Saxons*, hath been printed, the professed object of which is to examine and confute the notions advanced by sir John Dalrymple. This tract, being at present only distributed amongst the author's friends, is difficult to be procured, and is mentioned here for the sake of such readers as may be curious to explore this dark and controverted subject. See further Pearn. Legigraphic Chart of Landed Propert. ante 6. b. 7. a. 56. a. and 2 Whitak. Hist. Manchest. 154.—[Note 57.]

not knight's service, and yet it is not a tenure in socage, as shall be said hereafter. Also here he meaneth temporall services, and not frankalmoigne, as by the examples he put is manifest, and as in his proper place shall appeare more at large. Also here *Littleton* speaketh of socage largely taken, and so called *ab effectu*; that is, all tenures that have the like effects and incidents belonging to them as socage hath, are termed tenures in socage, albeit originally service of the plough was not reserved. As if originally a rose, a pair of gilt spurs, a rent, and such like were reserved, or that the tenants *in condemnatos ultrices manus mittant, ut alios suspendio, alios membrorum detruncatione, &c. puniant*, these are said to be tenures in socage *ab effectu*, for that there shall be like gardein in socage, like reliefe, and such other effects and incidents as a tenure in socage hath, and are so termed to distinguish the same from knight's service. Nay, the worst tenure that I have read of, of this kind, is to hold lands to be *ultor sceleratorum condemnatorum, ut alios suspendio, alios membrorum detruncatione, vel aliis modis juxta quantitatem perpetrati sceleris puniat*, (that is) to be a hangman or executioner. It seemeth in ancient times such officers were not voluntaries, nor for lucre to be hired, unlesse they were bound thereunto by tenure. And so note, that some tenures in socage are named *à causâ*, and some, and the greater part, *ab effectu*.

Ockam, cap. quas per solam consuetudinem, &c.

Ockam, fo. 31. a. & b.

' "*For homage by itselfe maketh not knights service.*" But it is a presumption where homage is due, that the land is holden by knights service, as hath beene said.

Sect. 118.

(4 Co. 8.) *ALSO, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalrie, is a tenure in socage.*

Of this sufficient hath beene said before.

Sect. 119.

AND it is said, that the reason, why such tenure is called and hath the name of tenure in socage, is this: because socagium idem est quod servitium socæ, *and* soca idem est quod caruca, &c. i. e. *a soke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by socage, ought to come with their ploughes, every of the said tenants for certaine daies in the yeare to plough and sow the demesnes of the lord. And for that such workes were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services, &c. And because that such services were done with their ploughs, this tenure was called tenure in socage. And afterward these services were changed into money, by the consent of the tenants and by the desire of the lords, viz. into an annual rent, &c. But yet the name of socage remaineth, and in divers places the tenants yet doe such*

such services with their ploughes to their lords; so that all manner of tenures, which are not tenures by knight's service, are called tenures in socage.

(6 Co. 59.) Cap. Burgage, Sect. 170. Mirror, cap. 2, sect. 18. Vid. 19 E. 2. Avowrie 224. 3 E. 2. Action sur le stat. 24. 10 E. 3. 24. 20 E. 3. Avowrie 124.

"*TIME of memory.*" Time of memory* is when no man alive hath had any ☞ proofe to the contrary, nor hath any conusance to the contrary, as shall be hereafter said in his proper place. And of necessity this change hereafter spoken of, must be before time of memorie; for within time of memory, the services of the plough cannot be changed into money by consent of the tenant and the desire of the lords, *scilicet*, into an annuall rent, neither by release or confirmation or other conveyance, so long as the seigniory remaineth, as shall be said in his due place. [86. b.]

39 E. 3. 17. 39 Ass. p. 3. 20 Ass. 1. Cap. Confirmation, Sect. 539.

"*Ought to come with their ploughes.*" The plough is named *propter excellentiam*; but the sicle, and the syth, for the reaping in harvest, and such like, are also included. For as *carucata terræ*, a ploughland, may containe houses, milles, pasture, medow, wood, &c. as pertaining to the plough; so under the service of the plough, all services of tillage or husbandry are included.

4 E. 3. 161. 6 E. 3. 283.

"*Yet the name of socage remaineth.*" Altho' the cause whereupon the name of socage first grew be taken away, yet the name remaines the same it hath been, and is used to distinguish this tenure from a tenure by knight's service. *Nomina si nescis, perit ☞ cognitio rerum. Et nomina si perdas, certè distinctio rerum perditur.* Therefore the names of things (as *Littleton* here teacheth) are for avoyding of confusion diligently to be observed. [87. a.]

* *It is to be observed that the words* "time of memory," *must be referred to the words in the text,* "the limitation of time of memory," *and therefore, standing as they appear to do singly, must be understood as if lord Coke had used the words* "time out of memory."

Sect. 120.

ALSO, if a man holdeth of his lord by escuage certaine, scil. *in this manner, when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but halfe a marke for escuage, and no more nor lesse, to how great a sum, or to how little the escuage runneth, &c. such tenure is tenure in socage, and not knight's service. But where the summe which the tenant shall pay for escuage is uncertaine,* scil. *where it may be that the summe that the tenant shall pay for escuage to his lord, may be at one time more and at another time less, according as it is assessed, &c. such tenure is tenure by knight's service.*

(6 Co. 6. b.)

"*ESCUAGE certaine,*" is not *in rei veritate servitium scuti,* which is to be done by the body of a man, but it is *servitium crumenæ*, of money, which is to be drawne out of the purse, and that is in effect a tenure in socage; wherein it is to be observed, that the service of payment of money is the more base, and lesse profitable for the commonwealth in this case; and hereof somewhat hath been said before in the Chapter of Escuage, Sect. 98, 99.

If

If a man hold by homage, fealty and escuage, *scil.* by an halfe penny, when escuage runs at fortie shillings, this is a tenure in socage, and no knight's service, for two causes.

15 E. 2. tit. Avowrie 215. 31 E. 1. Ass. 441. 26 Ass. 66. 5 E. 3. 6.

First, it is socage tenure, because of the certainty; for to the tenure in socage *certa servitia* doe ever belong, so as the husbandman may the rather live in quiet.

5 E. 4. 128. Vid. Rot. Parl. 4 E. 3. nu. 19. Clavering's case, Agnes Frowick's

excellently resolved in parliament. Hill. 3 E. 2. coram Rege Rot. 34. case.

Secondly, Escuage is to be paid at every time when it is assessed; and here it is not to be paid, but when it amounteth to forty shillings.

Sect. 121.

ALSO, if a man holdeth his land to pay a certaine rent to his lord for castle-gard, this tenure is tenure in socage (1). *But where the tenant ought by himself or by another to doe castle-gard, such tenure is tenure by knights service.*

HEREIN

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(1) According to Fitzherbert, such a tenure was *knight's service.* This he infers from the form of a writ of livery sued out by an heir on attaining his full age, where he held of the king *as of an honor* in the king's hands by the service of rendering the rent of ten shillings a year towards guarding the castle of Dover; and Fitzherbert endeavours to account for the tenure being knight's service, by suggesting, that the service might *anciently* have been guarding the castle, and that in modern times the king might take a rent in lieu of the castle-guard; which taking of a rent, says Fitzherbert, would not alter the nature of the tenure. Fitzherb. Nat. Br. 256. However, this opinion of the reverend judge is not delivered absolutely, but is accompanied with a *quære;* and indeed it seems very liable to exception. For—1. The form of the writ relied upon appears quite consistent with *socage in capite;* suing of livery by the heire at full age having been incident to that tenure as well as to *knight's service in capite,* unless the heir was under fourteen at the death of the ancestor. See ante 77. a.—2. The propriety of the writ, in the case to which it is applied, may be suspected; for suing of livery by the heir, except in some few special cases distinguished by a kind of prescription of which lord Coke speaks doubtfully, was confined to tenure *in capite,* or, to use the phrase preferred by mr. Madox, *ut de coronâ,* whereas the writ in Fitzherbert represents the tenure to have been *ut de honore.* See ante 73. a.—3. Fitzherbert's reason for considering the tenure as knight's service seems unwarranted by the terms of the writ. He supposes the service reserved to be castle-guard, and the rent to be merely taken by the king as a commutation in money; but the writ expressly states the rent to be the service. 4. If Fitzherbert, by saying that the king took the rent for the castle gard, means that the latter was so changed into the former, that the castle guard could no longer be demanded, then his idea of the tenure's continuing to be castle-guard and in chivalry, is contradicted by sir William Capell's case cited in lord Coke's report of Luttrel's case; for in that the court held, that by such a perpetual change of the service the tenure was converted into socage. See 4 Co. 88. a.—5. The authority of Littleton is clearly against Fitzherbert's

Vid. Sect. 98, 99.

HEREIN the difference standeth thus. If a rent be paid for castle-garde, it is cleere a socage tenure, as it is agreed in *Lutterel's* case according to *Littleton's* opinion. But if a summe in grosse, or other thing, be voluntarily paid or given by the tenant, and voluntarily received by the lord in lieu of castle-gard, yet the tenure by knight's service remaineth. Vide Sect. 98, & 99. [87. b.]

Vide 4 Co. 88, in Lutterel's case. 19 R. 2. Gard. 195. 26 Ass. 66. F. N. B. 83. 256. 6 Co. 20. Gregorie's case.

Sect. 122.

ALSO, in all cases where the tenant holdeth of his lord to pay unto him any certaine rent, this rent is called rent service.

IT is called rent service, because it is accompanied with some corporal service, as fealty at the least; in respect whereof the lord may distraine for it of common right. See more of this matter in the Chapter of Rents.

Sect. 123.

ALSO, in such tenures in socage, if the tenant have issue and die, his issue being within the age of 14 *yeares, then the next friend* (le prochein amy) *of that heire* (1), *to whom the inheritance cannot descend* (a que le heritage ne poet descender), *shall have the wardship of the land and of the heire untill the age of* 14 *yeares, and such gardeine is called gardeine in socage. For if the land discend to the heire of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land discend to the heir of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. And when the heyre cometh to the age of* 14 *years complete, he may enter and oust the gardian in socage, and occupy the land himselfe, if he will. And such gardian in socage*

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notion; and according to the opinion of the former, a case, in which the service reserved was a yearly rent in money for guard of the castle of Dover, was adjudged early in the reign of Charles the first. See Litt. Rep. 47. However it should not be concealed, that in this last case the court seemed inclined to think, that under *special* circumstances there might be a change of the castle-guard into rent by consent of the king and his tenant without altering the tenure, where evidence could be given of the manner in which the change was effected.—[Note 58.]

(1) Here the word *heir* is significant; for it seems to import, that guardianship in socage can be of *heirs* only. However, though it was always clear, that guardian in *chivalry* could only be on a *descent*, yet some have doubted whether wardship in *socage* might not be where the infant was in by *purchase*. This point was agitated so late as the 28th and 29th of Charles the second, when the court held, that guardianship in socage was equally confined to a descent with guardianship in chivalry. 2 Mod. 176. Vin. Abr. *Guardian*, I. [Note 59.]

socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heire; and of this he shall render an account to the heire, when it pleaseth the heire after he accomplisheth the age of 14 yeares. But such gardian upon his account shall have allowance of all his reasonable costs and expences in all things, &c. And if such gardian marry the heire within age of 14 yeares, he shall account to the heire, or his executors, of the value of the marriage, although that he tooke nothing for the value of the marriage; for it shall be accounted his own folly, that he would marry him without taking the value of the marriage, unless that he marrieth him to such a marriage, that is as much worth in value as the marriage of the heire.

"*IN such tenures in socage.*" If a man be seised of a rent charge, rent secke, common of pasture, and such like inheritances, which do not lie in tenure, and dyeth, his heire within age of 14 yeares; in this case the heire may choose his gardein: but if he be of such tender yeares as he can make no choice, then (if the father hath made no disposition of the custody of the childe) it were most fit, that the next of kin, to whom the inheritance cannot descend, should have the custody of him (2). And whosoever taketh the rent, &c. the heire shall charge him in an account. But if he hold any land in socage, in that case the ☞ gardian in socage shall take into his custody as well the rent charges, &c. as the land holden in socage, because he hath the custody of the heire. (2 Ro. Abr. 40.) Vide le statute de 4 & 5 Ph. & Marie, cap. 8. [88. a.]

"*If the tenant have issue and die.*" The same law it is if the tenant hath no issue, but a brother or cosin within age of 14 yeares at the time of his death. [a] Also this doth extend as well to issue female, as to issue male. [a] 10 R. 2. Account 132.

"*Within the age of 14 yeares.*" Of this sufficient hath been spoken in the next preceding Chapter.

"*Then the next friend* (le prochein amy) *of that heire, to whom the inheritance cannot descend.*" The next friend of the heire, &c. Here *friend* (amy) is taken for the next of blood. So the effect of it is, that the next of his blood to whom the inheritance cannot discend, whereby affinity without blood is excluded. Glanvil. lib. 7. cap. 11. Britton, 163. Fleta, lib. 1. cap. 9. Stat. de Hibernia, tit. Partition. (Plowd. 446.)

"*The next.*"

[b] If there be three brethren, and the youngest holdeth land in socage, and hath issue and dyeth his issue within age of 14 yeares, both the uncles are in equall degree, and yet the eldest shall be gardian; because in equall degree the law preferreth him. [b] Vid. 30 Ass. 47.

[c] And yet if lands holden in socage be given to a man and to the heirs of his body, and he dyeth his heire within age, the next cosin of the part of the father, albeit he be worthier, shall not be preferred before the next cosin of the part of the mother, but such of them as first seiseth the heire shall have his custody (1). But [c] Pl. Com. Carrel's case.

if

(2) See post. 88. b.

(1) This is according to the rule, *in æquali jure melior est conditio possidentis.* Plowd. 296, in Carrel's case. See too Hawk. Abr. of Co. Litt.

47 H. 3. Gard. 146. (2 Ro. Abr. 40. Ante 22. a.)

if lands be given in frankmariage, and the donees have issue and dye their issue within age of 14 yeares, the next of kin of the part of the mother shall have the custody of the body, and not the next of kin of the part of the father, albeit he first seised it, because the mother was the cause of the gift. If a man be seised of lands holden in socage of the part of his father, and of other lands holden in socage of the part of his mother, and dyeth his issue being within the age of 14 yeares, in this case such of the next ☞ of kinne of either side, as first happeth the body of the heire, shall have him (1); but the next of blood of the part of the father shall enter into the lands [88. b.] of the part of the mother, and the next of kinne of the part of the mother shall enter into the lands of the part of the father (2).

[d] F. N. B. 139. b. Regist. [e] 7 E. 3. 46. 16 E. 3. acc. 52. 21 E. 3. 8. 31 E. 3. Enfant 9. 17 E. 2. Account 121. 26 E. 3. 63. 10 H. 6. 14. F. N. B. 118. [f] Bract. li. 2, fo. 88. [h] Flet. l. 1, ca. 10.

[d] If *A.* be gardian in socage of the body and lands of *B.* within the age of fourteene yeares, *A.* shall be gardian in socage *per cause de gard* (3). But an infant within age, that [e] is not in the custody of another, cannot be gardian in socage; because no writ of account lyeth against an infant. And herewith agreeth *Bract.* [f] and yieldeth this reason, *alium regere non potest, qui seipsum regere non novit.* And *Fleta* saith, [h] that *minor minorem custodire non debet; alios enim præsumitur malè regere, qui seipsum regere nescit.* And by like reason an ideot, a man *non compos mentis*, a lunaticke, a man *cæcus et mutus*, or *surdus et mutus*, or a leper removed by a writ *de leproso amovendo*, cannot be gardian in socage. But in the case of gard *per cause de gard*, there lyeth an action of account against *A.* in the case abovesaid.

[i] Lib. Rub. cap. 70. [k] Glanv. lib. 7, ca. 11. [l] Pl. Com. Carrel's case. (2 Ro. Abr. 40. Cro. Eliz. 825. Mo. 635.)

"*To whom the inheritance cannot descend* (a que le heritage ne poet descender)." [i] *Nullus hæredipetæ suo propinquo vel extraneo periculosa sanè* (4) *custodia committatur.* Note [k] this word (poet) *may* or *can.* [l] And therefore this doth not onely exclude an immediate discent, but all possibility of discent. As if a man hath issue two sons by several venters, and having lands holden in socage of the nature of burgh *English* dieth the

* *The passage here cited from Fleta is in the eleventh chapter of the second edition.*

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(1) See ante 88. a. note 1.

(2) Mr. serjeant Hawkins supposes an elder brother to purchase land, and the land to descend to his younger brother being under 14; in which case the infant's paternal and maternal relations are equally of the blood of the first purchaser, and therefore equally capable of inheriting to them: and then mr. serjeant asks, who shall be guardian in socage. Hawk. Abr. of Co. Litt. Perhaps there may be some difficulty in solving this question. If Littleton's rule be understood *strictly*, there cannot be any guardian in socage in such a case, unless the next friend is a father or mother or other lineal ancestor, or of the half blood; for all of the other relations may by possibility succeed as immediate heirs to the son. But if the next of blood on either side may be guardian, the mother's blood must be preferred, because they are the *most remote* from the succession.—[Note 60.]

(3) Guardian *per cause de ward* is, where one infant in wardship is guardian of another infant, in which case the wardship of the first infant intitles his guardian to the wardship of the second. But it seems, that only guardian in chivalry and in socage could be guardian *per cause de ward.* See 2 Ro. Abr. 35. 40, and Vaugh. 184—[Note 61.]

(4) *Sine* instead of *sane* seems necessary to the sense of this passage.

the younger brother within age of 14 yeares, [m] the elder brother of the halfe blood shall not have the custody of the land (5); because by possibility the elder may inherit the land; for if the youngest dye without issue, and the land discend to an uncle, the elder brother of the halfe blood may be heire unto him: and herewith doth agree our ancient authors. [n] *Hæres sokmanni sub custodiâ capitalium dominorum non erit, sed sub custodiâ consanguineorum suorum propinquorum, hòc est, eorum qui conjuncti sunt jure sanguinis, et non jure successionis, ex parte quorum non descendit hæreditas; et regulariter verum est, quòd nunquam remanebit aliquis in custodiâ alicujus, de quo haberi possit suspicio, quòd velit jus clamare in ipsâ hæreditate, et unde si plures sint filiæ et hæredes tenere debeant in socagio, nulla debet esse in custodiâ alterius.* [o] And this is contrary to the civil law; for *leges civiles impuberum tutelas proximis de eorum sanguine committunt, sive agnati fuerint, sive cognati, unicuique, videlicet, secundùm gradum et ordinem, qui in hæreditate pupilli successurus est.* But this the law of *England* saith, *est quasi agnum lupo committere ad devorandum* (6).

[m] Lit. lib. 1, fo. 2, 3.

[n] Bract. lib. 2, fol. 87. Brit. fol. 163. b. Flet. lib. 1, c. 9. 28 E. 1. Stat. 1. Fortesc. c. 40.

[o] Fortesc. ubi supra. Statut. de Homagio capiendo, temps E. 1.

" *Then*

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(5) This point appears to have been adjudged *contra* in lord Coke's time, though it is not taken notice of by him. See Swan's case, 2 Ro. Abr. 40. Ow. 128. Mo. 635. Cro. Eliz. 825, and 2 And. 171. However, as lord Coke here decides against the half blood, the question was revived after the Restoration; but the case did not produce any opinion of the court. T. Jo. 17. The rule as expressed by lord Coke certainly excludes the half blood; because he extends it to *all* possibility of descent. But if the judgment in Swan's case was right, the rule should be confined to all possibility of *immediate* descent.—[Note 62.]

(6) Lord chancellor Macclesfield very much disapproved of the rule of our law, which gives the guardianship in socage to the next of kin to whom the land *cannot* descend. He would not allow the exclusion of the heir to the land to be founded on reason, but deemed it the offspring of barbarous times and the effect of a cruel presumption. Therefore, when he was applied to on a like principle, for an order to remove a lunatick from the custody of mr. justice Dormer, who was the lunatick's uncle, and next in remainder to him, but had with the consent of the *nominal* committee of the lunatick's person taken care of him for many years, and treated him with the greatest tenderness, under these circumstances his lordship refused to make such an order. 1 P. Wms. 260. See also 9 Mod. 142, and Cary's Rep. 137, 138. But notwithstanding this censure by one most deservedly of high authority, the rule of our law in respect to guardianship in socage, considered as one settling the right by *nearness of blood* without regard to *personal qualifications*, which was the point of view in which lord Coke and those he follows extolled it, is surely very defensible; for it gives the custody of the infant's person to those, who in point of *nearness of blood* have equal pretensions to the trust, without the same temptation in point of *interest* to abuse it. However, in justification of the Roman law it should be remembered, that their order of succession made it impossible to adopt a distinction like that of our law in the case of guardianship in socage; for by the Roman law, the relations both of the *father*'s and *mother*'s blood, being in equal degree, were equally capable of inheriting; and the emperor Justinian having wholly destroyed the distinction between the *agnati* and *cognati*, there could not be *proximity of blood* without *proximity to the succession*. Novell. 18. c. 4, 5. Such being the difference of the two laws in point of succession, it is rather unfair to make a comparison between them in point of gardianship. Besides, *nearness of blood alone* is at best a very exceptionable rule for settling the right of guardianship. It must frequently

"*Then the mother.*" Note, albeit land cannot discend to the mother from her sonne, (as hath beene said) because inheritance cannot ascend, yet here it appeareth by *Littleton*, that she is next of blood (7), for that none (as hath beene said) can be gardian in socage but the next of blood; and the like is to be said of the father, as hereafter next appeareth.

"*Then the father.*" By this it appeareth, that the father in case of a tenure in socage shall be gardian in socage, and shall not have the custody of his eldest sonne, in respect of his paternall naturall custody, (as he shall have in case of a tenure by knights service, as before appeareth) (8) but as gardian in socage. And the reason of the diversity is, for that in the case of a tenure in socage, the father must by law be accountable to the sonne both for his marriage, and also for the profits of his lands, which he should not be if he had the custody of his eldest sonne in this case as his father in respect of nature (9), and the act of law never doth any man wrong.

But no lord or other person, in respect of any tenure by knights service or otherwise, shall have the custody of any childe that is heire apparent to his father, but the father only during his life, as hath beene said before (10).

It is to be observed, that in the lawes of *England*, there are three manner of gardianships, viz. by the common law, by statute law,

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quently give a title to those, who are in every respect the least qualified for a trust so delicate and important. Nearness of blood ought to be greatly regarded; particularly in the case of parents, whose title by nature is so strong, that to wrest from them the custody and education of their children, except when there is any gross misconduct or the most apparent incapacity, would be very inhuman indeed. But personal qualities, situation of life, interest in the succession, and other circumstances, whether operating for or against, should also be attended to; and hence arises the necessity of a *discretionary* power in the choice of guardians. On this principle in many countries in Europe the father is now intrusted with the power of assigning guardians for his children by testament, and for want of a testamentary guardian, some great magistrate or judicial officer is authorized to nominate; and in other countries guardians are wholly dative by a magistrate. Groenweg. de Leg. Abrogat. lib. 1. tit. 15. Voet Comment. ad Pandect. l. 26. 1, 2, 3. 1 Strah. Dom. 264. Stair's Inst. of Law of Scotl 3d ed. 46. In *effect*, our law, as changed by statutes and regulated by the modern practice of the court of chancery, conforms very much to these modes of prescribing who shall have the guardianship. But this subject will be more fully opened in the succeeding notes.—[N. 63.]

(7) As to the construction of the words *next of blood* in other cases, see ante 10. b. and note 2. there.

(8) Ante 84. b.

(9) Lord Coke should not be understood to assert that a guardian by nature is not accountable for the profits of the infant's estate; *that* being a doctrine, which seems inconsistent with the nature of every other kind of guardianship except guardianship in chivalry. It is therefore presumed, that lord Coke's meaning was, that the father shall be deemed guardian in *socage*; because in that character the law makes him accountable to the son for the *value of his marriage* as well as for *the profits of his lands*; whereas in the character of gardian by *nature*, he is only accountable for the *latter**.—[Note 64.]

(10) Ante 84. a.

* *This appears to be the note referred to by Mr. Hargrave in the concluding part of his note* 12. *to* 88. *b. where he speaks of* a preceding note, which in the last sentence is unguardedly expressed, as if receiving the profits of lands might be part of the office of guardian by nature.

law, and by custome. By the common law there are foure manner of gardians, viz. gardian in chivalry (whom *Littleton* hath described before, Sect. 103, &c.) (11) gardian by nature, as the father

(11) Ante 74. b. Though guardianship in *chivalry* is now taken away by act of parliament, it may be useful to recollect some *general* things concerning it; and for the ease of the student in that respect, the following particulars, selected principally from the Chapter of Knights Service, are brought into one point of view.—Guardianship in chivalry could only be where the estate vested in the infant by *descent*.—All *males* under 21 at the ancestor's death were liable to it; but not *females*, unless they were then under 14.—It extended, not only to the *person* of the infant, but also to all such of the infant's *lands* or *tenements* as were within the guardian's seigniory; and if the king was guardian in respect of a tenure *in capite*, then to the *whole* of the infant's estate, of whomsoever holden, whatever the tenure, and whether lying in tenure or not.—If the infant heir held lands by knights service of several lords, each lord had the wardship of the land within his seigniory; and as to the body, the wardship of it belonged to that lord, of whom the tenure was most ancient, he being styled the lord by *priority*, and the others lords by *posteriority*. But this must be understood with an exception of the king; for if any lands of the infant were holden of the king by knights service *in capite*, he was intitled to the wardship both of the infant's body and all his lands held of the crown *in capite*, or of others by knights service.—It continued over males till *twenty-one*, over females till *sixteen* or *marriage*.—When it determined, if the tenure was of a *subject*, the heir might enter on the lord *immediately*; but if the king had the wardship, then the heir was not intitled to take possession of the land without suing to the crown for livery, which was a process both nice and expensive. See ante 77. a.—It had a preference with respect to the custody of the infant's body over every other species of wardship, except only that of the *father* where the infant was his *heir apparent*; even the *mother* being excluded.—It intitled the lord to make a sale of the marriage of the infant, subject only to the restriction of not *disparaging*; and if the infant refused the marriage tendered by the lord, or married *after* such a tender and against the lord's consent; in the former case, the infant was liable to the payment of a sum equal to the value of the marriage, that is, to the profit which the lord might have made by the sale of it; in the latter case, the heir *female* paid the same sum as for a refusal, but the heir *male* was charged the *double* value, which was called a forfeiture of marriage.—The guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the *bare* maintenance of the infant. At least it doth not appear in any work we have seen, what means were provided for enforcing the guardian out of the profits of the estate in wardship to support and educate the infant in a style and manner suitable to his rank and fortune.—Lastly, guardianship in chivalry, being deemed more an *interest* for the *profit* of the *guardian* than a *trust* for the *benefit* of the *ward*, was saleable and transferrable, like the ordinary subjects of property, to the best bidder, and if not disposed of was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might be devolved upon the most perfect *stranger* to the infant, one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence. This explication of the nature of wardship in chivalry, general as it is, may well excite a strong idea of the horrid evils necessarily incident to it. On the first reflection it is natural to wonder, how it happened, that a species of guardian-

father of the eldest son, of whom *Littleton* hath spoken Sect. 114, (12) gardian

ship so constituted on principles repugnant to the voice of nature, so founded in inhumanity, so retarding to the progress of science and literature amongst persons of high birth and with great hereditary estates, and so seemingly replete with mischiefs, both public and private, should, in a country distinguished for continual struggles to preserve the valuable and to annihilate the oppressive parts of its constitution, be patiently endured for several centuries after the Conquest, and even remain unreformed by any effectual checks to soften its rigour, till it was wholly taken away at the Restoration. Perhaps however on further consideration of the subject, the wonder may in some measure cease; for the facility of evading guardianship in chivalry, which could only be on a *descent*, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the *descent* were practised. One was enfeoffing the heir in the ancestor's life-time; and another was enfeoffing strangers on condition to pay a sum, far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See stat. Marlebridge 52 Hen. 3. c. 6, and 2 Inst. 109. When these modes were declared to be fraudulent, and therefore checked by the statute of Marlebridge, a third, still more fit to attain the same end, succeeded; for *uses* and *trusts* being invented, and guardianship in chivalry being only of *legal* estates, it became the fashion to make feoffments to uses, as well for preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent instead of becoming *legal tenant*, he of course escaped being in wardship. This evasion continued in practice till 4 Hen. 7, when the legislature thought proper once more to interfere in favour of the lord, and made the heir of *cestuy que use* equally liable to wardship in chivalry with the heir of one dying seised of the *legal* estate. See 4 Hen. 7. c. 17. Ante 84. b. and 2 Inst. 110. Indeed for some time after 4 Hen. 7, there seem to have been no other means of preventing wardship in chivalry, than the ancestor's making a lease for life with remainder to his *heir apparent* in fee. But this protection of wardship in chivalry was soon followed by a great diminution of its profits; for, in the succeeding reign, the statute of wills gave the power of devising so as to deprive the lord of the wardship in *two-thirds* of the land holden by knights service; in which contracted state this odious species of guardianship was suffered to languish, till it was intirely abolished by the famous statute of Charles the second, together with the other oppressive appendages of military tenures. 2 Inst. 110, 111. The curious reader may see further on this subject in Smith's Commonwealth, Engl. ed b. 3. cap. 5. Staunf. Prærog. 4 Inst. 188. Ley on Wards and Liv. et ante passim in the Chapter of Knights Service and the books there cited, the titles *Garde* and *Guardian* in the Abridgments, Crompt. Jurisd. of Co. 112. a. to 125, and Mad. Excheq. fol. ed. 221.—[Note 65.]

(12) Many of our books, especially some of modern date, are very indiscriminate, when they mention guardianship by *nature*. Sometimes the father is styled guardian by nature of his *heir apparent for the time* in general terms, such as at first appear to intimate, that by our law no other ancestor, except the father, not even the mother, is intitled to the guardianship in that right; and accordingly lord chief baron Comyns makes this inference from the language of the books, though as we conceive too hastily. See Com. Dig. *Guardian*, C. 3 Co. 38. a. 6 Co. 22. b. there cited. At other times we are told, that, the father being dead, the mother may have a writ of trespass *quare consanguineum et hæredem cepit*; which imports, that she may also be guardian by nature of her heir apparent. But then the silence in one book as to other ancestors,

gardian in socage, treated of by *Littleton* in this Section, and

ancestors, and the express exclusion of the grandfather in another book without the necessary explanation, tend to an opinion, that all ancestors, except the father and mother, are really excluded. Ante 84. b. 6 Co. 22. b. However in another place we find, that no such opinion was intended to be conveyed; and we are informed, that the grandfather and other ancestors may be guardians by nature of their heirs apparent, as well as the father and mother; tho' being liable to be postponed to others, where the *father* is not, both they and the mother have a title distinguishable from *his* in point of inferiority.—3 Co. 38. a. Further, some modern books do not confine guardianship by nature to *heirs apparent*, but denominate the father and mother the natural guardians of *all* their children; and sometimes even the parents of illegitimate issue seem to have been treated as their natural guardians. 1 Ves. 158. 2 Atk. 15. 70. 9 Mod. 117. Sometimes also the guardianship of *female* children under sixteen, as given to the father and mother by the statute of Philip and Mary, is said to be *jure naturæ*. 4 & 5 Phil. and Mar. c. 8, and 3 Co. 38. b. This various and indefinite manner of expression concerning guardianship by nature must create the most distressing confusion in the minds of students; and for their benefit therefore, we shall attempt to rescue the subject from a part of the obscurity in which it is involved, by offering some few distinctions calculated to reconcile the seeming contrariety of the books, so far as they are capable of being made consistent with each other. 1. It seems, that not only the father, but also the mother and every other ancestor may be guardians by nature, tho' with considerable differences, such as denote the superiority of the father's claim. The father hath the *first* title to guardianship by nature, the mother the second; and as to other ancestors, if the same infant happens to be heir apparent to two, as to both a paternal and a maternal grandfather, perhaps in this equality of rights priority of possession of the infant's person may decide the preference, according to the general rule *in æquali jure melior est conditio possidentis*. But this difference merely respects the order of succession to guardianship by nature. But whilst the tenure by knights service continued, there was another difference, which more strongly marked the superiority of this guardianship when claimed by the father; for he was intitled to the custody of the infant's person, even against the lord in chivalry; but the mother and other ancestors were not allowed to have the same preference. It is by this last diversity that lord Coke in another place reconciles the books, which appear to exclude the mother and all other ancestors except the father from guardianship by nature; it being observed by him, that they only apply to cases, in which the right to the infant's person was in contest with the lord in chivalry. 3 Co. 38. b. Ratcliffe's case. 2. According to the *strict* language of our law, only an *heir apparent* can be the subject of guardianship by nature; which restriction is so true, that it hath even been doubted, whether such a guardianship can be of a daughter, whose heirship, though denominated *apparent*, yet, being liable to be superseded by the birth of a son, is an *effect* rather of the *presumptive* kind. 3 Co. 38. b. Ante 84. a. Therefore when *guardianship by nature* is extended to children *in general*, or to any besides such as are *heirs apparent*, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independant of the common law. Thus when in chancery the father and mother are styled the *natural* guardians of *all* their children born in marriage, or of *any* of their illegitimate issue, we should suppose those who express themselves so generally, to refer to that sort of guardianship, which the order and course of nature, so far as we are able to collect it by the light of reason, seem to point out, and to mean, that it is a good rule to regulate the guardianship by, where *positive* law is silent, and it is in the discretion

[a] 8 E. 3. 43. 8 E. 4, 5. (5 Co. 37.)

and gardian *per cause de nurture*; (13) all frequent in [a] our books.

cretion of the lord chancellor to settle the guardianship. So too when lord Coke says, that the custody of a *female* child under *sixteen*, to which the father, and after his death the mother, is intitled by the provisions of the statute of the 4 and 5 Philip and Mary, is *jure naturæ*, we should understand him to mean, not that such a custody was a *guardianship by nature* recognized by our common law, but merely that it was a *statutory* guardianship adopted by the legislature in conformity to the dictates of nature, and upon principles of general reasoning. But though what our law calls guardianship by nature is thus confined to the *heir apparent*, yet we must not from thence conclude, that parents have not a right to the custody of their *other* children; for our law gives the custody of them to their parents till the age of *fourteen* by the guardianship of *nurture*; which species of guardianship, though it differs from *that* by *nature* not only in *name* but also in *duration* and some other particulars, as will appear by the next note, is founded on a like conformity to the order of nature. It being thus explained, who are intitled to the guardianship by *nature*, and what infants are its objects, we shall conclude with some few other particulars concerning it.—This guardianship continues till the infant attains the age of *twenty-one*.—The books inform us, that it extends no further than the custody of the infant's *person*; a peculiarity we did not sufficiently advert to, when we were writing a preceding note, which in the last sentence is unguardedly expressed, as if receiving the profits of lands might be part of the office of guardian by nature. See ante note 8*. of 88. b. Carth. 386. Ante 84.—It yields as to the custody of the person to guardianship in socage, where the title to both guardianships concur in the same individuals, as they *necessarily* do in the case of father or mother, if lands held by a socage tenure descend on the heir apparent being an infant, and *may* in the case of other ancestors; the reason of which is explained elsewhere. See fol. 88. b. note 8†. But guardianship in socage ending at *fourteen*, we presume, that after that age the father, or other ancestor, having a like title to both guardianships, becomes guardian by nature till the infant's age of *twenty-one*. See Carth. 384.—Lastly, the father may disappoint the mother and other ancestors of the guardianship by nature, by appointing a testamentary guardian under the statutes of Philip and Mary and of Charles the second, which will be the subject of a subsequent note. See infra, note 14.—[Note 66.]

(13) Here we shall bring into one point of view some few *general* things relative both to guardianship by *socage* and *that* by *nurture*.

Guardianship by *socage*, like the one in *chivalry*, springs wholly out of *tenure*. Therefore the title to it cannot arise, unless the infant is seised of lands, or other hereditaments *lying* in tenure, holden by socage. Ante fol. 87. b.—Like guardianship in *chivalry*, it is deemed to take place on a *descent* only; though some have argued to the contrary. Ante note 1. fol. 87. b.—The title to this guardianship is in such of the infant's next of blood, as cannot have by descent the socage estate, in respect of which the guardianship arises, by descent, without any distinction between the *whole* and *half* blood. If there are two or more in equal degree, he who first gains possession of the heir, shall have the custody of him: except where they happen to be brothers or sisters, or to be the infant's lineal ancestors, the law preferring the *eldest* in the former case, and the father or other *male* ancestor in the latter. But if the infant derives lands by descent both *ex parte paternâ*, and *ex parte maternâ*, in which case it may be possible not to find any next of kin incapable of inheriting to the infant, the next of kin on either side, first seising the infant, is intitled to the custody of his person, and the custody of the lands coming ex

* *Note 9. of 88. b. is probably the note intended to be here referred to.*
† *Note 6. of 88. b. was probably meant.*

books. By statute, viz. the statute in 4 and 5 *Ph. & Mar.* of women children, and that is in two manners, either of the father or

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ex parte paternâ goes to the maternal heir, and so *vice versâ*, as to the lands coming *ex parte maternâ*. Should however the infant derive lands by descent in such a way, as lets in both the paternal and maternal blood successively to the inheritance, but with a preference of the former; as where the infant derives lands by descent from a brother who was the first purchaser, and there is no next of kin but such as may inherit from the infant, it seems unsettled, who should have the guardianship.—If the person intitled to be guardian in socage is himself under custody of a guardian, the latter is intitled to the custody of *both*; to the *former* in his own right, and to the *latter pur cause de ward*, that is, in right of his wardship of the *former*.—Being wholly for the infant's benefit, and not in any respect for the guardian's profit, it is not a subject either of alienation forfeiture or succession, as wardship in chivalry was; and consequently if the guardian in socage becomes incapable or dies, the wardship devolves upon the person next in degree of kindred to the infant, not being inheritable to him. Fitzherbert indeed in his *Natura Brevium* cites two cases of Edward the third, in which guardian in socage granted the wardship to a stranger, and the grant was awarded good. F. N. B. 143. P. The same author too in his Abridgment gives another case of the same reign, according to which a lease of guardianship in socage was pleaded. Fitzh. Abr. *Garde* 161. But possibly these cases import, only that a guardian in socage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward; not that the guardianship itself may be transferred by bargain or sale. However, should these ancient authorities not bear the former construction, they seem sufficiently answered by the *doctrine* and *practice* of later times; for in them, the acknowledged qualities of guardianship in socage being, that it is a *personal* trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, are not consistent with its being assignable; and we have lord chief justice Vaughan's authority for saying, that even in his time *common experience* proved the contrary. See Plowd. 293. Vaugh. 181. See too post. 90. b. note 1.—It extends not only to the *person* and *socage* estates of the infant; but also to his hereditaments *not lying in tenure*; and even to his copyhold estates, unless there is a special custom for the lord's appointing a guardian of them. Ante 87. b. and Egleton's case, 1 Ro. Abr. 40. See also Hutt. 17, and 2 Lutw. 1181. But whether the guardian in socage is intitled to take into his custody the infant's *personal* estate, we have not yet been able to ascertain by any express authority. However, we are inclined to think, that *personalty* is included, except where by the custom of a particular place it happens to be liable to a different custody; our idea being, that the custody of the infant's person draws after it the custody of every species of property, for which the law hath not otherwise provided. This idea receives some countenance from the instances of *copyholds*, and of *hereditaments not lying in tenure*; for including which, it will be difficult to account by any other reason, than the one we give for including *personalty*. It is also strongly confirmed by the manner in which the 12 of Cha. 2. c. 24, régulates the powers of the guardian which it enables a father to appoint. After authorizing such guardian to take the custody of the infant's *personal estate*, as well as of his *lands tenements* and *hereditaments*, it provides that he may bring *such action or actions in relation thereunto, as by law a guardian in common socage might do:* words almost necessarily importing, that the *personal* estate is equally an object of the custody of guardian in socage with the infant's real property. Yet we must apprize the reader, that there is an expression of lord chief justice Vaughan in his Reports, which conveys or seems

or mother (14) without assignation, or of any other to whom the father shall appoint the custody, either by his last will, or by any act in his life-time, whereof you shall reade at large [*b*] in *Ratcliffe*'s case in my Reports (15). [*c*] Lastly, by custome, as of

[*b*] 3 Co. 57. Ratcliffe's case.
[*c*] 32 E. 3. Gard. 31. 8 R. 2. Gard. 166. (Cro. Jam. 99.)

orphans

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seems to convey a different opinion; for speaking of the guardian under the statute of Charles the second, he says, *this new guardian hath the custody, not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the infant, which the guardian in socage had not.* Vaugh. 186.—It is superseded both as to the body and lands, if the father exercises his power of appointing a testamentary or other guardian according to the statute of the 12 Cha. 2. See chap. 24.—Regularly it ends, when the infant, whether male or female, attains fourteen; though some say, that this must be understood only where another guardian, either by election of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time. Andr. 313.

As to guardianship by *nurture*, it only occurs where the infant is without any other guardian; and none can have it, except the father or mother. 8 E. 4. 7. b. Br. *Guard.* 70. 3 Co. 38.—It extends no further than the custody and government of the infant's person, and determines at fourteen in the case both of males and females. Ibid.—Lord chief baron Comyns refers to *Fleta*, as if according to that ancient book *grandfathers* and *great grandfathers* might be guardians by *nurture*. Com. Dig. v. 3. p. 421. But the passage cited doth not point at this *species* of guardian, it describing the *patria potestas* in *general*, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianships, as our own law regulates it.—[Note 67.]

(14) The direct object of the 4 & 5 Ph. and M. was to prevent the taking away or marrying maidens under sixteen against the consent of their parents. But the statute prohibited it in terms which implied, that the custody and education of such females should belong to the father and *mother*, or the person appointed by the former. It is observable on this statute, that though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have real or personal estate, yet the enacting part mentions maidens under sixteen *generally*. For other cases on this statute besides Ratcliffe's, see Poph. 204. Cro. Cha. 465. 1 Sid. 362. 2 Mod. 128. 3 Mod. 84. 168.—[Note 68.]

(15) There is now another statute in respect to the appointment of guardians; for the 12 Cha. 2. c. 24, after taking away guardianship in chivalry, enables the father by deed or will attested by two witnesses, to appoint who shall be guardians of his children after his decease. The substance of this parliamentary regulation is, 1. That the father shall have the power, though under *twenty-one*. 2. That he shall have it as to *all* his children under twenty-one and unmarried at his decease, or born after. 3. That he may appoint any persons, except popish recusants. 4. That the appointment may be either in possession or remainder. 5. That he may appoint the guardianship to last till twenty-one, or for any less time. 6. That the appointment shall be effectual against all claiming as guardians in socage or otherwise. 7. That the guardian so appointed shall have ravishment of ward on trespass, and recover damages for the ward's benefit. 8. That such guardian shall have the custody of the infant's estate both real and personal, and have the same actions in relation to them as a guardian in socage. 9. That the statute shall not prejudice the custom of London or any other city or corporate town.—For cases on the construction of this statute, see tit. *Guardian* in Vin. Abr. and Com. Dig. and the

orphans by the custome of the city of *London*, and of other cities and boroughes (16).

" *But*

the continuation of the latter book. The nature of this new kind of guardianship, which the statute professedly models after that in socage, except as to duration, is particularly discussed in Bedell and Constable, Vaugh. 177, and in lord Shaftesbury's case, 2 P. Wms. 102. Gilb. 172.—[Note 69.]

(16) Another species of customary guardianship is, where by the special custom of a manor the lord names, or is himself the guardian of an infant copyholder. See 2 Com. Dig. 399. The nature of this guardianship depends wholly on the custom of the particular manor; and though it is not expressly saved by the 12 Cha. 2, yet it has been held, that the father's appointment of the custody of his child under that statute will not extend to copyhold estates. Church and Cudmore, 2 Lutw. 1181. 3 Lev. 395, and Comberb. 253. —But besides the several kinds of guardians enumerated by lord Coke, and those we have already mentioned in addition, there are *four* others which still remain to be noticed.

The *first* of these is guardian by election of the infant himself. But the right of making such an election only arises, when, from a defect of the law, the infant finds himself wholly unprovided with a guardian. This may happen to be the case, either *before* fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having executed his power of appointing a guardian for his child, and there is no mother; or *after* fourteen, when the custody of the guardian by socage terminates, and from the want of the father's appointment there is no other ready to succeed to the trust, and to take care of the infant or his property. Lord Coke only takes notice of such an election, where the infant is *under fourteen*, and as to this omits to state how and before whom it should be made, nor have we yet met with any prior or cotemporary writer, who supplies the defect. Ante 87. b. As to a guardian after *fourteen*, it appears from the ending of guardianship in socage at that age, as if the common law deemed a guardian *afterwards* unnecessary. However, since the 12 of Cha. 2, enabling the father to appoint a guardian to his children till twenty-one, it has been usual for want of such a guardian to allow the infant to elect one for himself; and according to one book, this practice seems to have prevailed in some degree before the Restoration. Phil. Tenend. non Tollend. 199. Such election is said to be frequently made before a judge on the circuit. 1 Ves. 375. But we do not conceive this form to be essential. The last lord Baltimore, when he was turned of *eighteen*, having no testamentary guardian, and being under the necessity of having one for some special purposes relative to his proprietory government of Maryland, named a guardian by deed. This mode was adopted by the advice of two eminent barristers; for though one of them at first doubted, whether the administration of the government of the province was not devolved upon the crown during the infancy, yet he afterwards retracted this idea, and concurred in thinking, that the guardian named by the infant might act as lord proprietor. Indeed it seems as if there was no prescribed form of an infant's electing a guardian *after* fourteen, any more than there is before; and therefore election by *parol* might perhaps be sufficient, though it would be wrong to trust to a mode so unsolemn. But we do not wonder at the deficiency; because guardianship by election of the infant is of very late origin, it being, we believe, not only unnoticed by any writer before lord Coke, except Swinburne, but there still being no cases in print to explain the powers incident to it, or whether the infant may change a guardian so constituted by himself. Swin. Testam. ed. 1590. fol. 97. b. Even lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before mentioned this latter one, omits it here; whence

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"*Only to the use and profit of the heire.*" And therefore gardian in socage shall not forfeit his interest by outlawrie or attainder

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it may be probably conjectured, that, in his time, it was in strictness scarcely recognized as legal.

The *second* is guardian by appointment of the lord chancellor. How this jurisdiction was acquired by him is not easy to state. The usual manner of accounting for it appears to us quite unsatisfactory. See Gilb. Eq. Rep. 172. Saying, that his jurisdiction over ideots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former from a *separate commission* under the sign manual, but there is not any such to warrant the latter. The writs of *ravishment of ward* and *de recto de custodiâ* prove as little: for were not these returnable in the courts of common law; or, though they had not been so, how doth a jurisdiction to decide between contending competitors for the right of guardianship prove a power of appointing a guardian, where it happens that one is wanting? The writs *de custode admittendo*, in the Register, only relate to guardians *ad litem*. Reg. Br. Orig. 198. a. The assertion, that the appointment of guardians belonged to the chancellor before the erection of the court of wards, remains to be proved; or at least we, after a diligent search, do not find any authority in print. The passage referred to in *Fleta*, and the doctrine in Beverley's case 4 Co. by no means warrant the use made of them; for in neither is any notice taken of *infants*. Though the case of infants, as well as of ideots and lunatics, should be admitted to belong to the crown, yet something further is necessary to prove, that the chancellor is the person constitutionally delegated to act for the king. It is no wonder, therefore, that lord chancellor Hardwicke took occasion to disapprove of comparing the court's jurisdiction over infants with that over ideots and lunatics. 2 Atk. 315. As to the writs relative to the appointment and removal of guardians in the Register, they merely relate to *suits*: which is of very different consideration from *general* guardians. See Index to Reg. Brev. Orig. tit. *Custodes*. Nor will it answer the purpose, to attempt including guardianship in the idea of *trusts*, which are the peculiar objects of equitable jurisdiction, as it must be seen, that this is an overstrained refinement; for though guardianship in the *common* acceptation of the word *trust* may be properly so denominated, yet it as surely is not so in the *technical* sense in which our lawyers use the word, and Chancery exercises a jurisdiction over trusts; for, in this latter, trusts are invariably applied to *property*, especially *real estates*, and not to the *person*.—However, we must not be understood by these remarks to controvert the *present* legality of the jurisdiction thus exercised in Chancery over infants; our intent being simply to shew, that such jurisdiction is not, *as far as yet appears*, of *ancient date*; and that, though it is now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Our conjecture, as to the late commencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, which have been obligingly communicated to us by a respectable gentleman in the Register's office. According to these, the first instance to be found of a guardian appointed by the chancellor, *on petition without bill*, was in 1696, in the case of Hampden. But since that time, the court of chancery hath exercised the power of appointing guardians, without its being once called into question. Therefore in the case of lady Teynham against mr. Lennard, which was heard on an appeal to the lords in 1724, the counsel for the respondent very properly stated it as a thing fixed, that the lord chancellor was intrusted with that part of the crown's prerogative which concerned the guardianship of infants. 1 Brown Cas. in Parl. 544. Under the same idea too, the last marriage act refers to the chancellor for the appointment of a guardian to consent

attainder of felony or treason; because he hath nothing to his owne use, but to the use of the heire.

Also

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sent to marriage, where the infant is without a guardian and the mother is not living. 26 G. 2. c. 33. s. 11.

The *third* kind of guardian, not hitherto mentioned, is guardian by *appointment of the ecclesiastical court.* The right of appointing guardians for the personal estate, and, if there is no other guardian by tenure or otherwise, for the person also, is, we understand, claimed by the ecclesiastical court. Swinburne takes notice of such a guardian; but confines his observations, on the appointment and his extent of power, to the custom within the province of York. Swinburne on Testam. 1st ed. 99. b. In a case, first before the king's bench in lord Hale's time, he admitted the right of the ecclesiastical court to appoint a curator of the personal estate; and after his death the court inclined to the same opinion. 2 Lev. 162. T. Jo. 90. In another case soon after, the court of king's bench allowed the right as to the infant's *portion*, but denied it over the *person*. 3 Keb. 384. In the next case on the subject, the question as to the right was largely debated on a plea in prohibition. This alleged that by the common law used and approved in England, if any person by his will devises any goods to his children, the ordinary, before whom the will is proved, hath used to commit the custody of the sons and their portions till fourteen, and of the daughters and their portions till twelve, except where they are in the custody of any other by reason of any tenure, or by the father's appointment; and if any person detained such infants or their portions, the ordinary hath also used to compel the delivery of them by ecclesiastical censures. 2 Lev. 217. But on a demurrer this plea was overruled, and the prohibition ordered to stand; the latter being founded on the libel in the suit in the ecclesiastical court, which had stated the right in a more *extensive* way; for the libel was, that by the ecclesiastical law, every person having the tuition of any infant under age, by the will of the father or *per judicem competentem*, ought to have the custody of the infant and suit in the ecclesiastical court for the detainer. After this case we find nothing on the subject for a long time. But, in a case of the late king's reign, Lee justice casually takes notice of the ecclesiastical court's appointment without objection, saying, that the course of the spiritual court is, that if the infant is under seven years, they chuse a curator, but if he is seven he chuses. Fitzgib. 164. However, in a loose note of a still later case, lord chancellor Hardwicke is made to say, that only guardians *ad litem* can be appointed by the ecclesiastical court. 14 Vin. Abr. 176. pl. 7, in a note. In another case, the report of which is more to be relied upon, the same respectable judge reprobated it, as a presumption in the ecclesiastical court to appoint a guardian of the *person* and *estate*, and declared their appointment of any, except when a suit was depending, to be an interference with his power as chancellor; and so displeased was he in the instance before him, as to conclude with recommending to the attorney general, to consider, whether a *quo warranto* would not lie against the ecclesiastical court. 3 Atk. 631. Under a like apprehension of the subject, the late chief justice of the king's bench, in miss Catley's case, spoke of the appointment by the ecclesiastical courts as confined to guardians *in litem*, and therefore as perfectly insignificant. 4 Burr. v. 3. p. 1436. These authorities being brought before the reader, we shall leave him to his own judgment, with this further information only, that, in the warm debates in parliament about the last marriage act, this species of guardianship is said to have been incidentally discussed.

The *fourth* kind of guardian, not yet enumerated, is the guardian *ad litem*. But of this *special* guardian it may suffice for the present purpose to observe, that the power of appointing such is incident to all courts; and that the king *may*, as it is said, by letters patent appoint a guardian to prosecute or defend for

Pl. Com. (3 Co. 39.)

☞ Also if the mother be gardian in socage, and taketh husband, and dyeth, the husband shall not have this custody by survivour; because the wife had it *en auter droit*, in the right of the heire. [89. a.]

[d] 8 E. 2. Præsentm. 10. 7 E. 3. 39. 27 E. 3. 89. 29 E. 3. 5. F. N. B. 33. 31 E. 3. Estoppel 340. Britton, 163, 164. Fleta, lib. 1, cap. 10.

A gardian in socage shall not [d] present to a benefice in the right of the heire; beceuse he cannot be accomptable therefore, for that he can make no benefit thereof, for the law doth abhorre simony, or any corrupt contract for benefices; and therefore in that case the heire shall present himselfe (1). And *Britton* speaking of these gardians said well, *les queux gardeins sont pluis servants que gardeins*, (that is) which gardians are rather servants than gardians.

(2 Ro. Abr. 41. Cro. Jam. 99. 3 Inst. 156. Post. 120. a.)

[e] It is called the statute of Merlebridge, because the parliament in 52 H. 3. was holden there. Vide 32 E. 3. Gard. 31.

"*He shall render an account, &c. after the heire accomplisheth the age of* 14 *yeares.*" This point hath beene much controverted in our bookes, and the causes of the doubts have beene, 1. Upon the words of the statute of [e] *Merlebridge*, ca. 17. 2. Upon the originall writ of account against the gardian in socage. The words of the statute be, *cùm ad legitimam ætatem pervenerit sibi respondeat, &c.* and *legitima ætas* [f] lawfull age is xxi. yeares.

[f] 16 E. 3. Wast. 100. 18 E. 3. 55. 77. 29 E. 3. 5. F. N. B. 118. 6 E. 3. 38.

Also

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for an infant in suits generally, though such appointments have been long out of use. F. N. B. 27 L. See further as to guardian *ad litem* post. 135. b.

In the preceding notes about guardianship, we have purposely confined ourselves to the subject exclusive of the *royal family*. Their case is too delicate to warrant our touching on the subject without better materials than we are at present possessed of. Therefore we can only refer to the arguments in the case on the king's right in respect to the education and marriage of his grand-children, which was referred to the judges in the reign of George the first. See Fortesc. Rep. 401. & post. 133. b. note 1. —[Note 70.]

(1) S. p. acc. ante 17. b. post. 120. a. S. p. acc. as to guardian by nurture. Cro. Jam. 99. In another work lord Coke extends the doctrine so far, as to say that the infant shall present, *whatsoever his age* may be. 3 Inst. 156. But some suppose the guardian to have the right of presenting in the name of the infant. Others again admit the right of the infant *in general*, but add, that if the infant be of such tender years as not to have any discretion, then the guardian should present for him. See Vin. Abr. *Guardian*, Q. pl. 2. But the law seems now settled in the full extent of lord Coke's opinion by a determination of lord chancellor King. In a cause before him an advowson had been conveyed to trustees on trust to present such person as the grantor his heirs or assigns should by deed appoint; and on the principle that an infant of *any* age may present, his lordship confirmed an appointment by an infant-heir, though it appeared that the child was not a year old, and that the guardian guided the child's pen in making his mark, and putting his seal. 2 Eq. Cas. Abr. *Infant*, B. pl. 3. Vin. Abr. *Collation*, A. pl. 10. Wats. Clergym. L. ed. 1740. p. 140. See also 3 Atk. 710.—However, though this decision may remove all doubts about the *legal* right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant without the concurrence of the guardian.—[Note 71.]

Also the writ of accompt reciteth the said statute, *quare cùm de communi consilio regni nostri provisum sit, quòd custodes terrarum & tenementorum, quæ tenentur in socagio, hæredibus terrarum & tenementorum illorum, cùm ad plenam ætatem pervenerint, reddant rationabilem compotum.* [g] Whereupon it is gathered that no action of account did lye against the gardian in socage at the common law, untill the heire be of his lawfull age of 21 yeares. But as to the first *(legitima ætas)* as the statute [h] speaketh, or *plena ætas* (as the writ doth render it) are to be understood *secundùm subjectam materiam*, that is of the heire of socage land, whose lawfull and full age as to the custody of guardianship is 14. And as to the recitall of the statute, [i] it is evident that an action of account did lye against gardian in socage at the common law; and that the statute was made in affirmance or declaration of the common law; for the statute speaketh onely *de custodiâ parentûm*, that is of a gardian in right; but yet an action of account lyeth against him that occupieth the land as gardian, albeit he be not of the blood (as hereafter shall be said). And upon consideration had of the said statute and of all the bookes, it was adjudged in the court of common pleas, *Pasch.* 16 *Eliz.* Rot. 436, according to the opinion of *Littleton*, that the heire after the age of 14 yeares shall have an action of account against the gardian in socage, when he will at his pleasure; and so is an ancient question well resolved (2).

[g] 16 E. 2. Account 120. 17 E. 2. ibid. 121.
[h] 2 E. 2. Account. 14 E. 3. ib. 3 Mar. Dy. 137. Keylwey 131.
[i] 18 E. 2. Avowry 220. (2 Inst. 380. Cro. Cha. 229.) Pasch. 16 Eliz. Rot. 436, in communi banco. Mirror, ca. 2, sect. 17. Britton, fol. 163. b. Fleta, lib. 2, cap. 64. 18 E. 2. Avowry 220. 17 E. 3. 59. Merlbr. ca. 29. W. 2. ca. 11.

Britton was of opinion, that the statute of *Merlebridge*, which gave the *capias* in account, extended to gardian in socage, for he wrote before the statute of *W.* 2. c. 11. But later bookes have over-ruled this point, that no *capias* lyeth against gardian in socage, for the statute extendeth to bailifes only. Neither doth the statute of *W.* 2. extend to gardian in socage, for that speaketh only *de servientibus, ballivis, camerariis, & receptoribus.*

"*But such gardian upon his account shall have allowance of all his reasonable costs and expenses in all things.*" (3) And this is due to all accountants by the common law (4); and so it is declared by the said statute of *Merlebridge, salvis ipsis custodibus rationabilibus misis suis.*

The statute of Merlb. intended by Litt. is ca. 17.

"*Allowance.*"

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(2) But against a testamentary or other guardian, whose authority doth not determine till the infant is twenty-one, or *being a female* attains that age or *marries*, the infant cannot have action of account before; for the rule of the *common law* is, that account shall not lie whilst the guardianship continues. However, in *equity* the infant may by *prochein amy* sue his guardian for an account during the minority. 2 Vern. 342. 2 P. Wms. 119. 1 Ves. 91. 3 Atk. 625.—[Note 72.]

(3) Therefore a guardian cannot be charged in account as a *receiver*; because then he would lose his costs and expences; these it is said being in *general* allowed only to *guardians* and *bailiffs*, and not to *receivers*. Post. 172. a. —[Note 73.]

(4) The rule seems expressed too *generally*; lord Coke elsewhere telling us, that a receiver, who is one of the *three* denominations of accountants known to our law, cannot charge for costs and expences, except in some special cases in favour of trade and merchandise. Post. 172. 1 Freem. 3, 8. —[Note 74.]

41 E. 3. 3. 22 Ass. 41. 22 E. 3. Account 111. 29 Ass. 28. 3 H. 7. 4. b. 6 H. 7. 12. 10 H. 7. 25. 10 H. 6. 21. 2 E. 4. 15. Doct. & Stud. c. 38, fo. 130. (Cro. Eliz. 219. 1 Ro. Ab. 2, 3. 124.)

"*Allowance.*" What other allowances shall the gardian have? If the gardian receive the rents and profits of the lands, and be robbed of the same, whether shall he be discharged thereof upon his account? And it seemeth, that if he be robbed without his default or negligence he shall be discharged thereof (5). As if a bailife of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged thereof upon his account. And seeing the gardian shall be charged as bailife after the heire's age of 14, and be discharged upon his account if he be robbed, *pari ratione* if he be robbed before the age of 14. But otherwise it is of a carier, for he hath his hire (6), and thereby implicitely undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them (7). Note the diversity, and so it was resolved * in the king's bench.

* Hil. 38 Eliz. inter Woodliefe and Curties. (8) (4 Co. 83. b. Cro. Eliz. 815. Cro. Jam. 188. Noy 126.) 29 Ass. p. 28. (Cro. Jam. 188, 189.)

So it is if goods be delivered to a man to be safely kept, and after those goods are stollen from him, this shall not excuse him; because by the acceptance he undertook to keepe them safely, and therefore he must keepe them at his perill.

So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law (9). But if the goods be delivered to him to be kept as he would keepe his owne, there if they be stollen from him without his default or negligence, he shall

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(5) The rule is the same as to trustees, though for their greater security it is usual to insert *special* provisions in the instrument creating the trust. 2 Cha. Cas. 2.—[Note 75.]

(6) But the *hire* is not the *only* or *principal* ground, on which the carrier is liable; for factors, though they also receive a reward, are not so, except for *negligence* or by reason of a *special* undertaking. The great cause of the laws charging the carrier is the *public employment* he exercises. 1 Ld. Raym. 917. 1 Salk. 143. 12 Mod. 487.—[Note 76.]

(7) This is by the *common law* or *general* custom of the realm; and to recite it in the declaration, as is sometimes the practice both with respect to innkeepers and carriers, seems not only unnecessary but even rather improper; because it tends to confound the distinction between *special* customs, which ought to be pleaded, and the *general* custom of the realm, of which the courts are bound to take notice without pleading. Accordingly it seems admitted in several books, that describing the defendant to be a *common carrier*, without any thing more, is sufficient. Hob. 18. 1 Sid. 245. Hard. 485. 3 Mod. 227. Wils. v. 1. part 1. page 281.—[Note 77.]

(8) S. C. Mo. 462. Ow. 57. 1 Ro. Abr. 2.

(9) This doctrine was denied by the court in the great case of Coggs and Barnard; and it is now understood, that acceptance of goods to be kept *generally* is merely an undertaking to keep them as the party receiving keeps his own. 2 L. Raym. 911.—In Coggs and Barnard the action was for so negligently carrying some hogsheads of brandy that one of them was staved; and on motion in arrest of judgment, the court held that a *sufficient consideration* appeared in the declaration, though it was wholly grounded on a *special undertaking* to carry safely, without stating, either that the defendant was to have *hire*, or that he was a *common carrier*.—[Note 78.]

shall be discharged. So if goods be delivered to one as a gage or pledge, and they be stollen, he shall be discharged; because he hath a property in them (10), and therefore he ought to keepe them no otherwise than his owne; but if he that gaged them, tendred the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged.

[89. b.] If *A.* leave a chest locked with *B.* to be kept, and taketh away the key with him, and ☞ acquainteth not *B.* what is in the chest, and the chest together with the goods of *B.* are stolen away; *B.* shall not be charged therewith, because *A.* did not trust *B.* with them, as this case is (1). And that which hath beene said before of stealing, is to be understood also of other like accidents, as shipwrecke by sea, fire by lightning, and other like inevitable accidents (2). And all these cases were resolved and adjudged in the king's bench *. And by these diversities are all the bookes concerning this point reconciled (3).

8 E. 2, tit. Detinue 59. (8 Co. 32. 5 Co. 13. b.) (Doct. & Stud. 129. b.)

* Pasch. 43 Eliz. inter Southcote & Bennet, in Detinue. (4 Co. 83. b.)

Note, reader, it is necessary for any that receiveth goods to be kept, to receive them in this speciall manner, viz. to be kept as his owne, or to keep them at the perill of the owner (4). But now is *Littleton* to be further heard.

" *And*

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(10) Lord ch. j. Holt thought this reason insufficient, and justly as it seems. Other bailees have a property, that is, a *special* and *limited* one; and what hath the pawnee more? The only difference is in the *degree;* the pawnee's property, though not *absolute,* being rather more *enlarged,* and for some purposes a *beneficial* one. 2 L. Raym. 916. Com. Dig. tit. *Mortgage,* and Vin. Abr. tit. *Pawn.* But whatever the difference may be in point of property, it is become immaterial so far as regards the use made of it by lord Coke; because now *general* bailees of goods are not deemed any farther chargeable for the loss of them than pawnees.—[Note 79.]

(1) In the case here stated, the not informing *B.* what was in the chest is relied on as the material circumstance; but the modern doctrine would make it unnecessary to resort for aid from it, as according to that *B.* would not be chargeable, though he had known the contents of the chest. However, there are cases which turn upon the giving of such information. All. 93. 1 Ventr. 258, Carth. 486. 1 Stra. 145. Law of Nisi Prius ed. 1775, p. 71.—[Note 80.]

(2) Here lord Coke joins losses by shipwreck and lightning and other like inevitable accidents with those by stealing; but other authorities make a distinction, and according to them, neither carriers nor masters of ships are responsible for losses by *acts of God* or of the *king's enemies.* 2 Bulst. 280. 2 L. Raym. 918. Vin. Abr. tit. *Master of a Ship,* B. pl. 12.—[Note 81.]

(3) The *old* doctrine about bailment will be found at large in Southcote's case, which is cited by lord Coke in the margin. For the *modern* doctrine, the student should consult the famous case of Coggs and Barnard already cited. Lord chief justice Holt's argument in that case, as reported by lord Raymond, particularly merits attention; it being a most masterly view of the whole subject of bailment. Another important case connected with the same subject is that of Lane and Cotton, in which three judges against Holt held, that action on the case will not lie against the Master of the General Post-Office for the loss of a letter with exchequer bills in it. 12 Mod. 472. See further the following books, which are citations from a note by the editor of the 11th edition. —21 E. 4. 55. 4 E. 3. 6. 2 H. 7. 11. Palm. 548. W. Jo. 179. Grot. de Jur. Bell. l. 2. c. 12. s. 13. Puffend. de Jur. Nat. l. 5. c. 4. s. 6, 7. and Dom. Loix Civ. l. 1. t. 5. s. 2. t. 6. s. 3. t. 7. s. 3.—[Note 82.]

(4) We have already observed, that *in general* this distinction is now exploded.

"*And if such gardian marry the heire within age of* 14 *yeares, &c.*" For if he marry the heire after 14, he is out of his custody, and no account shall be made therefore.

"*He shall account to the heire.*" He shall account for the marriage of the heire, viz. for so much as any man *bonâ fide* had offered for the marriage, or would give in marriage unto him.

(1 Ro. Abr. 908. 910. Cro. Cha. 79.)

"*Or to his executors.*" Not (5) that an infant of the age of 14 may make his will (as some hereupon have collected); but the meaning of *Littleton* is, that if after his marriage he accomplish his age of 18 yeares, at what time he may make his testament (6), and

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exploded. Ante 89. a. note 9. See further tit. *Bailment* and *Carrier* in New Abr. tit. *Bailment* and *Action for Negligence* in Vin. tit. *Action on the case for misfeasance* in Com. Dig. Law of Nisi Prius ed. 1775, p. 69.

(5) It is *note* in *all* the former editions, but *not* is apparently *the true* reading.

(6) There is a great abundance of irreconcileable opinions in our books about the earliest age at which a will may be made of *personal* estate. Here lord Coke states 18 to be the age; though the reasons and authorities in favour of that time do not appear.—Others mention 17, that being the age at which an administration during the minority of an executor determines. 1 Vern. 255. 2 Vern. 558. But this opinion was probably founded on an idea, that our spiritual courts make no difference between the time for acting as an executor and the time for making a will, which is clearly a mistaken notion. However, it receives some countenance from the decisive manner in which a late chancellor of the first authority mentions 17, and the ambiguous terms in which he speaks of an earlier age. 1 Ves. 303. 3 Atk. 709.—According to others 15 is the age for *males*, if the party can be proved of sufficient discretion; but we are not informed why, and therefore little respect is due to this opinion, if *that* can be deemed one, which in fact was nothing more than a loose *dictum*. 2 Vern. 469.—Others doubt, whether any time before 21 is not too early; because none can be administrators till they have attained that age. 1 Vern. 326. The reasons usually assigned for not granting administration to any person under 21 are, that an administrator being created by statute his age should be according to the common law, and that the statute of distribution requires the security of a bond from an administrator, which an infant cannot give. See the books cited in Vin. Abr. *Executors*, L. 3. pl. 6. This latter reason against an infant's being administrator is the most forcible; but both seem equally inapplicable to the other point; the power of making a will of personal estate not being derived from or regulated by any statute, and the giving of a bond being foreign to the case of a testator.—In Perkins *four* is said to be the age for making a will of personalty; but though this is the time mentioned in the old as well as the new editions of this book, yet, as Swinburne well observes, it appears to be an error of the press by omission of the figure x, and most probably xiiii. was the age intended. Perk. sect. 503. Swinb. Testam. part 2. sect. 2. Off. of Ex. cap. 18.—The last opinion on the subject, and that most to be relied upon, distinguishes between *males* and *females*, making the *testamentary* power to commence in the former at 14, and in the latter at 12. At these ages the Roman law allowed of testaments, and the civilians agree that our ecclesiastical courts follow the same rule; and to them we ought principally to resort for information on testamentary subjects; because these being so peculiarly of spiritual conusance, they speak more *ex tripode juridico*, to use the phrase of a great author, than our common lawyers. Swinb. on Testam. part 2. sect. 2. Godolph. Orph. Leg. 276. 2 Strab. Dom. 11. Har. Justin. Instit. l. 2. t. 12. s. 1. But the doctrine is not sustained by the authority of civilians only. Some

and constitute executors for his goods and chattells, and the words are so to be understood, as may stand with law and reason. Note, executors could not have an action of account at the common law, in respect of the privity of the account; but the statute of *W.* 2. ca. 23, hath given the action of account to executors, the statute of 25 *E.* 3. ca. 5, to executors of executors, and the statute of 31 *E.* 3. c. 11, to executors of administrators.

7 E. 3. 62. 19 E. 3. Account 56. 38 E. 3. 7. 31 E. 3. tit. Account 57.

"*That he would marry him without taking the value.*" So as the gardian shall not account only for that which he shall receive in this case, but for that also which he might receive.

3 E. 3. 10. 46 E. 3. Account 40. 2 R. 2, ibid. 45. 6 R. 2. Account 47.

"*Unless that he marrieth him to such a marriage, that is as much worth, &c.*" This needeth no explanation.

If the heire in socage be ravished out of the custody of the gardian, and the ravisher marrieth the heire, the gardian shall have a writ of ravishment of ward, and recover the value of the marriage, &c. and shall account to the heire for the same.

Hill. 3 E. 2, coram Rege Rot. 34. Agnes Frowick's case. F. N. B. 139. I. & 140. 26 E. 3. 65. 1 E. 3. 19, 20.

And the gardian in socage is bounden by law, that the heire be well brought up, and that his evidences be safely kept.

The grandmother of the sonne and heire of *John Bernevill*, who held the manor of *Totington* in the county of *Midd.* in socage, recovered the heire in a ravishment of ward against *Simon Chevin*, which had married the stepmother of the heire; and by the rule of the court, the plaintife *pro nutriturâ hæredis et pro custodiâ evidentiarum invenit plegios.*

Trin. 1 H. 5. coram Rege, Rot. 1. Midd.

Sect. 124.

AND if any other man, who is not the next friend, occupies the lands or tenements of the heire as gardian in socage, he shall be compelled to yield an account to the heire, as well as if he had beene next friend; for it is no plea for him in the writ of account to say, that he is not the next friend, &c. but he shall answer whether he hath occupied the lands or tenements

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respectable books, written by common lawyers, mention 12 and 14 for the same purpose; prohibitions have been refused by the king's bench, when applied for to restrain the ecclesiastical courts from allowing wills made at such early ages; and there are instances, in which the doctrine hath been recognized and adopted by the court of Chancery. Off. of Ex. cap. 18. Sheph. Touchst. 403. T. Jo. 210. 2 Show. 204. Comb. 50. Prec. in Cha. 316. Gilb. Eq. Rep. 74. Mos. 5. To conclude this point, it may be added, that as on the one hand the rule of the ecclesiastical courts, in holding 12 and 14 to be ages at which males and females according to the difference of sex first have the power of making wills of personalty, seems now well established; so on the other hand it is in some degree consonant to the doctrine of our common law; for though *that* is silent as to the age for wills of personalty, these being the subjects of a different law, yet it adopts the same standard of 12 and 14 for other purposes, and so far deems them the ages of discretion, as to give infants of those ages the power of choosing guardians, and to presume that they are *doli capaces* in respect to crimes. 1 Hal. H. P. C. 22.—[Note 83.]

tenements as gardian in socage or no. But quære, *if after the heire hath accomplished the age of* 14 *yeares, and the gardian in socage continually occupieth the land until the heire comes to full age,* scil. *of* 21 *yeares, if the heire at his full age shall have an action of account against the gardian, from the time that he occupied after the said* 14 *yeares, as gardian in socage, or against him as his bailife.*

19 E. 2. Avowry 221. 39 E. 3. 16. 41 E. 3. Account 35. 49 E. 3. 10. 18 E. 3. 77. 28 Ass. p. 11. Pl. Com. 542. 6 E. 3. 38. F. N. B. 118.

AND if any other man, who is not the next friend, &c." If a stranger entreth into the lands of the infant within age of 14, and taketh the profits of the same, the infant may charge him as gardian in socage. And this doth well agree with the writ of account against a gardian in socage; for the words be, *Idem* B. *præfato* A. *rationabilem compotum suum de exitibus* ☞ *provenientibus de terris et tenementis suis in* N. *quæ tenentur in socagio, et quorum custodiam idem* B. *habuit dum præd.* A. *infra ætatem fuit, ut dicitur.* And true it is, that in judgement of law he had the custody of the lands: and he is called *tutor alienus*, and the right gardian in socage *tutor proprius;* and it is no plea for him to denie that he is *procheine amy*, but he must answer to the taking of the profits (1), as *Littleton* here saith. [90. a.]

13 E. 3. Account 77. 22 E. 3. 11. 41 E. 3. Account 35.

10 H. 7. 7. 4 H. 7. 6. b. 7 H. 7. 9. a.

6 E. 3. 38. 32 E. 3. Account 60. 7 E. 4. F. N. B. 118.

"*But quære, &c.*" This *quære* came not out of *Littleton*'s quiver; for it is evident, that after the age of 14 yeares he shall be charged as bailife, at any time when the heire will, either before his age of 21 yeares, or after (2).

Sect. 125.

ALSO, if gardian in chivalrie makes his executors and die, the heire being within age, &c. the executors shall have the wardship during the nonage, &c. But if the gardian in socage make his executors and die, the heire being within the age of 14 *yeares, his executors shall not have the wardship; but another next friend, to whom the inheritance cannot descend, shall have the wardship, &c. And the reason of this diversitie is, because the guardian in chivalrie hath the wardship to his owne use, and the gardian in socage hath not the wardship to his owne use, but to the use of the herie* (1)†. *And in this case where the gardian in socage dyeth before any account*

† *This note is in* 90. b. *of the* 13*th and* 14*th editions.*

(1) That is, whether he took the profits as guardian; for if he assumed to take them in that character, he shall answer for them accordingly, though he was not guardian *de jure*.—[Note 84.]

(2) Notwithstanding lord Coke's observation on the *quære*, it is in L. and M.; Roh.; P. and both of the MSS.

(1) † Fitzherbert cites two authorities, which make guardianship in socage grantable. F. N. B. 143. P. But Littleton's opinion militates strongly to the contrary; for if such a trust is so *personal* as not to be transmissible to executors, why should it be so to grantees? Accordingly in the arguing of a modern case it seems to have been taken for granted, that guardianship in socage cannot be assigned. Gilb. Eq. Rep. 177.—[Note 86.]

account made by him to the heire, of this the heire is without remedy, for that no writ of account lieth against the executors (2) ‡, *but for the king onely.*

"*To his owne use.*" A tenant holdeth land of a bishop by knights service, which seigniorie the bishop hath in the right of his bishoprick, the tenant dieth his heire within age, the bishop either before or after seisure dyeth: neither the king, nor the successor of the bishop, shall have the wardship, but his executors. For albeit the bishop hath the seigniorie *en auter droit*, yet the wardship being but a chattell, he hath in his owne right, and a chattell cannot goe in the succession of a sole corporation, unless it be in the case of the king (3). 7 R. 2. Br. 634. 40 E. 3. 14. 2 H. 4. 19. 10 Eliz. Dier 277. (Post. 117. 4 Co. 64. b.) 7 H. 4. 41. 44 E. 3. 42.

And yet if a bishop have an advowson, and the church become void, and the bishop die, neither the successor nor the executors shall present, but the king: because it is but a *chose in action* (4). 24 E. 3. 26. 44 E. 3. F. N. B. 33.

[90. b.] And so it is in the case where the king hath wardship, but ☞ that is a prerogative that belongeth to the king to provide for the church being void; for where the tenure by knights service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant. See more of this in the Chapter of Warranty, Sect. 740. (Cro. Jam. 248.)

"*The*

‡ *This note is in* 90. *b. of the* 13*th and* 14*th editions.*

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(2) ‡ Littleton must be understood to mean, that at *common law* account did not lie against executors; for in his time it did lie under several statutes against an executor *in general*, though they were deemed not to extend to the executor of guardian in socage. See post. note 3 to 90. b.—[Note 87.]

(3) Acc. ante 9. a. 46. b. post. 388. a.

(4) This reason requires some explanation. It is not, that *choses in action* are in their nature incapable of transmission to executors; for the contrary is known to be law, and some instances of it are here given; but it is, because in the case of a *chose in action*, so peculiar as a right of presentation, the law favours the king more than the bishop's executors, and therefore gives the king, as having in his custody the temporalties of the vacant bishoprick, that presentation, which executors in general are entitled to when they are opposed to an heir. See post. 388. Bro. Abr. *Presentation* 34. Wats. Clergym. L. ed. 1747, p. 72. But then it may be asked, why the king should not have a like preference, in the case of the bishop's being entitled to a wardship by knight's service in right of his fee and dying *before* reducing it into possession by seisure. The answer may be, that the law distinguishes between an *interest both of profit and trust*, as wardship by knight's service is, and one *merely of trust*, such as a presentation. The law gives the former to the bishop's executors, for the benefit of his personal estate. It gives the latter to the king; because the presentation to a vacant church cannot lawfully be sold; and as the bishop's personal estate cannot derive any *profit* from the presentation, the law deems it more proper to follow the temporalties of the see to which the advowson belongs. In a subsequent part of the Commentary, where it is said, that the bishop's executors shall not present, because nothing can be taken for a presentation, lord Coke seems to hint at something of this kind. Post. 388. a. However, as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king as settled by *authorities* and *long practice*.—This preference of the king's title by prerogative is carried so far, that even *presentation* and *institution* in the lifetime of the bishop will not prevail, unless there hath been also an *induction*. Vin. Abr. *Presentation*, C. a. E. a. Wats. Clergym. L. ed. 1747, p. 73.—[Note 85.]

31 E. 3. Account 57. 19 E. 3. ibid. 156. 48 E. 3. 2. 2 H. 4. 13. F. N. B. 117. 19 H. 6. 5. 4 E. 4. 25. 43 E. 3. 21. 11 Co. 89. (2 Inst. 404.) [*] Rot. Parl. 50 E. 3, nu. 123.

"*The heire is without remedy, &c.*" For albeit in an action of account against a gardian in socage, &c. the defendant cannot wage his law, yet in respect of the privity of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account neither lyeth against the executors of the accountant, nor at the common law for the executors of him to whom the account is to be made, as is aforesaid (3); but that is holpen by statute (4). [*] It hath beene attempted in parliament to give an action of account against the executors of a gardian in socage, but never could be effected (5).

[a] Pl. Com. 321. Keyleway 131. 11 Co. 89.

"*But for the king only.*" [a] The reason of this is, because the king's treasure is the sinewes of warre, and the honour and safety of the king in time of peace, *firmamentum belli, et ornamentum pacis;* and therefore the death of the party shall not barre the king of his treasure due unto him upon the account, because it is intended, that the king was busied about the publicke for the good of the common-wealth, and had not leisure to call his accountant to make his account, *et nullum tempus occurrit regi* (6). *Littleton* speaketh of the king's prerogative but twice in all his bookes, viz. here, and Sect. 178, and in both places, as part of the lawes of *England*. *Prærogativa* [b] is derived of *præ*, i. e. *ante*, and *rogare*, that is, to aske or demand beforehand, whereof commeth *prærogativa*, and is denominated of the most excellent part; because though an act hath passed both the houses of the lords and commons in parliament, yet, before it be a law, the royall assent must be asked or demanded and obtained, and this is the proper sense of the word. But legally [*] it extends to all powers, preheminences, and priviledges, which the law giveth to the crowne, whereof *Littleton* here speaketh of one. *Bract.* lib. 1, in one place calleth it *libertatem*, in another *privilegium regis;* [c] *Britton* [d] (following *W.* 1.) *droit le roy;* [e] *registr. jus regium*, and *jus regium coronæ, &c.*

Vid. Sect. 178. Stanf. Prær. 32.

[b] Fortescue, fo. 45. Rot. Parl. 1 H. 4, nu. 188. Pl. Com. 236. Stanf. Pl. Cor. 162. b. Stanf. Prær. 1. a. & 10. b.

[*] Stanf. Prær. 5. 10.

[c] Westm. 1. cap. 50.

[d] Britton, fol. 27. [e] Regist. fol. 61, &c.

Sect.

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(3) This rule of the common law, which did not allow of actions of account *against* or *for* executors, had some exceptions. The *latter* part of the rule did not extend to the executors of *merchants;* and the king was not within *either* part. F. N. B. 117. 11 Co. 90. a. It should also be remarked, that though at the common law executors in general were not compellable to account, yet if they consented to settle an account, they were liable to an action of *debt* for the balance. F. N. B. page 267 of 4to ed. in lord Hale's notes.—[Note 88.]

(4) The 13 E. 1. c. 23, gave an account to executors; but this being construed to describe *immediate* executors only, other statutes were made to extend the remedy to the executors of executors and to administrators. 25 E. 3, st. 5. c. 5. 31 E. 3. c. 11. 2 Inst. 404. Ante 98. b.—[Note 89.]

(5) Acc. Cott. Abr. Rec. 131. But now by 4 Ann. c. 18. s. 27, actions of account lie against the executors and administrators of every *guardian* bailiff and receiver.—[Note 90.]

(6) See post. 119. a. and the note there.

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ALSO, the lord, of whom the land is holden in socage, after the decease of his tenant shall have reliefe in this manner. If the tenant holdeth by fealty and certaine rent to pay yeerely, &c. if the tearmes of payment be to pay at two termes of the yeare, or at 4 termes in the yeare, the lord shal have of the heire his tenant as much, as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and tenne shillings rent payable at certaine terms of the yeare, then the heire shall pay to the lord ten shillings for relief, beside the tenne shillings which he payeth for the rent.

"*CERTAINE rent.*" A tenant holdeth of his lord certaine lands in socage, to pay yearely a paire of gilt spurs or five shillings in money at the feast of *Easter*. In this case the rent is uncertaine, and the tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for reliefe; but if he pay it not when he ought, then may the lord distraine for which of them he will. But if the tenure be to attend on his lord at the feast of *Christmasse*, or to pay ten shillings, there the reliefe must be ten shillings, because the other cannot be doubled. *Et sic de similibus.* [91. a.]

43 E. 3. Barre 294. 9 E. 4. 36. Bract. lib. 2, fol. 35. Glanvil. lib. 9, cap. 4. (2 Ro. Abr. 519. Post. 145. a.) (2 Co. 37. 2 Ro. Abr. 519.)

"*To pay yeerely.*" If the tenant holdeth of his lord by fealty, and to pay every two or three year ten shillings, albeit this be no annuall rent, yet shall he pay ten shillings for reliefe. *Et sic de similibus.*

But it is to be noted, that beside reliefe, whereof *Littleton* here speaketh, there belongeth to a tenure in socage of common right aid for the making of his eldest son a knight at the age of fifteene years, and to marry his daughter at the age of 7 yeares (1).

Vid. Sect. 103. F. N. B. 82. West. 1. cap. 35. 25 E. 3. stat. 5. cap. 11.

In the same manner it is, if a man be seised of certaine land which is holden in socage, and maketh a feoffement in fee to his owne use, and dieth seised of the use, (his heire of the age of 14 yeares or more, and no will by him declared) the lord shall have reliefe of the heire, as afore is said. And this by the statute of 19 H. 7. *cap.* 15 (2).

This is an addition to *Littleton*, wherefore I omit it the rather, for that the statute of 19 *H.* 7. is for the cause above mentioned become of none effect.

Sect.

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(1) We have already had occasion to observe, that these aids are taken away by the 12 Cha. 2. c. 24. Ant. 76. a. note 1.

(2) This part about relief from the heir of *cestui que use*, as lord Coke truly observes, is an addition to *Littleton*; and it first appears in *Redman*. See post. 117. a.

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AND in this case, after the death of the tenant, such reliefe is due to the lord presently, of what age soever the heire be; because such lord cannot have the wardship of the body, nor of the land of the heire. And the lord in such case ought not to attend for the payment of his reliefe, according to the terms and dayes of payment of the rent; but he is to have his reliefe presently, and therefore he may forthwith (1) *distreine after the death of his tenant for reliefe.*

16 H. 7. 4. 18 E. 3. 26. p. 18. Bracton, lib. 2, fol. 85, debit heres una vice redditum suum unius anni duplicatum.

"*PRESENTLY;*" and as *Littleton* saith, he ought not to attend the payment of his reliefe according to the daies of paiment of his rent, but he ought to have his reliefe presently, and for the same he may incontinently distraine after the death of the tenant.

Britton, fol. 178. acc. Fleta, lib. 1, cap. 8. (2 Ro. Abr. 519.)

(Ant. 47. b. 2 Ro. Abr. 519.)

And therefore in the case aforesaid, where the tenant holdeth by the rent of five shillings, or a paire of gilt ☞ spurres, if the heire be not presently (that is, as presently and as conveniently as he may, all due circumstances considered) after the death of his ancestor ready upon the land to pay reliefe, the lord may distrain for which of them he will; and if the tenant tendered either of them according to the law, and none for the lord was ready there to receive it, yet the lord may distraine for that which was tendered, at his pleasure (2). [91. b.]

45 E. 3. 19. 35 H. 6. 52. 20 Eliz. Dier. 361. Stanf. Prer. 13. b. F. N. B. 256. 259.

"*Of what age soever the heire be.*" And yet it appeareth in our bookes, that in this case the king in case of a tenure in socage in chiefe shall not have *primer seisin*, unless the heire be of the age of 14 yeares at the death of his ancestor; for if he be under that age, he is in the gard and custody of his *prochein amy*.

But otherwise it is in case of a common person, as here it appeareth. And where in some impressions these words be added *(so that he be past the age of* 14 *yeares)*, those words so added are against the law, and no part of *Littleton*'s works (3).

Sect.

* *This note is in* 91. *b. in the* 13*th and* 14*th editions.*
† *The word* in *seems to be here inserted for* or.

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(1) * But here we must understand Littleton to be speaking of a relief due on the descent of a fee simple in † fee tail *in possession;* for if only a *remainder* or *reversion* expectant on an estate for life descends on the heir, the relief is not leviable till the death of the tenant for life. Keilw. 83. b. Kitch. ed. 1592. fo. 146. b. As to the descent of a remainder or reversion expectant on an estate tail, it seems doubtful whether a relief is payable at *any* time in respect of such a descent. Keilw. 84. a.—[Note 91.]

(2) See ant. 83. b. note 4.

(3) Accordingly the words objected to by lord Coke are neither in L. and M. nor Roh.—They were first inserted in P.

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IN the same manner it is, where the tenant holdeth of his lord by fealtie and a pound of pepper or cummin, and the tenant dyeth, the lord shall have for reliefe a pound of cummin, or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearely a number of capons or hennes, or a pair of gloves, or certaine bushels of corne, or such like.

"*A POUND of pepper or cummin.*" Here it is to be observed, that the lord may reserve pepper, or any other things that be *exotica*, foreign, of the growth of outlandish countreyes or beyond sea, as well as of the growth of *England*, whereby navigation (the life of every island) is employed. And where *Littleton* here putteth his case in the disjunctive, if the tenant doth hold by fealty and one pound of pepper or a pound of cummin, he shall pay for reliefe a pound of pepper or a pound of cummin, over and besides the rent. But if the tenant holdeth of his lord by doing of certaine worke dayes in harvest, or to attend at *Christmasse*, or such like, he shall not double the same: for of corporall service, or labour or worke of the tenant, no reliefe is due, but where the tenant holdeth by such yearly rents or profits, which may be paid or delivered, whereof *Littleton* hath put his examples; and by them is manifestly proved, that corporall service, worke, or labour, shall not be doubled in this case (4). (Post. 142. a.) (2 Ro. Abr. 515.)

"*Or certaine bushels of corne.*" Here it appeareth, that the reliefe of bushels of corne is to be paid presently, though the tenant die in winter before corne be ripe.

[92. a.] ☞ Note, here are examples put of five natures. 1. *Aromatorum exoticorum*, of spices or drugs, of outlandish growth. 2. *Granorum*, of corne of *English* growth. 3. *Avium villaticarum*, of powltry; as capons, hens, &c. 4. *Artificiorum*, of handicrafts; as a paire of gloves generally either of outlandish or *English*. 5. *Aut similium*, or such like, (that is) of like outlandish growth, or of *English* growth, or of powltry, or of artifices outlandish or *English*, and like herein also, that they may be paid or delivered to the lord every year, or every second or third year, &c.

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BUT in some case the lord ought to stay to distreine for his reliefe untill a certaine time. As if the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John *the* Baptist, *if such tenant dieth in winter, then the lord cannot distreine for his reliefe, untill the time that roses by the course of the yeare may have their growth, &c. And so of the like.*

BY

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(4) But Rolle tells us, that master Herbert of the Inner Temple in his autumn reading 11 Cha. 1. held the contrary. 2 Ro. Abr. 515.

(Post. 197. b.) "*BY the course of the yeare.*" *Lex spectat naturæ ordinem,* The law respecteth the order and course of nature. *Lex non cogit ad impossibilia,* The law compells no man to impossible things. The argument *ab impossibili* is forcible in law. *Impossibile est quod naturæ rei repugnat.* And here it is to be observed, that *Littleton* puts a diversity betweene corne and roses; for corne will last. And therefore the tenant must deliver the corne presently before the time of growth (as before is said); and so of saffron, and the like. But roses, or other flowers, that are *fructus fugaces,* cannot be kept, and therefore are not to be delivered till the time of growing. Neither is the tenant driven by law artificially to preserve roses; for the law in these cases respecteth nature, and the course of the yeare, as *Littleton* here saith, *Et ars naturam imitatur. Et sic de similibus.*

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ALSO, if any will aske, why a man may hold of his lord by fealty only for all manner of services, insomuch as when the tenant shall doe his fealty, he shall sweare to his lord that he will doe to his lord all manner of services due, and when he hath done fealty, in this case no other service is due: to this it may be said, that where a tenant holds his land of his lord, it behooveth that he ought to do some service to his lord. For if the tenant nor his heires ought to do no manner of service to his lord nor his heires, then by long continuance of time it would grow out of memorie, whether the land were holden of the lord, or of his heires, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heires, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heires have some service done unto them, to proove and testifie, that the land is holden of them.

"*WHEN the tenant shall doe his fealty, he shall sweare to his lord, &c.*" Here it appeareth, that the doing of the fealty is both a performance of his service, and of his oath also when it is done, for that no other service is due; and that one oath of fealty is taken of all that hold, and is not to be changed for any noveltie or nicety of invention; for judges anciently and continually have suppressed innovations, and would in no case change the ancient common law.

31 E. 3. tit. Gager deliverance 5. 38 E. 3. 1. 42 Ass. p. 12. 4 E. 3. ca. 5. 18 E. 3. ca. 4, & 6. 4 H. 4. ca. 2. 2 H. 4. fo. 18.

☞ "*It behooveth that he ought to do some service to his lord.*" For there can be no tenure without some service; because the service maketh the tenure. [92. b.]

See of this in the Chapter of Fee Simple, Sect. 4. (1 Ro. Abr. 816. F. N. B. 144. Ante 13. a.)

"*His escheat of the land.*" *Eschaeta* is derived of this word *eschier, quod est accidere;* for an escheat is a casuall profit, *quod accidit domino ex eventu et ex insperato,* which happeneth to the lord by chance and unlooked for. And of this word *eschaeta* commeth *eschaetor,* an eschaetor, so called, because his office is to enquire

enquire of all casuall profits, and them to seise into the king's hands, that the same may be answered to the king (1).

Lands may escheat to the lord two manner of wayes; one by attainder, the other without attainder. By attainder in three sorts. First, *Quia suspensus est per collum.* Secondly, *Quia abjuravit regnum* (2). Thirdly, *Quia utlegatus est.* Without attainder; as if the tenant dies without heire.

See more of this in the Chapter of Warrantie, Sect.*

"*Or perchance some other forfeiture.*" As if the land be aliened in mortmaine; or when *Littleton* wrote, if the tenants had erected crosses upon their houses or tenements in prejudice of the lords, that the tenants might claim the privilege of the *Hospitalers* to defend themselves against their lords, they had forfeited their tenancies. But since *Littleton* wrote, the *Hospitalers* are dissolved, and consequently that forfeiture is gone.

W. 2. ca. 33. Flet. li. 2, ca. 43. & li. 5, ca. 34. 32 H. 8. ca. 24. (F. N. B. 144.)

"*Or profit.*" As *reliefe, aid pur file marier, aid pur faire fitz chivaler*, and the like.

* *Probably sect.* 745, 746, & 747.

[93. a.]

☞ Sect. 131.

AND for that fealtie is incident to all manner of tenures, but to the tenure in frankalmoigne (1), *(as shall be said in the tenure of frankalmoigne), and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty onely; and when he hath done his fealty, he hath done all his services.*

"*FEALTIE*

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(1) See further as to *escheat* and *escheator*, ante 13. b. and 18. b. and note 2. there. 4 Inst. 225. Mad. Excheq. chap. 10. s. 2.

(2) Abjuration, according to the *ancient* use of the word, had the effect of an attainder; because it was necessarily accompanied with the confession of a felony. But this kind of abjuration is not now in force; the privilege of sanctuary, of which it was consequential, having been taken away by a statute of James the First. See 21 Jam. c. 28. s. 7. 2 Inst. 629, and 2 Hawk. Pl. C. b. 2. c. 32. However, the word *abjuration* is still in use in our law for *some* purposes. For—1. Some statutes, in order to secure the *established religion*, require persons convicted of certain kinds of *recusancy* to abjure the *realm*, on pain of being adjudged guilty of a *capital* felony: and the word in this sense is similar to the ancient abjuration, and is attended with a like effect. 35 Eliz. c. 1, and 2. 13.—2. In order to secure the *succession of the crown* as settled at and since the Revolution, other statutes make all persons who refuse to take the oath prescribed for abjuring the *Pretender* and his descendants, liable to various penalties and forfeitures; but this kind of abjuration differs both in *object* and *effect* from the ancient one. 13 W. 3. c. 6. 1 An. st. 1. c. 22. 1 G. 1. st. 2. c. 13. 6 G. 3. c. 53.—[Note 92.]

(1) Tenure *at will* should be also excepted. See the next Section and ante 67. b. note 2. 68. b. n. 5. However, even to tenure *at will* fealty may be incident by the custom of a manor; and so generally, if not universally, it is to *copyhold* tenures. 10 H. 6. 13. 20 H. 6. 3. Kitch. on Co. ed. 1592. fol. 132. —[Note 93.]

(4 Co. 8. Post. 143. a.) "*FEALTIE is incident.*"

Of incidents there be two sorts, viz. separable, and inseparable.

Separable, as rents incident to reversions, &c. which may be severed: inseparable, as fealty to a reversion or tenure, which cannot be severed: for as all lands and tenements within *England* are holden of some lord or other, and either mediately or immediately of the king; so to every tenure at the least fealty is an inseparable incident, so long as the tenure remains; and all other services, except fealty, are severable. But where the tenure is by fealty only, there is no reliefe due for the cause abovesaid (2).

Sect.

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(2) The reason is plain. Socage relief, being a year's rent, cannot be calculated, if an annual rent is not payable. See ante 85. a. note 1. But as by *custom*, or by *express reservation* on creating the tenure, a payment wholly different from and unconnected with the yearly rent may be due for relief; so it may be presumed, that by the same means a relief may be payable, where there is no yearly rent; because the relief is ascertained, without reference to a yearly rent, in both cases equally. See Kitch. on Co. ed. 1592. fo. 103. Here it may not be amiss to advert to some other differences between the several kinds of relief payable by socage-tenants. 1. The *proper* socage-relief, that is, the relief incident to the tenure by socage by the *general* custom of the realm, is a year's rent, and consequently can never be payable, except where there is an annual rent; but the *improper* socage-relief, that is, the relief due either by *special* custom or by *express* reservation, may be *more* or *less* than the annual rent, or may be payable, where there is no annual rent. 2. The socage-relief by *common law* is only payable on a *descent* and by a *natural* person; but the two other reliefs *may* be due, where the tenant comes in by *purchase*, or where he takes as a *sole corporation* by *succession*. Ante 84. a. 2 Ro. Abr. 517, 518. 3. If the relief claimed is one at *common law*, it is presumed to be due, till the contrary appears; that is, unless it can be proved, that the relief hath been released, or that the tenure was reserved with an *express exemption* from relief. 3 Lev. 145. Vin. Abr. *Evidence*, A. b. 28. pl. 5. But if the relief be claimed by *special custom* or *special reservation*, the *onus probandi* must necessarily fall upon the lord. 4. If the relief is by the *common law*, it is merely a fruit *incident to the service*; but if the relief is by *express reservation*, it is a *part of the service*. This distinction, however nice it may appear, may be deemed an *essential* one. Relief, when only an *incident to the service*, is not within the limitation of 50 years prescribed for seisin of it by the 32 H. 8. c. 2, as hath been observed in a former note; nor will acceptance of rent estop the lord afterwards from claiming such a relief. Ante 83. a. note 2. Cro. Eliz. 885. But the law seems to be to the contrary in both these particulars, where the relief is *part of the service*. 5. If the relief is by the *common law*, or by *special reservation*, the remedy by distress follows of course; but it is said, that for relief by *special custom*, distress is not warranted without a prescription. W. Jo. 133.—These differences between the *three* kinds of socage-reliefs lie scattered in the books; and thus bringing them into one point of view may be useful. The learned reader will judge of their propriety. The diligent student may add to their number. See further Co. Copyhold, chap. 2. Survey Dial. 4th edit. 95, and the case of Hungerford and Havyland in W. Jo. 132. 2 Bulst. 323. Latch 37. 94. 129. 2 Ro. Rep. 270. O. Bendl. 180.—[Note 94.]

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ALSO, if a man letteth to another lands or tenements for terme of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also if a lease be made to a man for terme of yeares, it is said, that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of wast, when the lessor hath cause to bring a writ of wast against him; which writ shall say, that the lessee holds his tenements of the lessour for terme of yeares. So the writ proves a tenure betweene them. But he, which is tenant at will according to the course of the common law, shall not do fealty; because he hath not any sure estate. But otherwise it is of tenant at will according to the custom of the manor; for that he is bound to do fealty to his lord for two causes. The one is by reason of the custome; and the other is, for that he taketh his estate in such form to do his lord fealty.

"*IF a man letteth for terme of life, without naming any rent, &c. he shall do fealty, &c.*" And the reason is; because there is a tenure, and fealtie (as hath beene said) is incident to all manner of tenures; and it is to be noted, that the law, for the suretie ☞ of the lord, that his tenant shall be faithfull and loyall to him, doth create such a service as the tenant shall be bound thereunto by oath. V. Sect. 214. (Ante 67. a. 68. a.)

[93. b.]

"*Also if a lease be made for yeares, &c. the lessee shall do fealty.*" For there also is a tenure between them. And *Littleton*'s opinion in this case is holden for good law at this day (1). 40 E. 3. 34. 9 H. 6. 41. 10 H. 6. 13. 9 E. 4. 1. 21 E. 4. 29. 5 H. 5. 12. 5 H. 7. 11.

"*And this is well proved by the words of the writ, &c.*" *Nota*, the original writs are (as it were) the foundations and grounds of the law, and, as it appeares here by *Littleton*, are of great authority for the proofe of the law in particular cases (2). Vid. Sect. 84.

"*Because he hath not any sure estate.*" Therefore tenant at will shall not do fealty (as hath been said before); because the matter of an oath must be certaine. The rest of this Section needs no explication (3). (Ante 63. a. 5 Co. 10.)

CHAP.

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(1) See ante 67. b. note 2.

(2) See ante 73. b.

(3) It may be proper to conclude this Chapter of Socage, by pointing out the several changes made in the tenure of socage by the statute of the 12 Cha. 2. c. 24, so often mentioned. 1. It takes away the aids *pur file marier* and *pur fuire fitz chivalier*, which were incident to *all* socage-tenures. 2. It relieves socage *in capite* from the burden of the king's *primer seisin* and of *fines of alienation to the king*; to both of which *socage in capite* was equally liable with tenure by *knight's service in capite*, though not so to *wardship*. 3. It extends the father's power of appointing guardians by deed or will, which by the 4 and 5 Phil. and Mar.

Chap. 6. *Frankalmoigne.* Sect. 133.

***TENANT** in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankalmoigne; that is to say in Latine,* in liberam eleemosinam, *that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetuall almes, or in frankalmoigne; [or by such words to hold of the grantor, or of the lessor*, and his heires in free almes:] (1) in such case the tenements were holden in frankalmoigne.*

Bract. lib. 2, cap. 6, and lib. 4, ca. 2. Britton, fo. 164, 165. Mirror, ca. 2, sect. 18. Glanvil. lib. 7, ca. 1, & lib. 12, ca. 3, & 25. Fleta, lib. 3, ca. 5. 21 H. 7. 39. 29 E. 3. 14. 8 H. 6. 23. 12 H. 8. 8. (4 Co. 104.)

"***AN** abbot, prior, or another man of religion, or of holy church.*" It is to be observed, that of ecclesiastical persons some be regular, and some be secular. They be called regular, because they live under certain rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *a man of religion* or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are votaries, ☞ they are for distinction sake called secular, as bishops, deanes, and chapters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *of holy church;* and none of these are in law said to be *men of religion*, or religious. [94. a.]

Where *Littleton* saith *(infeoffed an abbot and his covent)* his meaning is, that the abbot only is infeoffed: for he is only a person capable, and the covent are dead persons in law, and have power of assent only, and that they thereunto assent. But since *Littleton* wrote, all abbeys, priories, monasteries, and other religious

See the Statutes of 27 H. 8. not printed, but in the abridgment. 31 H. 8. cap. 13, and 32 H. 8. ca. 24, &c. Vide Sect. 530.

* *The word which lord Coke translates "Lessor" is, in the original "Feoffor," but, as he evidently refers to a lease for lives, for which, before the statute of uses, Livery of Seisin was necessary, such a lease was a feoffment; so that the difference is immaterial.*

Mar. (the first statute conferring such a power) was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage.—In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration. But the statute of Charles the Second goes further than the mere alteration of socage; and having thus reformed and improved this favourite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knight's service, and by taking from the crown the power of creating any other tenure than socage in future.—[Note 95.]

(1) The words between brackets are in L. and M. but not in Roh.

religious houses of monkes, canons, friers and nuns, &c. have been dissolved, and their possessions given to the crowne (2).

The ecclesiasticall state of *England*, as it standeth at this day, (which is necessary for our student to know) is divided into two provinces, or archbishopricks, (viz.) of *Canterbury* and of *Yorke*. The archbishop of *Canterbury* is styled *Metropolitanus et Primas totius Angliæ*, and the archbishop of *Yorke Primas Angliæ*. Each archbishop hath within his province suffragan bishops of several diocesses (3). The archbishop of *Canterbury* hath under him within his province, of ancient foundations, viz. *Rochester* his principall chaplaine, *London* his deane, *Winchester* his chancellor, *Norwich*, *Lincolne*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bathe* and *Wells*, *Worcester*, *Coventry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David*, *Bangor*, and *St. Assaphe*, and four founded by king *Henry* 8. erected out of the ruins of dissolved monasteries (that is to say) *Gloucester*, *Bristow*, *Peterborow*, and *Oxford*. The archbishop of *Yorke* hath under him four, (viz.) the bishop of the county palatine of *Chester*, newly erected by king *Henry* 8. and annexed by him to the archbishopricke of *Yorke*, of the county palatine of *Durham*, *Carlisle*, and the isle of *Man*, annexed to the province of *Yorke* by *H.* 8. but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishoprickes and bishoprickes of *England* were founded by the kings of *England*, to hold by barony, as hereafter shall be said (4). * And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of *Canterbury* hath the precedencie, next to him the archbishop of *Yorke*, next to him the bishop of *London*, and next to him the bishop of *Winchester* (5), and then all other bishops of both provinces after their ancientnesse.

(4 Inst. 321.)

Matth. Parker de vitis archiepiscoporum. Lindwood. Camden Britannia. Vid. Rot. Parliam. anno 36 H. 8. 1 E. 6. 5 E. 6. &c. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop's see, and long since translated to Coventry. 33 H. 8. ca. 31. Camden ubi supra. 26 H. 8. first fruits and tenths. Vid. Sect. 137.

* 3 Co. 73.

deane and chap. of Norwich case. Vide Sect. 134. 201. 31 H. 8. cap. 10.

Every diocesse is divided into archdeaconries, whereof there be 60; and the achdeacon is called *oculus episcopi*; and every archdeaconry

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(2) The student will find a good history of the dissolution of monasteries in England in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.

(3) Here bishops are styled suffragans in respect of their relation to the archbishop of their *province*; but formerly each archbishop and bishop had also his suffragan, to assist him in conferring orders and in other *spiritual* parts of his office within his *diocese*. These in our ecclesiastical law are called suffragan bishops, and resemble the *chorepiscopi* or *bishops of the country* in the early times of the christian church. How this *inferior* order of bishops *may* be elected and consecrated is regulated by the 26 H. 8. c. 14, but notwithstanding this statute, it is not usual to appoint them.—They should not be confounded with the *coadjutors* of a bishop; the *latter* being appointed in case of the bishop's infirmity to superintend his *jurisdiction* and *temporalties*; neither of which was within the interference of the former. See fully on this subject in Gibs. Cod. 1st. ed. v. 1. 155.—[Note 96.]

(4) See ante 70. b. note 2. post. 164. a.

(5) This is a mistake; for the statute, by which precedency is principally regulated, gives the bishop of Durham place between the bishop of London and the bishop of Winchester. See 31 H. 8. c. 10. s. 3.—[Note 97.]

deaconry is parted into deanries; and deanries again into parishes, townes and hamlets. And thus much, for the better understanding of our author, and how the state ecclesiasticall standeth at this day, shall suffice.

Vide more hereof, Sect. 180. 528. 648, &c.

"*Frankealmoigne, that is to say in Latine, in liberam eleemosinam,*" in *English*, in free almes. There is an officer in the king's house called *eleemosinarius*, vulgarly called the king's almner (whose office and duty is excellently described in ancient authors), viz. *fragmenta diligenter colligere, et diligenter distribuere singulis diebus egenis; ægrotos et leprosos, incarceratos, pauperesque viduas, et alios egenos vagosque in patriâ commorantes charitativè visitare: item equos relictos, robas, pecuniam, et alia ad eleemosinam largita recipere, et fideliter distribuere. Debet etiam regem super eleemosinæ largitione, crebris summonitionibus stimulare, præcipuè diebus sanctorum, et rogare ne robas suas quæ magni sunt pretii, histrionibus, blanditoribus, accusatoribus, seu menistrallis, sed ad eleemosinæ suæ incrementum, jubeat largiri* (6).

Fleta, lib. 2, cap. 23.

All ecclesiasticall persons may hold in frankalmoign, be they secular or regular; and no lay person can hold in frankalmoign. This adjective *(liber)* doth distinguish many things in law from others; as here, *libera eleemosina* are words appropriated to this case, and do distinguish it from a tenure by divine service; *liberum tenementum*, from a tenure in villenage, by copyhold or base tenure; *liberum feodum*, franke fee, from a tenure in ancient demeane; ☞ *liberum maritagium*, from other estates taile; *libera firma*, frank ferme, when an estate is changed from knights service to socage; *liberum socagium*, from a tenure by service in chivalrie; *francus bancus*, to distinguish it from other dowers, for that it cometh freely without any act of the husband's or assignement of the heire; *libera lex*, to distinguish men who enjoy it, and whose best and freest birthright it is, from them that by their offences have lost it, as men attainted in an attaint, in a conspiracie upon an indictment, or in a *præmunire*, &c. and so of *libera capella, francus plegius* frankpledge, *libera chasea* free chase, *liber burgus, liber aper, liber taurus*, and the like. But in a matter (some will say) of curiosity, this shall suffice; and yet seeing it tends to the better understanding (others say) it is tolerable.

[94. b.]

Vide Sect. 1. Bract. l. 4, c. 37, 38. Britton, cap. 32. Britton, cap. 66. Bract. lib. 4. F. N. B. 150. Bract. lib. 4, fo. 288. 247. 292. Brit. fol. 245. Fleta, lib. 5, cap. 11. Fortescue, c. 26. 24 E. 3. 34. 48 E. 3. Conspir. 11. 27 Ass. 59. Stanf. 175. Vide Sect. 199. Fleta, lib. 1, cap. 47.

By the ancient common law of *England*, a man could not alien such lands as he had by descent, without the consent of his heire; (1) yet he might give a part to God in free almoigne, or with his daughter in free marriage, or to his servant *in remuneratione servitii*. Our old bookes described frankalmoign thus; when lands or tenements were bestowed upon God, (that is) given to such people as are consecrated to the service of God. In our ancient bookes these gifts of devotion were called Churchesset, or Churchseed, *quasi semen ecclesiæ;* but in a more particular sense it is described thus: *certam mensuram bladi tritici significat, quam quilibet olim sanctæ ecclesiæ die sancti Martini, tempore tam Britonum quàm Anglorum, contribuerunt. Plures tamen magnates, post Romanorum adventum, illam contributionem secundùm veterem legem Moisis nomine primitiarum dabant, prout in brevi regis Knuti ad*

Glanvil. lib. 7, ca. 1, fo. 44, 45. acc.

Britton, ca. 66, fol. 164. Bract. lib. 2, ca. 5 & 10. F. N. B. 211.

Fleta, lib. 1, cap. 42*.

* *The passage in Latin cited by lord Coke is in cap. 47, of the second edition of Fleta.*

(6) The office of king's almoner is usually given to the archbishop of York, with the title of lord high almoner.—[Note 98.]

(1) See Wright's Ten. 167.

ad summum pontificem transmisso continetur, in quo illam contributionem Churchsed appellant, quasi semen ecclesiæ.

"*And such tenure.*" For albeit neither fealty, nor any other temporall service is due, yet it is a tenure.

"*In old time.*" [a] That is to say, before the statutes of mortmaine, viz. *Magna Charta*, cap. 36, and 7 *E.* 1, *de religiosis, &c.* and before the statute of *quia emptores terrarum*, as shall be hereafter in his proper place said in this chapter (2). 7 E. 4. 12. 33 H. 6. 6, 7. 39 H. 6. 29. [a] Mortmaine. Britton, fol. 32, & 90. Bracton, lib. 2, cap. 5. Fleta, lib. 3, cap. 5. 11 H. 7. 12. (2 Ro. Abr. 61.)

"*Infeoffed an abbot and his covent, &c.*" Albeit the covent be dead persons in law, and the abbot only capable (as before is said), yet if the feoffment be made to an abbot and covent, the feoffment is good, and the state vesteth only in the abbot. And note a man may infeoffe an abbot, a bishop, a parson, &c. or any other sole body politique, by deed or without deed, in free almes; and so may a gift in frankmariage be made without deed also; but if lands be given to deane and chapter, or any other corporation aggregate of many, there the gift must be by deed (3). 39 H. 6. 30. b.

"*To have and to hold to them and their successors.*" For in case of an abbot or prior and covent regularly a fee simple doth not passe without this word (successors); (4) for the diversity standeth thus betweene a corporation aggregate of many capable persons, and a sole corporation. As if lands be given to a deane and chapter, they have a fee simple without this word (successors), for that the body never dies; but if lands be given to a bishop, parson, or any other sole corporation, who after their deceases have a succession, there without this word (successors) nothing passeth unto them but for life (5). But of corporations aggregate of many, there is a diversity when the head and body both are capable, as in the case of deane and chapter, and when one (as hath been said) is onely capable, as in case of abbot or prior and covent; but yet out of the generall rules, the case of frankalmoign is (1 Ro. Abr. 832.) Vid. Litt. in the Chapter of Fee simple, Sect. 1, a.

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(2) See post. Sect. 140.

(3) In *general* a corporation aggregate cannot take or pass away an interest in land, or even do any acts of importance, without deed; but there are several exceptions to the rule. See ante 66. b. Vin. Abr. *Grants*, D. a. *Corporation*, K. Com. Dig. *Franchises*, F. 12, 13, 14. New Abr. *Corporation*, E. 3.—[Note 99.]

(4) Contra 1 Ro. Abr. 832.—Also in the following annotation by lord Hale, which he gives at the bottom of fol. 8. b. several authorities are cited to the contrary. Vid. 7 E. 3. 41. 11 H. 4. 84. *Gift to abbot and monks passeth fee simple. If an abbot makes lease* reddendo *rent* nobis, *it enures to the successor.* 20 *H.* 6. 8. *Land granted to the abbot of S. and his heirs is only for life.* 9 H. 5. 9. Hal. MSS.—See further the authorities cited in Vin. Abr. *Estate*, L. pl. 1.—[Note 100.]

(5) Acc. ante 8. b. But some take a distinction between describing a sole corporation both by his *natural* and *politick* name, and describing him by his *politick* name only; and it has been resolved, that a visitatorial power, granted to the bishop of Ely over Trinity College, Cambridge, in the *latter* way, ought to be construed as a grant to the bishop of Ely for *the time being*, and therefore extended to *successors*. This point was adjudged in Dr. Bentley's case. See 2 Stra. 913. Fitz. Gibb. 308. 312. 1 Barnard. 453.—[Note 101.]

39 H. 6. 30. is excepted, as hereafter shall be said. Also lands must be given to a corporation aggregate of many by deed; but to a sole corporation it may be granted without deed.

Bracton, lib. 2. cap. 10. *Potest donatio fieri in liberam elemosinam ecclesiis cathedralibus, conventualibus, parochialibus, et viris religiosis.*

35 H. 6. 56. 7 E. 4. 11. Vid. Bract. lib. 2, ca. 10. "*In pure and perpetual almes.*" Here it appeareth, that a tenure in frankalmoigne may be created without this word (*libera*), for *pura* implyeth as much.

35 H. 6. 56. 7 E. 4. 11. Bract. ubi supra. 44 E. 3. 24. "*Or in frankalmoigne.*" But one of these words, either *pura* or *libera*, must be used, or else it is no tenure in frankalmoigne.

20 H. 6. fol. 36. 38 E. 3. 4. a. 14 H. 6. 12. 10 H. 7. 13. 16 H. 7. 9. 18 E. 3. Counsans 39. 33 H. 6. 22. 17 E. 3. 51. 6 E. 3. 54, &c. Tr. 5 H. 3. Rot. 4. in Scaccario. The prior of Dunstable's case. "*Or by such words, to hold of the grantor, or of the lessor, and his heires in free almes.*" Here it appeareth, that by these words a fee simple passeth without this word (successors), albeit it be in case of a sole corporation. For as in case of a gift in frankmariage, an estate taile passeth to the donees without the words (of the heires of their two bodies) as hath beene said in the Chapter of Fee taile; so in case of a gift in frankalmoigne (which may be resembled to a divine mariage), a fee simple passeth, as hath bin said, though it be in case of a sole corporation, without this word (successors). And besides, grants in frankalmoigne are ancient grants, as hath beene said, and therefore shall be allowed, as the law was taken, when such grants were made.

☞ Sect. 134. [95. a.]

IN the same manner it is, where lands or tenements were granted in ancient time to a deane and chapter and to their successors, or to a parson of a church and his successors, or to any other man of holy church and to his successours, in frankalmoigne, if he had capacitie to take such grants or feoffments, &c.

"*IN the same manner, &c.*" Here *Littleton*, having put an example of bodies incorporate aggregate of many, whereof the head is only capable, now putteth examples both of bodies incorporate aggregate of many (all being capable) and of sole corporations of secular persons.

"*Deane*," *Decanus*, is derived of the *Greek* word δεκα, that signifieth Ten, for that he is an ecclesiasticall secular governour, and was anciently over ten prebends, or canons at the least, in a cathedral church, and is head of his chapter (1).

"*Chapter*,

(1) Various kinds of deans, besides deans of chapters, are known to our law: and it requires more divisions than one to distinguish them properly. Considered in respect of the *difference of office*, deans are of *six* kinds. 1. Deans of *chapters*, who are either of cathedral or collegiate churches; though the members of churches of the latter sort may more properly be denominated *colleges* than *chapters*. 2. Deans of *peculiars*, who have sometimes both jurisdiction and cure

"*Chapter*," *Capitulum est clericorum congregatio sub uno decano in ecclesiâ cathedrali* (2). And chapters be twofold, viz. the ancient and the later. And the later be also of two sorts. First, (3 Co. 73.)

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cure of souls, as the dean of Battel in Sussex; and sometimes jurisdiction only, as the dean of the Arches in London, and the deans of Bocking in Essex and of Croydon in Surrey. 3. *Rural* deans. 4. Deans *in the colleges* of our universities, who are officers appointed to superintend the behaviour of the members and to enforce discipline. 5. *Honorary* deans, as the dean of the Chapel Royal at St. James's, who is so styled on account of the dignity of the person over whose chapel he presides. As to the chapel of St. George, Windsor, there being canons as well as a dean, it is something more than a mere chapel, and, except in name, resembles a collegiate church. 6. Deans of *provinces*, or, as they are sometimes called, deans of bishops. Thus the bishop of London is dean of the province of Canterbury, and to him as such the archbishop sends his mandate for summoning the bishops of his province, when a convocation is to be assembled; which perhaps may account for calling the dean of the province dean of the bishops. What the other parts of his office are, the books we have been able to consult do not explain; nor do they mention whether there is a dean for the province of York. See Lyndw. Oxf. ed. 317. Gibs. Synod. Anglican. 17. Ante 94. a.—Another division of deans, arising from the nature of the office, is into deans of *spiritual* promotions and deans of *lay* promotions. Of the former kind are deans of peculiars with cure of souls, deans of the royal chapels, and deans of chapters; though as to these last a contrary opinion formerly prevailed. Perhaps too rural deans may be added to the number. Of the latter kind are deans of peculiars without cure of souls, who therefore may be and frequently are persons not in holy orders. In respect of the manner of appointment, deans are, 1. *Elective*, as deans of chapters of the *old* foundation; though they are only so nominally and in form, the king being the real patron, which will appear from the next note but one. 2. *Donative*, as those deans of chapters of the *new* foundation, who are appointed by the king's letters patent, and are installed under his command to the chapter, without resorting to the bishop either for admission or for a mandate of instalment; if that mode of promoting *still* prevails in respect to any of the new deaneries. See the next note but one. Deans of the royal chapels are also *donative*, the king appointing to them in the same way. So too may deans of peculiars without cure of souls be called; as the dean of the *Arches*, who is appointed by commission from the archbishop of Canterbury; but this must be understood in a large sense of the word *donative*, it being most usually restrained to *spiritual* promotions. 3. *Presentative*, as some deans of peculiars with cure of souls, and the deans of *some* chapters of the *new* foundation if not of *all*. Thus the dean of Battel is presented by the patron to the bishop of Chichester, and from him receives institution. Thus too the dean of Gloucester is presented by the king to the bishop with a mandate to admit him and to give orders for his instalment. See the next note but one. 4. *By virtue of another office*, as the bishop of London is dean of the province of Canterbury, and the bishop of St. David is dean of his own chapter.—Again in respect of the manner of holding, deans are so *absolutely* or *in commendam*. But this division applies only to *spiritual* deaneries.—In thus pointing out the several denominations of deans we have attempted a more comprehensive as well as a nicer *general* discrimination and arrangement, than the books usually resorted to furnish; though to them we are indebted for most of the materials, and to them we refer the student for a competent idea of the nature of each kind of deanery. See *Decanus* and *Deanery* in Spelm. Gloss. Cow. Dict. Ayl. Parerg. Nels. Rights of the Clerg. Burn. Eccles. L. and the Index to Gibs. Cod.—[Note 102.]

(2) But the name of chapter is not confined to *cathedrals*, the prebendaries

First, those which were translated or founded by king *Henry* the eighth, in place of abbots and covents, or priors and covents, which were chapters whiles they stood; and these are new chapters to old bishoprickes. Secondly, where the bishopricke was newly founded by *Henry* the eighth (as *Chester*, *Bristow*, &c.) there the chapters are also new (3). There is a great diversitie betweene the commings in of the ancient deanes and of the new. For the ancient come in, in much like sort as bishops doe; for they are chosen by the chapter, by a *conge de eslier*, as bishops be, and the king giving his royall assent they are confirmed by the bishop. But they which are either newly translated or founded, are donative, and by the king's letters patents are installed, which are matters necessarie to be knowne (4).

"*If*

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and canons of *collegiate* churches being also styled chapters; though rather improperly, as we have before hinted.—[Note 103.]

(3) The *new* deaneries and chapters to *old* bishopricks are *eight;* namely, Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle. The new deaneries and chapters to *new* bishopricks are five; namely, Peterborough, Chester, Gloucester, Bristol, and Oxford. See Will. Cathedr.—[Note 104.]

(4) In this account of the *old* and *new* deaneries, many particulars, relative to the manner of coming to the possession of them, are omitted; and therefore we shall add some *general* things historically in respect to both. As to the *old* deaneries, it will be very difficult to trace the subject, with any tolerable degree of precision, higher than the reign of king John, or to ascertain what was the *legal* mode of constituting deans of chapters before. If our ancient chronicles are to be depended upon, nothing could be more variable than the practice for several reigns after the Conquest. Thus in the church of York, we find sometimes the archbishop collating to the deanery, sometimes the king conferring, and sometimes the chapter electing; and it is probable, that a like uncertainty prevailed in other cathedrals. See Drake's Antiq. York 557 to 565. 1 Will. Surv. Cathedr. 64. At length however after many struggles the *elective* mode of constituting deans, as well as bishops, abbots, and priors, was established throughout the kingdom; for king John by a charter of the 16th of his reign grants, *ut de cætero, in universis et singulis ecclesiis et monasteriis cathedralibus et conventualibus totius regni nostri Angliæ, liberæ sint in perpetuum electiones quorumcunque prælatorum majorum et minorum;* and *deans* of chapters clearly fall within the description of *minor prelates.* See king John's charter in 1 Coll. Eccles. Hist. Append. No. 33, and as to the word *prælatas*, consult Lyndw. Oxf. ed. 41, and 217. But notwithstanding the strong terms in which the freedom of canonical election is provided for by this charter, and the repeated confirmation of it by various statutes, the election of a dean by the chapter is by long practice converted into a mere form, and the king is in reality as much the patron of the *old*, as he is both in name and substance of the *new* deaneries. For two centuries past at least, the king's *conge d'élire*, which by the charter of John must precede every election of a prelate and was in use long before, hath been invariably accompanied with the king's *letter missive*, as it is styled, recommending a particular person, whom the chapter of course elect their dean. In the case of the *old bishopricks*, which are filled in the same form, the election of the person named by the crown is secured by a statute of the 25th of Henry the eighth, which compels the chapter to yield to the recommendation by the pains of *præmunire*, and if they refuse authorizes the king to appoint a bishop by letters patent. See post. 134. a. But no such statute hath been yet made in respect to the *old* deaneries; and therefore the right of the crown over them rests wholly on the charter of king John and the subsequent practice. Here then

" *If he had capacitie to take.*" For ecclesiasticall persons have not capacitie to take in succession, unlesse they be bodies politique;

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then it may be asked, how the crown, without the aid of a statute, can enforce its claim of patronage; and what are the means, by which the nomination would be made effectual if the chapter should disregard the royal recommendation, and persevere in a *free* exercise of the right of electing? This question may be resolved, by considering, that even the charter of king John requires the king's confirmation of the choice made by the chapter; and therefore by refusing to confirm he may always prevent the effect of their election. Nay it hath been said, that the election is so wholly a ceremony as not even to be essential, and that even before any act of parliament to dispense with it the king might nominate to the *old* bishopricks by letters patent, without resorting to the chapter for the form of their concurrence; and the *old* deaneries are within the same reason. See Revan O'Brian v. Knivan in Cro. Jam. 552. Palm. 22, and 2 Ro. Rep. 101. 130, and s. c. cited in F. N. B. 4to ed. 396, note (a). This doctrine, it must be owned, notwithstanding the positive terms in which it was asserted, and the reverence due to the judges by whom it was recognised, seems as repugnant to the *letter* of king John's charter, as the mode of electing in conformity to the *letter missive* certainly is to the genuine *spirit* and intention. But the latter having the sanction of a practice too ancient to be now drawn into question, it can be of little use to deny the former; and accordingly in the reign of Charles the first we find some instances, in which the king actually appointed to some of the old deaneries by letters patent without the least appearance of opposition on the part of the chapter. See Rym. Fœd. vol. 8, part 3, page 166, vol. 9, part 1, p. 82. To fix the time when the *letter missive*, in respect either to the old deaneries or the old bishopricks, first came into use; to explain how from a mere recommendation it grew into a royal mandate; and more particularly to determine, whether it operated as such before the Reformation, or whether *that*, in consequence of the assertion of the king's supremacy, was the æra of implicit obedience to it; might be both curious and useful. Probably the *letter missive* was not *generally* used to controul the freedom of election, till after the time of Edward the first. At least mr. Prynne, hostile as he was to canonical election, he deeming it an usurpation to the prejudice of the royal prerogative, gives us a *conge d'élire* of Edward the first for the election of a bishop, which concludes with a recommendation to the chapter in *general* terms to chuse a person duly qualified; but he takes no notice of its being accompaaied with a *letter missive*; a circumstance which, had it occurred, would scarcely have escaped his observation, See 3 Pryn. Rec. 1255. The earliest precedent of such a letter we have hitherto met with since the charter of king John, is of the year 1347, when Philip de Weston is said to have been elected to the deanery of York on exhibiting a letter from Edward the third. Drak. Antiq. York, 563. Another instance of a *letter missive* relative to the same deanery occurs in 1544; Henry the eighth signifying it to be his pleasure that dr. Wooton should be elected, and the chapter electing him accordingly. Drak. Antiq. York, 565, and Append. 81. These few facts may give *some* idea of the gradation, by which the crown hath possessed itself of the complete patronage of the old deaneries. We are not prepared for a more ample discussion: and if we were, this would not be the proper place for a subject so extensive.—As to the deans of the *new* foundation, though the king nominates by letters patent, yet *some*, if not *all*, of the *new* deans of *cathedral* churches are *now* deemed *presentative* and not *donative*, the practice being to present the letters patent to the bishop for institution and a mandate of installment. It hath indeed been a question, whether they are *donative* or *presentative*; for the understanding of which we shall shortly state the principal facts on which the case, so far as relates to the *deanery* of Gloucester, depends.

politique; as bishops, archdeacons, deanes, parsons, vicars, &c. or lawfully incorporate by the king's letters patents, or prescription; as

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The new deaneries were erected by Henry the eighth under powers given by act of parliament, which also authorized him to make statutes for their regulation by *letters patent or writing under the great seal.* In the charter for founding the deanery of Gloucester, being one of the *new* foundation, the king reserved the nomination of the deans to himself, and directed, that the deans and chapters should be governed according to such rules and statutes as the king should appoint by *indenture.* The king afterwards by commissioners named for the purpose formed a body of statutes, amongst which one required, that the king should upon every vacancy nominate a dean by letters patent, and that he should be presented to the bishop, and being instituted by him should be admitted by the chapter. The commissioners signed these statutes; but they were neither under the *great seal* nor *indented;* and on account of this deviation both from the act of parliament and the commission, they were considered as invalid, and powers were given by other acts to Mary and Elizabeth successively to form other statutes. However nothing final being done under these powers, *some* of the statutes framed by Henry the eighth's commissioners, for want of others more regularly made, were adopted, but the particular statute which made the deanery *presentative,* was never practised *after* the Restoration; and only in one instance *before,* the deans being constituted by mere grants from the crown. In this state of things came the 6 Ann. c. 21, which established *such* of the statutes of the cathedral and collegiate churches founded by Henry the eighth, *as had been usually received and practised in the government of the same respectively since the Restoration,* and were not inconsistent with the constitution of the church of England or the laws of the land. But this act, made to remove doubts, created a very important one; which was, whether the act confirmed the *whole* body of statutes where *any* of them had been practised since the Restoration, or only such statutes or parts of statutes as had been *individually* received. Amongst other cases which depended on the solution of this doubt, one was the mode of constituting the dean of Gloucester; for if receiving a part of Henry the eighth's statutes necessarily was followed with a confirmation of the whole, then the cathedral church of Gloucester being under this predicament, it was become essential to conform to the particular statute, which required a presentation of the dean to the bishop, though that form had hitherto been disregarded. It being of importance to have this point settled, the crown in 1720 referred it to sir Philip Yorke and sir Robert Raymond the then attorney and solicitor general, who were of opinion, that it was intended by the act of queen Anne to confirm the whole body of statutes where any part had been received, and therefore that in the case of the particular deanery of Gloucester a presentation was become necessary; though they allowed the question to be one of *great doubt* and *difficulty.* See Burn. Eccl. L. tit. *Deans* and *Chapters.* To this opinion was added the form of a presentation; and it is presumed that the deanery of Gloucester hath ever since been treated by the crown as *presentative.* Probably too under the same sanction the example may have been followed in respect of such other of the *new* deaneries as at the time of the act of queen Anne were in the same circumstances; that is, had statutes of doubtful authority from Henry the eighth or any of his successors, some of which between the Restoration and the act of Anne had been usually practised, though not the particular one directing a presentation of their deans. But whether this construction of the act of Anne hath ever been judicially recognized, we cannot inform the reader. As to those *new* deaneries, which had statutes requiring a presentation and usually complied with *after* the Restoratioa, there cannot be the least doubt of their being legally *presentative.* But if there are any of the *new* deaneries, the rules and statutes

as deanes and chapters, colledges, &c. But a colledge of religious persons, chauntry priests, and such like, that are not lawfully

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statutes of whose churches are wholly silent as to presentation, it is most likely that they always have been donative, and still continue so; and we guess, that the church of Westminster may fall under this description, it being *collegiate*, and not for any other purpose subject to the jurisdiction of any bishop.—From this detail about appointing to deaneries of the new foundation, it seems that lord Coke was fully justified in styling *all* of them *donative;* for it is said, that none of the charters for founding the *new* deaneries mention presentation, and that the subsequent statutes prescribing it were equally liable to the objection of *informality* as those of the church of Gloucester, and there was no act for establishing them in lord Coke's time. On the other hand, bishop Gibson *might* be equally warranted in calling *all* the *new* deaneries *presentative*, if we except the collegiate church of Westminster; because in 1713, when the *first* edition of his book on Ecclesiastical Law was published, they were become so by the operation of the act of act of queen Anne. This distinction of *time* did not strike the bishop, though a writer in general well informed and much to be relied on, when he animadverted on those, who like lord Coke denominated the *new* deaneries *donative.* 1 Gibs. Cod. 197.

What we have hitherto observed, as to the manner of constituting the *old* and *new* deans, must be confined to *England;* those of *Wales* and *Ireland* being under different circumstances, and therefore reserved for a separate consideration. Of the *four* Welsh cathedrals, *two* are without deans; or rather the dignities of bishop and dean unite in the same person, the bishop being deemed *quasi decanus*, and having, it is said, both an episcopal throne and a decanal stall allotted to him in the choir. The cathedral churches of St. David's and Llandaff are of this kind. St. Asaph and Bangor, the other two Welsh cathedrals, have the dignity of dean distinct from that of bishop; but the patronage of both deaneries is in the respective *bishops*, they being neither elective by the *chapter*, nor donative by the *crown*. See Ect. Thesaur. ed. of 1742, and Will. Parochial. Anglic. In respect to *Ireland*, as we are informed, before the Reformation the deaneries of the cathedral churches there were elective by the respective chapters, under a *conge d'élire* from the crown, in much the same manner as the *old English* deaneries. But since the Irish act of the 2d of Elizabeth, c. 4, s. 1, which takes away the election of bishops in Ireland, and declares them wholly donative by the king, and hath never been repealed as the English statute of Edward the sixth to the same effect was, the form of electing to the *old* deaneries hath been also discontinued, and the king appoints to them by letters patent as to bishopricks. This change, so far as regards the Irish old deaneries, not having yet had a parliamentary sanction, its legality depends on a notion, that the patronage of deaneries as well as of bishopricks was an ancient right of the crown, that the election by the chapter was a mere ceremony, and that the statute for putting an end to it in the case of the bishopricks was a provision of caution and not one of necessity; and this notion, little consonant as it may appear to some of the facts we have stated in our historical account of the *old* English deaneries, is not only supported by practice since the reign of Elizabeth, but seems to have been *judicially* recognized and acted upon in the case of the Irish bishoprick already cited from Croke James and other books. See ante 96. b. in the notes. Such, we are told, is the state of the patronage of the Irish *old* deaneries *in general;* but it must be added, that the right of the crown over *one* or *two* of them, which either are or are supposed to be under peculiar circumstances, is denied by the chapters. Suits on this subject have been depending between the crown and the chapter of *St. Patrick*, one of the two cathedrals of the archbishoprick of Dublin; the crown claiming the deanery as a royal *donative.* and the chapter insisting

lawfully incorporated, but onely consist in vulgar reputation, have no capacity to take in succession. Therefore *Littleton* added materially *(if he had capacitie to take)*.

Sect.

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insisting that the dean is *elective* by them on a *conge d'élire* not from the *king*, but from the *archbishop of Dublin*, and that it is so in the true sense of the word, and not in *name* only, like our English deaneries of the old foundation. See in 17 E. 3. 40, a case in which the deanery of York is pleaded to be elective in this form. One amongst other grounds, on which the chapter are said to defend their title, is, that the deanery was founded by an archbishop of Dublin. See War. Irel. by Harr. vol. 1, p. 302. But it seems, that both this fact and the inference from it are denied on the part of the crown. We have also heard, that the chapter of *Kildare*, which is another of the *Irish old* deaneries, claim a right of electing their own dean in the same way. As to the *Irish new* deaneries, we are told that all of them are unquestionably *royal donatives*. The only one, about which there hath been any contest, is the deanery of *Dromore*, the collation of which was some years ago claimed by the bishop under letters patent from king James the first; but the patent not being warranted by the king's letter, on which it passed, the crown prevailed. We shall close this note about the *old* and *new* deaneries of cathedral and collegiate churches, with some general observations on the various modes of constituting them. From the inquiries we have made into the subject, it seems to us that the right to appoint such deans and the mode must generally depend almost wholly upon *charters*, *usage* or *acts of parliament*, and very little on arguments drawn from the *nature of the office* or from *foundership*, however common those topicks may be. The *former* indeed can scarce have influence on any case, which may arise as to the appointment of deaneries. What is there in the nature of the office, which is inconsistent with its being *elective*, *presentative*, *donative*, or *collative*, or which renders either of those modes so incongruous as to be contrary to any principle of our law? What is there in the office, which imports, that the patronage should *necessarily* be in the crown, though it usually is? The facts we have stated shew, that in England some deaneries are *nominally elective* under the *royal conge d'élire*, and the rest *really presentative* or *donative* by the crown; and that the only two deaneries of the Welsh cathedrals are *collative* by bishops. Nay, if it can be proved, that election under a *conge d'élire* from a *bishop*, instead of one from the *king*, is an established mode of appointing to any deanery in Ireland, we do not see any legal objection to it *merely as a mode*, however *singular* it may be. The argument from foundership will also for the *most part* be found inconclusive. Several of the English *old* deaneries were certainly endowed by bishops, either with their own private possessions, or by dismembering those of their respective sees; and yet *all* are *elective* under a *conge d'élire*, not from *bishops*, but from the *king*. 1 Stilling. Eccles. Cas. 341. But should a case ever happen, in which there is neither *charter*, *usage* nor *statute* prescribing a rule, then some general principle of law must be appealed to for a direction; and in such a case, which is barely a possible one, *foundership* seems to be the *true* and indeed *only* criterion of the title to the patronage and right of constituting. It is feared, the reader will think, that we have dilated too much on the *modes of constituting* deans of *cathedral* and *collegiate* churches; but as there is little of *digested* matter upon the subject in other books, this may excuse us for detaining him so long here. For the *different* instruments and other *forms* made use of in appointing deans both of *old* and *new* chapters in England, see 2 Ought. Ord.—Note, that on *promotion* to a bishoprick, deaneries, as well as other spiritual preferment, becoming void after *consecration*, and in consequence of it, the king being by *prerogative* intitled to the next turn, therefore in this particular instance the *English* deaneries of the *old* foundation are not even *nominally elective*.—[Note 105.]

Sect. 135.

AND they, which hold in frankalmoigne, are bound of right before God to make orisons, prayers, masses, and other divine services, for the soules of their grantor or feoffor, and for the soules of their heires which are dead, and for the prosperity and good life and good health of their heires which are alive. And therefore they shall doe no fealty to their lord; because that this divine service is better for them before God, than any doing of fealty; and also because that these words (fankalmoigne) exclude the lord to have any earthly or temporal service, but to have onely divine and spirituall service to be done for him, &c.*

IN this Section there appeareth a division of tenures, that is to say, some be spirituall, and some be temporall. And of spirituall some be incertain, as tenures in frankalmoign; and some be certain, as tenures by divine service. Again, divine service certaine is two-fold; either spirituall, as prayers to God; or temporall, as distribution of almes to poore people.

[95. b.] "☞ *Bound of right.*" That is, they are compellable by the ecclesiasticall law to doe it; and therefore it is said that they are bound of right, (for want of remedy and want of right is all one) and the common law (as here it appeareth) taketh knowledge of the ecclesiasticall law in that behalfe.

"*To make orisons, prayers, masses, and other divine services.*" Since *Littleton* wrote, the lyturgye or booke of Common Praier and of celebrating divine service is altered. This alteration notwithstanding, yet the tenure in frankalmoigne remaineth; and such prayers and divine service shall be said and celebrated, as now is authorized: yea, though the tenure be in particular, as *Littleton* [a] hereafter saith, viz. *to sing a masse, &c. or to sing a placebo et dirige*, yet if the tenant saith the praiers now authorised, it sufficeth. And as *Littleton* [b] hath said before in the case of socage, the changing of one kinde of temporall services into other temporall services altereth neither the name nor the effect of the tenure; so the changing of spirituall services into other spirituall services altereth neither the name nor effect of the tenure. And albeit the tenure in frankalmoigne is now reduced to a certaintie contained in the booke of Common Prayer, yet seeing the originall tenure was in frankalmoigne, and the change is by generall consent by authority of parliament, [c] whereunto every man is party, the tenure remaines as it was before.

[a] Vide Sect. 137.

[b] Vide Sect. 119.

[c] 2 E. 6, c. 1. 5 & 6 E. 6, cap. 1. 1 Eliz. ca. 2.

"*Shall do no fealty.*" Herein tenant in frankalmoigne differeth from a tenant in frankmarriage; for tenant in frankmarriage shall doe fealty, as hath beene said in the Chapter of Fee taile, but tenant in frankalmoigne shall not doe any, or any other thing, but *devota animarum suffragia*.

"*Such divine service is better for them.*" And it is also said in

* *The word* heires *seems to be here inserted for* ancestors. *See Mr. Ritso's Intr. p.* 115.

[d] 33 H. 6. 6. 13 E. 1. tit. Count de Voucher 118.

in our bookes [d], *que frankalmoigne est le pluis haute service;* and this was confessed by the heathen poet:

——fuit hæc sapientia quondam
Publica privatis secernere, sacra profanis.

And certaine it is, that *nunquam res humanæ prosperè succedunt, ubi negliguntur divinæ.*

Sect. 136.

AND if they, which hold their tenements in frankalmoign, will not or faile to do such divine service (as is said) the lord may not distraine them for not doing this, &c. because it is not put in certainty what services they ought to do. But the lord may complaine of this to their ordinary or visitour, praying him, that he will lay some punishment and correction for this, and also provide that such negligence be no more done, &c. And the ordinarie or visitor of right ought to doe this, &c.

"*THE lord may not distraine them for not doing this, &c.*"

"*Distraine.*" The ☞ word distresse is a *French* word. In *Latine* it is called *districtio, sive angustia;* because the cattell distrained are put into a strait, which we call a pownd. [96. a.]

"*Because it is not put in certainty what services they ought to do.*" It is a maxim in law, that no distresse can be taken for any services that are not put into certaintie, [e] nor can be reduced to any certainty; for, *id certum est, quod certum reddi potest;* for [f] *oportet quòd certa res deducatur in judicium:* and upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certaine enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the mannor which is certaine, the lord may distrain for this uncertainty. *Et sic de similibus.*

[e] 35 H. 6. 37. Br. tit. Offic. 4. 8 E. 3. 3. 66. 20 E. 3. Avowry 131. (Cro. Cha. 383. Cro. Jam. 585. 1 Sid. 263.)

[f] Bracton, fol. 230, & 328. (Post. 142.) 7 E. 3. 38.

(5 Co. 73. a.)

"*May complaine.*" That is, to complaine in course of justice, according to the eclesiasticall law.

[g] Mirror, ca. 5, sect. Bracton, lib. 5, fo. 405, &c. Fleta, lib. 2, ca. 50, & 55, lib. 6, ca. 38. Britton, fo. 69. 70 W. 2. ca. 19. 17 E. 2.

"*To their ordinary.*" *Ordinarius;* and so he is called [g] in the ecclesiasticall law, *quia habet ordinariam jurisdictionem in jure proprio, et non per deputationem.* The name we have anciently taken from the canonists, and doe apply it onely to a bishop, or any other that hath ordinary jurisdiction in causes ecclesiasticall. In this case of *Littleton* it is to be observed, that the law doth appoint every thing to be done by those, unto whose office it properly appertaineth; and forasmuch as it belongeth to the

Bre. 822. Regist. 141. Lindwood, tit. de Constit. cap. exter. Bract. lib. 5, ca. 2. fo. 400 & 401, and the other authors abovesaid. (Post. 344. 9 Co. 39. 2 Inst. 398.)

office

office of the ordinary in this case to see divine service said, and to compell them to doe it by ecclesiasticall censures, therefore complaint is to be made unto him. Here and in the next Section it appeareth, that for deciding of controversies, and for distribution of justice within this realm, there be two distinct jurisdictions; the one ecclesiasticall, limited to certaine spirituall and particular cases (of the one whereof our author here speaketh); and the court wherein these causes are handled, is called *forum ecclesiasticum*. The other jurisdiction is secular and generall, for that it is guided by the common and generall law of the realme, *quæ pertinet ad coronam et dignitatem regis, et ad regnum in causis et placitis rerum temporalium in foro seculari.* So as in this case put by our author, the lord hath remedy for his divine service (albeit they issue out of temporall lands) in *foro ecclesiastico*, by the ecclesiasticall law; otherwise the lord should be without remedy. Yet the common law, to the intent that ecclesiasticall persons might the better discharge their duty in celebration of divine service, and not be intangled with temporall businesse, hath provided, that if any of them be chosen to any temporall office, he may have his writ *de clerico infra sacros ordines constituto non eligendo in officium, &c.* and thereof be discharged. Regist. Orig. 187.

"*Or visitour.*" That is, where the king or any of his progenitors is founder of the house, there the ordinary regularly shall not visit them, but the chancellour of *England* is appointed by law to be visitor of them; or where a speciall visitor is appointed upon the foundation, the complaint must be made to that visitor. 27 E. 3. 84, 85. Regist. 40. F. N. B. 42. 10 Eliz. Dier. 273. 16 E. 3. Bre. 660. 21 E. 3. 60. 6 H. 7. 13. 8 Ass. 29. Brooke tit. Premunire 21.

"*Of right ought to doe this, &c.*" *Of right*, (that is to say) he ought it by the ecclesiasticall law in the right of his office.

And here is implied a maxime of the common law, that where the right (as our author here speaketh) is spirituall, and the remedy thereof onely by the ecclesiasticall law, the conusans thereof doth appertaine to the ecclesiasticall court. (5 Co. 66. b. 2 Co. 43. Plowd. 277.)

[96. b.]

☞ Sect. 137.

BUT if an abbot, or prior, holds of his lord by a certaine divine service, in certaine to be done, as to sing a masse everie Friday *in the weeke, for the soules,* ut supra, *or every yeare at such a day to sing a* placebo et dirige, *&c. or to finde a chaplain to sing a masse, &c. or to distribute in almes to an hundred poore men an hundred pence at such a day; in this case, if such divine service be not done, the lord may distreyne, &c. because the divine service is put in certaine by their tenure, which the abbot or prior ought to doe. And in this case the lord shall have fealtie, &c. as it seemeth. And such tenure shall not be said to be tenure in frankalmoigne, but is called tenure by divine service. For in tenure in frankalmoigne no mention is made of any manner of service; for none can hold in frankalmoigne, if there be expressed any manner of certaine service that he ought to doe, &c.*

"*BY*

2 E. 3. 27, 28. "*BY a certaine divine service to be done, as to sing a masse, &c. or to distribute in almes, &c.*" Here be the two parts above mentioned, of divine service; and for this divine service certaine, the lord hath his remedy, as here it appeares by our author, in *foro seculari:* for here it appears, that if the lord distreine for not doing of divine service, which is certaine, he shall upon his avowry recover dammages at the common law, that is, in the king's temporall court, for the not doing of it. And if issue be taken upon the performance of the divine service, it shall be tried by a jury of twelve men; because albeit the service be spirituall, yet the dammages are temporall, and so is the seigniory also.

(5 Co. 72. b. F. N. B. 209. L.)

38 H. 6. 26, 27.

2 E. 6. ca. 13. versus finem. 13 E. 3, ca. 5. 11 H. 7. c. 8. 1 El. ca. 2. 13 El. ca. 1. 23 El. ca. 1. 1 Ja. c. 11 & 12.

And here is implyed another maxime of the law, that where the common or statute law giveth remedy in *foro seculari*, (whether the matter be temporall or spiritual) the conusans of (4 Co. 20.) of that cause belongeth to the king's temporall courts onely; unlesse the jurisdiction of the ecclesiasticall court be saved or allowed by the same statute to proceed according to the ecclesiasticall lawes.

"*Or to distribute in almes to an hundred poore men.*" Here note, that the almes and reliefe of poor people, being a worke of charity, is accounted in law divine service; for what herein is done to the poore for God's sake, is done to God himselfe.

"*May distreyne, &c.*" Here (*&c.*) includeth many excellent things, as when, where, and what may be distreyned, of all which there is a taste given in their proper places. [97. a.]

"*In this case the lord shall have fealtie, &c. as it seemeth.*" For, as it hath beene said, fealty is incident to every tenure, saving the tenure in frankalmoigne, and where the lord may distreine, there is fealty due. And *Britton* calleth this tenure (by divine service) *aumone*, and not *libera eleemosina*. And, saith he, *tenure en aumone est terre ou tenement que est done a aumone, dount ascun service est retenue al feoffor.*

Brit. fo. 164.

"*&c.*" And here *(&c.)* implyeth distresse, escheat, and the like.

33 H. 6. fol. 6. Brit. ca. 66. (2 Inst. 460.) 13 E. 1. Count de Vouch. 118.

"*And such tenure shall not be said to be tenure in frankalmoigne, but is called tenure by divine service, &c.*" And therefore our old bookes divided spirituall service into free almes (which was free from any limitation of certainty) and almes, because the tenants were bound to certaine divine services.

"*If there be expressed any manner of certaine service.*" This holdeth where the certainty is reserved upon the original grant. If lands were given to hold *in liberâ eleemosinâ, reddendo* a rent, it seemeth the reservation of the rent to be void, * because it is repugnant and contrary to the former grant in *liberâ eleemosinâ.*

* 13 H. 4. tit. Mesne 74. 30 E. 3. 30. 19 E. 2. Avowrie 224. 32 E. 1. Taile 31. 26 Ass. 66. 4 H. 6. 17. Trin. 4 E. 3. F. N. B. 232. f. 15 E. 3. Corody 4. 11 Ass. 22. 50 Ass. Pl. 6.

Vide Trin. 4 *E.* 3, and *F. N. B.* 231. f. that an abbot or prior that hold in frankalmoigne shall not be charged with a corody.

Also

Also lands holden in frankalmoigne cannot [*l*] be ancient demesne, in respect of charges incident thereunto.

[*l*] 32 E. 1. Ant. Dem. 39. 8 E. 3. 5.

"*That he ought to doe, &c.*" Here by *(&c.)* is understood temporall or spirituall service also, which he ought to doe corporally, or render, or pay.

There were within this realme of *Englande* one hundred and eighteene monasteries, founded by the kings of *Englande*; whereof such abbots and priors as were founded to hold of the king *per baroniam*, and were called to the parliament by writ, were lords of parliament, and had places and voices there. * And of them there were twenty-seven abbots and two priors, as by the rolles of parliament appeares. But since our author wrote, all these (as hath been said) (1) are dissolved. King *Stephen* did found the abbey of *Feversham*, in Kent, *et dedit abbati et monachis, et successoribus suis, manerium de Feversham in com. Kanciæ, simul cum hundredo, &c. tenendum per baroniam, &c.* who albeit he held by a barony, yet because he was never (that I [*m*] finde) called by writ, he never sate in parliament.

(F. N. B. 232. a.) * For example, Rot. Parl. 5 H. 8. & 21 H. 8. &c.

[*m*] Canc. Pas. 30 E. 1. coram rege this foundation is so pleaded. (Post. 134. a. 344. a.)

All the archbishops and bishops of *England* have beene founded by the kings of *England*, and doe hold of the king by barony (as before hath beene said), (2) and have beene all called by writ to the court of parliament, and are lords of parliament. As (amongst many) take one notable record: [*o*] *Mandatum est omnibus episcopis, qui conventuri sunt apud Gloucestriam, die Sabbati in crastin. sanctæ Katharinæ, firmiter inhibendo, quòd sicut baronias suas, quas de rege tenent, diligunt, nullo modo præsumant consilium tenere de aliquibus quæ ad coronam regis pertinent, vel quæ personam regis, vel statum suum, vel statum consilii sui contingunt, sciturі pro certo, quòd si fecerint, rex inde se capiet ad baronias suas. Teste rege apud Hereford, 23 Novemb. &c.* And the bishoprickes in *Wales* were founded by the princes of *Wales*; and the principality of *Wales* was holden of the king of *England*, as of his crowne; and when the prince of *Wales* committed treason, rebellion, &c. the principality was forfeited, and the patronages of the bishops annexed to the crowne of *England*, so as the king is to have pensions for his chaplaines, and corodies for his vadelets, of them, as of bishops founded by himselfe (3). And *vide* Mich. 10 *H.* 4. Rot. 60. *Wallia coram rege*, that the judgment was given accordingly against the bishop of St. *David's* in *Wales, per justiciarios de utroque banco et alios de perito consilio domini regis.* And the bishops of *Wales* are also called by writ to parliament, and are lords of parliament, as bishops of *England* be.

[*o*] Ex. rot. pat. de anno 18 H. 3. m. 17.

10 H. 4, fo. 6. b.

Sect.

(1) See ante 94. a.

(2) See ante 70. b. and note 2, there.

(3) It seems, however, that it is not now the practice of the crown to exert this right of incumbering bishops with pensions and corodies. Should the student wish for any particular information concerning either, whether belonging to the king or to a common person, they not being peculiar to the former, the more ancient books must be resorted to; as those of modern date, except bishop Gibson's *Codex*, either wholly pass over the subject, or treat of it very slightly. See Fitz. N. B. 230, to 232, and title *Corody*, in Fitz. Abr. Bro. Abr. Ash. Prompt. and the Index to Gibs. Cod.—[Note 106.]

Sect. 138.

ALSO, if it be demanded, if tenant in frankmarriage shall do fealty to the donor or his heires before the fourth degree be past, &c. it seemeth that he shall. For he is not like as to this purpose to tenant in frankalmoign; for tenant in frankalmoign by reason of his tenure shall do divine service for his lord, as is said before; and this he is charged to do by the law of holy church, and therefore he is excused and discharged of fealty: but tenant in frankmarriage shall not do for his tenure such service; and if he doth not fealty, he shall not do any manner of service to his lord, neither spiritual nor temporall, which would be inconvenient, and against reason, that a man shall be tenant of an estate of inheritance to another, and yet the lord shall have no manner of service of him (1). *And so it seemes he shall do fealtie to his lord before the fourth degree be past. And when he hath done fealtie, he hath done all his services.*

V. Sect. 87. 136. 201. 265. 440. 478. 665. 722. 40 Ass. 27.

"*WHICH would be inconvenient, &c.*" An argument drawne from an inconvenience is forcible in law, as hath beene ☞ observed before, and shall be often hereafter. *Nihil quod est inconveniens, estl icitum* *. And the law, that is the perfection of reason, cannot suffer any thing that is inconvenient. [97. b.]

Littleton, fo. 50. b. 42 E. 3. 5. 28 E. 3. 395. 20 H. 6. 28. (Ante 23. a.)

It is better, saith the law, to suffer a mischief that is peculiar to one, than an inconvenience that may prejudice many. See more of this after in this Chapter.

Note, the reason of this diversitie betweene frankalmoigne and frankmarriage, standeth upon a maine maxime of law, that there is no land that is not holden by some service spirituall or temporall; and therefore the donee in frankmarriage shall do fealty, for otherwise he should do to his lord no service at all; and yet it is frankmarriage, because the law createth the service of fealty for necessity of reason, and avoiding of an inconvenience. But tenant in frankalmoigne doth spirituall and divine service, which is within the said maxime, and therefore the law will not cohort him to do any temporall service. See the next Section.

"*And against reason.*" And this is another strong argument in law, *Nihil quod est contra rationem est licitum;* for reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *Nemo nascitur artifex.* This legall reason *est summa ratio.* And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in *England* is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *Neminem oportet*

* *See ante Mr. Hargrave's note* 1. *to* 66. *a.*

(1) *as it seemeth,* L. and M.

oportet esse sapientiorem legibus: no man, out of his own private reason, ought to be wiser than the law, which is the perfection of reason.

[98. a.]

☞ Sect. 139.

AND if an abbot holdeth of his lord in frankalmoign, and the abbot and covent under their common seale alien the same tenements to a secular man in fee simple, in this case the secular man shall doe fealty to the lord; because he cannot hold of his lord in frankalmoigne. For if the lord should not have fealtie of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

THIS case is worthy of great observation; for hereby it appeareth, that albeit the alienors held not by fealty nor any other terrene service, but onely by spirituall services, and those incertaine, yet the alienee shall hold by the certaine service of fealty, (and of this opinion is *Littleton*, agreeable with our bookes in former authorities) for the law createth a new temporall service out of the land to be done by the alienee, wherewith the abbot was not formerly charged, for the avoyding of an inconvenience, viz. that the feoffee should do no manner of service, and consequently that the land should be holden of no man. Wherein it is to be remembered, that (as hath bin said before) all the lands and tenements in *England*, in the hands of any subject, are holden of some lord or other, and that every tenant must do some kinde of service; and that all lands and tenements are holden either mediately or immediately of the king, for originally all lands and tenements were derived from the crown. And it is to be observed, that when the law createth any new tenure, it is the lowest, (viz. tenure in socage) and with the least service that can be done, and neerest to the freedome of the former service: as in this case a tenure in socage by fealty only is created by the law, which is the lowest and least service the law can create, because fealty is incident to every tenure except tenure in frankalmoigne; for if it should create any other service, it must create fealty also. And the law, according to equity and justice, giveth this fealty to the lord, of whom the land was before holden in frankalmoigne. And lastly, the law so abhorreth an inconvenience, as that it createth out of the land a new service for avoyding thereof. It appeareth by our bookes, that a seigniory in frankalmoigne may be granted over, and consequently the tenant shall hold of the grantee by fealty only; and therefore *Britton* said well, that no service could be demanded of a tenant in frankalmoigne, *tant come les terres remaine en les maines les feoffees.*

31 E. 3. Cessavit 22. 33 H. 6. 67. 21 E. 4. 11. 9 Co. 123. Anth. Lowe's case. (2 Inst. 502. 3 Co. 3. b.)

(Ante 1. 2 Inst. 501.)

9 Co. 123, in Anth. Lowe's case.

42 Ass. Pl. 6. Britton, 164. b.

Sect. 140.

ALSO, if a man grant at this day to an abbot, or to a prior, lands or tenements in frankalmoigne, these words (frankalmoign) are voide; for it is ordained by the statute which is called quia emptores terrarum, *(which was made* anno 18 E. 1.) *that none may alien nor grant lands or tenements in fee simple to hold of himselfe. So that if a man seised of certaine tenements, which he holdeth of his lord by knights service, and at this day he, &c. granteth by licence the same tenements to an abbot, &c. in frankalmoigne, the abbot shall hold immediately the tenements by knights service of the same lord of whom his grantor held, and shall not hold of his grantor in frankalmoigne, by reason of the same statute. So that none can hold in frankalmoigne, unlesse it be by title of prescription, or by force of a grant made to any of his predecessours before the same statute was made. But the king may give lands or tenements in fee simple to hold in frankalmoigne, or by other services; for he is out of the case of that statute.*

"*ORDAINED by the statute.*" Here it appeareth by the authority of *Littleton*, that this is a statute, and yet the king alone speaketh, viz. *Dominus rex in parliamento suo, &c. ad instantiam magnatum regni sui concessit, providit et statuit.* ☞ But because it is *dominus rex in parliamento, &c. concessit*, it is as much in this case (being an ancient statute) as *dominus rex authoritate parliamenti concessit.* Secondly, it is, (amongst other acts of parliament) entred into the parliament roll, and therefore shall be intended to be ordayned by the king, by the consent of the lords and commons in that parliament assembled. Thirdly, it is a generall law, whereof the judges may take knowledge, and therefore it is to be determined by them, whether it be a statute or no (1). Now for the

Vid. 8 Co. the Prince's case.

[98. b.]

(1) This observation on *general* or *public* statutes points at *two* important rules distinguishing between them and *particular* or *private* statutes.—According to the *first*, which relates to their several *degrees of notoriety*, the judges may and ought to take notice of *public* acts without pleading; but *private* acts *must* be pleaded. But there are some exceptions to *both* parts of this rule. See Law of *Nisi Prius*, ed. of 1775. p. 222, and 1 Sid. 209.—The *second* rule imports a difference in the *mode of trial*; for the existence of a *public* act must be tried by the judges, who are to inform themselves in the best manner they can; but a *private* act may be put in issue, and shall be tried by the *record*. See Hal. Hist. C. L. 15, and Com. Dig. *Parliament*, R. 5.—A *third* difference, which hath been taken between a *general* and a *particular* act, is, that the *latter* will not bind *strangers*, though it is without a *saving* of their rights. However well founded this last difference *may* be, it certainly is usual in *modern private* acts, to insert a special saving clause, explaining how far the rights of strangers are intended to be affected.—A *fourth* difference relates to *offering statutes in evidence to a jury*; for it is said, that a *public* act, printed by the *king's printer or other person authorized by the crown*, is good evidence to a jury; but that of a *private* act, there must be either an *exemplification under the great seal*, or *a copy sworn to be compared with the parliament roll*. Some authorities however

the divers formes of acts of parliament, you may read them in the Prince's case *ubi supra.*

" *Called quia emptores terrarum,*" This statute is called so, because the statute beginneth with these words, *Quia emptores terrarum.* (Post. 142. 2 Inst. 500.)

" *None may alien, &c. lands in fee simple to hold of himselfe.*" This is justly inferred upon the statute; but the letter of the statute is, that *feoffatus teneat terram illam de capitali domino, &c.* So as by the authority of *Littleton*, he that citeth a statute is not bound to recite the very words thereof, so long as he misseth not of the substance and necessary consequence thereupon; and yet the safer way is to vouch the words of a law, as they be.

" *Granteth by licence the same tenements, &c.*" Here *Littleton* speaketh of a licence, or a dispensation within the said statute of *quia emptores terrarum* (and mentioneth no other statute) which may be done by the king and all the lords immediate and mediate; for it is a rule in law, *alienatio licèt prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri,* and *quilibet potest renunciare juri pro se introducto:* and the licence of lords immediate and mediate in this case shall enure to two intents, viz. to a dispensation both of the statute of *quia emptores terrarum*, and of the statutes of mortmaine, as *Littleton* here implyeth, because their deedes shall be taken most strongly against themselves (1). But it

13 E. 3. tit. Release 33. 27 H. 8. F. N. B. 211. I.

[99. a.]

44 Ass. Pl. 19. 9 E. 4. b. 11. Pl. Com. 502, 503. Grendon's case. Vide 10 Co. 25, 26. 31. & 110. Vide Sect. 686. (5 Co. 56. 7 Co. 14.)

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however do not correspond with this last difference; and others except out of it *private* acts concerning a whole county. See Vin. Abr. *Evidence*, A. b. 1. Law of Nisi Pri. ed. 1775. p. 225. 1 Stra. 446. It should also be remarked, that there is a difference between proving private acts *to a jury*, and proving them on the issue of *nul tiel record*, which never goes to a jury; nothing less than an *exemplification under the great seal* being sufficient in the latter case. 2 Salk. 566. For these and other differences between *general* and *particular* statutes, see further in Vin. Abr. *Statutes*, D. E. 2, 3, and Hatt. Treat. on Stat. cap. 2. p. 11. Though the book last cited is published with the name of sir Christopher Hatton, lord chancellor to queen Elizabeth, some doubt whether he was really the author. Nichols. Engl. Histor. Libr. 2d ed. 192. However it is at all events a treatise well worth consulting. As to the different forms of statutes, besides the Prince's case in 8 Co. see Pryn. on 4 Inst. 13. Hal. Hist. Com. L. 13. Vin. Abr. *Statutes*, A. Com. Dig. *Parliament*, R. 3, and the Preface to Ruffhead's edit. of Stat.—[Note 107.]

(1) Here lord Coke explains the king's power of granting licences to alien in mortmain, notwithstanding the old statutes against such alienations, on a principle which makes the licence rather the waiver or remission of a forfeiture, than a dispensation. The licence being considered in the former way, it is attributing to the king no greater power as lord paramount, than subjects, being mesne lords, may exercise in respect of the forfeitures to which they are entitled on alienations in mortmain. In other words, it is construing the statutes so as not to bring the case of a licence within them; and consequently dispensation became unnecessary. It should also be remembered, that the king's power of granting such licences seems recognized by a statute of Edward the third. See 18 E. 3. st. 3. c. 3. However, the pretended power

it is a safe and good policy in the king's licence to have a *non obstante* also of the statutes of mortmaine, and not only a *non obstante* of the statute of *quia emptores terrarum*. But it appeareth by *Littleton* (which is a secret of law) that there needeth not any *non obstante* by the king of the statutes of mortmaine, for the king shall not be intended to be misconusant of the law; and when he licenseth expressely to alien to an abbot, &c. which is in mortmaine, he needs not make any *non obstante* of the statute of mortmaine, for it is apparent to be granted in mortmaine, and the king is the head of the law, and therefore *præsumitur rex habere omnia jura in scrinio pectoris sui*, for the maintenance of his grant to be good according to the law, for which cause of purpose *Littleton* maketh no mention of any licence in mortmaine. *Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensatâ.*

(Ante 70. b.) Lit. fol. 20. a. (2 Ro. Abr. 518.) 8 R. 2. Relief 14. 3 H. 4. 2. a. (Ante 84. a.)

"*The abbot shall hold, &c. by knights service.*" For although by the death of the abbot there is neither ward, marriage, nor relief due, yet he holdeth by knights service, albeit the lord cannot have the fruit of it; and if the abbot, with the consent of

Vide Little. fol. 20.

the

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of suspending statutes by regal authority, without consent of parliament, being declared illegal at the Revolution; and it having been usual to grant licences to alien in mortmain in a manner, which imported an exercise of suspending or dispensing power, that is, with a *non obstante* of the statutes of mortmain, and *quia emptores;* under these circumstances a jealousy of any thing, in the least connected with an assumption of dispensing power, might have influenced many to have confounded such licences with dispensation; and therefore it was deemed prudent to give them a parliamentary sanction. See 7 and 8 W. 3. c. 37. It is observable, that the statute made for this purpose authorizes the king to grant mortmain licences, without any regard to the person of whom the lands were held; and declares, that they shall not be subject to *any* forfeiture. Before this last act the king's licence only prevented the forfeiture to himself; and if there was any mesne lord, he might take advantage of the mortmain statutes, notwithstanding the royal licence. See Fitzh. Nat. Br. 221. O. But the act of William seems to be expressed so, as to *extend* the operation of the king's licence, and to render it effectual *universally*, by preventing a forfeiture to other lords as well as to the king himself. Another thing deserving of notice is, that the statute is quite silent as to the writ of *ad quod damnum;* which anciently was thought an essential preliminary to the licence, in order that the king might know what prejudice would arise to himself or others from granting it. Fitzherbert indeed tells us, that in his time it was become a common practice to purchase licences to alien in mortmain without suing an *ad quod damnum*, and instead of it to add to the patent, granting the licence, special words to signify that it should be good without any writ. But he adds, that it seems dubious, whether such patents were good, if they turned out to be prejudicial and disadvantageous to the king or others. See Fitzh. N. B. 222. D. Whether since the statute of William writs of *ad quod damnum* previous to licences from the crown to alienate in mortmain are necessary, may deserve consideration; for which purpose it may be material to inquire, what the practice hath been.—Since writing the former part of this note, we are well informed, that writs of *ad quod damnum* have not been usual on granting mortmain licences since the statute of William.—[Note 108.]

the covent, alien the land over to a man and his heires, there is the ward, marriage, and reliefe revived. But by prescription (as it hath been said) the successor of an abbot may pay reliefe. An abbot or prior, &c. that holdeth lands by knights service, albeit he ought not in respect of his profession to serve in warre in proper person, yet must he find a sufficient man, conveniently arrayed for the warre, to supply his place. And if he can find none, then must he pay escuage, &c. for his profession doth not priviledge him, but that the king's service in his warre must be done, that belongeth to his tenure.

Nota, (reader) since *Littleton* wrote, a man might either in his life-time, or by his last will in writing, [*m*] give lands, tenements, &c. to any spirituall body politick or corporate, to be holden of himselfe in frankalmoigne, or by divine service, as by the statute of 1 and 2 *Phil. & Mariæ* (which indured for twenty years) appeareth; which statute, since that time, hath beene favourably and benignely expounded.

[*m*] 1 & 2 Ph. & Mar. c. 8. Mich. 8 & 9 Eliz. Dyer, fol. 265.

"*So that none can hold in frankalmoigne, unlesse it be by title of prescription, &c.*" It is to be understood, that a man seised of lands may at this day give the same to a bishop, parson, &c. and their successors in frankalmoigne, by the consent of the king, and the lords mediate and immediate, of whom the land is holden; for the rule is, *quilibet potest renunciare juri pro se introducto.*

12 E. 4. 4. 27 H. 8. 2 E. 2. Avowrie 185.

So if an ecclesiasticall person hold lands by fealty and certaine rent, the lord at this day may confirme [*n*] his estate, to hold to him and his successors in frankalmoigne; for the former services be extinct, and nothing is reserved but that he holds of him, and so he did before.

[*n*] 4 E. 3. 21. 22 E. 3. 15. 38 H. 6. 25. Litt. cap. Confirmat. 123.

"*But the king may, &c. for he is out of the case of that statute.*" It is cleere that the king is out of the case of the statute: for the statute is, *quòd feoffatus teneat terram illam, &c. de capitali domino feodi, &c.* and this cannot be intended of the king, who is superior to all, and inferiour to none. But where the king is bound by acts of parliament and where not, *vide* 11 *Co.* 66. *Magdalen Colledge* case.

11 Co. 66. Magdalen Colledge case.

Sect. 141.

AND note, that none may hold lands or tenements in frankalmoigne, but of the grauntor, or of his heires. And therefore it is said, that if there be lord mesne and tenant, and the tenant is an abbot, which holdeth of his mesne in frankalmoigne, if the mesne die without heire, the mesnaltie shall come by escheate to the said lord paramont, and the abbot shall then hold immediately of him by fealty only, and shall do to him fealty; because he cannot hold of him in frankalmoign, &c.

"*BUT of the grauntor, or of his heires.*" The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to any other, no more than a foundership of a house of religion,

14 E. 3. tit. Mesne, 7. 14 H. 3. tit. Disclaim, Br. 33.

15 E. 3. Confirm. 8. 27 H. 8. b. Temps E. 1. Garr. 90. 45 E. 3. 23. 47 H. 3. Garr. 99. 11 H. 4. 52. 14 H. 4, 5. 10 H. 7. 11.

religion, (which is intended to be in frankalmoigne, or homage ancestrel, or the writ of *contra formam feoffamenti*, or the writ of ☞ *contra formam collationis*, or any other incident to their inheritable blood. But it is no incident inseparable; for the lord may release to the tenant in frankalmoigne, and then the tenure is extinct, and he shall hold of the lord paramount by fealty, as in the case of *Littleton*, Sect. 139. [99. b.]

28 Ass. 33. 18 E. 3. 18. 22 E. 3. 18. Corody Broke 5. 22 H. 6. 50. 4 E. 2. Avowry 201, 202. 19 E. 3. ibid. 122. 11 E. 3. ibid. 100. 30 H. 6, 7. 33 H. 8. Dyer 51. F. N. B. 16. F. N. B. 211. c. 15 E. 3. Confirm. 8.

Vide 15 E. 4. (2 Ro. Abr. 447. contra—Hob. 130. Post. 143. 213. b.)

"*Or of his heires.*" Here (or) hath the sense of (and); for a man cannot at this day grant lands in taile and reserve a rent to his heires, and exclude the grantor himselfe; for the heire cannot take any thing in the life of the ancestor, neither can the heire take any thing by descent, when the ancestor himselfe is secluded. But if a man had granted lands at the common law to hold of his heires, these words (to hold of his heires) are void, and he shall hold of the grantor as he held over, which he should have done, if he had made no reservation at all.

33 E. 3. tit. Annuity 52. 3 Ass. Pl. 8, &c.

And albeit *Littleton* saith, that no man can hold lands in frankalmoign but of the grantor or his heires, yet might an abbot by assent of his covent, or a bishop with assent of his chapter, and such like, by license as is aforesaid, have given lands in frankalmoigne, to hold of them and their successors; and as *Littleton* himselfe agreeth, the king may give land in frankalmoigne, in which case the land shall be holden of him, his heires and successors.

"*And therefore it is said, if there be mesne and tenant, and the tenant is an abbot, &c.*" By this it appeareth, that if the seigniory be transferred by act in law to a stranger, and thereby the privity is altered, that the tenure in frankalmoigne is changed to a tenure in socage by fealty, as well as it appeareth before when the seigniory or tenancy is granted to another; and the law in this case also createth a new fealty, wherewith the land was not charged before.

2 E. 4. 46. (2 Ro. Abr. 501. 513.) 7 E. 4. 12. a.

"*The mesnaltie shall come by escheate to the said lord paramont.*" This new tenure, created by law, shall upon the escheate drowne the seigniory; for alwaies the seigniory neerer to the land drownes the seigniory that is more remote off; and yet the lord in this case, to whom the mesnaltie is escheated, shall hold by the same services that he held before the escheat.

Sect. 142.

AND note, that where such man of religion holds his tenements of his lord in frankalmoigne, his lord is bound by the law to acquite him of every manner of service which any lord paramount will have or demand of him for the same tenements; and if he doth not acquite him, but suffereth him to be distreyned, &c. he shall have against his lord a writ of mesne, and shall recover against him his damages and costs of suit, &c.

"*MAN*

"*MAN of religion.*" And yet this case extendeth to all ecclesiasticall persons that hold in frankalmoigne, be they secular or regular; for the mesne ought to acquite all of them; for they be bound [a] to make praiers for their founder, and his heires; and in consideration of those prayers, the founder, &c. is bound to pay to the chiefe lord all rents and services issuing out of that land, as it appeareth by that which followeth.

[a] Pl. Com. 306. b. in Sharington's case. 33 H. 6. 6. 39 H. 6. 29. 14 E. 3. Mesne 7.

[100. a.] "*To acquite him.*" ☞ *Acquite* is compounded of *ad*, and the old verbe *quietare*, and signifieth in law [b] to discharge, or keepe in quiet, and to see that the tenant be safely kept from any entries, or other molestation for any manner of service issuing out of the land to any lord that is above the mesne. [c] And hereof commeth [d] acquitall, and *quietus est*, (that is) that he is discharged; and he that is discharged of a felony, &c. by judgment, is said to be acquitted of the felony, *acquietatus de felonia*; and if he be drawne in question againe, he may plead [e] *autrefoits acquite*. And therefore if such a tenant, as *Littleton* here speaketh of, be distrained by any lord paramount, the mesne (to keep the tenant quiet) may put his beasts in the pownd, instead of the beasts of the tenant.

[b] Fleta, lib. 2, ca. 43. Britton, fol. 58, 59. Vide hereafter in this Sect. in Writ of mesne [c] Vide Sect. 142. 540. [d] 8 E. 2. Corone 424. 20 E. 2. ibid. 232. Stanf. Pl. Corone 105. [e] 4 E. 3. 33. 17 E. 3. 44.

7 H. 4. 18. 34 H. 6. 47. 13 E. 4. 6. F. N. B. 136. 9 Co. 110, 111, in Tresham's case.

There be three kinds of acquitals. 1. An acquitall by deed. 2. An acquitall by prescription. 3. An acquitall by tenure: and by tenure foure manner of wayes. 1. By owelty of services, for service acquits service. 2. Tenure in frankmoigne, whereof *Littleton* here speaketh. 3. Tenure in frankmarriage. 4. Tenure by reason of dower.

3 E. 3. 14. 77. 5 E. 3. 11. 4 H. 6. 28. 39 E. 3. 19. 11 H. 4. 52. 12 H. 4. 9. 14 H. 4. 17. F. N. B. 136. b. h.

39 H. 6. 30. 33 H. 6, 7. F. N. B. 135. m. 4 E. 4. 35. 12 H. 4. 9. 28 E. 3. 95. 17 E. 3. 29.

"*Of every manner of service.*" [f] And yet not of services onely, as homage, fealty, rentworkes, and other services, but also of improvement of services; as if he be distreyned for reliefe,* *aide pur file marier, aide pur faire fitz chivaler, &c.* Also for suite service to a hundred. [g] But for suit reall in respect of resiance within any hundred, leet, or turne, the mesne shall make no acquitall, for that is in respect of his person and resiancy.

[f] 39 H. 6. 31. a. 9 E. 4. 27. F. N. B. 136. m. 17 E. 2. Mesne. 5 E. 3. 49. * Bracton, lib. 2, fol. 84. [g] 4 E. 3. 42. For this writ see the Register fol. and F. N. B. fol. 135. Mirror, cap. 2, sect. 13. Bracton, lib. 2, fol. 84. Britton, fol. 58. Fleta, lib. 2, ca. 43. Westm. 2. cap. 9.

"*Writ of mesne,*" *breve de medio*, so called by reason of the words of the writ of mesne, which are, *unde idem A. qui medius est inter C. et præfatum B.* *A.* who is mesne, between *C.* that is the lord paramount, and *B.* that is the tenant paravaile. And note, that there be six writs in law, that may be maintained, *quia timet*, before any molestation, distresse, or impleading: as 1. A man may have his writ of *mesne* (whereof *Littleton* here speaks) before he be distreyned. 2. A *warrantia cartæ*, before he be impleaded. 3. A *monstraverunt*, before any distresse or vexation. 4. An *audita querela*, before any execution sued. 5. A *curia claudenda*, before any default of inclosure. 6. A *ne injustè vexes*, before any distresse or molestation. And these be called *brevia anticipantia*, writs of prevention.

W. 2. ca. 9. Vide 8 Co. 134. Mary Shepley's case.

"*And shall recover against him his damages.*" It is to be knowne, that there be two severall judgments in a writ of mesne, one at the common law, another by the statute of *W.* 2. ca. 9. At the common law he shall have judgment to recover his acquitall, and if he be distreyned or damnified, his damages and costs: and the processe at the common law was summons, attachment and distresse infinite, in the same county where the writ is brought. * The judgement by the said statute of *W.* 2, is a forejudger of the mesnalty, and that in two severall cases. One upon processe given by the said statute, viz. summons, attachment, and grand distresse, and if he commeth not, and the writ be returned, he shall be forjudged. The other case is, where the tenant recovereth his acquitall in a writ of mesne, if he be not acquited afterwards, he shall have a writ of *distringas ad acquietandum* against the same mesne, and if he commeth not, he shall be forjudged by his default of the mesnality; and so if he commeth, and it be found against him by verdict, he shall be forjudged: but forjudger in that case is not given against his heire, for that the statute speaketh onely of the mesne, and not of his heires. And the judgment in case of forjudgement is, *quòd T. (le mesne) amittat servitia de A. (le tenant) de tenementis prædictis, et quòd omisso prædicto T. præfat' R. (le seignior paramount) modo sit attendens et respondens per eadem servitia per quæ T. tenuit.* The said statute, in case of forjudgment, doth not bind a feme covert; and yet if such a judgement be given against a baron and feme, it is not void, but erroneous, and to be reversed in a writ of error. And so a forjudgement against a tenant in taile shall binde the issue in taile in an avowry, untill he reverseth it by error. If two joyntenants bring a writ of mesne, and the one is summoned and severed, the other cannot forjudge the mesne; for he ought to be attendant to the lord paramount, as the mesne was, and that cannot he be alone. And so it is if there be two joyntenants mesnes, and in a writ of mesne brought against them, one maketh default, and the other appeares, there can be no forjudger.

* Bracton, lib. 2, fol. 84. Fleta, lib. 2, cap. 43.

46 E. 3. 31. 18 E. 2. tit. Mesne. F. N. B. 136. 2 H. 4. 7. 17 E. 3. Contra formam Collat. 1. F. N. B. 121.

(Post. 233. b.) 7 E. 3. 41. tit. Mesne 18. 9 E. 2. ibid. 67. 14 E. 2. ibid. 70. 9 Co. 73. b. Doct. Hussey's case.

(10 Co. 134.)

☞ If the tenant be disseised, and the disseisor in a writ of mesne forjudge the mesne, this shall not bind the disseisee. And so if the mesne be disseised, and a forjudgment is had against the disseisor, this doth not bind the disseisee; for the words of the said statute are, *quando tenens sine præjudicio alterius quàm medii attornare se potest capitali domino.* [100. b.]

But if the daughter, the sonne being *en venter sa mere*, be forjudged, it shall bind the son that is borne afterwards, because he had no right at the time of the forjudgment. And so if the tenant enter in religion, and his heire forejudgeth the mesne, and then the ancestor is deraigned, he shall be bound *causâ quâ suprà.* If there be lord, prior mesne, and tenant, the mesne cannot be forjudged; because he alone can doe nothing to the prejudice or the disherison of his church: and the like law is of a bishop, parson, and the like.

16 E. 3. Judgm. 117. (7 Co. 8. a.) W. 2. ca. 9.

No forjudgement can be, but when there is but one mesne betweene the lord distreyning and the tenant; because the tenant, upon the forjudgement, cannot be attendant to the lord distreyning, in respect there is a mesne between them, and so the said statute provideth for in expresse termes.

Nota, the plaintife, in a writ of mesne, may chuse either processe at the common law, or upon the said statute of *W.* 2. Forjudgement is called *forisjudicatio*, and he that is forjudged *foris judicatus.*

judicatus. And *Bracton* hath this writ, *Rex vicecomiti, &c. et non permittas, quòd A. capitalis dominus feodi illius habeat custodiam hæredis, quia in curiâ nostrâ foris judicatur de custodiâ, &c.* *Fleta* calleth it *abjudicationem*, and thereupon commeth *abjudicatus*; for he saith, *post proclamationem, &c. factam, abjudicetur medius de feodo et servitio suo* (1). 50 E. 3. 23. F. N. B. 137. Bract. l. 4, 256. b. Brit. f. 58. b. Flet. l. 2, c. 43.*

* *In the second edition of Fleta, and probably in every printed copy of the work, the passage cited by lord Coke is in* li. 2, ca. 50, § 8.

Chap. 7. *Homage Auncestrel.* Sect. 143.

TENANT by homage auncestrel is, where a tenant holdeth his land of his lord by homage, and the same tenant and his auncestours, whose heire he is, have holden the same land of the same lord and of his auncestors, whose heire the lord is, time out of memorie of man, by homage, and have done to them homage. And this is called homage auncestrell, by reason of the continuance, which hath beene, by title of prescription, in the tenancie in the blood of the tenant, and also in the seigniorie in the blood of the lord. And such service of homage ancestrell draweth to it warrantie, that is to say, that the lord, which is living and hath received the homage of such tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage ancestrel.

"*BY title of prescription, in the tenancie in the blood of the tenant, and also in the seigniorie in the blood of the lord.*" Here *Littleton* doth not define what homage auncestrell is, but putteth an example in one case. For in the 146 Section it appeareth, that blood is not alwayes necessary on the lord's side. In this example here put, there must be a double prescription, both in the blood of the lord and of the tenant, and therefore I think there is little or no land at all at this day holden by homage anncestrel. 9 H. 3. Vouch 277. 47 H. 3. Garr. 99. Temps E. 1. Garr. 90. 4 E. 2. Vouch. 245. 45 E. 3. 43. 11 H. 4. 50. 4 H. 6. 26.

And hereof it is sayd, *Autant est le seignior tenus a son homage, come le homage a son seignior, forsque solement en reverence.* And herewith agreeth *Bracton: Est tanta et talis connexio per homagium inter dominum et tenentem, quòd tantùm debet dominus tenenti, quantùm tenens domino, præter solam reverentiam.* Brit. fol. 170. a. Bract. fol. 78. Glanv. li. 9. ca. 4, 5, 6.

"*Draweth*

(1) There is not any thing in the 12th of Charles the second, which in the least varies the tenure in *frankalmoigne*, it being expressly saved by the statute. See 12 Cha. 2. c. 24. s. 7. Indeed had the saving been omitted, we do not see, how any of the other provisions in the statute could have affected this tenure; and therefore it is presumed, that the saving was merely the effect of an abundant caution. The statute adds, that it shall not subject tenures in frankalmoigne to *any greater or other services*; but what was intended to be guarded against by these latter words is not very obvious. — [Note 109.]

Vide Britton ubi supra. 14 H. 6. 25. 18 H. 6. 2. b. Glanvil. lib. 9. c. 4, 5, and 6. 9 H. 3. Voucher 277. 47 H. 3. Voucher 270, 271. 43 E. 3. 3. a. (F.N.B. 134. f.)

"*Draweth to it warrantie.*" ☞ Hereby appeareth, what a reverend respect the law hath to ancient inheritances continued in the blood of the lord and of the tenant; for in this example put, if the continuance hath not bin in the blood of both sides, no warrantie belongeth to homage ancestrel; but if ancient continuance hath been on both sides, [m] then such homage ancestrell draweth to it warranty; so as ancient continued inheritance on both parties hath more priviledge and account in law, than inheritances lately, or within memory acquired. [101. a.]

[m] See the second Part of the Institutes upon the 6th chapter of the statute of Bigamie. (Post. 384. a.)

18 H. 6. 2. b. per Newton.

If the lord grant the services of his tenant by homage ancestrel, the tenant shall not be compelled in a *per quæ servitia* to atturne, unlesse the conusee will grant in court to warrant the land unto him.

9 H. 3. Voucher 277.

If the tenant vouch by force of this warrantie in law, it is a good counterplea, that the tenant (or any one of his ancestors) *recesit de servitio suo, et fecit servitium suum* A. B. *sine aliquâ coactione de suâ propriâ voluntate.*

[a] 9 H. 3. Voucher 277. Temps E. 1. Gar. 90. 45 E. 3. 23. [b] Glanvil. lib. 9. c. 4, 5, and lib. 1, cap. 3. Bracton, lib. 2, fol. 83.

"*And hath received the homage of such tenant.*" [a] So as before homage received, the tenant could not absolutely bind the lord to warranty, and therefore of ancient time there lay [b] a writ *de homagio capiendo*, for the tenant against the lord, to compell him to receive his homage for the benefit of his warranty. Which writ you shall read in *Bracton* and [c] *Britton*, and the process, and manner of triall thereupon, and the same you shall finde in 47 *H.* 3.

[c] Britton, fol. 172, 173. 47 H. 3. Garrantie 99.

Sect. 144.

AND also such service by homage ancestrell draweth to it acquittall, scil. *that the lord ought to acquite the tenant against all other lords paramont him of every manner of service.*

Sect. 142, and 540. (Ante 100.)

"*Draweth to it acquittall.*" Of acquitall somewhat hath been said in the Chapter of Frankalmoigne.

Sect. 145.

AND it is said, that if such tenant be impleaded by a præcipe quod reddat, &c. *and vouch to warrantie his lord, who commeth in by process, and demands of the tenant what he hath to binde him to warranty, and he sheweth, how he and his ancestors, whose heire he is, have holden their land of the vouchee and of his ancestors time out of minde of man; and if the lord, which is vouched, hath not received homage of the tenant nor of any of his ancestors, the lord (if he will) may disclaime in the seigniory, and*

and so ouste the tenant of his warranty. But if the lord, who is vouched, hath received homage of the tenant, or of any of his ancestors, then he shall not disclaime, but he is bound by the law to warrant the tenant; and then if the tenant loseth his land in default of the vouchee, he shall recover in value against the vouchee of the lands and tenements, which the vouchee had at the time of the voucher, or any time after.

"*A præcipe quòd reddat.*" This is understood of the king's writ directed to the sherife of the county where the land lyeth, whereby the sherife is authorised to command the tenant of the land to yield the same to the demandant; and of these words of the writ *(præcipe quòd reddat)* the writ is so called. Writs ☞ of *præcipe* be of foure kindes, *præcipe quòd reddat, præcipe quòd faciat, præcipe quòd permittat,* and *præcipe quòd non permittat, &c.* as appeareth by the Register.

[101. b.]

(Post. 139. b.) Regist. 159.

"*And vouch to warrantie.*" *Vouch, avoucher,* (in *Latin vocatio,* or *advocatio)* is a word of art, made of the verbe *voco,* and is in [d] the understanding of the common law, when the tenant calleth another into the court that is bound to him to warrantie, that is, either to defend the right against the demandant, or to yield him other land, &c. in value, and extendeth to lands or tenements of an estate of freehold or inheritance, and not to any chattel real personall or mixt, saving only in case of a wardship granted with warranty (as shall be said more at large in the Chapter of Warranties); for in the other cases concerning chattels, the partie, if he hath a warrantie, shall not vouche but have his action of covenant, if he hath a deed; or if it be by *parol,* then an action upon his case, or an action of deceipt, as the case shall require. Now seeing that one *Latin, French,* or *English* word can have this particular signification, therefore the common lawyer (that I may speake once for all) is driven, as the professors of other liberall sciences use to doe, to use significant words framed by art, which are called *vocabula artis,* though they be not proper to any language. He that voucheth is called the voucher *vocans,* and he that is vouched is called vouchee *warrantatus.* [e] The proces whereby the vouchee is called, is a *summoneas ad warrantizandum,* whereupon if the sherife returneth that the vouchee is summoned, and he make default, then a [f] *magnum cape ad valentiam* is awarded; when if he make default againe, then judgement is given against the tenant, and he over to have in value against the vouchee. If the vouchee doe appeare, and after make default, then *parvum cape ad valentiam* is awarded; and if he make default againe, then judgement as before. But if the sherife returne, that the vouchee hath nothing, then after writs of *alias* and *pluries,* a writ of *sequatur sub suo periculo* shall be awarded; and if the like returne be made, then shall the demandant have judgement against the tenant; but he shall not have judgement to recover in value, because the vouchee was never warned, and it appeareth that he hath nothing. But in the grand *cape ad valentiam,* it appeareth that he hath assets, and his making default after summons is an implyed confession of the warranty. And it is called a *sequatur sub suo periculo,* because the tenant shall lose his ☞ land without any recompence in value, unlesse he upon that writ can bring in the vouchee to warrant the land unto him: and if, at the *sequatur sub suo periculo,* the tenant and the vouchee make

[d] Mirr. cap. 5. sect. 1, and 5. Bract. li. 5. fo. 380, 381. Brit. c. 75, de Gar. Vouch. Fleta, li. 6, c. 23. 24, 25, 26, &c. optime. Lamb. Expli. Verb. Advocate. (Post. 365. 389. Hob. 3. 28. Noy 131. 2 Ro. Abr. 738.)

(Cro. Jam. 307.)

[e] V. Reg. Jud. for all these judiciall writs.

[f] V. Vet. N. B. 179. 186. 39 E. 3. 28. 14 H. 6. 7. 17 E. 3. 41. 3 H. 4. 4. 11 H. 4. 72. 45 E. 3. 19. F. N. B. 134, 135. (Post. 393. a.)

[102. a.]

(Post. 393.)

make default, and the demandant hath judgme[nt] tenant, and after brings a *scire facias* to have tenant may have a *warrantia cartæ*, and if he wer a stranger, he may vouche again; but if he h[ath] recover in value, he shall never have a *warrantia c[artæ]* againe, for by this judgement to recover in value of the warrantie. And you shall finde in bookes a single voucher, and that is when there is but on[e] with a double voucher, and that is when the vou[cher] over; and so a treble voucher, &c. Againe, there also a foraine voucher; and that is, when th[e] impleaded within a particular jurisdiction, (as in like) voucheth one to warranty, and prayes that h[e] moned in some other county out of the jurisdictio[n]

Glouc. c. 12. F. N. B. 6. c. This is called a foraine voucher, but might more a voucher of a forainer, *de forinsecis vocatis ad w[arrantizandum]*

Note, that by the civill law every man is bound thing that he selleth or conveyeth, albeit there warranty; but the common law bindeth him no[t] be a warranty, either in deed or in law; for *ca[use]* shall be said more at large in the Chapter of W[arranty] Third Booke.

(Cro. Jam. 4. 1 Ro. Abr. 96. F. N. B. 94.)

Brit. 174. "*The lord (if he will) may disclaime in the sei[gniory]*. *claime*, *disclamare*, is compounded of *de* and *clamo*, utterly to renounce the seigniorie.

[a] 47 H. 3. Disclaim. 35. 16 H. 7. 1. 20 E. 2. tit. Nuper Ob. 14. F. N. B. 197, & 151. b. 45 E. 3. 19. 21 E. 3. 50 E. 3, 23, &c. (Doctr. Plac. 131.) [b] 14 H. 3. tit. Disclaim. B. 33. [a] Note, there be divers kinds of disclaymer, th[at] disclaimer in the tenancie; a disclaymer in the disclaymer in the seigniorie; whereof *Littleton* her[e] case.

[b] But if the tenant in frankalmoigne bring a [writ] against his lord, the lord cannot disclayme in th[at] because he cannot hold of any man in frankalmoig[ne] donor and his heires. And so note a diversity bet[ween] in frankalmoigne, whereby divine service is ma[de] homage ancestrell, which respecteth temporall se[rvice] the lord will not disclayme in the seigniory, in the c[ase] ancestrell, then albeit he hath not received hom[age] warrant the land.

47 H. 3. Disclaim. 35. Vide Bract. l. 4. 252. b. 16 H. 7. 1. Brit. 173, 174. (Doctr. Plac. 131.) "*If the lord, who is vouched, hath received homag[e] not disclaime.*" Therefore it is good for the tenant, to oust the lord of his disclaymer, in his voucher t[o] the lord hath taken homage of him; and if he alled[ge] the lord offer to disclayme, the tenant may cou[nter] same by acceptance of homage. And the reason cannot disclayme in that case is, for that he hath humble and reverent acknowledgement, to becom[e] life and member and terrene honour, and to be ... and loyall to him, for the tenements which he holds of him, and against the acceptance hereof the lord cannot disclayme.

"*Which he had at the time of the voucher.*" Hereby it appeareth, that the tenant shall not be driven to recover in value only those lands, which the lord had from that ancestor, which created the seigniory, for that were in a manner impossible, for that the seigniory must be created before time of memory; and the first creation of the seigniory did not create the warranty, but the

he continuance of both sides time out of minde created the warnty. And that is the reason that a writ of annuity shall not] lye against the heire by prescription; because it cannot be nowne, whether he hath any land by descent from the said ioestor, that first granted the annuity. And here is a point orthy of observation, that in the case of homage ancestrell hich is a special warranty in law) by the authority of *Littleton*, e lands generally, that the lord hath at the time of the voucher, all be liable to execution in value, whether he hath them by scent or purchase. But in the case of an expresse warrantie, e heire shall be charged but only for such lands as he hath by scent from the same ancestor which created the warranty.

[c] 46 E. 3. 5. b. 10 E. 4. 10. b. 19 H. 6. 74. 37 H. 6. 19. 5 H. 7. F. N. B. 152.

Note what privilege this ancient warranty (created by operan of law) hath more than the expresse warranty. And so u may observe, that in this case *firmior et potentior est operatio is quàm dispositio hominis.*

28 E. 1. Vouch. 291. 9 E. 2. War. Car. 20. 19. Fines 127.

" *At the time of the voucher, or any time after.*" This is evident d worthy of diligent observation, viz. that the lands of the uchee shall be liable to the warranty that the vouchee hath at e time of the voucher, for that the voucher is in lieu of an tion; and in a *warantia cartæ*, the land which the defendant h at the time of the writ brought, shall be lyable to the rranty.

29 E. 3. 3. 18 E. 3. 1. 2 H. 4. 10. 23 E. 3. Recov. in valu. 3. 16 E. 3. Vouch. 85. 19 E. 3. Vouch. 24. 22 E. 3. Fitz. Nat. Bre. 134. f.

Upon a judgment in debt, the plaintife [*d*] shall not have cution, but only of that land which the defendant had at the e of the judgment, for that the action was brought in respect of the person, and not in respect of the land. But if an action of debt be brought against the heire, and he alieneth, hanging the writ, yet shall the land which he had at the time of the original purchase, be rged, for that the action was brought against the heire in ject of the land. [*e*] If a man be nonsuit, the land only ch he had at the time of the amerciament assessed, shall be rged, and not that which he had at the finding of the pledges. the amerciament is not in respect of the land, but of his want prosecution, which was a default in his person. But the issues a juror shall be levied upon the feoffee, albeit they were not before the feoffment, because he was returned and sworne in ject of the land. Note the diversity.

[*d*] 9 H. 4. 14. 42 E. 3. 1. 42 Ass. 17. 9 E. 2. tit. Execut. 249. (1 Ro. Abr. 898. 891, 892.) [*e*] 22 Ass. pl. 32.) (Finch L. 353.)

f a man give lands in fee with warranty, and binde certaine ls specially to warranty, the person of the feoffor is hereby nd, and not the land, unlesse he hath it at the time of the cher.

32 E. 1. Voucher 292. (2 Ro. Abr. 771.)

Sect. 146.

AND it is to be understood, that in every case where the lord may disclaime in his seigniorie by the law, and of this he will disclaime in a court of record, his seigniorie is extinct, and the tenant shall hold of the lord next paramount to the lord which so disclaimeth. But if an abbot or prior be vouched by force of homage ancestrell, &c. albeit that he never tooke homage, &c. yet he cannot disclaime in this case, nor in any other case; for they cannot take away or devest a thing in fee, which hath beene vested in their house.

" *HIS*

Vide Britton, fol. 58. 110. (Doctr. Plac. 133.)
[f] 45 E. 3. 7.
22 E. 4. 35.

"*HIS seigniorie is extinct, and the tenant shall hold of the lord next paramount, &c.*" Here two things are to be observed: first, that by this disclaymer in the seigniory, the seigniory is [f] extinct in the land.

Secondly, that after the disclaymer the tenant shall hold of the next lord paramount by the same services as the meane so disclayming held before.

Vide Sect. 143.

"*If an abbot or prior be vouched, &c. albeit, &c. yet he cannot disclaime, &c.*" Here it appeareth of the lord's side, that continuance of bloud is not necessary; but yet there must be privity of succession time out of minde in one politicke body; for if that body be once dissolved, though a new one be founded of the same name, and all the possessions be granted to them, yet the homage ancestrell is gone. But if a prior and covent be translated, *concurrentibus iis quæ in jure requiruntur*, to an abbot and covent, or to deane and chapter, there the homage ancestrell remaines; for though the name be changed, yet the body was never dissolved, but in effect it remaineth still. If the body politique were founded within time of memory, there cannot be homage ancestrell, for that continuance faileth; and though ancestor is ever properly applyed to a naturall body, yet it is called homage ancestrell when the tenure is of a body politique, for that it is ancestrell of the tenant's side. But on the other side, an abbot or prior cannot hold by homage ancestrell; for, as appeareth by *Littleton*'s examples, it must ever be ancestrell on the tenant's side. And where *Littleton* putteth his case of an abbot or prior, the same law is of a bishop, deane, archdeacon, prebend, parson, vicar, and the like. Another thing here to be observed is, that an abbot or prior cannot disclaime, &c. for regularly it is true, *quòd meliorem conditionem ecclesiæ suæ facere potest prælatus, deteriorem nequaquam;* and againe, *ecclesiæ suæ conditionem meliorem facere* ☞ *possunt sine consensu, deteriorem non possunt sine consensu.* And therefore an abbot, prior, bishop, deane, archdeacon, prebend, parson, vicar, or any other sole corporation, that is seised *in auter droit*, cannot disclaime; because, as *Littleton* saith, they alone cannot devest any fee which is vested in their house or church. For the wisdome of the law would never trust one sole person with the disposition of the inheritance of his house or church. But an abbot and prior had their covent, the bishop his chapter, the parson and vicar their patron and ordinarie, and the like of other sole corporations, without whose assent they could passe away no inheritance.

[103. a.]

14 H. 6. 12.
2 H. 6. 9.
38 Ass. p. 22.
37 Ass. 6.
Co. 3. 72. &c. Deane and Chapter de Norwich case.
40 E. 3. 27.
6 E. 4. 1.
6 E. 3. 51, 52. (7 Co. 10, 11.)
16 E. 4. 2. a.
21 H. 7. 20.

"*They cannot take away or devest a thing in fee, &c.*" These generall words have certaine exceptions; for in a *quo warranto*, at the suit of the king, against a bishop, abbot, or prior, for franchises and liberties, if the bishop, abbot, or prior, disclaime in them, this should bind their successors. If an abbot or prior had acknowledged the action in a writ of annuitie, this should have bound the successour; because he cannot falsifie it in an higher action, and there must be an end of suits. *Expedit reipublicæ, ut sit finis litium.* But if the abbot levie a fine, or acknowledge the action in a *præcipe quòd reddat*, the successor shall be bound *pro tempore*, but he may have a writ of right, and recover the land.

6 E. 3. 51, 52.
38 E. 3. 33.
16 E. 3. tit. Abbot 13.
10 E. 3. tit. Abbot 12.

7 R. 2. Abbot 7. 12 H. 4. 11. 20 H. 6. fo. ultimo. 4 H. 7. 2. 2 H. 4. 6. 34 Ass. p. 7.
14 E. 4. tit. Abbot B. 8 E. 3. 28. 12 H. 8. 7.

"*By*

"*By force of homage ancestrell, &c.*" Here (*&c.*) implyeth or by any other warrantie [*i*], as by the reason, which our authour here yieldeth, appeareth.

[*i*] 12 H. 8. 7.

"*A thing in fee.*" [*k*] For if in an action of debt upon an obligation against an abbot, the abbot acknowledgeth the action, and dieth, the successor shall not avoid execution, though the obligation was made without the assent of the covent; for he cannot falsifie the recoverie in an higher action, *et res judicata pro veritate accipitur*, and this is but a chattell. And so it is of a statute or recognisance acknowledged by an abbot or prior.

[*k*] 7 R. 2. tit. Abbot 7. See the bookes next above. (6 Co. 8. a.)

Sect. 147.

ALSO, if a man, which holds his land by homage ancestrel, alien to another in fee, the alienee shall doe homage to his lord: but he holdeth not of his lord by homage ancestrell; because the tenancie was not continued in the blood of the ancestors of the alienee; neither shall the alienee have warrantie of the land of his lord; because the continuance of the tenancie in the tenant and to his bloud by the alienation is discontinued. And so see, that if the tenant, which holdeth his land of his lord by homage ancestrell alieneth in fee, though he taketh an estate againe of the alienee in fee, yet he holds the land by homage, but not by homage ancestrell.

"*ALIEN to another in fee.*" For hereby the privity of the estate is altered, and the continuance of it in the bloud of the tenant is dissolved. But if the tenant maketh a lease for life, or a gift in taile, this is a continuance of the privitie and estate in the tenant in respect of the reversion that remaineth in him; for the fee, whereof *Littleton* heere speaketh, was not out of him. But if the tenant maketh a feoffment in fee upon condition, and dieth, his heire performeth the condition, and re-entreth, the homage ancestrell is destroyed in respect of the interruption of the continuance of the privitie and estate; and this case was put and not denied in the argument [*m*] of the case betweene the lord *Cromwell* and *Andrewes*, *Mich.* 14 & 15 *Eliz.* which I myselfe heard and observed. As if *cestuy que use* had made a feoffment in fee upon condition, and entred for the condition broken, he should have detained the land & against the feoffees for ever, for that the estate and privitie was for the time taken out of the feoffees, and thereby dissolved for ever. But if the land were recovered against the tenant upon a faint title, and the tenant recover the same againe in an action of higher nature, there the homage ancestrell remaines; for the right was a sufficient meane for the continuance. So it is if he had reversed it in a writ of error. [*n*] If the alienee be impleaded in *Littleton's* case, and vouche the alienor that held by homage ancestrell, albeit he commeth in by fiction of law to many purposes in privitie of his former estate, yet to this purpose he cannot come in as tenant by homage ancestrell, because of the discontinuance of the estate and privitie, and as *Littleton* saith, the tenancy was not continued in the bloud. [*o*] And *Britton* saith, *et come ascun nequedent soit vouche per homage, et le seigniour tende de averrer, que le tenement, dount il vouche,*

(Post. 202. a.)

[*m*] 1 Mich. 14 & 15 Eliz. 5 H. 7.

[103. b.]

(F. N. B. 135.)

[*n*] 5 E. 3. per Cantrel.

[*o*] Britton, fol. 170. a.

vouche, fuit translate hors del sanke del primer purchasor, per feoffment ou per ascun auter translation, en tiel case soit le tenant charger de voucher son feoffor ou ses heires.

38 E. 3. 20. 11 H. 4. 22. 17 E. 3. 47. 59. 73, 74. 26 E. 3. 56. 18 E. 3. 56.

"*Though he taketh an estate againe of the alienee in fee, &c.*" For the cause aforesaid, in respect of the interruption of the privitie and continuance of the estate. And herewith agreeth our bookes in cases of warranties in deed, or warranties in law. See more of this in the Chapter of Warranties.

16 E. 3. Voucher 87. 18 E. 3. 30. 44 E. 3. Litt. fol. 169.

Sect. 148.

ALSO, it is said, that if a man holds his land of his lord by homage and fealty, and he hath done homage and fealty to his lord, and the lord hath issue a son, and dies, and the seigniorie discendeth to the sonne; in this case the tenant, which did homage to the father, shall not doe homage to the sonne; because that when a tenant hath once done homage to his lord, he is excused for terme of his life to doe homage to any other heire of the lord. But yet he shall doe fealtie to the sonne and heire of the lord, although he did fealtie to his father.

"*SHALL not doe homage to the sonne.*" If *A.* holdeth of *B.* as of the manor of *Dale*, whereof *B.* is seised in taile; *B.* discontinueth the estate taile, and taketh backe an estate in fee simple; *A.* doth homage to *B.* *B.* dieth seised, the issue in taile entreth; *A.* shall doe homage againe to the heire in taile of *B.* (Post. 348. a.) because he is remitted to the estate taile; and the state in fee that his father had, in respect whereof the homage is done, is vanished, and the heire in taile is in of a new estate, in respect whereof he ought to doe a new homage. [p] But regularly it is [p] Britton, 175, 176. true, which *Littleton* saith, that when a tenant hath done once homage to his lord, he is excused for terme of his life to make homage to any other heires of the lord. But he shall doe fealtie to his sonne, albeit he hath done fealtie to the father.

☞ Sect. 149. [104. a.]

ALSO, if the lord, after the homage done unto him by the tenant, grant the service of his tenant by deed to another in fee, and the tenant atturneth, &c. the tenant shall not be compelled to doe homage. But he shall doe fealty, altho' he did fealty before to the grantor; for fealty is incident to every atturnement of the tenant, when the seigniory is granted. But if any man be seised of a mannor, and another holds of him the land, as of the mannor aforesaid by homage, which tenant hath done homage to his lord who is seised of the mannor, if afterwards a stranger bringeth a præcipe quod reddat *against the lord of the mannor, and recovereth the mannor against him, and sues execution; in this case the tenant shall againe doe homage to him, which recovered the mannor, although he had done homage before; because the estate of him, which received the first homage, is defeated*

defeated by the recovery, and it shall not lye in the power of the tenant to falsifie or defeat the recovery which was against his lord. And so see a diversitie in this case, where a man commeth to a seigniorie by recovery, and where he commeth to the same by discent or grant.

"*ALSO, if the lord, &c. grant the service of his tenant by deed, &c.*" Note a diversitie, when the lord alieneth the seigniorie, and when the tenant alieneth the tenancy; for when the tenant hath done homage, and the seigniory is transferred to another, either by the act of the party as alienation, or by act in law as descent, yet the tenant shall not iterate homage, as he shall do fealty; but when the tenant doth homage, and alieneth the tenancy, there is a new tenant, which never did homage, and therefore he ought to doe homage to the lord, albeit his alienor had done it before. And it is to be observed, that none shall doe [*] homage, but the tenant of the land to the lords of whom it is holden; and therefore if homage be due to be done by the tenant, if the tenant alieneth the land to another, the alienor cannot be compelled to doe homage.

Britton 176. 13 E. 1. tit. Per quæ servitia 22. & tit. Gar. 91. (8 Co. 102.)

[*] 8 E. 4. 27. b.

"*Atturneth, &c.*" Here by *(&c.)* is to be understood, that albeit he pay his rent, performe his annual services, and doe fealtie, ☞ which is a part of homage, yet homage he shall not doe.

[104. b.]

"*But if any man be seised of a mannor, &c.*" Here it appeareth, that the case of the recovery of the seigniorie differeth from the alienation of the lord, which is his owne act, or the descent of the seigniory to the heire, which is an act in law. And the reason of this diversitie is, for that by the recoverie the state of him that received the homage is defeated; for it shall not lie in the mouth of the tenant to falsifie, or to frustrate or defeat the recovery, which was against his lord of the mannor or seigniory, for that the tenant had nothing therein, and every man by law ought to meddle in such cases with that which belonged unto him, which is worthy of observation concerning falsifying of recoveries.

Vid. Sect. 551. 33 E. 3. Avowrie 255. 37 H. 6. 33. 39 H. 6. 34. 7 H. 7. 11. Doct. & Stud. fol. 45. 28 H. 8. Dyer 41.

Note, that to falsifie, in legall understanding, is to prove false, that is, to avoyd, or, as *Littleton* here saith, to defeat, in *Latine falsare, seu falsificare,* [i] *falsum facere.*

[i] 7 H. 8, cap. 4.

But since *Littleton* wrote, it is recited by act of parliament, that whereas divers, &c. have suffered recoveries against them of divers mannors, &c. for the performance of their wills, for the suretie of their wives joyntures, &c. and the recoverors had no remedy to compell the freeholders and tenants, &c. to attourne unto them, nor could by order of law attaine to the rents, services, &c. that act doth give the recoverors power to distreyne and avow; whereupon many have thought, that this doth impugne *Littleton*'s case of the recovery. But *distinguendum est. Littleton* intendeth his case, either upon a recovery by title, (for he saith, that the state of the tenant in the recovery is defeated) or without any consent upon pretence of title, which is all one; for the tenant cannot falsifie, and the lord should avow as one that came in of a former title. And *Littleton* hath good authority in law to warrant [a] his opinion, and the statute of 7 *H.* 8, extendeth to common recoveries had by consent and agreement,

[a] 39 H. 6. 22. 37 H. 6. 38. 35 H. 6. 22.

as appeareth by the act itselfe, which then was, and yet is a common assurance and conveyance, whereof the law taketh notice, and whereupon (as appeareth by the act) an use might be limited. So as it is apparent, that such recoverors came in meerely under the state of the lord, &c. and had no remedy (as the statute saith) to compell the freeholders and tenants to attourne, and without attournement could neither distreyne nor avow. Wherefore this statute gave recoverors remedy to distreyne, and a forme to avow and justifie, which they had not before, as it appeareth by the *Doctor and Student*, who lived at that time. The bodie of the act is, *That such recoverers may distreyne and make avowrie, &c. as those persons against whom the said recoverie is, should have done, &c. if the same recovery had not been had, and have like remedie, &c.*

28 H. 8. Dyer 41. If a man had made a lease for yeares to begin at *Michaelmas*, reserving a rent, and before *Michaelmas* he had suffered a common recovery, the recoveror should distreyne for that rent, which the lessor before the recovery could not. But if the recovery had not beene had, then he might have distreyned, and so it is within the statute. But if a fine had beene levied of a mannor, and before attournment the conusee had suffered a common recovery, the recoveror should not distreyne, &c. because the conusee against whom the recovery was had, could not.

(Post. 215. a. 321. a.)

But this act extended onely to distresses and avowries for rents, services, and customes, and gave also a forme of a *quare impedit*. But upon this statute it was holden, that the recoveror could not have an action of debt against the lessee for yeares, nor an action of wast against tenant for life or yeares; and therefore remedy was provided in these cases, by the statute of 21 *H.* 8.

21 H. 8. cap. 15.

Sect. 150.

ALSO, if a tenant, which ought by his tenure to doe his lord homage, commeth to his lord, and saith unto him, Sir, I ought to doe homage unto you for the tenements which I hold of you, and I am here ready to doe homage to you for the same tenements; and therefore I pray you, that you would now receive the same from me.

"*COMMETH to his lord.*" The tenant ought to seeke the lord to doe him homage, if the lord be within *England*; for this service is personall as well of the lord's side as of the tenant's side, for law ☞ requireth order and decency. And therefore *Bracton* saith, *et sciendum, quòd ille, qui homagium suum facere debet, obtentu reverentiæ quam debet domino suo, adire debet dominum suum ubicunque inventus fuerit in regno, vel alibi si possit commodé adiri, et non tenetur dominus quærere suum tenentem, et sic debet homagium ei facere.* And the same law it is for fealty; and the diversity between these services and the rent is, because that these are personall, and the rent may be payd and received by other, and therefore a tender of the rent upon the land is sufficient.

[105. a.]

Bracton, fol. 80. a. And Britton, fol. 171, agreeth herewith.

Sect.

Sect. 151.

AND if the lord shall then refuse to receive this, then after such refusall the lord cannot distreine the tenant for the homage behinde, before the lord requireth the tenant to doe homage unto him, and the tenant refuse to do it.

AND the reason hereof is, for that when the tenant hath done his endeavour and duty to offer his corporall service, and the lord refuseth the same, or doe not accept his service upon his tender thereof, (which is a refusall in law) then the law, in respect of the lord's fault, requireth that before the lord can distreine for it, that he doth require the tenant to doe that service; and if he either refuse to doe it, or doe it not when he is required, it is a refusall in law.

Vide Bracton, fol. 83. Britt. 171, 172. 21 E. 3. 24. 21 Ass. p. 73. 20 E. 3. Avowry 223. 45 E. 3. 9. 7 E. 4. 4. 21 E. 4. 17. 20 H. 6. 31. (9 Co. 79.)

Sect. 152.

ALSO, a man may hold his land by homage auncestrell, and by escuage, or by other knights service, as well as he may hold his land by homage auncestrell in socage.

SO as homage ancestrell may belong as wel to a tenure by escuage or knights service, as to a tenure in socage, or to a tenure in nature of socage; whereof there hath somewhat been spoken in the Chapter of Socage (1).

CHAP.

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(1) The statute of 12 Cha. 2, having taken away *all tenure by homage* in *general* words, without any exception either express or implied of *homage auncestrel*, the latter, though not particularly named, yet as being one species of homage, was virtually included. See 12 Cha. 2. c. 24. s. 1, 2. But most probably it had expired before the statute; for lord Coke doubted, whether even in his time there was any relique of this tenure. Ante 100. b. An early extinction of homage auncestrel is easily accounted for, by recollecting, that a *double prescription*, one in the lord's *blood* and another in the tenant's, or a *privity* of *succession time out of mind*, which was much the same in effect, was essential to homage auncestrel: and consequently, that if one alienation either of the seigniory or the tenancy had been made within time of memory, the *homage auncestrel* was destroyed, and it became *simple homage*. In a former note we had occasion to make a general observation on the reason for discharging tenures from *homage*, and on the advantages arising from it, whilst it remained, both to the lord and tenant, particularly to the latter, where the homage was *auncestrel*. Ante 67. b. note 1. We have only to add here, that though amongst us homage of *every kind*, so far as it relates to tenures, is now wholly at an end, yet so intimately blended are the various branches of one

☞ CHAP. 8. *Grand Serjeantie.* Sect. 153. [105. b.]

TENURE by grand serjeanty is, where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshall, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlaines of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is a greater and more worthy service, than the service in the tenure of escuage. For he, which holdeth by escuage, is not limited by his tenure to do any more especiall service then any other, which holdeth by escuage, ought to doe. But he, which holdeth by grand serjeanty, ought to doe some speciall service to the king, which he, that holds by escuage, ought not to doe.

[a] Glanv. lib. 9, ca. 4. [b] Bracton, lib. 2. 35, & 84, 85, lib. 1, cap. 10. * Fleta, lib. 1, cap. 10. lib. 2, cap. 9. in fine. [c] Britton, cap. 66, fol. 164, 165. Ockam cap. quod non absolvitur. 45 E. 3. 25. per Finchden. Fleta, ubi supra.

"*TENURE by grand serjeanty.*" Serjeanty commeth of the *French* word *(serjeant) i. satelles*, and [a] *serjeantia idem est quod servitium.* And it is called [b] *magna serjeantia*, or *serjanteria**, or *magnum servitium*, great service, as well in respect of the excellency and greatnesse of the person to whom it is to be done (for it is to be done to the king only) as of the honour of the service itselfe; and so *Littleton* himselfe in this Section saith, that it is called *magna serjeantia*, or *magnum servitium*, because it is greater and more worthy than knights service, for this is *revera servitium regale*, and not *militare* onely. *Fleta* saith, *magna autem serjeantia dici poterit, cùm quis ad eundum cum rege in exercitu, cum equo cooperto, vel hujusmodi, ad patriæ tuitionem fuerit feoffatus.*

Bracton, lib. 2. 84. 11 H. 4. 34. 10 H. 4. Avowry 267. F. N. B. 83. 10 H. 6. Ant. Demesne 11.

"*Of our lord the king.*" This tenure hath seven speciall properties. 1. To be holden of the king only. 2. It must be done, when the tenant is able, in proper person. 3. This service is certaine and particular. 4. The reliefe due in respect of this tenure differeth from knights service. 5. It is to be done within the realme (1). 6. It is subject to neither *aid pur faire fitz chivaler*, or *file marier*. And 7, it payeth no escuage.

"*As*

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system, and in subjects of jurisprudence so dependant is a knowledge of the *present* state of things on a reference to the *ancient* one, that the remnant of tenures in this country can never be duly comprehended, without the aid of a general outline, as well of homage and its effects, as of the other perished parts of the same venerable structure—[Note 110.]

(1) *Generally* the service of *grand serjeanty* was of such a kind as necessarily to be *within* the realm; but *some* services, which amount to grand serjeanty, might be due *out of* the realm as well as *within*, and both Littleton and Coke gives us instances of such reservations. See Sect. 153. b. here, and post. 106. b.—[Note 111.]

" *As to carry the banner of the king, or to lead his army.*" This great service to the king may (as it appeareth hereby) concerne the warres and matters of military; for some grand serjeanties are to be done in the time of war for the safety of the realme; and some in time of peace, for the honour of the realme. [106. a.] 23 H. 3. tit. Gard. stat. de Ward. et Relev. 28 E. 1.

" *Or to be his marshall.*" [*] If the king giveth lands to a man, to hold of him to be his marshall of his host, or to be marshall of *England*, or to be constable of *England*, or to be high steward of *England* [†], chamberlayne of *England*, and the like, these are grand serjanties; and these and such like grand serjanties are of great and high jurisdiction, and some of them concerne matters military in time of war, and some services of honour in time of peace. And this is to be observed, that though there were divers lords marshalls of *England* before the raign of [z] *R.* 2, yet king *R.* 2, created *Thomas Mowbrey* duke of *Norfolke* the first earle marshall of *England per nomen comitis marischalli Angliæ*. (4 Inst. 123.) [*] Fleta, lib. 1, cap. 10. 11 Eliz. Dier. 285. Camd. Brit. 286, 287. [†] Ockam, cap. Officium Constabularii. [z] In Rot. Patent. de anno 20 R. 2.

" *Or to carry his sword, &c. or to be his sewer at his coronation, &c.*" These and such like grand serjanties at the king's coronation are services of honour in time of peace.

" *To be one of his chamberlaines, &c. or to do other like services.*" It is also a tenure by grand serjanty to hold [a] by any office to be done in person concerning the receipt of the king's treasure; *Quia thesaurus regis respicit regem et regnum*; and *census regius est anima reip.* So it is *firmamentum belli, et ornamentum pacis.* (4 Inst. 106.) [a] Vid. 51 H. 3. statut. 5. 10 E. 3. c. 11. 14 E. 3. c. 14. 26 H. 8. ca. 2. 34. & 5 H. 8. ca. 16. 11 E. 4. fo. 1. Pl. Com. 207, 208.

Milites camerarii dicuntur, quia pro camerariis ministrant; and concerning their office, this is the effect, as *Ockam* [b] saith, *officium camerariorum in recepta consistit in tribus, scilicet, claves arcarum, &c. bajulant, pecuniam numeratam ponderant, et per centenas libras in formulas mittunt.* But discontinuance in effect hath worne out their office. And yet they continue their name, and keepe the keyes of the treasurie where the records doe lye. [b] Ockam, cap. Quid sit Scaccarium. Gervasius Tilburiensis in Libro Nigro sub custodiâ camerariorum.

And another saith, *camerarius dicitur à camera, quia camera est locus in quem thesaurus recolligitur, vel conclave in quo pecunia reservatur.* So as *camerarius* in legall signification *est custos regii censûs:* and *Willielmus de Bellocampo comes Warwici* held *officium camerarii in scaccario.* Rot. claus. 6 E. 1. memb. 1.

Or by any office concerning the administration of justice, *quia justitiâ firmatur solium.* Ex lecturâ Marrowe.

It appeareth by an ancient record, [c] that *Varianus de Sancto Petro tenuit de domino rege in capite medietatem serjantiæ pacis per servitium inveniendi decem servientes pacis ad custodiendam pacem in Cestriâ.* [c] Ex inquisitione post mortem Variani de Sancto Petro, 4 E. 2. Cestr.

See *Ockam* of the first institution and ancient order of the exchequer, *Dier* 4 *Eliz.* 213, the usherie of the exchequer holden by grand serjanty. Vid. 7 Ass. 12. 7 E. 3. 57.

" *Like services, &c.*" Here by (*&c.*) is to be understood other like services not expressed, as partly appeareth by that which hath beene said, viz. to be steward of *England*, constable of

England, chamberlayne of *England*, and other honourable services, whereof more shall be said in this Chapter.

"*Some speciall service to the king.*" That is to say, that this great service be specially set downe; for it may consist of divers branches, as to goe with the king in his warre in the foreward, and to returne in the reareward; and also to pay rent, &c. but yet it must be certaine and particular.

23 H. 3. Gard. 148.

Sect. 154.

ALSO if a tenant which holds by escuage dyeth, his heire being of full age, if he holdeth by one knight's fee, the heire shall pay but a C. s. for reliefe, as is ordained by the statute of Magna Charta, c. 2. *But if he which holdeth of the king by grand serjeanty, & dieth, his heire being of full age, the heire shall pay to the king for reliefe one yeares value of the lands or tenements which he holdeth of the king by grand serjeantie over and besides all charges and reprises* (1). *And it is to be understood, that* serjeantia *in Latine is the same* quod servitium, *and so* magna serjeantia *is the same* quod magnum servitium.

(Ante 83. a.)

[106. b.]

11 H. 4. 72. b.

"*SHALL pay to the king for reliefe one yeares value of the lands, &c.*" And herewith agreeth 11 *H.* 4. 72. b.

"*Serjeantia is the same quod servitium.*" Hereby it appeareth that the explanation of ancient words and the true sense of them are requisite, and to be understood *per verba notiora*.

Sect. 155.

ALSO, they, which hold by escuage, ought to doe their service out of the realme; but they, which hold by grand serjeantie, for the most part ought to doe their services within the realme.

"*TENANTS by escuage, ought to doe their service out of the realme.*"

F. N. B. 83. E. (4 Co. 88.)

For he, that holdeth by cornage or castle-gard, holdeth by knights service, and is to doe his service within the realme; but he holdeth not by escuage; and therefore *Littleton* materially said tenant *by escuage*, and not tenant by knights service (2).

"*For*

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(1) See as to reliefs ante 69. b. 76. a. 83. a.

(2) Here lord Coke shews, that escuage, though usually an incident to knight's service, is not always so; that is, that knight's service *may* be without escuage. On the other hand, escuage, if *uncertain*, which we must understand it to be when mentioned *generally*, *cannot* be without knight's service. To express this in fewer words, escuage is inseparable from knight's service, but knight's service is not so from escuage. This tends to confirm what we observed

"*For the most part.*" For to bear the king's banner, or his lance, or to lead his host, and to be his marshall, &c. may be as well without the realme; and therefore *Littleton* said (for the greatest part).

Sect. 156.

ALSO, it is said, that in the marches of Scotland *some hold of the king by cornage, that is to say, to winde a horne, to give men of the countrie warning, when they heare that the* Scots *or other enemies are come or will enter into* England; *which service is grand serjeanty. But if any tenant hold of any other lord, than of the king, by such service of cornage, this is not grand serjeanty, but it is knights service, and it draweth to it ward and marriage* (2); *for none may hold by grand serjeanty but of the king only.*

"*IN*

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observed in a former note, that escuage ought to be considered rather as an incident to the tenure by knight's service, than as a distinct tenure. However, it at the same time seems to point out the reason for calling some tenures by knight's service tenures by escuage; because such a denomination distinguished that species of knight's service, to which escuage was incident, from cornage, castle-guard, and such other tenures by knight's service as were not liable to escuage. We think this a more satisfactory way of justifying Littleton against the censure of mr. Madox for using the term of *tenure by escuage*, than resorting to the distinction suggested by sir Martin Wright; who, as we have formerly hinted, attempts to prove, that though generally escuage was an incident to tenure by knight's service, yet sometimes it was a tenure of itself. Ante 73, note 2. But still we must confess the justice of mr. Madox's animadversion, so far as it applies to the calling *homage* and *fealty* tenures; because the former being incident to every species of knight's service, except where the tenant was exempt from it by profession, and the latter being an incident to all tenures except tenures at will or at sufferance, it could answer no purpose of discrimination thus to denominate any tenure. In fact, it was not the practice to call any tenure a tenure either by fealty or by homage, except in the case of homage auncestrel; and though Littleton begins his account of tenures with homage and fealty, yet we may very well suppose his previous explanation of them and escuage, or at least of the former, to have been made merely as an introduction to the description of knight's service. We should not be thus prolix in observing on a controversy, which is more verbal than any thing else, if it was not for the sake of convincing the reader, that however properly mr. Madox guards against confounding the incidents of a tenure with the tenure itself, still it would be an injustice both to Littleton and Coke to impute any such misconception to them; and therefore, that so far as mr. Madox's animadversion hath this tendency, respectable as his writings are, it ought to be rejected. Indeed it is highly improbable, that grave and learned authors, like Littleton and Coke, to both of whom, particularly the former, the whole doctrine of tenures was so much more familiar than it can possibly be in modern times, when the *practice* in respect to tenures is confined to a very narrow circle, and we are mere *theorists* as to the greater part of the subject, should adopt an error so fundamental.—[Note 112.]

(2) * This passage seems rather to imply, that wardship and marriage were not incident to tenure by *cornage*, when it was of the king, and therefore called grand serjeanty. But this was not the meaning of Littleton, as appears from a

* *This is note* 2 *of* 107. *a. in the* 13*th and* 14*th editions.*

4 H. 5. cap. 7. 22 E. 4. cap. 8. Camden in Britannia.

"*IN the marches of Scotland.*" *Marches* is either a *Saxon* word, and signifieth *limites, bourdours*, or an *English* word, viz. Markes. *Nota*, for that it lyeth neere to *Scotland*, it is sayd in the marches of *Scotland*, and yet the land, ☞ whereof *Littleton* here speaketh, lieth in *England* (1). [107. a.]

"*By cornage.*" *Cornagium* is derived (as *cornuare* also is) *à cornu*, and is as much (as before hath been noted) (3) as the service of the horne. It is also called in old bookes *horngeld*.

23 H. 3. tit. Gard. 148. 8 E. 3. 66. in fine. 16 E. 3. Avowrie 90. F. N. B. 83.

Note, a tenure by cornage of a common person is knights service, of the king it is grand serjeanty; so as the royall dignity of the person of the lord maketh the difference of the tenure in this case (4). And I find that there were *cornicularii* amongst the *Romans; et dicti fuerunt cornicularii quia cornu faciebant excubias militares;* and *magna serjeantia* is appropriated only to this tenure.

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ALSO, a man may see in anno 11 H. 4. *that* Cokayne, *then chiefe baron of the exchequer, came into the common place, and brought with him the copy of a record in these words.* Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c. *And he demanded, if this were grand serjeanty, or petite serjanty. And* Hanke *then said, that it was grand serjanty; because he had a service to do by the bodie of a man, and if he cannot find a man to doe the service for him, he himselfe ought to doe it* (5). Quod alii justitiarii concesserunt. *Then saith* Cokaine, *Ought the tenant in this case to pay reliefe to the value of the land by the yeare?* Ad quod non fuit responsum.

"*AND*

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subsequent Section, in which he is more explicit, and expressly tells us, that *all* tenures by grand serjeanty were liable both to ward and marriage. See Sect. 158.—[Note 113.]

(1) See further as to the *marches* of Scotland, 4 Inst. 281, and Nichols. Leges March.

(3) See ante 69. b.

(4) See post. 108. b. where for a like reason a service, which if it was to be done to a *subject* would be *socage*, is distinguished by the denomination of *petit serjeanty*.

(5) Particular respect is due to the opinions of ancient times on the subject of tenures; but in the instance of the case here mentioned to be put to the judges, their resolution seems so inconsistent with the nature of grand serjeanty, as described both by Littleton and Coke, that it may be allowable to doubt the propriety of the opinion. Littleton states the doing the service to the king in *proper person* as a thing essential to grand serjeanty; and lord Coke enumerates it amongst the special properties of this tenure, with the exception only of performing the service by deputy when the tenant himself is incapable. Ante 106. b. But if this be so, how can a service, expressly reserved to be done by *any* person, fall within the description? It is observable indeed, that Littleton recites the opinion of the judges without the least approbation; and that even they themselves, when pressed to declare what the relief ought to be, whether

"*AND if he cannot find a man to doe the service for him, &c.*" Hereby it appeares, that tenant by grand serjeantie may in some cases make a deputy; and therefore the diversitie is, that where the grand serjanty is to be done to the royall person of the king, or to execute one of those high and great offices, there his tenant cannot make a deputie without the king's licence; and therefore *Littleton* hath said before that such services are to be done in proper person. But he that holdeth to serve him in his warre within the realme or by cornage, may make a deputie.

11 H. 4. 72. 24 E. 3. 32. Vide Hill. 8 E. 1. Middl. inter Placita de Banco, sir John Moyse's case. 11 H. 4. 72.

[*] *Johannes de Archier qui tenet de domino rege in capite per serjantiam archeriæ, &c. in comitatu Glouc. hæres in custodiâ.*

[*] Claus. 18. H. 3. m. 5.

"*Infra quatuor maria.*" That is, within the kingdome of *England*, and the dominions of the same kingdome (6).

Rot. Escaestor. 41 H. 3. nu. 23. Stephen Haringdon's case.

Now

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whether 5*l.* as for a tenure by escuage, or a *year's value of the lands* as for a grand serjeanty, avoided answering; from which hesitation it seems, as if they were not disposed to adhere to their first opinion in all its consequences. On the other hand, if the tenure in question was not *grand serjeanty*, but mere *knight's service*, it tends to prove, that though the personal service, in lieu of which escuage was payable, was *in general* due only on *foreign expeditions*, yet by *special* reservation it might be due *within the realm*. However, reserving service in war within the realm was a thing so unusual in *practice*, that the service, for which escuage was a commutation, was called *servitium forinsecum*; a denomination which, according to lord Hale, is founded on the circumstance of its being due *out of the realm*. See ante 69. b. note 3. In a former note on escuage, we adopted lord Hale's opinion as to the reason of calling knight's service *servitium forinsecum*; because we thought his conjecture a probable one. Ante 74. a. note 1. But the reader should recollect, that others explain the denomination in a different way. Ante 74. b.—[Note 114.]

(6) On many occasions it may be of importance thoroughly to understand the phrase of *infra*, or, as according to classical style it ought to be, *intra quatuor maria*; for there are various subjects, as well of the *law of nations*, as of *municipal law*, which are necessarily connected with it. Of the former kind are the *sea-dominion* claimed by our king and its incidental rights; especially the right of salutation by striking of the flag and lowering the top-sail to our ships of war; a ceremony, which, however it may be construed by foreigners as a mere *compliment*, is considered by ourselves as a *recognition* of sovereignty. Of the latter sort are the doctrine concerning essoins *de ultra mare*, and all those cases which turn upon the *allegation of being beyond sea*; as questions of legitimacy, of outlawry, and on the statutes of limitation particularly may. But notwithstanding the necessity of knowing, for such a variety of purposes, what is the sense of the term of being *within the four seas*, we do not find the subject sufficiently enlarged upon either by lord Coke, or indeed scarce any other writers deserving of being called *original*; except mr. Selden, who is very copious upon it; and sir Philip Medows, who, though not so favourable to our claim of *sea-dominion*, nor so generally known as the former, is well intitled to notice. See Seld. Mar. Claus. lib. 2. per tot. but more particularly in cap. 1. and 24, and Medows's Observat. concerning the Dominion, &c. of the Seas, in a small tract, which was published in 1689. In this scarcity of information on the subject, it may be acceptable to the reader to be assisted in his inquiries by a short but pointed view of the subject; for which purpose we shall first mention the origin of the phrase of the *four seas*, and explain its most general and extended sense.

The appellation of the *four seas* takes its rise from the four parts into which the

Now it is good to be seene what persons that hold by grand serjantie may doe and performe that honourable service in person, and who ought not to be received ☞ thereunto, but ought to make a sufficient deputy. At the [107. b.] coronation of [a] king *R.* 2. *John Wilshire* citizen of *London* exhibited his petition to the high steward of *England* in his court, that where the said *John* held certain lands in *Hayden* in the county of *Essex* of the king by grand serjeantie, viz. to hold a towell when the king should wash his hands before dinner the day of his coronation, &c. and prayed that he might be accepted to doe this office of grand serjeantie, the judgement followeth. *Et quia apparet per record' de Scaccario domini regis in curiâ monstrat' quòd prædicta tenementa tenentur de domino rege per servitium prædictum, ideo dictus Johannes admittitur ad servitium suum hujusmodi faciendum per Edmondum comitem Cantabrigiæ deputatum suum, et sic idem comes in jure ipsius Johannis manutergium*

[a] 1 R. 2. Rot. Claus. m. 45.

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the sea encompassing Great Britain, by reference to the four cardinal points of the globe, is divided. All these parts taken together, are sometimes called the *British seas;* but considered separately each varies in its denomination with the coasts of the island. To the *West* our sea is by ancient writers called *Vergivian*, not only including the sea between Great Britain and Ireland, but extending over the Atlantic ocean, which washes the western coast of the latter; and this western part of our sea is subdivided; for so much as runs between England and Ireland is called *St. George's Channel*, or the *Irish sea;* and the sea on the west coast of Scotland is sometimes named the *Caledonian*, *Deucaledonian*, or *Scottish* sea, and sometimes the *North* sea. On the *North* side of our island there is also the *Scottish* or *North* sea. To the *East* we have the *German* ocean, which is bounded principally by the opposite coasts of Germany and the United Provinces. Lastly, to the *South* there is the *British Channel*, or *sea*, as some denominate it; which runs along the *French* coast, and comprehending the Bay of Biscay, ends with the northern coast of *Spain*. See Seld. Mar. Claus. lib. 2, cap. 1, and the introductory account of the British ocean prefixed to the description of Ireland, in Camd. Britan. Such is the description of the four seas, as we have it principally from mr. Selden. But it should be observed, that the description is framed with a view to the whole island of Great Britain, as in mr. Selden's time it became united under the government of the same king; and not to *England* as distinct from *Scotland*, according to the sense of our English law-books before the reign of James the first; for in them the four seas were understood with more restriction, and to be those which encompassed England only. See Medow's Observ. on the Domin. of the Seas, 11. Seld. Mar. Claus. lib. 2, cap. 31, and Justice's Treat. on Sea-Laws, 1st. ed. 165. Another thing, very necessary to be attended to, is the very large and comprehensive terms of the description, so far as they regard the *West* and *North* parts of the British seas; the former seeming to reach to the eastern shore of the continent of America, and the latter to be in some measure without any certain limits. Even the two other parts do not seem to be marked out with that nice precision, the want of which, as the reader will readily conceive, may under some circumstances be the cause of considerable embarrassments, both in transactions with foreign states, and in the exercise of judicial authority amongst ourselves. See Seld. Mar. Claus. lib. 2, c. 30, 31, 32. The difficulties arising from this uncertainty will be best understood, by considering what the extent of the phrase of the *four seas* is in some particular instances. But this illustration shall be attempted in another place, where lord Coke gives the opportunity of resuming the subject. See post. 244. a.—[Note 115.]

tergium tenuit, quando dominus rex lavabat manus suas dicto die coronationis suæ ante prandium.

By which record it appeareth, that the said *John Wilshire*, being of his quality and having not any dignitie, could not doe and performe this high and honorable service to the royall person of the king, but did make an honorable deputy, who performed it in his right; which is worthy of observation.

At the same coronation *William Furnevall* exhibited his petition in the same court, that where he held the mannor of *Farnham*, in the county of *Buck.* with the hamlet of *Cere* in the same county, by the service to find to the king at his coronation a glove for his right-hand, and to support the king's right hand the same day, while he held in his hand the verge royall, the judgement followeth. *Quâ quidem petitione debitè intellectâ, et factâ publicâ proclamatione, si quis clameo ipsius Willielmi in eâ parte contradicere vellet, nemineque ei contrariente, consideratum fuit, quòd idem Willielmus, assumpto per eum primitùs ordine militari, ad servitium prædictum admitteretur faciendum; et postmodo (videlicet) die Martis proximo ante coronationem prædictam dominus rex ipsum Willielmum apud Kenington honorificè præfecit in militem, et sic idem Willielmus servitium suum prædictum dicto die coronationis, juxta considerationem prædictam, perfecit et in omnibus adimplevit.* By which it appeareth, that a knight is of that dignity, that he may performe this high and honourable service in his owne person; and although this *William Furnevall* was descended of an honorable family, yet before he was created knight he could not performe it. Vid. 1 R. 2. memb. 45.

And sir *John de Argentine, chivalier*, performed the service of grand serjeanty, to be the king's cup-bearer at the same coronation.

[*m*] *Anne*, which was the wife of sir *John Hastings* earle of *Pembroke*, who held the mannor of *Ashley* in *Norfolke* of the king by grand serjantie, viz. to performe the office of the napery at his coronation, was adjudged to make a deputy, because a woman cannot doe it in person; and thereupon she deputed sir *Thomas Blount*, knight, who performed the same in her right. [m] Vid. 1 R. 2. m. 45.

John, sonne and heire of *John Hastings* earle of *Pembroke*, exhibited in the same court his petition, shewing that by his tenure he was to carrie the great spurres of gold before the king at his coronation, &c. The judgement is, *Auditâ et intellectâ billâ prædictâ, pro eò quòd dictus Johannes est infra ætatem et in custodiâ domini regis, quanquam sufficienter ostenditur per recorda, et evidentias, quòd ipse servitium prædictum facere deberet, consideratum extitit, quod esset ad voluntatem regis, quis dictum servitium istâ vice in jure ipsius Johannis faceret; et super hoc dominus rex assignavit Edmundum comitem Marchiæ ad deferendum dicto die coronationis prædicta calcaria in jure præfati hæredis, salvo jure alterius cujuscunque. Et sic idem comes Marchiæ calcaria illa prædicto die coronationis coram ipso domino rege deferebat.* By which it appeareth, that the heire, before he hath accomplished his age of one and twenty yeares, cannot performe his great and honourable service, but during the minoritie the king shall appoint one to performe the service. Vid. 1 R. 2. m. 45.

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AND note, that all which hold of the king by grand serjanty, hold of the king by knights service; and the king for this shall have ward, marriage and reliefe; but he shall not have of them escuage, unlesse they hold of him by escuage.

46 E. 3. 15. a. per Finchden.

HERE *Littleton* saith, that he, that holds by grand serjeantie, doth hold by knights service, which is so said of the effects. And therefore *Littleton* doth add, that the king shall have ward, marriage and reliefe, which are the effects of knights service, &c. [108. a.]

(Ante 75. a.)

Sometimes in ancient records, *servitium militare* is called *servitium hauberticum*, or *servitium brigandinum*, or *servitium loricatum*. And a *haubert* or *brigandine* signifieth a coat of maille (1).

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(1) The tenure by grand serjeanty still continues, though it is so regulated by the 12 of Cha. 2, as to be made in effect *free and common socage*, except so far as regards the merely honorary part of grand serjeanty; for the first part of the statute, which destroys the incidents to tenures by knights service, of which grand serjeanty was the highest species, is expressed with a generality sufficient to reach grand serjeanty; but then a proviso follows, by which the *honorary* services of this tenure are expressly saved. It is observable, that the proviso for this purpose is penned with an inaccuracy, which leads to a very mistaken idea of the incidents to grand serjeanty. The honorary services are preserved with a cautious exception of several burthensome properties, such as *marriage*, *wardship* and *voyages royal*; to which are added *escuage* and the *aids pur faire fitz chivaler et file marier*, though *these latter* were certainly quite foreign to grand serjeanty. See ante 105. b. From this undistinguishing mode of expression, and from the confusion and redundancy so conspicuous in most parts of the statute, we are inclined to infer, that those, who attribute the framing of it to lord chief justice Hale, found themselves on a loose report, very injurious to the memory of that shining ornament of his profession. See Gilb. Eq. Rep. 176.—[Note 116.]

CHAP. 9. *Petite Serjeantie.* Sect. 159.

TENURE by petite serjeanty is, where a man holds his land of our soveraigne lord the king, to yield to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a paire of gilt spurs, or an arrow, or divers arrowes, or to yield such other small things belonging to warre.

"*OF our lord the king.*" And so *Littleton* concludeth this Chapter, that a man cannot hold by grand serjeanty or petite serjeanty but of the king, and of the king as of his person, and not of any honour or manor (2). And it is to be observed, that regularly a tenure of the king as of his person is a tenure *in capite*, so called κατ' ἐξοχην, *propter excellentiam*; because the head is the principall part of the body, and he that holdeth of any common person as of his person, he in truth holdeth *in capite*; but againe κατ' ἐξοχην it is only in common understanding applyed to the king, and that seigniory of a common person is called a tenure in grosse, that is, by itselfe, and not linked or tied to any mannor, &c. Britton, fol. 164. Bracton, lib. 2, fol. 35. Fleta, lib. 2, cap. 9. Ockam, cap. Quid de avibus oblatis. (6 Co. 6.)

And this tenure of the king *in capite*, is said [*a*] to be a tenure of the king as of his crowne, that is, as he is king. [*b*] And therefore if one holdeth land of a common person in grosse as of his person, and not of any mannor, &c. and this seigniory escheateth to the king (yea though it be by attainder of treason) he holdeth of the person of the king, and not *in capite*; because the originall tenure was not created by the king. And therefore it is directly said, that a tenure of the king *in capite*, is when the land is not holden of the king as of any honor, castle, or mannor, &c. but when the land is holden of the king as of his crowne (3). [*a*] Bracton, lib. 2, fol. 87. (2 Ro. Abr. 504.) [*b*] 3 E. 3. Tenures B. 94. 30 H. 8. 43. 28 H. 8. Livery B. 57. 29 H. 6, ibid. 58. 6 H. 8. Dier 58. Vide Le statute de 1 E. 6, cap. 4. F. N. B. 5. K. (2 Ro. Abr. 72, 73.)

Note,

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(2) In a former note we mentioned mr. Madox's disapprobation of calling any tenures of the king *by way of distinction* tenures *ut de persond*. We shall here explain his reasons for rejecting the phrase more fully. The phrase seems *unnecessary*; for *that* of *ut de coronâ* fully answers the same purpose of distinction. It also seems *injudicious*, and to tend to an erroneous idea of tenures; because it supposes, that *some* tenures are *not* of the *person*, whereas in truth *all are*, and none can hold feudally of an inanimate thing, or otherwise than of a man's person. Mad. Baron. Angl. 167. This is the substance of mr. Madox's objections to the phrase; and we still think, that in strict propriety of speech, his animadversion on those who use it, is justifiable. However in justice to lord Coke it should be remembered, that he was not the inventor of the phrase; mr. Madox himself tracing its origin to the latter end of the reign of Henry the eighth.—[Note 117.]

(3) Mr. Madox is not less adverse to thus distinguishing tenure *in capite* from tenure *ut de honore*, than to the distinction of *ut de persond*; nor are his reasons less convincing. Tenure *in capite*, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately and without the interposition of any mesne or intermediate lord; and therefore when an honor or other seigniory came into the hands of the crown by escheat or otherwise, its tenants were

Note, that an honor is the most noble seigniory of all others, and originally created by the king, but may afterward be granted to others. See for the creation of an honor, 13 *H.* 8. cap. 5. 33 *H.* 8. cap. 37, 38. 37 *H.* 8. cap. 18. (4).

And it is to be observed, that a man may hold of the king *in capite*, or of his crowne, as well in socage, as by knight's service (5).

Magna Chart. cap. 27.

"*To yield to him yearly a bow, or a sword, &c.*" As grand serjeanty must be done by the body of a man, so petite serjeanty hath nothing to do with the body of a man, but to render some things touching warre; as a bow, a sword, a dagger, a knife, a launce, a pair of gantlets of iron, or shafts, and such like.

Regist. fo. 2. F. N. B. fo. 1.

It is to be observed, that grand serjeanty or knights service is not in law called *liberum servitium*, as socage is, but *per feodum unius militis, &c.* But to finde the king so many ships for

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were as much tenants *in chief* to the king, as those who were so by original grant from the crown. In proof of this mr. Madox selects from ancient records a great variety of instances between the 8th of Richard I. and the 20th of Henry VI. in which tenures *ut de honore* are *expressly* styled tenures *in capite*; and as mr. Madox adds no instances of a later time than Henry the eighth and queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured, that the error complained of by mr. Madox originated soon after the time of Henry the sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of *tenures in capite* was to distinguish those estates which were held of the king by a tenure originally created by the king, from those held of him by a tenure commencing by the subinfeudation of a subject; between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Ang. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency and more correctness, by denominating tenures of the first sort tenures *ut de corond*, and those of the second tenures *ut de honore*. The influence of this mistaken notion of tenancy *in capite* is very evident, as well throughout the statute of Charles the second for taking away the oppressive fruits of knight's service and tenure *in capite*, as in those grants from the crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. See Mad. Excheq. fol. ed. 432. But great as this error about tenure *in capite* may be, lord Coke is excuseable for conforming in his language to it; because before his time it had been adopted by the legislature. See 37 H. 8. c. 20. s. 2, 3, 4. 1 E. 6. c. 4. s. 1, 2, & 3, and Mad. Baron. Angl. 233.—[Note 118.]

(4) The first book of mr. Madox's *Baronia Anglica* is principally employed in explaining the nature of an *honor*. He objects to the propriety of the statutes of Hen. 8. referred to by lord Coke; and as they only create *titular* honours, and therefore cannot give a just idea of the nature of the *genuine* honor, which is a *land barony*, blames lord Coke for his reference. Mad. Bar. Angl. 8, 9, 10, and 236.—[Note 119.]

(5) See Mad. Baron. Angl. 238, 239, where the learned author observes on the inaccuracy of language in the 12 Cha. 2. about tenure *in capite*. The title of the act expresses, that it was made for taking away tenure *in capite*; and the first enacting clause proceeds on the same idea. But had the act been accurately penned, it would simply have discharged such tenure of its oppressive fruits and incidents; which would have assimilated it to *free and common socage*, without the appearance of attempting to annihilate the *indelible* distinction between holding *immediately* of the king, and holding of him through the *medium* of other lords. See ante note 3.—[Note 120.]

[108. b.] ☞ for his passage is called *liberum servitium*; and therefore it is said, *per liberum servitium, ad inveniendum nobis quinque naves ad transitum nostrum ad mandatum nostrum.* And therefore clearly such a tenure is neither grand serjeanty, nor knights service; because nothing is to be done by the body of any man, nor in that case touching war, but ships to be found. And this is the reason that *Littleton* yieldeth of the examples he doth here put, because that such a tenant by his tenure ought not to go, nor to doe any thing in his person, touching war. And herewith agreeth *Bracton, ex parvis serjeantiis, quæ non respiciunt regem nec patriæ defensionem, nullum competere debet maritagium nec custodiam, &c.* Bract. li. 2, fo. 35.

If a man holdeth land of the king, to finde an horse of such a price and a saddle and a bridle by forty dayes, or any other time when the king goeth with his army against *Wales*, this is petite serjeanty, and no grand serjeanty, for the cause aforesaid. 9 H. 3. Gard. 145.

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AND such service is but socage in effect; because that such tenant by his tenure ought not to goe, nor do any thing, in his proper person, touching the warre, but to render and pay yearly certaine things to the king, as a man ought to pay a rent.

"*SUCH service is but socage, &c.*" But, as it hath beene said, the dignity of the person of the king giveth the name of petite serjeanty, which in case of a common person should be called plain socage, *ab effectu*; for it shall have such effects or incidents as belong to socage, and neither ward nor marriage, &c. for they belong to knights service. 9 H. 3. Gard. 145.

Of this tenure the Great Charter in the person of the king saith thus: *Nos non habebimus custodiam hæredis, &c. occasione alicujus parvæ serjeantiæ, quam tenet de nobis per servitium reddendo nobis cultellos, sagittas, &c.* Mag. Chart. ca. 28. Vid. Stat. de Wardis & Releviis 28 E. 1.

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AND note, that a man cannot hold by grand serjeanty, nor by petite serjeanty, but of the king, &c.

OF this sufficient hath beene sayd before, saving that *parva serjeantia* is only appropriate to this tenure (1). Vide Sect. 1.

CHAP.

(1) The tenure of petite serjeanty is not named in the 12 of Cha. 2. but the statute is not without its operations on this tenure. It being necessarily a tenure *in capite*, though in effect only so by socage, *livery* and *primer seisin* were of course incident to it on a descent; and these are expressly taken away by the statute from every species of tenure *in capite*, as well *socage in capite* as *knight's service in capite*. See ante 77. a. But we apprehend, that in other respects *petit serjeanty* is the same as it was before; that it continues in denomination, and still is a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to *war*.—[Note 121.]

Chap. 10. *Tenure in Burgage.* Sect. 162.

***TENURE** in burgage is, where an ancient burrough is, of which the king is lord, and they, that have tenements within the burrough, hold of the king their tenements; that every tenant for his tenement ought to pay to the king a certaine rent by yeare, &c. And such tenure is but tenure in socage.*

Bracton, lib. 3. Tract. 2. Britton, fol. 164. Mirror, cap. 2, sect. 18.

"*BURGAGE,*" in *Latine burgagium*, is derived of this word *burgus*, which is *vicus*, *pagus*, or *villa*, a towne (2); and it is called a burgh (3), because it sendeth burgesses to parliament (4).

10 Co. 123, 124, the Mayor of Lynn's case. 40 Ass. p. 27. 43 E. 3. 32. 21 E. 4. 53 & 54. 21 H. 7. 15. 2 E. 3. cap. 3.

[b] Bracton, lib. 3. fol. 124. Fleta, lib. 1, cap. 47.

Of burghs some be incorporate, and some not; and some be walled, and some not. [b] It ☞ was in former times taken for those companies of ten families, which were one another's pledge; and therefore a pledge is in the *Saxon* tongue *borhoe*, whereof some take it that a burgh came; whereof also commeth headborough or borowhead, *capitalis plegius*, a chiefe pledge, viz. the chiefe man of the borhoe, whom *Bracton* calleth *frithburgus*; and hereof also commeth burgbote, which, as *Fleta* saith, signifieth *quietantiam reparationis murorum civitatis aut burgi.* [109. a.]

Every city is a burgh, but every burgh is not a city; whereof more shall be said hereafter. And the termination of this word *burgagium* (as before hath beene noted), signifieth the service whereby the burgh is holden. And of this word *(burgh)* two ancient and noble families take their names, viz. *de Burgo*, and *de Burgo caro*, *Burchier.*

F. N. B. 64. d.

"*Of which the king is lord.*" But it may be holden of another, as by that, which immediately followeth, appeareth.

Sect.

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(2) For the difference between *town* and *borough*, see post. 115. b.

(3) For the etymology of *borough*, besides Spelman, Du Fresne, and the other glossarists, see Whitl. on Parliam. 497. Brad. on Bor. 1. and Mad. Firm. Burg. 2.

(4) Mr. Madox cautions his readers against this derivation of *borough*. Mad. Firm. Burg. 2. His reason, we presume, was, that *borough* was a word far more ancient than the practice of sending burgesses to parliament. However it is possible, that some boroughs might be denominated towns, till they were allowed to chuse representatives in parliament; and that they acquired the name of *boroughs* from the circumstance of having that privilege. If any *towns* did become *boroughs* in this way, it in *some degree* accounts for lord Coke's explication of the word, though it will not wholly justify him as an etymologist. —[Note 122.]

Sect. 163.

AND the same manner is, where another lord spirituall or temporall is lord of such a burrough, and the tenants of the tenements in such a burrough hold of their lord to pay, each of them yearly, an annual rent.

THIS is evident, and needeth no explanation. Only this by the way is to be observed, that bishops, being lords of parliament, have not been called lords spirituall so lately as some have imagined. 16 R. 2, ca. 5. 1 H. 4. ca. 2, &c.

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AND it is called tenure in burgage, for that the tenements within the burrough be holden of the lord of the burrough by certaine rent, &c. And it is to wit, that the ancient townes called burroughes be the most ancient towns that be within England; *for the townes that now be cities or counties, in old time were boroughes, and called boroughes; for of such old townes called boroughs, come the burgesses of the parliament to the parliament, when the king hath summoned his parliament* (1).

"*BY certaine rent, &c.*" By *(&c.)* here is implyed fealtie, or other service, as to repaire the house of the lord, &c.

"*The ancient townes called burroughes.*"

So as a burgh is an ancient towne, holden of the king or any other lord, which sendeth burgesses to the parliament.

And it is to be observed, that *Burgh* and *Burie* have all one signification; as *Canterburie, Burie Saint Edmond, Sudburie, Salisburie, Banburie, Heytesburie, Malmesburie, Shaftesburie,* & *Teukesbury,* and others send burgesses to the parliament. *Vide pro villis, parochiis et hamlettis, postea, Section* 171.

[109. b.]

"*Cities,*" *Civitas,* whereof commeth the word city. A city is a borough incorporate (2); which hath or hath had a bishop; and

(1) See ante 108. b. note 4.

(2) This implies, that unless a borough is *corporate*, it *cannot* be a city. But if this was lord Coke's idea, it is not quite accurate; for though in general the description may be true, yet it is not universally so. Westminster is a *city*, and also a *borough*, so far at least as the sending members to parliament can entitle it to that denomination; and yet it certainly is not corporate. Mr. Madox mentions Westminster as a borough *not corporate;* and we ourselves have seen papers in the archives of the dean and chapter of Westminster, which confirm his idea. Mad. Firm. Burg. 49. This fact is material to another purpose. Westminster not being corporate, and yet having, as we apprehend, first sent

and though the bishopricke be dissolved, yet the city remaineth.

In the time of *William* the Conquerour it is declared in these words: *Item nullum mercatum vel forum sit, nec fieri permittatur, nisi in civitatibus regni nostri, et in burgis clausis et muro vallatis, et castellis, et locis tutissimis, ubi consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ, quæ constitutæ sunt à bonis prædecessoribus nostris, deperire non possint, nec defraudari, nec violari, sed omnia ritè et per judicium et justitiam fieri debeant: et ideo castella et burgi et civitates sunt et fundatæ et ædificatæ; scilicet ad tuitionem gentium et populorum regni, et ad defensionem regni, et idcirco observari debent cum omni libertate et integritate et ratione.* So as by this it appeareth, that cities were instituted for three purposes. First, *Ad consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ conservand'.* 2. *Ad tuitionem gentium et populorum regni.* And thirdly, *Ad defensionem regni.* For conservation of laws, whereby every man enjoyeth his owne in peace; for tuition and defence of the king's subjects; and for keeping the king's peace in time of sudden uprores; and lastly, for defence of the realme against outward or inward hostility.

Lamb. fol. 125.

Mirror, cap. 2, sect. 18. Britton, fol. 87.

Civitas et urbs in hoc differunt, quòd incolæ dicuntur civitas, urbs verò complectitur ædificia; but with us the one is commonly taken for the other. *Villeins sont coultivers de fiefe demurrants in villages upland; car de ville est dit villeine, et de boroughes burgesses, et de cities citizens.*

Every borough incorporate, that had a bishop within time of memory, is a citie, albeit the bishopricke be dissolved; as *Westminster* had of late a bishop, and therefore it yet remaines a city (3). The burgh of *Cambridge*, an ancient city, as it appeareth

Mich. 7 R. 1. Rot. 1. (which was in Anno Dom. 1195) in an Ass. of Darreine Presentment for the Church of St. Peter's in Cambridge.

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members to parliament in the reign of Edward the sixth, is an instance, that the inhabitants of a town may acquire the right of having representatives in parliament *within time of legal memory* without being incorporated, and therefore seems inconsistent with the doctrine of lord chief justice Holt on this subject in Ashby and White. See 3 Pryn. Brev. Parl. sect. 7, p. 188. 1 Will. Notit. Parl. 7, and 21, of the preface. Car. Rights of Elect. part 2. page 233. 1 Stow's Survey Stripe's ed. of 1720. p. 8 and 10, of the second appendix, and 2 Dougl. Hist. of Cas. of Controv. Elect. 296, 297, 298. It is with great pleasure that we cite mr. Douglas's work, as it affords the opportunity of congratulating the student on the accession of a collection of excellent reports on the law of parliamentary election, accompanied with an instructive historical preface, and very judicious annotations. This is the only work of the kind, except one lately published from mr. Glanville's manuscript; and they are both particularly valuable, on account of their tendency to *diffuse* the knowledge of a branch of law, which *before* was too much confined to the narrow circle of a few favourites in possession of the *practice*.—[Note 123.]

(3) This is rather an unapt example of the truth of lord Coke's position; for Westminster, as we have already stated, is *not* a borough *incorporate*. See supra, note 2. As to Westminster's being a *city*, it became so by *express creation*, and not *singly* by making it the see of a bishop, however sufficient *that* of itself might have been; the letters patent, which erected the bishoprick, ordaining, *quòd tota villa nostra Westmonasterii extunc et deinceps in perpetuum sit civitas*,

by a judiciall record (which is to be preferred before all others) where *mos civitatis Cantabrigiæ* is found by the oath of twelve men, the recognitors of that assise; which (omitting many others) I thought good to mention, in remembrance of my love and duty *almæ matri academiæ Cantabrigiæ*.

There be within *England* two archbishoprickes, and twenty-three other bishoprickes. Therefore so many cities there be; and *Cambridge* and *Westminster* being added, there are in all twenty-seven cities within this realme, and may be more, than at this time I can call to memory.

It is not necessary that a citie be a county of itselfe; as *Cambridge*, *Ely*, *Westminster*, &c. are cities, but are no counties of themselves, but are part of the counties where they be.

"*Counties*," or Shires; the one taken from the *French*, the other from the *Saxon*, in *Latine Comitatus*. Counties are certaine circuits or parts of the kingdome, into the which the whole realme was divided for the better government thereof, so as there is no land but it is within some county. And every of them is governed by a yearly officer, which we call a Shireve; which name is compounded of these two *Saxon* words *shire* and *reve* [*i. e.*] *præpositus* or *præfectus comitatûs*. But hereof more hereafter in his proper place shall be spoken. There be in *England* forty-one counties, and in *Wales* twelve. (Post. 168. a.)

"*Come the burgesses of the parliament to the parliament, &c.*" Parliament is the highest and most honourable and absolute court of justice in *England*, consisting of the king, the lords of parliament, and the commons. And againe, the lords are here divided into two sorts, viz. spirituall and temporall. And commons are divided into three parts, viz. into knights of shires or counties, citizens out of cities, and burgesses out of burroughes; the words of the writ to the sherife for the election being, *duos milites gladiis cinctos magis idoneos et discretos comitatûs tui, et de quâlibet civitate comitatûs tui duos cives, et de* ☞ *quolibet burgo duos burgenses de discretioribus, et magis sufficientibus, &c.* all which have voyces and suffrages in parliament. You shall reade in the parliament rolls, that (as hath beene said) there is *lex et consuetudo parliamenti, quæ quidem lex quærenda est ab omnibus, ignorata à multis, et cognita à paucis.* Of the members of this court some be by descent, as ancient noblemen; some by creation, as nobles newly created; some by succession, as bishops; some by election, as knights, citizens, and burgesses. 10 Co. 123, 124. Vid. devant Sect. 97. [110. a.] Vide Sect. 3. (4 Inst. 2.)

It is called parliament, because every member of that court should sincerely and discreetly *parler la ment* (1) for the general good

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civitas, ipsamque civitatem Westmonasterii vocari. See the letters patent in 1 Burn. Reform. page 246, of the Appendix.—[Note 124.]

(1) The latter part of this etymology is justly exploded; but it is some excuse for lord Coke, that it did not first come from him, it being to be found in preceding authors of eminence. See Lamb. Archeion in the chapter of *Parliament*, and 1 Whitl. on Parliament 174. A learned writer of the present time suggests, that perhaps *parliament* may be a compound of *parly* and *ment*, two Celtick words, the *former* answering to *parler* in French, and the *latter* signifying *abundance*, and both together importing the same as *great talk* amongst the Indians

4 H. 8. cap. 8.

good of the common wealth; which name it hath also in *Scotland* (2); and this name before the Conquest was used in [a] the time of *Edward* the Confessor, *William* the Conqueror, &c. (3). It was anciently before the Conquest called *michel sinoth, michel gemote, ealsa witena gemote;* that is to say, the great court or meeting of the king and of all the wisemen, sometime of the king with the counsell of his bishops nobles and wisest of his people. This court the *Frenchman* calleth *les estates*, or *l'assemble des estates*. In *Germany* it is called a *diet*. For those other courts in *France* that are called parliaments, they are but ordinary courts of justice; and (as *Paulus Jovius* affirmeth) were first established by us.

[a] Treatise de Modo tenend. Parliam. 21 E. 3. fo. 60. a. Johannes de Rupicella tempore regis Johannis. Pol. Virgil. li. 3, tempore H. 1. W. 1. 3 E. 1. in the title. (Doct. & Stud. 164. 3 Inst. 125. 179. 4 Inst. 53.)

The king of *England* is armed with divers councils, one whereof is called *commune concilium*, and that is the court of parliament, and so it is legally called in writs and judiciall proceedings

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Indians of North America. Barringt. Obs. on Ant. Stat. 2d ed. 56. But though we do not doubt that there are two such words in the Celtick language, we are scarce more satisfied with this derivation, than with that expressed by lord Coke. The opinion adopted by mr. Lambard seems far the most probable; and this is, that *parliament* is not a *compound* word, but *simply* derived from the French verb *parler*, with the addition of *ment* in the termination; which mode of converting *verbs* into *nouns* as well as into *adverbs* is common in the *French* tongue. Lamb. Archeion in the chap. of *Parliament*. A like practice prevailed in the formation of the *Roman* language; and thence the true source of derivation for *testamentum*, and other similar Latin words; though an injudicious desire to render them more significant and expressive of the qualities of the subjects to which they are applied, than their true deduction would warrant, gave birth to a forced and fanciful kind of etymology, like that now so properly rejected in the instance of the word *parliament*. This false taste in respect to etymology is of a very ancient date; nor were lord Coke and his cotemporaries more chargeable with it, than some of the most admired and pure classical writers of antiquity, not excepting even *Cicero*. See Menag. Jur. Civil. Amœn. cap. 39, particularly in his observations on the word *testamentum*, and Tayl. Elem. Civ. L. 7. It seems to have originated from not attending to the real office of etymology, and confounding it with the definition of the subject to which a word is applied; two things quite distinct in their nature, though it frequently happens, that they reflect light on each other.—[Note 125.]

(2) For a history of the origin and constitution of the parliament in Scotland before the union of the two kingdoms in the reign of queen Anne, and of the change made by the establishment of one parliament for Great Britain, see the Treatise on the Laws of Election for Scotland, with which mr. Wight hath lately obliged the public.—[Note 126.]

(3) Mr. Lambard guesses, that the word *parliament* was introduced here soon after the Conquest. He cites *Westminster the first*, as the most ancient statute in which he had observed the word to be used; though from a passage in the statute of Edward the second, mentioning *parliaments* in the times of that king's *progenitors*, he infers, that the word had been adopted several reigns *before*. Lamb. Archeion cap. *Parliament*, and Westm. 1. 3 E. 1, and Articuli Cleri 9 E. 2. One of mr. Prynne's arguments against the great antiquity of the *modus tenendi parliamentum* is the frequent use of the word *parliament;* he insisting, that it was never applied to denote the *great council of the nation* in any of our ancient records or writings prior to the reign of Hen. 3. See Pryn. on 4 Inst. 2. See further Brad. Introduct. to Engl. Hist. 71.—[Note 127.]

ings *commune concilium regni Angliæ*. And another is called [*b*] *magnum concilium:* this is sometime applied to the upper house of parliament, and sometime out of parliament time to the peeres of the realme, lords of parliament, who are called *magnum concilium regis;* for the proofe whereof take one [*c*] record for many in the fifth yeare of king *H.* 4. at what time there was an exchange made betweene the king and the earle of *Northumberland*, whereby the king promiseth to deliver to the earle lands to the value, &c. *per advice et assent des estates de son realme et de son parliament (parensi que parliament soit devant le feast de St. Lucy) ou auterment per advice de son graund councell, et auters estates de son realme, que le roy ferra assembler devant le dit feast, in case que le parliament ne soit.* And herewith agreeth the act of parliament in 37 *E.* 3. cap. 18, where it is said, before the chancellor treasurer and great councell. (4) Thirdly (as every man knoweth), the king hath a privy councell for matters of state; (as for example) [*d*] *Henricus de Bellomonte baro de magno et de privato concilio regis juratus*, and many others before and after. The fourth councell of the king are his judges of the law for law matters; and this appeareth frequently in our [*e*] bookes; and must be intended, when it is spoken generally by the councell, it is to be understood *secundum subjectam materiam;* for example, if it be legall, then by the king's councell of the law, viz. his judges (5).

[*b*] Bracton, lib. 1, cap. 2. Regist. 280.

[*c*] 27 Aug. 5 H. 4.

[*d*] In dors. Claus. 16 E. 2. m. 5. (7 Co. 36.)

[*e*] 43 Ass. 15. 27 H. 6. 5. 1 R. 3. 11. Regist. 191. 122, 123. 4 E. 3. 2.

39 E. 3. 35. 3 Ass. 15. 19 E. 3. Judgement 174. W. 1. ca. 1. Lestat. de Templar. 16 R. 2. Stat. de Præmunire. See the same published by Mr. Lambard.

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(4) In the controversy about the origin of the *Commons* in parliament, mr. Tyrrel contends, that anciently *commune consilium* sometimes denoted an assembly distinct from parliament, and one composed of fewer persons; and particularly, that the *commune consilium*, mentioned in the clause of king John's *Magna Charta*, about assessing escuage, which enumerates only archbishops, bishops, abbots, counts, and the greater barons, was of this sort. Tyrr. Biblioth. Politic. 311. 314.—[Note 128.]

(5) Lord Coke in another place repeats the expression, that *for matters of law the judges are the king's counsel.* Post. 304. a. But he omits explaining, whether they are so called, on account of their *judicial* opinions in the king's courts, of their opinions in parliament, when advised with by the lords, or any *extra-judicial* opinions the king may be entitled to demand from them. As to the latter, they were not favoured by lord Coke, as appears by his behaviour in the great case of Commendams in the reign of James the first, when the king severely reprimanded the judges for disobeying his mandate to postpone proceeding in a cause concerning the prerogative till they were consulted by him. Though lord Coke was deserted by the other judges, who asked pardon for having remonstrated against the king's command; and though the privy council decided, that the command was agreeable to law; yet lord Coke bluntly refused either to retract or apologize. See lord Coke's life in the Biograph. Britan. One thing much relied on by those who justified the king's order, was the oath of the judges, which is printed in the statute book as a statute of Edward the third, and expressly requires them to *counsel the king in his business.* See 18 E. 3. stat. 4. But what is thus called a statute lord Coke denies to be one, and indeed very properly; for it has not the least resemblance of a statute, being simply the form of an oath. 3 Inst. 146. 224. However, it must be admitted, that there are various instances of the king's consulting the judges, and of their giving their opinions *extra-judicially.* Several of these instances are referred to

Now for the antiquity of this high court of parliament, whereof *Littleton* here speaketh, it appeareth, that divers parliaments have beene holden long before and untill the time of the Conqueror, which be in print, and many more appearing in ancient records, and manuscripts (6). [*f*] *Le roy Alfred assembler' les comties, &c. et ordeina pur usage perpetual, que deux foitz per an ou plus sovent pur mister in temps de peace se assemblerent a Londres, a parlementer sur le guidement del people de Dieu, et coment soy garderont de pecher, viveront en quiet, et receiveront droit per usage et sanits judgements. Per ceste estate se fieront plusors ordinances per plusors roys jesque a temps le roy que ore est, que fuit le roy E.* 1. The conclusion of that great parliament holden by king *Ethelstan* at *Grately* is very remarkable, which I have seene in these words. *All this was enacted in that great synod or councell at Grately, whereat was the archbishop Wolfehelme, with all the noblemen and wise men, which king Athelstan called together.*

[*f*] Mirror, ca. 1, sect. 2. Vide Statutes de 4 E. 3. ca. 14. & 36 E. 3. ca. 10.

There have beene in the time of, and since the Conquest, in the reignes of *H.* 1. king *Stephen*, *H.* 2. *R.* 1. king *John*. *H.* 3. &c. 280 sessions of parliament, and at every session divers acts of parliament made, no small number whereof are not in print (7).

Mirr. ca. 2, sect. 4. 7. 10. 14. ca. 4. de Defaults, & cap. de Homicide, cap. 1, sect. 13, cap. 4. de Poyns. Ockam quid cum Ven. Matth. Paris. 212, 213.

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in the Reports of lord Fortescue, who endeavours to shew, that even in the case of ship-money the *extra-judicial* opinion first given was condemned, not because it was extra-judicial, but because it was grossly contrary to law. Fortesc. Rep. 386. 389. Rushw. vol 3. Append. 212. Some instances of such consultations have happened since the Revolution, particularly some few years after in sir John Fenwick's case, and in the reign of George the first, when it was made a question whether the education and marriage of the prince of Wales's children belonged to the king or to their father, and still more recently in the case of admiral Byng during the last reign. See Fortesc. Rep. 385. But however numerous and strong the precedents may be in favour of the king's *extra-judicially* consulting the judges on questions in which the crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve; lest the rigid impartiality so essential to their *judicial* capacity should be violated. The anticipation of *judicial* opinions on causes *actually depending* should be particularly guarded against; and therefore a wise and upright judge will ever be cautious, how he *extra-judicially* answers questions of such a tendency. So far one may venture to qualify the right; because even the house of lords have declined taking the opinion of the judges for a reason of this sort, though their attendance on that assembly is confessedly for assisting the lords in matters of law. See Fortesc. Rep. 384, 385. But it would be a presumption in us, if we were to be more particular on a subject of so much delicacy, by attempting to mark the bounds to a right, the extent of which we do not find clearly ascertained by precedent or authority. See further on this subject Fost. 199. 241.—[Note 129.]

(6) The statutes of Edward the third cited by lord Coke in the margin require a parliament to be holden once every year; but it seems doubtful, whether they were meant to limit the duration of each parliament, or merely the intermission of holding parliaments. The 16 Cha. 2. c. 1, which directs, that the sitting of parliaments shall not be discontinued above three years, is certainly for the *latter* purpose, and therefore still continues in force, notwithstanding the modern statutes for making parliaments first triennial and afterwards septennial, these being for the *former* purpose. See 6 W. & M. c. 2. 1 Geo. 1. c. 38. —[Note 130.]

(7) See Pref. to Ruffhead's Stat. 21.

The jurisdiction of this court is so transcendent, that it maketh, inlargeth, diminisheth, abrogateth, repealeth, and reviveth lawes, statutes, acts, and ordinances, concerning matters ecclesiasticall, capitall, criminall, common, civill, martiall, maritime, and the rest. None can begin, continue, or dissolve the parliament, but by the king's authority. Of which court it is said, [a] *Que il est de tres grand honor et justice, de que nul doit imaginer chose dishonorable.* [b] *Habet rex curiam suam in concilio suo in parliamentis suis, præsentibus prælatis, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, et novis injuriis emersis nova constituuntur remedia, et unicuique justitia prout meruerit retribuetur ibidem.* But this properly doth belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice.

[a] Pl. Com. 398. b. Doctor & Stud. ca. 55, fol. 164.
[b] Fleta, lib. 2. ca. 2. Fortescue de Laudibus Legum Angliæ. Bract. lib. 1, ca. 2. (Doct. & Stud. 32.)

[110. b.]

☞ Sect. 165.

ALSO, for the greater part such boroughes have divers customes and usages, which be not had in other towns. For some boroughes have such a custome, that if a man have issue many sonnes and dyeth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heire unto his father by force of the custome; the which is called borough English (1)†.

"*CUSTOMES and usages.*" *Consuetudo* is one of the maine triangles of the lawes of *England;* those lawes being divided into common law, statute law, and custome. Of which it is said, [*] that *consuetudo quandoque pro lege servatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet; longævi enim temporis usus et consuetudinis non est vilis authoritas.* [c] *Longa possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino.*

(Post. 115. b.)
[*] Bract. lib. 1, ca. 3, fol. 2.
[c] Idem, lib. 2, fol. 52. (Dav. 33. a.)

Of every custome there be two essentiall parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawfull interruption.

"*Which be not had in other towns.*" It is necessary to be knowne what customes may be alledged in an upland towne, which is neither citie nor borough. [*] In an upland towne, that is neither city nor borough, such a custome to devise lands cannot be alledged. Neither in an upland towne can there be a custome of borough *English* or gavelkinde; but these are customes, which may be in cities or boroughes. [d] Also, if lands be within a mannor fee or seigniory, the same by the custome of the mannor fee or seigniory may be devisable, or of the nature of gavelkinde or borough *English*. [*] But an upland towne may alledge

(Doct. Plac. 104. 5 Co. 84. a.)
[*] 44 E. 3. 33. 40 Ass. 4. 27. 41. 21 E. 4. 54. 43 E. 3. 32.
[d] 21 E. 4. 53. 54. (6 Co. 59. b.)
[*] 21 E. 4. 54. 15 E. 4. 29. 11 H. 7. 14. 44 E. 3. 18. 21 H. 7. 40.

† *This reference seems misplaced, as the note was probably meant to refer to the second paragraph of the Commentary on sect.* 165, *ending with the words,* "without lawfull interruption."

(1) Another thing essential to a good custom is, that it be *reasonable;* which doctrine, together with the other *general* rules concerning customs, is well explained and applied in the famous Irish case of *Tanistry* reported by sir John Davies. See Dav. 31. b.—[Note 131.]

alledge a custome to have a way to their church, or to make by-lawes for the reparations of the church, the well ordering of the commons, and such like things. And it is to be observed, that in special cases, a custome may be [e] alledged within a hamlet, a towne, a burgh, a city, a mannor, an honor, an hundred, and a county: but a custome cannot be alledged generally within the kingdome of *England*; for that is the common law (2).

[e] Bract. lib. 4. 271. 34 E. 1. Detinue 60. 17 E. 2. Detinue 58. 3 E. 3. Det. 156. 30 E. 3. 25. 39 E. 3. 6. 9. 10. 31 E. 3. Render 6. 17 E. 3. 27. 21 E. 4. 28. 22 E. 4. 8. 7 E. 3. 51. 30 E. 3. 23. 34 H. 8. Dier 54. F. N. B. 122. 5 E. 3. Tresp. 13. Vid. Glanvil. lib. 7. ca. 3. 9.

"*The youngest son shall inherit.*" And yet by some customes the youngest *brother* shall inherit; for *consuetudo loci est observanda* (3).

"*All the tenements.*" Either in fee simple, fee taile, or any other inheritance. If lands of the nature of borough *English* be letten to a man and his heires during the life of *P. S.* and the lessee dyeth, the youngest sonne shall enjoy it (4).

"*Borough* English:" So called, because this custome was first (as some hold) in *England* (5).

Sect.

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(2) This doctrine, about the restriction of customs to places of a particular denomination, will appear more satisfactory, by considering the reason of having some restraint, and the nature of that, which lord Coke points out as the established one. The policy of some restraint is founded on the uncertainty and confusion which would ensue from an infinite diversity of customs, if every place, however small and inconsiderable, should be allowed to set up special customs in direct opposition to the general custom of the realm. On this principle the privilege of having *special* customs, derogating from the common law, is in general denied to *inferior* places, such as *upland towns*, not being either *cities* or *boroughs*, and *hamlets*; though it is allowed to *larger* or more important districts, such as *counties*, *manors*, *hundreds*, *honors*, *cities*, and *boroughs*. The *special* cases, hinted at by lord Coke as an exception to this restraint, seem to be those, in which the custom tends to advance some right recognized by the common law. Thus a town's having a church, being a right at common law, a custom for a way to or repairing the church operates by rendering the exercise of that right more effectual. See Robins. Gavelk. 32, and 225. However, the case of dower by custom, mentioned by lord Coke in the Chapter on Dower, seems to be an instance within the exception, without being within the reason of it. But of this example lord Coke writes doubtfully; for, after inferring from the text of Littleton, that customary dower may be within a *town*, he observes, that it is safer to alledge it within a *manor*. See ante 33. b.—[Note 132.]

(3) But this extension of Borough English to the *collateral* line must be specially pleaded. See Robins. on Gavelk. 38. 43. 93, and in the Appendix.—[Note 133.]

(4) See acc. as to estates *tail* in Gavelkind land, though expressly limited to the heirs male of the body at common law, Dy. 179. b. See also ante fol. 10. a. note 3. But as Borough English may be *extended* by special custom, so may it be *restrained*; and therefore the customary descent may be confined to *fee simple*. See Appendix to Robins. Gavelk. and March 54, there cited.—[Note 134.]

(5) See as to the denomination of Borough English and the subject in general, Append. to Robins. Gavelk.

Sect. 166.

ALSO, in some boroughes, by custome, the wife shall have for her dower all the tenements which were her husband's.

AND this is called frank banke, *francus bancus. Consuetudo est in partibus illis, quòd uxores maritorum defunctorum habeant francum bancum suum de terris sockmannorum tenent' nomine dotis.* Bract. lib. 4. Tract. 6. ca. 13. F. N. B. 150. o. Pl. Com. 413. (Ante 33. b.)

[111. a.] ☞ "*Which were her husband's, &c.*" Here is implyed by (*&c.*) that in some places the wife shall have the moiety of the lands of her husband, so long as she lives unmarried; as in gavelkinde. And of lands in gavelkinde a man shall be tenant by the curtesie without having of any issue (1). In some places the widow shall have the whole, or halfe, *dum sola et casta vixerit*, and the like. 10 E. 3. Aide. 129.

Sect. 167.

ALSO, in some boroughs, by the custome, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whome such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the forme and effect of the devise, without any liverie of seisin thereof to be made to him, &c. (4).

"*DEVISE.*" *Deviser:* This is a *French* word, and signifieth *sermocinari* to speake, for *testamentum est testatio mentis, et index animi sermo* (2). So as *to devise by his testament* is to speake by his testament, what his minde is to have done after his decease. (5 Co. 73. b.)

"*By his testament.*" *Testamentum est* [*m*] *duplex.* 1. *In scriptis.* 2. *Nuncupativum, seu sine scriptis.* And in some cities and boroughes, lands may [*n*] passe as chattels by will nuncupative or paroll without writing (3). *Revera* [*o*] *terminatum est, quòd potest*

[*m*] Vide Sect. 58.
[*n*] Britton, fo. 164. 212. b.
[*o*] Bract. lib. 4. fol. 272. Fleta, lib. 5. cap. 5. & lib. 2. cap. 50.

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(1) Accord. ante 30. a. All the differences between curtesy and dower of gavelkind land and the same estates at common law are minutely explained and commented upon in mr. Robinson's book on Gavelkind. See page 155, and 159. —[Note 135.]

(4) The *&c.* is not in L. and M.

(2) See ante fol. 110. a. note 1.

(3) But now by the 29 Cha. 2. c. 3, a will of *lands* devisable by *custom* is not good, unless it is in writing, and signed and attested in the same manner as a will of lands devisable by *statute.* See post. 111. b. *Nuncupative* wills of *personalty,* except

potest legari, ut catallum, tam hæreditat, quàm perquisitum, per barones Londoñ et burgenses Oxon. Ideo verum est, quòd in burgis non jacet assisa mortis antecessoris. But in law most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum*, when it concerneth chattels.

4 E. 3. 53. 7 H. 6. 1. 14 H. 8. 5. 22 Ass. 78. Abbr. Ass. 113. b.

"*His lands or tenements.*" And by the same custome he may devise a rent out of the same lands and tenements (5).

4 E. 2. Mortdanc. 39. 49 E. 3. 17. F. N. B. 196. 21 H. 6. 38. a. 7 E. 2. tit. Mortdanc.

"*Which he hath in fee simple.*" For lands in taile are not devisable by will; and therefore he in this place necessarily added (*which he hath in fee simple*) and purposely omitted the same in the clause concerning borough *English*; because there an estate taile is included.

F. N. B. 199. Regist. in ex gravi Querela. (10 Co. 46.) [p] 2 H. 6. 16. 27 H. 6. 8. 2 E. 4. 13. 21 E. 4. 21. 4 H. 7. 16.

"*May enter.*" Note, the custome of a city or borough concerning the devise of lands is, *quòd liceat unicuique civi sive burgensi, &c. ejusdem civitatis sive burgi tenementa sua in eâdem civitate sive burgo in testamento suo in ultimâ voluntate suâ, tanquam catalla sua, legare cuicunque voluerit, &c.* [p] Now if a man deviseth, either by speciall name or generally, goods or chattels reall or personall, and dyeth, the devisee cannot take them without the assent of the executors (6). But when a man is seised of lands in fee, and deviseth the same in fee, in taile, for life, or for yeares, the devisee shall enter; for in that case the executors have no meddling therewith. And in the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in [q] the devisee before he doth enter, and in that case nothing [r] (having regard to the estate or interest devised) descendeth to the heire. But if the heire of the devisor entreth and holdeth the devisee out, he may either enter as *Littleton* here saith, or have his writ called *ex gravi querelâ*; and this writ (without any particular usage) is incident to the custome to devise; for otherwise, if a descent were cast before the devisee did enter, the devisee should have no remedy. After an actuall possession this writ lyeth not; for then the devisee may have his ordinary remedy by the common law.

[q] 4 Mar. Br. tit. Devise 49. [r] Regist. fol. 244. 39 Ass. pl. 6. 3 E. 3. Devise 12. 29. Ass. 31. 34 E. 3. tit. Formedon. Pl. postr. 30 H. 8. Devise 28. F. N. B. 198, 199, &c.

Britton, fol. 212. b. (Post. 240. b. Cro. Cha. 201. 1 Sid. 191.)

And

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except those of soldiers in actual service and mariners at sea, are also newly regulated by the same statute.—[Note 136.]

(5) But it was formerly much controverted, whether a rent *charge in esse*, issuing out of such lands, and having commenced *within time of memory*, was within the custom of devising; and it was not settled to be so, till the case of Randal and Jenkins in the time of lord Hale. See 1 Mod. 112, and Robins. on Gavelk. 79 to 84. As to rents *service*, they of course followed the nature of the reversion or seigniory, to which they were incident; nor was there any doubt as to the custom's extending to *other* rents, if they had existed *immemorially*.—[Note 137.]

(6) Acc. Perk. sect. 488. 570, and 572, to 576. The other authorities relative to this doctrine will be found in Vin. Abr. *Devise*, A. a. and Com. Dig. *Administration*, C. 5.

[111. b.] ☞ And well said *Littleton*, that lands and tenements were devisable in burghes by custome; for that [s] at the common law no lands or tenements were devisable by any last will and testament, (1) nor ought to be transferred

[s] 27 H. 8. cap. 10. Britton, fol. 212. 78. b. 164.

Vide before in this Sect. 32 H. 8. cap. 1. 34 H. 8. ca. 5.

from

(1) The *testamentary* power over *land* was certainly in use among our Anglo-Saxon and Danish ancestors; though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country: for as Tacitus, writing of the ancient Germans, says, *successores sui cuique liberi et nullum testamentum.* Spelm. Posthum. 21. 127. After the Norman Conquest, the power of devising land ceased, except as to *socage* lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to *terms for years or chattel interests* in land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were ever disposeable by will. This limitation of the testamentary power proceeded, partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of death-bed dispositions; but principally from the general restraint of alienation incident to the rigors of the feudal system, as it was *established* or at least *perfected* by the *first William.* See Wright's Ten. 172. In the reign of Edward the first, the statute of *Quia emptores* removed in great measure this latter bar to the exercise of testamentary power; that is, in respect to all *freeholders*, except the king's tenants *in capite.* But the two former obstructions still continued to operate; though indeed this was in *name* and *appearance* only; for soon after the statute of *Quia emptores*, feoffments to *uses* came into fashion, and, last wills were enforced in Chancery as good declarations of the *use;* and thus through the *medium* of *uses* the power of devising was continually exercised in *effect* and *reality.* But at length this practice was checked, not *accidentally*, but *designedly*, by the 27th of Hen 8. which, by transferring the *possession* or *legal estate* to the use, *necessarily*, and *compulsively* consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction, to make its operation dependant on the intention of parties, were invented. However, the bent of the times was so strong in favour of every kind of alienation, that the legislature, in a few years after having interposed to restrain an *indirect* mode of passing land by last wills, expressly made it devisable. This great change of the common law was effected by the statutes of the 32 and 34 of Henry 8. which taken together gave the power of devising to all having estates in fee fee simple, except in *join-tenancy*, over the *whole* of their *socage* land, and over *two-thirds* of their lands holden by *knight's service.* The operation of these statutes was further extended by the conversion of *knights service* into *socage* in the 12 Cha. 2. But still *copyhold* lands, and also, as the best opinion seems to have been, estates *pur autre vie* in *freehold* lands, remained undevisable. On the one hand, they were not devisable at *common law;* because they came within the description of *real* estate. On the other hand, they, or at least the former, are not within the *statutes* of Henry 8, these requiring, that the tenure should be *socage*, which a *copyhold* is not; and that the party should have an estate in *fee simple*, which is more than a *tenant pur autre vie* can be said to have. See as to *copyhold* lands 2 Ro. Rep. 283, and as to estates *pur autre vie* in freehold lands Cro. Eliz. 804. Mo. 625, 1 Saund. 261. 1 Salk. 619. This defect of provision in the statutes of wills is now supplied as to estates *pur autre vie* by the 29 Cha. 2. c. 3, which makes them devisable in the same manner as estates in fee simple. But no provision is yet made in respect to *copyhold* estates *; and therefore the power of devising is now

* *The* 55 *Geo.* 3. *c.* 192. *seems to make dispositions by will of copyhold estates effectual without previous surrenders.*

from one to another, but by solemne livery of seisin, matter of record, or sufficient writing (2); but as Littleton here saith, that by certaine private customes in some burghes they are devisable. But now since *Littleton* wrote, by the statutes of 32 and 34 *H.* 8. lands and tenements are generally devisable (3) by the last will in writing of the tenant in fee simple, whereby the ancient [illegible] common law is altered, whereupon many difficult questions, and most commonly disherison of heires when the devisors are pinched by the messengers of death, doe arise and happen. But (4) these statutes take not away the custome to devise, (4) whereof *Littleton*

(a) Trin. 3 Car. [illegible] in Bur- [illegible] case.
4 Co. 18. & 76.
8 Co. 84, 85.
9 Co. 133. 10 Co. 80. 83. 84. 11 Co. 24. 1 Co. 25 a. [illegible] Dyer 4 & 5 Phil. & Mar. 155, an. 4 Eliz. Dalison. Pasch. 22 Eliz. between Barker and his wife plaintiffs and William Long defendant, in a writ of partition. Bendloe's argument.
(5 Co. 123.)

speaketh:

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now indirectly exercised over these by an application of the doctrine of uses, similar to that which was anciently resorted to in respect to freehold lands: for the practice is to surrender to the use of the owner's last will; and on this surrender, the will operates as a declaration of the use, and not as a devise of the land itself. See 2 Ro. Rep. 383. 2 Atk. 37. Gilb. on Uses 36. From this deduction it appears, that the *testamentary* power is now exerciseable, either *directly* or *indirectly*, over land of every tenure now in use, and also over every sort of interest in land, which, not being fettered with entails, can be transferred by alienation taking effect in the owner's lifetime.—[Note 138.]

(2) See fol. 111. b. note 1.

(3) But a statute made since lord Coke's time, requires a number of forms, besides *writing*, in a will of lands or tenements devisable by the *statute of wills*; for by the statute against frauds and perjuries a will of such property is void, unless it is *signed* by the testator, or by some person for him in his presence and by his direction, and is also *attested* and *subscribed* in his presence by three witnesses. See 29 Cha. 2. c. 3. Also by the last-mentioned statute the same forms are required, as well in devises by *custom* as in those of estates *pur autre vie*. But these regulations do not extend to *copyhold* estates and *terms for years*; the statute of frauds and perjuries, so far as it regulates devises of land, being expressly confined to the three former kinds of devises. As to *copyholds*, a devise of them operates only as a declaration of uses on the surrender to the use of the will; and therefore if the form required by the surrender, which is usually nothing more than a testamentary declaration in writing, is observed, it is sufficient without any witness; and even a *nuncupative* will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form, till the 29 Cha. 2, required all declarations of trusts to be in *writing*. See 2 Atk. 37, and Barnad. Ch. Rep. 9. In respect to *terms for years*, they, falling within the description of personal estate, are disposable by will accordingly. But this must be understood with some distinction. Thus if they are terms, not in *gross*, but vested in trustees *to attend the inheritance*, they so follow the nature of the latter, that if the owner devises the land *generally* by a will not so attested as to pass the inheritance, not even the *trust* of the term will pass. See 2 P. Wms. 236. Also as to terms in *gross*, though a testator being possessed of such may *transmit* them by the same unsolemn kind of will as other personalty, yet he cannot *create* them by will, without observing all the forms essential to a devise of real estate; because the interest, in right of which the testator creates the term, is *real* estate, and creating the term is a *partial* devise of it. Besides appointing new forms of executing wills of real estate, the 29 of Cha. 2, prescribes how devises shall be revoked.—[Note 139.]

(4) Whilst the power of devising depended wholly on the statutes of Henry the eighth, it was frequently of importance to resort to the custom of devising, as being most beneficial for the devisee. The *power by custom* might be *larger* than

speaketh: for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statutes is utterly void for a third, and the same shall descend to the heire. If he hath any lands holden by knights service *in capite*, and lands in socage, he can devise but two parts of the whole; but if he hold lands by knights service of the king, and not *in capite* *, or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will [x] no more, but to make up the land so conveyed two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage land; so as it is apparent, that the benefit of the lords was more carefully provided for, than the good of the heire.

[x] 6 Co. 17, 18, sir Edward Clere's case. 3 Co. 34. b. Butler and Baker's case.

But if a man, holding some land of the king by knights service *in capite*, convey two parts of his land to the use of his wife for life, now (as hath beene said) he can devise no part of the residue, but yet he may by his will devise the reversion of the two parts so conveyed to his wife: for the intention of the act is to give power to dispose of two parts intirely.

10 Co. 80, 81. Leon. Lovey's case.

Leon. Lovey's case, and Butler and Baker's case ubi supra.

If the devisor leave a full third part of the land immediately to descend in fee simple or in taile, he may devise the other two parts in fee simple. If a third part be not left, it shall be made up according to the act. But hereditaments, that are not of any yearely value, as *bona et catalla felonum et fugitivorum*, waifes, estrayes, and the like, can neither be left to descend for any part of the third part, or devised as part of the two parts. But yet if such

* *See ante fol.* 108. *a. n.* 3, *where Mr. Hargrave points out the error of considering a tenure of the king* ut de honore *as not a tenure* in capite.

than the *statutory power*; the former sometimes enabling to devise the *whole*, where the latter could only be exercised over *two parts*. 2 Sid. 153. There was also an essential difference between the two powers in the *mode of execution*; for a will in *writing* was conceived to be necessary to a devise under the *statutes*, but a *nuncupative* will might be sufficient under the *custom*. 2 Sid. 154. But these differences do not now subsist any longer. As on the one hand the 12 of Cha. 2, by communicating to all freehold lands the qualities of the tenure by *common socage*, has rendered the power of devising the *whole* under the statutes of Henry the eighth *universal*; so on the other hand the 29 of Cha. 2, against frauds and perjuries, requires the same solemnities of writing, signing, and attestation to a devise by custom, as to one under the statutes. See ante fol. 111. b. note 1, and 111. a. note 3. The two powers of devising being thus assimilated and made for the most part commensurate, it can *seldom* happen, that it should be necessary to call the power by *custom* in aid; though it is *possible*, as where the custom enables an infant of fourteen, or a feme covert, neither of which is capable of devising under the statutes. As to the *infant*, see 37 Hen. 6. 5. Perk. sect. 504. 2 And. 12. 5 Co. 84, and as to the *feme covert* 5 Com. Dig. 14, where it is said, that by the custom of London she may devise to her husband, but without citing any authority.—[Note 140.]

such franchises of uncertaine value be holden of the king *in capite*, they shall restraine the devise of all his lands, and make it void for a third part. So it is if a man hath a reversion expectant upon an estate taile dry and fruitlesse holden of the king by knights service *in capite*, yet that shall restraine him to devise but two parts of his lands only. And where the statute speaks of a remainder, it is to be intended only of such a remainder as may draw ward and marriage by the common law. As if a reversion upon a state for life be granted to one for life, the remainder in fee, during the life of the grantee for life it is not within the statute; but if he dyeth, this is such a remainder as is within the statute, although it be dry and fruitless. If a gift in taile or a lease for life be made, the remainder in fee, this remainder in fee is not within the statute. But if a man hath lands holden by knights service *in capite* in possession, reversion, or remainder, and is also seised of socage land, and devise by his will all his lands, and after he selleth away the *capite* land, or that land is recovered from him, the will is good for the whole socage land. The values both of the third part and the two parts of the lands shall be taken as they happen to be at the time of the death of the devisor; for then his will takes effect.

(1 Sid. 56.) Leon. Lovey's case, ubi supra, fol. 81.

He that holds by knights service in chiefe, deviseth by his will a rent, common, or other profits as shall amount to the value of two parts out of all his lands: this rent issueth only out of the two parts, and the third part is free of it. And if he hath lands holden by knights service, and not *in capite*, he may charge two parts of the knights service land as is aforesaid, and all his socage land, &c. And if he hath onely socage land, he may by his will charge it at his pleasure, so as the king's and lord's third part is free, and the heire's two parts charged; and this is onely by force of the statute of 34 *H.* 8.

3 Co. 84, 85, sir Richard Perhall's case. 3 Co. 33. Butler and Baker's case. 6 Co. 17, 18, in sir Edward Clere's case. (8 Co. 173. Post. 271. Cro. Cha. 38.)

If a man make a feoffment in fee of his lands holden by knights service to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will, by force, and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory (5). But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment and power thereby given, then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will without any reference to his power by the ☞ feoffment, yet this will shall enure to declare the use upon the feoffment, because he had no power as owner of the land to devise any part of it (1). But if the feoffment had been made to the use of his last will, although

[112. a.]

(5) Adjudged acc. in Mytton and Lutwich, W. Jo. 7.

(1) This was the point adjudged in sir Edward Clere's case; and though, as the *whole* of the land is now devisable, the doctrine of that case is no longer of consequence in respect to the extent and exercise of the power of devising, yet it may be material for other purposes; for it comprehends a *general* rule, settling how an act shall operate, where it may take effect in two ways, that is, either as the execution of a power derived from *interest*, or as the execution

of

although he deviseth the land with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment (2). All which and many other points of intricate and abstruse learning you shall more largely read in my Reports. (Mo. 280.)

"*Without any liverie of seisin to be made to him, &c.*" For in his life time livery of seisin could not be made, because his will is ambulatorie till his death, and no estate passeth during his life; neither can livery be made after his decease, for then it cometh too late. 40 Ass. 38.

Here (*&c.*) (3) implyeth, that the devise is good without any atturnement of any lessee or tenant.

Sect. 168.

ALSO, though a man may not grant, nor give, his tenements to his wife during the coverture, for that his wife and he be but one person in the law; yet by such custome he may devise by his testament his tenements to his wife, to have and to hold to her in fee simple, or in fee taile, or for tearme of life, or yeares, for that such devise taketh no effect but after the death of the devisor. And if a man at divers times makes divers testaments, and divers devises, &c. yet the last devise and will made by him shall stand, and the others are voyd (5).

"*A MAN may not grant, nor give, his tenements to his wife, &c.*" This opinion is [*a*] cleere, for by no conveyance at the common law a man could during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife; and now the state is executed to such uses by the statute [*b*] of 27 *H.* 8. for an use is but a trust and confidence, which by such a mean might be limited by the husband to the wife. But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that *Littleton* here yieldeth (4). [*a*] 4 H. 7. [*b*] 27 H. 8. cap. 10. (Plowd. 111. Dy. 106. a. 2 Ro. Abr. 788.)

"*During*

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of a power, not arising from *interest*, but *specially reserved*. In the great case of *Commendams* the doctrine is well explained by lord Hobart, and finely applied. Hob. 160.—[Note 141.]

(2) The distinction here made, between a feoffment *to the use of a last will*, and one *to such uses as the feoffor should appoint by last will*, seems extremely subtle. However, lord Coke reports it as adopted by the judges in sir Edward Clere's case; and, according to Moore, the same point was adjudged in Battey and Trevilian. Mo. 278. But then as to the former of these cases, the opinion on this point must have been extra-judicial, the feoffment having been to *such uses as should be appointed by will*, and not *to the use of the will itself*; and as to the latter case, it went off finally on another point. The reasoning in support of the distinction will be found post. 271. b. and more at large in Mo. 516. —[Note 142.]

(3) See note 4 of fol. 111. a.

(4) See further on this subject ante note 1, fol. 3. a.

(5) The words *and the others are voyd* are not in L. and M.—Roll.—nor P.

"*During the coverture.*" That is, during the continuance of the marriage. For to cover in *English* is *tegere* in *Latine*, and is so called, for that the wife is *sub potestate viri*, and she is disabled to contract with any without the consent of the husband.

[c] Bracton, lib. 2, ca. 15. [c] *Omnia, quæ sunt uxoris, sunt ipsius viri. Non habet uxor potestatem sui, sed vir.*

Idem, lib. 5. Tract. 5, cap. 25. (Hob. 2. Cro. Eliz. 129. Plowd. 414.) 10 H. 7. 20. "*One person in the law.*" *Vir et uxor sunt quasi unica persona, quia caro una, et sanguis unus. Res licèt sit propria uxoris, vir tamen ejus custos cùm sit caput mulieris.*

If *Cestuy que use* had devised that his wife should sell his land, and made her executrix and dyed, and she tooke another husband, she might sell the land to her husband, for she did it *in auter droit*, and her husband should be in by the devisor (6).

"*By his testament.*" *Testamentum* is (as is said before) *testatio mentis* (7), and is favourably to be expounded according to the meaning of the testator. *In contractibus benigna, & in testamentis benignior, in restitutionibus benignissima interpretatio facienda est.* [112. b.]

[d] 4 E. 2. tit. Devise 23. [e] 44 Ass. p. 36. 44 E. 3. 33. 18 E. 3. 8. "*To his wife.*" And *Littleton* himselfe yieldeth the reason; [d] because the devise doth not take effect till after the decease of the devisor. And in some [e] places the custome is generall, that

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(6) Acc. post. 187. b. It is agreed in the books, that a wife may, without her husband, execute a *naked authority, whether given before or after coverture*, and though no special words are used to dispense with the disability of coverture: and in the case put by lord Coke the devise gives no more. The rule is the same, where both an *interest* and an authority pass to the wife, if the authority is *collateral* to and doth not flow from the interest; because then the two are as unconnected, as if they were vested in different persons. Rep. temp. Finch. 346. As too a feme covert may without her husband convey lands in execution of a mere *power* or *authority*, so may she with equal effect in performance of a *condition*, where land is vested in her on condition to convey to others. W. Jo. 137, 138. The reason, why in these instances the wife may convey without her husband, seems to be, that he can receive no prejudice from her acts, but a great one might arise to others, if his concurrence should be essential. Yet if the legal estate of lands is vested in a married woman on trust for another, some hold, that she cannot pass it to *cestui que trust*, unless the husband joins; and therefore that if she makes feoffment or fine without him, the first will be void, the latter voidable. This was the opinion of judge Jones in the case of Daniel and Upley; but the judges Whitlock and Dodridge dissented from Jones, and held, that the husband's joining was not any more requisite than in the other cases. W. Jo. 137. Perhaps however Jones's opinion may be most conformable to strictly legal doctrine; and his thus distinguishing a *trust* from a *power* and a *condition* may be accounted for. Trusts are properly the subjects of consideration for the courts of equity only; and though in them the legal estate is made subservient to the trust, yet the courts of law take notice of trusts for very few purposes, nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts. See further as to acts by a feme covert without her husband, under the titles *Baron* and *Feme*, *Executor* and *Administration*, in the Abridgments.—[Note 143.]

(7) See the note on this sort of etymology in fol. 110. a.

that he may devise any lands, &c. in some [*f*] places lands onely which the devisor purchased; in some places that he may devise any estate; in some places for life onely, &c. [*f*] Britton 264.

But albeit the last will doth not take effect untill after his decease, yet if a feme covert be seised of lands in fee, she cannot devise the same to her husband, because at the making of her will she had no power, being *sub potestate viri*, to devise the same; and the law intendeth it should be done by coertion of her husband.

"*Divers testaments.*" For *voluntas testatoris est ambulatoria usque ad mortem* (as hath beene said before) and the latter will doth countermand the first. And it is truely sayd, that the first grant and the last will is of the greatest force. 2 H. 5. 8. 2 R. 3. 22. (Cro. Eliz. 9. Cro. Jam. 49. 290. 649.)

"*Divers devises, &c.*" Here by *(&c.)* is to be understood as well devises of chattels reall or personall, as of freehold and inheritance: also that in one will where there be divers devises of one thing, the last devise taketh place. *Cùm duo inter se pugnantia reperiuntur in testamento, ultimum ratum est* (1).

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ALSO, by such custome a man may devise by his testament, that his executours may alien and sell the tenements that he hath in fee simple, for a certaine sum, to distribute for his soule (2). *In this case, though the devisor*

(1) There is a great contrariety in the books, on the effect of two inconsistent devises in the same will. Some hold with Lord Coke that the second devise revokes the first. Plowd. 541. Others think, that both devises are void on account of the repugnancy. Ow. 84. But the opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties. The authorities for and against lord Coke's opinion are well collected and arranged in a note in the English edition of Plowden. See page 541.—Also amongst those who think that both devises shall operate, there is some difference as to the manner in which the two devisees ought to take. In some of the old books it is said generally, that there shall be a jointenancy. But according to the modern opinion, and, as it seems, the best, there will be a jointenancy or a tenancy in common, according to the words used in limiting the two estates; by which we presume it is meant, that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a jointenancy, the devisees shall be join-tenants, but otherwise shall be tenants in common. See 3 Atk. 493.—[Note 144.]

(2) The distribution here meant probably was giving money to the church to have masses for the testator's soul; a superstition very common in the time of Littleton, and then not inconsistent with any law. Afterwards indeed uses and trusts of land for such purposes were restrained by the 23 of Hen. 8. c. 11, commonly called the statute of *superstitious* uses, though not *wholly*, the statute allowing them if they were not appointed for more than twenty years, and without any limitation of time in the instance of cities and towns corporate having customs to devise in mortmain. But now we apprehend, that, independently of the statute of Henry the eighth, devises of this kind could not have effect: for either they would be void by the mortmain statutes, or, when not

devisor die seised of the tenements, and the tenements descend unto his heire; yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heire, and thereof make a feoffment, alienation and estate by deed, or without deed, to them to whom the sale is made. And so may ye here see a case, where a man may make a lawful estate, and yet he hath nought in the tenements at the time of the estate made. And the cause is, for that the custome and usage is such (1). *For a custome, used upon a certaine reasonable cause, depriveth the common law* (Quia consuetudo, ex certâ causâ rationabili usitatâ, privat communem legem).

"*THAT his executours may alien and sell his tenements.*" And that, which in *Littleton's* time a man might doe by custome, in some particular places, he may now doe by the statutes of 32 and 34 *H.* 8. generally.

32 H. 8. cap. 1.
34 H. 8. cap. 5.

"*The executors, after the death of the testator, may sell.*" Here it appeareth, that the executors having but a power, as *Littleton* putteth the case, to sell, they must all joyn in the sale. Then put the case, that one dies, it is regularly true, that being but a bare authoritie, the survivors cannot sell. But if a man deviseth his land to *A.* for terme of life, and that after his decease his lands shall be sold by his executors generally, (as *Littleton* here putteth his case) and make three or foure executors, and during the life of *A.* one of the executors dieth, and then *A.* dieth, the other two or three executors may sell, because the land could not be sold before, and the plurall number of his executors remaine. But if they had beene named by their names, as by *I. S. I. N. I. D.* and *I. G.* his executors, ☞ then in that case the survivors could not sell the same, because the words of the testator could not be satisfied; and I myself knew this case adjudged. [*] A speciall verdict was found, that *A.* was seised of certaine lands in fee, and devised the same in taile; and if the donee died without issue, that his said land should be sold by his sons in law, he in truth having five sons in law. One of his sons in law died in the life of the donee, and after the donee dyed without issue, and then the foure of the sonnes in law sold the land, and it was adjudged that the sale was good, because they were named generally by his sonnes in law, and the lands could not be sold by them all; and the words of the will in a benigne interpretation are satisfied in the plurall number, albeit that they had but a bare authority: but if they had been particularly named, it had been otherwise. But if a man deviseth lands to his executors to be sold, and maketh two executors, and the one dieth, yet the survivor may sell the land; because as the state, so the trust shall survive; and so note the diversity betweene

[113. a.]

49 E. 3. 16.
29 Ass. 17.
39 Ass. 17.
9 H. 6. 24.
15 H. 7. 12. 21.
14 H. 8. 6.
30 H. 8. tit. Devise Br. 31.
8 Eliz. Dyer 177.
(6 Co. 16.
1 Ro. Abr. 328.
Mo. 61, 62. 147.
Cro. Cha. 382.)

(1 Co. 173.)
[*] Hill. 26 El. inter Vincent & Lee in the King's Bench.
(Cro. Eliz. 26.
1 Leon. 285.
Mo. 147.
5 Co. 68.
Cro. Cha. 382.
1 Ro. Abr. 328.)

39 Ass. p. 17.
4 Eliz. Dier 210.
23 Eliz. Dier 371. Pasch.
32 Eliz. Ro. 1307, in Communi Banco, and so resolved in Vincent's case. (1 Sid. 6. Post. 118. b. 236. a. 315. b.)

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not within the reach of any of them, would be deemed superstitious by our courts of equity; which would therefore direct the money to be applied to some use really charitable, at the court's discretion; or, should the determined cases not be thought strong enough to warrant the exercise of a discretion so large, would consider the devisee as a trustee for such as would be intitled if there was no devise. See the cases referred to in Vin. Abr. *Charitable Uses*, D. ---[Note 145.]

(1) *&c.* in L. and M.

betweene a bare trust, and a trust coupled with an interest. In both those cases the executors may [a] sell part of the land at one time, and part at another, as they may finde purchasers.

[a] 1 Co. 173, in Digges's case.

In *Littleton*'s case admit that one executor had refused to sell, then, as the law stood when *Littleton* wrote, it was cleare that the others could not sell. But now by the statute [b] of 21 H. 8. it is provided, that where lands are willed to be sold by executors, that though part of them refuse, yet the residue may sell. And albeit the letter of the law extendeth only where executors have a power to sell, yet being a beneficiall law, it is by construction extended where lands are devised to executors to be sold. Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused, because he is party and privy to the last will, and remains executor still. Mine advice to them that make such devises by will, to make it as certaine as they can, is, that the sale bee made by his executors, or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate; unlesse his meaning be, they should take the profits of his lands in the meane time; and then it is necessary that he deviseth, that the meane profits till the sale shall be assets in their hands, for otherwise they shall not be so. But hereof thus much shall suffice (2).

[b] 21 H. 8. cap. 4.

(1 Leon, 60.) Tr. 27 H. 8, in the Common Place. Serjeant Bendloe's Report. (1 Rol. Abr. 329. 1 Leon. 87. 225.)

" *And*

(2) What my lord Coke advances in this and the preceding folio, about the effect of a will devising that executors shall sell land, is open to a variety of observation.—He first supposes, that such a devise passes no *interest* or estate to the executors, but merely a *power* or *authority;* and thence he infers, that, like common naked authorities, it will not survive. But these positions seem at least controvertible, having been expressly contradicted by decisions since lord Coke's time: and though both should be admitted to be true in point of *law*, they would not avail in a court of *equity;* as this jurisdiction, notwithstanding the extinction of the power at law, would compel its execution in favour of those for whose benefit the power was given. As to the power's not surviving for want of an interest, lord Coke himself, both here and in other places, concedes, that if one *devises lands to be sold by his executors*, an *interest* will pass. See post. 181. b. 236. a. Now such a devise so resembles *devising that executors shall sell the land*, as to give the distinction made between them the appearance of too curious and overstrained a refinement; such as rather consists in the formal arrangement of words, than of any thing substantial. But the subtlety of the distinction is not the only objection to it; lord Hale, whilst he was chief baron of the exehequer, referring to a case, in which it was adjudged against the distinction. Hardr. 419. However, it has been adopted in cases since the first publication of the Coke upon Littleton. Thus in the case of Lovell and Barnes, in the 12th of Charles the first, though the judges held that such a power of selling given to *two* executors survived, yet they disavowed founding themselves on the will's passing an interest. See W. Jo. 352, and Cro. Cha. 382. Nay, even in a case of much later date, lord chancellor King acted, as if he deemed the distinction settled at law; for he directed the heir to join in a sale, in which his concurrence would otherwise have been unnecessary. See Yates and Compton, 2 P. Wms. 308. In respect to the operation of such a devise, considered as mere authority, the strict notion about *naked powers* is certainly with lord Coke; and some of the old books, besides those cited by him, very much favour its application to the case of executors. Dy. 119. ed. 1688, the case in marg. and Mo. 61. But there are some

49 E. 3. 16.
38 Ass. 3.
39 Ass. 17.
13 E. 3. Devise 3.
14 H. 8. 10.
15 H. 7. 12. b.
(9 Co. 77. a.)

"*And thereof make a feoffment.*" For albeit the executors in this case have no estate or interest in the land, but only a bare and naked power, yet this feoffment amounteth to an alienation, to vest the land in the feoffee, as it appeareth here, and the feoffee shall be in by the devisor.

"*By*

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respectable authorities the other way: for Perkins is of opinion, that the power of selling may be exercised by the surviving executor; and Brook infers the same doctrine to be the point adjudged in a case of Edward the third; and further it was held accordingly, by three judges in the reign of Charles the first, on a reference to them out of chancery. Perkins, sect. 550. Bro. Abr. *Devise* 50, and the case of Lovell and Barnes, Cro. Cha. 382. W. Jo. 352. This *latter* opinion seems most likely to conform to the meaning of a will in cases of this sort; for it can scarcely be imagined, that a testator, when he intrusts his executors with a power of selling land, should mean to have those, for whose benefit he directs the sale, disappointed by the death of one of the persons invested with an authority, which the survivor is equally capable of executing. Perhaps too it may be possible to justify the opinion, by proving a power of selling thus given to executors to be something more than the case of a naked power. Where a naked power is vested in two or more *nominatim*, without any reference to an office in its nature liable to survivorship, as an executorship is, it without doubt would be a contradiction of the general rule to allow the power to survive. But where a power of selling is given to *executors*, or to persons *nominatim* in *that character*, it is not wholly irreconcileable with the rule to deem a surviving executor a person within the description; for by the death of one executor the whole character of executors becomes vested in the survivor, and the power being annexed to the executors *ratione officii*, and the office itself surviving, why should not the power annexed to it also survive, as well as where it survives by reason of being coupled with an interest? This manner of accounting for the opinion, that a power of selling annexed to an executorship may survive, is only a conjecture, hazarded for the sake of reconciling a *particular* case with a *general* rule; the reasons which influenced those who adopted the opinion, not appearing in any book we have seen. However, the conjecture is agreeable to the manner in which lord Hale, in a manuscript note on a Coke upon Littleton we have been favoured with, is represented to have considered the power's surviving when given to *two* executors, as in the case of Lovell and Barnes. The words of the note are these: *Hales chief baron says, it is so, because they were to sell by reason* officii; *yet the law stands, that authorities shall not survive; and perhaps it had been otherwise, if he had ordered his land to be sold by A. and B. not being named executors, and one of them had died, for that seems to be a personal trust.* The conjecture also receives great countenance from some books, in which it is said, that such a power of selling given to *executors* shall *pass* to their executors and administrators; for if an authority, not being coupled with an interest, becomes *transmissible* in the way of succession *in infinitum* till executed, by reason of its being given to executors, much more may it *survive* for a like reason. Kelw. 44. 2 Brownl. 194. If indeed the doctrine in the books we refer to is well founded, it will prove a power of selling land given to executors capable both of *transmission* and *survivorship*. But whether lord Coke's notion of the power's not surviving, or the opposite one, most conforms to *strictness of law*, is not now of any great importance; as such a power, though extinct at *law*, would certainly be enforced in *equity*. This has long been the practice of our courts of equity; these rightly deeming the purpose, for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees; which brings the case within the general rule of equity,

"*By deed or without deed.*" And therefore if by the custome a man deviseth, that a reversion or any other thing that lyeth in grant shall be sold by the executors, they may sell the same without deed (3); for the vendee shall be in by the devisor, and not by the executors, as hath beene said. 19 H. 6. (1 Leon. 31.)

"*Consuetudo ex certâ causâ rationabili usitatâ privat communem legem.*" *Quia consuetudo contra rationem introducta potiùs usurpatio quàm consuetudo appellari debet. Consuetudo præscripta et legitima vincit legem.*

"*Privat communem legem.*" For no custome or prescription can take away the force of an act of parliament (4); and therefore *Littleton* materially speaketh here of the common law. 4 E. 4. 4. 11 H. 4. 7. 39 H. 6. 39. 7 H. 6. 1, 2.

9 H. 6. 56. 8 H. 7. 4. 8 Eliz. Dier 247. (2 Roll. Abr. 266. 4 Inst. 274. 298. 303.)

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equity, that a trust shall never fail of execution for want of a trustee, and that if one is wanting the court shall execute the office. The relief is administered by considering the land, in whatever person vested, as bound by the *trust*, and compelling the heir, or other person having the legal estate, to perform it. There are many printed precedents of thus executing not only powers actually extinct at law, or supposed to be so, but also such as, in point of law, either for want of the will's naming by whom they should be executed, or because those named had died before the testator, never could exist or take effect. Some of these precedents are as early as the reign of Charles the first. See Locton and Locton 2 Freem. 136, and 1 Cha. Cas. 179. Garfoot and Garfoot. 1 Cha. Cas. 35. Gwilliam and Rowel, Hardr. 204. Pitt and Pelham, 2 Freem. 134. 1 Cha. Rep. 283, and 1 Cha. Cas. 176. T. Jo. 25. 1 Lev. 304. See also Max. of Eq. 57, and Vin. Abr. *Devise*, Q. e. and S. e. Nor do the courts of equity appear ever to have confined this relief, as they certainly do many kinds of aid, to persons of particular and favoured descriptions, such as wife, children, or creditors; for though in some of the old cases, the persons relieved were of one or other of these descriptions, yet in others nearly of the same time the parties are not stated to have fallen within either of them; and we have not heard of any case, in which relief has been refused on that account. See Locton and Locton already cited, and the case of Tenant and Browne cited in 1 Cha. Cas. 180. The reason of not favouring particular persons in this instance will appear evident, when it is considered, that testamentary powers to sell are deemed to be *in the nature of trusts*, and trusts are executed in equity for *all* persons *indiscriminately*.—Lord Coke next takes for granted, that if there is a devise *to A. for life, and that after his decease the lands shall be sold by the testator's executors*, they cannot sell the *reversion*, but must wait till the death of the wife: and the case cited from Bro. Abr. *Devise*, pl. 1, countenances this opinion. But in one report judge Haughton argues, that the words *after the decease* of the tenant for life, mean only to mark the determination of his estate, *not to limit the time for sale*, and therefore, that a sale may be in his life-time; and in another judge Clench expresses himself almost to the same purpose. 2 Bulst. 125. Godb. 46. There is also a case against lord Coke in 2 Leon. 220, and the point is doubted in Cro. Cha. 382*.—See further in respect to such devises, Vin. Abr. K. e. to S. e.—[Note 146.]

(3) The case cited in the margin from 19 H. 6. is in fo. 23.

(4) See 115. a.

* *But see Anon. Excheq. 1806, cited in Mr. Sugden's Treatise of Powers, 2d ed. p. 265.*

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AND note, that no custome is to bee allowed, but such custome, as hath bin used by title of prescription, that is to say, from time out of minde. But divers opinions have beene of time out of minde, &c. and of title of prescription, which is all one in the law. For some have said, that time out of mind should bee said from time of limitation in a writ of right; that is to say, from the time of king Richard *the first after the Conquest, as is given by the statute of* Westminster *the first, for that a writ of right is the most high writ in his nature, that may be. And by such a writ a man may recover his right of the possession of his ancestors of the most ancient time, that any man may by any writ by the law, &c. And in so much that it is given by the said estatute, that in a writ of right none shall be heard to demand of the seisin of his ancestors of longer time than of the time of king* Richard *aforesaid, therefore this is proved, that continuance of possession, or other customs and usages used after the same time* (puis le dit temps)*, *is the title of prescription, &c. And this is certaine. And others have said, that well and truth it is, that seisin and continuance after† the limitation, &c. is a title of prescription* (puis le dit limitation (1) est un title de prescription), *as is aforesaid, and by the cause aforesaid. But they have sayd, that there is also another title of prescription, that was at the common law before any estatute of limitation of writs, &c. and that it was, where a custome, or usage, or other thing, hath beene used, for time whereof mind of man runneth not to the contrary. And they have said, that this is proved by the pleading, where a man will plead a title of prescription of custome* (2). *Hee shall say, that such custome hath beene used from time whereof the memory of men runneth not to the contrary, that is as much as to say, when such a matter is pleaded, that no man then alive hath heard any proofe of the contrary; nor hath no knowledge to the contrary; and insomuch that such title of prescription was at the common law, and not put out by an estatute,* ergo, *it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right* (3) *is of so long time passed* (4). Ideo quære de hoc. *And many other customes and usages have such ancient boroughes.*

(4 Co. Luttrel's case. 9 Co. 57. 2 Roll. Abr. 265, 266. 1 Sid. 161. 1 Roll. Abr. 560. 566. Cro. Cha. 175.) (4 Co. 86.)

"*PRESCRIPTION.*" Prescription is a title taking his substance of use and time allowed by the law. *Præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis.* In the common law a prescription, which is personal, is for the most part applyed to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors; for as a naturall body is said to have ancestors, so a body politique or corporate [113. b.]

* *The French word puis seems here to signify* from *or* ever since *and not* after *as lord Coke translates it. See Mr. Ritso's Intr. p.* 110, 111.

† *See the note above, and Mr. Ritso's Intr. ubi supra.*

(1) *&c.* in L. and M. and Roh.
(2) *&c.* in L. and M. and Roh.
(3) *&c.* in L. and M. and Roh.
(4) *&c.* in L. and M. and Roh.

corporate is said to have predecessors. And a custome, which is local, is alledged in no person, but layd within some mannor or other place. As taking one example for many. *I. S.* seised of the mannor of *D.* in fee prescribeth thus: that *I. S.* his ancestors, and all those whose estate he hath in the sayd mannor, have time out of minde of man had and used to have common of pasture, &c. in such a place, &c. being the land of some other, &c. as pertaining to the sayd mannor. This properly we call a prescription. A custome is in this manner. A copyholder of the mannor of *D.* doth plead, that within the same mannor, there is and hath beene such a custome time out of mind of man used, that all the copyholders of the said mannor have had and used to have common of pasture, &c. in such a wast of the lord, parcell of the said mannor, &c. where the person neither doth or can prescribe, but alledgeth the custome within the mannor. But both to customes and prescriptions, these two things are incidents inseparable, viz. possession or usage, and time. Possession must have three qualities: it must be long, continual, and peaceable; *longa, continua, et pacifica:* for it is said, *transferuntur dominia, sine titulo, et traditione, per usucaptionem, scil. per longam, continuam, et pacificam possessionem. Longa, i. e. per spatium temporis per legem definitum*, of which hereafter shall be spoken. *Continuam dico, ita quòd non sit legitimè interrupta.* [114. a.] ☞ *Pacificam dico, quia si contentiosa fuerit, idem erit quod priùs, si contentio fuerit justa. Ut si verus dominus, statim cùm intrusor vel disseisor ingressus fuerit seisinam, nitatur tales viribus repellere, et expellere, licet id quod inceperit perducere non possit ad effectum, dum tamen cùm defecerit, diligens sit ad impetrandum et prosequendum. Longus usus nec per vim, nec clam, nec precariò, &c.*

(6 Co. 60. a. 65. b. 66.) 12 E. 4. 1, 2. Mariæ, Br. Prescr. 100. 6 E. 6. Dy. 71. 14 E. 3. Bar. 277. 43 E. 3. 32. 7 H. 6. 26. 22 H. 6. 14. 16 E. 2. tit. Prescript. 53. 45 Ass. 8. 40 Ass. 27. 41. 21 E. 4. 53. 54. (9 Co. 57.)

Bract. fo. 51, 52.

Bract. fo. 222. b.

If a man prescribeth to have a rent, and likewise to take a distresse for the same, it cannot bee avoyded by pleading, that the rent hath beene alwayes payd by cohersion, albeit it began by wrong.

13 E. 4. 6.

"*A title of prescription.*" Seeing that prescription maketh a title, it is to be seene; first, to what things a man may make a title by prescription without charter; and secondly, how it may be lost by interruption.

For the first, as to such franchises and liberties as cannot be seised as forfeited, before the cause of forfeiture appeare of record, no man can make a title by prescription, because that prescription being but an usage *in pais*, it cannot [*] extend to such things as cannot bee seised, nor had, without matter of record: as to the goods and chattels of traitors, felons, felons of themselves, fugitives, of those that be put in exigent, deodands, conusance of pleas, to make a corporation, to have a [114. b.] sanctuary, to make a ☞ coroner, &c. to make conservators of the peace, &c. (1).

(Dr. & Stud. 16. 5 Co. 72.) 21 H. 6. Prescript. 44. 21 E. 4. 6. 1 H. 7. 23. 9 H. 7. 11. 20. 7 H. 6. 45. 6 E. 3. 32. 42. 45 E. 3. 2. 2 E. 4. 26. (9 Co. 59. Doc. Plac. 103. 44 Ass. p. 8.

2 Roll. Abr. 270.) [*] Fleta, lib. 1, cap. 25. Brit. f. 6, & 15. 49 E. 3. 3. Stanf. Pl. Cor. 21. 51. 5 Co. 109, 110. 9 Co. 29. (Post. 195. a. 2 Roll. Abr. 114. 265.) (2 Ro. Abr. 270. 9 Co. 29. Post. 195. a.)

[e] But

(1) See an observation on this doctrine against prescribing to make conservators of the peace, in 2 Hawk. Pl. C. b. 2, c. 8, s. 10.

[e] But to treasure trove, waifes, estraies, wrecke of sea, to hold pleas, courts of leets, hundreds, &c. infange thiefe, outfange thiefe, to have a parke, warren, royall fishes; as whales, sturgions, &c. fayres, markets, franke foldage, the keeping of a gaole, tolle, a corporation by prescription, and the like, a man may make a title by usage and prescription onely without any matter of record. [*] *Vide* Sect. 310, where a man shall make a title to lands by prescription.

But it is to be observed, [f] that although a man cannot, as is aforesaid, prescribe in the said franchise to have *bona et catalla proditorum, felonum, &c.* yet may they and the like bee had obliquely, or by a meane by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla proditorum, felonum, &c.*

[e] 22 E. 3. Coron. 241. 9 H. 7. 11. 20. 18 H. 6. Prescript. 45. 11 H. 4. 10. 21 H. 7. 33. 9 E. 4. 12. 39 E. 3. 35. 46 E. 3. 16. 11 H. 6. 25. F. N. B. 91. 1 H. 7. 24. Stamf. Pl. Cor. 38. 44 E. 3. 4. 22 E. 4. 43, 44. 3 E. 3. Brooke Prescrip 57. 44 Ass. pl. [*] 8 H. 6. 16. [f] 12 E. 4. 16. 32 H. 6. 25. 12 Eliz. Dier 288, 289. 11 E. 3. tit. Issue 40. (2 Ro. Abr. 271. 2 Inst. 19. Cro. Jam. 155, 156. 454.) 15 E. 3. tit. Judgment 133. 14 E. 3. ibid. 155.

As to the second, by what meanes a title by prescription, or custome, may be lost by interruption. It is to be knowne, that the title, being once gained by prescription or custome, cannot be lost by interruption of the possession for ten or twenty yeares, but by interruption in the right; as if a man have had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right.

In a writ of mesne the plaintife made his title by prescription, that the defendant and his ancestors had acquited the plaintife and his ancestors and the terre-tenant time out of minde, &c. the defendant took issue, that the defendant and his ancestors had not acquited the plaintife and his ancestors and the terre-tenant; and the jury gave a special verdict that the grandfather of the plaintife was enfeoffed by one *Agnes*, and that *Agnes* and her ancestors were acquitted by the ancestors of the defendant time out of minde before that time, since which time no acquitall had beene; and it was adjudged and affirmed in a writ of error, that the plaintife should recover his acquitall, for that there was once a title by prescription vested, which cannot be taken away by a wrongfull *cesser* to acquite of late time: and albeit the verdict had found against the letter of the issue, yet for that the substance of the issue was found, viz. a sufficient title by prescription, it was adjudged both by the court of common pleas, and in the writ of error by the court of king's bench for the plaintife; which is worthy of observation. So a *modus decimandi* was alledged [*] by prescription time out of mind for tithes of lambes; and thereupon issue joyned; and the jury found, that before twenty yeares then last past there was such a prescription, and that for these twenty yeares he had paid tithe lamb *in specie*. And it was objected, 1. That the issue was found against the plaintife, for that the prescription was generall for all the time of prescription, and twenty years fail thereof. 2. That the party by payment of tithes *in specie* had waived the prescription or custome But it was adjudged for the plaintife in the prohibition; for albeit the *modus decimandi* had not bin paid by the space of twenty yeares, yet, the prescription being found, the substance of the issue is found for the plaintife. And if a man hath a common by prescription, and taketh a lease of the land for twenty yeares, whereby the common is suspended, after the yeares ended, he may claime the common generally by prescription, for that the

(2 Ro. Abr. 271. 278.)

[*] Mich. 43. & 44 Eliz. in a prohibition betweene Nowell pl. and Hicks vicar of Edmonton defendant in the King's Bench. (2 Co. Bishop of Winton's case. 6 Co. 69. 3 Co. 9. 2 Ro. Abr. 292.)

suspension was but to the possession and not to the right, and the inheritance of the common did alwayes remaine; and when a prescription or custome doth make a title of inheritance (as *Littleton* speaketh), the partie cannot alter or waive the same *in pais* (2).

" *Time out of mind, &c. and of title of prescription, which is all one in law.*" So as the time prescribed or defined by law is, time whereof there is no memorie of man to the contrary. [e] *Omnis querela, et omnis actio injuriarum, limita infra certa tempora.* (Dr. & Stud. 17. a.)

[e] Bracton, fol. 314.

" *Time of limitation.*" Limitation, as it is taken in law, is a certaine time prescribed by statute, within the which the demandant in the action must prove himselfe or some of his ancestors to be seised. (1 Ro. Abr. 685.)

" *In a writ of right.*" In [f] ancient time the limitation in a writ of right was from the time of *H.* 1. whereof it was said *à tempore regis Henrici senioris.* After that by the statute of [g] *Merton* the limitation was from the time of *H.* 2. and by the statute [h] of *W.* 1. the limitation was from the time of *R.* 1. And this is that limitation, that *Littleton* here speaketh of. Whereof in the *Mirror* in reproofe of the law it is thus said: [i] *Abusion est de counter cy longe temps, dount nul ne poet testmoigner de vieu et de oyer, que ne dure my generalment ouster 40 ans.*

[f] Regist. 158. Bract. fo. 373. 5 Ass. p. 2. 34 H. 6. 40.
[g] Stat. de Mert. 20 H. 3. ca. 8.
[h] West. 1. an. 3 E. 1. c. 8. Vide W. 2. 13 E. 1. ca. 46.
[i] Mirror, ca. 5, sect. 1.

[115. a.] ☞ Time of limitation is twofold: first, in writs; and that is by divers acts of parliament: secondly, to make a title to any inheritance; and that (as *Littleton* here saith) is by the common law.

Glanvil. li. 13, ca. 3, & 34. Mirror, ca. 5, sect. 4. Fleta, l. 2, c. 38, & l. 4, c. 5. Britton, fol. 79. 82. Bracton, l. 2, f. 52, and f. 179. 253. 373.

Limitation of times in writs is provided by the said statute of *Merton* (1), and after by the said statute of *W.* 1. which *Littleton* here citeth, and which was in force when he wrote, but is since altered by a profitable and necessary statute [k] made *anno* 32 *H.* 8. and by that act, the former limitation of time in a writ of right is changed and reduced to threescore yeares next before the *teste* of the writ; and so of other actions, as by the statute at large appeareth. But it is to be observed, that this act of 32 *H.* 8. extendeth [l] not to a *formedon* in the *discender* (2),

[k] 32 H. 8. cap. 2. See the second part of the Institutes. Merton, c. 8.

[l] Mich. 10 & 11 Eliz. Dyer 278. Fitzwilliam's case.

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(2) It is observable, that mr. serjeant Rolle has incorporated most of the preceding passages relative to prescription into his Abridgment. See Ro. Abr. tit. *Prescription*, and the additional matter in Vin. Abr. same title R.—S.—T.

(1) See cap. 39, and lord Coke's Commentary upon it in 2 Inst. 238.

(2) The statute mentions formedons in *remainder* and *reverter*, and limits them to fifty years; but omits formedon in *descender*. Nor is the latter deemed to be comprehended within the clause of the statute relative to writs of *right*; for a formedon is not in the strict sense a writ of right; though it certainly is in the nature of one, the *mere right* being equally triable in both. Accordingly, in the case cited by lord Coke from Dyer, three judges held, that a formedon in *descender* was not within the statute. The other judge doubted. See also the additional case in the margin of Dy. ed. 1688. fol. 278. a. But as the 21 Jam. 1. c. 16,

nor to the services of escuage homage and fealty (3), for a man may live above the time limited by the act. Neither doth it extend to any other service, which by common possibility may not happen or become due within sixty yeares, as to cover the hall of the lord, or to attend on his lord when he goeth to warre, or the like; nor where the seisin is not traversable or issuable (4). Neither doth it extend to a rent created by deed (5), nor to a rent reserved upon any particular estate; for [*m*] in the one case the deed is the title, and in the other the reservation; nor to any writ of right of advowson, *quare impedit*, or assise of *darreine presentment* (for there was a parson of one of my churches that had been incumbent there above fifty yeares, and dyed but lately) or any writ of right of ward, or ravishment of ward, &c. but they are left as they were before the statute of 32 *H.* 8. (6). But hereof thus much for the better understanding of *Littleton* shall suffice (7).

4 Co. 10, & 11. Bevel's case.

[*m*] 8 Co. 65. sir William Foster's case.

1 Mar. Parliam. 2. cap. 5.

Vide 17 E. 3. 11. Pl. Com. 371. b.

"*From*

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c. 16, requires formedons of every kind to be brought within twenty years after the descent of the title, this defect of the former statute is now of no consequence.- [Note 148.]

(3) Acc. 3. Lev. 21.

(4) The reason is plainly this. The limitation in the 32d of Henry the eighth is wholly referrible to seisin; the statute requiring a seisin within a certain time, according to the nature of the writ; that is, sixty years for writs of *right*, fifty for *possessory* writs founded on an *ancestor's* possession, thirty for *possessory* writs founded on the party's own possession, and so on. Now the limitation being thus dated from a seisin, it would be absurd to extend the statute to actions, in which seisin, not being issuable, can never become the subject of evidence or trial.—[Note 149.]

(5) This was the point adjudged in sir William Foster's case cited by lord Coke in the margin; and there is a much earlier adjudication to the same effect in Moore. See Mo. 31. The reason of this exemption of rents created by *deed* out of the statute is of the same kind as is explained in note 4.; the statute pointing at rents, to which the title is by *seisin*. But according to sir William Jones, such exemption should be understood with this qualification; that the *certainty* of the rent should appear in the deed; because otherwise the *quantum* or *quality* of the rent is no more ascertained by the deed, than if there was not one existing. Therefore if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is, and the latter rent not having commenced by deed is one, of which seisin is the proper proof; in such a case, seisin, as sir William Jones thought, is equally requisite to both rents, and consequently both ought equally to be deemed within the limitation of the 32 of Hen. 8. See W. Jo. 238.—[Note 150.]

(6) It was doubtful whether the several writs, here mentioned in respect to advowsons and wardship, were not within the statute of Henry the eighth; and to remove this doubt a statute of Mary cited by lord Coke was made, declaring that the former statute should not extend to them. The reasons of that statute are fully explained in Plowden. See fol. 371. But so far as regards *advowsons*, this statute of Mary is no longer of any use; it being enacted by the 7th of Anne, c. 18, that no usurpation shall displace the estate of the patron, and that he may be present on the next avoidance, as if there had not been any usurpation; which provision in effect takes away all limitation of suits about the right of patronage. See 3 Blackst. Comm. 5th ed. 250.—[Note 151.]

(7) See further as to the statute of 32 Hen. 8. Brooke's reading upon it. Since the 32 of Hen. 8. there have been various statutes for limitation of the time

"*From the time of king Richard the first.*" And that was intended from the first day of his raigne; for *(from the time)* being indefinitely, doth include the whole time of his raigne, which is to be observed. Vide 34 H. 6. 36.

"*A writ of right,*" *Breve de recto;* so called, for that the words in the writ of right are, *quòd sine dilatione plenum rectum teneas.*

"*Title of prescription at the common law, &c. for time whereof mind of man runneth not to the contrary.*" *Docere oportet longum tempus, & longum usum illum, viz. qui excedit memoriam hominum; tale enim tempus sufficit pro jure.* Bract. lib. 4. fol. 230. Fleta, lib. 4. cap. 24. (5 Co. 72. Dr. & Stud. 16. b.)

"*Any proofe of the contrary.*" For if there be any sufficient proofe of record or writing to the contrary, albeit it exceed the memory, or proper knowledge of any man living, yet is it within the memory of man: for memory or knowledge is two-fold. First, by knowledge by proofe, as by record or sufficient matter of writing. Secondly, by his owne proper knowledge. A record or sufficient matter in writing are good memorialls; for *litera scripta manet.* And therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said, *tradere memoriæ.* And this is the reason, that regularly a man cannot prescribe or alledge a custome against a statute, because that is matter of record, and is the highest proofe and matter of record in law. But yet a man may prescribe against an act of parliament, when his prescription or custome is saved or preserved by another act of parliament. (8 Co. 121.) 28 Ass. 25. 38 Ass. 18. 45 E. 3. 26. 5 H. 7. 10. 8 H. 7. 7. 11 H. 7. 21. Dyer 23 Eliz. 273.

There is also a diversity betweene an act of parliament in the negative and in the affirmative; for an affirmative act doth not take away a custome (8); as the statutes of wills of 32 and 34 *H.* 8. doe not take away a custome to devise lands, as it hath beene often adjudged. Moreover, there is a diversity betweene statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there aswell as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for, as our author saith, *consuetudo, &c. privat communem legem* (9). As the statute of *Magna Charta* provideth that no (2 Ro. Abr. 266. 4 Inst. 274. 298. 303. 2 Inst. 20. 11 Co. 63. 12 Co. 22. Plow. 207. Cro. Jam. 313. 2 Rol. Abr. 266.) Magna Charta, cap. 35. (2 Leon. 28.)

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time for bringing actions; of which the principal and general one is the 21 of Jam. c. 16. See tit. *Temps* in Com. Dig. and tit. *Limitation* in the other Abridgments.—[Note 152.]

(8) This rule about *affirmative* statutes is very common in the books. See the references in the margin of Plowd. Engl. ed. 112. In another place lord Coke lays down a like rule as to their not taking away the *common law*, but with more particularity; for his words are, that *a statute made in the affirmative without any negative expressed or implied, doth not take away the common law.* 2 Inst. 200. This seems to be the justest way of stating the rule both as to common law and customs. See further Plowd. 113, and the references in the margin of Engl. edit. Hatt. on Stat. 83. 4 Com. Dig. 339. 432. Elmes's case 1 And. 71, and Dy. 373, pl. 13, and Jones and Smith 2 Bulstr. 36.—[Note 153.]

(9) This appears to be a good rule; for if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by

no leet shall be holden but twice in the yeare (10), yet a man may prescribe to hold it oftener, and at other times (11); for that

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by parliament; and consequently its operation should not be extended to the destruction of prescriptions and customs, which were before allowable. As to the use of *negative* words in such a case, they may either arise from the subject, or be a *mode* of expressing what the common law is; in either of which cases, there cannot be any colour of reason for giving more effect to *negative* than belongs to *affirmative* words. In short, to say that a statute *merely declaratory* of the common law, being expressed in negative words, shall operate on subjects to which the common law is not applicable, seems to be a direct contradiction; for how can a statute be *merely declaratory*, if it is in *any* degree *introductive of a new law*? However, there are books in which lord Coke's distinction, in respect to negative statutes declaratory of the common law, is denied. See W. Jo. 270, 271. 289. If those who oppose his opinion, had meant only to say, that in the instances, by which he illustrates his rule, the negative words of the statutes not only import something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it, or that on other accounts the instances were not apt, there might possibly be some colour for their dissenting from lord Coke. But what is professed to be controverted is the distinction itself; which, as we understand it, seems to be perfectly unexceptionable.—[Note 154.]

(10) It is observable, that *Magna Charta* distinguishes between *tourns* or the *leets* of *sheriffs* and the *view* of *frank-pledge*; limiting the *former* to *twice* a year, and the *latter* to *once*. In the more ordinary sense *frank-pledge* and *leet* are synonymous; as appears from the style of tourns and other leets, which in court rolls are usually denominated *curiæ* or *visus franci plegii*. But when *frank-pledge* is used, as in *Magna Charta*, it should be understood in a *strict* and *particular* sense; according to which it meant only that part of the business of a court leet, which related to the taking of sureties or free pledges for every person within the jurisdiction; a practice which had fallen into disuse long before lord Coke's time. See 8 H. 7. 4. and 2 Inst. 72.—[Note 155.]

(11) Adjudged acc. 2 Leon. 28. But it may be doubted, whether the prescription for holding a leet oftener than twice a year, when examined into, will appear a fit example to prove the rule, that negative statutes in affirmance of the common law may be prescribed against. The only words of *Magna Charta* which relate to the holding of tourns or leets are these: *Nec aliquis vicecomes, vel ballivus, faciat turnum suum per hundredum, nisi bis in anno; et nonnisi in loco consueto, videlicet semel post Pascha et iterum post festum Sancti Michaelis; et visus de franco plegio tunc fiat ad illum terminum Sancti Michaelis sine occasione* See Blackst. ed. of Magn. Chart. But this provision or declaration seems wholly confined to the *tourns* or leets of *sheriffs*, and not to include the *leets of private persons*; though it must be owned there are some authorities to the contrary. Acc. Bro. Abr. *Lease* 23, and the opinion of *Periam* in 2 Leon. 74. *Contra* 2 Hal. Hist. Pl. C. 71, and the opinion of *Rhodes* 2 Leon. 74. See also 2 Hawk. Pl. C. 56. Therefore should this provision in *Magna Charta* be only an affirmance of the common law, which, as we shall mention in the next note, is a point controverted, the instance would still be liable to exception. See 2 Hawk. Pl. 56. But the strongest objection is, that, in the same chapter of *Magna Charta*, there is a *general* and express reservation of ancient liberties; there being added this qualification, *ita scilicet quòd quilibet libertates suas, quas habuit et habere consuevit tempore regis Henrici avi nostri, vel quas postea perquisivit:* which words, even in the opinion of those who extend *Magna Charta* to *all* leets, suffice to save prescriptions. 2 Leon. 75. What renders lord Coke's thus applying the case of leets the more remarkable is, that he himself, in his Second Institute, when commenting on this part of *Magna Charta*, agrees, that *leets*

that the statute [n] was but in affirmance of the common law (12).

So the statute [o] of 34 *E.* 1. (13) provideth, that none shall cut downe any trees of his owne within a forest without the view of the forrester; but inasmuch as this act is in affirmance of the common law (14), a man may prescribe to cut downe his woods within a forest without the view of the forester (15). And so

[n] 6 H. 7. 2. 8 H. 4. 34. 12 H. 7. 18. 31 H. 6. Leet 11. 18 H. 6. 13.

[o] 34 E. 1. tit. Forest. Rast. 1 E. 3. cap. 2.

(Doc. Plac. 342. 2 Rol. Abr. 266. Ante 2. Post. 165. b. 233. a. Dr. & Stud. 164.) Cro. Jam. 155.

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leets of private persons, so far as regards the *negative* words of *Magna Charta*, are not within it, and takes particular notice of the reservation of ancient liberties. 2 Inst. 72. See further 4 Com. Dig. 122. Perhaps lord Coke might intend to assert, that, notwithstanding *Magna Charta*, it is lawful to prescribe for holding a sheriff's tourn oftener than twice a year; which indeed seems to be admitted by judge Rhodes, who construed *all* leets to be within *Magna Charta*. But we do not observe that the authorities lord Coke cites mention any such prescription.—[Note 156.]

(12) Some think that *Magna Charta*, so far as regards the time for holding tourns and leets, was introductive of a new law. See 2 Hawk. Pl C. 56.—[Note 157.]

(13) The 34 E. 1. is not printed in the modern editions of the statutes. Indeed it seems doubtful, whether it is entitled to the denomination; for lord Coke in another of his works treats it as an *ordinance*, and to prove it such cites Fitzherbert's *Natura Brevium*. 4 Inst. 298. F. N. B. 167. A. See also 12 Co. 23. If it be true, that the 34 E. 1. is only an ordinance, lord Coke's case should be put on the 1 E. 3. st. 1, c. 2, or the *Charta de Foresta* of the 9 H. 3. c. 4, both of which laws provide to the same effect as the 34 E. 1. and are certainly acts of parliament. See also a like negative provision in the *consuetudines et assisa de forestâ*, printed as a statute of uncertain time in Ruffh. ed. Append. 25. and cited by Noy in W. Jo. 270. 291.—[Note 158.]

(14) Acc. Manw. Forr. L. 1st. ed. 41. a. and Fitz. Abr. *Trespass* 239. there cited.

(15) It having been denied by persons of considerable respect, that such a prescription is good, we shall give some account of the state of the arguments for and against it.—The *general* ground on which lord Coke asserts the prescription to be lawful, is, *first*, that a statute, though expressed in negative words, yet if it is a mere affirmance or declaration of the common law, may be prescribed against; and *secondly*, that the statutes against cutting down trees in a forest without view of the forester, are *negative* statutes of this sort. As to the *first* of these propositions, we have endeavoured to evince its reasonableness in a former note; in which also the reader is referred to the various authorities on the subject, for the purpose of shewing, that they greatly preponderate in favour of lord Coke. See note 13. In respect to the *second* proposition, the authorities not only support it, but are so uniform, that we do not find it any where controverted. See note 14. The *particular* argument for the prescription consists principally of various allowances of it at *eyres of the forest*, and of two express adjudications of the point on demurrers in *courts of common law*. The cited instances of *allowances* are not few; for, besides the three cases of *Henry de Percy*, *Thomas lord Wake of Liddel*, and *Gilbert de Acton*, here mentioned by lord Coke, he *in his Fourth Institute* cites another, which was in the 8th of Edward the third on a claim by *Thomas Pickering* and *Margaret his wife*. See 4 Inst. 297. The cases at common law are *Sellinger's* and *lord Hatton's*. The *former* is stated by lord Coke to have been before the exchequer in the time of Elizabeth, and to have been adjudged upon *argument and long advisement*; and probably is the same case he here cites as one of the 16th

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was it adjudged in 16 *Eliz.* in the exchequer by sir *Edward Sanders* chiefe baron, and other the barons of the exchequer, as sir

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of Elizabeth. See 4 Inst. 297, and 12 Co. 22. The *latter* is taken notice of by judge Croke, who reports lord Coke to have cited it as a judgment on demurrer in the king's bench. Cro. Jam. 155. To these authorities we may add an *extrajudicial* opinion of all the judges on being consulted by James the first; the words of which seem to imply, that a custom for cutting wood in the king's forests without view of the forester may be good. See the third resolution of the judges in 4 Inst. 299. It is said too, that in a case of the 19 of E. 1. between the *prebend of Chichester* and the *earl of Arundel*, issue was joined on such a custom; from which it may be inferred, that in those ancient times the goodness of the custom was not doubted. W. Jo. 290.—On the other hand lord Lovelace's case, whose claim came before an eyre in the 8th of Charles the first, is a direct decision against the allowance of a prescription for cutting wood without view of the forester; and in that case lord chief justice Richardson, when this part of the Commentary upon Littleton was referred to, denied lord Coke's *general doctrine* about negative statutes declaratory of the common law. W. Jo. 270. Two other adjudications, to the like effect, appear to have been made at eyres in the same reign; one of which was on a claim by the tenants of the manor of Bray, who, in proof of the custom they alledged, offered in evidence an inquisition of the reign of Edward the second. W. Jo. 289, 290. 348. The principle on which Noy, attorney-general, argued in these cases, was a general one, that negative statutes, such as those which occur against cutting wood in the king's forest without licence, cannot be controuled by custom or prescription. To prove this he appealed to a case from a year-book of Henry the sixth; which he considered as directly in point, and as a judgment that tithe of timber cannot be prescribed for against the statute of *sylva cædua*, though only an *affirmance* of the old law, merely because the statute is *negative*. See W. Jo. 270. 290, and 25 E. 3. c. 3. The year-book reported to have been cited by Noy is the 20th of Hen. 6. but we do not meet with any case of that year relative to the statute of *sylva cædua*, and therefore the 9 of Hen. 6. 56. which is to the point, was probably meant; though if it was, it contains no *judgment*, but only a *query*, which Brooke, in abridging the case, by mistake calls the reporter's *opinion*. Bro. *Prescription* 2. Noy also cited the earl of Arundel's case from a record of the 16 of Edward the second, as a decision, that a prescription to cut wood against the forest statutes was not good. W. Jo. 270. As to the cases urged against him, he observed, that the case between the *prebend of Chichester* and *the earl of Arundel* was of a *chace*, and the statutes only related to *forests*; that in *Percy*'s case the forest was *not in the hands of the crown* when the statutes were made; and that the case of the reign of Elizabeth, which lord Coke reports from lord Popham, was of a *chace*, of which the king was seised *in right of his duchy of Lancaster*. W. Jo. 290, 291. It is observable however, that mr. Noy leaves the two cases of *lord Wake* and *Gilbert de Acton* wholly unanswered, though they were cited against him. As to the other authorities we have stated for a prescription against the *forest* statutes, or those against *negative* statutes in *general* being declaratory, they do not appear to have been urged against mr. Noy. But besides the authorities relied on by Noy, there is one more; for judge Croke, after taking notice of the judgment for the prescription in *lord Hatton*'s case, reports Popham to have said, that *it was adjudged otherwise about the same time in the exchequer*. Cro. Jam. 155. However, this is irreconcileable with lord Coke's representation of the judgment of the *exchequer* both here and elsewhere, unless we suppose him to mean a different case.—Having thus brought together, and digested, what we found scattered in the books on this much litigated subject, we shall dismiss it, leaving the reader to his own judgment, with this single remark. If the

greater

sir *John Popham* chiefe justice of the king's bench reported to me.

In the eire of the forest of *Pickering*, before *Willoughby Hungerford* and *Hanbury* justices itinerants there, *anno* 8 *E.* 3. I reade [*p*] a claime made by *Henry de Percy*, lord of the mannor of *Semor* within the said forest. The forestors, verderours, and regarders found his claime to be true, viz. *quòd prædictus Henricus de Percy, & omnes antecessores sui tenentes* [115. b.] ☞ *manerium prædictum à tempore quo non extat memoria, & sine interruptione aliquali, tenuerunt prædictum manerium cum pertinentiis extra regardum forestæ, & habuerunt woodwardum portantem arcum & sagittas ad præsentandum præsentanda de venatione tantùm, &c. & habuerunt in boscis suis de Semere forgeas & mineras, & amputârunt, dederunt, & vendiderunt boscum suum infra manerium prædictum, sine visu forestariorum pro voluntate suâ, & fugârunt & ceperunt, vulpes, lepores, capreolos, &c. sicut idem Henricus Percy superiùs clamat.* Which claime by prescription, and found as is aforesaid, the justices doubted onely of two points. The first, forasmuch as the said manor was within the limits of the forest, it should not onely be *contra assisam forestæ*, for his woodward to beare bow and arrowes, where by law he ought to beare but an hatchet, and no bow nor arrowes within the forest, but also *de facili cedere possit in destructionem ferarum, &c.* and they therefore doubted whether it might bee claimed by prescription. Their second doubt was concerning *fugationem & captionem capreolorum in boscis suis prædictis, eò quòd est bestia venationis forestæ, & transgressores inde convicti finem facerent ut pro transgressione venationis:* and for that difficulty, the claime was adjourned into the king's bench. But of the other parts of the prescription no doubt at all was made; and the like had been allowed in the same eire, as in the case of *Thomas* lord *Wake* of *Lydell*, and of *Gilbert* of *Acton*, in the same eyre, Rot. 37, and of others.

[p] Itin. Pickering ann. 8 E. 3. Rot. 38.

(8 Co. 136. Cro. Jam. 155.)

"*This is proved by the pleading.*" Note, one of the best arguments or proofes in law is drawne from the right entries or course of pleading; for the law it selfe speaketh by good pleading; and therefore *Littleton* here saith, it is proved by the pleading, &c. as if pleading were *ipsius legis viva vox.*

(Post. 126. a. 283. a. Ante 17. a. 10 Co. 88. 1 Sid. 336.)

"*Insomuch. that such title of prescription was at the common law, &c.*" Note, all the prescriptions that were limited from a certaine time were by act of parliament, as from the time of *H.* 1. which

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greater number of authorities, which, unless the cases we have referred to are mistated or misunderstood, is in favour of the prescription, shall be thought to be of *equal* or *nearly of equal* weight with the *more modern* decisions on the other side; then probably, as the subject strikes us, the good sense of lord Coke's distinction as to negative statutes, together with a consideration of the multiplicity of books which favour his *general* doctrine, will so strongly turn the scale in this *particular* instance of forest-law, as scarce to leave any doubt. Indeed it was for the sake of explaining, how far the *general* doctrine may be affected by the decision on this point of *forest*-law, that we have detained the reader so long upon it.—[Note 159.]

which was the first time of limitation set downe by any act of parliament, and so from the reigne of *R.* 1. &c. But this prescription of time out of memory of man was (as *Littleton* here saith) at the common law, and limited to no time. Also here is implyed a maxime of the law, viz. that whatsoever was at the common law, and is not ousted or taken away by any statute, remaineth still.

(Ante 110. b. Post. 344. a.)

"*Common law.*" The law of *England* is divided, as hath beene said before, into three parts; 1, the common law, which is the most generall and ancient law of the realme, of part whereof *Littleton* wrote; 2, statutes or acts of parliament; and 3, particular customes (whereof *Littleton* also maketh some mention). I say particular, for if it be the generall custome of the realme, it is part of the common law.

(Pref. to 8th Co.)

The common law hath no controler in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remaines still, as *Littleton* here saith. The common law appeareth in the statute of *Magna Charta* and other ancient statutes (which for the most part are affirmations of the common law) in the originall writs, in judiciall records, and in our bookes of termes and yeares. Acts of parliament appeare in the rolls of parliament, and for the most part are in print. Particular customes are to be proved.

Sect. 171.

ALSO, every borough is a towne (chescun burgh est un ville), *but not* è converso. *More shall be sayd of custome in the Tenure of Villenage.*

(2 Inst. 669.) Vid. Linwood. verbo Vicus. Bract. lib. 5, fol. 434, & lib. 2, fol. 211. Fortescue, cap. 29. 7 E. 6. Fines levie de terre. Br. 91. 34 E. 1. Quare imp. 187. Fortescue, cap. 29.

"TOWNE (ville)", *villa, quasi vehilla, quòd in eam convehantur fructus.* And it is called *vicus*, because it is *prope viam. Villa est ex pluribus mansionibus vicinata, & collata ex pluribus vicinis.* If a town be decayed so as no houses remaine, yet it is a towne in law. And so if a borough be decayed, yet shall it send burgesses to the parliament, as Old *Salisbury* and others doe. It cannot be a towne in law, unlesse it hath, or in time past hath had, a church, and celebration of divine service, sacraments and burials. What alteration hath beene made in townes, heare what a great lawyer saith. *In Angliâ villula tam parva inveniri non poterit, in quâ non est miles, armiger, vel paterfamilias, &c. magnis ditatus possessionibus, necnon liberi tenentes alii & valecti plurimi, suis patrimoniis sufficientes, &c.* And it appeareth by *Littleton*, that a towne is the *genus*, and a borough is the *species*; for hee saith that every borough is a towne, but every towne is not a borough. *Et sub appellatione villarum continentur burgi & civitates.*

Fortescue, cap. 24.

Domesday, Glouc.

☞ *Berewica*, or *berewit*, in *Domesday* signifieth a towne. *Hæ berewicæ pertinent ad Berchley. (Et sic recitat plus quàm viginti villas.)* [116. a.]

There be in *England* and *Wales* eight thousand eight hundred and three townes, or thereabouts.

See

See more *de villis, parachiis, et hamlettis*, in the ancient authors of the law, and plentifully in our other bookes. But let us now heare what *Littleton* saith (1).

Bract. ubi sup. Flet. li. 4, c. 15. & lib. 6, ca. 49. Brit. fo. 124, & 274, &c.

CHAP. 11. Of Villenage. Sect. 172.

TENURE in villenage is most properly, when a villeine holdeth of his lord, to whom he is a villeine, certaine lands or tenements according to the custome of the mannor, or otherwise, at the will of his lord, and to doe to his lord villeine service; as to carry and recarry the dung of his lord out of the city, or out of his lord's mannor unto the land of his lord, and to spread the same upon the land, and such like (hors del city, ou del manor (2), son seignior, jesques a le terre son seignior, en gisant ceo (3) sur le terre, *et hujusmodi). And some free men hold their tenements according to the custome of certaine manors, by such services. And their tenure also is called tenure in villenage, and yet they are not villeines; for no land holden in villenage, or villein land, nor any custome arising out of the land, shall ever make a free man villeine. But a villeine may make free land to bee villeine land to his lord. As where a villeine purchaseth land in fee simple, or in fee taile, the lord of the villeine may enter into the land, and oust the villeine and his heires for ever; and after, the lord (if hee will) may let the same land to the villein, to hold in villenage.*

"*TENURE in villenage,*" Villeine is from the *French* word *villaine*, and that *à villa, quia villæ adscriptus est*; for they which are now called *villani*, of ancient times were called *adscriptitii*. And in the common law he is called *nativus; quia pro majore parte natus est servus:* and this is hee which the civilians call *servus*. [*a*] *Theyn* in the *Saxon* tongue is *liber*, and *then*, *servus*. *Theme* (sometimes written *theame* corruptly) is an old *Saxon* word, and signifieth *potestatem habendi in nativos sive villanos, cum eorum sequelis, terris, bonis et catallis*. But *teame*, sometime corruptly written *theame*, is of another signification; for it is also an old *Saxon* word, [*b*] and signifieth, where a man can-

Lib. Rub. 76. & 77. Glanv. li. 5. ca. 1 & 2, &c. Vide Bract. li. 1. ca. 6, &c. Brit. fo. 77. & 67. 82. 97, 98. 125, 126. 147. Flet. li. 1. c. 3. Flet. l. 2. cap. 44. Idem, li. 4. cap. 11 & 12. Mir. ca. 2.

sect. 18. Ockam. (F. N. B. 77. a.) [*a*] Flet. li. 1, ca. 24. [*b*] Vide Lamb. inter leges Sanct. Edw. fo. 132. nu. 25.

not

(1) We do not observe that there is any thing in the statute of Charles the second for taking away military tenures, which in the least varies the tenure by burgage. For further information about *burgage* and *boroughs*, see Brad. on Bor. Mad. Firm. Burg. Squire's Anglo Sax. Gov. 1st ed. tit. *Boroughs* in the index, and Wright's Ten. 205.—[Note 160.]

(2) *In L. and M. and Roh. the words are* del cite *(which seems used in the same sense as* scite) del mannor.

(3) *Instead of* en gisant ceo, *the words in L. and M. and Roh. are* gisaunt warrette et de spreder le fyme le signour.

not produce his warrant of that which hee bought according to his voucher.

" *Villenagè*," *Villenagium*, (as in like cases hath been sayd where the termination is in *age*) is the service of a bondman. And yet a free man may doe the service of him that is bond. And therefore a tenure in villenage is twofold; one, where the person of the tenant is bond, and the tenure servile; the other, where the person is free, and the tenure servile. [c] *Serva terra liberos de sanguine existentes, villanos facere non potest.* And therefore it is said, [d] *est enim ratio et regula generalis in istis duobus casibus, quòd liber homo nihil libertatis propter* ☞ *personam suam liberam confert villenagio, nec liberum tenementum è contrario mutat statum aut conditionem villani.* And againe, [e] *Villenagium vel servitium nihil detrahit libertati; habita tamen distinctione utrùm tales sint villani, et tenuerunt in villano socagio de dominico domini regis.* And againe, [f] *Tenementum non mutat statum liberi non magis quàm servi; poterit enim liber homo tenere purum villenagium, faciendo quicquid ad villanum pertinebit, et nihilominus liber erit, cùm hoc faciat ratione villenagii, et non ratione personæ suæ: et ideo poterit, quando voluerit, villenagium deferere, et liber discedere, nisi illaqueatus sit per uxorem nativam ad hoc faciendum, ad quam ingressus fuit in villenagium, et quæ præstare poterit impedimentum, &c.* And againe, [g] *Purum villenagium est, à quo præstatur servitium incertum et indeterminatum, ubi scire non poterit vespere quale servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit.* And another saith to the same intent, *Ceux ne scavoient le vespere, de quoy ils serverent en la matyn.* [h] *Fuerunt in Conquestu liberi homines, qui liberè tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines; et cùm per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendo inde opera servilia, sed certa et nominata, &c. et nihilominus liberi, quia, licèt faciunt opera servilia, cùm non faciunt ea ratione personarum, sed ratione tenementorum, &c.*

(F. N. B. 12. 2 Rol. Abr. 73.)
[c] Hil. 29 E. 1. Cor. reg. Ebor. in thesaur.
[d] Bract. li. 4. fo. 170.
[116. b.]
[e] Idem, li. 1. ca. 6. Brit. c. 31. & 66. Flet. li. 1. ca. 3.
[f] Bract. fo. 26. 43 E. 3. 5. acc.
[g] Bract. li. 4. fo. 208. Brit. ca. 31.
[h] Bract. li. 1. fo. 7.

How villenage or servitude began, and for what cause, it is said, [i] *Ab homine et pro vitio introducta est servitus. Sed libertas à Deo hominis est indita naturæ. Quare ipsa, ad homine sublata, semper redire gliscit, ut facit omne quod libertate naturali privatur.* And another saith, [k] that the condition of villeines from freedome unto bondage, of ancient time grew by constitutions of nations. [l] *Fiunt etiam servi liberi homines captivitate de jure gentium*, and not by the law of nature, as from the time of *Noah's* Flood forward, in which time all things were common to all, and free to all men alike, who lived under the law naturall; and by multiplication of people, and making proper and private those things that were common, arose battels. And then it was ordained by constitution of nations, that none should kill another; but that he that was taken in battell, should remain bond to his taker for ever, and he to doe with him, and all that should come of him, his will and pleasure, as with his beast, or any other chattell, to give, or to sell, or to kill: and after it was ordained, for the cruelty of some lords, that none should kill them, and that the life and members of them, as well as of freemen, were in the hands and protection of kings, and that he that killed his villeine, should have the same judgment as if he had killed a freeman.

[i] Fortesc. ca. 42.
[k] Brit. ca. 31.
[l] Bract. li. 1. ca. 6. Flet. li. 1. ca. 3. & ca. 5. Mir. cap. 2. sect. 18.

freeman. Thereupon they were called *servi, quia servabantur à dominis et non occidebantur, et non à serviendo.* He is called *nativus, à nascendo, quia plerumque natus est servus;* and he is called *villanus*, for that he doth his villeine service *in villis.*

Est autem libertas naturalis facultas ejus quod cuique facere libet, nisi quod de jure, aut vi prohibetur. Servitus est constitutio de jure gentium, quâ quis domino alieno contra naturam subjicitur. And againe, [*m*] *Et tout soyt que touts creatures duissont este frank solonque le ley de nature, per constitution nequidant, et fait de homes sont outers creatures enservies, sicome est dit beasts en parkes, pissons en servors, et oyseux en cages.*

(F. N. B. 77. f.) Bract. li. 1. ca. 6. Britton, ca. 31. & ubi supr. Fleta, lib. 1. ca. 2 & 3. [*m*] Mirror, cap. 2. sect. 18.

[*n*] This is assured, that bondage or servitude was first inflicted for dishonouring of parents; for *Cham* the father of *Canaan* (of whom issued the *Canaanites*) seeing the nakedness of his father *Noah*, and shewing it in derision to his brethren, was therefore punished in his sonne *Canaan* with bondage. And herewith agreeth the divine: *Ante vini inventionem inconcussa libertas. Non esset hodie servitus, si ebrietas non fuisset.*

[*n*] Mirror, cap. 2, sect. 18. Genesis ix. vers. 10, 11, &c. Ambrose.

[117. a.] *"Out of the city or out of his lord's mannor, &c."* This is false printed, for the ☞ originall is, *hors del scite del mannor*, and so would it be amended in the impressions of the booke hereafter.

"And some free men hold, &c." This is apparent enough, especially upon that which hath beene said. Mirror, cap. 2. sect. 18. acc.

"Where a villeine purchaseth land in fee simple." Yet the villeine may purchase some kinde of inheritances in fee simple, which the lord of the villeine cannot have. As if a villeine purchase a common *sauns nomber*, the lord shall not have it; for the lord may surcharge the same, which should be a prejudice to the terre-tenant: and the same law of a *corodie incertaine* granted to a villeine, and such like inheritances. And therefore *Littleton* materially said, *purchaseth land.* When the villeine hath an estate of any thing certaine, the lord shall have it; as a rent granted to the villeine, commons certaine, estovers certaine, and such like. [*o*] But that which lyeth in action, as a warranty made to the villeine his heires and assignes, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant, or other thing in action made to the villeine; because they lye in privity, and cannot be transferred to others.

Mirror, cap. 2. sect. 18. 22 Ass. p. 37. [*o*] Doct. and Stud. ca. 43. (3 Co. 62, 63. 2 Ro. Abr. 740. Post. 120. a.)

[*p*] If a man be lessee of a villeine for life, for yeares, or at will, and the villeine purchaseth lands in fee; if the lessee entreth into the lands, he shall hold the lands as a perquisite to him and his heires for ever. But if a bishop hath a villeine in the right of his bishopricke, and he purchaseth lands, and the bishop entreth, the bishop shall have this perquisite to him and his successors, and not to him and his heires; for the law respecteth the quality, and not the quantity of his estate. So if executors have a villeine for yeares, and the villeine purchase lands in fee, and the executors enter, they shall have a fee simple, but it shall be assets.

[*p*] L. 5. E. 4. 61. 18 E. 3. 29. 21 H. 6. 37. Bro. tit. Vil. 70. (Plow. 235. a. Ante 90. a.)

"Fee taile." By this it is apparent, that if lands bee given to a villeine, and to the heires of his body, the lord may enter and put out the villeine and the heires of his body; for *quicquid ac-*

15 E. 4. 9. b. Pl. Com. 555. in Walsingham's case.

quiritur servo acquiritur domino (1). And in this case the lord gaines a fee simple determinable upon the dying of the villeine without heire of his body; and the absolute fee simple remaineth still in the donor. And if the lord enter, and after infranchise the donee, and after the donee hath issue, yet that issue shall never have remedy either by *formedon* or entry, to recover this land, by force of the statute of *donis conditionalibus;* for that statute giveth remedy to the issues of the donee, that have capacity

(1) This rule about *slaves* holds in *some degree* in respect to *apprentices* and *servants*, particularly the former; though with a great difference in point of extent and application. All acquisitions of property real and personal made by the villein, in whatever way arising, with no other exception than what is allowed of to prevent prejudice to third persons, belonged to his lord; because an incapacity to acquire any thing for his own benefit was one of the harsh characteristics of the villein's condition. But the relation of the apprentice and servant to his master is more mild and limited; for it only imports, that the master shall be intitled to their personal labour during the term stipulated, either in a particular way, or generally, according to the nature of the service or apprenticeship. Consequently the master cannot claim any other acquisitions, than such as are the result of that labour. What the apprentice or servant earns by his labour, whilst he remains with the master, or is actually working for him, falls so clearly within this principle, that there can be no room for doubt. Nor can there be any, where the apprentice or servant is employed by another person with the knowledge and consent of the master, without any circumstances indicating a waiver of their earnings. The books contain several adjudications founded upon this latter idea. Most of them indeed relate to apprentices in the *seafaring* way; whose wages and prize-money as seamen, though earned whilst in another service, have been recovered by those to whom they were bound. But the principle, which governs them, seems to apply to apprentices and servants in *general*. See 6 Mod. 69. 12 Mod. 415. Comberb. 450. 1 Stra. 582. 1 Barnad. Rep. 312. 1 Ves. 48. 83. Some of the cases go so far, as to give the master a right to the wages or earnings, whether the service is performed by the apprentice *with or without the master's licence;* and even though the earnings accrue in a *trade* or *service different* from that to which the apprentice is bound. 6 Mod. 69. 12 Mod. 83. 1 Ves. 83. But though the rule should be so large in respect to *apprentices*, it may be doubted, whether it is equally so in the case of *other* servants. There is a case of the reign of James the first in which a judgment against the master appears to be principally founded on the want of his consent and privity to the retainer. Cro. Jam. 653. 2 Rol. Rep. 269. Independently too of authority, the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract; such a case rather importing the master's right to damages for injury sustained by the consequences of the second retainer, than a right to the profits accruing from it. We have already mentioned, that most of the cases, which occur in the books, relate to the apprentices of watermen and seafaring persons. It may therefore be proper to add, that in 31 Geo. 2. c. 10, one object of which is to regulate the pay of seamen in the royal navy, there is a provision, that in particular cases the master shall not be intitled to the wages of his apprentice. See Sect. 10. Note also the 17th Section in the 2 and 3 Anne c. 6, from which it seems, as if the framers of that law doubted, whether the master of an apprentice who goes into the royal navy, would be intitled to his wages without an express provision.—[Note 161.]

capacity and power to take and retaine such a gift; and the title of the lord remaines, as it did at the common law, for the statute restraineth acts done only by the tenant in taile. And so it is, if lands be given to an alien, and to the heires of his body, upon office found, the land is seised for the king, afterwards the king makes the alien a denizen, who hath issue and dyeth, the king shall detaine the land against the issue.

Sect. 173.

AND note, if a feoffement be made to a certaine person or persons in fee, to the use of a villeine; or if a villeine, with other persons, be infeoffed to the use of the villein; what estate soever that the villein hath in the use, in fee taile, for terme of life or years, the lord of the villein may enter into all those lands and tenements, as if the villein had been sole seised of the demeane. And this is given by the statute of anno 19 H. 7. ca. 15 (2).

THIS is an addition to *Littleton;* and the statute of 19 *H.* 7. ca. 15, therein mentioned, for the cause that hath beene aforesaid, hath lost his force (3).

[117. b.]

☞ Sect. 174.

BUT if a free man will take any lands or tenements, to hold of his lord by such villeine service, viz. to pay a fine to him (1) *for the marriage of his sonnes or daughters, then he shall pay such fine for the marriage; and notwithstanding though it be the folly of such free man to take in such forme lands or tenements to hold of the lord by such bondage, yet this maketh not the free man a villeine* (2).

"*To pay a fine for the marriage, &c.*" [q] And this villeine and servile tenure is called in old bookes *marchetum* or *merchet. Marchetum verò pro filiâ dare non competit libero homini, inter alia, propter liberi sanguinis privilegium, &c.* And this is true *de communi jure, sed modus et conventio vincunt legem.* And as *Littleton* here saith, it is the folly of such a freeman to take such mannors, lands or tenements, to hold of the lord by such bondage. And yet this doth not make such a freeman a villeine, [r] *Quia hujusmodi præstationes fiunt ratione tenementi, et non ratione personæ, in donatione comprehensæ et reservatæ; non enim*

[q] 15 E. 3. tit. Aid 33. Bracton, lib. 2. fo. 26. Mirror, ca. 2. sect. 18. See more of this after in this Chapter, Sect. 194. (Dr. & Stud. 66. b)

[r] Fleta, lib. 3. cap. 13. Mir. cap. 2. sect. 18.

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(2) This Section was first introduced in Redman's edition.

(3) The cause meant is, that the 27 of H. 8, transfers uses into possession. See lord Coke's note on Sect. 115. fol. 84. b.—[Note 162.]

(1) In Roh. the words *for his marriage or* come in here.

(2) This Section in L. and M. stands the last in the Chapter of Villenage.

enim unum et idem est, sed longè aliud, tenere liberè, et per liberum servitium, &c. For the signification of this word, *vide* Sect. 194. 74. 441.

Sect. 175.

ALSO, every villeine is either a villeine by title of prescription, to wit, that hee and his ancestors have been villeines time out of mind of man; or he is a villeine by his owne confession in a court of record.

(2 Ro. Abr. 732.) Lib. Rub. cap. 76, 77. Bracton, lib. 1. cap. 6. Bract. fol. 77. (Post. 120. a.) [s] Bract. lib. 1, cap. 6. Fleta, lib. 1, ca. 3. 8 Ass. p. 13. 11 Ass. 12. 24 Ass. 1. 73 Ass. 1. 17 E. 3. 78, 79. 27 E. 3. 89. 18 E. 4. 25. 27 H. 8. 7. b. Le statute de 17 E. 3. 17.

"*EVERY villeine is either a villeine by title of prescription, &c.*" Every villeine is, either by prescription, or confession. *Servi aut nascuntur, aut fiunt.* By prescription, either regardant to a mannor, &c. or in grosse. In gross, either by prescription, or by granting away a villeine that is regardant, or by confession. [s] *Fit etiam servus liber homo per confessionem in curiâ regis fact'* (3).

[t] 17 E. 3. 23. 11 H. 4. 26. 37 H. 6. 21. Dier Mich. 7 & 8 Eliz. 242. Pl. Com. 79, &c. [u] Glanvil. lib. 9. cap. 8. Bracton, lib. 3. fo. 156. Brit. fo. 121. [x] 6 Co. 11 & 12, in Jentleman's case. (3 Inst. 71. F. N. B. 138. Post. 128. 260. a. 4 Co. 71. a. 8 Co. 38. 1 Ro. Abr. 527. 573. 576. 1 Sid. 314.) (2 Ro. Abr. 862, 863. Plow. 491. b. 1 Sid. 94. 2 Ro. Abr. (14 H. 8. 15. 1 Rol. Ab. 543.)

"*In a court of record.*" Record is derived of the *Latine* word *recordor*, that is, to keepe in minde, as the poet saith, *Si rité audita recordor.* And therefore a record or inrolment is a memoriall or monument of so high a nature, [t] as it importeth in it selfe such an absolute verity, as if it be pleaded (4) that there is no such record, it shall not receive any triall by witnesse, jury, or otherwise, but only by itselfe. [u] And every court of record is the king's court, albeit another may have the profit, wherein if the judges do erre, a writ of error doth lye. [x] But the county court, the hundred court, the court baron, and such like, are no courts of record; and therefore the proceedings therein may be denyed, and tryed by jury, and upon their judgements a writ of error lyeth not, but a writ of false judgement, for that they are no courts of record, because they cannot hold plea of debt or trespasse, if the debt [118. a.]

or

(3) From our law's thus permitting a person to be a villein by *acknowledgment* in a court of record, some have argued, that it is a legal mode of *creating* personal bondage; with a view to prove, that there is not any thing so repugnant in our law to domestic slavery, as is generally imagined, and thence to lay a foundation for more easily inferring the lawfulness of importing slavery from our colonies. But in another place we have had occasion to object to this way of considering the acknowledgment, and to explain, why it should be deemed merely a confession of that immemorial antiquity in the villein's slavery, which was otherwise necessary to be proved. See the editor's *Argument in the case of Somersett, a Negro*, 60 to 65, and Hob. 99.—[Note 163.]

(4) The words *if it be pleaded* are material; for *in evidence before a jury* the *copy* of a record will be a sufficient proof of its existence and contents. See Law of Nis. Pri. 226. ed. 1775. Com. Dig. tit. *Certiorari*.—[Note 164.]

or damages doe amount to forty shillings, or of any trespasse *vi et armis* (1).

Monumenta, quæ nos recorda vocamus, sunt veritatis et vetustatis vestigia.

Sect. 176.

BUT if a freeman hath divers issues, and afterwards he confesseth himselfe to be a villaine to another in a court of record; yet those issues which he hath before the confession are free, but the issues which he shall have after the confession shall be villaines.

This is so evident as it needeth no explication.

Sect. 177.

ALSO, if a villaine purchase land, and alien the land to another before that the lord enter, then the lord cannot enter; for it shall be adjudged his folly, that he did not enter, when the land was in the hands of the villaine. And so it is of goods. If the villaine buy goods, and sell or give them to another, before the lord seiseth them, then the lord may not seise the same. But if the lord, before any such sale or gift, commeth into the towne, where such goods be, and there, openly amongst the neighbours, claime the goods, and seise part of the goods, in the name of seisin of all the goods which the villaine has or may have (1), &c. this is a good seisin in law, and the occupation which the villaine hath after such clayme in the goods (2) †, shall be taken in the right of the lord.*

IN this case before the lord doth enter, hee hath neither *jus in re nèc jus ad rem*, but onely a possibilitie of an estate, which estate he must gaine by his entry; and therefore if the villaine doth by way of prevention alien before the lord doth enter, the lord is barred of the possibility, which he had to the land, for ever. [a] *Si autem servus vendiderit feodum, quod sibi et hæredibus perquisierit, antequam dominus seisinam inde ceperit, valet donatio, et dominus sibi ipsi imputet, quod tantum expectavit.* But [b] if the villaine of the king purchaseth land, and alieneth before the king (upon an office found for him) doth enter, yet the king after office found shall have the land; *quia nullum tempus occurrit regi*, as *Littleton* himselfe saith in the next Section (2). And yet, after

(Dr. & Stud. 140. 2 Rol. Abr. 735.)

[a] Fleta, lib. 3. ca. 13. Britton, fol. 98. a. 19 E. 2. Dower 17.

[b] 35 E. 3. tit. Villenage 22. 9 H. 6. 21. per Babington. 12 H. 7. 12. (8 Co. 170. 7 Co. 28. 2 Ro. Abr. 734.)

office

* † *These are notes* 1, *and* 2, *to* 118. *b. in the* 13*th and* 14*th editions.*

(1) See post 260. a.
(1) * The words *which the villaine has or may have* not in L. and M. nor Roh.
(2) † Instead of *the goods* it is *law* in L. and M. and R.
(2) See post. 119. a.

office found, the king shall not have the meane profits; because the title is by the seisure.

"*Purchase land.*" The like law is of seigniories, advowsons, reversions, remainders, rents, commons certaine, and such like certaine inheritances, wherein the villaine ☞ hath any estate or interest. If the villaine purchase land either in fee simple, fee taile, or for life, if the villaine doth alien before the lord doth enter, hee doth prevent the lord. But yet the issue of the villaine shall recover the land entailed in a formedon, and then the lord may enter. [118. b.]

"*Alien the land.*" Alien commeth of the verbe *alienare, id est, alienum facere, vel ex nostro dominio in alienum transferre, sive rem aliquam in dominium alterius transferre.* If a freeman hath issue, and afterward by confession becommeth bond, and purchaseth lands in fee, and, before the lord enter, he dieth seised, and the land descends to his issue which is free; in this case the lord shall not enter upon the heire, and yet this is a descent and no alienation. The like law it is, if the land so purchased by the villaine doth escheate to the lord of the fee before any entry made by the lord of the villaine: so as the act of the law, that is, the descent or escheat may as well prevent the lord of his entry, as the act of the party by alienation.

If a villaine be disseised before the lord doth enter, the lord may enter into the land in the name of the villaine, and thereby gaine the inheritance of the land; but if there be a descent cast, so as the entry of the villaine be taken away, then the villaine must recontinue the estate of the land by judgement and execution, before the lord of the villeine can enter. And this word [alien] doth not onely extend to alienations of land in deed, but also to alienations in law; as if the villeine purchase land and dyeth without heire, and the land escheate, or if there be a recovery against the villaine in a *cessavit*, or the like.

(2 Ro. Abr. 732. 6 Co. 109. 2 Ro. Abr. 58. Cro. Eliz. 386.)

"*And so it is of goods, &c.*" *Goods, biens, bona,* includes all chattels, as well reall as personall. *Chattels* is a *French* word, and signifies goods, which by a word of art we call *catalla.* Now goods, or chattels, are either personall or reall. Personall, as horse and other beasts, houshold stuffe, bowes, weapons and such like, called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions. Reall, because they concerne the reality, as tearmes for yeares of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by *elegit,* and such like.

Bona dividuntur in mobilia et immobilia. Mobilia rursum dividuntur in ea, quæ se movent et quæ ab aliis moventur. But, by the common law, no estate of inheritance or freehold is comprehended under these words *bona* or *catalla* (3). And it is to be observed, that as the title of the lord to his villeine's lands beginneth by his entry, so his title to the goods beginneth by the seisure of them. And

(3) See farther as to chattels, Bro. Abr. tit *Chattels,* Com. Dig. tit. *Biens* and *Assets,* and Vin. tit. *Executors,* U—Y—Z.

And here againe it is to be observed, that where our author, in this branch concerning goods, useth these words (sell or give) that the same extendeth as well to gifts in law, as gifts in deed. And therefore if a niefe hath goods, and taketh baron, by this gift in law by force of the marriage, the lord is barred. And so it is if a villaine make his executors and dieth, by this gift in law the lord is barred, as shall be said hereafter.

"*And claime the goods, and seise part of the goods.*" For a claime onely of the goods of the villaine is not sufficient in law, but he must seise some part in the name of all the residue, as here it appeareth; or that the goods be within the view of the lord; for the claime and his view amount to a seisure, as the clayme of a ward being present by word is a sufficient seisure, albeit the gardian layeth no hands on him. See hereafter Sect. 321. And so note a diversity betweene a claime of lands or tenements and goods. [c] In an action of trespasse or detinue brought by the villaine, a release made to the defendant by the lord is a good barre; for that amounts to a seisure and grant. If the villaine doth buy goods and make his executors, and dieth before the lord doth seise them, the executors shall detaine them against the lord of the villaine.

3 H. 4. 15. 46 E. 3. Barre 217. Doct. and Stud. cap. 43. fol. 139. 22 E. 3. 6. Baldwin Freuil's case. (Ante 88. Post. 145. b.) [c] 18 H. 6. 23. b. per Ascough. 3 H. 4. 16. 46 E. 3. Barre 217.

"*Has or may have, &c.*" Here *(&c.)* doth imply an excellent point of learning, for that such a claime doth not only vest the goods, which the villaine then hath, but also which he after that shall acquire and get (4). But otherwise it is of lands of freehold or inheritance; for there such a generall entry or claime extends only to the lands the villaine hath at that time, and not to any other which he shall purchase after, as by our author in this Section may justly be collected.

[119. a.]

Sect. 178.

BUT if the king hath a villeine, who purchases land, and alien it before the king enter; yet the king may enter, into whose hands soever the land shall come. Or if the villeine buyeth goods, and sell them before that the king seiseth them; yet the king may seise these goods, in whose hands soever they be. Because nullum tempus occurrit regi (1).

"*IF*

(4) *Contra*, as to the goods *afterwards* acquired, Dr. and Stud. dial. 2. chap. 4.

(1) See acc. 41. b. 57. b. 90. b. 118. a. 294. b. and for instances, Plowd. 243. —But the rule of *nullum tempus occurrit regi* is subject to various exceptions, both at *common law* and by *statute*.—1. There are many cases in which the subject may make title against the king by *prescription*, as to treasure trove, waifs, estrays, and such other things as may be seised without matter of record. Ante fol. 114. a. and b.—2. In some cases the king's right *necessarily* fails for want of exertion in due time, either because the *subject* of his right *determines* before

Vide Sect. 125. Vide Staunford Prær. f. 32. c.

"*IF the king hath a villeine, &c.*" This is evident upon that which hath beene said before.

35 E. 3. tit. Villenage 22.

[d] Mirror, cap. 3.

[e] Britton, fol. 88.

Bract. lib. 1. quæ res dari possint.

"*Or if the villeine buyeth goods, &c.*" If the king's villeine acquire any goods or chattells, the propertie of them is in the king before any seisure or office; and it is well said of an ancient author, [d] *Al roy, quant al droit de la corone ou a franch estate, ne poet nul temps occurre;* and another [e] speaking in the person of the king saith, *Nul temps n'est limit quant a mes droits.*

Sect.

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before he claims it, or because it is *specially limited in point of time* by its creation. An instance of this is, where the land of tenant for life is found to be forfeited, and he dies before seizure by the king; for it is then too late to seize for the king, who, as Staundford expresses it, hath *surceased his time*, the estate forfeited being determined, and the right of entry being in him in reversion. Staundf. Prærog. 32. b. The law is the same, where the king is intitled to the *next* presentation; in which case, if another presents, and the incumbent dies, the king cannot have the second or any subsequent presentation. This was the opinion of Browne justice against Weston in Willion and Berkely, Plowd. 243. 249, and was so adjudged in Baskerville's case, 7 Co. 28. a. Lord chancellor Egerton finds fault with the doctrine of this last case; but his objections do not appear in the least satisfactory. See his observations on lord Coke's Reports 8.—3. Sometimes lapse of time drives the king *to a suit*. Thus by the statute of the 13th of Rich. the second, and according to lord Coke by the *common law*, if the king presents to a benefice already full with an incumbent, the king's presentee shall not be received by the ordinary, till the king has *recovered* his presentment by due process of law. 13 R. 2. st. 1. c. 1. Staundf. Prærog. 32. b. 2 Inst. 358. Post. 344. b. See also Cro. Jam. 385. 4 H. 4. c. 22. Gibs. Cod. 1st ed. 802.—4. There are several statutes, which wholly extinguish the king's title, if not exerted within a limited number of years. By a statute of the 14th of Edward the third, the king lost his presentment, where he was intitled by having in his hands the temporalties of a bishoprick, or the lands of a person within age, unless he presented within three years after the voidance. But this statute was soon repealed. See 14 E. 3. st. 3. c. 2. 25 E. 3. st. 3. c. 2. 2 Gibs. Cod. 1st ed. 800. The chief statutes, for limiting the king's title to a certain time, now in force, are the 21 of Jam. 1. c. 2, and the 9 of Geo. 3. c. 16. By the *former* the king is disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued 60 years *before the beginning of the then session of parliament*, unless within that time there has been a possession under such title. But the efflux of time rendering this provision continually more ineffectual, the *latter* statute introduced one of a permanent kind, by limiting the king to sixty years *before the commencement of the suit or proceeding for recovery* of the estate claimed. See further a Commentary on the 21 Jam. in 3 Inst. 188. See also something relative to the rule of *nullum tempus occurrit regi*, in Hob. 152. 154. 347.—[Note 165.]

Sect. 179.

ALSO, if a man let certaine land to another for terme of life, saving to himself the reversion, and a villeine purchase of the lessor the reversion; in this case it seemeth, that the lord of the villeine may presently come to the land, and claime the reversion as the lord of the said villeine, and by his claime the reversion is forthwith in him. For in other forme or manner he cannot come to the reversion. For he cannot enter upon the tenant for life. And if he should stay untill after the death of the tenant for life, then perchance he should come too late. For peradventure the villeine will grant or alien the reversion to another in the life of the tenant for life, &c.

"*MAY presently come to the land.*" For he cannot claime the reversion but upon the land, and he by his coming upon the land for that purpose is no trespasser; because the law giveth him power to claim the reversion, lest he should be prevented, and claime he cannot, unless he commeth to the land. So likewise if the villeine purchase a seigniory, rent, common, or any other freehold or inheritance, out of any lands or tenements of another, ☞ the lord may lawfully come to the land to make his claime to the seigniory, rent, or other profit out of the land. But if the villeine purchase a seigniorie, or a rent, common, or other inheritance issuing out of the land of the lord himselfe, it is said, that the seigniorie, rent, common, or such other inheritance, is extinguished in the lord's possession without any claime.

[119. b.]

Vide 41 E. 3. tit. Audita querela 18. 12 H. 4. tit. Execution 28. F. N. B. 104. 1 H. 7. 15. b.

"*Grant.*" Here must be intended an attornement; for after the grant and before attornement the lord may not (1) claime the reversion (2).

"*In the life of the tenant for life, &c.*" Here by *(&c.)* is included tenant in taile, tenant *pur auter vie*, tenant by statute merchant, staple, *elegit*, and for yeares; for during all these estates the lord may claime the reversion, as well as in case of the tenant for life.

Sect. 180.

IN the same manner it is, where a villeine purchases an advowson of a church full of an incumbent, the lord of the villeine may come to the said church, and claime the said advowson, and by this claime the advowson is

(1) This is apparently an error of the press, the sense requiring the omission of *not*. Accordingly the first edition is without it. But the error appears in all the subsequent editions.

(2) But now by the 9 Ann. c. 16. s. 9. the grant of a reversion is perfect without attornment.—[Note 166.]

is in him. For if he will attend till after the death of the incumbent, and then to present his clarke (a presenter son clerke) *to the said church, then, in the mean time, the villein may alien the advowson* (3), *and so oust the lord of his presentment.*

"*ADVOWSON, Advocatio*, so called, because the right of presenting to the church was first gained by such as were
13 H. 14. b. founders, benefactors, or maintainers of the church; viz. *ratione fundationis*, as where the ancestor was founder of the church; or *ratione donationis*, where he endowed the church; or *ratione fundi*, as where he gave the soile, whereupon the church was built. And therefore they were called *advocati*. They were also called *patroni*, and thereupon the advowson is called *jus patronatûs*. And in one word, advowson of a church is the right of presentation or
Fleta, lib. 5. cap. 14. collation to the church. *Advocatus est ad quem pertinet jus advocationis alicujus ecclesiæ, ut ad ecclesiam nomine proprio, non alieno, possit præsentare.* Every church is either presentative, collative, donative, or elective. *Vide* Section 645. 648.

24 E. 3. 30. 25 E. 3. 47. 36 E. 3. 9. 44 E. 3. 3. 9 H. 6. 31. "*Full of an incumbent.*" If the church be presentative, the church is full by admission and institution against any common person; but against the king it is not full untill induction. 22 H. 6. 27. 21 E. 4. 34. b. Vide Sect. 648. (Post. 344. a.)

"*Incumbent*" commeth from the verbe *incumbo*, that is, to be diligently resident, *id est, obnixè operam dare;* and when it is written *encumbent*, it is falsely written, for it ought to be *incum-*
10 H. 6. 7. *bent*, as *Littleton* doth here (4). And therefore the law doth intend him to be resident on his benefice.

"☞ *The lord of the villeine may come to the said church, and claime the said advowson.*" Note, albeit the [120. a.] advowson is a thing incorporeall, and not visible, yet because the principall duty of the presentee of the patron is to be done in the church, the claime of the lord of the villeine must be made there; and by that claime the inheritance of the advowson shall be vested in the lord; for every claime or demand to devest any estate or interest must be made in that place which is most apt for that purpose.

Dect. & Stud. lib. 2. ca. 31. 5 E. 3. 180. 10 E. 3. 42a. 25 E. 3. 49. 9 E. 3. 46a. "*After the death of the incumbent.*" *Nota*, a church presentative may become void five manner of wayes, viz. 1. By death, whereof *Littleton* here speaketh. 2. By creation. 3. By resignation. 4. By deprivation. 5. By cession, as by taking a benefice incompatible.
11 H. 4. 37. 39. & 76. 41 E. 3. 5. F. N. B. 31, 32.

"*And then to present his clarke to the said church, &c.*" A presentation is derived *à præsentando; quia præsentare nihil aliud est quàm præsto dare, seu offerre.* And *Littleton* here briefly expresseth the effect of a presentation; for it is the act of the patron offering his clerke to the bishop of that diocesse, to be instituted to such a church, in these or the like words directed to the bishop, *Præsento vobis* A. B. *clericum meum ad ecclesiam de* Dale, *&c.*

This

(3) &c. L. and M.
(4) However, in L. and M. and Roh. the word is *encumbent*.

This may be done as well by word as by writing; and if it be by writing it is no deed, for the presentation is of the clerke, and the direction to the bishop, so as this writing is in nature of a letter to the bishop: and this is the reason that the king himselfe may present by word, as elsewhere is said. A villein at this day purchaseth an advowson in fee, the church becomes voide, the lord for one hundred pound given by *A. B.* clerke presents him to the church, and his clerke is admitted, instituted, and inducted; yet this gaineth not the advowson to the lord [*d*]. And so it is in that case, if any on the behalfe of *A. B.* had given or contracted with the lord in consideration of any valuable thing to present *A. B.* to the said church, albeit it had beene without the consent or knowledge of *A. B.* yet it should not have vested the advowson in the lord. But this was not law when *Littleton* wrote. [*e*] But now by the statute of 31 *Eliz.* the presentation, admission, institution, and induction in both the said cases, and in the like are made voide (1), where before the said statute they were but voidable by deprivation (2). And if a man present by usurpation to a benefice, by reason of any corrupt contract, agreement, &c. that presentation and the institution and induction thereupon are void; for that act extends to all patrons as well by wrong as by right. But where any presents by usurpation, the rightfull patron, and not the king, shall present; for otherwise every rightfull patron may lose his presentation. And such an incumbent, that commeth in by reason of any such corrupt agreement, is so absolutely disabled for ever after to be presented to that church, as the king himselfe, to whom the law giveth the title of presentation in that case, cannot present him againe to that church; for the act, being made for suppression of symony and such corrupt agreements, so bindes the king in that case, as he cannot present him that the law hath disabled (3); for the words of the act be, shall there-

(2 Ro. Abr. 353.)

[*d*] Adjudg. in communi banco Mich. 41 & 42 Eliz. inter Baker & Rogers.

[*e*] Adjudged in the King's Bench, Mich. 13 Ja. in a quar. imp. brought by the king against the bishop of Norwich, Thomas Cole, and Robert Secker clerke, for the vicarage of Haverell in Suffolk. (Cro. Jam. 385. Hob. 75. Hob. 165. 12 Co. 100. 73. 3 Inst. 153. 1 Ro. Abr. 370. Cro. Jam. 385. 533. Cro. Cha. 331.)

Cro. Cha. 477. 7 Co. 32. Post. 234. 11 Co. 68.

upon

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(1) Though the person presented is not privy to the simony, yet the presentation is void, the statute making no distinction in this respect, but giving the turn to the king as a punishment of the patron. Adjudged 12 Co. 100. Agreed 12 Co. 73.—[Note 167.]

(2) The effect of the difference between *void* and *voidable*, in the instance of a simoniacal presentation, may be seen in Windsor's case, 5 Co. 102, and Winchcomb's case, Hob. 165, the judgment in both turning upon it,—[Note 168.]

(3) Adjudged accordingly in the king against the bishop of Norwich, Hob. 75. Cro. Jam. 385. In sir Arthur Ingram's case on the 5 E. 6. against the sale of offices, there was a like decision, that the king could not dispense with the disability created by statute. Post. 234. a. Hob. 75. Cro. Jam. 385. 3 Inst. 154. When the famous case of sir Edward Hales, in the reign of James the second, was argued, these two cases were urged to prove, that the king could not dispense with the disability for not taking the oaths and sacrament according to the 25 Cha. 2. usually called the test act; and lord Coke himself in his Third Institute applies them to a like case on the 5 Eliz. in respect to the oath of supremacy, 3 Inst. 154. The principal judicial authority relied on for the dispensation was the case in the year-book of 2 H. 7. 6. b. in which, notwithstanding the statutes making void a grant of the office of sheriff for more than a year, the judges are represented to have held a grant for life with a *non obstante* to be good. But trusting to such an authority only exposed the weakness

upon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice. [f] And the party being disabled by the act of parliament (which being an absolute and direct law) cannot be dispensed withall by any grant, &c. with a *non obstante*; as it may be, when any thing is prohibited *sub modo*, as upon a penalty given to the king (4). And the said act doth

[f] Pl. Com. 502. 27 H. 8. 2 H. 7. 6. 11 H. 7. 11. 13 H. 7. 8. b. 11 H. 4. 76. 5 E. 3. 29. F. N. B. 211. E.

not

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ness of the cause it was intended to sustain. The book cited, so far from containing any judgment of the point, ends with an adjournment of the case, accompanied with this remarkable declaration, that both judges and counsel agreed, what they had then said *should be taken for nothing*. As far too as appears, the grant in question might have been adjudged good on the ground of being within an exception of the statutes. The king also had been specially enabled by the 9 H. 5. cap. 5, to dispense with the statutes for four years on account of the wars and a pestilence. But, lastly and principally, it was an insuperable objection to the authority of this case, that the 23 H. 6. to remove all doubts, provides, that the king's grant for more than a year should be *void*, notwithstanding any *non obstante*. What respect could be due to a *judicial* opinion, declaring a dispensation *good*, which the *legislature* itself had positively enacted should be *void*? Yet it is not to be concealed, that in the report of Calvin's case, lord Coke justifies the king's dispensation in this instance on the principle of its being beyond the power of parliament to take away his right to the service of his subjects. Calvin's case, 7 Co. 15. This strange language is the more unaccountable, as it is inconsistent with his own doctrine here, and in the case on the statute against the sale of offices.—[Note 169.]

(4) But by the bill of rights, 1 W. & M. it was declared, that *from the then session* of parliament, no dispensation with any statute should be valid, unless such statute allows it, and except in such cases as should be specially provided for the then session. 1 W. & M. sess. 2. c. 2. s. 12. The occasion of this excellent provision was the equally extravagant and unwarrantable exercise of the dispensing power by James the second, who, having procured the sanction of a judicial opinion to a dispensation with the test act in favour of sir Edward Hales, madly proceeded to a suspension of the principal laws for the support of the established religion; an excess, in which, monstrous as it was, several of the judges, to the great scandal of Westminster-hall, gave him countenance, the priests of the temple of justice treacherously aiding to pollute it, instead of manfully opposing the sacrilege. Till the time of this prince the doctrine of dispensation was received with very important qualifications, of which the principal were these.—1. It was said, that the king could not dispense with the common law; though lord chief justice Vaughan seems to deny this position. Dav. 75. 3 Inst. 154. Vaugh. 334.—2. It appears to have been generally agreed, that the king could not dispense with a statute, which prohibited what was *malum in se*.—3. *Malum prohibitum* was not deemed universally dispensable with; for some held, the king could not dispense with a statute, if the prohibition was *absolute*, and not *sub modo*, as under a penalty to the king, or, as others express it, where the statute was made for the *general* good, and not with a view merely to the king's profit or interest.—4. None contended, that the royal dispensation could diminish or prejudice the property, or private right of the subject.—5. It was understood, that the king could dispense, *not generally*, but only in favour of *particular persons*, and, according to some, for these only in *particular instances*.—But some of these distinctions had great uncertainty and subtlety in them, and were so open to controversy, that they only tended to create embarrassment: and though the others greatly restricted the largeness of the claimed prerogative, yet they were far from obviating

not only extend to benefices with cure, but to dignities, prebends, and all other ecclesiastical livings.

"*Clarke* (clerke)." *Clericus*, is twofold: *ecclesiasticus* (which *Littleton* here intendeth), and he is either secular or regular, so called 4 H. 4. cap. 12.

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obviating the chief objection to so formidable a pretension. Had the boundary of the dispensing power been ever so clearly marked, still it was wise and prudent to annihilate it. So far as it resembled the power of repealing laws, it was an intolerable corruption, wholly irreconcileable with the first principle of our constitution, by which the power of legislation cannot be exercised by the king, without the two houses of parliament. So far as it did not fall within this idea, it was unnecessary: for those acts, which were the fruits of it, might have derived their force from other acknowledged powers of the crown, such as the right of waiving penalties and forfeitures belonging to itself, and the prerogative of pardoning.—It is worthy notice, that the *declaration of rights*, which the lords and commons made on tendering the crown to William and Mary, distinguishes between *suspending* laws by regal authority, and *dispensing* with them. The former, being a *general* and *absolute* abrogation for a time, is condemned without any exception; but the latter, being only a *special exemption* of certain individuals, is merely declared illegal, *as it had been exercised of late*. Also the *bill of rights*, though it declares against the *future* exercise of a dispensing power in any case, except where the king is specially authorized by act of parliament, yet contains a proviso saving from prejudice all prior charters, grants, and pardons. 1 W. & M. sess. 2. ch. 2. sect. 12 & 13. If the condemnation of the dispensing power for the *time past* had been unqualified, it might have destroyed the titles under numberless subsisting grants from the crown, the validity of which it was deemed most equitable to leave to the decision of the courts of justice in the ordinary way.—Such as wish to go more deeply into the controversy about the dispensing power, may find the following references useful.—For the history of dispensations, see Dav. 69. b. Pryn. on 4 Inst. 128 to 133. Atkyns on power of dispens. with pen. stat.—For the cases on the subject, see the case of the merchants of Waterford in 2 R. 3. 11. 1 H. 7. 2. the sheriff's case in 2 H. 7. 6. b. the doctrine in 11 H. 7. 11. b. 12. a. Grendon and the bishop of Lincoln, Plowd. 502. case of the aulnager, Dy. 303. Calvin's case, 7 Co. 15. the prince's case, 8 Co. 29. b. case of the taylors of Ipswich, 11 Co. 53. case of monopolies, ibid 84. Irish case of commendam, Dav. 68. case of Customs, 12 Co. 18. the cases cited ante note 3. Colt and Glover v. the bishop of Litchfield, or English case of commendam, Mo. 898. 1 Rol. Rep. 151. Hob. 246. Evans and Kiffins v. Askwith, W. Jo. 158. Palm. 457. Latch. 31. 233. Noy 93. 2 Rol. Rep. 450, case of clerk of the court of wards, Hob. 214. Needler and the bishop of Winchester, Hob. 230. Lord Wentworth's case, Mo. 713. case of dispensation with 3 Jam. 1. c. 5, against a recusant's holding an office, Hardr. 110. cases of dispensation with statutes against retailing wine without licence, namely Young and Wright, 1 Sid. 6. Thomas and Waters, Hardr. 443. 2 Keb. 425. Thomas and Boys, Hardr. 464. Thomas and Sorrell, Vaugh. 330. 1 Lev. 217. 1 Freem. 85. 115. 128. 137. 2 Keb. 245. 280. 322. 372. 416. 790. 3 Keb. 76. 119. 143. 155. 184. 223. 233. 264. sir Edward Hale's case on the test act of 25 Cha. 2, in 2 Show. 475. Comberb. 21. State Tri. v. 7, p. 612. 4 Bac. Abr. 179, and case of the seven bishops in the reign of Jam. 2. State Tri. 4th ed. v. 5, p. 393. Of these cases, Thomas and Sorrell and sir Edward Hale's are the principal. The former was argued with the greatest solemnity in the exchequer chamber, the delivery of the opinion of the judges, of whom the majority was for the dispensation, taking up a day in four several terms. The latter was treated with less form; but gave occasion to some considerable publications on the subject; particularly lord

called because he is *servus et hæreditas domini:* and *laicus*, and in this sense is signified a pen-man, who getteth his living in some court or otherwise by the use of his pen.

Note, if the church becommeth void, albeit the present avoidance be not by law grantable over, yet may the lord of the villeine present in his owne name, and thereby gaine the inheritance of the advowson to him and his heires; for albeit it be not grantable over, yet it is not meerly a chose in action; [g] for if a feme covert be seised of an advowson, and the church becommeth void, and the wife dyeth, the husband shall present to the advowson; [h] but otherwise it is of a bond made to the wife; because that is meerly in action.

(Ante 117. a.)

[g] 14 H. 4. 12. 38 E. 3. 35. 13 E. 3. quare imp. 57.

[h] 43 E. 3. 10. 39 E. 3. 5. 4 H. 6. 5.

(Post. 351. a. 1 Ro. Abr. 345.)

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ALSO, there is a villeine regardant, and a villeine in grosse. A villein regardant is, as if a man be seised of a mannor to which a villein is regardant, and he which is seised of the said mannor, or they whose estate he hath in the same mannor, have beene seised of the villein and of his ancestors as villeins and neifs (1) *regardant to the same mannor time out of memory of man. And villein in grosse is, where a man is seised of a mannor whereunto a villein is regardant, and granteth the same villein by his deed to another, then he is villein in grosse, and not regardant.*

"*VILLEINE regardant.*" He is called regardant to the mannour, because he hath the ☞ charge to do all base or villenous services within the same, and to gard and keep the same from all filthie or loathsome things that might annoy it: and his service is not certaine, but he must have regard to that which is commanded unto him. And thereupon he is called regardant, *a quo præstandum servitium incertum et indeterminatum, ubi scire non poterit vespere quale servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit*, as before hath beene observed. And *Littleton* sayth, hereafter, that no other thing is said to be regardant, but onely a villeine: [i] yet in old bookes it was sometimes applyed to services.

[120. b.]

H. 7. 5.

Bract. li. 2, fo. 26, Mir. ca. 2, sect. 18.

Vide Sect. 84.

[i] 20 E. 3, tit. Issue 30.

"*In grosse*," is that which belongs to the person of the lord, and belongeth not to any mannor, lands, &c.

Sect.

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lord chief justice Herbert's account of the authorities on which the judgment was given in sir Edward Hale's case, mr. Atwood's answer to it, and a tract by lord chief baron Atkyns against the king's power of dispensing with penal statutes. In a manuscript report of sir Edward Hale's case, sir Bartholomew Shower is mentioned to have replied to lord chief baron Atkyns. But we have not yet met with any such piece. Mr. Hume's state of the arguments for and against the dispensing power, though written with an evident bias in favour of the crown's prerogative, is worth consulting. Hume's Hist. 8vo. ed. v. 8, p. 242. 254. See also Tyrr. Bibliothec. Politic. 589 to 597.—For the proceedings in parliament after the Revolution, in respect to sir Edward Hale's case and the dispensing power, see Gray's Deb. v. 9, p. 297 to 307, 314 to 332, 336 to 344. 396. Chandl. Deb. of the Lords, v. 1, p. 394.—[Note 170.]

(1) *and niefs* not in L. and M.

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ALSO, if a man and his ancestors, whose heire he is, have beene seised of a villeine and of his ancestors as of villeines in grosse time out of memorie of man, these are villeines in grosse.

THIS needeth no explanation, but to add the saying of an ancient author. *Servage de home est subjection, issuant de cy grand antiquitie, que nul franke cep poet estre trove per humane remembrance.* Mir. ca. 2, sect. 18.

Sect. 183.

AND here note, that such things, which cannot be granted, nor alienedwithout deed or fine, a man which will have such things by prescription, cannot otherwise prescribe but in him and in his ancestors, whose heire he is, and not by these words, In him and them whose estate he hath; for that he cannot have their estate without deed or other writing, the which ought to be shewed to the court, if he will take any advantage of it. And because the grant and alienation of a villeine in grosse (3)* *lyeth not without deed, or other writing, a man cannot prescribe in a villein in grosse, without shewing forth a writing, but in himselfe which claims the villeine, and in his auncestors whose heire he is. But of such things, which are regardant or appending to a mannor, or to other lands and tenements, a man may prescribe, that he and they whose estate he hath* (que il et ceux que estate il ad), *who were seised of the mannor, or of such lands and tenements, &c. have been seised of those things, as regardant or appendant to the manor, or to such lands and tenements* (4)* *time out of mind of man* [de temps dont memorie, &c. (5)*]. *And the reason is, for that such manor or lands and* (1)† *tenements may passe by alienation without deed, &c.*

"*OR fine,*" in *Latine, finis.* [*l*] *Ideo dicitur finalis concordia; quia imponit finem litibus, et est exceptio peremptoria.* [*m*] *Finis est amicabilis compositio et finalis concordia, ex consensu et licentiâ &c. domini regis, vel ejus justiciariorum* (1). [*n*] *Talis concordia finalis dicitur, eò quòd* Vide. Sect. 441. 194. 174. 74. [*l*] Bract. li. 5. tract. 5. c. 28. (Post. 262. a.) [*m*] Glanv. li. 8. ca. 1.

[121. a.]

[*n*] 9 Co. cap. 3. Statut. de modo levandi fines. Pl. Com. 357. (3 Co. 84. 8 Co. 51.) 5 Co. fol. 38. Teye's case.

finem

* *These are notes* 3, 4, *and* 5, *of* 121. *a. in the* 13*th and* 14*th editions.*
† *This is note* 1 *of* 121. *b. in the* 13*th and* 14*th editions.*

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(3) * *in grosse* not in L. and M. nor Roh.
(4) * *&c.* in L. and M. and Roh.
(5) * court *instead of* &c. *in L. and M. and Roh.*
(1) † *or* instead of *and* in L. and M.
(1) This, though a just description of fines, considered according to their original and still apparent import, yet gives a very inadequate idea of them in their modern application. In Glanville's time they were really amicable compositions of *actual* suits. But for several centuries past, fines have been only

finem imponit negotio, adeo ut neutra pars litigantium ab eo de cætero

only so in *name*, being in *fact fictitious* proceedings, in order to transfer or secure real property, by a mode more efficacious than ordinary conveyances. What the superiority of a fine in this respect consists of will best appear, by stating the chief uses to which it is applied.—One use of a fine is *extinguishing dormant titles*, by shortening the usual time of limitation. Fines, being agreements concerning lands or tenements solemnly made in the king's courts, were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all, who should not claim within a year and a day. See Plowd. 357. Hence we may probably date the origin and frequent use of fines as feigned proceedings. But this puissance of a fine was taken away by the 34 E. 3, and this statute continued in force till the 1 R. 3, and 4 H. 7, which revived the ancient law, though with some change, proclamations being required to make fines more notorious, and the time for claiming being enlarged from *a year and a day* to *five years*. See 34 E. 3. c. 16. 1 R. 3. c. 7. 4 H. 7. c. 24. The force of fines on the rights of strangers being thus regulated, it has been ever since a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might subsist, with a right of *entry* for twenty years, and with a right of *action* for a much longer time.—Another use or effect of fines is barring estates tail, where the more extensively operative mode by common recovery is either unnecessary or impracticable. The former may be the case when one is tenant in tail with an immediate reversion or remainder in fee; for then none can derive a title to the estate except as his *privies* or *heirs*, in which character his fine is an immediate bar to them*, the latter occurs when one has only a remainder in tail, and the person, having the freehold in possession, refuses to make a tenant to the præcipe for a common recovery, which would bar all remainders and reversions; for, under such circumstances, all which the party can do is to bar those *claiming under himself* by a fine. How this power of a fine over estates tail commenced, has been *vexata questio*. The statute *de donis*, after converting fees conditional into estates tail, concludes with protecting them from fines, there being express words for that purpose. But the doubt is, when this protection was withdrawn, whether by the 4 H. 7. or the 32 H. 8: It is a common notion, into which some of our most respectable historians have fallen, that the 4 H. 7, was the statute which first loosened entails; and thus opening the door for a free alienation of landed property has been attributed to the deep policy of the prince then on the throne. See Hume's History 8vo. ed. v. 3. p. 400. But this is an error proceeding from a strange inattention to the real history of the subject. Common recoveries had been sanctified by a judicial opinion in Taltarum's case, as early as the twelfth of Edward the fourth: and from them it was that intails received their death wound; for, by this fiction of common recoveries, into the origin of which we mean to scrutinize in some other place, every tenant in tail in possession was enabled to bar intails in the most perfect and absolute manner; whereas fines, even now, being only a *partial* bar of the issue of the persons who levy them, must in general be an inefficacious mode. In respect to the 4 H. 7, it was scarce more than a repetition of the 1 R. 3, the only object of which indisputably was to repeal the statute made the 34 E. 3, in favour of non claims, and against them to revive the ancient force of fines, but with some abatement of the rigour in point of time and other improvements, as we have already hinted; a provision of the utmost consequence to the security of titles. Accordingly lord Bacon, whose discernment none will question, in his life of Henry the seventh, commends

* *But, where the tenant in tail has the reversion or remainder in fee by descent, a recovery is preferable to a fine, for the reasons stated by Mr. Preston in his Treat. on Convey. vol. 1. 2d ed. p. 9—12.*

commends the statute of the 4th of his reign, merely as if aimed at non claims. Bac. Hen. 7, in Ken. Comp. Hist. 2d ed. v. 1. p. 596. Nor indeed could there have been the least pretence to extend the meaning of the law further, if it had not been for some ambiguous expressions in the latter end of it. Like the 1 R. 3, after declaring a fine with proclamation to be an universal bar, it saves to all, except *parties*, five years to claim after the proclamation of it. But this saving did not suit the case of the issue in tail, or of those in remainder or reversion; because during the life of the immediate tenant in tail, these could have no right to the possession, and it was possible, that he might live more than five years from the proclamation of the fine. The framers of the 4 H. 7, foresaw this; and therefore like the 1 R. 3, it contains an additional saving of five years for all persons, to whom any title should come *after* the proclamation of the fine by force of any intail subsisting *before*; words, which as strongly apply to the issue of the tenant in tail levying a fine, as to those in remainder or reversion. Had therefore the 4 H. 7, stopped here, what the learned and instructive observer on our ancient statutes writes would be strictly just, that, instead of destroying estates tail, the statute expressly saves them. Barringt. on Ant. Stat. 2d ed. p. 337. But a subsequent part of the statute, in declaring how a fine shall operate on such as have five years allowed, if they do not claim within that time, expresses, that they shall be concluded *in like form as parties and privies*; and another clause, in regulating who should be at liberty to aver against a fine *quod partes nihil habuerunt*, saves this plea for all persons, with an exception of *privies* as well as *parties*. From these two clauses, though the former of them was copied from the 1 R. 3, grew a doubt, whether the statute did not enable tenant in tail to bar his issue by a fine. The arguments for it were, that the issue were *privies* both in blood and estate; and that if the statute meant to bind them, when the tenant in tail had *not any* estate in the land at the time of the fine, it was highly improbable, there should be a different intention, when he really had one. 2 Show. 114. On the other hand it might be said, that, as the word *privies* in the statute *de modo levandi fines* and in the 1 R. 3, was not deemed sufficient to reach heirs in tail, and to control the statute *de donis*, why then should the same word in the 4 H. 7, include them; more especially when it was considered, that it was as much the professed scope of the 4 H. 7, as it was of the 1 R. 3, to revive the operation of fines against non claims, and that both contained the same express saving for persons claiming under intails? 2 Inst. 517. Pollexf. 502. By such contrariety of reasoning, the judges in the 19 H. 8, became divided in opinion; three holding, that the 4 H. 7, was not a bar to the issue, and four that it was. See 19 H. 8. 6. b. Dy. 2. b. pl. 1. Br. Abr. Fines, 1. 121. 123. Bro. N. C. 144. Pollexf. 502. To remove the doubt the legislature passed the 32 H. 8, by which the heirs in tail are expressly bound. 32 H. 8. c. 26. But the last named statute, though intitled an exposition of the 4 H. 7, and though made to operate *retrospectively*, contained several exceptions, particularly one of fines of lands, of which the reversion is in the crown. Consequently room was still left for contesting the effect of the 4 H. 7, independently of the 32 H. 8, and in the reign of Charles the second a case arose, which made a discussion of the point almost unavoidable. It was the case of the earl of Derby against one claiming under a fine by the earl's father, who was tenant in tail with reversion in the crown, and so within an exception in the 32 H. 8. Two points were made, of which the first was, whether this fine, thus depending wholly on the 4 H. 7, was a bar to the issue in tail; and on adjournment of the case into the exchequer chamber, eight judges against three held, that the fine of tenant in tail was a bar to the issue before the 32 H. 8, great stress however being laid by those of this opinion on the exposition of the former by the latter. See Murrey on the demise of the earl of Derby against Eyton and Price, Pasch. 31. Cha. 2, in Scacc. T. Raym. 260. 286. 319. 338. Pollexf. 491. Skinn. 95. 2 Show. 104. T. Jo. 237. It is observable, that both lord-keeper North and lord chief-justice Saunders, the lateness of whose promotions prevented their publicly giving

their opinions, concurred with the majority of the judges in the construction of the 4 H. 7, and further, that Pollexfen, who as counsel argued most ably for the earl of Derby the issue in tail, afterwards declared his private sentiments to be against the earl on that statute. But it should be adverted to, that, though the majority of the judges were against lord Derby on this point, they gave judgment for him on a secondary one, which was, that the intail, being of the gift of the crown, fell within the protection of the 34 H. 8. Therefore their opinion on the 4 H. 7, finally proved to be wholly extra judicial. But we do not know of any case, in which the controversy has been again agitated.—A third effect of fines is passing the estates and interests of married women in the inheritance or freehold of lands and tenements. Our common law bountifully invests the husband with a right over the whole of the wife's personalty, and entitles him to the rents and profits of her real estate during the coverture. It further gives him an estate for his own life in her inheritance, if the husband is actually in possession, and there is born any issue of the marriage capable of inheriting. But the same law, which confers so much on the husband, will not allow her, whilst a feme-covert, to enlarge the provision for him out of her property, or to strip herself of any claims which the law gives her on his. On the contrary, jealous of his great authority over her, and fearful of his using compulsion, it creates a disability in her to give her consent to any thing, which may affect her right or claims after the coverture, and makes all acts of such a tendency absolute nullities. By the rigour of the ancient law, we take this rule to have been so universally applicable, that a married woman could in *no* case bind herself or her heirs by any *direct* mode of alienation. But accident gave birth to two *indirect* modes, namely, by fines and common recoveries. Though it might be proper to incapacitate the wife from being influenced by the husband to prejudice herself by any conveyances or agreements during the coverture, yet justice to others required, that such as might have any claim on the wife's freehold or inheritance, should not be forced to postpone their suits till the marriage was determined; for if they should, then, to use the words of Bracton, in explaining why the husband's infancy would not warrant the parol to demur in a suit for the wife's land, *mulier implacitata de jure suo si propter minorem ætatem viri posset differre judicium, ita posset quælibet mulier in fraudem nubere.* Bract. lib. 5. tract. 5. c. 21. fo. 423. a. Probably it was on this principle, the common law allowed a judgment against husband and wife in a suit for her land to be as conclusive, as if given against a feme-sole; which was carried so far, that, till the statute of Westminster the second, even judgment against them, on default in a *possessory* action for the wife's freehold, drove the wife after the husband's death to a writ of right to recover her land. 2 Inst. 342. From enabling the husband and wife to defend her title, and making the judgment on such defence to be conclusive, permitting them to compound the suit by a final agreement of record, in the same manner as other suitors, was no great or difficult transition; more especially when it is considered, that in the case of femes-covert fines are never allowed to pass, without the court's secret examination of them apart from their husbands, to know, whether their consent is the result of a free choice, or of the husband's compulsive influence. Such, we conceive, is the true source, whence may be derived the present force of fines and common recoveries as against the wife, who joins in them; for, whatever in point of bar and conclusion was their effect, when in suits really *adverse*, of course attended them, when they were *feigned*, and in that form gradually rose into modes of alienation, or as the more usual phrase is, *common assurances*. The conjecture we have thus hazarded to illustrate, how it happens, that a married woman may alienate her real rights by fine, though not by any instrument or act strictly and nominally a conveyance, leads to proving, that the common notion of a fine's binding femes-covert merely by reason of the *secret examination* of them by the judges is incorrect. If the secret examination of *itself* was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to femes-

cætero poterit recedere (2). Of the severall parts of a fine, and many incidents to the same, you shall reade in my Reports.

" *Whose estate* (que estate), &c." *quorum statum*, as much as to say, whose estate he hath. Here *Littleton* declareth one excellent rule, [*o*] that a man cannot prescribe in any thing by a *que estate*, that lyeth in grant, and cannot passe without deed or fine; but in him and his ancestors he may, because he comes in by descent without any conveyance. Neither can a man plead a *que estate* in himselfe of any thing that cannot passe without deed; [*p*] but in another he may, as in barre of an avowry, the plaintife may plead a *que estate* in the seigniory in the avowant. But *Littleton's* words are to be observed, *(a man which will have such things by prescription)*. Therefore [*q*] when a thing that lyeth in grant, is but a conveyance to the thing claimed by prescription,

[*o*] 22 Ass. 53. 23 Ass. 6. 12 H. 7. 16. 16. (Doct. Pla. 302, 303, 304.)

[*p*] 39 H. 6. 8. 18 E. 4. 23.

[*q*] 11 H. 4. 89. 19 R. 2. Action sur le case 51. 13 E. 3. Br. 674. (Cro. Jam. 673. 10 Co. 59. b.)

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covert equally with a fine. But it is clearly otherwise; and, except in the case of conveyances by *custom*, there must be a *suit* depending for the freehold or inheritance, or the examination being *extra-judicial* is ineffectual. In the Second Institute lord Coke represents this to be the *general* law, and, amongst many other authorities cited to prove it, refers to a case of Hen. 7, reported by Kielwey, in which, whether the examination of a feme-covert, on the inrolment of a bargain and sale to the *king*, sufficed to bind her, was largely debated. 2 Inst. 673. Kielw. 4. a. to 20. a. The just explanation therefore of the subject is, that the *pendency of a real action* for the *freehold* of the land, in consequence of previously taking out an original writ, without which preliminary even at this day a fine is a nullity, should be deemed the *primary* cause of the fine's binding a feme-covert; and that the *secret examination* of her, on taking the acknowledgment of the fine, is only a *secondary* cause of this operation. Such are the *three* chief effects, by reason of which, fines, no longer used, according to their original, as recorded agreements for conclusion of *actual suits*, have been changed into, and are still retained, as *feigned* proceedings; and being thus accommodated to answer purposes, to which ordinary conveyances cannot be applied, it is no wonder, that they should not only be considered as a species of conveyance, but also be deemed a principal guard to the titles to real property, and as such be ranked amongst the most valuable of the common assurances of the realm. In this digression on the properties of a fine, we have purposely omitted to consider its operation, either as an *estoppel*, except so far as it may be said to be one to the issue in tail by force of the 4 H. 7, and 32 H. 8, or as a *discontinuance*, or lastly in respect of the conusor's *warranty*, which is always inserted in it. The virtues of a fine, in the three points of view we have examined it, namely, to extinguish dormant titles, to bar the issue in tail, and to pass the interests of femes-covert; these constitute the more *peculiar* qualities, on account of which it is most usually, if not always, resorted to. As to the three other effects, it may be enough to observe here, that they are equally incident to feoffments, or any other deeds having warranties annexed. The distinct consideration of them is reserved for another occasion.—[Note 171.]

(2) If binding the *parties*, or even *privies*, exclusive of heirs in tail, was the only effect of a fine, it would scarce be preferable to less solemn agreements; for, without doubt, they are so far binding. The most distinguishable properties of a fine are barring *strangers* unless they claim within five years, barring the *issue in tail immediately*, and binding *femes covert*, as we have explained in the foregoing note.—[Note 172.]

scription, there a *que estate* may be alledged of a thing that lyeth in grant; as a man may prescribe, that he and his ancestors, and all those whose estate he hath in an hundred, have time out of minde, &c. had a leet, &c. this is good, &c.

[r] 9 E. 4. 3. b. 29 Ass. 19. 2 H. 6. 10. 48 E. 3. tit. 33. 3 H. 6. 28. (Bro. Que estate 3.)

[r] Regularly the plaintife shall not intitle him by a *que estate*, but he must shew how he came by it; but after avowry made, the plaintife shall plead a *que estate*, because he is now become as a defendant.

[s] 41 Ass. 2. 40 Ass. 28.

[s] A man may plead a *que estate* of a tenancy in taile, or of an estate for life, so as he averreth the life of them; but he cannot plead a *que estate* of a lease for years (6), or at will.

2 H. 4. 20. 15 E. 4. 1. 5 H. 7. 39. 18 E. 4. 10. 7 E. 6. tit. Que estate Br. 31. 27 H. 6. 3. 7 El. Dyer 238. (1 Co. 46. 1 Sid. 298. Doc. Plac. 304.)

[t] 22 H. 6. 34. 6 E. 4. 12. 31 H. 8. Que estate Br. 48. 29 H. 6. 14.

[t] A disseisor, abator, intruder, recoveror or any other that cometh in the *post* ☞ shall plead a *que estate*. [121. b.]

9 H. 6. Estop. 25.

[u] 11 H. 4. 81. 27 H. 6. 32. 9 E. 4. 3. 2 E. 6. tit. Que estate 8.

[u] A *que estate* must be alledged in the tenant or defendant himselfe, and not in one in the meane conveyance, from whom he claimeth; and yet some bookes be to the contrary.

1 E. 6. Que estate Br. 49. (Cro. Cha. 54. 1 Lev. 190.)

"*The which ought to be shewed to the court.*" The reason wherefore a deed, that is pleaded, ought to be shewed to the court is, because every deed must prove itselfe to have sufficient words in law, whereof the court must adjudge: and also to be proved by others, as by witnesses or other proofe, if the deed be denyed, which is matter of fact.

"*By alienation without deed, &c.*" Here by *(&c.)* is implyed, that whatsoever passeth by livery of seisin, either in deed or in law, may passe without deed; and not only the rents and services parcell of the mannor shall with the demeanes, as the more principall and worthy, passe by livery without deed, but all things regardant, appendant, and appurtenant to the mannor, as incidents or adjuncts to the same, shall, together with the mannor, passe without deed; all which, as here it appeareth, and elsewhere is said, shall passe, without saying *cum pertinentiis* (2).

Sect.

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(6) But see 1 Lev. 100. and 1 Sid. 298.

(2) But by the 17 E. 2, *de prærogativa regis*, the king's grant of a manor will not pass an advowson appendant without express mention of it. Yet there are some cases, which have been deemed not within the reason of the statute; such as the crown's *restitution* of lands to wards at their full age and to the heirs of ideots, or of temporalties to new bishops. Staundf. Prærog. 43. a. Doder. Advows. 36. Even words of *reference* have been held sufficient; as where the king granted a manor with all its appurtenances, as fully as the same came to and were possessed by the crown, and an advowson was appendant to the manor. Adjudged in Whistler's case, 10 Co. 63. a.—It is agreed in our old books, that before the statute *de prærogativa regis*, the king's grant of a manor would pass an advowson appendant, without naming it, or so much as

Sect. 184.

AND it is to be understood, that nothing is named regardant to a manor, &c. but a villeine. But certaine other things, as an advowson and common of pasture, &c. are named appendant to the manor, or to the lands and (3) *tenements, &c.*

"*REGARDANT:*" *Vide* Sect. 181.

"*Appendant.*" Appendant is any inheritance belonging to another, that is superior or more worthy. In law it is called *pertinens, quasi invicem tenens*, holding one another; a word indifferent both to things appendant, and things appurtenant. The quality and nature of the things do make the difference. But regardant (as our author saith) is only applyed to a villeine. (*) Appendants are ever by prescription (4); but appurtenants may be created in some cases at this day (5). As if a man at this day grant to a man and his heires common in such a moore for his beasts levant or couchant upon his mannor; or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent within his mannor; by these grants these commons are appurtenant to the mannor, and shall passe by the grant thereof. In the civill law it is called *adjunctum* (6).

Vide Sect. 1. (*) 5 Ass. 9. 8 H. 7. 4, 5. 28 H. 8. Dier 30. b. Pl. Com. 381. F. N. B. fol. 181. (2 Ro. Abr. 60. 5 Co. 17. b.)

[x] If *A.* be seised of a mannor, whereunto the franchise of waife and stray and such like are appendant, and the king purchaseth the mannor with the appurtenances, now are the royal franchises re-united to the crowne, and not appendant to the mannor. But if he grant the mannor in as large and ample manner as *A.* had, &c. it is said, that the franchises shall be appendant (or rather appurtenant) to the mannor.

[x] 43 Ass. p. 10. 43 E. 3. 22. (10 Co. 64, 65. 2 Ro. Ab. 185.)

Concerning things appendant and appurtenant, two things are implied [y].

First, that prescription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unlesse the thing

[y] Hill and Grange's case, Pl. Com. 168.

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as using the word *appurtenances*. Staundf. Prærog. 42. a. 10 Co. 64. a. But in the history of Westmorland, lately published by Mr. Nicholson and Dr. Burn, the record of a case of *darrein presentment* of the 15 E. 1, is cited, in which the court adjudged, that a grant of the manor of Burgh, with its *appurtenances*, being from the crown, would not pass the advowson of the chapel though appendant to the manor; and thence the 17 E. 2, is concluded to be only declaratory of the common law. See vol. 1. p. 564, 565. The case appealed to seems full in point. But then there is a strong current of authorities the other way; for the case of 43 E. 3. 23, is to the contrary, and so are the instances of things appendant not within the statute. Staundf. Prærog. 42. a. 10 Co. 64. a.—[Note 173.]

(3) *or* for *and* in L. and M.

(4) See note 2, to 122. a..

(5) Acc. 1 Ventr. 407.

(6) *Adjunctum* is rather a term of the logicians. The *accessorium* of the civil law answers best to our terms of *regardant*, *appendant*, *appurtenant*, and *incident*. How these differ from that, which is *part* or *parcel of* a thing, is explained in judge Doderidge's Treatise on Advowsons. See p. 38.—[N. 174.]

thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeall cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall (7). But things incorporeall which lye in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeall, as a mannor house or lands; or things corporeall to things incorporeall, as lands to an office. [z] But yet (as hath been said) they must agree in nature and quality; for [a] common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there. [b] Nor a leet, that is temporall, to a church or chappell, which is ecclesiasticall. Neither can a nobleman, esquire, &c. claime a seat in a church by prescription as appendant or belonging to land, but to a house, for that such a seat belongeth to the house in respect of the inhabitancy thereof; and therefore, if the house be part of a mannor, yet in that case he may claime the seat as appendant to the house for the reason aforesaid. [122.]

(1 Rol. Abr. 230.)
[z] 1 H. 7. 24. Pl. Com. 169.
[a] 5 Ass. 9. (1 Sid. 354.)
[b] 10 E. 3. 5. 37 H. 6. 34. 26 H. 8. 4. 4 Co. 36, 37. in Tirringham's case.

Secondly, that nothing can be properly appendant or appurtenant to any thing, unlesse the principall or superior thing be of perpetuall subsistance and continuance. For example, an advowson that is said to be appendant to a mannor, is *in rei veritate* appendant to the demesnes of the mannor. which are of perpetuall subsistance and continuance, and not to rents or services, which are subject to extinguishment and destruction (1).

(12 Co. 104.) 5 E. 6. Dier. 70. b. (1 Rol. Abr. 230.)

An advowson is appendant to the mannor of *Dale*, of which mannor the mannor of *Sale* is holden, the mannor of *Sale* is made parcel of the mannor of *Dale* by way of escheat, the advowson is only appendant to the mannor of *Dale*.

(1 Rol. Abr. 230.)

And where it is said, that a chamber may be parcell of a corody, and passe by the name of the corody, which may be extinguished, there he that hath the corody hath but his habitation in the chamber; as a fellow of *Trinity* Colledge in *Cambridge* hath in his chamber, or as one that had a corody and a chamber in an house of religion, he had but his habitation only. As for offices of fee whereunto land may appertaine, they are of perpetuall subsistance, either being *in esse*, or in that they are grantable over.

31 H. 6. 15. b.

Note, that an advowson at one turne may be appendant, and at another

13 E. 2. Quar. imp. 170.
43 E. 3. 35. 13 E. 3. Quar. imp. 58. 17 E. 3. 38. 9 Eliz. Dier 259. 7 E. 3. 20.

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(7) This position is not universally true. It sometimes fails as to things appurtenant. *Return of writs* or a *leet* may be appurtenant to an *hundred;* so may *waif* and *stray* to a *leet;* and yet in these instances *both* subjects are *incorporeal.* Ante 121. a. 8 H. 7. 1, 2, 3. Rast. Entr. 128. The true test seems to be the propriety of relation between the *principal* and the *adjunct;* which may be found out, by considering, whether they so agree in nature and quality, as to be capable of union without any incongruity. See 1 Ventr. 386.—[Note 175.]

(1) Acc. Dy. 70. b. and two adjudged cases in marg. of ed. 1688. Acc. also by Dyer in 2 Leon. 222. The same point was agitated in *Long* and *Heming*, 31 Eliz. of which case the reports differ so much, that it is difficult to say, what was decided by the court. But it rather seems to have ended with an opinion consonant to lord Coke's. Sav. 103. Cro. Eliz. 209. 1 Leon. 207. 4 Leon. 216. Doder. Advows. 42.—[Note 176.]

another tume in grosse. As if the mannor be divided betweene coparceners, and every one hath a part of the mannor without saying any thing of the advowson appendant, the advowson remaines in coparcenary, and yet, in every of their turnes, it is appendant to that part which they have; and so it is, if they make composition to present against common right, yet it remaines appendant. But if upon such a partition an expresse exception be made of the advowson, then the advowson remaines in coparcenarie and in grosse, and so are the bookes reconciled.

19 E. 3. Quar. imp. 59. 35 H. 6. 32, 33. 38 H. 6. 9. 2 H. 7. 5. (6 Co. 64. a.)

"*Common of pasture.*" [c] *Communia*, it cometh of the *English* word common, because it is common to many; and thereupon and accordingly is here called by *Littleton* common of pasture, for that the feeding of beasts in the land wherein the common is to be had belongs to many.

[c] Glanvill. lib. 3. ca. 36. Bract. lib. 4. c. 19. & 42. Brit. cap. 55, 56, 57. Fleta, lib. 4, ca. 19. Mirror, ca. 5, sect. 3.

[d] There be foure kinds of common of pasture, viz. common appendant, which is of common right, (and therefore a man need not prescribe for it) (2) for beasts commonable (that is) that serve for the maintenance of the plough, as horses and oxen to plough the land, and for kine and sheepe to compester the land, and is appendant to arrable land (3).

[d] 20 E. 3. Admeasurement 8. Temps E. 1. Common. 24. 17 E. 2. ibid. 23. 4 H. 6. 22 H. 6. (1 Rol. Abr. 396. Cro. Cha. 542. 6 Co. 59.)

[e] The second is common appurtenant, that is, for beasts not commonable; as swine, goats, and the like. [f] If a man purchase part of the land, wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant; and for common appurtenant one must prescribe (4).

[e] 37 H. 6. 34. 26 H. 8. 4. F. N. B. 181. (Dier 70. b.)

[f] 4 Co. f. 37. 38, &c. Tirringham's case. (Hob. 235. 1 Roll. Abr. 399. Cro. Cha. 482. Cro. El. 531.)

[g] The third is *common per cause de vicinage*, which differeth from both the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity: in which case one may inclose against the other, though it hath beene so used time out of mind, for that it is but an excuse for trespasse.

[g] 8 Co. 78, 79. W. Wilde's case. (7 Co. 5. Corbet's case.)

The last is common in grosse, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Of common appendant, appurtenant, and in grosse, some be certaine, that is, for a certaine number of beasts; some certaine by consequent, viz. for such as be levant and couchant upon the land; and some be more incertaine, as commons *sauns nomber* in grosse,

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(2) This may at first seem to clash with the doctrine before, that *appendants are ever by prescription.* Ante 121. b. n. 4. But they may be reconciled; for, as appendancy cannot be without prescription, the former always *implies* the latter; and therefore if one pleads common appendant, it is unnecessary to add the usual form of prescribing.—[Note 177.]

(3) See Fulb. Prepar. 68. b. and 1 Saund. 351.

(4) But not if there is a *grant* to shew; common appurtenant being claimable by *grant*, as well as by *prescription.* Adj. Cro. Cha. 482.—[Note 178.]

(1 Saund. 345.) grosse, and yet the tenant of the land must common or feed there also (5).

[h] Fleta, ubi supra. [i] 18 E. 3. fol. 43. [k] 15 E. 2. Prescript. 51. 12 H. 8. fol. 2. (Cro. Jam. 208. 257. 1 Ro. Abr. 396. 2 Rol. Abr. 267. 7 Co. 5. 1 Vent. 391. 1 Saund. 351.) [*] Pasch. 26. Eliz. in the King's Bench, inter White & Shirland in com. Oxon. Vide Sect. 1 & 2. (F. N. B. 180. c. 2. Saund. 326. 1 Rol. Abr. 405.) [l] Vid. 3 E. 3. 29, 30. 4 E. 3. 7. 46 E. 3. 23. 15 E. 2. Prescript. 51. (2 Rol. Abr. 258.)

There be also [h] divers other commons, as of estovers, of turbary, of pischary, of digging for coles, minerals, and the like. [i] If common appendant be claymed to a mannor, yet *in rei veritate* it is appendant to the demesnes, and not to the services; and therefore if a tenancy escheate, the lord shall not encrease his common by reason of that. [k] If a man claime by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custome against the law, to exclude the owner of the soyle; for it is against the nature of this word common, and it was implyed in the first grant, that the owner of the soyle should take his reasonable profit there, as it hath beene adjudged. [*] [l] But a man may prescribe or alledge a custome to have and enjoy *solam vesturam terræ*, from such a day till such a day, and hereby the owner of the soyle shall be excluded to pasture or feed there (6); and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soyle from feeding there. *Nota diversitatem.* [m] So a man may prescribe to have *separalem pischariam* in such a water, and the owner of the soyle shall not fish there; but if he claim to have *communiam pischariæ*, or *liberam pischariam*, the owner of the soyle shall fish there (7). And all this hath ☞ beene resolved. [*] And therefore it is necessary for every man by learned advice to plead according to the truth of his case; for *parols font plea*.

[122. b.]

[m] 20 H. 6. 4. 10 H. 7. 24. Temps E. 1. Assise 422.

[*] Inter Chinery & Fishen in le Com. Banke in replevin, & Mich. 29 & 30 Eliz. inter Shirland & White in com. Oxon. et inter Foiston & Cracbrode eodem termino in Essex. (2 Rol. Abr. 267.)

A man

(5) It has been denied, that common in *gross* can be *sans nombre*. 1 Saund. 346. But see Fulb. Prepar. 70. a. and the books there cited.—[Note 179.]

(6) For the cases about *sola vestura* see ante 4. b. n. 1. As to *separalis pastura*, whether a prescription for it can be made against the owner of the soil, has been the subject of argument in three different cases since lord Coke's time. In the first the court of common pleas was equally divided. North and Cox, Mich. 20 Cha. 2. Vaugh. 251. 1 Lev. 253. In the second the court of king's bench inclined to think such a prescription good; but the demurrer, on which the point arose, being over-ruled by consent, in order to try the fact, and a verdict being found against it, a decision of the question of law became unnecessary. Potter and North, Easter 21 Cha. 2. 1 Ventr. 383. 1 Saund. 347. 1 Lev. 268. But in the third case, which was on a motion to arrest judgment, the whole court of king's bench adjudged for the prescription. Hopkins and Robinson, East. 23 Cha. 2. Pollexf. 13. 1 Mod. 74. 2. 2 Saund. 324. 2 Leon. 2. Since this last case lord Coke's doctrine seems to have been generally acquiesced in.—[Note 180.]

(7) According to this passage, ownership of the soil is not necessarily included in a *several fishery*, and *common of fishery* and *free fishery* are the same thing. But one, whose works will be admired, as long as a good taste for literary compositions, or gratitude for the pleasure and instruction derived from them, shall have any influence, gives a very opposite explanation; for, according to him, ownership of soil is *essential* to a *several fishery*; and a *free fishery* differs both from *several fishery* and *common of fishery*: from the former, by being confined to a *public* river, and not *necessarily* comprehending the soil; from

[n] A man seised of land whereunto common is appendant, and is disseised, the disseisee cannot use the common, untill he entreth into the land whereunto it is appendant. [o] But if a man

[n] 19 H. 6. 33.

[o] Vide Sect. 541. (4 Co. 31. a. Post. 307. 349. b. 368. b.)

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from the latter, by being *exclusive*. 2 Blackst. Com. 8. ed. 39. But we doubt, whether this distinction may not be in a great degree questionable.—1. In respect to a *several fishery*, where is the inconsistency in granting the *sole* right of fishing, with a reservation of the soil and its other profits? Bracton expressly takes notice of such a grant; for his words are, that one may *servitutem imponere fundo suo, quòd quis possit piscari cum eo, et ita in communi, vel quòd alius per se ex toto*. Bract. fo. 208. b. There are also numerous other authorities for it; the old books of entries agreeing, that one may prescribe for a *several fishery* against the owner of the soil; to which should be added, the three cases of Elizabeth cited by lord Coke. See Lib. Intrat. 162. b. 163. a. Rast. Entr. 597. b. and the books cited under the letter *d* in fol. 4. b. and under *m* here, and the cases referred to under the * on the other side. Nor do we understand why a *several piscary* should not exist without the soil, as well as a *several pasture*, as to which latter we have already shewn the doctrine to be settled. Supra note 6. The chief reasons which occur against lord Coke, seem to be these.—Several writs, never applicable except to the soil, lie for a piscary; such as a *præcipe quòd reddat, monstraverunt de rationabilibus devisis*, and *trespass*, which latter writ is particularly insisted upon by lord chief justice Holt. Dav. 55. b. Hugh. Comm. Orig. Wr. 11 W. Jo. 440. 1 Ventr. 122. 2 Salk. 637. Skinn. 677. *Suum liberum tenementum* is a good plea to trespass for fishing in a *several piscary*. 17 E. 4. 6. 18 E. 4. 4. 10 H. 7. 24. 26. 28. The soil will pass, as it is said, by the grant of a piscary. Plowd. 154.—But all these objections may be repelled.—The writs relied on will not always lie for a piscary. Thus if a *præcipe quòd reddat* is brought of a piscary in the water of another person, the writ is bad, and a *quòd permittat* is the proper remedy. Fitz. Abr. Briefe 861. F. N. B. 23. i. and note b. of the 4to ed. Besides, in the cases of actions for trespass in a *several piscary*, or at least in some of them, the writ seems in effect to state a *several piscary* in the *plaintiff's own soil*, which therefore proves nothing as to the sense of *several piscary* without further explanation. Reg. Br. Orig. 95. b. Carth. 285. Skinn. 677. The plea *liberum tenementum* may be replied to by prescribing for a *several piscary*. See the books before cited as to such a prescription. Though the grant of a piscary *generally may*, perhaps, pass the soil, yet it will not, if there are any words to denote a different intention; as where one seised of a river grants a *several fishery* in it, which is the case put by lord Coke in another place; and much less will the soil pass, when there is an express reservation of it. Ante 4. b. and n. 2, there.—Hence, as it should seem, the arguments are short for the purpose; for at the utmost they only prove, that a *several piscary* is *presumed* to comprehend the soil, till the contrary appears, which is perfectly consistent with lord Coke's position, that they may be in different persons, and indeed appears to us the true doctrine on the subject.—2. Both parts of the description of a *free* fishery seem disputable. —Though, for the sake of distinction, it might be more convenient to appropriate *free fishery* to the franchise of fishing in *public* rivers by derivation from the crown; and though in other countries it may be so considered; yet, from the language of our books, it seems, as if our law practice had extended this kind of fishery to *all* streams whether *private* or *public*, neither the Register nor other books professing any discrimination. Ro. 95. b. Fitzh. N. B. 86. g. Fitz. Abr. Ass. 422. 4 E. 4. 28. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b. Cro. Cha. 554. 1 Ventr. 122. 3 Mod. 97. Carth. 285. Skinn. 677. Again, it

is

man be disseised of a mannor whereunto an advowson is appendant, he may present unto the advowson, before he enters into the mannor; and the reason of this diversitie is, because in the case of the common it should be a prejudice to the tenant of the soile: for if the disseisee might do it, the disseisor also might put on his cattle, which should be a double charge to the tenant, but not so of the advowson.

Sect. 185.

ALSO, if a man will acknowledge himselfe in a court of record to be a villeine, who was not a villein before, such a one is a villeine in grosse (1).

Bract. lib. 1. cap. 6. Britton, fol. 78. Fleta, l. 1. c. 3. 43 E. 3, 4. b. 19 E. 2. tit. Vil. 34. 18 E. 4. 29. [p] 19 H. 6. 32. 26 Ass. 62. 37 Ass. 17. 11 H. 4. 16, in appeale. (2 Ro. Abr. 732.) 41 E. 3. tit. Vill. 6.

THIS is intended in some action brought against him that made such confession, [p] or where he is brought into court by course of law; for if he commeth into the court extrajudicially, and not by any due course of law, such confession is without warrant of law, and bindeth not the partie, because the court had no warrant to take it. But if a *precipe* be brought against one, he may confesse himselfe villeine to an estranger, and that he holds the land in villenage of him, and this is good and shall bind him. And if in that case the demandant reply, that he the day of his writ purchased was a freeman (2), and thereupon issue is taken, and he is tryed to be free, yet he shall remaine villeine to the stranger in respect of his confession.

19 H. 6. 32. b.

If a writ of *nativo habendo* be brought against one, and the plaintiffe, as he ought, offereth in his count to prove the villenage by the cousins and kindred of the defendant, and thereupon produceth the uncles of the defendant, who upon examination confesse themselves to be villeines to the demandant; this confession, being

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is true, that in one case the court held *free fishery* to import an *exclusive* right equally with *several piscary*, chiefly relying on the writs in the Reg. 95. b. and the 43 E. 3. 24. But then this was only the opinion of two judges against one, who strenuously insisted, that the word *libera ex vi termini*, implied *common*, and that many judgments and precedents were founded on lord Coke's so construing it. 2 Salk. 637. Carth. 285. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations a little before the case in question. See *Upton* and *Dawkins* 3 Mod. 97, and *Peake* and *Tucker* cited in Carth. 286, in marg. We may add to this the three cases cited by lord Coke as of his own time; and that there are passages in other books which favour this distinction. See Cro. Cha. 544. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b.—These remarks on *several* and *free fishery* may serve the student as a notice of the doubts on the subject, and also assist in any future discussion for removing them; which, in truth, is the whole scope of the annotation.—[Note 181.]

(1) See ante 117. b. n. 3.

(2) This replication was given by the 37 E. 3. c. 16, before which statute the plea of being a villein to a stranger to the writ could not be denied.—[Note 182.]

being entred of record, doth so bind, that, albeit they were so free before, they and the heires of their bodies are by this confession bond and villeines for ever, for the uncles came in by due course of law in an action depending in court.

Sect. 186.

ALSO, a man which is villeine is called a villeine(3), *and a woman which is villeine is called a niefe; as a man which is outlawed is called outlawed, and a woman which is outlawed is called waived.*

"*NIEFE,*" or *Naife,* is in *Latine naturalis, seu nativa,* because for the most part niefes are bond by nativitie.

"*A woman which is outlawed is called waived.*"

Waived, waiviata, and not *utlegata or exlex,* for that women are not sworne in leets, or tornes, as men which be of the age of twelve yeares or more be; and therefore men may be called *utlegati, id est, extra legem positi,* but women are *waiviatæ, id est, derelictæ,* left out or not regarded, because they were not sworne to the law; wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworne to the law, which is intended of the oath of allegiance in the leet (4).

And the outlawrie of a woman is legally called *waiviaria mulieris.*

F. N. B. 161. a. Regist. 132, & 277. Britton, fol. 20. Bract. l. 3. tract. 2. ca. 12, 13. Fleta, lib. 1. cap. 28. 3 H. 5. tit. Utlawry Statham. Regist. orig. 132. (2 Rol. Abr. 804.)

[123. a.]

☞ Sect. 187.

ALSO, if a villeine taketh a free woman to wife, and have issue betweene them, the issues shall be villeines. But if a niefe taketh a freeman to her husband, their issue shall be free.

* *This is contrarie to the civill law; for there it is said,* partus sequitur ventrem*(1).

SURCULUS totum alimentum à stipite capit, poma tamen edit sua. The siens (2) takes all his nourishment from the stocke, and yet it produceth his own fruit.

Fortescue, cap. 42. Glanv. lib. 5. cap. 6. Hill. 29 E. 1, coram rege Eborum in thesaur.

Si

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(3) *and nief* in L. & M. & Roh.

(4) See ante 68. b. n. 1, 2, to which add post. 172. b. Spelm. Gloss. voc. *Fidelitas.* 2 Inst. 73. Britt. cap. 29. Cow. Inst. l. 2. t. 3. s. 14. Flet. l. 2. c. 52. l. 3. c. 16. Mirr. c. 3. sect. 35. 7 Co. 6. b. 7. a. Calvin's case Tyrr. Biblioth. Polit. 4th ed. 907. Ellesmere's argument in Calvin's case 76.

(1) The sentence between the stars is not in L. and M. Roh. or P.

(2) *Siens,* or, according to the modern spelling, *cion,* signifies the *shoot* of a tree, and is derived from the French word *scion,* which is the same as *surculus* in Latin.—[Note 183.]

[q] Lib. Rub. cap. 77.

[q] *Si quis de servo patre natus sit et matre liberâ, pro servo reddatur occisus in eâ parte; quia semper à patre non à matre generationis ordo texitur. Si pater sit liber et mater ancilla, pro libero reddatur occisus.*

[r] Fortescue, ubi supra.

[r] *Lex Angliæ nunquam matris, sed semper patris, conditionem imitari partum judicat.*

[s] Herewith agreeth Britton, fol. 78. b.

[s] The husband and wife are all one person in law, and the niefe marrying a freeman is infranchised during the coverture (3); and therefore by the common law of *England*, the issue is free (4).

[t] Bract. lib. 4. fol. 298. b. Idem, lib. 1. cap. 6. Mirror, cap. 2. sect. 28.

[t] *Si mulier serva copulata sit libero, &c. quòd partus habebit hæreditatem, et mater nullam dotem, quia mortuo viro suo libero redit in pristinum statum servitutis, nisi hæres ei dotem fecerit de gratiâ* (5). And when a bondman marrieth a free woman, they are all one person in law, and *duæ animæ in carne unâ*, and *uxor subjecta est viro, et sub potestate viri* (6).

[u] Bract. lib. 4. fo. 271.

[u] *Observatur in com' Cornubiæ de tali consuetudine, quæ talis est, quòd si liber homo ducat nativam aliquam in uxorem ad liberum tenementum et liberum thorum, si ex eâ duæ procreantur filiæ, una erit libera et alterâ villana, quia ibi partiti sunt pueri inter liberum patrem et dominum uxoris villanæ.*

[x] Glanvill. lib. 5. cap. 6.

[x] *Qui verò procreantur ex nativâ unius et nativo alterius, proportionabiliter inter dominos sunt dividendi.*

Fortescue, cap. 42.

"*This is contrary to the civill law.*" (7) For true it is, that by that

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(3) According to Fitzherbert, the marriage enfranchises the woman *for ever*; and he cites as an authority Britton, who considers it as a negligence in the lord not to have prevented the marriage. F. N. B. 78. G. Brit. 79. b. But Bracton, in the passage cited by lord Coke two or three lines further, confines the enfranchisement to the coverture, and there are several authorities which concur with him. Bro. *Villenage* 23. Pasch. 33 E. 3. Statham tit. *Villenage*, Fitz. Abr. *Villenage* 21. 30. 46. Lord Coke was aware of this contrariety in the books; for in a subsequent part he takes notice of it, but calls the opinion, that the enfranchisement ceases with the coverture, the better one. Post. 136. b. 137. b. However, he inclines to except the case of the nief's marrying with her own lord. But even this is denied by Perkins. Perk. sect. 314. It is a strong argument against this latter writer, that, in other cases of *constructive* manumissions, though in some the ground of inference was not so strong as the lord's marriage with his nief, the enfranchisement was *perpetual*. It is a still more forcible reason, that reviving the slavery on the lord's death, if he left an heir by his nief, would have necessarily induced the *unnatural* consequence of making the mother the slave of her own issue.—[Note 184.]

(4) It was unnecessary to resort to this reason to prove the issue of such a marriage free; the rule of our law being, that the child shall follow the father's condition; consequently, whether the nief was *free* or *bond* during the coverture, made no difference to her issue.—[Note 185.]

(5) In the chapter of dower lord Coke represents a nief marrying a free-man to be dowable. Ante 31. a. But this passage from Bracton is direct to the contrary. Perkins distinguishes, allowing dower to the nief from a *stranger*, but not from her *lord*. Perk. sect. 314.—[Note 186.]

(6) Here lord Coke omits explaining what effect the marriage of a villein with a free-woman has on his condition. As Britton writes, if the villein marries his own *lady*, it enfranchises him for ever. Brit. 78. b. If the marriage is with any other woman, it is clear, from Littleton's declaring the issue villeins, that the father remained a slave as before.—[Note 187.]

(7) This difference between our and the civil law is the subject of the chapter in

that law *partus sequitur ventrem*, as well where a free man takes a bond woman to wife, as where a bondman takes a free woman to wife. In the first case the issue is by the civill law bond, and in the other free; both which cases are contrarie to the law of *England*. But this is no part of *Littleton;* and therefore we in this manner pass it over.

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ALSO, no bastard may be a villeine, unless he will acknowledge himselfe to be a villeine in a cour̄t of record; for he is in law quasi nullius filius, *because he cannot be heire to any.*

"*NULLIUS* [a] *filius.*" *Cui pater est populus, pater est sibi nullus et omnis.* [a] Vide Sect. 399. 18 E. 1. tit. Villein 36. (Ante 3. b. Post. 244. b.)

Cui pater est populus, non habet ille patrem.

[b] Some hold that the bastard of a niefe shall be a villeine. [c] And others hold, that if a villeine hath a bastard by a woman, and after marrieth the woman, that this bastard is a villeine. But the law is contrary in both cases; for in both cases, the issue by the common law is a bastard, and consequently, *quasi nullius filius*, as *Littleton* here saith. [d] Though a bastard be a reputed sonne, yet is he not such a sonne, in consideration whereof an use can be raysed, for the reason that *Littleton* here yields; because in judgment of law he is *nullius filius*. [e] (8) And, [b] Bract. lib. 1, fo. 5. a. Fleta, lib. 1, cap. 3. Britton, fol. 78. [c] 29 E. 3. 34. 43 E. 3. 4. Britton, ubi supra. [d] 23 Eliz. Dier 374. [e] 18 Eliz. Dier 296. 14 Eliz. Dier 313. 18 Eliz. Dier 345.

for

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in Fortesc. de Laud. Leg. Angl. cited in the margin. See also mr. Selden's and mr. Gregor's notes in the 8vo. ed. of 1775.—[Note 188.]

(8) This point was so held in Worseley's case of 23 Eliz. in Dyer, which lord Coke refers to in the margin. According to Dyer judge Periam was of a contrary opinion. But Anderson, who reports the same case, informs us, that the judges were agreed. 1 And. 75. In the queen against an illegitimate son of sir John Perrot, and in Frampton against Gerrard, two subsequent cases of the same reign, the judges recognized the doctrine. 2 Rol. Abr. 785. 791, and Mo. 735. However, it should be observed, that though a bastard is not a *son* for whom the consideration of blood will *raise* an use, yet, on an estate otherwise effectually passed, an use may be as well *declared* to a bastard being *in esse* and sufficiently described as to another person: and so Rolle in his Abridgment states the law to be, but at the same time cites the case of Frampton and Gerrard as determined to the contrary. 1 Ro. Abr. 791. Gilb. on Uses 207. The reason why the use to the bastard is bad in the first instance, and good in the second, depends on the common, but perhaps obscure, distinction, between uses raised by transmutation of the possession, as on a feoffment, grant, fine, or common recovery, and those raised without, as a covenant to stand seised, or bargain and sale; or, to express it in more intelligible terms, between declaring uses on a possession or estate actually *transferred* to a *third person*, and declaring them on a possession or estate *retained* in the *party himself*. In the former case the estate is passed completely from the grantor or donor, without

☞ for the same reason, where the statute of 32 *H.* 8. of wills, speaketh of children, bastard children are not within that statute, and the bastard of a woman is no child within that statute, where the mother conveys lands unto him. [123. b.]

[*f*] Trin. 18 E. 1. rot. 61. Bedf. coram rege. (Cro. Jam. 541. 1 Roll. Abr. 536. Godb. 281. Palm. 9.)

[*f*] It was found by verdict, that *Henry* the sonne of *Beatrice*, which was the wife of *Robert Radwell* deceased, was born *per undecim dies post ultimum tempus legitimum mulieribus constitutum.* And thereupon it was adjudged, *quòd dictus Henricus dici non debet filius prædicti Roberti secundum legem et consuetudinem Angliæ constitut'* (1). Now *legitimum tempus* in that case appointed

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without the aid of a court of equity; and therefore it is immaterial, whether the use declared on the estate is gratuitous or not, it being sufficient that the grantee or donee receives it coupled with a trust or use. But in the latter case the transaction rests in covenant or agreement between the covenantor or bargainor and the *cestui que use;* and if the covenant or agreement was not founded on the consideration of *blood* or a *valuable* consideration, such as marriage or money, our courts of equity, which, till the 27 of H. 8. had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, chancery would enforce uses annexed to a *perfect gift*, however gratuitous they might be, but not those resting only on a *naked contract*, without even so much as the consideration of *blood* to maintain them. The authorities in proof of this distinction are abundant; nor do we know of any seeming to impeach it, except the single case of Frampton and Gerrard already cited from Rolle, which, if it did turn on such a point, is sufficiently controuled by other cases to make the doctrine indisputable. Mo. 102. Ow. 40. 1 Leon. 197. 1 Co. 176. b. W. Jo. 346. Cart. 143. 12 Mod. 161. Gilb. on Uses 113. 207. Add to this the disfavour of our law to bastardy, in not recognizing any but *legitimate* blood to be a good consideration, and the whole secret of the rule as to uses to bastards will be disclosed. On a covenant to stand seised, an use will not rise to a bastard; because, the use depending on *contract*, some consideration is requisite, and *lawful blood* and *marriage* are the two considerations *peculiar* to such a covenant, which necessarily excludes *bastardy*. But on bargains and sales of land, in which the essential consideration to raising an use is *money* or a *price*, or on any conveyances, on which the estate being passed out of the grantor, and therefore not depending on his contract, uses may be declared without any consideration, bastards stand precisely on the same footing with other persons, and are equally capable of having uses limited to them. To give the sum of this elucidation in one sentence, where the use will not rise without the consideration of *blood*, if derived through any but the pure channel of marriage, however near the blood may be, it will not avail.—[Note 189.]

(1) Lord Hale, in a note on a passage about legitimacy in fol. 8. a. gives a fuller extract of this case from the record, than is here expressed. His words are these: Trin. 18 E. 1. Coram rege, rot. 13. Bedford, et M. 22, 23 E. 1. rot. 2. *In assise by John Radwell against Henry son of Beatrice, who was wife of Robert Radwell*, quia compertum est, quòd dictus Henricus fuit natus per 11 dies post 40 septimanas, quod tempus est usitatum mulieribus pariendi, ex quo prædictus Robertus non habuit accessum ad prædictam Beatricem per unum mensem ante mortem suam, præsumiter dictum Henricum esse bastardum, ideo *judgment for the plaintiff*. Hal. MSS.—If this state of the case is correct, lord Coke's is erroneous in several particulars of consequence. 1. He is short in not expressing, that the record mentions *forty weeks*, and so leaving it to be deemed an *inference* of his own, as which it hath been accordingly treated. 2. He exceeds the record, by representing it to style *that time* the

appointed by law at the furthest is nine moneths, or forty weeks;

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the *latest* for a woman's going with child, when the record only calls it the *usual* period. 3. He wholly omits the husband's having had *no access to the wife for one month before his death*; a fact very material, it being very easy to allow *eleven days* after the *usual* time, but requiring a strong case to warrant extending such liberality to nearly *six weeks*. 4. The word *præsumitur*, which lord Coke passes over, is of importance; for it indicates, that, notwithstanding the great excess of time, it was conceived to create only a *presumption* for the bastardy, and consequently, if very cogent circumstances to account for the protraction of the birth, and in favour of the wife's chastity, had occurred, the judgment might have been for the legitimacy. So far we had advanced, when on looking into Rolle's Abridgment, we found the same ancient case of Radwell more at large, than either in lord Coke or lord Hale. But Rolle agrees with the former, as well in respect to the record's not mentioning the *forty weeks*, as to its stating the birth to be eleven days after the *latest time in law for a woman's going with child*; and as from Rolle's particularity he seems to have most minutely attended to the record, his authority, till the whole record appears, seems most decisive. However the two last particulars, in which lord Coke differs from lord Hale, still remain, to which Rolle adds these further circumstances: that the *husband languished of a fever a long time before his death*; that on the taking of an inquisition afterwards in the court of a lord, of whom he held lands by knight's service, *the wife swore she was not pregnant*, and to prove it uncovered herself in open court; and that, in consequence of all this, the lord received a *collateral* relation as heir. The words describing the wife's exposure of her person are remarkable; for the record states, that she, being interrogated, *juramento asserebat, se non esse prægnantem; et, ut hoc omnibus manifestè liqueret, vestes suas ad tunicam exuebat, et in plenâ curiâ sic se videri permisit.* 1 Ro. Abr. 356. pl. 3, and 18 E. 1. rot. 13, in B. R. there cited. It reflects great discredit on the lord's court, which permitted such a gross indecency; and still more on the king's judges, who suffered it to be recorded as one of the grounds for a verdict before them. How laudably contrariant is the proceeding on the writ *de ventre inspiciendo*. This remedy for the heir against the pretence of pregnancy, so well known to be of earlier date than the reign of Edward the first, as it was framed in the times of Bracton, Britton, and Fleta, delicately requires the widow to be inspected by a jury *of her own sex*; and though in subsequent times the sheriff was ordered to summon a jury composed both of men and women, yet still the *search* was to be made by the latter only. Bract. 69. a. Brit. 165. b. Flet. lib. 1, c. 15. Reg. Br. Orig. 227. a. What harsh ideas of the times might we be led to adopt, if the early introduction of the writ *de ventre inspiciendo* did not demonstrate, that the unseemly record we are observing upon was a *singularity*, and so many other testimonies of a more advanced refinement in judicial proceedings did not concur to rescue the age of our English Justinian from the suspicion of a *general practice* of such barbarism. Let us then suppose the record to be as it is in Rolle; which is the more probable to be the truth, because a contemporary judge, who reports its having been *produced* on a trial of legitimacy, represents it much in the same way. Cro. Jam. 541. But still it will not warrant lord Coke's inferring from it, that *forty weeks* constitute the latest time our law allows for a woman's going with child. On the contrary, no particular time being mentioned, what period was meant, must be found out through some other *medium*; and as the record states *other* unfavourable circumstances besides the excess of time, and that the *jury presumed* against the child's being the issue of the deceased husband, it seems fair to suppose, that the law was understood not to be so strict in the time alluded to, whatever that time might be, as indiscriminately to condemn as illegitimate all children not born within

weeks (2); but she may be delivered before that time, which judgement I thought good to mention. And this agreeth with that

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it, but rather to consider every excess, unless very extraordinary indeed, as only raising a presumption against them. This construction is clearly most consistent with the terms of the record in question. In the next note we shall attempt to satisfy the reader, that the rule resulting from it is most conformable to other precedents and authorities, as well as to the reason of the thing. After the case of Radwell from the record of E. 1. lord Hale gives the four following cases:—Rot. Parl. 9 E. 2. m. 4. Gilbert de Clare comes Glouc. obiit 30 Junii 7 E. 2. in parliamento tent. quindena Hil. 9 E. 2. *the sisters and coheirs pray livery. Matilda,* quæ fuit uxor comitis, *pretends to be big by the earl, which was accordingly found* per inquisitionem. *The coheirs reply, that,* si comitissa prægnans esset, tantum tempus elapsum est, ut secundum cursum pariendi non potest dici imprægnari a comite. *Yet they could not obtain livery till* Pasch. 10 E. 2. *but the question hung in deliberation.*—Note 18 R. 2. *where a woman in such a case immediately after the death of the first husband took a second husband, and had issue born forty weeks and eleven days after the death of the first husband, and it was held to be the issue of the second husband.*—M. 17 Jac. B. R. *Alsop and Stacey. Andrews dies of the plague. His wife, who was a lewd woman, is delivered of a child forty weeks and ten days after the death of the husband. Yet the child was adjudged legitimate and heir to Andrews; for* partus potest protrahi *ten days* ex accidente.—M. 4. Car. in Cur. Ward, *and afterwards* P. 5. Car. B. R. *Thecar marries a lewd woman, but she doth not cohabit with him, and is suspected of incontinency with Duncomb; Thecar dies; Duncomb within three weeks after the death of Thecar marries her; two hundred and eighty-one days and sixteen hours after his death she is delivered of a son. Here it was agreed,* 1. *If she had not married Duncomb, without question the issue should not be a bastard, but should be adjudged the son of Thecar.* 2. *No averment shall be received that Thecar did not cohabit with the wife.* 3. *Though it is possible, that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of Thecar.* Hal. MSS.—Lord Hale's case of E. 2. appears very extraordinary, the time from 30 June 7 E. 2, when the earl of Gloucester died, to the *quindene* of Hilary, or 29 Jan. 9 E. 2, when the livery to his sister was further postponed in parliament, being *within one day of a year and seven months;* which is a much later date for the delivery of a live child, than the most liberal in their calculations have hitherto assigned. However, on reading the printed copy of the original record, in the rolls of parliament lately published, we find lord Hale's note quite accurate. See Rot. Parl. v. 1, p. 353. As to the case of R. 2, it confirms the doubt we have elsewhere stated of the opinion, that, if a widow marries again and has a child within nine months after the death of the first husband, the child may choose his father; and is an authority for deciding according to the proof of the woman's condition when her first husband died. Ante fo. 8. a. note 7. Terms of the Law, first edit. tit. *Bastard,* and Cowel Inst. lib. 1. t. 9. Lord Hale's two other cases are reported in several books, Alsop and Stacey being in Cro. Jam. 541. Godb. 281. Palm. 9. 1 Ro. Abr. 356, and Thecar's in Cro. Jam. 685. Winch. 71. Litt. Rep. 177.—[Note 190.]

(2) If our law was really as strict in point of time as is here represented, it would not sufficiently conform to the course of nature. The physicians, it is true, generally call *nine* months, each being of thirty days, the *usual* period for a woman's going with child. But then they allow, that, as a delivery may be accelerated by accidental causes, so it is frequently protracted, not only for *ten days* beyond the nine months, but to the end of the *tenth* month, and sometimes for a considerably longer time. See Zacch. Quæst. Medico-legal. lib. 1, tit. 2.

that in *Esdras: Vade et interroga pregnantem, si quando impleverit novem menses suos, adhuc poterit matrix ejus retinere partum in semetipsâ? Et dixi, Non potest, domine.* 4 Esdras 4. 41. Vide Pancirol. Nova Reporta, page 485, &c.

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tit. 2. Justice therefore requires, that, in the case of posthumous children, an excess of the usual time should not operate further, than by raising a proportional *presumption* against the legitimacy. The Roman law was very liberal in this respect; for the *decemviri* allowed, that a child may be born in the tenth month; and though a law of the Digest excludes the eleventh, yet the emperor Adrian, after consulting with the philosophers and physicians, decreed even for this, where the mother was of good and chaste manners. See Dig. 1. 4. 12. Paul. Sentent. lib. 4, t. 9, s. 5. Nov. 39, c. 2, t. 17, with Gothofred's learned notes on those two texts of the Roman law. Cod. lib. 6, t. 29, leg. 2 Aul. Gell. lib. 3, cap. 16. Huber. Prælect. in Dig. lib. 1, tit. 6. A like liberal discretion probably prevails in most countries in Europe; for an instance of which, we appeal to a writer of great authority, who reports a decision by a majority of judges in the supreme court of Friesland, by which a child was admitted to the succession, though not born till three hundred and thirty-three days from the day of the husband's death, which period wants only three days of *twelve lunar* months. Sand. Decis. lib. 4, tit 8. Definit. 10. Nor will our own law, notwithstanding what lord Coke advances, if the authorities are duly collected and considered, be found deficient on this interesting subject. Indeed there is a passage in Britton, which gives countenance to lord Coke's limitation of forty weeks; for this writer excludes from the inheritance posthumous children not born within forty weeks from the husband's death. Britt. 166. a. However, even this writer seems to extend in some degree beyond the forty weeks; unless he meant to make the wife's conception exactly of equal date with the husband's death, which surely is not a very reasonable construction. But without dwelling on such a nicety, it is sufficient, that the principal of the few other authorities in our books are against so rigid a rule. Bracton is very cautious, illegitimatizing only the issue born so long after the husband's death, as to create an improbability of its being his child, without naming any fixed period. Bract. lib. 5, fo. 417. b. As to the determined cases, the only authorities of this sort, we meet with, are enumerated in the preceding annotation; and these duly weighed will not be found, it is apprehended, to warrant lord Coke's conclusion. In Radwell's case, the finding against the issue is expressed to have been grounded merely on *presumption*; and besides, if we construe the record properly, the presumption arose from proof of the husband's non-access to the wife for a month before his death. The case of 9 E. 2. is an instance of allowing so much time beyond forty weeks, that it seems too strong to have much weight; but so far as it can claim any, it counts against lord Coke. The case of 18 Rich. 2. at first seems full for lord Coke's rule, the child, though born only *eleven* days beyond the *forty weeks*, having been declared not the issue of the deceased husband. But when it is further considered, there will be found nothing to prove a *positive general* rule; for it was very special, the widow having married a second husband the day after the death of the first, so that the question was not of legitimacy, but merely to which husband the issue belonged. One of the two only remaining cases considerably extends the time beyond the forty weeks; for in *Alsop* and *Stacey*, the first of them, the issue was found legitimate, notwithstanding the lapse of forty weeks and *ten days*, and the lewd character of the wife; and even as to *Thecar*'s case, which is the other of them, the issue having been born two hundred and eighty-two days, there was an excess of the forty weeks, though but a trifling one. The precedents therefore, so far from corroborating lord Coke's limitation of the

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ALSO, every villein is able and free to sue all manner of actions against everie person, except against his lord, to whom he is villeine. And yet in certaine things he may have against his lord an action. For he may have against his lord an action of appeale for the death of his father, or of his other ancestors, whose heire he is.

[g] Bract. lib. 4. fol. 196. Britton, cap. 49, fo. 125.

"*EVERY villein is able and free to sue, &c.*" [g] In an action brought by a villeine *versus non dominum, non valebit ei exceptio, quia est servus alienus, ex quo nihil ad ipsum utrùm liber sit an servus.*

[h] 14 E. 4. 6. b. 15 E. 4. 32. 20 E. 3. tit. Villein 10. 38 E. 3. 21.

[h] And it is to be observed, that he that hath but a particular estate in a villeine, as tenant for life or for yeares, shall disable the villeine, if he brings an action against him; but the lessor shall not (as it is said) disable him.

[i] Fleta, lib. 2. cap. 4. (3 Inst. 131.)

[i] *Examinatio villenagii non tenet, nisi ex ore veri domini fuerit pronunciata.*

[k] Brit. cap. 22, fo. 38. Bracton, lib. 1, fo. 6.

"*Appeale.*" *Appellum*, commeth of the *French* word *appeller*, that signifieth to accuse or to appeach. An appeach, [k] an appeal, is an accusation of one upon another, with a purpose to attaint him of felonie by words ordained for it.

[l] 18 E. 3. 32. 11 H. 4. 93. 1 H. 4. 6. 29 H. 6, tit. Corone 17.

"*For the death,*" [l] For a villeine shall not have an appeale of robberie against his lord, for that he may lawfully take the goods of the villein as his own.

[m] Fleta, li. 1, c. 5. 1 H. 4. 6.

[m] And if in an appeale of death it be found for the plaintife, he is infranchised for ever. *Hinc enim est, quòd eo ipso sunt hujusmodi domini servos suos amissuri, cum de injuriis fuerint convicti.* And there is no diversitie herein, whether he be a villein regardant or in grosse, although some have said the contrary.

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ultimum tempus pariendi, do, upon the whole, rather tend to shew, that it hath been the practice in our courts to consider forty weeks merely as the more *usual* time, and consequently not to decline exercising a discretion of allowing a longer space, where the opinion of physicians or the circumstances of the case have so required.—In the course of our enquiries into the subject of this note, we were curious to know the general sentiments of that eminent anatomist Dr. Hunter on three interesting questions. These were, what is the *usual* period for a woman's going with child, what is the *earliest* time for a child's being born alive, and what the *latest*. The answer, which he obligingly returned through a friend, we have liberty to publish, and it was expressed in the words following. 1. *The usual period is nine calendar months; but there is very commonly a difference of one, two, or three weeks.* 2. *A child may be born alive at any time from three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time. At six months it cannot be.* 3. *I have* known *a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months, and* believe *two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.*—[Note 190*.]

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ALSO, a niefe that is ravished by her lord, may have an appeale of rape against him.

"*RAPE.*" [*n*] *Raptus* is, when a man hath carnall knowledge of a woman by force and against her will.

[*n*] Mirror, ca. 1, sect. 12, c. 3, de Rape, & cap. 4, de Homicide. (3 Inst. 60.)

"*Appeale of rape.*" By the generall purview of the statutes [*] that give the appeale of rape, the niefe shall have an appeale of rape against the lord. [*o*] And it seemeth by the ancient authors of the law, that this so hainous an offence was severely punished by losse of eyes, and privy members; but of old time it was felony, which you may reade at large in the Second Part of the Institutes, *W.* 1. ca. 13.

[*] W. 1, ca. 13. W. 2, ca. 35. 6 R. 2, ca. 6. 11 H. 4, cap. 13. 1 E. 4, cap. 1.

[*o*] 29 H. 6. 11, tit. Coron. 17. Bract. lib. 3, fol. 147.

[124. a] [*p*] ☞ And this word *rape*, which our author here useth, is so appropriated by law to this case, as without this word *(raptuit)* it cannot be expressed by any periphrasis or circumlocution; for *carnaliter cognovit eam*, or the like, will not serve.

[*p*] 9 E. 4. 26. Mirror, ca. 1, sect. 13.

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ALSO, if a villeine be made executor to another, and the lord of the villeine was indebted to the testator in a certaine sum of money, which is not paid; in this case, the villeine, as executor of the testator, shall have an action of debt against his lord; because he shall not recover the debt to his owne use, but to the use of the testator.

OF this matter sufficient hath beene spoken in this Chapter before. The villein shall have an action as executor against his lord; and it is no plea for the lord to say, that the plaintife is his villeine; for he shall not be enfranchised by the user of this action; because he hath it by a gift in law to the use of the testator, and not to his owne use.

(Doc. Plac. 388.) 21 E. 4. 50. a.

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ALSO, the lord may not take out of the possession of such villeine, who is executor, the goods of the deceased; and if he doth, the villeine as executor shall have an action for the same goods so taken against his lord, and shall recover damages to the use of the testator. But in all such cases it behoveth, that the lord, which is defendant in such actions, maketh protestation, that the plaintife is his villein; or otherwise the villeine shall be infranchised, although the matter be found for the lord, and against the villein, as it is said.

"*THE lord may not take out of the possession, &c.*" Of this also sufficient hath been said before.

"*And shall recover damages to the use of the testator.*" [q] Note, damages recovered by the executor in an action of trespasse shal be assets; and yet they were never in the testator. And so it is in other like cases, as by our bookes it appeareth.

[q] 21 E. 4. 4. b. 11 H. 6. 35. b. 3 H. 6. 2. 2 H. 4. 21. 1 H. 4. 6.

[r] If an executor hath a villeine for yeares, and the villein purchases lands in fee, the executor entreth, he shall have the whole fee simple; but because he had the villein *in auter droit*, viz. as executor to the use of the dead, it shall be assets in his hands Note a diversity between the quantity of the estate, and the quality of it; for the law respecteth not the quantity of the estate; for not onely [s] ☞ tenant in taile and tenant for life of a villeine shall have the perquisite of the villeine in fee, but [t] tenant for yeares and tenant at will also shall have it in fee.

[r] Doct. & Stud. Brooke, tit. Villenage 70.

(Ante 117. a.)

[s] L. 5 E. 4. 61.

[t] 21 H. 3. 6. 37. (Ante 117. a.)

[124. b.]

But the law respecteth the quality; for in what right he hath the villeine, in the same right he shall have the perquisite; as in the case of the executor abovesaid, and in the case of the bishop [u] that hath the villeine in right of his church, he shall have the perquisite in the same right.

[u] 41 E. 3. 21.

[x] So if a man hath a villeine in the right of his wife, he shall have the perquisite also in her right. But if the purchase be after issue had, then the baron shall have the perquisite to him and his heires; because by the issue he is intituled to be tenant by the curtesie in his owne right.

[x] 18 E. 3. 29.

"*Protestation*," [y] *Protestatio*, is an exclusion of a conclusion that a party to an action may by pleading incurre; or it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him. But in this case without a protestation, albeit the issue be found for the lord, the villeine shall be enfranchised, as it appeareth hereafter in this Section.

Vide Sect. 193. [y] Pl. Com. 276. b. in Greisbrook's case.

Sect. 193.

ALSO, if a villeine sueth an action of trespasse, or any other action, against his lord in one county; and the lord saith, that he shall not be answered, because he is his villeine regardant to his mannour in another county (1); *and the plaintife saith, that he is free, and of a free estate, and not a villein; this shall be tryed in the county where the plaintife hath conceived his action, and not in the county where the mannor is: and this is in favour of liberty. And for this cause a statute was made* anno 9 R. 2. ca. 2, *the tenor whereof followeth in this forme. Also, for that where many villeins and niefs, aswell of great lords as of other men, aswell of spirituall as temporall, flye and go into cities, townes, and places franchised, as into the city of* London, *and other like places, and feine divers suits against their lords, because they would make themselves free by the answer of their lords: it is accorded and assented, that lords nor others shall not be forebarred of their villeins by reason of their answer in law. By force of which statute, if any villeine will sue any manner of action to his own use in any countie, where it is hard to try against his lord* (ou il est,

(1) &c. in L. and M. and Roh.

est fort a trier envers son seignior*), *the lord may chuse whether he will plead, that the plaintife is his villeine, or make protestation that he is his villeine, and plead his other matter in bar. And if they be at issue, and the issue be found for the lord, then the villeine is a villeine, as he was before by force of the same statute. But if the issue be found for the villeine, then the villeine is free; because that the lord tooke not at the beginning for his plee, that the villeine was his villeine, but tooke this by protestation, &c.*

"*THIS shall be tryed in the county, &c.*" Be tryed, that is, as it is intended, by the verdict of twelve men, that is called in law a triall, *triatio*. Brit. fol. 79. 125. b. 126. a.

[*a*] In this case the law doth favour the villein in the issue; for otherwise by the rule of law in like cases he ought to answer to the speciall matter, viz. to the regardancy; but in favour of liberty he may reply, that he is free and of free estate, and consequently this issue concerning the person shall be tryed where the writ is brought. [*b*] The like law it is, if issue be joyned upon the ideocy of the plaintife or defendant, it shall be tryed where the writ is brought, because it concerneth the person. [*a*] 7 E. 3. 50. 26 E. 3. 73. 38 E. 3. 34. 40 E. 3. 36. 43 E. 3. 4. 31. 44 E. 3. 36. 47 E. 3. 26. 22 H. 6. 52. 35 H. 6. 12. 39 H. 6. 24.

Vide Sect. 534. [*b*] 2 Mar. Dier 112. (Post. 125. 7 Co. 1.)

"*In favour of liberty.*" It is commonly said, that three things be favoured in law; life, liberty, and dower.

[*c*] *Impius et crudelis judicandus est, qui libertati non favet. Angliæ jura in omni casu libertati dant favorem.* (F. N. B. 77. f.) [*c*] Fortescue, cap. 42.

Tryall is to finde out by due examination the truth of the point in issue or question betweene the parties, whereupon judgement may be given. And as the question betweene the parties is twofold, so is the triall thereof; for either it is *quæstio juris*, (and that shall be tried by the judges either upon a demurrer, special verdict or exception, for *cuilibet in suâ arte perito est credendum; et quod quisque nôrit in hoc se exerceat;* and it is commonly and truly said, *ad questionem juris non respondent juratores*) or it is *quæstio facti* (1). And the triall of the fact is in divers sorts, whereof a light touch is given before, Sect. 102. Of these a triall by xii. men (here intended by *Littleton*) is the most frequent and common. And some few rules of law are necessary here to be remembered (for the better understanding of the bookes of law hereafter) where and from what place, viz. *de quo vicineto*, out of what neighbourhood the jury shall come, a necessarie poynt to be knowne; for if there be a mistryall, (that is) if the jury commeth out of a wrong place, or returned by a wrong officer, and give a verdict, judgement ought not to be given upon such a verdict. [*d*] Wherein the most general rule is, that every tryall shall be out of that towne, parish, or hamlet, or place known out of the towne, &c. within the record, within which the matter of fact issuable is alledged, which is most certaine and nearest there-

[125. a.]

Vide Sect. 234. Vide Sect. 102. Vide Sect. 234. more of this matter. (6 Co. 47. 5 Co. 36. b. Cro. Cha. 480.) [*d*] 3 E. 3. 73. 20 H. 6. 30. 7 H. 4. 27. 9 H. 5. 8. 8 H. 6. 34. 7 H. 6. 27. 17 E. 3. 56. 43 E. 3. 5. 47 E. 3. 6. 34 H. 6. 1. (2 Roll. Abr. 618. Cro. Jam. 150. 326. 513. 676. Hob. 76. 9 Co. 66. b. 11 Co. 25. b. 6 Co. 14.) (7 Co. 1. 1 Sid. 9. 88. Hob. 89. 1 Sid. 10. 2 Ro. Abr. 609. 1 Roll. Rep. 369. Cro. Eliz. 818.)

* *The literal meaning of these words appears to be,* where he (the villein) is powerful or strong in trial against his lord, *and not, "where it is hard to try against his lord," as they are translated by lord Coke. See Mr. Ritso's Intr. p. 106.*

unto,

(1) See post. 155. b. 228. a.

unto, the inhabitants whereof may have the better and more certaine knowledge of the fact (2). As if the fact be alledged *in quâdam*

(2) Both in civil and criminal suits the common law is very nice in requiring every issuable fact to be alledged, not only within a *county*, but also within a *parish*, *town*, or *hamlet*, or for want of either of these, some other *known place* of the same county, not being a *hundred*, which probably was excluded as *too large* a division; and if this rule was not observed, it might be pleaded in abatement, or otherwise taken advantage of, by either party, according to the stage of the suit. Cro. Eliz. 260. Thel. Dig. Br. lib. 2, c. 15, to 18. Com. Dig. *Abatement*, H. 13. *Pleader*, C. 20. The necessity of having the county named is very obvious; as otherwise it could not be known, whether the court had jurisdiction, who was the proper officer to direct the process of the court to, or whence the jury was to come, and consequently the cause could not go on. Nor is it difficult to account for stating a *particular place* in the *county*. One reason might be, that, if there was no other explanation of the case where the cause of action or ground of defence arose, than by reference to the extensive limits of a county, the allegation might fail in that certainty so essential to its being either well understood or properly controverted; and the rule, so far as it may have this foundation, still continues unchanged. But the other and principal reason was, that, if issue was taken on the fact alledged, it might be tried by a jury of the *visne* or neighbourhood, which our ancestors conceived to be more likely to be qualified to investigate and discover the truth, than persons living at a distance from the scene of the transaction. For this purpose the *venire facias* always directed the sheriff to summon a jury from the neighbourhood of the *parish* or *place*, within which the fact to be tried was alledged; and this was not mere form; for it was the sheriff's duty to attend to the direction; and if *at least four* of the hundred, in which the place was situate, were not included in the panel returned by him, it was a good cause of challenge to the *array* or *whole panel*; or if four such persons did not attend to be sworn, the *polls*, or particular jurors, might be challenged for the same default. Post. 157. a. 48 E. 3. 30. 48 Ass. 5. 7 H. 4. 46. 21 E. 4. 59. b. Nay, so very essential did the common law deem the having some of the neighbours on the jury, that, if the visne appeared on the record to be from a wrong place, whether in consequence of the party's alledging the fact in a place not proper for a *visne*, or of the court's mis-awarding it, in both cases it was equally a mis-trial, and a good ground for a motion to arrest the judgment, or for reversing it by error. Cro. Eliz. 260. Hob. 5. But thus restricting every *visne* to a particular part of the county, though well intended, was followed with great inconveniences. It encouraged the losing party after a trial, to make trivial objections to the *visne*, in order to disappoint his adversary of the fruits of a just verdict; and either because the rules for laying the *visne* were in themselves vague, or because they were perverted by an over-curious interpretation, such objections not only became very common, but often succeeded, as appears from the profusion of cases and learning to be met with on the subject in our Reports. See Roll. Abr. and Vin. Abr. tit. *Trial*. At length the grievance became so intolerable to suitors, that parliament interposed to relieve them; for which purpose several statutes were made. The 21 Jam. c. 13, gives aid after verdict, where the *visne* is *partly* wrong, that is, where it is awarded out of too many or too few places in the county named. The 16 & 17 Cha. 2. c. 8, goes further; and cures the defect of the *visne* wholly, so that the cause was tried by a jury of the proper county, without any regard to the part of the county from which the jury came. Still, however, either party was at liberty to object to the default of hundredors at the trial, which was found to be very troublesome on account of the difficulty of always having four jurors so qualified. The 4 & 5 Ann. c. 16, therefore directs, that every *venire facias* shall be awarded from *the*

body

quidam platea vocat' King-street in civitate Westm. in com' Midd. in this case the visne cannot come out of the *plates*; because it is neither town, parish, hamlet, nor place out of the neighbourhood whereof a jury may come by law. But in this case it shall not come out of *Westminster*, but out of the parish of *St. Margaret*, because that is the most certaine. But

[125. b.] therein also it is to be noted, that if it had been alledged in *King-street* in the parish of *St. Margaret* in the county of *Middlesex*, then should it have come out of *King-street*, for then should *King-street* have beene esteemed in law a towne [e]; for whensoever a place is alledged generally in pleading (without some addition to declare the contrary, as in this case it is) it shall be taken for a towne. [f] And albeit *parochia* generally alledged is a place incertaine, and may (as we see by experience) include divers townes; yet, if a matter be alledged *in parochia*, it shall be intended in law, that it containeth no more townes than one, unlesse the party doth shew the contrary. [g] But when a parish is alledged within a city, there without question the visne shall come out of the parish, for that is more certaine than the city.

[e] 4 E. 3. 30. 8 E. 3. 68. 39 H. 6. 13. Brooke Pleading 61.
[f] 4 E. 4. 41. 5 E. 4. 29. 22 E. 4. 9. 35 H. 6. 30. 22 H. 6. 47. 1 Co. 162. Digges' case.

11 Co. 25. 6 Co. 14. (Hob. 190. 2 Roll. Abr. 616.) [g] 1 E. 3. 8. 7 H. 6. 38.

[h] If a trespasse be alledged in *D.* and *nul tiel ville* is pleaded, the jury shall come out *de corpore comitatûs*; but if it be alledged in *S.* and *D.* and *nul tielle ville de D.* is pleaded, the jury shall come out *de vicineto de S.* for that is the more certaine. So if a matter be alledged within a mannor, the jury shall come *de vicineto manerii*; but if the mannor be alledged within a towne, it shall come out of the towne, because that is most certaine, for the mannor may extend into divers townes. And all these points were resolved by all the judges of *England* upon conference betweene them in the case of *John Arundel* esquire indited for the death of *William Parker* [*].

[h] 22 E. 4. tit. Visne, f. 97. 6 H. 7. 3. b. 11 H. 7. 22. b. 9 E. 4. 3. a. 3 E. 4. 26. 39 H. 6. Trasp. 93. 4 E. 3. 30. (Hob. 89. 266. 6 Co. 65. b. 1 Leon. 109. Cro. Car. 17. Cro. Jac. 302, 303. 308.)

[i] In a reall action, where the demandant demands land in one county, as heire to his father, and alledges his birth in another county, if it be denyed that he is heire, it shall not be tryed where the birth was alledged, but where the land lyeth, for there the law presumes it shall be best knowne who is heire. But if the defendant make himselfe heire to a woman, for that is

[*] 6 Co. 14. Arundel's case.
[i] 45 E. 3. 5. a. 46 E. 3. 6 & 7. Gernon's case. 18 E. 3. 58. 11 H. 4. 56. b. 57. (Cro. Jac. 239.)

17 E. 3. 36. b. 39 Ass. 10. 38 Ass. 30. 35 Ass. 7.

the

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body of the county in which the action is triable. But these statutes do not extend to *indictments* or other *criminal* suits; nor has any act been yet made to include any such, except the 24 G. 2. c. 18, which only applies to actions on penal statutes. Why a regulation so convenient should be thus confined principally to civil cases, seems unaccountable. However, though the ancient law continues in force as to trials for crimes, yet it hath been long deviated from in practice; lord Hale taking notice, that even during his time he never knew an instance of a challenge for want of hundredors in treason or felony; and the sheriffs, as we are well informed, now always summoning juries from the county at large, without the least regard to the visne of each indictment. 2 Hal. Hist. Pl. C. 272. Under such circumstances, retaining the form of a *visne* from the particular place of the county in which the crime is alledged, merely serves to create delay and embarrassment in the distribution of criminal justice, whenever an accused person may chuse captiously to exert his right of challenging for default of hundredors.—[Note 191.]

the surer and more certaine side, and the mother is certaine, when perhaps the father is incertaine, and therefore there it shall be tryed where the birth is alledged, because they have more certaine conusance than where the land lyeth. And so it is where generally bastardy is alledged, the tryall shall be in like case *mutatis mutandis*. [*k*] If a man plead the king's letters patents, and the other party plead *non concessit*, it shall not be tryed where the letters patents beare date, for they cannot be denyed, but where the land lyeth.

[*k*] Mich. 31 & 32 Eliz. Rot. 365, in the King's Bench, inter Edan & Frankline, adjudge 3 Mar. Dier 129. 18 Eliz. Dier 353. 17 Eliz. Dier 342. (1 Roll. Abr. 604. Plowd. 232. Cro. Jam. 239. 9 Co. 47. a.)

Every tryall must come out of the neighbourhood of a castle, mannor, town, or hamlet, or place known out of a castle, mannor, towne or hamlet, as some forrests and the like, as before and by the authorities thereupon quoted appeareth.

Every plea concerning the person of the plaintife, &c. shall be tryed where the writ is brought, as it appeareth before.

When the matter alledged extendeth into a place at the common law, and a place within a franchise, it shall be tryed at the common law.

[*l*] 6 E. 4. 24. 9 H. 6. 46, 47. 21 H. 6. 4. 18 Ass. 7. 30 E. 3. 16, 17. 7 E. 4. 31. 27 H. 8. 30. 11 H. 4. 68.

[*l*] In an action against two, the one pleads to the writ, the other to the action, the plea to the writ shall be first tryed; for, if that be found, all the whole writ shall abate, and make an end of the businesse.

[*m*] 15 E. 4. 25. b. 9 H. 6. 46. 26 E. 3. 7 E. 4. 31. 39 E. 3. 16, 17. (Cro. Jac. 134. 1 Sid. 76. Hob. 54. 66. Noy 144. 2 Roll. Abr. 103.

[*m*] In a plea personall against divers defendants, the one defendant pleads in barre to parcell, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth to the whole, the plea that goeth to the whole, (that is) to both defendants, shall be first tryed; and of this opinion was *Littleton* in our bookes, for the tryall of that goeth to the whole; and the other defendant shall have advantage thereof, for in a personall action the discharge of one is the discharge of both. As for example, if one of the defendants in trespasse pleade a release to himselfe (which in law extends to both) and the other pleads not guilty (which extends but to himselfe); or if one plead a plea which excuses himself onely, and the other pleads another plea which goeth to the whole, the plea which goeth to the whole, shall be first tryed; for, if that be found, it maketh an end of all, and the other defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a plea reall it is otherwise; for every tenant may lose his part of the lands. [*n*] As if a *præcipe* be brought as heire to his father against two, and one plead a plea which extendeth but to himselfe, and the other pleads a plea which extends to both, as bastardy in the demandant, and it is found for him, yet the other issue shall be tryed, for he shall not take advantage of the plea of the other, because one joyntenant may lose his part by his misplea. [*o*] But where an issue is joyned for part, and a demurrer for the residue, the court may direct the tryall of the issue, or judge the demurrer first at their pleasure.

[*n*] 9 H. 6. 46. 39 E. 3. 16, 17.

[*o*] 10 Co. 54. and the bookes there cited.

[*p*] Mich. 21 & 22 Eliz. Dier 367. 5 Co. 36. b. Bainham's case. 39 E. 3. 2. b. 44 E. 3. 6. 11 H. 6. 13.

[*p*] If a *venire fac.* be awarded to the coroners where it ought to be to the sherife, or the visne commeth out of a wrong place, yet if it be *per assensum partium*, and so entred of record, ☞ it shall stand; for *omnis consensus tollit errorem* (1). And thus much of these excellent points of learning: and if you desire to know the institution and right use

[126. a.]

5 Co. 40. Dormer's case. (5 Co. 36. b. Hob. 5. 1 Sid. 193. 2 Roll. 635. 1 Sid. 339.) (5 Co. 40. b. Cro. Eliz. 664. 1 Sid. 269.) Vid. Sect. 234.

of

(1) The cases to this point disagree; but the most modern are with lord Coke. See Vin. Abr. *Trial*, S. a. 2.—[Note 192.]

of this triall by twelve men, and of the antiquitie thereof, and more of this matter, read the 234 Section hereafter, which is worthy of your observation.

"*Statute.*" This commeth of the *Latine* word *statutum*, which is taken for an act of parliament made by the king, the lords and commons, and is divided into two branches, generall and speciall. This statute here mentioned is a generall statute, and is darkely and obscurely penned.

Vid. 25 E. 3. ca. 18. F. N. B. 77. c. 26 E. 3. 73.

"*And if they be at issue.*" [q] Issue, *exitus*, a single, certaine, and materiall point issuing out of the allegations or pleas of the plaintife and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men. And it is twofold; a special issue, as here in the case of *Littleton*; or generall, as in trespasse, not guilty, in assise, *nul tort nul disseisin*, &c. And as an issue naturall commeth of two several persons, so an issue legal issueth out of two several allegations of adverse parties.

[q] Vid. Sect. 414. 7 H. 6. 43. 9 E. 4. 36. 36 H. 6. 15. 5 E. 4. 26. 11 H. 4. 79. (Mo. 80. 1 Ro. Rep. 86. 1 Leon. 78. 9 Co. 110. Cro. Cha. 164. 80. Doct. Plac. 256, 257. Cro. Jam. 87. 560. Doct. Plac. 187. Cro. Jam. 580. 586. 589. Hob. 233.) 7 E. 3. 34. (Cro. El. 372.)

And to make our bookes more easie to be understood concerning this point, it is good to set downe some necessary rules (among many other) concerning joyning of issues. An issue being taken generally referreth to the count, and not to the writ. As in an account the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of *T.*: the defendant pleadeth, that he was never his receiver in manner and forme, &c. this shall referre to the count, so as he cannot be charged but by the receipt by the hands of *T.*

[r] A speciall issue must be taken in one certain materiall point, which may be best understood, and best tryed.

[r] 20 E. 3. Issue 31. 22 E. 4. 28. 8 E. 3. 8. 9 H. 6. 18. 38 E. 3. 33.

[s] An issue shall not be taken upon a negative pregnant, which implyeth another sufficient matter, but upon that which is single and simple. As *ne dona pas per le fait* imply a gift by parol; therefore the issue must be *ne dona pas modo et formâ*.

[s] 21 H. 6. 9. b. 16 E. 4. 5. 24 E. 3. 32, 33. 75. 31 E. 3. Issue 17. 13 E. 3. ib. 27. 21 E. 3. 49. 30 E. 3. 8. 10 E. 3. 32. 22 E. 3. 13. 18 E. 3. Issue 35. 5 H. 7. 8. 31 Ass. 25. 12 E. 4. 4. 8. 2 H. 4. 23. 38 H. 6. 22. 40 E. 3. 5. 5 E. 3. 24.

[t] An issue joyned upon an *absque hoc*, &c. ought to have an affirmative after it. Two affirmatives shall not make an issue, unlesse it be lest the issue should not be tried.

[t] 12 El. Dy. 253. 22 H. 6. 19. 32 H. 6. 23. 2 R. 3. 6 H. 7. 5.

[u] Some issues be good upon matter affirmative and negative, albeit the affirmative and negative be not in precise words. As in debt for rent upon a lease for yeares, the defendant pleades, that the plaintife had nothing at the time of the lease made; the plaintife replyeth that he was seised in fee, &c. this is a good issue.

11 H. 4. 79. [u] 2 H. 7. 4. 5 H. 7. 12. 26. 11 H. 4. 83. 6 E. 4. 6. b. 26 H. 8. Dyer 6. in Formedon. 28 H. 8. Dyer 31. 18 H. 6. 8, 9. 15 E. 4. 32. 32 H. 6. 23. 7 H. 6. 27. 43 Ass. 4. 9 E. 4. 36. Pl. Com. 172. a. 36 H. 6. 15. (6 Co. 24.)

[w] Where the issue is joyned of the part of the defendant, the entry is, *et de hoc ponit se super patriam*; but if it be of the part of the plaintife, the entry is, *et hoc petit quòd inquiratur per patriam.*

[w] 26 H. 8. 3. 18 El. Dy. 353. (1 Sid. 215. 290. 340, 341. Cro. Cha. 164.

[x] There be some negative pleas that be issues of themselves,

[x] 22 H. 6. 57. 22 E. 3. 16, 17. 59. 33 H. 6. 21. 3 H. 7. 9. 12 E. 4. 13. 17 E. 3. 53. 77, 78. 24 E. 3. 50. 40 E. 3. 19.

whereunto

whereunto the demandant, or plaintife, cannot reply, no more than to a generall issue, which is, *et prædictus A. similiter.* As if the tenant do vouch, and the demandant counterplead that the vouchee or any of his ancestors had any thing, &c. whereof he might make a feoffment, he shall conclude, *et hoc petit quòd inquiratur per patriam, et prædictus tenens similiter.* So in a fine pleaded by the tenant, &c. the demandant may say, *quòd partes finis nihil habuerunt, et hoc petit quòd inquiratur per patriam, et præd' tenens similiter.* And so in a writ of dower the tenant pleads *unques seisie que dower*, he shall conclude, *et de hoc ponit se super patriam, et præd' petens similiter;* and so in many other cases; and of this opinion was *Littleton* in our bookes. [y] A man leaves his wife enseint with a child, issue shall not be taken that she was not enseint by her husband on the day of his death, for *filiatio non potest probari;* but the issue must be, whether she was enseint the day of his death (2).

[y] 41 E. 3. 21. b.

A pro-

(2) The case cited from the Year-Book of 41 E. 3. is a direct authority to this purpose. However it may be doubted, whether the doctrine continues to be law. At least it fails in principle, if it is founded on the notion that the presumption of the husband's being the father of every child the wife bears or conceives during the marriage, cannot be repelled by evidence to the contrary. Such a position indeed is asserted more than once by lord Coke in the present work, and may be met with in other books. Post. 244. a. 373. a. Vin. Abr. *Bastard*, A. 2. & B. But it never was an universal rule, lord Coke and all the authorities agreeing, that if the husband is beyond sea during the whole time of the wife's going with child, the issue is a bastard. Nor is the position in any degree true at present; for ever since Pendrel's case in the 5 Geo. 2. it has been settled, that not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility or even improbability of the husband's being the father, is admissible. 1 Blackst. Comment. 5th edit. 457. 2 Stra. 925. 3 P. Wms. 365. Bott's Poor Laws, 2d ed. 105. Our books do not state on what grounds Pendrel's case was determined. But very ancient authorities are not wanting to justify over-ruling the doctrine which prevailed in lord Coke's time. Bracton taking notice of the presumption, that marriage proves legitimacy, adds, *et semper stabitur huic præsumptioni, donec probetur contrarium, ut, ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel aliâ causâ impeditus, vei erat in eâ invalitudine ut generare non posset.* Bract. fo. 6. a. In another place the same author is still more explicit, for he states it to be a violent presumption against the child's legitimacy, if the husband is proved, *propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam coeundi, parmultum tempus non concubuisse cum uxore;* or *si probetur, quòd extra regnum vel provinciam per biennium et ultra longè extiterit, quòd vehementer præsumi posset, quòd ad uxorem accessum habere non potuit.* Bract. fo. 63. b. There are also other passages to a like effect both in Bracton and Fleta. Bract. fo. 70. b. 278. a. Flet. lib. 1. c. 15. It is worthy remark too, that not only these limitations of the rule of *pater est quem nuptiæ demonstrant*, but even the words of them are in a great degree borrowed from the text of Justinian. See Dig. lib. 1. tit. 6. l. 6. But this by no means ought to lessen their value with our common lawyers. On the contrary, it should be deemed an additional reason for referring to them; because the trial of *general* bastardy belongs to the ecclesiastical courts, and these, in this instance, as well as in others, are much swayed by the authority of the Roman law. See further on this subject Godolph. Repertor. Canon. 477. Bryd. Law of Bastard. 83. Voet ad Pandect. lib. 1. tit. 6. sect. 6. Ayl. Parerg. tit. *Bastardy*, and the same title in the Abridgments.—[Note 193.]

[z] A protestation availeth not the partie that taketh it, if the issue be found against him; and therefore if the issue be found for the villeine, he is infranchised for ever. And yet in some special case, albeit the issue be found against him, that maketh the protestation, yet he shall take benefit of his protestation. [*] As if a man entreth into warrantie, and taketh by protestation, the value of the land, albeit the plea be found against him, yet the protestation shall serve him for the value.

[z] 10 E. 4. Protest. 5. 10 E. 4. 12. 32 Ass. 9. 30. E. 3. 14. 9 H. 6. 39. Vid. Sect. 192. (Plowd. 276. Cro. Cha. 365. Doct.Plac.296.)
[*] 30 E. 3. 14.

Sect. 194.

ALSO, the lord may not mayme (ne poet mayhemer) *his villeine; for if he mayme his villeine, he shall of that be indicted* (il serra de ceo indite) *at the king's suit, and if he be of that attainted, he shall for that make grievous fine and ransome to the king. But it seemeth, that the villeine shall not have by the law any appeale of mayhem against his lord; for in appeale of mayhem a man shall recover but his damages; and if the villeine in that case recover dammages against his lord, and hath thereof execution; the lord may take that the villeine hath in execution from the villeine, and so the recovery is void, &c.*

"*MAYME.*" *Mayhemer*, [a] or *mehaigner*, a *French* word, of which commeth *mayhem*, *mahemium*, *(id est) membri mutilatio*, & and *membrum est pars corporis habens destinatam operationem in corpore. Mayhemium verò dici poterit, ubi aliquis in aliquâ parte sui corporis effectus sit inutilis ad pugnandum.* And the law hath so appropriated this word *mayhem*, which our author here useth, to this offence, as *mayhemavit* cannot be expressed by any other word, as *mutilavit*, *truncavit*, or *detruncavit*, or the like.

[126. b.]

[a] Staund. l. 1, ca. 41. Glanvil. lib. 14, ca. 7. Bract. lib. 3, fol. 144, 145. Brit. cap. 25, fol. 48, 49. Flet. lib. 1, ca. 38. (Post. 288. 1 Sid. 215.)

Mirror, cap. 1, sect. 9. Vide Sect. 1. (4 Co. 39. b.)

"*He shall be indicted,*" *il serra indite*, or rather *endite*, and so is the original; for it commeth of the *French* word *enditer*, and signifieth in law an accusation found by an enquest of 12 or more upon their oath; and the accusation is called *indictamentum*. And as the appeale is ever the suit of the partie, so the inditement is alwaies the suite of the king, and as it were his declaration. [b] Some derive it from the *Greeke* word ἐνδίκνυμι to accuse.

[b] Lamb. Just. of Peace.

"*Shall not have, &c. any appeale of mayhem.*" Because in that appeale he shall recover but damages, which the lord after execution might take againe, and so the judgement be *inutile* and illusory, and *sapiens incipit à fine*. And the law never giveth an action, where the end of it can bring no profit or benefit to the plaintife. But here it is to be observed, that, albeit the party grieved can have no action for the mayhem, yet at the king's suite he shall be punished therefore, for the reason hereafter expressed in this Section. [d] And in ancient time there were appeales *de plagis et de imprisonamento;* but they are out of use, and turned to actions of trespasse.

[c] Vide 1 H. 4. 6. b. (4 Co. 43.)

[d] Fleta, lib. 1, cap. 40. Britt. cap. 25. Bract. 145. Mirr. cap. 3.

"*Fine,*" *finis*. Here fine signifieth a pecuniarie punishment for

for an offence, or a contempt committed against the king, and regularly to it imprisonment appertaineth. And it is called *finis*, because it is an end for that offence. [*e*] And in this case a man is said *facere finem de transgressione, &c. cum rege*, to make an end or fine with the king for such a transgression. It is also taken for a summe given by the tenant to the lord for concord, and an end to be made. [*f*] It is also taken for the highest and best assurance of lands, &c.

[*e*] Regist. Judic. 25. 8 Co. 59. Beecher's case. (8 Co. 38.)

[*f*] Vide Sect. 74. 174. 441. (11 Co. 42.)

Here it is good to see, what a fine differeth from an amerciament. [*g*] Americament in *Latine* is called *misericordia*, for that it ought to be assessed mercifully. And this ought to be moderated by affeerement of his equals, or else a writ *de moderatâ misericordiâ* doth lie. And thereof *Glanville* saith thus. [*h*] *Est autem misrecordia domini regis, quâ quis per juramentum legalium hominum de vicineto eatenus amerciandus est, ne aliquid de suo honorabili contenemento amittat.*

[*g*] 8 Co. 59. Beecher's case. F. N. B. 76. (1 Ro. Abr. 238.)

[*h*] Glanvil. lib. 9, cap. 11. Magna Charta, cap. 14. Flet. lib. 2, c. 43, & 60, & lib. 1, cap. 43. Bract. lib. 3, fol. 116.

[*i*] The cause of an amerciament in plea reall, personall, or mixt (where the king is to have no fine) is, for that the tenant or defendant ought to render the demand (as he is commanded by the king's writ) the first day; which if he do, he shall not be amerced. So as for the delay that the tenant or defendant doth use, he shall be amerced. [*k*] And albeit the amerciament cannot be imposed, nor the king fully intitled thereunto, untill judgement be given, because by the judgement the wrong is discerned; yet a pardon before judgement, after judgement given, shall discharge the party, because the originall cause, viz. the delay, &c. is pardoned. [*l*] What then if a *præcipe* be brought against an infant, and, hanging the plea, he commeth of full age? ☞ He shall be amerced for the delay after his full age. So likewise if the demandant or plaintife be nonsuit, or judgement given against him, he shall be likewise amerced *pro falso clamore*. 8 Co. 62. b.) [127. a.]

[*i*] 22 E. 3. 1 & 2. 14 E. 3. Amerciam. 16. 8 R. 2. ibid. 26, &c.

[*k*] Pl. Com. 401. Cole's case. 37 H. 6. 21. 5 Co. 49. Vaughan's case.

[*l*] Vaughan's case ubi supra. Beecher's case ubi supra. (1 Roll. Rep. 11.) 5 Co. 49. a. Cro. Cha. 410.

[*m*] And for the payment of this amerciament the demandant or plaintife, &c. shall finde pledges; and those demandants or plaintifes that shall finde no pledges, (as the king, the queene, an infant, &c.) shall not be amerced. And therefore when such are demandant or plaintife, the writ shall not say, *Si rex, &c. fecerit te securum de clamore suo prosequendo.*

[*m*] F. N. B. 31. f. 47. c. & 101. a. Bract. lib. 4, fol. 254. 17 E. 3. 75. 18 E. 3. 2. Br. tit. Amerc. 53. 43 Ass. 45. &c.

[*n*] If a writ doe abate by the act of the demandant or plaintife, or for matter of forme, the demandant or plaintife shall be amerced; but if it abate by the act of God, as by the death of one, where there is two or the like, there shall be no amerciament. And to an amerciament imprisonment belongeth not, as it doth to a fine or ransome. If you desire to read more of fines and amerciaments, vide 8 *Co.* 38, 39, &c. *Greslye's* case; and 11 *Co.* 43, 44. *Godfreye's* case (1).

[*n*] Beecher's case. 8 Co. 60. b. (1 Ro. Abr. 213.)

It

(1) In very ancient times amercements were a considerable object in our law, as appears by the *Great Charter's* prohibiting their exorbitancy, and the writ of *moderata misericordia* for relieving against excessive amercements in courts not being of record. F. N. B. 75. a. But so far as regards amercements

[o] It is to be knowne that *wite, wita,* is an old *Saxon* word, and signifieth an amerciament; as *fledwite,* an amerciament for fleeing or being a fugitive; and so is *flemiswite, blodwite* an amerciament for drawing of blood, *ferdwite* concerning warfare; and so *letherwite, childwite, wardwite,* and the like. Sometimes it signifieth forfeiture, sometimes freedom, or acquittall.

[o] Fleta, lib. 1, cap. 47. Stat. de exposit. verborum.

[p] And *bote* is also an ancient *Saxon* word, and sometimes signifieth amerciament, or compensation, as *theftbote, manbote;* or freedome from the same, as *brigbote, castlebote, burghbote.*

[p] Lamb. explication of Saxon words. Leges Inæ, cap. 19.

Wera or *were* [q] sometimes signifieth amerciament or compensation, but properly *Wera Anglicè idem est in Saxonis linguâ, vel pretium vitæ hominis appretiatum;* which and the like words you shall often reade in ancient charters.

[q] Lamb. ubi supra, and Fleta, lib. 1, cap. 47.

"*Ransome,*" [r] *Redemptio* is here taken for a grand summe of money for redeeming of a great delinquent from some heynous crime, who is to be captivate in prison untill he payeth it. Some hold it to amount to his whole estate, and others hold that ransome is a treble fine. [s] But in legall understanding a fine and ransome are all one; for, upon the statute of *Merlebridge,* cap. 3. upon these words, *Non ideo puniatur dominus per redemptionem,* [t] the tenant shall not have (where the lord distraineth within his fee where nothing is behind) an action of trespass *quare vi et armis* against his lord; for therein the lord should be punished by redemption, that is, by fine, and in that action the fine is very small. And this is manifest by many authorities in all succession of ages; and this appeareth by our author in this place; for he saith, *He shall for that make grievous fine and ransome;* where fine and ransome must of necessitie, in his opinion, be taken for all one; for if the fine and ransome were divers, then should the party that mayhemed the villeine, pay two summes, one for a fine, and another for a ransome, which never was done. And aptly a redemption and a fine is taken to be all one; for, by the payment of the fine, he redeemeth himself from imprisonment, that attendeth the fine, and then there is an end of the businesse.

[r] Dier, 6 Eliz. 232.

[s] See the Second Part of the Institutes, Merlebr. cap. 3. (2 Inst. 106. Plowd. 66. b. F. N. B. 90. c. 4 Co. 11. b. Post. 281. b.)

[t] 5 H. 7. 10. 48 E. 3. 5, 6. 41 E. 3. 26. 44 E. 3. 13. 2 H. 4. 4. 11 H. 4. 78. 1 H. 6. 6. 9 H. 7. 14. 8 E. 4. 15. 10 E. 4. 7. 20 E. 4. 3. 21 E. 4. 3. Mich. 17 & 18 Eliz. Bevel's case. 4 Co. 11, & 9 Co. 76. Combe's case.

It signifieth properly a summe of money paid for the redemption of a captive, and is compounded of *re* and *emo,* that is, to redeeme or buy again. And it is to be knowne, that [u] by the ancient law of *England,* if the defendant in an appeale of mayhem had been found guilty, the judgement against the defendant had beene, that he should lose the like member that the plaintife lost by his means; as if the plaintife had lost an hand, the defendant also should lose one, *et sic de cæteris;* in respect whereof the writ said, [w] *felonicè mahemavit,* for that the defendant should lose a member.

[u] 40 Ass. 9. Mirror, cap. 4, & ca. 5, sect. 18. Britt. cap. 25, fol. 48. Bract. lib. 3, fol. 144, 145. Fleta, l. 1, cap. 38.

[w] Bract. ubi supra.

Brit. cap. 3, fol. 77. b. (4 Co. 43. Post. 288. a.)

Alwaies at the common law, when the defendant should lose life or member, the writ said *felonicè, &c.* And now albeit the law

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ments on judgments in civil suits in the king's courts of record, they have *long* been *mere form.* Yet in lord Coke's time it was error to omit the entry of them. 5 Co. 49. a. Now indeed by the 16 & 17 Cha. 2. c. 8, such an error it amendable.—[Note 194.]

law be changed (for at this day the plaintife shall, as our author saith, recover but dammages) yet the writ of appeale saith still *felonicè*.

Note, the life and members of every subject are under the safegard and protection of the king; for, as *Bracton* [x] saith, *Vita et membra sunt in potestate regis.* And therewith agreeth a notable record, *Pasch.* 19 *E.* 1, *coram rege*, Rot. 36, *Northt. Vita et membra sunt in manu regis*, to the end that they may serve the king and their countrie, when occasion shall be offered. Nay, the lord of the villeine, for the cause aforesaid, cannot mayheme the villeine, but the king shall punish him for mayheming of his subject (for that hereby he hath disabled him to do the king service) by fine, ransome, and imprisonment, untill the fine and ransome be paid. So as there is a manifest diversity betweene a ransome and an amerciament; for ransome is ever when the law inflicteth a corporal punishment by imprisonment (and so is also a fine); but otherwise it is of an amerciament, as hath been said. And [y] ancients have said, that *ransome n'est forsque redemption de paine corporel per fine des deniers.* This offence of mayhem is under all felonies deserving death, and above all other inferior offences; so as it may be truly said of it that it is, *Inter crimina majora minimum, et inter minora maximum* (z). And in my circuit in *anno* 1 *Jacobi regis*, in the county of *Leicester*, one *Wright*, a young strong and lustie rogue, to make himselfe impotent, thereby to have the more colour to begge or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indited, fined and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid.

[x] Bract. lib. 1, fol. 6. Pasch. 19 E. 1. coram Rege, Rot. 36. Northt.

[y] Mirror, cap. 5, sect. 1 & 3.

[127. b.]

"*Void, &c.*" Here by *(&c.)* is implyed a maxime in law, *Quòd inutilis labor et sine fructu non est effectus legis.* And againe, *Non licet, quod dispendio licet.* And, *Sapiens incipit à fine;* and, *Lex non præcipit inutilia.* [z] Therefore the law forbiddeth such recoveries, whose ends are vaine, chargeable, and unprofitable.

[z] Vide Sect. 273 and 578.

Sect. 195.

ALSO, if a villeine be demandant in an action real, or plaintiffe in an action personall against his lord, if the lord will plead in disabilitie of his person, he may not make plaine (1) *defence* (il ne poit faire pleine defence); *but he shall defend but the wrong and the force, and demand the judgement, if he shall be answered, and shew his matter by and by* (et monstra son matter maintenant*), *how he is villeine, and demand judgement if he shall be answered.*

* *The translation of* maintenant, *it should seem, is* presently, *or* forthwith, *or* without delay, *and not,* "*by and by*," *as it is here interpreted. See Mr. Ritso's Intr. p.* 111.

"*DEMANDANT*,"

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(2) Since lord Coke's time, *premeditated* maiming, accompanied with *laying in wait*, has been made a *capital* felony. See 22 and 23 Cha. 2. c. 1, commonly styled the *Coventry* act.—[Note 195.]

(1) It should be *full*.

"*DEMANDANT*," *Petens*, is hee which is actor in a reall action, because he demandeth lands, &c. and *plaintife*, *quærens*, in actions personals and mixt, *quia queritur de injuriâ*, &c. *Tenant*, *tenens*, in reall actions; and *defendant*, *defendens*, in actions personall and mixt.

"*Defence*" (2) commeth of the word *defendo*, so called of the manner of the pleading, viz. *prædict. A. B. defendit vim et injuriam*, &c.

For example, in a personall action brought by *A. B.* against *C. D.* the defence is, *Et prædictus, C. D. defendit vim et injuriam quando*, &c. *et damna, et quicquid quod ipse defendere debet*, &c.

In this defence there be three parts to be considered. First, when he defendeth the wrong and the force, this hath a double effect, viz. to make himselfe partie to the matter; and this is the reason, that the defendant in this and the like actions can plead no plea at all, before he makes himself partie by this part of the defence; as it appeareth here by *Littleton*, that [*a*] if the defendant will plead in disabilitie of the person of the plaintiffe, he must first make himselfe partie by this first part of the defence. Neither can he plead to the jurisdiction of the court, without this part of the defence (3). Secondly [*b*], by the defence of the damages, he affirmeth that the plaintiffe is able to sue, and (upon just cause) to recover damages (4). Thirdly, and by the last part, viz. and all that which he ought to defend, when and where he ought, he affirmeth the jurisdiction of the court. *Et sic de similibus*. And of such necessitie it is for the tenant or defendant to make a lawfull defence, as [*c*] albeit he appeareth and pleads a sufficient barre without making defence, yet judgment shall be given against him.

[*a*] 40 E. 3. 36. 14 H. 6. 18. 35 H. 6. 12. 1 E. 4. 15.

[*b*] 29 E. 3. 23. 8 H. 6. 3.

[*c*] 36 H. 6. Judgement 58.

[*d*] If villenage be pleaded by the lord in an action reall, mixt or personal, and it is found that he is no villaine, the bringing of a writ of error is no enfranchisement; because thereby he is to defeate the former judgement; and if, in the mean time, the plaintiffe or demandant bring an action against the lord, he need make no protestation, so long as the record remaines in force, for at that time he is free, but the lord shall be restored to all by a writ of error.

[*d*] 18 E. 4. 6, & 7.

Sect.

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(2) It has been well observed, that *defence*, as applied in our law pleadings, means, not a *justification*, which is the ordinary signification, but a *denial*. 3 Blackst. Comm. 8th ed. 296. Had this occured to the author of the book on *real* actions, he would not have been at a loss for the reason of the *tenant's defending the demandant's right* in a writ of right. Booth on Real Actions 112. —[Note 196.]

(3) Held *contra* by three judges against Holt chief justice. Carth. 220.

(4) Adjudged acc. on Demurrer, Carth. 229.

Sect. 196.

ALSO, there are sixe manner of men, (5) *who, if they sue, judgement may be demanded, if they shall be answered, &c. One is, where a villeine sueth an action against his lord, as in the case aforesaid.*

[c] Bract. lib. 5, fol. 421. Britton, cap. 49, fol. 125. Mirror, cap. 2, sect. 18. 13 H. 4. Surety 12. A Gardian shall disable.

"*ONE is where a villeine sueth an action, &c.*" *Littleton* here ☞ rehearseth six kinds of disabilities of the person, disabling him to sue any action reall, personall, or mixt. [128. a.]

(Post. 352. b.)

"*If they shall be answered.*" This is the legall conclusion of the plea, when the plea is in disabilitie of the person. And of the verbe *respondere* came *responsalis*, often used in the ancient authors of the law. [f] *Responsalis* was he, that was appointed by the tenant or defendant, in case of extremity and necessitie, to alledge the cause of the parties absence, and to certifie the court upon what tryall he will put himselfe, viz. the combate or the country. So as his power was more than the essoinor, which casteth an essoigne only to excuse the absence of the party, as an estranger, which casteth a protection, doth. For by the common law, the plaintife or defendant, demandant or tenant, could not appeare by attornie without the king's special warrant by writ or letters patents, but ought to follow his suite in his owne proper person (by reason whereof there were but few suits). [g] *Abusion est a reteiner attorny sans breve de la chancerie.* And therefore *Bracton* saith truly, [h] *Attornatus hæc omnia facere potest* (that is, plead all manner of pleas). *Est igitur magna differentia inter attornatum et responsalem.* So as the statutes that give the making of attorneyes, have worne out *responsales.* Now what manner of men attorneys ought to be, or rather what they ought not to be, heare what antiquity hath said: [i] *Attorneyes poient estre touts ceux, aux queux ley voile suffer. Fems ne poient estre attorneyes, ne enfans, ne serfs, ne nul que est en garde ou auterment faut de foy, ne nul criminous, ne nul essoigne, ne nul que n'est a le foy le roy, ne nul que ne poet este counter, &c.*

[f] Bract. lib. 4, fol. 212. b. & lib. 5, fol. 349. Fleta, li. 6, c. 11. Glanvil. lib. 11, cap. 1. Brit. ca. 126. Vid. W. 1. c. 43. F. N. B. 25. C. Regist. 9. (F.N.B. 156. e.)

[g] Mirr. ca. 5, sect. 1.

[h] Bracton ubi supra.

(5 Co. 89. 7 Co. 74.)

[i] Mirror, ca. 2, sect. 21.

Sect. 197.

THE second is, where a man is outlawed upon an action of debt or trespasse, or upon any other action or indictment, the tenant, or the defendant, may shew all the matter of record, and the outlawry, and demand judgement, if he shall be answered; because he is out of the law to sue an action during the time that he is outlawed.

"*THE*

(5) In L. and M. Roh. P. and Red. the reading is *against whom.*

"*THE second is* [*k*] *where a man is outlawed, &c.*" But these generall words receive a distinction, viz. [*l*] if an executor or an administrator sueth any action, utlary in the plaintife shall not disable him: because the suit is *in auter droit*, that is, in the right of the testator, and not in his owne right. And for the same reason, [*m*] a maior and commonalty shall have an action, though the maior be outlawed. [*n*] In a writ of error to reverse an utlary, utlary in that suit, or at any stranger's suit, shall not disable the plaintife, because if he in that action should be disabled if he were outlawed at several mens suits, he should never reverse any of them. [*o*] In an attaint outlary in the plaintife cannot be pleaded in disability of the person (1). [*p*] Outlary in *Chester* or *Durham* shall not disable the plaintife in any court at *Westminster, &c.* [*q*] *Minor verò, et qui infra ætatem* 12 *annorum fuerit, utlagari non potest, nec extra legem poni; quia ante talem ætatem non est sub lege aliquâ nec in decennâ.* [*r*] He that is abjured the realme may be disabled, for that he is *extra legem*, and yet he is not properly outlawed.

[*k*] Bracton, lib. 5. fol. 421. Britton, ca. 22, fol. 39. Mirr. ca. 3, de exceptions a prövors ca. 4, defaults punishable.
[*l*] 21 E. 4. 49. b. 21 H. 6. 30. b. 14 H. 6. 15.
[*m*] 12 E. 4, fol. 12.
[*n*] 7 H. 4. 40.
[*o*] 23 H. 8. c. 3. 2 H. 7. 7. (1 Sid. 43. Cro. Jam. 425. 616.)
[*p*] Mirr. ca. 3. acc. 12 E. 4. 16. 33 H. 6. ca. 2.
[*q*] Bract. lib. 3, fo. 125. 3 H. 5. Utlagary 11. 38 E. 3. 5. [*r*] Britton, fo. 39.

"*Shew all the matter of record.*" Here note two things: first, by this word (*shew*), that [*s*] when any man pleads an utlary in disability of the person, he must ☞ shew forth the record of the outlawrie *maintenant sub pede sigilli*, (because the plea is but dilatorie) unlesse the record be in the same court. But if he plead an outlawrie in barre, if it be denyed, he shall have a day to bring it in.

[128. b.]

[*s*] 20 E. 2. Coron. 232. 19 Ass. p. 10. 3 H. 6. 15. b. 37 H. 6. 23. 5 H. 7. 6 Eliz. Dyer 228. F. N. B. 244.

Stanf. Pl. Coron. 105. (Noy 74. 143.) (8 Co. 142. b.)

Secondly, [*t*] before the defendant can disable the plaintife, the outlawrie must appeare of record; and the judgement after the *quinto exactus* given by the coroners in the county court is not sufficient, until the writ of *exigent* be returned, and the outlawrie appeare of record: which is manifest by *Littleton's* owne words, (viz.) *matter of record;* whereof see more hereafter, Sect. 503.

It is to be observed, that there be two kinds of appearances before the *quinto exactus*, to avoid the outlawry, viz. an appearance in deed, that is, to render himselfe, &c. and the other is by an appearance in law, [*u*] that is, by purchasing a *supersedeas* out of the court where the record is, which is an appearance of record: and therefore, though it be not delivered to the sherife before the *quinto exactus*, yet it shall avoid the outlawrie; and so are the bookes, that speake hereof, to be intended.

[*t*] 28 Ass. 49. 12 E. 3. Utlagarie, 3 M. 4 & 5 El. Dyer 222. 38 E. 3. 13. (Post. 228. b. 5 Co. 111.)

[*u*] Tr. 44. El. in Com. Banc. inter Mere & Dolburie. 33 H. 6. 1. 11 H. 4. 34. Dyer 3 El. 192.

5 El. 223. 4 H. 4. le 1. case. 8 H. 4. f. 7. 37 H. 6. 17. 33 E. 3. Ert. 77. 21 H. 6. 20. (Mo. 73.)

[*w*] If a man be outlawed at the suit of one man, all men shall take advantage of this personall disability. And so it is in case of *alien née*, and of *excommengement*. But otherwise it is in case of villenage, for that disability is onely given to the lord.

[*w*] 33 H. 6. 19. b. &c.

"*During the time that he is outlawed.*" [*x*] If the defendant plead an outlawrie in the plaintife, in disability of his person, and the

[*x*] 44 E. 3. 27. (Dect. Plac. 162. 396.)

(1) Rot. Parl. 20 H. 6. n. 18. c. 2. Hal. MSS.

the plaintife after that plea pleaded purchase a charter of pardon; because the charter hath restored him to the law, the defendant shall answer. So note, the disability abateth not the writ, but disinableth the plaintife, untill he obtaineth a charter of pardon; and so it appeareth here by *Littleton*.

[y] 9 El. Dyer 262. 7 H. 4. 4. b. Stanf. Pl. Coron. 188. 5 Co. 109, in Foxleye's case. 28 E. 3. 92. 29 Ass. p. 47. 63. 30 H. 6. 5. (Doct. Plac. 395.)

"*Judgement if he shall be answered.*" [y] If the ground or cause of the action be forfeited by the outlawry, then may the outlawry be pleaded in barre of the action; as in an action of debt, detinue, &c. But in reall actions, or in personall, where dammages be incertaine, (as in trespasse of batterie, of goods, of breaking his close, and the like) and are not forfeited by the outlawrie, there outlawry must be pleaded in disability of the person.

[z] Mir. c. 1, sect. 3, &c. 3, & 4. sæpe. cap. 5, sect. 1.

[z] And it is to be observed, that, in the reign of king *Ælfred*, and untill a good while after the Conquest, no man could have been outlawed but for felonie, the punishment whereof was death. But now the law is changed, as it appeareth by that which hath beene sayd. And hereby you shall understand old bookes and records, which say, that an outlawed man had *caput lupinum*, because he might be put to death by any man, as a wolfe that hateful beast might.

[*] Fleta, lib. 1, ca. 27. Bract. li. 5, f. 421. Brit. f. 20. b.

[*] *Utlagatus et waiviata capita gerunt lupina, quæ ab omnibus impune poterunt ampitari; merito enim sine lege perire debent, qui secundum legem vivere recusant.* And another saith,

[a] Mir. ca. 4, sect. 4, defaults punishable.

[a] *Utlage pur felonie teigne leu pur loup, et est criable woolfeshered, pur ceo que loup est beast haye de touts gents, et de ceo en avant list al ascun de le occider al foer del loup, dont custome soloit estre de porter les testes al chiefe lieu del county, ou de la franchise, et soloit la avoire demy mark del countie pur chescun teste de utlage et de loupe.* And this agreeth with the law before the Conquest,

[b] Lamb. fol. 128.

[b] *Utlagatus lupinum gerit caput, quod Anglicè woolfeshead dicitur; et hæc est lex communis et generalis de omnibus utlagatis.*

[c] 2 Ass. P. 3. 2 E. 3. tit. Coron. 148.

[c] But, in the beginning of the raigne of king *Edward* the third, it was resolved by the judges, for avoyding of inhumanity, and of effusion of Christian blood, that it should not be lawfull for any man, but the sherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he should undergoe such punishments and paines of death as if he had killed any other man; and so from thenceforth the law continued untill this day. (*Nota, wolfeshead* and *wolferfod* is all one.)

[*] Bracton, lib. 5, fol. 421. 8 H. 6. 9. b. 40 E. 3. 5. 35 H. 6. 6. 40 E. 3. 2.

[*] And after in *Bracton's* time, and somewhat before, processe of outlawry was ordained to lie in all actions that were *quare vi et armis*, which *Bracton* calleth *delicta*; for there the king shall have a fine (1). But since, by divers statutes, processe of outlawry

(1) Whether the common law gives process of outlawry against crimes, being merely *constructive* breaches of the peace, was questioned in a late case before the king's bench on a *libel*. But the chief justice, in delivering the court's judgment, spoke at large to prove, that such process lies against crimes *universally*. Mr. Wilkes's case 4 Burr. v. 4. page 2537. However, the reasoning, on which this opinion is grounded, stands opposed by a former judgment of the common pleas on a prior case relative to the same gentleman. 2 Wils. 151. But it was adopted by both houses of parliament, when, in this case, they resolved, that privilege of parliament doth not extend to *libels*. See Annual Reg. for 1764. The arguments for the contrary opinion are forcibly expressed in

outlawry doth lie in account, debt, detinue, annuity, covenant, *action sur le statute de* 5 Rich. 2. *action sur le case*, and in divers other common or civill actions. But now let us heare what *Littleton* will say unto us.

Sect. 198.

THE third is an alien, which is born out of the ligeance (2) *of our soveraigne lord the king, if such alien will sue an action reall or personal, the tenant or defendant may say, that he was borne in such a country, which is out of the king's allegeance, and aske judgment if he shall be answered.*

[129. a.] "*ALIEN.*" [a] *Alienigena* is derived from the *Latine* word *alienus*, and according to the etymologie of the word, it signifieth one borne in a strange country, under the obedience of a strange prince or country, (and therefore *Bracton* saith, that this exception, *propter defectum nationis*, should rather be *propter defectum subjectionis*) or as *Littleton* saith, (which is the surest) out of the liegeance of the king. Note, here *Littleton* saith not *out of the realme*, but *out of the ligeance*; for he may be borne out of the realme of *England*, yet within the liegeance. And he that is borne within the king's liegeance is called sometime a *denizen*, *quasi deins née*, borne within, and thereupon in *Latine* called *indigena*, the king's liegeman; for *ligeus* is ever taken for a naturall borne subject.

[a] Bract. lib. 5, fol. 415. 427. Mir. c. 1, sect. 3, c. 5, sect. 1, & ca. 3, except aprovers. Flet. li. 6, c. 47. Brit. fo. 29. 13 E. 3. Bre. 677. 25 E. 3. de Natis ultra mare. 31 E. 3. Cosinage 5. 42 E. 3, 2. 9 E. 4. 7. 11 H. 4. 26. 7 Co. 1. Calvin's case.

14 H. 4. 19, 20. 3 H. 6. 55. 22 H. 6. 38. Stanf. Pl. Cor. 197. a. Pl. Com. 268, per Sanders. Vid. Sect. 1. 439, 440, 441.

But many times in acts of parliament, *denizen* is taken for an alien borne, that is infranchised or denizated by letters patent, whereby the king doth grant unto him, [b] *quòd ille in omnibus tractetur, reputetur, habeatur, teneatur, et gubernetur, tanquam ligeus noster infra dictum regnum nostrum Angliæ oriundus, et non aliter, nec alio modo.* But the king may make a particular denization: [c] as he may grant to an alien, *quòd in quibusdam curiis suis Angliæ audiatur ut Anglus, et quòd non repellatur per illam exceptionem, quòd sit alienigena et natus in partibus transmarinis*, to enable him to sue onely. The severall senses of which word must be gathered *ex antecedentibus, adjunctis, et consequentibus*; and they that take him in that sense, derive the word from *donaison*, (i. e.) *donatio*, because his freedome is given unto him by the king.

(2 Inst. 741.)

[b] 9 E. 4. f. 8. Pl. Com. 130, b.

[c] Rot. Parl. 22 E. 1. Elias de Daubenie.

There is another kind, and that is an alien naturalized, and that must be by act of parliament. And this alien naturalized to all intents and purposes is as a naturall borne subject (1), and differeth

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in a protest by some of the lords, who were against making such a resolution. Journ. Dom. Proc. 29 Nov. 1763.—[Note 197.]

(2) Ubi natus in partibus transmarinis *shall not be an alien. See Hill.* 13 *E.* 1. rot. 1. Hal. MSS.—[Note 198.]

(1) But now by the 12 & 13 W. 3. c. 2, naturalized persons are incapacitated

fereth much from denization by letters patent; for if he had issue in *England* before his denization, that issue is not inheritable to his father; but if his father be naturalized by parliament, such
(Cro. Cha. 601.) issue shall inherite. So if an issue of an *Englishman* be borne beyond sea, if the issue be naturalized by act of parliament (2), he shall inherit his father's lands; but if he be made denizen by letters patent, he shall not; and many other differences there be betweene them.

Vide Calvin's case ubi supra.

"*Ligeance*," *à ligando*, being the highest and greatest obligation of dutie and obedience that can be. Ligeance is the true and faithful obedience of a liegeman or subject to his liege lord, or soveraigne. *Ligeantia est vinculum fidei: ligeantia est legis essentia.*

Ligeantia domino regi debita est duplex.

- *Perpetua,*
  1. *Originaria, sive naturalis, sive nata* [d]; and this is alwayes absolute and incident inseparable. *Nemo patriam, in quâ natus est, exuere, nec ligeantiæ debitum ejurare possit.*
  2. *Data, aut per denizationem, aut per naturalizationem (ut supradictum est) et ista ligeantia per denizationem potest esse sub conditione.*
- *Temporanea aut,*
  - *Localis, quia quilibet alienigena, qui in hoc regno sub protectione regis degit domino regi ligeantiam debet.* And if he be indicted of high treason, the indictment shall say, [e] *contra ligeantiæ suæ debitum; et ideo dicitur temporanea et localis, quia non durat, nisi quousque infra regnum moratur.*
  - *Limitata*, as when one is made denizen for life, or in taile. [f] But one cannot be naturalized, either with limitation for life, or in taile, or upon condition: for that is against the absolutenesse, puritie, and indebility of naturall allegiance.

[d] 13 El. Dier. fo. 300. b. Doctor Storie's case.

(Hob. 271.)

[e] 3 & 4 P. & M. Di. 144. 7 Co. 6, &c. Calvin's case.

[f] 9 E. 4. 7. Calvin's case ubi supra. (Cro. Jam. 539. 2 Bo. Rep. 95.)

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pacitated from being of the privy council, members of either house of parliament, or enjoying any office or place of trust, civil or military, or from having any grant of lands or other hereditaments. The 1 G. 1, goes still further; for it enacts, that no bill of naturalization shall be received without a clause to this effect. 1 G. 1. st. 2. c. 4. s. 2. But when any foreigner, distinguished by eminence of rank or services, is naturalized, it is usual, first to pass an act for the repeal of these statutes in his favour, and then to pass an act of naturalization without any exception.—[Note 199.]

(2) This imports a special act of parliament to be necessary. But what ever the law might be in lord Coke's time, now, by several modern statutes, persons born beyond sea, if their fathers, or paternal grandfathers, were natural-born subjects, are likewise made so, though with an exclusion of some unfavoured persons. 7 Ann. c. 5. s. 3. 4 G. 2. c. 21. 13 G. 3. c. 21. See ante fo. 8. a. note 1.—[Note 200.]

[*] An abbot, prior, or prioresse alien, shall have actions reall, personal, or mixt, for any thing concerning the possessions or goods of his monastery here in *England*, though he be an alien borne out of the king's ligeance; because he bringeth it not in his owne right, ☞ but in the right of his monastery, and not in his naturall but in his politique capacity (1).

[129. b.]

[*] 13 E. 3. Br. 264. 20 E. 3. Annuity 24. 17 E. 3. 21. 40 E. 3. 10. 27 Ass. 48. 14 H. 4. 7. 22 E. 4. 44. 21 H. 7. 7.

Stanf. Prær. 54. L'estat. de Carlisle, 35 E. 1.

"*Reall or personal.*" [*h*] In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the king, and one that is subject to one that is in league with the king (2); and true it is that an alien enemie shall maintaine neither reall nor personall action, *donec terræ fuerint communes*, that is untill both nations be in peace (3); but an alien that is in league, shall maintaine personall actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions. An alien that is condemned in an information, shall have a writ of error to relieve himselfe. *Et sic de similibus.*

(Doct. Plac. 8. Dy. 2. b.) [*h*] Bracton, 426, 427. 430. 8 E. 3. 51. 5 E. 2. Aiel 8. 13 E. 3. Bre. 677. 22 E. 3. 14. 20. 21 E. 3. Cosinage 5. 42 E. 3. 2. 13 E. 4. 9. 11 H. 4. 26. 9 E. 4. 7. 19 E. 4. 7.

20 E. 4. 6. 13 E. 4. 9, 10. 32 H. 6. 23. 38 H. 8. Br. Denizen. 10. 1 E. 6. Nonhab. Br. 13 & 62. Vide 4 H. 3. Dower 179. 6 E. 3. 263. 31 H. 6. ca. 4. Livre d'Entries in Eject. 7. 6 H. 8. Dier 2. 6 H. 7. 15.

[*] If an alien be made a prior or abbot, the plea of *alien née* shall not disable him to bring any reall or mixt action concerning his house, because he is *in auter droit*, as before is said (4).

[*] 29 E. 3. Br. Denizen 15. Vid. Stanf. Pl. Cor. 197. a.

"*Out of the ligeance of our soveraigne lord the king.*" Here *Littleton* doth not say, out of the realme or beyond the sea (5), (as he doth Sect. 439, 440, 441. 677.) but out of the ligeance; for (as hath beene said before) a man may be borne out of the realme, viz. of *England*, as in *Ireland*, *Jersey*, and *Guernsey*, &c. (6) and yet seeing he is not borne out of the ligeance of the king, as *Littleton* here speaketh, he is no alien. But hereof there is

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(1) Here, as also generally where lord Coke mentions *professed* persons, he must, we conceive, be understood to write as of the law before the dissolution of monasteries, and the consequent establishment of the protestant faith. See *ante* 3. b. note 7.—[Note 201.]

(2) Et nota *it shall be tried by the record, if he be in amity or not, viz. a proclamation of war. But a proclamation prohibiting commerce, as anciently between the emperor and the queen, doth not disable a German in a personal action.* Trin. 41 Eliz. C. B. Hal. MSS.—[Note 202.]

(3) But now, on declaring war, the king usually, in the proclamation of war, qualifies it, by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves; and, without doubt, such persons are to be deemed alien friends in effect.—[Note 203.]

(4) *A female alien shall have dower.* Rot. Parl. 8 H. 5. n. 15. 9 H. 5. n. pro comitissâ *Arundell.* Hal. MSS.—See *ante* 31. b. note 9.—[Note 204.]

(5) See *ante* 107. a. n. 6, there, and post. 44. a.

(6) Rot. Parl. 9 H. 6. n. 20. *indenization of one born in Wales.* Simile Rot. Parl. 23 H. 6. n. 26. Co. 2 Inst. 741, on stat. 2 H. 4. Hal. MSS.

is so much and so plentifully spoken in our bookes, and especially in the case of *Calvin ubi supra*, as this shall suffice.

"*And aske judgement if he shall be answered.*" So as the tenant or defendant shall neither plead *alien née* to the writ or to the action, but in disability of the person as in case of villenage and outlawrie before. [*i*] And *Littleton* is to be intended of an alien in league; for if he be an alien enemy, the defendant may conclude to the action.

[i] Livre d'Entries, Alien 1. (Doct. Plac. 89. Dy. 2. b.)

Sect. 199.

THE fourth is a man, who by judgement given against him upon a writ of præmunire facias, &c. *is out of the king's protection. If he sue any action, and the tenant or defendant shew all the record against him, he may aske judgement if he shall be answered; for the law and the king's writs be the things, by which a man is protected and holpen; and so, during the time that a man in such case is out of the king's protection, he is out of helpe and protection by the king's law, or by the king's writ.*

(3 Inst. 119.) "*PRÆMUNIRE.*" Some hold an opinion, that the writ is called a *præmunire*, because it doth fortifie *jurisdictionem jurium regiorum coronæ suæ* of the kingly lawes of the crown against foreine jurisdiction, and against the usurpers upon them, as by divers acts of parliaments appears. But in truth it is so called of a word in the writ; for the words of the writ be, *præmunire facias præfatum A. B. &c. quòd tunc sit coram nobis, &c.* where *præmunire* is used for *præmonere*, and so do divers interpreters of the civill and canon law use it; for they are *præmuniti* that are *præmoniti*. By the statutes before quoted in the margent you shall perceive what statutes were made before *Littleton* wrote, and what have beene ordained since to make offences in danger of a *præmunire*.

For statutes, Vid. 35 E. 1. stat. de Carlisle. 25 E. 3 c. 22. 25 E. 3. Stat. de Provisors. 27 E. 3. c. 1. 38 E. 4. c. 3. 2 R. 2. c. 12. 3 R. 2. c. 3. 12 R. 2. c. 5. 16 R. 2. c. 5. 2 H. 4. c. 3 & 4. 6 H. 4. c. 1. 24 H. 8. c. 12. 25 H. 8. c. 19, 20. 26 H. 8. c. 16. 1 Eliz. ca. 1. 5 Eliz. c. 1. 13 Eliz. ca. 1, 2. 8. 27 Eliz. c. 2. 39 Eliz. ca. 18.

For Precedents, Vide Mich. 29 E. 3. coram rege in Thesaur. Pasch. 44 E. 3. Ibid. Melbourne's case. Mich. 38 H. 6. Ibid. the case of Rich. Beauchamp and others. Hil. 25 H. 8. coram rege, the case of Nic. Bishop of Norwich. Trin. 36 H. 8. Rot. 9. coram rege, the case of the Bishop of Bangor. Mich. 26 & 27 Eliz. coram rege, Perrot against D. Bevance and others, Booke of Entries, fo. 429, & 480. & ibid. Mich. 9 H. 7. f. 23.

"*Out of the king's protection.*" The judgement in a *præmunire* is, that the defendant shall be from thenceforth out of the king's protection, and his lands and tenements, goods and chattels ☞ forfeited to the king, and that his body shall remaine in prison at the king's pleasure. So odious was this offence of *præmunire*, that a man that was attainted of the same, might have been slaine by any man, without danger of law; because [*k*] it was provided by law, that a man might do

[130. a.]

Book cases. 21 E. 3. 40. B. 18 H. 6. 6. 9 E. 4. 2. 35 E 3. 7. 24 H. 8. tit. Præmunire 16. 10 H. 4. 12. 27 E. 3. 84. 6 H. 7. 14. 44 E. 3. 36. 11 H. 7. tit. Præmunire, p. 5. 17 H. 7. Justice Spilmans. in Turberville's case. Kelwey, f. 195. Doct. & Stud. Lib. 2, cap. 32, Brooke tit. Præmunire 21. Temps. E. 6. Bishop Barloe's case. Coron, 196.

[k] 24 H. 8. Brooke

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to him as to the king's enemy, and any man may lawfully kill an enemy. But queene *Elizabeth* and her parliament [*], liking not the extreme and inhumane rigor of the law in that point, did provide, that it should not be lawful for any person to slay any person in any manner attainted in or upon any *præmunire, &c.* Tenant in taile is attainted in a *præmunire*, he shall forfeit the land but during his life; for albeit the statute of 16 *R.* 2. ca. 5, enacteth, that in that case their lands and tenements, goods and chattels, shall be forfeit to the king, that must be understood of such an estate as he may lawfully forfeite, and that is during his owne life. And these generall words do not take away the force of the statute *de donis conditionalibus*, but he shall forfeit all his fee simple lands, states for life, goods and chattels; and so was it resolved in *Trudgin's* case.

[*] 5 Eliz. ca. 1. Hil. 21 El. Trudgin's case resolved per les Justices. 7 H. 4. 20. Simon Beverley's case. (Post. 391. 2 Ro. Abr. 177.)

"*For the law and the king's writs, &c.*" There be three things, as here it appeareth, whereby every subject is protected, viz. *rex, lex, et rescripta regis*, the king, the law, and the king's writs. The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*. The processe and the execution, which is the life of the law, consisteth in the king's writs. So as he that is out of the protection of the king, cannot be aided or protected by the king's law, or the king's writ. *Rex tuetur legem, et lex tuetur jus.* [*l*] Besides men attainted in a *præmunire*, every person that is attainted of high-treason, petit-treason, or felony, is disabled to bring any action; for he is [*] *extra legem positus*, and is accounted in law *civiliter mortuus*.

[*l*] 4 E. 4. 8. 1 E. 4. 1. b. 30 E. 3. 4. 8 Eliz. Dier 24. [*] Mich. 9 E. 3. coram rege, Rot. 84 Warw.

It is to be understood, that there is a generall protection of the king whereof *Littleton* here speaketh; and this extends generally to all the king's loyall subjects, denizens and aliens within the realme, whose offences have not made them uncapable of it, as before it appeareth. And there is a particular protection by writ, which is one of the king's writs that *Littleton* here speaketh of. This particular protection is of two sorts; one, to give a man immunity or freedome from actions or suits; the second, for the safetie of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawfull molestation or wrong. The first is of right, and by law; the second are all of grace, (saving one) for the generall protection implyeth as much. Of the first sort some are *cum clausulâ (volumus)*; so called, because the writ hath this word *(volumus)* in it, viz. *volumus quòd interim sit quietus de omnibus placitis et quærelis, &c.* and the other a protection *cum clausulâ (nolumus)*; so called for the like reason. Of protections *cum clausulâ (volumus)* for staying of pleas and suites there be foure kindes, viz. 1. *Quia profecturus* (so called by reason they are part of the words of the writ). 2. *Quia moraturus* (so named for distinction for the like cause). 3. *Quia indebitatus nobis existit* of the matter. 4. When any sent into the king's service in warre is imprisoned beyond sea. The former are for staying of actions and suits in generall. The third is for staying of suits of the subject for debts and duties due by the king's debtor to them. Of the fourth you shall reade hereafter in this place. For the former two these nine things are to be observed. 1. For what cause they are to be granted. 2. For what persons they are allowable. 3. A threefold time is to be considered, viz. the time of the purchase of them, the time of the continuance of them, and the time when they shall be cast. 4. In what place the service is to be

Protection, { Generall. Particular.

of the Generall, vide 7 Co. Calvin's case per totum. (F. N. B. 28. B. 1 Leon. 185. Mo. 239. 2 Ro. Abr. 32.)

be performed. 5. In what actions these protections are allowable. 6. Under what seale and to whom they are directed. 7. Who is to allow or disallow of them. 8. By whom they are to be cast, and in what manner. 9. How upon just cause they may be repealed or disallowed. I must but point at these matters, to make the studious reader capable of them, and referre him to the bookes and other authorities at large, being excellent points of learning.

As to the first, it is of two natures: the one concernes services of war, as the king's souldier, &c. the other wisedome and counsell, as the king's ambassador or messenger *pro negotiis regni*. Both these being for the publique good of the realme, private mens actions and suites must be suspended for a convenient time; for *jura publica anteferenda privatis;* and againe, *jura publica ex privatis promiscuè decidi non debent.* [a] And the cause of granting of a protection must be expressed in the protection, to the end it may appeare to the court that it is granted *pro negotiis regni et pro bono publico,* [b] or, as some others say, *pur le common profit del realme.* And *Britton* saith, *nostre service, sicome estre en nostre force, et le defence de nous et de nostre people, &c.* [*] A man in execution *in salvâ custodiâ* shall not be delivered by a protection.

[a] 39 H. 6. 30. 3 H. 6. tit. Protection 2. 13 R. 2, ca. 16.

[b] Mirror, cap. 2. Sect. 23. Britton, fo. 281. Fleta, lib. 6, cap. 7, 8, &c. Bracton.

[*] 5 Maria Dyer 162. (Cro. Cha. 389.)

[c] To the second, these protections are not allowable onely for men of full age, but for men within age, and for women (1), as necessary attendants upon the campe, and that in three cases, *quia lotrix, seu nutrix, seu obstetrix.*

[c] 19 H. 6. 51. 30 E. 3. 21. F. N. B. 28. l. 11 E. 3. Rot. Pat. 3 part, for the Countesse of Warwick.

[d] Corporations aggregate of many are not capable of these two protections, either *profecturæ* or *moraturæ*, because the corporation itselfe is invisible, and resteth onely in consideration of law. [e] Protection for the husband shall serve also for the wife. [130. b.]

[d] 30 E. 3. 1. 21 E. 4. 36. 21 E. 3. 97.

[e] 35 H. 6. 3. 43 E. 3. 23. 48 E. 3. 7. 4 H. 5. Protection 107.

[f] Albeit the vouchee, tenant by resceit, preier in aide, or garnishee, bee no parties to the writ, yet before they appeare, a protection may be cast for them; because when the demandant grants the voucher or resceit, in judgment of law they are made privie. But if the demandant counterplead the voucher or resceit, then untill it be adjudged for them, and so they privie in law, a protection cannot be cast for them. And so it is of the garnishee, a protection may be cast for him at the day of the returne of the *scire facias.* [g] No protection can be cast for

[f] 45 E. 3. Protect. 37. 3 H. 6. 18. 30. 8 H. 6. 16. 9 H. 6. 36. 40 E. 3. 18. 32 E. 3. Protect. 54. 21 E. 3. 14 H. 4. 16. 45 E. 3. tit. Protect. 40.

14 E. 3. Protect. 66. (2 Ro. Abr. 324.) [g] 24 E. 3. 26. 47 E. 3. 5. 5 H. 5. 5. 38 E. 3. 1. F. N. B. 28. g. 20 R. 2. Protect. 106. 22 H. 6. 28. 9 H. 6. 36. 43 E. 3. 36. 17 E. 3. 24. 25 E. 3. 43. 24 E. 3. 26. 13 E. 3. Protect. 71. 14 E. 3. ib. 65. 63. 20 E. 3. ibid. 84.

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(1) A respectable writer, considering women as not requisite in a camp, thinks, that here lord Coke mistakes *protections* for *essoins.* Barr. on Ant. Stat. Ir. ed. 154. But as we apprehend, those who have been accustomed to a camp-life, will bear testimony to the necessity of each of the three capacities mentioned by lord Coke.—[Note 205.]

the demandant or plaintife; because the tenant or defendant cannot sue a re-sommons, or a re-attachment, but the plaintife onely, that sued out the summons or attachment, &c. must sue also the re-sommous or re-attachment. And so it is of an actor in nature of a plaintife, &c. as the garnishee after appearance, and an avowant, and the like. [*h*] An officer of the king's resceit, or any other officer in any court of record, whose attendance is necessary for the king's service or administration of justice, being sued, cannot have a protection cast for him.

[h] 7 H. 4. 3. a.

[*i*] In every action or plea reall or mixt against two, where protection doth lie, a protection cast for the one doth put the plea without day for all. So it is in debt, detinue and account. But in trespasse, or any action in nature of trespasse, which is in law severall, where every one may answer without the other, there a protection cast for the one shall serve for him onely, unless they joyne in pleading; or if they plead severall pleas, and one *venire facias* is awarded against all, there a protection cast for one, shall put the plea without day for all; and therefore in former times the plaintife used to sue out severall *venire facias* in those cases for feare of a protection, &c.

[i] 9 E. 3. Protect. 80, 81. 32 E. 3. ib. 55. 16 E. 2. ib. 77. 13 E. 3. ib. 70. 41 E. 3. ib. 95. 41 E. 3. 32. 42 E. 3. 9. 5 H. 5. 7. 3 H. 4. 15. 2 R. 2. Protect. 45. 43 E. 3. ibid. 31. 2 H. 6. 22.

21 H. 6. 41. 38 E. 3. 12. 7 H. 6. 21. 33 E. 3. Protect. 116. 4 H. 4. 4. 29 E. 3. 41. 45 E. 3. 24. 28. 11 E. 4. 7. F. N. B. 28. k. (11 Co. 5. b.)

[*k*] As to the three-fold time, first, a protection *profecturæ* regularly must not be purchased hanging the plea. But this faileth, when he goeth in the king's service in a voyage royall; and that is two-fold; either touching warre, and that onely is when the king himselfe or his lieutenant, that is *prorex* goeth; or when any goeth in the king's ambassage, *pro negotio regni*, or for the marriage of the king's daughter, or the like, this is also called a voyage royall. But a protection *moraturæ* may be purchased and cast *pendente placito*.

[k] 3 H. 6. Protect. 2. 39 H. 6. 39. 44 E. 3. 12. 13 R. 2. c. 16. 3 H. 4. 16. 11 H. 4. 7. 7 E. 4. 27. 28 H. 6. 1. 17 H. 6. Protect. 56. 13 R. 2. cap 16.

10 E. 3. 54. 13 E. 3. Amerciament 18. 7 Co. 7, 8. Calvin's case. (2 Ro. Abr. 322. Ante 69. b.)

[*l*] Regularly a protection cannot be cast, but when the party hath a day in court, and when if he made default, it should save his default. Therefore when execution is to be granted against body, lands, or goods, no protection can be cast; because the defendant hath no day in court. If a protection be cast at the *nisi prius* for one, if before the day in banke it be repealed by *Innotescimus*, yet because it was once well cast, it shall save his default; but if the protection be disallowed, either for variance, or that it lay not in the action, or the like, there it shall turne to a default.

[l] 4 H. 6. 22. 17 E. 3. 76. 33 E. 3. tit. Protect. 115. 34 E. 3. ib. 124. 27 E. 3. 79. 29 E. 3. Protect. 85. 88. 2 E. 4. 15. 19 E. 3. Protect. 82. 79. 13 E. 3. ib. 72. 9 E. 3. 21.

3 H. 6. 55. 4 H. 6. 22. 11 H. 6. 14. 14 H. 6. 22. 21 H. 6. 10. 27 H. 6. 4. 28 H. 6. 1. 35 H. 6. 58. 44 E. 3. 2. 16. 48 E. 3. 8. 7 H. 4. 5. 14 H. 4. 23. 27 E. 3. 78.

[*m*] If a man hath a protection, and notwithstanding plead a plea, yet at another day of continuance after that a protection may be cast; so at a day after an exigent; but after appearance he cannot cast a protection in that terme, untill a new continuance be taken.

[m] 22 E. 3. 4. 16 E. 3. Protect. 47. 44 E. 3. 16. 3 E. 3. Amerciament 18. 34 E. 3. Protection 123.

Thirdly,

[n] 39 H. 6. 39. F. N. B. f. 28. Fleta, lib. 6, ca. 8. Temps E. 1. Grand cape 26. (Post. 254. b.)

[n] Thirdly, no protection, either *profecturæ* or *moraturæ*, shall indure longer than a yeare and a day next after the *teste* or date of it. And so it is of an *essoigne de service le roy*. If a protection bear *teste* 7. *die Januarii*, and have allowance *pro uno anno*, the re-summons, re-attachment, or re-garnishment, may be sued 8. *Januarii* the next yeare; and yet that is the last day of the yeare.

[o] Brit. fol. 282, 283, & 280. Fleta, lib. 6, cap. 8. Accord.

And where *Britton*, treating of an essoigne beyond the *Græcian* sea, in a pilgrimage, &c. saith thus, [o] *ascun gent nequident se purchasent nos letters de protection patents durable a un an, ou a 2 ou a 3 ans, et jalameyns font attorneys generals, ausi per nos letters patents: et ceux font bien et sagement, car nul grand seignior, ne chivalier de nostre realme, ne doit prender chemyn sauns nostre conge, car issint poet le realme remainer disgarny de fort gente.*

Three things are hereupon to be observed. First, that this was a protection of grace, whereof more shall be said hereafter. Secondly, that it was for the safetie of the great men of the realme, and that they should make generall attornies, so as no actions or suits should be thereby staid. Thirdly (by the way), that great men could not passe out of the realme without the king's licence.

[p] 1 E. 3. 25.

[p] A protection granted to one, &c. untill he be returned from *Scotland*, was disallowed for the incertaintie of the time.

[q] 7 Co. 8. Calvin's case. 7 E. 4. 29. F. N. B. 38. c. g. h. 7 H. 4. 14. 19 H. 6. 35. 38 H. 6. 3. 32 H. 6. 3 R. 2. Rot. Parliament nu. 21. 22 E. 4. Protect. 18. 8 R. 2. ibid. 126. 11 H. 4. 57. Regist. judic. 14. 36 H. 6. tit. Protect. 27. 6 R. 2. ibid. 14. Regist. orig. 88. sæpe.

[q] To the fourth, the protection, as well *moraturæ* as *profecturæ*, must be regularly to some place out of the realme of *England*, and that must be to some certaine place, as *super salvâ custodiâ Calicæ, &c.* and not to *Carlisle* or *Wales*, which are within the realme, or to the like. But it may be to *Ireland* or *Scotland*, because they are distinct kingdomes; or to *Calice*, *Aquitaine*, or the like. But a protection *quia moratur super altum mare*, will not serve, not onely because (as some thinke) that *mare non moratur*, but for the incertaintie of the place, and for that a great part of the sea is within the realme of *England*.

[r] Bract. li. 5. 139, 140. Britton, 181. Flet. li. 6, ca. 7, 8, &c. 14 E. 2. Protect. 109. 34 E. 3. ib. 122. 19 E. 3. ib. 78. 23 E. 3. ib. 99. 21 E. 3. 13. [s] 10 H. 6. Protect. 105.

[r] To the fifth, in some actions protections shall not be allowed by the common law; and in some actions they are ousted by act of parliament. Actions at the common law, as all actions that touche the crowne, as appeales of felony, and appeales of mayhem. [s] So ☞ where the king is sole partie, no protection is to be allowed; in like manner in a *decies tantum*, where the king and the subject are plaintifes; but, in late acts of parliament, protections in personal actions are expresly ousted. A protection may be cast against the queene the consort of the king.

[131. a.]

[t] 39 H. 6. 39. 43 E. 3. 6, & 32. 27 H. 6. 1. F. N. B 28. 17 E. 3. 23. 4 Co. 35. Bosom's case. Bract. lib. 5. fo. 139, 140. (2 Ro. Abr. 325, 326.)

[t] In a writ of dower *unde nihil habet*, no protection is allowable, because the demandant hath nothing to live upon. Otherwise it is in a writ of right of dower. Likewise in a *quare impedit*, or assise of darreine presentment, a protection lieth not, for the imminent danger of the laps. Neither lieth a protection in assise of *novel disseisin*; because it is *festinum remedium*, to restore the disseisee to his freehold, whereof he is wrongfully and without

without judgement disseised. [u] In a *quare non admisit*, a protection is not allowable, because it is grounded upon the *quare impedit*; and the like in a certificate upon an assise for the like reason; *et sic de similibus*. A protection *quia profecturus* is not allowable (as hath beene said) in any action commenced before the date of the protection, unlesse it be in a voyage royall.

[u] 13 E. 3. tit. Protection 52. 12 E. 3. ib. 69. 31 E. 1. ib. 112.

[w] An infant is vouched, and at the *pluries venire facias*, a protection was cast for the infant; and disallowed, because his age must be adjudged by the inspection of the court.

[w] 19 E. 2. Protect 111. 32 E. 3. ibid. 54.

[x] By act of parliament no protection shall be allowed in an attaint (but at the common law a protection for one of the petite jury had put the plea without day for all); nor in an action against a gaoler for an escape; nor for victuals taken or bought upon the voyage or service: nor in pleas of trespasse, or other contract made or perpetrated after the date of the same protection.

[x] 23 H. 8. c. 3. 34 E. 1. Protection 38. 7 H. 4. c. 4. 1 R. 2. cap. 8.

[y] In a writ of error brought by an infant upon a fine levied, the plaintife sued a *scire facias* against the conusee, for whom a protection was cast, and the court examined the age of the plaintiffe, and by inspection adjudged him within age, and recorded the same, and then allowed the protection; and this can be no mischiefe to the plaintife: whereupon it followeth, that albeit the plaintife dyeth afterwards before the fine be reversed, yet, after his age adjudged and recorded, his heire shall in that case reverse the fine for the nonage of his ancestor. [a] And so it was resolved in the case of *Kekewiche* (1) in a writ of error brought by him, by the opinion of the whole court of the king's bench. Otherwise it is if the plaintife dyeth before his age inspected.

[y] 21 E. 3. 24. 31 E. 3. Protect. 97. 5 E. 4. 50. 35 H. 6. 43. 46. 8 E. 4. 8. 17 E. 3. 22. 13 E. 3. Protect. 73. (Post. 380. b. Mo. 78. 189. Cro. Jam. 230.)

[a] Pasch. 12 Ja. Regis in the King's Bench.

[b] Note, in judiciall writs which are in nature of actions, where the partie hath day to appeare and plead, there a protection doth lie; as in writs of *scire facias* upon recoveries, fines, judgements, &c. Albeit by the statute of *W.* 2, essoignes and other delayes be ousted in writs of *scire facias*, yet a protection doth lie in the same. So it is in a *quid juris clamat*, and the like. But in writs of execution, as *habere facias seisinam*, *elegit*, execution upon a statute, *capias ad satisfaciendum*, *fieri facias*, and the like, there no protection can be cast for the defendant; because he hath no day in court, and the protection extendeth onely *ad placita et querelas*, and must be allowed by the court, which cannot be but upon a day of appearance.

[b] 13 E. 3. Protect. 72. Fleta, l. 2. c. 18. 40 E. 3. 18. 48 E. 3. 18, 19. 37 H. 6. 32. 21 E. 4. 19. 15 H. 7, 8. 47 E. 3. 5. 17 E. 3. 68. 14 E. 3. Protect. 64. W. 2. cap. 45.

[c] In a writ of disceit brought against him that obtained and cast a protection upon an untrue surmise in delay of the plaintife, that protection is allowable. In an action brought upon the statute of labourers a protection doth lie, *et sic de similibus*.

[c] 20 E. 3. Protect. 83.

[d] To the sixth, no writ of protection can be allowed, unlesse it be under the great seale, [*] and it is directed generally.

[d] 35 H. 6. 2. Artic. super. Cart. 6.

46 E. 3. Petition 19. [*] 2 Co. 17. Lane's case. 8 Co. 68. Trollop's case.
20 H. 6. 25. 2 E. 4. 4. 38 H. 6. 23.

[e] To the seventh, the courts of justice, where the protection is cast, are to allow or disallow of the same, bee they courts of record

[e] 43 E. 3. Protect. 96.

(1) S. C. Mo. 844.

record or not of record, and not the sherife, or any other officer or minister.

[f] 21 E. 4. 18. [f] To the eighth, the protection may be cast, either by any stranger, or by the partie himselfe. An infant feme-covert, a monke, or any other, may cast a protection for the tenant or defendant. And this difference there is when a stranger casteth

[g] 38 H. 6. 23. it, and when the tenant or defendant casteth it himselfe; [g] for the defendant or tenant casting it, he must shew cause wherefore he ought to take advantage of the protection; but an estranger neede not shew any cause, but that the tenant or defendant is here by protection.

[h] 44 E. 3. 12. 47 E. 3. 6. [h] As to the ninth, a protection may be avoyded three manner of wayes. First, upon the casting of it before it be allowed. Secondly, by repeale thereof after it be allowed. (2) By disallowing of it many wayes; as for that it lieth not in that action, or that he hath no day to cast it, or for materiall variance betweene the protection and the record, or that it is not under

[i] 13 R. 2. c. 16. 11 H. 4. 70. 7 H. 6. 22. 22 H. 6. 50. 30 H. 6. 3. 19 H. 6. 35. 21 E. 4. 20. 1 H. 6. 6. 42 E. 3. 9. 44 E. 3. 2. 39 E. 3. 4, 5. the great seale, or the like. [i] Thirdly, after it be allowed, by *Innotescimus;* as if any tarry in the country without going to the service for which he was retained over a convenient time after that he had any protection, or repaire from the same service upon information thereof to the lord chancellor, he shall repeale the protection in that case by an *Innotescimus*. But a protection shall not be avoyded by an averment of the partie in that case, because the record of the protection must be avoyded by matter of as high nature.

20 E. 3. Protect. 80. 34 E. 3. ib. 119.

[k] 44 E. 3. 4. 12. 47 E. 3. 6. 34 E. 3. Protect. 119. 28 H. 6. 3. 34 H. 6. 22. 30 H. 6. 3. 32 H. 6. 4. [k] ☞ There is a clause in the protection to this effect: *præsentibus minimè valituris, si contingat ipsum, &c. à custodia castri prædicti recedere.* Or, *si contingat iter illud non arripere, vel infra illum terminum à partibus transmarinus redire.* Whereupon there be two conclusions to bee observed. [131. b.]

First, that though the protection be allowed by the court for a yeare, yet if it be repealed by an *Innotescimus*, that the resommons or re-attachment shall be granted upon the repeale within the yeare; for the protection that was allowed had the said clause in it. And of that opinion be our later bookes; and the repeale by *Innotescimus* should serve for little purpose, if the law should not be taken so.

Secondly, that albeit he that had the protection, either *moraturæ* or *profecturæ*, returne into *England*, and haply be arrested and in prison, yet, if he came over to provide munition, habiliments of warre, victuals, or other necessaries, it is no breach of the said conditionall clause, nor against the act of 13 *Richard* 2. cap. 16, for that in judgement of law comming for such things as are of necessity for the maintenance of the warre, *moratur* according to the intention of the protection and statute aforesaid. And thus much of the two first protections, *cum clausulâ volumus, profecturæ* and *moraturæ*.

[l] Registrum 28 l. b. F N. B. 28. b. [l] As to the third protection *cum clausulâ volumus*, the king by his prerogative regularly is to be preferred in payment of his

(2) The sense requires *thirdly* here; and that, where *thirdly* is, it should be *fourthly*. But the print in the former editions is as we have given it.

his duty or debt by his debtor before any subject, although the king's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli, et firmamentum pacis.* (1) And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached untill he paid the king's debt. But hereof grew some inconvenience, for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof [*m*] it is enacted by the statute of 25 *E.* 3. that the other creditors may have their actions against the king's debtor, and proceed to judgement, but not to execution, unlesse he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts.

33 H. 8. c. 29. in the preamble. 41 E. 3. tit. Execution 38. 18 E. 3. ibid. 56. 27 E. 3. 88. b. 4 E. 4. 16. 3 Eliz. Dier 197. Rot. Pat. 27 E. 3. part. 1. m. 2. [*m*] 25 E. 3. cap. 19. (Cro. Cha. 389. 390. Hob. 115.)

This kind of protection hath (as it appeareth) no certaine time limited in it. But in some cases the subject shall be satisfied before the king; [*n*] for regularly whensoever the king is intitled to any fine or duty by the suit of the party, the party shall be first satisfied, as in a *decies tantum.* And so if in an action of debt the defendant denie his deed, and it is found against him, he shall pay a fine to the king, but the plaintife shall be first satisfied; and so in all other like cases. And so it is in bills preferred by subjects in the star-chamber, there costs and dammages (if any be) shall be answered before the king's fine, as it is daily in experience.

[*n*] 41 E. 3. 15. 17 E. 3. 73. 29 E. 3. 13. 4 E. 4. 16.

The fourth protection *cum clausulâ volumus* is, when a man sent into the king's service beyond sea is imprisoned there, so as neither protection *profecturæ* or *moraturæ* will serve him; and this hath no certaine time limited in it; [*o*] whereof you shall reade at large in the *Register*, and *F. N. B.*

[*o*] Regist. sæpe. F. N. B. 28. c.

[*p*] Now we are at length come to protections *cum clausulâ nolumus*; all which, saving one, are of grace, and, as hath beene said, are implyed under the generall protection; for, as *Fitzherbert* saith, every loyall subject is in the king's protection. Of these protections of grace, you shall not read much in our yeare books, because they stayed no actions or suites. [*q*] Of the divers formes of these you shall reade at large in the *Register*, and *F. N. B.* which were too long and needlesse to be here recited.

[*p*] Vide 7 Co. 8, 9. Calvin's case.

[*q*] Regist. 28o. &c. F. N. B. 29. A. B. C. D. E. F. G. H. Register 28o. Statut. de 14 E. 3. F. N. B. 30. A.

The protection *cum clausulâ nolumus*, that is of right, is, that every spirituall person may sue a protection for him and his goods, and for the fermors of their lands and their goods, that they shall not be taken by the king's purveyor, nor their carriages or chattels taken by other ministers of the king, which writ doth recite the statute of 14 *E.* 3.

Of these protections I cannot say any thing of mine owne experience; for albeit queene *Elizabeth* maintained many warres, yet she granted few or no protections; and her reason was, that he was no fit subject to be imployed in her service that was subject to other mens actions, lest she might be thought to delay justice (2).

Sect.

(1) See ante 30. b.

(2) Since lord Coke's time protections have fallen wholly into disuse; lord Cutts, a famous officer in the reign of William the third, being the last person indulged with one, of whom our Reports take notice. 3 Blackst. Comm. 8th ed. 289, and 3 Lev. 332. However, it is still usual in acts of parliament to guard against the use of protections in suits, to which persons acting under the authority of the legislature are parties.—[Note 206.]

Sect. 200.

THE fifth is, where a man is entred and professed in religion. If such a one sue an action, the tenant or defendant may shew, that such a one is entred into religion in such a place, into the order of Saint Benet, *and is there a monke professed, or into the order of friers, minors or preachers, and is there a brother professed, and so of other orders of religion, &c. and aske judgement if he shall be answered. And the cause is this; that when a man entreth into religion, and is professed, he is dead in the law, and his sonne, or next cousin incontinent shall inherit him, as well as though he were dead indeed. And when he entreth into religion, he may make his testament, and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed. And if that he make no executours when he entreth into religion, then the ordinary may commit the administration of his goods to others, as if he were dead indeed.*

[a] Bract. lib. 5, fo. 415. 421. Brit. ca. 22, fo. 39. Fleta, lib. 6, ca. 41. 5 E. 2. tit. Nonabil. 26. 3 H. 6. 24. 1 E. 3. 9. 7 H. 4. 2. Doctr. & Stud. 141. 21 R. 2. Judgment 263. 11 R. 2. ib. 107. (Post. 136. a.) [b] 4 H. 4. ca. 17. 25 H. 8. ca. 12.

"*ENTRED and professed in religion.*" [a] It is to be observed, that a man doth enter into religion at his first comming, and liveth under obedience; but he is not professed, till a yeare be past, or some time of probation. And he is said to be professed, when he hath taken the habit of religion, and vowed three things, obedience, wilfull poverty, and perpetual chastity. And therefore our author saith here, *entred and professed.* [132. a.]

[c] Bracton, fo. 421. b.

"*Into the order of friers, minors* [b], *or preachers.*" It appeareth in our bookes, that of friers there were foure orders, viz. minors, augustins, preachers, and carmelites; and the *franciscani, capuchini,* and *observantes,* are included under the title of minors; and they were called observants, because they be not conventuall or joyned together in a brotherhood, but live separately, and bind themselves to observe more strictly the rites of their order. [c] *Cùm quis semel se religioni contulerit, renunciat omnibus quæ sæculi sunt, habitâ distinctione, utrùm habitum probationis susceperit, vel habitum professionis.*

[d] Bracton, fo. 301. 426. Britton, fo. 226. 250, 251. Fleta, lib. 6, ca. 41. [e] F. N. B. 196. 5 E. 4. 3.

"*He is dead in the law.*" *Civiliter mortuus,* or *mortuus sæculo.* [d] These is a death in deede, and there is a civill death, or a death in law, *mors civilis* and *mors naturalis,* as here it appeareth; and therefore to oust all scruples, leases for life are ever made during the naturall life, &c. (1) If the father enter into religion, then shall his sonne and heire have an assise of mordancester, and the writ shall say, [e] *Si W. pater, &c. die quo obiit habitum religionis assumpsit, in quo habitu professus fuit, ut dicitur.*

"*As*

(1) See acc. 2 Co. 48. b. Blackst. Comm. 8th ed. v. 1, p. 132, v. 2. 121. But by lord Coke's observing here, that *natural* is added to *oust all scruples,* it seems as if he did not conceive it to be absolutely necessary.—[Note 207.]

[132. b.] ☞ "*As well as though he were dead indeed.*" But yet to three purposes, profession, that is, the civill death, hath not the effect of a naturall death.

First, this civill death shall never derogate from his owne grant, nor be any mean to avoid it. And therefore if tenant in taile maketh a feoffment in fee, and entreth into religion, his issue shall have no formedon during his life; because that should be in derogation of his own grant, and be a meane to avoyd the same. (F. N. B. 213. A.)

[*f*] Secondly, it shall never give her availe, without whose consent he could not have entred into religion, and therefore his wife after his civill death shall not be indowed, untill his naturall death. But if the wife, after her husband hath entred into religion, alien the land which is her owne right, and after her husband is deraigned, the husband may enter and avoid the alienation. [*f*] 32 E. 1. Dower 176. 31 E. 3. Collusion 29. 33 E. 3. Entre conge 52. 21 E. 4. 14. (Ante 33. b.)

Thirdly, it shall not worke any wrong or prejudice to a stranger that hath a former right; and therefore if the disseisor entreth into religion, and is professed, so as the land descends to his heire, yet this descent shall not tolle the entrie of the disseisee.

[*g*] A woman cannot be professed a nunne during the life of her husband. But some do hold a diversitie [*h*] that *ante carnalem copulam*, the husband or wife may enter into religion without any consent, but *post carnalem copulam* neither of them can without consent of the other. [*g*] 5 E. 4. 3. a. [*h*] 18 H. 6. 33. per Fortesc.

[*i*] But if a man holdeth lands by knights service, and is professed in religion, his heire within age, he shall be in ward. [*k*] If I be disseised, and my brother releaseth with warranty, and is professed in religion, and the warranty descendeth upon me, this warrantie shall binde me; because I am his heire, and such inheritance as my brother had shall descend upon me. [*i*] 31 E. 3. Collusion 29. [*k*] 34 E. 3. Garranty 71. Vid. the Chapter of Warranty, Sect.†

[*l*] And if one joyntenant be professed in religion, the land shall survive to the other. If a man or woman be professed in religion in *Normandie*, or in anie other foraine part, such a profession shall not disable them to bring any action in *England*, because it wanteth triall; but they must be professed in some house of religion within this realme, for that may be tried by the certificate of the ordinarie, so as of foraigne professions the common law taketh no knowledge (1). [*m*] And yet in some case one that is professed in religion within the realme shall have an action: as if he be made an executor, or if he be an administrator, he shall maintaine an action, not in his owne right, but in right of the dead. [*l*] 21 R. 2. Judgm. 263. (Post. 181. b.) [*m*] 10 E. 3. 511. 14 E. 3. Executors 87. 5 H. 7. 25. 21 H. 6. 30. 3 H. 6. 24.

[*n*] If a monke be made a bishop, or a parson, or a vicar, he shall have an action concerning his bishopricke, parsonage, or vicarage, *et sic de similibus*. [*n*] 44 E. 3. 9. Nonability 3. 14 H. 8. 16.

[*o*] And if a monke be farmer of the kinge, yielding a rent, he shall have an action concerning that farme. And albeit *Littleton* speaketh generally of one that is professed in religion, yet must it not be understood of the soveraigne or head of the religious house, as of the abbot, prior, or the like; [*] for albeit [*o*] 2 H. 4. 7. 8 H. 5. 6. 7 E. 4. 30. 44 E. 3. 4. 20 E. 3. Vill. 10. & Nonability 9. 14 H. 4. 37. b.

49 E. 3. 4. [*] Bract. fo. 415, 416. 429. Mir. c. 2, sect. 14. 5 H. 7. 26. Vid. Sect. 296. 14 E. 4. 36.

they

† *Probably sections 718, 735, 736, & 737; as there Littleton teaches that warranty descends always to the heir at common law.*

(1) See ante 3. b. n. 7, to which add the arguments in the case of *Thornby* and *Fleetwood*, 1 Stra. 347. Com. 207. 10 Mod. 113. 356. 406.

they be professed in religion, yet by the policie of the law, they are persons able to purchase, and to implead and to be impleaded, to sue and to be sued, for any thing that concernes the house of religion; for otherwise the house might be prejudiced, and other men also of their lawful actions. And this is the ancient law of *England*, as it appeareth in these words, [p] *des biens des gents de religion appent l'action al chiefe en son nosme pur luy et son covent.* But what if a monke, &c. were beaten, wounded, or imprisoned, &c. doth the law give no remedie therefore? Yes, verily; [q] for in that case the abbot and the monke shall joyne in an action against the wrong doer; and if the writ be *ad dammum ipsius prioris*, the writ is good; and if it be *ad dammum ipsorum*, it is good also. Also if a monke be by conspiracie falsely and maliciously indicted of felony and robberie, and afterwards is lawfully acquitted, his soveraigne and he shall joyne in a writ of conspiracy and the like. And where *Littleton* speaketh of a man that is professed in religion, the same law is of a nunne, *sanctimonialis, mutatis mutandis.*

[p] Mir. ubi supra.

[q] 22 Ass. 87. 21 E. 3. 41, 42. 22 E. 3. 2. 37 H. 6. 8. 32 H. 6. 36. Bract. l. 5, f. 416. 420. 13 E. 3. Bre. 261. 22 E. 3. 2. 38 H. 6. 7. b. 24 E. 3. 34. b. 45. 7 R. 2.

[r] A wife is disabled to sue without her husband, as much as a monke is without his sovereign; and yet we read in books that in some cases a wife hath had abilitie to sue and be sued without her husband: [s] for the wife of sir *Robert Belknap*, one of the justices of the court of common pleas, who was exiled or banished beyond sea, did sue a writ in her owne name, without her husband, he being alive; whereof one said, *ecce modo mirum, quòd fœmina fert breve regis, non nominando virum conjunctum robore legis.*

Nonabilitie 3. 9. [r] 4 H. 3. Bre. 766. [s] 2 H. 4. f. 7. a. (1 Bulstr. 140. Mo. 7. 666. 851. 1 Ro. Rep. 400.)

[t] King *Edward* the third brought a *quare impedit* against the lady of *Maltravers;* and she pleaded, that she was covert of baron; whereunto it was replyed for the king, that her husband the lord *Maltravers* was put in exile for a certaine cause; and she was ruled to answer.

[t] 10 E. 3. 53.

[u] King *Henrie* the fourth brought a writ of ward against *Sibel B.* who pleaded, that she was covert baron, &c. whereunto it was replied for the king, that her husband for a crime that he had committed against the king and the peeres, was relegate or exiled into *Gascoigne*, there to remaine untill he obtained the king's grace: and *Gascoigne* chiefe justice, *ex assensu sociorum*, awarded that she should answer.

[u] 1 H. 4. 1. b.

Sir *Tho. Egerton*, lord chancellor, in his argument which he published apart by himselfe in *Calvin's* case *de post natis* demanded what former president there was for the warrant of the lady *Belknap's* case in 2 *H.* 4. 7. (1) which occasioned me to search, and upon search I found, that the like judgment had been given before at the parliament holden in *Crast. Epiph. an.* 19 *Edw.* 1. where the case was, that *Thomas* of *Weyland* being abjured the realme for felony in the yeare before, *Margerie de Mose* his wife, and *Richard* sonne of the said *Thomas*, exhibited their petition of right unto the parliament, for the manor of *Sobbir*, wherein her husband had but an estate for life joyntly with her, and the inheritance in *Richard* the son by fine. The earle of *Gloucester*, lord of the fee, (who, claiming the land by escheat, had taken the possession thereof) alledged, *quòd non fuit juri consonum, quòd aliqua fœmina intraret*

[133. a.]

Pl. in Parliam. 19 E. 1.

in

(1) See Ellesm. Argum. in the case of the *post nati* 56.

in aliquas terras vivente marito suo, eò quòd præfatus Thomas abjuravit regnum, et adhuc vivit; et asserit idem comes nunquam hujusmodi casum accidisse, et inde petit post multas allegationes, quòd possit prædictum manerium tenere ut eschaetam suam. Super quo per ipsum dominum regem præceptum fuit, quòd tam justic' sui de utroque banco quàm cæteri de regno suo, tam milites quàm servientes in legibus et consuetudinibus Angliæ experti, mandarentur, quòd essent coram rege et ejus consilio, &c. ad certiorandum ipsum regem, qualiter et quomodo in casu isto fuerit procedendum, et qualiter temporibus præteritis et antecessorum suorum in casibus consimilibus fieri consuevit, et interim scrutantur recorda de consimilibus; ubi recitantur duo vel tres consimiles casus. Et quia, licèt priùs non videbatur aliquibus juri consonum fuisse, quòd uxor in vitâ viri secundum sanctam ecclesiam, qualitercunque deliquisset quoad forum regium, non posset nec deberet à viro suo separari, et sic quicquid foret in possessione uxoris converteretur in potestatem viri sui, et hoc manifestè imminueret contra consuetudinem regni; et etiam quia quidam dubitabant, quòd de possessionibus et bonis uxoris vir possit aliqualiter sustentari: tamen coram consilio domini regis, vocatis thesaurar' et baronibus et justiciariis de utroque banco, concordatum est, quòd prædicta Margeria rehabeat talem seisinam, &c. secundum purportum finis prædict. &c. (2) *Patet etiam consimile exemplum tempore Henrici patris regis.* I have cited this solemne resolution the more at large, because there be many excellent things to be observed in it: so as by that which hath beene said, it plainly appeareth, that this opinion, concerning the hability of the wife of a man abjured or banished, was not first hatched by the judges in *Henry* the fourth's time. And here is to be observed, that an abjuration, that is, a deportation for ever into a forreine land, like to profession, (whereof our author speaketh here) is a civil death; and that is the reason that the wife may bring an action, or may be impleaded during the naturall life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, is banished for ever, as *Belknap*, &c. was, this is a civill death, and the wife may sue as a *feme sole*. And hereby you may understand your bookes, which treat of this matter. But if the husband, by act of parliament, have judgement to be exiled but for a time, which some call a relegation, that is, no civill death (3). And in 8 *E.* 2. an abjuration is called a divorce betweene the husband and wife. *Sed opus est interprete;* for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam*, but by the making of the statute of 35 E. 1. ca. 1. exilium Hugonis de Spencer patris et filii tempore E. 2. 31 E. 1. Cui in vita 31. (Ante 3. a.) authority

Note the ancient triall of difficult matters in law.

The great authority of judicial records and precedents.

A solemn resolution of the law in this point.

(3 Inst. 217.) 8 E. 2. Coron. 425.

So resolved in parliament upon

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(2) The whole record of Weyland's case is amongst the collection of Parliamentary Records lately published; and by this it appears, that lord Coke is not very accurate in the *words* of his extract. 1 Parl. Rec. 66. Amongst other deviations from the record, one is, that he mentions *two or three like cases* to have been recited, whereas in the record the *only one* taken notice of is that of Matilda the wife of Robert Cissor, in the reign of Henry the third.—[Note 208.]

(3) But though it is not a civil death, yet for the time the effect is the same to the wife; and therefore it is equally necessary, that she should have a right to sue alone. For the authorities on this subject, see 4 Vin. 152. 1 Com. Dig. 18.—[Note 209.]

authority of parliament, or in case of abjuration, and that must be upon an ordinary proceeding in law, as it was in this case of *Weyland*.

Another example we have in our bookes to this effect. If the husband had aliened the land of his wife, and after had committed felony and beene abjured the realme, the wife shall have a *cui in vita* in his life-time, agreeable with the said resolution in parliament, for that the abjuration was a civill death (4).

See in the *Register*, a woman was banished out of the towne of *Calice* for adultery, by the law or custome of that place, and there appeareth *charta pardonationis pro muliere bannitâ. Sed nos non habemus talem consuetudinem.*

Regist. fol. 312. b.

[a] But by the common law, the wife of the king of *England* is an exempt person from the king, and is capable of lands or tenements of the gift of the king, as no other feme covert is, and may sue and be sued without the king; for the wisedome of the common law would not have the king (whose continuall care and study is for the publike, *et circa ardua regni)* to be troubled and disquieted for such private and petty causes: so as the wife of the king of *England* is of ability and capacity to grant and to take, to sue and be sued as a feme-sole by the common law.

[a] Vide in my preface to the Sixth Booke. This was law before the Conquest. 10 E. 3. 26. b. 30 E. 3. 5. 18 E. 3. 1. 22 E. 3. 21. 49 E. 3. 4. 49 Ass. 8. 11 H. 4. 67. 14 E. 3. Voucher 110. 20 E. 3. Nonabil. 9. 31 E. 3. Quar. imp. 146. 3 H. 7. 14. 19 H. 6. 2. 28 H. 6. 13. 7 H. 7. 7. a. 26 H. 6. Aid le roy 24. Flet. li. 2, ca. 63, in fine. Pl. Com. 231. Stanf. Prær. 10. b. (Ante 3. a.)

[b] And such a queene hath many prerogatives; as, she shall find no pledges, for such is her dignity, as she shall not be amerced.

[b] 18 E. 3. 2. 33 E. 3. Brief 916. F. N. B. 101. a.

The queene nor the king's sonne are restrained by the statute of 1 *H.* 4. cap. 6, concerning grants by the king.

[c] In a *quare impedit* brought by her, some say, that plenarty is no plea, no more than in the case of the king.

[c] 18 E. 3. 32. 24 E. 3. 35. 75.

[d] If any bailife of the queene's bring an action concerning the hundred, he shall say, *in contemptum domini regis et reginæ.*

[d] 32 E. 3. Bre. 346. 9 E. 3. 33.

☞ The queen shall pay no tolle.

[e] If the tenant of the queene alien a certaine part of his tenancie to one, and another part to another, the queene may distraine in any one part for the whole, as the king may doe; but other lords shall distraine but for the rate; and therefore where the queene so distraineth, there lyeth a writ *de onerando pro ratâ portione.* [f] The writ of right shall not be directed to the queene no more than to the king, but to her bailife. Otherwise it is when any other is lord.

[133. b.]

[e] F. N. B. 235. A.

[f] F. N. B. 1. F.

[g] In case of aide prier of the queene, it is *domina regina inconsulta*, and the cause of the aide prier shall not be counterpleaded no more than in the king's case. And see where the aide shall be granted of the king and queene, and where of the queene onely, and she of the king. [h] But a protection shall

[g] 14 E. 3. Voucher 110. 21 E. 3. 53. 22 E. 3. 3. b. 17 E. 3. 65. 10 E. 3. 17. 5 E. 3. 4. 15 E. 3. Aide del roy 66. 10 E. 3. 18. 26 H. 6. Aide le roy 24.
[h] 21 E. 3. 13. 34 E. 3. Protect. 122. 11 H. 4. 67. b.

be

(4) Vid. Mich. 9 & 10 E. 1. Rot. 46. *A wife shall have a writ of deceit against her husband, who levies a fine in her name.*—Vid. Rot. Parl. 3 & 4 E. 4. n. 42. *Special act to enable the duchess of Exeter to act as a single woman during the life of her husband, who was attainted of treason.* Hal. MSS.—See the act in Ro. Parl. v. 5, p. 548.—[Note 210.]

be allowed against the queene, but not against the king. Neither shall the queene be sued by petition, but by a *præcipe*. [*i*] The queene is not bound by the statute of *Marlebridge* for driving a distresse into another country.

[*i*] 30 E. 3. 5.

[*k*] If any doe compasse the death of the queene, and declare it by any overt fact, the very intent is treason, as in the case of the king.

[*k*] L'estat. de 25 E. 3. de Proditionibus.

[*l*] No man may marry the queene dowager without the king's licence (1). But let us now returne to *Littleton*.

[*l*] Rot. Parl. 8 H. 6. nu. 7.

"*He may make his testament and his executors, &c.* [*m*] If *A.* be bound to the abbot of *D.* *A.* is professed a monke in the same abby, and after is made abbot thereof, he shall have an action of debt against his owne executors.

[*m*] 4 E. 4. 25. 6 E. 4. 4. 45 E. 3. 10. a. 18 E. 4. 19. 22 H. 6. 5. 5 H. 7. 25. b.

"*Then the ordinary may commit the administration, &c. as if he were dead indeed.*" [*n*] Note the statute of 31 *E.* 3. ca. 11, that giveth actions to the administrators, speaketh of a man that dies intestate, which by the authority of *Littleton* extendeth as well to a civill death as to a naturall.

[*n*] Pl. Com. 280, 281. Greisbrooke's case.

Sect. 201.

THE sixth is, where a man is excommunicated by the law of holy church, and he sueth an action reall or personall, the tenant or defendant may pleade, that he, that sueth, is excommunicated, and of this it behoves him to shew the bishop's letters under his seale, witnessing the excommunication, and aske judgment, if he shall be answered, &c. But in this case, if the demaundant or plaintife cannot deny it, the writ shall not abate (le breve n'abatera my), *but the judgment shall be, that the tenant or defendant shall go quit without day, for this, that when the demandant or plaintife hath purchased his letters of absolution, and shewed them to the court, he may have a resummons, or a reattachment, upon his originall, after the nature of his writ. But in the other five cases the writ shall abate, &c. if the matter shewed may not be gainsaid.*

"*EXCOM-*

(1) We have searched in vain for the parliamentary roll of 8 Hen. 6. cited in the margin, as an authority for this position. It is neither amongst the printed Statutes at large, nor amongst the Rolls of Parliament lately published. Yet it is taken notice of as a statute in the Abridgment of Parliamentary Records. Cott. Rec. 589. In another of lord Coke's works, he cites it as of the 8 Hen. 6. See 2 Inst. 18. But we cannot find any such statute in print. It is not meant by this to doubt the existence of such a statute. We only apprize the reader of the inaccuracy in the reference to it. For the doctrine of marriages of the *royal family*, we refer the curious reader to the opinion of the judges in the reign of George the first, when they were consulted on the prerogative claimed by the king over his grand-children; and to the debates, whilst the act of the present reign for regulating the future marriages of the royal family was under the consideration of parliament. See Fortesc. Rep. 401. 12 Geo. 3. c 11. Ann. Reg. for 1772, and the two protests of the dissentient lords in Journ. Dom. Proc. 3. March 1772.—[Note 211.]

"*EXCOMMUNICATED, excommunicatus, excommunicatio.*" [a] *Sicut quis poterit habere lepram in corpore, ita et in animâ. Excommunicato interdicitur omnis actus legitimus, ita quòd agere non potest, nec aliquem convenire, licèt ipse ab aliis possit conveniri.*

[a] Bracton, lib. 5, fo. 415. 426, 427. Fleta, lib. 6, c. 44. Britton, ca. 49, fol. 125. (F. N. B. 62. Doctr. Plac. 8.)

Excommunicatio est nihil aliud quàm censura à canone vel judice ecclesiastico prolata et inflicta, privans legitimâ communione sacramentorum, et quandoque hominum. [*] It is divided into the greater and the lesser. *Minor est, per quam quis à sacramentorum participatione conscientiâ vel sententiâ arceatur. Major est, quæ, non solum à sacramentorum, verùm etiam fidelium communione excludit, et ab omni actu legitimo separat et dividit.* But either of them both disableth the party. [b] *Cum excommunicato, autem, nec orare, nec loqui, nec palam, nec absconditè, nec vesci licet, exceptis quibusdam personis.* But every excommunication disableth not the party. [c] If balifes and commons, or any other corporation aggregate of many, bring an action, *excommengement* in the bailifes shall not disable them, for that they sue and answer by attorney. Otherwise it is of a sole corporation. But if executors or administrators be excommunicated, they may be disabled; because they, which converse with a person excommunicate, are excommunicate also. [d] If a bishop be defendant, an excommunication by the same bishop against the plaintife shall not disable him, and it shall be intended for the same cause, if another be not shewed.

[*] F. N. B. 64. F.)

[b] Bracton, 426. b. acc.

[c] 30 E. 3. 15. 42 E. 3. 13. 21 H. 6. 30. 21 E. 4. 49.

[134. a.]

[d] See Artic. Cleri, ca. 7. 5 E. 3. 8. 8 E. 3. 70. 9 H. 7. 21. 10 H. 7. 8 & 9. 18 E. 3. 58. 28 E. 3. 97. 16 E. 3. Excom. 5. 20 E. 3. ibid. 9. 3 H. 4. 3.

"*The bishop's letters under his seale.*" [e] None can certifie excommengement but only the bishop, unlesse the bishop be beyond sea or *in remotis;* or one that hath ordinary jurisdiction, and is immediate officer to the king's courts, as the archdeacon of *Richmond*, or the dean and chapter in time of vacation. [f] But in ancient time every officiall or commissary might testify excommengement in the king's court; and for the mischiefe that ensued thereupon, it was ordained by parliament, that none should testifie excommengement but the bishop only.

[e] Bracton, lib. 5, fo. 426. b. 12 E. 4. 15. 20 H. 6. 17. 20 E. 3. Excommengement 20. 33 E. 3. ibid. 29. 44 E. 3. ibid. 23. 11 H. 4. 14. F. N. B. 64, 65. 239. 7 E. 4. 14. 8 H. 6. 3. Registr. 67. (8 Co. 68. 1 Ro. Abr. 883.)

[f] 11 H. 4. 62. in Debt.

[g] If a bishop certifie that another bishop hath certified him, that the partie which is his diocesan is excommunicated, this certificat upon another's report is not sufficient. [h] If the bishop of *Rome*, or any other having foraigne authority doth excommunicate any subject of this realm, and certifieth so much under his seale of lead, this shall not disable the party; for the common law disallowes all acts done in disability of any subject of this realm by any forraine power out of the realme, as things not authentique, whereof the judges should give allowance. [i] If the bishop certifieth the excommunication under seal, albeit he dyeth, yet the certificate shall serve. [k] *Si quis innodatus fuerit per excommunicationes diversas pro diversis delictis, et profert literas absolutionis de unâ sententiâ, non erit absolutus, quousque de omnibus aliis absolvatur.*

[g] 33 E. 3. Excom. 29. F. N. B. 65. (Dy. 371. b. 4 Inst. 327.)

[h] 16 E. 3. Excom. 4. 31 E. 3. ibid. 4. & 6. 30 Ass. 19. F. N. B. 64.

4 H. 7. 15. 12 E. 4. 15. 14 H. 4. 14. [i] 14 E. 3. Excom. 8. 8 E. 2. ibid. 26.

[k] Hill. 14 E. 3. Coram rege, London, in Thesaur. (Ante 97. a. Post. 344.)

"*Bishop.*" *Episcopus*, a bishop, is regularly the king's immediate officer to the king's court of justice in causes ecclesiasticall, and all the bishoprickes in *England* are of the king's foundation, and the king is patron of them all; [l] and at the first they were donative,

[l] 17 E. 3. fo. 40. 25 E. 3. cap. de Provis. Mat. Par. pag. 69. 25 H. 8. ca. 10. 3 Co. 73, le case de deane & chapter de Norwich. Vid. Sect. 133, 134.

and

and so it appeares by our bookes, and by acts of parliament, and by history, and that was *per traditionem annuli & pastoralis baculi*, i. e. the crosier (1). And king *Henry* the first, being persuaded by the bishop of *Rome* to make them elective by their chapter or covent, refused it (2).. [*m*] But king *John* by his charter acknowledging the custome and right of the crowne in former times, yet granted *de communi consensu baronum*, that they should bee eligible, which after was confirmed by divers acts of parliament. And afterward the manner and order, as well of election of archbishops and bishops, as of the confirmation of the election and consecration, is [*n*] enacted and expressed in the statute of 25 *H.* 8. But by the statutes of 31 *H.* 8. and 1 *E.* 6. (3) they were made donative by the king's letters patents, both which statutes are repealed (4), and the statute of 25 *H.* 8. doth yet remaine in full force and effect (5).

[*m*] Rot. Patent. 15 January, 17 Regis Johannis. Mat. Par. pag. 252. 35 E. 1. Lestat. de Carlisle. 25 E. 3. Lestatut. de Proviss. 13 R. 2. ca. 2.
[*n*] 25 H. 8. ca. 20.

And

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(1) Mr. Washington, one of the writers against the dispensing power in the reign of James the second, insists, that in the Saxon times bishopricks were conferred in parliament; and that the king's investiture was subsequent to such election. For proof of this position, one of his chief authorities is the following passage in Ingulphus: *A multis annis ante retroactis nulla erat electio prælatorum mere libera et canonica; sed omnes dignitates, tam episcoporum quàm abbatum, regis curia pro suâ complacentiâ conferebat.* Ingulph. Hist. fol. 509. b. Observat. on Eccles. Jurisd. 24. Another instance relied on is the election of Wulstan bishop of Worcester, which Matthew Paris describes in the words following: *Ulstanus, electo ad archiepiscopatum Eboracensem Aldredo, unanimi consensu, tam cleri quàm totius plebis, rege insuper, ut quem vellent sibi eligerent præsulem et animarum pastorem, annuente, in episcopum ejusdem loci eligitur.* Matth. Par. Hist. 20.—[Note 212.]

(2) After some struggles, Henry gave up the point of investiture; but, according to mr. Washington, elections of bishops continued as before till king John's time; and he says, there are precedents of many bishops elected in parliament in the reigns of Stephen and Henry the second. Observat. on Eccles. Jurisd. 33, and 2 Spelm. Concil. 42 & 119.—[Note 213.]

(3) 31 H. 8. c. 9, & 1 E. 6. c. 2. But the former statute only relates to the new bishopricks erected by Henry. See Rastall's 3d ed. of Stat.—[Note 214.]

(4) But notwithstanding the repeal of the 1 E. 6. the election of bishops is, as that statute emphatically expresses it, mere *shadow*, *colour*, and *pretence*; for by the 25 of Hen. 8. if they do not elect the person recommended by the king's *letter missive*, which accompanies his *congé d'élire*, they incur the penalties of a *præmunire*. See s. 7. There is no such statute now in force, in respect to deaneries, which we have observed in a former note; and yet the election to the *old* deaneries is in practice controuled by the king's letter missive, as much as the election to bishoprics. See ante 96. a. note 3. It is probable, therefore, that the *letter missive* is of considerably greater antiquity as to both than the statute of Henry the eighth. Ibid.—[Note 215.]

(5) This was once doubted; for the 1 Ma. st. 2. c. 20, which repealed the 1 Edw. 6. was, by an oversight, as it seems, wholly abrogated by the 1 Jam. 1. c. 25, instead of being abrogated merely so far as relates to the marriage of of priests. At length, however, the judges held, that the 1 E. 6. c. 2, was virtually repealed by the 1 & 2 Ph. & M. c. 8, and 1 Eliz. c. 1. See Tracts by Antiq. Soc. v. 3, p. 416. 12 Co. 7.—It is observable, that lord Coke, in this his account of the patronage of bishopricks, omits distinguishing those of the *old* foundation from those of the *new*. But this is material, the latter being still *donative* by letters patent, according to the statute of 31 H. 8. which authorized their erection. See 31 H. 8. c. 9, in Rastall's edition of the statutes.

And where *Littleton* saith, that the bishop under his seale must testifie, &c. it is to be knowne, [o] that none but the king's courts of record, as the court of common pleas, the king's bench, justices of gaole delivery, and the like, can write to the bishop to certifie bastardy, mulierty, loyalty of matrimony, and the like ecclesiastical matters; for it is a rule in law, that none but the king can write to the bishop to certifie; and therefore no inferiour court, as *London*, *Norwich*, *Yorke*, or any other incorporation, can write to the bishop, but [p] in those cases the plea must be removed into the court of common pleas, and that court must write to the bishop, and then remand the record againe. And this was done in respect of the honor and reverence which the law gave to the bishop, being an ecclesiasticall judge, ☞ and a lord of parliament by reason of the baronie which every bishop hath (1). And this was the reason [a] a *quare impedit* did not lye of a church in *Wales* in the county next adjoyning, for that the lordship's marchers

[o] 2 E. 3. Corone 160. 8 E. 3. 59. 24 E. 3. 33. 44 E. 3. 28. 8 R. 2. Consans 88. (2 Ro. Abr. 589.)

[p] 41 E. 3. 42 E. 3. 18 E. 3. 61. 14 H. 4. 25. 3 H. 4. 12. Regist. 7. a. F. N. B. 6. E.

[a] 8 E. 3. 59. 36 H. 6. 33. tit. Quar. Imp. Brooke 109. 35 H. 6. 30. 11 H. 6. 3. 24 E. 3. 33.

[134. b.]

—As to the *Irish* and *Welsh* bishopricks, about which lord Coke is silent, the former by force of the Irish statute of 2 Eliz. c. 4, are made *donative* by the king's letters patent; but what the latter are, we cannot at present inform the reader, mr. Browne Willis's *Survey of the Cathedrals*, which is the only book we are possessed of on the subject, not stating how the Welsh bishops are created.—[Note 216.]

(1) Acc. ante 70. b. & 97. a.—We have already taken notice, that, according to lord Hale, the title, by which bishops sit in parliament, is, not having *baronial* possessions, but *usage* and *custom*; and that his notion had been ably controverted by bishop Warburton. Ante 70. b. n. 2. However, on further investigating the subject, we incline to concur with lord Hale. But then it is with some little addition. In the Anglo-Saxon times the bishops certainly were admitted to sit in parliament; and as this was prior to their holding their estates by a baronial tenure, it could not then be on account of their baronies; nor will it be easy to suggest any other probable reason for their presence during that period, than an usage founded on the propriety of having the heads of the church to guard it from injury, and to assist the other members of the legislature in their deliberations on religion and other ecclesiastical concerns. At the Conquest, as all agree, the possessions of the bishops were converted into baronies; and for a long time after they were summoned to parliament as barons by tenure. But it is no less certain, that, for many centuries past, they have been called to sit, without any regard to their temporal possessions or the tenure by which they are holden; which is more especially true in the instance of the new sees erected by Henry the eighth, the bishops of these never having had any estates by a baronial tenure, and consequently having no claim to be called to parliament, otherwise than as prelates of the church, and by reason of the usage, which had so long before prevailed in respect to their order. If all this be so, then, though the bishops once sat in parliament for their baronies, yet lord Coke's position, which imports, that they still sit by the same title, is not strictly accurate; but we should rather adopt lord Hale's idea of their sitting by usage as more applicable to the present circumstances. Perhaps, indeed, lord Coke only meant to refer to the more ancient reason of their being summoned to parliament, and thence to infer, that in presumption of law they are still deemed to be called on the same account; in which case there is little more than a difference of words between him and lord Hale. As to bishop Warburton's hypothesis on this subject; we still think that he shews great ability; but at the same time we cannot help owning, that he appears to us to have

marchers could not write to the bishop: [b] neither shall conusance be granted in a *quare impedit*, because the inferior court cannot write to the bishop. And herewith agreeth antiquitie. [c] *Nullus alius præter regem potest episcopo demandare inquisitionem faciendam.* [d] And another speaking of loyaltie of marriage, *nec alius quàm rex super hoc demandaret episcopo, quòd inde inquireret. Episcopus alterius mandatum, quàm regis, non tenetur obtemperare.* And therewith agreeth *Britton* also.

[b] 15 E. 3. Conusans 41. Jurisdict. 24. 40 E. 3. 2. Vide Sect. 134.
[c] Bract. lib. 3. 106.
[d] Fleta, lib. 5. cap. 14†. Britton, fol. 248. b.

"*The writ shall not abate* (le breve n'abatera my), *&c.*" *Abater* is a *French* word, and signifieth *destruere*, or *prosternere*, to destroy or prostrate. And *abatement de briefe* is a prostration or overthrowing of the writ.

[*] "*Shall go quit without day, &c.*" That is, to go quiet without any continuance to any certaine day; and therefore the defendant is not bound to any certaine attendance, untill the party purchaseth his letters of absolution, and the reattachment or resommons be sued, the entry of which award is, *ideo loquela prædicta remaneat sine die quousque, &c.*

[*] Bract. lib. 5, fol. 425. 11 R. 2. Excom. 25. 13 E. 4. 8. 3 Ass. p. 12. Vide Sect. 691.

"*Day.*" *Dies*, [e] in legall understanding is the day of appearance of the parties, or continuance of the plea. And you shall understand, that first in reall actions there are *dies communes*, common dayes, whereof you shall reade in divers ancient statutes.

[e] 51 H. 3. cap. 1 & 2. Marlebr. ca. 12. 32 H. 8. ca. 21.

[f] Also in all summons upon the originall there must be fifteene dayes after the sommons before the appearance. [g] But if the orignall be returned *tarde*, and *sommons alias* goeth forth, there must be nine returnes between the *teste* and the returne. And so in other judiciall processe in reall actions, saving if conusans be demanded to be holden within his mannor, there processe shall be awarded from three weekes to three weekes.

[f] Articul. super Cart. ca. 15. 28 E. 1.
[g] 8 H. 6. 20. 30 H. 6. 35. 8 Eliz. Dier 252. (2 Inst. 567.)

And

† *It should be, as it seems, Fleta, lib. 5, cap. 25.*

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have too much indulged in speculation, more adverting to what struck him as the most rational and proper grounds of admitting the bishops into the house of lords, than to the fact of the real title. He represents the bishops to sit as *barons by tenure*, so far as regards the *judicial* capacity of the lords, and as *prelates of the church*, so far as the lords act in a *legislative* character. But the fact on which he builds the first part of his distinction fails him; because, for the reasons already stated, the bishops no longer have baronies by tenure, nor have had any for several centuries past. Besides, independently of this, the whole of the speculation seems to us unfounded in any sufficient authority, and consequently the mere offspring of modern refinement; our simple and unlettered ancestors, when they laid the foundations of the English parliament, not being likely to have acted under the influence of a policy so deep, as the nice distinction thus attributed to them necessarily supposes. At present we have only to add further on this curious and difficult subject, that, as we have touched it so slightly, our observations should be understood as intended to convey only a general idea. Should the reader have occasion to penetrate more deeply into the subject, he must consult the several pieces published in 1679 on the controverted question, whether the bishops can vote in the preliminary steps of a bill of attainder; particularly the tracts by bishop Stillingfleet and mr. Hunt for the right, and those by lord Hollis against it. See 1 Burn. Hist. fol. ed. 460. 2 Stillingfleet's Eccles. Cas. 228. Hunt's Argument for the Right of the Bishops in Capital Cases 128. Hollis's Remains, 122. See further Seld. tit. Hon. ed. 1678, p. 697. Staundf. Pl. C. 153.—[Note 217.]

And before the statute of *articuli super chartas*, in all sommons and attachments in plea of land there shall be contained the terme of fifteene dayes. [q] And it appeareth as well by the statute as by the ancient authors of the law, who wrote before the statute, that this was the ancient common law; and the reason of these long dayes given in reall actions was the recovery being so dangerous, that the tenant might the better provide him both of answer and of proofes. [*] But by consent they may take other than common dayes.

[q] Mirror, cap. 2, sect. 19. Bract. lib. 5, fol. 334, & lib. 4, fol. 255. Brit. fol. 279. b. Fleta, l. 6, c. 6. 12 E. 4. 15. [*] 11 H. 6. 23. 15 E. 3. Jour 22. 21 E. 3. 29. 15 Ass.

And it is not amisse to note what the ancient law was in proceeding against a man for his life. And therefore heare what *Britton* saith: *Sur le presentment de cest felony* (under which he includeth also treason) *voilons nous* (for he wrote in the king's name) *que trestous ceux, que ont serr' endites, face le viscont hastiment prender, et safement lour corps en prison garder, et que ilz sont menes devant nous, ou devant nos justices: et pur ceo que nulluy ne soit disgarnis de lour respons, voilons que ceux, que issint soient prise, que ilz eynt temps de purveyer lour respons* 15 *jour au meyns silz le prient, et en dementiers soient safement gardes.*

Britton, fo. 10. b.

[r] *Vide Fortescue* of this matter. And see the *Mirror*, that in some cases the party convicted had forty dayes, or at least thirty dayes to shew some matter to disturbe (that is, to arrest) judgement, which now I know is gone *in desuetudinem*, and great expedition is now made in pleas of the crowne concerning the life of man. *Sed de morte hominis nulla est cunctatio longa.*

[r] Fortescue in libro de Laudibus Legum Angliæ. Mirror, ca. 4. Sect. Sept choses disturben judgement mortels.

[s] And the use of the king's bench at this day is, that if the offence be committed in another county than where the bench sits, and the inditement be removed by *certiorari*, there must be fifteene dayes betweene every processe and the returne thereof; but if it be committed in the same county where the bench sit, they may proceed *de die in diem;* but so they will do rarely. But let us returne againe to the common pleas.

[s] 9 Co. 118. b. Zancher's case. (2 Inst. 568.)

Secondly, there is a day called *dies specialis;* [a] as in an assise in the king's bench or common pleas, the attachment need not be 15 dayes before the appearance. Otherwise it is before justices assigned. But generally, in assises, the judges may give a speciall day at their pleasure, and are not bound to the common dayes; [*] and these daies they may give as well out of terme as within. So upon an imparlance the court may give any speciall or particular day, but that must be in the terme time; and likewise in a *scire facias*, upon a fine or a recovery in a reall action, because it is a writ of execution; and so it is in a *per quæ servitia* and the like, and in all judiciall writs: in processe against an infant to judge of his age, or where the husband prayeth in ayd of his wife, or in a *pone* at the suit of the defendant, there need not be fifteene dayes. Also after demurrer in law, the court may give what day they will. [b] And it is worthy the noting, that if in an assise the parties be adjourned to *Westm. usque* 15 *Paschæ*, there they be not demandable till the fourth day; but if it be adjourned *usque diem Lunæ*, or *diem Martis*, there the parties are demandable on that day.

[a] Artic. super Cart. ubi supra. F. N. B. 177. c. 11 Ass. 30. 12 Ass. 4. 22 Ass. 79. 3 H. 6. Ass. 2. 9 E. 4. 5. a. 27 E. 3. 1. 2 W. 1. cap. ult. [*] F. N. B. 177. D. 7 Ass. 7. 14 Ass. 4. 24 E. 3. 31. 39 E. 3. 20. 9 E. 4. 18. 12 E. 4. 15. 6 H. 6. Error 87. 12 E. 4. 15. [b] 41 E. 3. Jour 16. 8 E. 4. 4. 1 H. 6. 4. 27 Ass. 38.

Thirdly, [c] there is a day of grace, *dies gratiæ*, or a day of courtesie. The name doth shew of what kind it is; and regularly this day is granted by the court, at the prayer of the ☞ demandant or plaintife in whose delay it is, and never at the prayer of tenant or defendant. But it is worthy of observation, [d] that a day of grace is never granted,

[c] 3 E. 2. Avowrie 188. 15 E. 3. Jour. 20. 22 E. 3. 20. 1 E. 3. 4. 9 Co. 49.

[135. a.]

The Earl of Shrewsbury's case. 33 H. 6. 42. [d] 14 E. 3. Jour 24. 15 E. 3. ibid. 21. 22 E. 3. 9. 27 E. 3. 88.

granted, where the king is party by aide prayer of the tenant or defendant; nor where any lord of parliament or peere of the realme is tenant or defendant. [e] And sometimes the day that is *quarto die post*, is called *dies gratiæ*; for the very day of returne is the day in law, and to that day the judgement hath relation: but no default shall be recorded till the fourth day be past, unlesse it be in a writ of right, where the law alloweth no day, but onely the day of returne. This day is sometimes called *dies amoris*, and sometimes a *dies datus*. But it were too long to enumerate all. This shall be sufficient to give the reader a taste to understand the residue concerning this matter.

[e] 22 E. 4. Jour 39. 18 E. 3. ibid. 20. 38 E. 3. 20. 9 Ass. 21. 21 E. 3. 13. 41 E. 3. ibid. 16. 33 H. 6. 42. 34 H. 6. 27. 10 Eliz. Dier 269.

39 H. 6. 29. 24 E. 3. 28. 24 E. 3. Breve 556. Bract. lib. 5, fol. 367.

[f] There is also a day of appearance in court by the writ, and by the roll. By writ, when the sherife returns the writ. By the roll, when he hath a day by the roll, and the sherife returnes not the writ, there the defendant, to save himselfe from corporall paine, as by imprisonment, or to prevent the losse of issues, or to save his freehold or inheritance, may appeare by the day he hath by the roll.

[f] 21 E. 3. 43. 3 H. 6. 2. a. 22 H. 6. 20. 3 E. 4. 15. 6 E. 4. 7 E. 4. 15. 8 E. 4. 18. 3 H. 7. 8. 10 H. 7. 11. b. 27 H. 6. 14. 11 Co. 40. 17 E. 3. 2. 11 Eliz. Dier, 286.

[g] Note, it is said commonly, that the day of *nisi prius*, and the day in bank, is all one day. That is to be understood as to pleading, but not to other purposes.

There are *dies juridici* (which [h] *Britton* calleth *temps covenables*) and *dies non juridici*. *Dies juridici* (except it be in assises) are only in the tearme. [i] And there be also in the tearme *dies non juridici*. As in all the foure tearmes the sabbath day is not *dies juridicus*, for that ought to be consecrated to divine service (1). Also in *Michaelmasse* tearme the feasts of *All Saints* and of *All Soules* (2); in *Hillarie* tearme the *Purification of the Blessed Virgin Marie*; and in *Easter* terme the feast of the *Ascension* are not *dies juridici*, but set apart by the ancient judges and sages of the law for divine service. As for *Trinity* tearme, it sometimes had seven dayes of returne, and was as long as *Michaelmasse* tearme is now: but for avoiding of infection in that hot time of the yeare, and that men might not be letted to gather in harvest, three returnes (since *Littleton* wrote) viz. *Crastino Sancti Johannis Baptistæ, Octabis Sancti Johannis Baptistæ, and* 15 *Sancti Johannis Baptistæ*, are by the statute of 32 *H.* 8. cut off, and become *dies non juridici*. And in those dayes the feast of *Saint John the Baptist* was not *dies juridicus*. And the said statute, called *Dies Communis in Banco*, is in divers points (since *Littleton* wrote) altered, as by the said statute appeareth. And in ancient time respect and reverence was had by law to certaine times, as it appeareth [k] by the statute of *W.* 1. cap. 51, which hath a short but

[g] 21 H. 6. 10. 20. 4 H. 6. 9. 40 E. 3. 31. Cro. Jam. 646.)

[h] Britton, fol. 134. a. (2 Inst. 264.)

[i] Mirror, cap. 3, sect. Exception de Temps, & cap. 5, sect. 1. (Plowd. 265. Cro. Cha. 602. Cro. Eliz. 227.)

32 H. 8. cap. 21.

[k] W. 1. cap. ultimo.

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(1) Writ of summons in a common recovery was made returnable in a month from the day of Easter, which happened to be *Sunday*; and the tenant in tail who was vouchee, died the same day. The judgment was reversed; because it could not be given till the day after the vouchee's death, and then it came too late. *Swan* and *Broome*, 4th part Burr. v. 3. p. 1596. But though *Sunday* is not *dies juridicus* for giving judgment, or awarding judicial process, yet it is for some other purposes, as for exhibiting an information on the 5 & 6 E. 6. against ingrossing. W. Jo. 156.—[Note 218.]

(2) In consequence of the abbreviation of Michaelmas term, by the 24 Geo. 2. c. 48, these two days do not now fall within it.—[Note 219.]

but an excellent preamble: viz. *Et pur ceo que grand charitie serra de faire droit a touts en tout temps, ou mestier serroit; purvieu est per assentment des prelates, que assises de novel disseisin, mortdauncester, et darreine presentment, fuissent prises en le Advent, en Septuagesime, et en Quaresme, auxibien come (le home) prent lenquestes: et ceo pria le roy as evesques.*

[l] 7 Ass. p. 7. 14 Ass. 5. F. N. B. 177, &c. Britton, fol. 134. b.

[*l*] This statute is expounded in bookes, which I have onely added, to the end the studious reader might understand the bookes that darkly speake of this matter, and be ignorant of nothing that belongs to the understanding of any part of the law. Now *Advent* is a moneth before the feast of the *Nativity of our Saviour Christ*, so called *de adventu Domini in carne*. *Septuagesima* beginneth ever on the sabbath day, and is the third sabbath before *Shrove Sunday*, so called, because it is the seventieth day before the feast of *Easter*. *Sexagesima* is the second sabbath before *Shrove Sunday*, so named, because it is the sixtieth day before *Easter*; and so of *Quinquagesima* and *Quadragesima*, [*m*] whereof you shall reade in acts of parliament, and ancient authors (3). Now as there be *dies juridici*, so there be *horæ convenientes*, whereof the *Mirror* saith, [*n*] *abusion, que len tient pleas per dimenches (id est sabbaths) ou per auters jours defendus, ou devant le soleil levy, ou noctantre, ou en dishonest lieu.*

[m] W. 1. cap. 51. fait anno 3 E. 1. Britton, fol. 134, ca. 53.

[n] Mirror, lib. 5, sect. 1.

[o] Bract. lib. 4. fol. 264. Britton, fol. 209. (Cro. Eliz. 43. 1 Saund. 286.)

[*o*] Furthermore, there are (as ancient authors term them) *dies solaris et dies lunaris, secundum quod Deus divisit lumen à tenebris, ex quibus duobus diebus efficitur unus dies, qui dicitur artificialis, ex die præcedente et nocte subsequente, qui constat ex 24 horis.*

But we at this day, retaining the same method, do differ in words. For we say, *dierum alii sunt naturales, alii artificiales; dies naturalis constat ex 24 horis, et continet diem solarem et noctem:* and therefore in indictments of burglary, and the like, we say, *in nocte ejusdem diei. Iste dies naturalis est spatium, in quo sol progreditur ab oriente in occidentem, et ab occidente iterum in orientem. Dies artificialis sive solaris incipit in ortu solis, et desinit in occasu:* and of this day the law of *England* takes hold in many cases. Now divers nations begin the day at divers times. The *Jewes*, the *Chaldeans*, and *Babylonians*, begin the day at the rising of the sun; the *Athenians* at the fall; the *Umbri* in *Italy* beginne at midday; the *Ægyptians* and *Romanes* from midnight; and so doth the law of *England* in many cases. Of all which you shall reade plentifull matter in our bookes, and in my Reports, which by this short instruction you shall the better understand.

Gen. cap. 1. ver. 4, 5.

[p] Bract. lib. 5, fol. 359. Britton, fol. 209. a.

[*p*] There is also *annus minor* and *major*. The lesser yeare consisteth of 365 dayes and sixe houres, whereby in every fourth yeare there is *dies excrescens*, which makes that yeare to have *in rei veritate* 366 daies, and that is called *annus major*. [*q*] A quarter of a year containeth by legall computation 91 dayes, and half a yeare containeth 182 days; for the odde hours in legall computation are rejected; and by [*r*] the statute *de anno bissextili*, it is provided, *quòd computentur dies ille excrescens et dies proximè præcedens pro unico die*, so as in computation that day excrescent is not accounted.

[q] 17 Eliz. Dier 345. (2 Ro. Abr. 521.)

[r] 21 H. 3. stat. de anno bissextili.

[135. b.]

A month

(3) See further, as to *dies non juridici*, Spelman's Treatise on the Terms amongst his Posthuma, page 87.

A month, *mensis*, is regularly accounted in law 28 dayes, and not according to the solar month, nor according to the kalendar [*s*], unlesse it be for the account of the laps in a *quare impedit*. There is *mensis solaris*, and *mensis lunaris*. *Solaris est* 12 *pars anni, viz. spatium* 30 *dierum horarum* 10 *et minutorum* 30, *et lunaris est spatium* 28 *dierum*.

[*s*] 6 Co. 62. Catesbye's case. (2 Ro. Abr. 521. Cro. Jam. 167.)

"*Resummons or reattachment*." These are writs that the demandant or plaintife, after he hath obtained his letters of absolution, may sue out to bring the tenant or defendant againe into court to have day, to make answer unto him. [*t*] And these writs doe lye in all cases when the plea is discontinued or put without day, either in this case, or in case when the demandant or tenant hath his age, or for the *non venue* of the justices, or in case of a protection, or *essoine de service le roy, &c.* Of these writs there be two sorts, viz. generall and speciall, whereof you may see presidents, and reade more at large in the case of discontinuance of processe in my Reports, and need not here to be inserted.

[*t*] Bract. lib. 5, fo. 425. Britton, ca. 74. 7 Co. 29, 30. (Post. 363. a.)

"*Upon his original*." This is intended of his originall writs, or of that which is instead of an originall writ. But note, that in the other five cases the writ shall abate; and in the case of excommengement the writ shall not abate, but the plea to be put without day untill the plaintife purchase his letters of absolution, and sue out his resummons, or reattachment.

But in the case of outlawry the writ shall abate if he obtaine not his pardon. 44 E. 3. 27.

In ancient times more persons seemed to be disabled than these six recited by *Littleton*. As first, he that was a leper, and by the writ *de leproso amovendo* was *propter contagionem morbi prædicti* (as the writ saith) *et propter corporis deformitatem* (as others say) to be removed from the society of men to some solitary place; and thereupon [*u*] it is said, *datur etiam exceptio tenenti ex personâ petentis peremptoria propter morbum petentis incurabilem et corporis deformitatem; ut si petens leprosus fuerit, et tam deformis quòd aspectus ejus sustineri non possit, et ita quòd à communione gentium sit separatus, talis quidem placitare non potest, nec hæreditatem petere.* [*x*] And herewith *Britton* agreeth. Treating of disabled men, as men outlawed, abjured the realme, attainted of felony, &c. he addeth, *ne mesel, ouste de common gents.*

[*u*] Bract. lib. 5, fol. 421.

[*x*] Britton, fol. 39, & 88.

[*y*] And *Fleta* saith, *competit etiam ei exceptio propter lepram manifestam, ut si petens leprosus fuerit, et tam deformis quòd à communione gentium meritò debet separari; talis enim morbus petentem repellit ab agendo.*

[*y*] Fleta, lib. 6, cap. 39.* 22 E. 3. in dors. clau. 20. Part. nu. 14. F. N. B. 234. Register.

And if these ancient writers be understood of an appearance in person, I think their opinions are good law; for they ought not to sue nor defend in proper person, but by atturney; for they are separated *à communione gentium propter contagionem morbi et deformitatem corporis.*

Before the Conquest, this disease was not known in *England*; for master *Camden*, writing of *Burton Lazers* in *Leicestershire*, saith, [*a*] *primis Normannorum temporibus collecta per Angliam stipe nosocomium hoc constructum ferunt, quo tempore lepra (quæ à nonnullis elephantiasis) gravissimè vi contagionis per Angliam serpsit.* And it is called *morbus elephantiasis*, because the skinnes of lepers are like to elephants. [*b*] And the law of *England*, for the removing of the lepers from the society of men to some solitary place, is grounded upon God's law.

[*a*] Cambden in Leicestershire, verbo Burton.

[*b*] Levit. cap. xiii. verse 44, 45, 46. Num. cap. v. verse 1, 2. iv Regum c. 15.

* *It should be cap. 40, as it seems.*

Also

[c] Bract. l. 5. 420, 421. Britton, f. 39. Flets, l. 6, c. 37.

[d] 33 H. 6. 18. F. N. B. 27. G.

[e] 27 H. 8. 11. 40 E. 3. 16. 20 E. 4. 2. F. N. B. 27 H. (2 Inst. 261.)

[c] Also there was a time when ideots, madmen, and such as were deafe and dumbe naturally, were disabled to sue, because they wanted reason and understanding (*tales enim non multùm distant à brutis*). But at this day they all may sue; for the suit must be in their name, but it shall be followed by others. [d] And note, that when an ideot doth sue or defend, he shall not appeare by gardian or procheine amy, or atturney, but he must be ever in person; [e] but an infant, or a minor, shall sue by procheine amy, and defend by gardian (1). But now let us heare what *Littleton* will say unto us.

Sect.

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(1) Acc. Fitzh. N. B. 27 H. At common law, infants could neither sue nor defend, except by *guardian*; by whom was meant, not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent. F. N. B. 27 H. & L. Sty. 369. Bro. Gardein, pl. 11. & 17. But this rule was found inconvenient, it sometimes happening, that an infant was secreted by those having the legal custody of him, and so prevented from applying to have a guardian *ad litem* appointed. Hence was seen the necessity of permitting any person to litigate for the infant's benefit, who should be disposed to risque the expence. On this principle the statute of Westminster the first enables any one to sue as *prochein amy* for an infant in an assise, where the infant himself is essoigned by his guardian, or otherwise disturbed from suing the assise. 3 E. 1. c. 49. 2 Inst. 261. The statute of Westminster the second extended this provision, by permitting the *prochein amy* to sue in *all* actions; and though in this statute, as well as in the former, eloignment of the infant was mentioned, yet by construction it is not deemed necessary, but the *prochein amy* may sue, whether that circumstance occurs or not, it being considered merely as an instance of the necessity of the case, and as such only taken notice of by those who framed the statute. 13 E. 1. c. 15. 2 Inst. 390. But notwithstanding these statutes, as there is not any thing in them which prohibits the suing by guardian, we presume, that it remains as lawful as it was before. It is therefore probable, that Fitzherbert and lord Coke, when they tell us, that an infant *shall* sue by *prochein amy*, did not mean to exclude the election of suing either in that way or by guardian. That Fitzherbert did not mean this, appears from his afterwards mentioning without disapprobation a case of debt, in which suing by guardian was allowed. Coke too, in his report of Rawlyns's case, says, that on search many precedents of infants suing by guardian were found; nor in that case was any objection grounded on its being a suit by guardian. 4 Co. 53. b. But whether we construe the meaning of these two judges rightly or not, a case occurred, in which the point is said to have been so adjudged. Young v. Young, W. Jo. 177. However the reader should at the same time be apprized, that according to another report of the same case, the court delivered no opinion on the point, whether an infant may sue by guardian. Cro. Cha. 86. See further on this subject Palm. 295. & Vin. Abr. *Guardian and Ward.* N. 7.—What we have hitherto advanced as to suing by *prochein amy* applies to the courts of common law only. As to our courts of equity, the usual practice in them is to sue for infants by *prochein amy* and to defend by guardian. But it is said, that they may sue in either way. Pract. Reg. in Chanc. 296. —[Note 220.]

Sect. 202.

ALSO, if a villeine be made a secular chaplaine, yet his lord may seise him (2) *as his villeine, and seise his goods, &c. But it seemeth, that if the villeine enter into religion, and is professed, that the lord may not take nor seise him, because he is dead in law; no more than if a free man taketh a niefe to his wife, the lord cannot take nor seise the wife of the husband, but his remedy is to have an action against the husband, for that he took his niefe to wife without his licence and will, &c. And so may the lord have an action against the soveraigne of the house, which taketh and admitteth his villeine to be professed in the same house, without the licence and leave of the lord, and he shall recover his damages to the value of the villeine. For he which is professed a monke, shall be a monk, and as a monke shall be taken for terme of his naturall life, unlesse he be deraigned* (sinon que il soit deraigne) *by the law of holy church. And he is bound by his religion to keepe his cloyster, &c. And if the lord might take him out of his house, then he should not live as a dead person, nor according to his religion, which should be inconvenient, &c.*

"*SECULAR chaplaine* [*a*]" is he that is *infra sacros ordines*; but he is not regular, (that is) liveth not under certain rules, ☞ nor hath vowed those three things above specified. [136. a.]

[a] Mirror, cap. 2, sect. 18. Doct. and Stud. fol. 141. 4 E. 4. 25. per Danby. 27 Ass. pl. 49.

[*b*] "*Enter into religion, and is professed.*" That is intended (as hath been said) when he is regular and profest under certain rules, as to become one of the foure orders of friers (that is to say) *freres Minors, Augustines, Preachers,* or *Carmelites,* or become a monke, canon, or nunne, &c. *Qui ad vivendum regulariter se astringunt, sive sunt monachi, sive canonici regulares sive sanctimoniales.* For all these are regular and votaries, and are dead persons in law; but so are not the secular persons, as prebends, parsons, vicars, &c.

[b] Britton, cap. 31, fol. 79. Doctor and Student, fo. 141. (Doctr. Plac. 9. Ante 132. a.) 4 H. 4. cap. 14.

And therefore it is holden in our bookes, [*c*] that if a secular priest taketh a wife, and hath issue and dyeth, the issue is lawfull, and shall inherite as heire to his father, &c. for (as it was then holden) the marriage was not void, but voidable by divorce, and after the death of either partie no divorce can be had (1).

[c] 21 H. 7. 39. 19 H. 7. tit. Bastardy 33. 5 E. 2. tit. Nonability 26. 47 E. 3. Casu ult. (12 Co. 9. 1 Ro. Abr. 340.)

But if a man marrieth a nunne, or a monke marrieth, these marriages were holden void, and the issues bastards; because (as it was then holden) the marriage was utterly voyde, for that the nunne and the monke (as *Littleton* here saith) were dead persons in law. And that is the reason yielded by *Littleton*, wherefore a villeine, being professed in religion, cannot be seised by

(2) Vide tamen Pasch. 8 E. 1. rot. 7, *the case of Edward Rowald* contra—Hal. MSS.

(1) See 2 Inst. 687.

by the lord, because he is dead in law; and yet his blood or bondage is not thereby altered, but his person in respect of his profession only privileged. [d] *In decretalibus statutum est, quòd nullus episcopus spurios aut servos, donec à dominis suis fuerint manumissi, ad sacros ordines promovere præsumat.* But notwithstanding his person is privileged till he be disgraded.

[d] Glanvil. lib. 5, cap. 5. Britton, fo. 79, & 82.

[e] Fleta, lib. 2, cap. 44. Britton, ubi supra.

And so it is holden in ☞ our old bookes. [e] If a villeine be made a knight, for the honour of his degree his person is priviledged, and the lord cannot seise him untill he be disgraded. *Nullam vilem personam, natione spurium, vel servilis conditionis, ad militiæ strenuitatis ordinem promoveri licebit; sed cùm à dominis suis petantur ut nativi, ipsis primò degradatis, statim ad judicium procedatur.*

[136. b.]

[f] F. N. B. 78. b. 30 E. 1. tit. Villein 46. 33 E. 3. ibid. 21. (Post. 137. b.) 18 E. 2. ibid. 30. 46 E. 3. 6. 4 E. 4. 25. 1 H. 4. 6. 13 E. 1. Villein 36. 18 Ass. 10. Doct. & Stud. 141. Mirror, ca. 2, sect. 18. acc.

"*If a free man taketh a niefe.*" [f] Some have holden, that by this marriage the wife shall be free for ever; but the better opinion of our bookes is, that she shall be priviledged during the coverture onely, unlesse the lord himselfe marrieth his niefe; and then some hold, that she shall be free for ever (1).

If a niefe be regardant to a mannor, and she taketh a freeman to husband by licence of the lord, and the lord maketh a feoffment in fee of the mannor, the husband dieth, the feoffee shall not have the niefe, but the feoffor, for that during the marriage she was severed from the mannor. And so is the booke 29 *Ass.* (which is falsly printed) to be understood.

[g] 16 H. 3. nuper obiit 17. 8 H. 3. Breve 789.

[g] If two coparceners be of a villeine, and one of them taketh him to husband, she and her husband shall not have a *nuper obiit* against her coparcener, but after the decease of her husband she shall.

[h] Vide Britton, fol. 82. Fortesc. c. 43. 46 E. 3. 6. a.

"[h] *But his remedy is to have an action against the husband, &c.*" Albeit marriage is lawfull, yet when it worketh a prejudice to a third person, an action in this case lyeth against the husband to the value of his losse. And albeit he did not know her to be a niefe, yet the action lyeth against him; for he must take notice thereof at his perill, [i] unlesse she be out of the service of the lord, and vagrant; and then if one not knowing her to be a niefe marrieth her, some say, that in that case no action lyeth against the husband. [k] And likewise the lord shall have an action against those that were the meanes to make the villeine a knight.

[i] 7 R. 2. tit. Barre 240. (F. N. B. 168. b. 1 Leon. 240.)

[k] Britton, fol. 82. b.

31 H. 6. ca. 5. 12 H. 7. c. 7. 11 H. 4. 5. b.

"*Soveraigne,*" *præcipuus, chiefe;* as here, *soveraigne of the house,* is the chiefe of the house.

31 H. 8. cap. 29.

"*Unlesse he be deraigned* (sinon que il soit deraigne)." This word *(deraigne)* commeth of the *French* word *derayer*, or *deraigner*, that is to say, to displace or to turne one out of his order; and hereof cometh *deraignment*, a displacing or turning out of his order. So when a monke is deraigned, he is degraded

(1) See ante 123. n. 3. Post. 137. b.

graded and turned out of his order of religion, and become a lay man.

" *Which should be inconvenient.*" *Ab inconvenienti* is a good argument in law, as *Littleton* often observeth*. And here *Littleton* concludeth, that the lord cannot take a monke out of his house, for that it should be inconvenient, which *Littleton* here sheweth, for divers reasons, and therefore unlawfull. And the inconvenience is, that where a man of religion should live according to his profession in religion, by the taking of him out he should not. 40 Ass. 27. Finchden.

" *If the lord might take him, &c.*" By this it appeareth, that if a man detaineth a villeine in his house, the lord of the villeine may take him out of the house; for here the impediment, wherefore the lord could not take him out of the house, was, for that the villeine was a monke professed. And so in case of the wardship here next following.

Sect. 203.

IN the same manner it is, if there be a gardeine in chivalry of the body and land of an infant within age, if the infant, when he comes to the age of 14 *yeares, entreth into religion, and is profest, the gardian hath no other remedy (as to the wardship of the body) but a writ of ravishment* de gard *against the soveraign of the house. And if any being of full age, who is cousin and heire of the infant, entreth into the land, the gardian hath no remedy as to the wardship of the land, for that the entry of the heire of the infant is lawfull in such case.*

" *A WRIT of ravishment de gard.*" This writ is given by the statute of *W.* 2. cap. 35, *in verbis conceptis;* the words of which writ be, that the defendant, *talem hæredem, cujus maritagium ad ipsum A. ☞ pertinet, &c. rapuit et abduxit, &c. contra pacem.* Now *rapere* signifieth properly to take away by violence and force. And when the soveraigne took and admitted the ward into his house to be professed, this in judgment of law is a ravishment of the ward; and as it appeareth in our bookes before the said statute, there lay a general action of trespass in that case. [137. a.] 9 Co. Doctor Hussey's case, fol. 72.

" *After the age of* 14 *yeares, &c.*" Our author mentioneth this age because it is prohibited by the statute of 4 *H.* 4, that no childe shall be received into any house of religion before that age without consent of his parents and gardians, &c. 4 H. 4. cap. 17.

" *The gardian hath no remedy, &c.*" Here it appeareth, that, by the profession of the ward, the lord loseth the wardship of the land, because he is *civiliter mortuus*, a dead man in law, and cannot hold any inheritance; neither can the gardian continue the wardship of the land, because by the civill death of the ward the inheritance is descended to another, who is either to be in ward, or pay reliefe. So as in this case the gardian hath *damnum*, but

* *See ante Mr. Hargrave's note* 1, *fol.* 66. *a.*

(Noy 184. 1 Ro. Abr. 107. Post. 197. b.)

but it is *absque injuriâ*, because he loseth the wardship of the land by act of law, viz. the descent thereof to another; and therefore the law giveth to him no remedy in this case, neither by any formed writ, nor by action upon his case; for *Littleton*'s words are generall (he hath not any remedy).

Sect. 204.

ALSO, in many and divers cases the lord may make manumission and enfranchisement to his villeine. Manumission is properly, when the lord makes a deed to his villeine to enfranchise him by this word (manumittere), *which is the same as to put him out of the hands and power of another. And for that that by such deed the villeine is put out of the hands and out of the power of his lord, it is called manumission. And so every manner of infranchisement made to a villein may be said to be a manumission.*

[l] Glanvill. lib. 5, cap. 5. Britton, fol. 78. &c. 82. 97. 110. Fleta, lib. 3, cap. 13. & lib. 2, cap. 44.

"*MANUMISSION*," [l] *Manumittere, quod idem est quod extra manum vel potestatem ponere.*

Quia quamdiu quis in servitute est, sub manu et potestate domini sui est.

Qui in potestate domini sui est, in manu domini sui esse dicitur; sed postquam manumissus est, ab illo liberabitur, ergo dicitur quasi extra manum, id est, extra potestatem domini sui missus. And here is to be noted (as in many other places is observed) what regard *Littleton* hath to the true etymologies of words.

[m] Mirror, ca. 2, sect. 18.

"[m] *Enfranchisement.*" (Hereby *Littleton* explaineth manumission). It ☞ is derived from the *French* word *franchise*, that is, liberty; and in the common law it hath divers significations: sometimes the incorporating of a man to be free of a company or body politique, as a free man of a city, or burgesse of a burrough, &c. sometimes to make an alien a denizen; and here to manumise a villeine or bondman. So as this word *(enfranchisement)* is more general than *manumission;* for that is properly applyed to a villein; and therefore every manumission is an infranchisement, but every infranchisement is not a manumission. [n] There be two kindes of manumissions, one expresse, and the other implyed. Expresse, when the villeine by deed in expresse words is manumised and made free. The other implyed, by doing some act that maketh in judgement of law the villeine free, albeit there be no expresse words of manumission or enfranchisement. [o] If a villein be manumised, albeit he become ingratefull to the lord in the highest degree, yet the manumission remaines good: and herein the common law differeth from the civill law, for *libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum et ingratum.*

[137. b.]

[n] Mirror, cap. 2, sect. 18.

[o] Fortescue, cap. 46.

There be also some cases where the villein shall be privileged from the seisure of the lord, albeit he be not absolutely manumised or infranchised. Sometimes *ratione loci;* [p] as if a villeine

[p] 39 E. 3. 6. b. F. N. B. 79. a. (Dy. 266. b. 283. b.)

remaine

remaine in the ancient demeane of the king a yeare and a day without claime or seisure of the lord, the lord cannot have a writ of *nativo habendo*, or seise him, so long as he remaines and continues there; and the reason of this was, in respect of the service he did to the king in plowing and tillage of the demeane, and other labours of husbandry for the king's benefit. And herewith agree old bookes, [q] which say, that this immunity was sometimes granted by common consent to the king for his profit, and for the help or ease of his villeins. [r] If a villein be a priest of the king's chappel, the lord cannot seise him in the presence of the king, for the king's presence is a privilege and protection for him. Sometimes *ratione professionis;* [s] as if a villeine be professed a monke, or a niefe a nun, as hath been sayd. [t] Sometimes (as some have said) *ratione dignitatis;* as if the villeine be made a knight, &c. Sometimes *ratione matrimonii;* as if a niefe marry a free man, she is priviledged during the marriage, but not absolutely enfranchised; for if her husband dye, she is niefe againe, unlesse the lord himself marrieth the niefe, and then she is enfranchised for ever, as hath been said before (1). And it shall not be amisse to observe the wisdome of our ancients, with what solemnity (for more surety thereof) manumissions were made. *Qui servum suum liberat, in ecclesiâ, vel mercato, vel comitatu, vel hundredo, coram testibus et palam faciat, et liberas ei vias, et portas conscribat apertas, et lanceum et gladium, vel quæ liberorum arma, in manibus ei ponat.* Our author having spoken of an expresse manumission, here followe infranchisements in law.

[q] Glanvil. lib. 5. cap. 5. Fleta, lib. 2, cap. 44. Brit. fol. 79. Mirror, cap. 2, sect. 18. (2 Ro. Abr. 736, 737.)

[r] 27 Ass. p. 49.

[s] Glanvil. lib. 5, ca. 5.

[t] Britton, ubi supra. (Ante 136. b.)

Lib. Rub. cap. 78.

Sect. 205.

ALSO, if the lord maketh to his villeine an obligation of a certaine sum of money, or granteth to him by his deed an annuity, or lets to him by his deed lands or tenements for terme of yeares, the villeine is enfranchised.

FOR when the lord enableth the villeine to have an action against him, as for debt or annuity, &c. or giveth to the villeine a certaine and fixed estate in lands, tenements, or hereditaments, as a lease for yeares, this amounteth to an infranchisement, not only during the yeares, but for ever; [u] and albeit the lease be made to the villeine without deed, yet it is an infranchisement for ever.

(5 Co. 56. a.)

[u] 50 E. 3. tit. Vil. 25. 11 H. 7. 13.

Sect.

(1) Ante 123. a. n. 3.

☞ Sect. 206. [138. a.]

ALSO, if the lord maketh a feoffement to his villeine of any lands or tenements, by deed or without deed, in fee simple, fee taile, or for terme of life or yeares (1), *and delivereth to him seisin, this is an enfranchisement.*

Vide 24 E. 3. 30. 12 H. 3. tit. Vill. 42.

This is evident, and agreeth with our bookes.

Sect. 207.

BUT if the lord maketh to him a lease of lands or tenements, to hold at will of the lord, by deed or without deed, this is no enfranchisement; for that he hath no manner of certainty or surety of his estate, but the lord may oust him when he will.

"*BY deed.*" So as a deed made to a villeine by the lord is no infranchisement, when the deed transferreth no certaine or fixed estate, but revocable at the lord's will. If the lord release to his villeine all the right in *Black Acre*, and the villeine is not thereof seised, this is no infranchisement, because it is voyd, and can give no cause of action. If the lord attorneth to his villeine, this is no infranchisement.

11 H. 7.

Sect. 208.

ALSO, if the lord sueth against his villeine a præcipe quod reddat, *if he recover, or be nonsuite after appearance, this is a manumission, for that he might lawfully have entered into the land without suit. In the same manner it is, if he sue against his villeine an action of debt or account, or of covenant, or of trespasse, or of such like, this is an infranchisement, for that he might imprison the villeine, and take his goods without such suite. But if the lord sue his villeine by appeale of felonie, where he was indited of the same before* (1)*, *this shall not enfranchise the villeine, albeit that the matter of appeale be found against the lord, for that the lord could not have the villeine to be hanged without such suit. But if the villeine were not* (2)† *indited of the same felonie before the appeal sued against him, and*

* † *These are notes* 1, *and* 2, *of* 138. *b. in the* 13*th and* 14*th editions. It should have been observed before, that the notes on Littleton should be referred to rather by the number of the section of Littleton than by that of the folio of Coke on Littleton. This way of reference seems the more proper when it is considered, that Littleton is always referred to by the number of the section, and never by the number of the folio of Coke on Littleton, and that, in the fifteenth, sixteenth, and present, editions, many of Littleton's sections, or some words of the same, are not in the same folio, or half folio, in which they are in the prior editions.*

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(1) The words *or yeares* not in L. and M. Roh. nor P. They first appear in Redm.

(1)* *Where he was indited of the same before* in Red. but not in L. and M. Roh. nor P.

(2) † *not* in Roh. and Red. but not in L. and M. nor P.

and afterward is acquited of this felony, so as he recover dammages against his lord for the false appeale, then the villeine is infranchised, because of the judgment of dammages to be given unto him against his lord. And many other cases and matters there be, by which a villeine may be enfranchised against his lord, &c. But enquire of them [Sed de illis quære (3)].

"*IF the lord sueth against his villeine a* præcipe quod reddat, &c. *this is a manumission.*" And the principall reason hereof is, for that by this suit he enableth the villeine to be a person able to render him the land by course of law, where the lord without any such suit might have entered. [a] But if the tenant in tayle be of a manor wherunto a villeine is regardant, and enfeoffeth the villein of the mannor, and dyeth, the issue shall have a *formedon* against the villeine, and after the recovery of the mannor he shall seise the villein. And ☞ the reason is, for that he could not seise the villeine till he had recovered the mannor, which was the principall, and at the time of the writ brought he was no villeine.

[a] 24 E. 3. Discont. 16 Vid. Britton, 78, & 126.

[138. b.]

(Ante 122. b. 2 Ro. Rep. 409.)

The tenant infeoffes the villeine of the lord and an estranger upon collusion: in this case, although the lord may enter upon the villeine for the moity, yet may he have a writ of ward against them both without infranchisement of the villeine; for if the lord should enter upon the villeine, then should his seigniory be suspended, and then could not he have a writ of ward against the other.

The lord, upon a writ of covenant brought by the villeine, levies a fine to his villeine of land which is ancient demesne; the lord of whom the land is holden reverseth the fine in a writ of deceit; albeit the authority and jurisdiction of the court is disproved, and that the lord of the villeine shall be restored to the land given by the fine, yet is it an enfranchisement, for that he answered to the writ of covenant, and the fine was voydable, and not voyde; and therefore, being once an enfranchisement, it cannot be avoided by the reversing of the fine.

"*Be nonsuite, (id est) non est prosecutus breve suum.*" For by the law the plaintife is first agent at every continuance; and therefore the record sayth, *quod petens seu querens* (naming them) *obtulit se*, who if he be called, and make default, then he is said to be nonsuit, *id est, non est prosecutus, &c.*

By *Littleton* here it appeareth, that there is a nonsuite before appearance at the returne of the writ, or after appearance at some day of continuance. [x] The difference between a *nonsuit* and a *retraxit* on the part of the demandant or plaintife is this. A *nonsuite* is ever upon a demand made, when the demandant or plaintife should appeare, and he makes a default. A *retraxit* is ever when the demandant or plaintife is present in court ☞ (as regularly he is ever by intendment of law, untill a day be given over, unlesse it be when a verdict is to be given, for then he is demandable). And this is in two sorts, one privative and the other positive. Privative, as upon

[x] 8 Co. 58. 6a. Becher's case. 3 H. 6. 13. Brooke tit. Nonsuit 1. 8 H. 6. 7. 50 E. 3. 12.

[139. a.]

(3) *de illis quære* not in L. and M. nor Roh.

upon demand made, that he make default, and depart in despite of the court; and then the entry is, [y] *et postea eodem die revenit ad barram prædict' tenens, et præd' petens tunc solenniter exactus non venit, sed à sectâ suâ predictâ in contemptum curiæ se retraxit, ideo consideratum est, &c.* Positive, as when the entry is, *et super hoc idem quærens dicit, quòd ipse non vult ulterius placitum suum prædictum prosequi, sed abinde omnino se retraxit, ideo, &c.* Another form thereof is, *quòd idem quærens fatetur se (seu cognovit se) ulterius nolle prosequi versus prædict' defend', &c. de placito prædicto.* [z] A departure in despight of the court is on the part of the tenant, and is, when the tenant or defendant after appearance and being present in court upon demand makes departure in despight of the court, and then the entry is, *et prædict' tenens seu defendens licet solenniter exactus non revenit, sed in contemptum curiæ recessit et defaltam fecit, ideo, &c.* It is called a *retraxit*, because that word is the effectual word used in the entry, as before it appeareth, and it is ever on the part of the demandant or plaintife. [a] Another difference betweene a *retraxit* and a nonsuit is, that a *retraxit* is a barre of all other actions of like or inferior nature: *qui semel actionem renunciavit, amplius repetere non potest.* But regularly a nonsuit is not so, but that he may commence an action of like nature, &c. againe. For it may be, that he hath mistaken somewhat in that action, or was not provided of his proofes, or mistaking the day, or the like. But yet for some special reasons, nonsuit in some actions is peremptory.

[y] Tr. 5 H. 6. Rot. 320. in Com. Banco.

[z] F. N. B. 78. f. 108. d. 19 E. 2. Villein 31.

[a] 8 Co. ubi supra.

In a *quare impedit*, if the plaintife be nonsuite after appearance, the defendant shall make a title, and have a writ to the bishop; [b] and this is peremptory to the plaintife, and is a good barre in another *quare impedit* (1); and the reason is, for that the defendant had by judgement of the court a writ to the bishop, and the incumbent, that commeth in by that writ, shall never be removed, which is a flat barre as to that presentation; and of this opinion is *Littleton* in our bookes. And the same law, and for the same reason, it is in the case upon a discontinuance.

[b] 5 E. 3. 35. 2 H. 5. 31 H. 6. 15. 22 H. 6. 44, 45. 33 H. 6. 1. 55. 19 E. 4. 9. 21 E. 4. 2. b. &c. F. N. B. 38. k. 7 Co. 27. b. Sir Hugh Portman's case.

[c] In a writ *de nativo habendo*, nonsuit after appearance is peremptory; for thereby the villeine is infranchised. And so it is if two be plaintifes in a *nativo habendo*, if one be nonsuit, this is the nonsuit of both, and no summons and severance doth lie in that case, albeit it be a reall action. And this is, *in favorem libertatis;* for in a *libertate probandâ* nonsuit after appearance is not peremptory, neither is the nonsuit of the one the nonsuit of both.

[c] 6 E. 2. Vill. 26. 12 E. 2. Ibid. 28. 19 E. 2. ibid. 31. F. N. B. 78. e. 4 E. 2. Nonsuit 29.

[d] Nonsuit in an appeale of murder, rape, robbery, &c. after appearance is peremptory; and this is *in favorem vitæ;* for if the defendant be acquitted, and take out processe upon the statute of *W.* 2. against the abettors, or if he purchase his originall writ, for that cause he may be nonsuit.

[d] 9 H. 4. 1. 12. Stanf. Pl. Cor. 148. a. & 171. c. 22 Ass. 97. Fitz. Cor. 184. 22 E. 3. 6. 47 E. 3. 16.

[e] If the plaintife in an appeale of mayhem be nonsuit after

7 H 7. 5. 40 E. 3. Dam. 77. 17 E. 2. Coron. 386. 3 E. 2. Action sur l'estat 28.

[e] 43 Ass. 39. 40 Ass. 1. (1 Sid. 32.)

appearance,

(1) But lord Dyer held the nonsuit not peremptory, if another *quare impedit* was brought within the six months. Dall. 81, 82. Perhaps, however, he only meant to assert this in the case of a nonsuit *before* appearance. As to lord Coke's doctrine, other authorities for it may be added to those he cites. See 1 Brownl. 161. 2 Salk. 559.—[Note 221.]

appearance, it is peremptory; for the writ saith, *felonicè maihemavit*, and therefore the nonsuit is peremptory.

[*f*] In an attaint, if the plaintife after appearance be nonsuit, it is peremptory; and the reason is, for the faith that the law gives to the verdict, and for the terrible and fearefull judgement that should be given against the first jury if they should be convicted; and therefore upon the nonsuit, the plaintife shall be imprisoned, and his pledges amerced. But if the processe in an attaint be discontinued, the plaintife may have another writ of attaint, because upon the nonsuit there is a judgment given, but not upon the discontinuance. *Note*, it is truly said, that *exceptio probat regulam;* for these cases excepted stand upon their special and particular reasons, and fall not within the general reason of the rule. It is a general rule, that nonsuite before appearance is not peremptory in any case, for that a stranger may purchase a writ in the name of him that hath cause of action, as shall be said hereafter in this Section.

[*f*] 32 Ass. 13. 19 Ass. 13. 20 E. 3. Attaint 42. 22 E. 3. 7. F. N. B. 108. d.

[*g*] In reall or mixt actions the nonsuit of one demandant is not the nonsuit of both, but he that makes default shall be summoned and severed; but regularly in personall actions, the nonsuit of the one is the nonsuit of both, unless it be in certaine particular cases.

[*g*] 11 H. 6. 23. 35. F. N. B. 35. b. 19 E. 3. tit. Sever. 14. 3 E. 2. Nonsuit 18. 19 E. 3. Sev. 16. 12 E. 3. ib. 22. 38 E. 3. 9. 29 H. 6. 45. 38 E. 3. 35. 41 E. 3. Nonsuit 10. 45 E. 3. 10. 2 H. 4. 2. (2 Ro. Abr. 132. 10 Co. 134.)

[*h*] In personall actions brought by executors there shall be summons and severance, because the best shall be taken for the benefit of the dead. And so it is in an action of trespasse, as executors for goods taken out of their owne possession. Like law in account as executors by the receit of their owne hands.

[*h*] 42 E. 3. 13. 48 E. 3. 14. 28 H. 6. 3. 11 E. 2. Sev. 26. 13 E. 3. ib. 15. 18 E. 3. ib. 28.

[*i*] In an *audita querela* concerning the personalty, the nonsuite of the one is not the nonsuit of the other, because it goeth by the way of discharge and freeing of themselves, and therefore the default of the one shall not hurte the other.

[*i*] 5 E. 3. ibid. 20. 7 E. 3. 12. 15 E. 3. Sever. 23. 6 Co. 25. Ruddock's case.

[*k*] In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both, because the tenant cannot attorne according to the grant.

[*k*] 20 E. 3. Severance 17.

[*l*] Some actions follow the nature of those actions whereupon they are grounded; as the writs of error, attaint, *scire facias*, and the like. If a reall action be brought by severall *præcipes* against two or more, if the demandant be nonsuite against one, he is nonsuite ☞ against all; for as to the demandant it is but one writ under one *teste*. *Note*, severance is two-fold, viz. by summons *ad sequendum simul*, and that is when one of the demandants or plaintifes never appeared; and by award of the court of nonsuit without any summons, and that is after appearance.

[*l*] 47 E. 3. 6. b. 47 Ass. 3. 29 Ass. 34. 7 H. 4. 45. 34 H. 6. 31. 25 H. 6. 19. 29 E. 3. 37. 6 Co. ubi supra. 22 H. 6. 42. 4 E. 4. 33. 19 E. 2. Nonsuit 32.

[139. b.]

18 E. 3. ibid. 13. 20 E. 3. ib. 26, 27. 19 E. 3. ibid. 12. 3 E. 3. ibid. 17. 38 E. 3. 9. 20 H. 6. 45. 44 E. 3. 16. 19 E. 3. Severance 16. (1 Sid. 378.)

[*m*] The king's majesty cannot be nonsuite, because in judgement of law he is ever present in court; but the king's attorney, *qui sequitur pro domino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of a nonsuite. But in an information by an informer, *qui tam, &c.* the informer may be nonsuited.

[*m*] 6 R. 2. Nonsuit 13. 25 H. 8. Nonsuit Br. 68. 20 H. 7. 5. (2 Ro. Abr. 130, 131. Post. 227. b.)

[*n*] At the common law, upon every continuance or day given over before judgement, the plaintife might have been nonsuited;

[*n*] 2 H. 4. ca. 7. 3 E. 3. 21. 47 E. 3. 1, 2. 3 E. 4. f. 11.

and therefore before the statute of 2 *H.* 4, after verdict given, if the court gave a day to be advised, at that day the plaintife was demandable, and therefore might have been nonsuit, which is now remedied by that statute.

[o] 2 H. 5. 5. 8 R. 2. Nonsuit 34.

[o] But after demurrer in law joyned, if the court doth give a day over, at that day the demandant or plaintife is demandable, and therefore may be nonsuit, for that is not holpen by any statute.

[p] 9 H. 7. 1. 21 E. 3. 32. 11 Co. 39. 41. Metcalf's case. (2 Ro. Abr. 131. contra.)

[p] And after an award to account, the plaintife may be nonsuit; and so note a diversity betweene an interlocutory award of the court, and a final judgement (1).

By these few instructions you shall the more easily understand the bookes of tearmes and yeares, and other authorities of law. And here (to returne to *Littleton*) it is to be noted, that albeit the lord be nonsuit, yet the infranchisement of the villeine doth remaine, for that grew by the appearance to the writ, and cannot be taken away by the nonsuit subsequent. So it is if the writ do abate, yet the infranchisement remaines.

[q] 7 H. 4. 8. 11 H. 4. 13. 9 E. 4. 23. 7 H. 4. 8. a. 7 H. 7. 6. b. 5 H. 7. 15.

[q] *After appearance.*" For otherwise a stranger may purchase a writ in his name; and therefore *Littleton* materially added these words after appearance.

"*Præcipe.*" There be three kinds of *præcipes*. 1. A *præcipe quòd reddat*, whereof *Littleton* here speaketh; 2, a *præcipe quòd permittat*; and 3, a *præcipe quod faciat*, whereof you may read plentifully in the *Register* and *Fitherbert's Natura Brevium*, and belongs not properly to this treatise.

"*Account.*" Of this sufficient hath beene said before.

Vide Sect, 748. 4 Co. 80. Noke's case. F. N. B. 145.

"*Covenant,*" *Conventio*. Hereof there be two kinds, viz. a covenant personall, and a covenant reall; and a covenant in deed, and a covenant in law.

[r] W. 2. cap. 12. 22 Ass. p. 39. 33 H. 6. 2. 14 H. 7. 2. 40 Ass. 18. 40 E. 3. 42.

"*Where he was indited of the same.*" [r] For if the villeine be not first indited of it, then, upon the acquittall of the villeine, the villeine shall recover damages against the lord by the statute of *W.* 2. *Quia multi per malitiam, &c.* and consequently shall be enfranchised. But if the villeine be formally indited of the felony, then though the villeine be acquitted upon the appeale, he shall recover no damages against the lord. For wheresoever the lord giveth to the villeine a just cause of action, he is enfranchised.

[s] Kelway 134.

[s] And therefore if the lord kill his villeine, his sonne and heire shall have an appeale, and thereby his heire shall be enfranchised, because the offence of the lord gave to the heire a just cause of action against the lord.

Sect.

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(1) But Brooke says, that the *award* to account is a *judgment*, and therefore that a man cannot be nonsuited after such award. Bro. Abr. *Nonsuit*, pl. 17. 21 E. 3. 7. Rolle to the same purpose cites 3 H. 4. 7. 21 E. 3. 7. 21 H. 6. 26. 1 H. 7. 1. b. See 2 Ro. Abr. 131. However, he adds, that the 27 E. 3. 87, and Co. Litt. are *contra*. Lord Coke's opinion is particularly warranted by Metcalfe's case in the Eleventh Report, which, as he here explains, proceeded on the distinction between an *interlocutory* and a *final* judgment.—[Note 222.]

Sect. 209.

ALSO, if the lord of a mannor will prescribe, that there hath beene a custome within his mannour time out of minde of man, that every tenant within the same mannor, who marrieth his daughter to any man without licence of the lord of the mannour, shall make fine (1), *and have made fine to the lord of the mannor for the time being, this prescription is voyd. For none ought to make such fine but onely villeines. For every free man may freely marry his daughter to whom it pleaseth him and his daughter. And for that this prescription is against reason, such prescription is voyd.*

" *THAT there hath beene a custome, &c.*

Here some may object, that such a custome may have a lawfull beginning; for *Littleton* in the beginning of this Chapter, Sect. 174, alloweth, that [*a*] a freeman may take lands of the lord to be holden of him, that is, to pay a fine for the marriage of his sonne or daughter; and therefore [*b*] some have thought that such a custome generally within the mannor should be good. But the ☞ answer is, that though it may be so in a particular case upon such a special reservation of such a fine upon a gift of land, yet to claime such a fine, by a generall custome within the mannor, is against the freedome of a freeman, that is not bound thereunto by particular tenure. But a custome may be alledged within a mannor, [*b*] that every tenant (albeit his person be free) that holdeth in bondage or by native tenure, the freehold being in the lord, shall pay to the lord, for the marriage of his daughter, without licence, a fine: and it is called *marchett*, as it were a *chete* or fine for marriage (2). And here *Littleton* saith, that none ought to pay such fines but villeines, (that is) either villeines of blood, or freemen holding in villenage or base tenure. So note a diversity betweene a freeholder and a freeman holding in villenage. Villeines use to pay to their lords in acknowledgement of their bondage for their several heads, and thereupon it is called *chevage*, *chevagium*, of the *French* word *chiefe*, as it were the service of the head. Of which *Bracton* saith, [*c*] *chevagium dicitur recognitio in signum subjectionis et dominii de capite suo.* And sometimes it is written *chivage*, but more properly *chiefage*. [*d*] *Chevagium* signifieth also a great misprision for any subject to take summes of money, or other gifts yearly in name of *chevage*, because they take upon them to be their chiefe heads or leaders (3).

[140. a.]

[*a*] 10 E. 3. 23. Roger de Vale's case. 15 E. 3. Aid 33.
[*b*] 34 H. 6. 15. a. per Litt.
[*b*] 43 E. 3. 5. 14 H. 6. 15.
[*c*] Bracton, lib. 1, cap. 10. Britt. fol. 79. b.
[*d*] 27 Ass. 44.

" *For*

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(1) The words *at the will of the lord* are added in L. and M.

(2) See further, as to *marchet*, the word in Spelm. Gloss. and the Appendix to Robinson on Gavelkind, p. 2.

(3) The case cited by lord Coke from the Book of Assises, consists of various articles inquired of by a jury in the court of king's bench; and the seventeenth of these relates to those, *who receive persons under their patronage, taking from them certain yearly fees, by gift, rent, or in the name of chevage, to maintain*

" *For that this prescription is against reason, it is voyd.*" This containes one of the maximes of the common law, viz. that all customes and prescriptions that be against reason are voyd.

(2 Ro. Abr. 265. Ante 113. a.)

Sect. 210.

BUT in the county of Kent, *where lands and tenements are holden in gavel-kinde, there, where, by the custome and use out of minde of man, the issues male ought equally to inherite, this custome is allowable, because it standeth with some reason; for every son is as great a gentleman as the eldest son is, and perchance will grow to greater honour and valour, if he hath any thing by his ancestors, or otherwise peradventure he would not encrease so much, &c.*

" *IN* [e] *the county of* Kent." For that in no county of *England* lands [f] at this day be of the nature of gavelkinde of common right, saving in *Kent* onely. But yet in divers parts of *England*, within divers mannors and seigniories, the like custom is in force.

[e] Vide l'estatute de Consuetudinibus Kanciæ. ann. 21 E. 1. 2 E. 3. 12. 3 E. 3. 21, 38. 23 Ass. pl. 12.

8 E. 3. 42. b. (Post. 175. b.) [f] Vide Mirror, cap. 1, sect. 3.

" *In gavel-kinde.*" That is, *gave all kinde:* for this custome giveth to all the sons alike (4).

" *The issues male to inherite.*" And this is the generall custome extending to sons. But yet [g] by custome, when one brother dieth without issue, all the other brethren may inherit (1).

[g] 23 Ass. pl. 21. (1 Ro. Ab. 624.)

[140. b.]

" *Every sonne is as great a gentleman as the eldest son is.*" By this it appeareth, that gentry and armes is of the nature of gavelkinde; for they descend to all the sons, every son being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity. But yet *jure primogenituræ*, the eldest shall beare, as a badge of his birthright, his

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maintain them in wrong or right. Lambard, in treating of unlawful assemblies, describes the offence of chevage from the book of Assises, and takes notice of it as still inquirable. Lamb. Eirenarch. ed. 1602. p. 163.—[Note 223.]

(4) This was the common etymology, when lord Coke wrote; and it was countenanced by mr. Lambard, in the explication of words prefixed to his Anglo-Saxon laws. Lamb. de Prisc. Anglor. Leg. voc. Terra ex Scripto. But the latter afterwards inclined to a more probable derivation, conjecturing that *gavel* signified *rent*, and so *gavelkind* imported land of such a *kind* as to yield *rent*. Lamb. Perambulat. of Kent, ed. 1596. p. 529. Mr. Somner pursues the same idea, and expatiates to support it. Somn. Gavelk. 1st ed. 3. It is rather surprising, that lord Coke did not hit upon a like derivation, as elsewhere he describes *gavel* or *gabel* to signify *rent*. Post. 142. a.—See further to this point Robins. on Gavelk. 1.—[Note 224.]

(1) This extension of the custom of gavelkind to *collaterals*, prevails universally in Kent. See Robins. on Gavelk. 92.—[Note 225.]

his father's armes without any difference, for that, as *Littleton* saith, *Section* 5, he is more worthy of blood; but all the younger brethren shall give several differences, *et additio probat minoritatem*, and [*h*] *hæreditas inter masculos jure civili est dividenda.*

[*h*] Fortescue, cap. 40.

"*Or otherwise peradventure he would not encrease so much.*" The reason of this is rendered by the poet.

Haud facile emergunt, quorum virtutibus obstat
Res angusta domi.———— Juvenal. Sat. 3.

But now by the statute of 31 *H.* 8. a great part of *Kent* is made descendable to the eldest sonne, according to the course of the common law (2), for that, by the meanes of that custome, divers ancient and great families after a few descents came to very little or nothing. 31 H. 8. ca. 3. V. 18 H. 6. cap. 1. (1 Sid. 136.)

In plures quoties rivos deducitur amnis,
Fit minor, ac undâ deficiente, perit.

Sect. 211.

ALSO, where by the custome called Burrough English *in some burrough, the youngest son shall inherit all the tenements, &c. this custome also stands with some certaine reason; because that the younger son (if he lacke father and mother) because of his younger age, may least of all his brethren helpe himselfe, &c.*

"*BY the custome called Burrough English.*" Of this custome *Littleton* hath spoken before in the Chapter of Burgage. And in our bookes there is a special kind of Borough *English* [*i*]; as it shall descend to the younger son, if he be not of the halfe blood; and if he be, then to the eldest son (3). Vid. Sect. 165. [*i*] 32 E. 3. tit. Age 61.

[*k*] Within the mannor of *B.* in the county of *Berks*, there is such a custome, that if a man have divers daughters, and no son, and dieth, the eldest daughter shall only inherit; and if he have no daughters, but sisters, the eldest sister by the custome shall inherit, and sometimes the youngest. And divers other customes there be in like cases. And herewith agreeth *Britton*, who saith, [*l*] *de terres des ancients demeynes soit use solonque le antient usage del* [*k*] Mich. 10 Ja. Eliot's case in Briefe de faux Judgement. [*l*] Brit. 187. b.

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(2) There are six other statutes for disgavelling particular lands in Kent, besides the 31 H. 8, though that is the only statute in print. They are mentioned in mr. Robinson's book on Gavelkind, and the learned writer is very full in his explanation as well of them, as of the 31 H. 8, especially observing, that they are construed to alter only the partible quality of the customary descent to males, which agrees with lord Coke's manner of mentioning the 31 H. 8. See Robins. on Gavelk. p. 75.—[Note 226.]

(3) The reader will find the chief instances of special kinds of Borough-English brought together in mr. Robinson's book on Gavelkind. See Append. p. 6.—[Note 227.]

del lieu, dount en ascun lieu le tient lieu per usage, que le heritage soit departible entre touts les enfants freres et sores, et en ascun lieu que le eigne avera tout, et en ascun lieu que le puisne frere avera tout.

"*Because of his younger age, may least of all his brethren helpe himselfe, &c.*" Here by *(&c.)* are implyed those causes wherefore a youth is lesse able to ayd himselfe, &c. which the poet briefely and pithily expresseth thus:

Horace.

☞ *Imberbis juvenis, tandem custode remoto,* [141. a.]
Gaudet equis, canibusque, et aprici gramine campi,
Cereus in vitium flecti, monitoribus asper,
Utilium tardus provisor, prodigus æris,
Sublimis, cupidusque, et amata relinquere pernix.

And againe, no living creature more infirme than man:

Ho.

Nil homine infirmum tellus animalia nutrit
Inter cuncta magis.——

Sect. 212.

BUT if a man will prescribe, that if any cattle were upon the demeanes of the mannor there doing damage, that the lord of the mannor for the time being hath used to distreine them, and the distresse to retaine till fine were made to him for the damages at his will, this prescription is voyd; because it is against reason, that if wrong be done any man, that he thereof should be his own judge; for by such way, if he had damages but to the value of an halfpeny, he might assesse and have therefore an C. pound, which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not, nor will not be allowed before judges (ceo ne doit (1) estre allow devant judges); quia malus usus abolendus est (2).

10 E. 3. 23.
4 E. 3. 54.
7 E. 3. 24.
38 E. 3. 18.
2 H. 3. 4.
3 H. 4.
8 H. 6. 19.
5 H. 7. 9. b.

"*IT is against reason, that if wrong be done any man, that he thereof should be his own judge.*" For it is a maxime in law, *aliquis non debet esse judex in propriâ causâ.* * And therefore a fine levied before the baylifes of *Salop* was reversed, because one of the bailifes was partie to the fine, *quia non potest esse judex et pars* (3).

* Hil. 4 H. 4. coram rege Salop. (9 Ro. Abr. 92, 93. 1 Ro. Abr. 492. 496.)

"Malus usus abolendus est:" and every use is evill, that is (as our author saith) against reason, *quia in consuetudinibus*

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(1) *Instead of* doit *it is* voet *in L. and M. Roh. and P.*

(2) Sect. 174, is placed here in L. and M. as we have formerly noticed. See 117. b. note 2.

(3) See 14 Vin. Abr. 573. 4 Com. Dig. 6.

nibus non diuturnitas temporis, sed soliditas rationis est considerandа (4). (5 Co. 84.)

And by this rule cited by our author, at the parliament holden at *Kilkenny* in *Ireland*, *Lionel* duke of *Clarence* being then lieutenant of that realme, the *Irish* customs called there the *Brehon* law (for that the *Irish* call their judges *Brehons*) was wholly abolished, for that (as the parliament sayd) it was no law, but a lewd custome, *et malus usus abolendus est* (5). An. 40 E. 3. at Kilkenny. The Brehon law. Vide Sect. 265.

But our student must know, that king *John* in the twelfth yeare of his raign went into *Ireland*, and there, by the advice of grave and learned men in the laws whom he carried with him, by parliament *de communi omnium de* Hiberniâ *consensu*, ordained and established, that *Ireland* should be governed by [141. b.] ☞ the lawes of *England* (1), which of many of the *Irishmen*, according to their owne desire, was joyfully accepted and obeyed, and of many the same was soone after absolutely refused, preferring their *Brehon* law before the just and honourable lawes of *England*. (Vaugh. 293.)

Rex, &c. baronibus, militibus, et omnibus liberè tenentibus salutem. Satis, ut credimus, vestra audivit discretio, quòd quando bonæ memoriæ Johannes, quondam rex Angliæ, pater noster, venit in Hyberniam, ipse duxit secum viros discretos et legis peritos, quorum communi consilio, et ad instantiam Hybernensium, statuit et præcepit leges Anglicanas in Hybernià, ita quòd leges easdem in scripturas redactas reliquit sub sigillo suo ad Scaccarium Dublin. Rot. Pat. 11 H. 3. 7 Co. 22. b. Calvin's case.

Rex comitibus, baronibus, militibus, et liberis hominibus et omnibus aliis de terrâ Hyberniæ salutem. Quia manifestè esse dignoscitur contra coronam et dignitatem nostram et consuetudines et leges regni nostri Angliæ, quas bonæ memoriæ dominus Johannes rex, pater noster, de communi omnium de Hybernià consensu, teneri statuit in terrâ illâ, quòd placita teneantur in curiâ Christianitatis de advocationibus ecclesiarum et capellarum, vel de laico feodo, vel de catallis, quæ non sunt de testamento, vel matrimonio: vobis mandamus, prohibentes quatenus hujusmodi placita in curiâ Christianitatis nullatenus sequi præsumatis in manifestum dignitatis et coronæ nostræ præjudicium, sciturі pro certo, quòd si feceritis, dedimus in mandatis justitiario nostro Hyberniæ statuta curiæ nostræ in Angliâ contra transgressiones hujus mundati nostri cum justitiâ procedat, et Rot Patent. 18 H. 3. M. 17. N. 21.

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(4) See Dav. Rep. 32. & 7 Vin. Abr. 180. 185.

(5) Acc. 4 Inst. 358.—So much of the Irish statutes of 40 E. 3, as relates to abolishing the Brehon law, is in Dav. on Ireland, fol. ed. 28. The other heads of these statutes are also given in the same book, p. 44. What were the most exceptionable parts of the Brehon law, or Irish customs, are explained, ibid. 36, in Spens. Irel. 1st ed. 4, and Ware's Antiq. of Ireland, Harris's ed. 69.—[Note 228.]

(1) Some think, that the laws of England were introduced into Ireland before this charter of John by his father Henry the second. This opinion is strongly enforced by the testimony of an historian of the reign of Henry the third; for Matth. Paris writes, that *rex Henricus, antequam ex Hibernià rediret, apud Lismore concilium congregavit, ubi leges Angliæ sunt ab omnibus gratanter receptæ, et, juratoriâ cautione præstitâ, confirmatæ.* Molyn. Case of Irel. Lond. ed. of 20. p. 24, and Matth. Par. ad ann. 1172. vit. H. 2. ibid. cit. The other authorities to establish the same fact are well collected by mr. Harris in his edition of Ware's Antiquities of Ireland. See p. 78. See further 1 Lel. Hist. Irel. 76, and Vaugh. 293.—[Note 229.]

et quid nostrum est exequatur. In cujus, &c. teste rege apud Winchcomb, 13 die Octobris, anno regni nostri 13. Et mandatum est justiciario Hyberniæ per literas clausas, quòd predictas literas patentes publicè legi et teneri faciat.

Rot. Parl. 7. H. 7.

Rex, &c. pro communi utilitate terræ Hyberniæ, et pro unitate terrarum, provisum est, quòd omnes leges et consuetudines, quæ in regno Angliæ tenentur, in Hybernia teneantur, et eadem terra eisdem legibus subjaceat, ac per easdem regatur, sicut Johannes rex, cum illic esset, statuit et firmiter mandavit. Ideo volumus, quòd omnia brevia de communi jure, quæ currunt in Angliâ, similiter currant in Hybernia sub nostro sigillo regis. In cujus, &c. teste meipso apud Woodstocke. Wherein it is to be observed, that union of lawes is the best meanes for the unity of countries.

* Tri. 13 E. 4 coram rege in Thesaur in banco placito. [m] 2 R. 3. 12. in Camera Stellata. 1 H. 7. 3. (4 Inst. 350.)

* *Una et eadem lex esse debet tam in regno Angliæ quam Hyberniæ.* [m] *Terra Hyberniæ inter se habet parliamentum et omnimodas curias prout in Angliâ, et per idem parliamentum facit leges et mutat leges, et illi de eâdem terrâ non obligantur per statuta in Angliâ, quia hii non habent milites parliamenti* (2).

By an act of parliament (called *Poyning's* law) holden in *Ireland* in the tenth yeare of *Henry* the seventh, it is enacted, that all statutes made in this realme of *England* before that time, should be of force and be put in use within the realme of *Ireland* (3); which (though it be by way of digression) is not unnecessary for our student to know. But now let us heare our author (4).

CHAP.

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(2) From citing this passage of the year-book of Richard the Third, according to which English statutes do not bind Ireland, and from this manner of mentioning the same passage in his 12th report, one might infer, that lord Coke was of that opinion. 12 Co. 111, 12. But in Calvin's case, referring to the same year-book, he explains it to mean, where Ireland is not *specially named*; and so he states the rule to be in the 4th Institute. 7 Co. Calvin's case 22. b. 4 Inst. 350, 351. Here also he cites the year-book of 1 Hen. 7, which controuls the year-book of R. 3. Lord Coke's explanation in Calvin's case evinces his sentiments more strongly; because Ireland, if considered as quite distinct in government from England, would have been a more apt instance to support his doctrine in favour of the post-nati of Scotland. We do not, however, mean by this to offer any opinion on the controversy about the political connection between England and Ireland. It is a subject of too much importance and delicacy, as well as of too much extent, to be discoursed of in a note. See 6 Geo. 1. c. 5. 22 G. 3. c. 53, and 23 G. 3. c. 28. The first of these statutes asserts the legislative power of Great Britain over Ireland, and also the appellant jurisdiction. By the two latter both are annihilated.†—[Note 229*.]

(3) Irish stat. 10 H. 7. c. 22.

(4) The statute for taking away military tenures leaves the tenure by villenage as it was before; one of the provisoes declaring, that the act shall not be construed *to alter or change any tenure by copy of court-roll, or any services incident thereunto.* 12 Cha. 2. chap. 24. s. 7.—[Note 230.]

† *The controversy mentioned by Mr. Hargrave in this note ceased to be a subject of importance in the year 1801, when Great Britain and Ireland were, by the joint concurrence of their respective parliaments, united into one kingdom. See* 39 & 40 Geo. 3. c. 67.

CHAP. 12. Of Rents. Sect. 213.

THREE manner of rents there be, that is to say, rent service, rent charge, and rent secke. Rent service is, where the tenant holdeth his land of his lord by fealtie and certaine rent, or by homage fealty and certaine rent, or by other services and certaine rent. And if rent service at any day, that it ought to be payed, be behinde, the lord may distraine for that of common right.

SOME have divided rents into foure kindes, viz. rent service, rent charge, rent distreynable of common right, (whereof somewhat shall be said in this Chapter) and rent secke.

"*Rent*," in *Latine redditus*, [*a*] by some *dicitur à redeundo, quia retroit, et quotannis redit.* * And others say it is derived of *reddere*, for that the rent is reserved out of the profits of the land, and is not due till the tenant or lessee take the profits; for *reddendo inde* or *solvendo*, or *reservando inde*, or the like, [*b*] is as much to ☞ say as the tenant or lessee shall pay so much out of the profits of the lands; for *reddere nihil aliud est quàm acceptum aut aliquam partem ejusdem restituere. Seu reddere est quasi retro dare*, and hereof commeth *redditus* for a rent.

[142. a.]

Here note for the better understanding of ancient records, statutes, charters, &c. *gabel*, or *gavell, gablum, gabellum, gabellettum, galbellettum*, and *gavillettum*, do signifie a rent (1), custome duty, or service, yielded or done to the king or any other lord; as, *Wallingford continet 276 hagas, i. e. domos reddentes 9 libras de gablo, i. e. de redditu:* and *Oxford, hæc urbs reddebat pro theolonio et gablo regi 20 l. et sextarios mellis, comiti Alpharo 10 libras.* And this is the legall signification thereof (2).

[a] Flets, lib. 3. ca. 14. Britton, ca. 41. Mirror, ca. 2, sect. 16. Pl. Com. 132. b. * 10 Co. 127. Clun's case. [b] Pl. Com. 138, 139, &c. in Browning's and Bestling's case. 35 H. 6. 34. Domesday. Statutum de gaviletto anno 10 E. 2. (Ante 87. b. Post. 144. 2 Ro. Abr. 446.)

"*Rent*

(1) See acc. ante 140. a. note 4.

(2) But though in old deeds *gavelet* may often signify *rent*, and this use of the word may best agree with its origin, yet it is not the only legal signification. On the contrary, the word is now most usually applied to a remedy or process, peculiar in denomination to Kent and London, by which the lord of the fee, when his tenant is in arrear for rent or service, may force him to pay the arrears and damages, by seizing the land, and holding it till payment. In Kent this remedy is founded on immemorial usage; mr. Robinson learnedly deducing it as well from the general law of fiefs, as from the practice of our Anglo-Saxon ancestors; and the passages cited by another eminent writer, in treating of forfeiture by *cesser*, tending to the same point. Robins. on Gavelk. 243. Wright's Ten. 197. The *gavelet*, thus prevailing by the custom of Kent, may be used whether there is a sufficient distress on the land or not, but is restricted to gavelkind tenure. Robins. on Gavelk. 243. To London a writ of the same denomination was given for rent-service *generally* by the 10 of Edward the second, which is therefore called the statute of *gavelet*. But by the words of the statute this latter *gavelet* only lies where the lord cannot obtain payment by distress. From this account of the *gavelet* in Kent and London,

"*Rent service.*" It is called a rent service, because it hath some corporall service incident unto it, which at least is fealty, as here it appeareth.

Vide Sect. 218. (Ante 47. a.) "*His land.*" [*c*] A rent service cannot be reserved out of any

[*c*] 44 E. 3. 45. 5 Co. 4. Seignior Mountjoye's case. 9 Ass. 24. 30 Ass. 5. 17 E. 3. 75. 7 Co. 23. Butt's case. Pl. Com. 139.

inheritance

London, it appears that sir Henry Spelman was well justified, when, after giving the etymon of *gavelet*, and describing it sometimes to signify the tenure of *gavel kind*, he adds, *gaveletum juris etiam processus est huic dicatus tenuræ, casu quo tenens redditus & servitia ultra modum subducit; quod et Londoniensibus ceditur statuto an.* 10 *Edwardi* 2, *de gaveleto.* Spelm. Gloss. voc. *Gaveletum.* We take notice of this passage from Spelman, because the learned and ingenious observer on our ancient statutes seems to have misunderstood the *gavelet* thus described; for though the word originally imported *rent*, yet our explanation shews, that it also means *a process for the recovery of rent*, technically called *gavelet*, both in Kent and London. See Barr. on Ant. Stat. 2d ed. 149.—Besides the two remedies thus called *gavelet*, there is another very similar one for rent-service in all parts of the kingdom; and this is the writ of *cessavit*, which is regulated by, if it did not wholly originate from the statutes of Gloucester and Westminster the second. 6 E. 1. c. 4. 13 E. 1. st. 1. c. 21. 41. But lord Coke, in his comment on the statute of Gloucester, mentions his having read the record of the proceedings on a *cessavit* in the reign of king John. 2 Inst. 295. Yet this seems strange, because, in the reign of this prince, the lord of the fee had a much more easy way of recovering his tenant's land for default of service, than by a *cessavit* in the court of the king; namely, a distress of the land by a process of seizure in his own court. The latter mode continued till the 52 of Hen. 3, took it away, by prohibiting distress of the freehold except by the king's writ, and so leaving the tenant's chattels as the only subject for the lord's distress. It was this alteration of the old law, which, as we apprehend, gave occasion to introducing the *cessavit* by the statutes of Gloucester and Westminster; nor at the utmost can we account for an earlier use of the *cessavit* than the 52 of Hen. 3. Perhaps, therefore, lord Coke's case of king John was nothing more than a process of *cesser* in the lord's court, and he might only call it a *cessavit* by reason of the resemblance between the proceedings on the writ of *cessavit* in the king's court, and those on the process of *cessavit* in the court of the lord.—These remedies of *gavelet* and *cessavit* are now fallen wholly into dissuse, mr. Lambard not remembering an instance of resorting to the customary *gavelet* of Kent in his time; and the cases in our books on both the *gavelets* and the *cessavit* being all of ancient date; from which it may be presumed, that distress of the tenant's goods is now usually a very sufficient, or at least a preferable remedy. Lamb. Perambulat. ed. 1596. p. 554. Nor, whilst the others continued in use, were they applicable, except when the tenure was in fee. Booth on Real Act. 133. But in imitation of them, it hath long been the practice to reserve a power of re-entry for non-payment of rent on granting leases for lives or yeares: and the legislature have also interposed against lessees, as well to obviate the difficulty from the niceties of an entry for forfeiture at common law, by enabling landlords to recover possession by ejectment in a special manner, as to qualify and prevent an abuse of the tenant's remedy of injunction in equity. 4 Geo. 2. c. 28. Further, on a like principle of convenience, a summary jurisdiction is given to justices of the peace, enabling them to restore the possession to the landlord, where the tenant deserts the premises in lease, without leaving a sufficient distress. 11 G. 2. c. 19. See further as to the *cessavit* and other remedies for substraction of services, 3 Blackst. Comm. 8th ed. 230.—[N. 231.]

inheritance but such as is manurable, whereinto the lord may enter and take a distresse, as in lands and tenements, reversions, remainders, and, as some have said, out of the herbage of lands, and regularly not out of any inheritances incorporeall, or that lye in grant. [d] By act of law one rent or service may issue out of another; as if *A.* before the statute of *quia emptores terrarum* had given lands to *B.* to hold to him by fealty and ten shillings rent, and *B.* had made a feoffment in fee to *C.* &c. whereby there was a mesnalty created; in this case *C.* should hold of *B.* either by the same services the law created, or such as he specially reserved, and *B.* did by operation of law hold those services of *A.* by fealty and ten shillings rent, that is to say, by rent and service out of rent and service: and if the rent be behinde, the lord paramount may distraine upon the land for his rent, for both mesnalty and seigniory do issue out of the land, the mesnalty immediately, and the seigniory mediately, which is worthy of due consideration and observation.

[d] 3 H. 6. 21. 5 H. 7. 36. 21 H. 7. 39. 1 H. 4. 82. 10 H. 6. 12. 19 E. 3. tit. Gard. 40. 21 H. 6. 11.

"*Certaine rent.*" [e] For the rent must be certaine, or which may be reduced to a certainty; for *id certum est, quod certum reddi potest.* [f] *Continetur carta reddendo inde annuatim ad tales terminos, vel faciendo inde talia servitia, vel tales consuetudines, quæ omnia debent esse certa et in chartâ expressa, &c.* But of this I have spoken Sect. 136. And the rent may as well be in delivery of hens, capons, roses, spurres, bowes, shafts, horses, hawkes, pepper, comine, wheat, or other profit that lyeth in render, office, attendance, and such like, as in payment of money. [g] But a man upon his feoffment or conveyance cannot reserve to him parcell of the annuall profits themselves, as to reserve the vesture or herbage of the land or the like (3), for that should be repugnant to the grant: *non debet enim esse reservatio de proficuis ipsis, quia ea conceduntur, sed de redditu novo extra proficua.*

[e] Britton, fol. 100. a. (Ante 96. a.)
[f] Fleta, lib. 3, ca. 14. (Ante 91. b.)
[g] 38 H. 6. 38. a. (Ante 47. a. 4. b.)

"*May distraine for that.*" For where there is a fealty, &c. incident to the rent, there is a distresse incident also thereunto. [h] But it is to be understood, that for a rent or service, the lord cannot distreine in the night, but in the day time: and so it is of a rent charge. But for damage feasant one may distreine in the night, otherwise it may be the beasts will be gone before he can take them.

[h] Mirror, ca. 2, sect. 16. 10 E. 3. Avowry 137. 11 H. 7. 5.

"*Of common right.*" Of common right, [i] that is, by the common law, so called, because the common law is the best and most common birth-right that the subject hath for the safeguard and defence, not onely of his goods, lands and revenues, but of his wife and children, his body, fame, and life also. So as the meaning of *Littleton* in this particular case is, that the lord may distreine for his rent of common right, that is, by the common law, without any particular reservation or provision of the party. And it is to be observed, that the common law of *England* sometimes is called right, sometimes common right, and sometimes *communis justitia.* In the grand charter the common law is called right. *Rectum nulli vendemus, nulli negabimus, aut differemus justitiam*

[i] W. 1. ca. 1. 2 H. 4. ca. 1. 7 H. 4. ca. 1. 4 H. 8. ca. 8.

(3) See Bro. Abr. *Reservation* 46. Dr. & Stud. Dial. 2. c. 22.

justitiam vel rectum. In the statute of *W.* 1. c. 1, it is called *common droit. En primes voet le roy, et commande, que le peace de s. eglise et de la terre soit bien garde et maintaine en touts points, et que common droit soit fait a touts, auxibien aux poers come aux riches, sauns regard de nulluy;* which agreeth with the ancient law in the time of king *Edgar. Porro autem has populo quas servet proponimus leges. Primùm publici juris beneficio quisquam fruitur, idque ex æquo et bono, sive is dives sive inops fuerit, jus reddit.* And *Fleta* saith, *Item quòd pax ecclesiæ et terræ inviolabiliter observetur, et quòd communis justitia singulis puriter exhibeatur.* And all the commissions and charters for execution of justice are, *facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliæ.* So as in truth justice is the daughter of the law, for the law bringeth her forth. And in this sense ☞ being largely taken, as well the statutes and customes of the realme, as that which is properly the common law, is included within *common right. Littleton* in this his treatise nameth *common right* sixe times.

Lamb. fo. 78. inter Leges Regis Edgari.

Fleta, lib. 1, c. 29.

Vide Sect. 214. 216. 226. 252. 231.

[142. b.]

Sect. 214.

AND if a man will give lands or tenements to another in the taile, yielding to him certaine rent by the yeare (1), *he of common right may distraine for the rent behind, though that such gift was made without deed, because that such rent is rent service. In the same manner it is, if a lease be made to a man for life, or the life of another* (2), *rendring to the lessor certaine rent, or for tearme of yeares rendring rent.*

35 H. 6. 34. (Cro. Eliz. 33. Post. 225. b.)

"*WITHOUT deed.*" For it is a rule in law, that a rent service may be reserved without deed.

Vide Sect. 131, 132.

"*In the same manner it is, if a lease be made, &c.*" For these be rents services, because fealty is incident to these rents; for (as it hath been said before) a lessee for life or years shall do fealty. And if a man make a lease at will reserving a rent, the lessee shall not do fealty, and yet the lessor shall distreine for the rent of common right.

"*Rendring,*" commeth of the word *reddo, i. e. rem pro re dare*, and signifieth yielding or repaying; but of this I have spoken before in this Chapter, Sect. 213.

Sect. 215.

BUT in such case, where a man upon such a gift or lease will reserve to him a rent service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in

(1) *by the yeare* not in L. and M. nor Roh. but in P. and Red.
(2) *or the life of another* not in L. and M. nor Roh. but in P. and Red.

in fee, or will give lands in taile, the remainder over in fee simple, without deed, reserving to him a certaine rent, this reservation is void, for that no reversion remaines in the donor, and such tenant holds his land immediately of the lord, of whom his donor held, &c.

"REVERSION," *Reversio*, commeth of the *Latine* word *revertor*, and signifieth a returning againe; and therefore *reversio terræ est tanquam terra revertens in possessione donatori, sive hæredibus suis, post donum finitum, &c.* as in the cases that *Littleton* here hath put. (Ante 22. b. Plowd. 151. a 162. a. Cro, Cha. 400. 548. 2 Ro. Abr. 60.)

"*It behoveth, that the reversion, &c. be in the donor or lessor, &c.*" This is not to be understood only of a reversion immediately expectant upon the gift or lease. For if a man maketh a gift in tayle, the remainder in tayle, reserving a rent, and keepe the reversion in himselfe, this is a rent service. (Ante 47. a.)

[148. a.] "*Reserving.*" *Reserve* commeth of the *Latine* word *reservo*, that is, to provide for store; as when a man departeth with his land, he reserveth or provideth for himselfe a rent for his owne livelihood. And sometime it hath the force of *saving* or *excepting*. So as [*k*] sometime it serveth to reserve a new thing, viz. a rent, and [*l*] sometime to except part of the thing in *esse* that is granted (1).

[*k*] 8 E. 4. 4 8. 26 Ass. pl. 66. (Ant. 47. a.)

[*l*] 35 H. 6. 34. (Post. 317. a.)

And it is to be understood, that in the case of the gift in taile, lease for life or years, the fealtie is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himselfe the fealty, or such like service. But the rent he may except; because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in taile without any reservation, the donee shall hold of the donor by the same services that he held over. [*m*] But otherwise it is of an estate for life or years; for there if he reserveth nothing, he shall have fealty onely, which is an incident inseparable to the reversion, as hath been said.

(Ant. 23. a.)

[*m*] Litt. fo. 4. Old Tenures 5. 38 E. 3. 7. 33 H. 6. 7.

"*The remainder over in fee simple without deed.*" Here it appeareth, that if a man maketh a gift in taile, the remainder in fee, without deed [*n*], the remainder is good, and passeth out of the donor by the livery of seisin: and so it is of a lease for life or yeares, the remainder over in fee; for the particular estate and the remainder, to many intents and purposes, make but one estate in judgment of law. *Vide Sect.* 60.

[*n*] 40 E. 3. 10. 10 E. 4. 1. 12 E. 4. 16. 15 E. 4. 18. 18 E. 4. 12. 18 H. 8. 4. 3 H. 7. 13. F. N. B. 219. 11 H. 4. 39.

"*Remainder*," in legall Latine, is *remanere*, coming of the Latine worde (Ant. 49. b.) 38 E. 3. 36. 44 E. 3. 8.

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(1) In a preceding note lord Coke asserts, that reservation is *always* of a thing newly created out of the land demised. Ante 47. a. But here he is more qualified in expression, and allows the word to be *sometimes* used to *except* part of the thing granted. However, the former is the more technical use of the word; *exception* being a more proper term than *reservation* for the latter purpose. The learning on this subject will be found under the title *Reservation* in Viner's Abridgment.—[Note 232.]

worde *remaneo*; for that [o] it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time, as in the cases here of *Littleton* appeareth (2).

[o] 2 Co. 51. Cholmelie's case. (Ant.49.a. Plowd. 25. a. 35. a.)

Sect. 216.

AND this is by force of the statute of quia emptores terrarum. *For before that statute, if a man had made a feoffment in fee simple, by deed or without deed, yielding to him and to his heires a certaine rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramont.*

(2 Inst. 500. Ant. 98. b.) "*QUIA emptores terrarum.*" Hereof is spoken before in the Chapter of *Frankalmoigne, Sect.* 140.

(Ant. 142. b.) "*By deed or without deed, &c.*" For all rent services may be reserved without deed (as hath been said), and as it appeareth here.

And at the common law if a man had made a feoffment in fee by parol, he might upon that feoffment have reserved a rent to him and his heires; because it was a rent-service, and a tenure thereby created.

(Dy. 246. b. Ant. 23. a.) "*And if there were no reservation, &c. the feoffee held of the feoffor by the same service, &c.*" This is evident, and agreeth with our bookes [*], that in this case the law created the tenure; wherein it is to be observed, how the law regardeth equitie and equalitie, without any provision or reservation of the party.

[*] Britton, fol. 100. 2 E. 3. 33. 25 E. 3. gard. 21. 49 E. 3. 10. 22 Ass. pl. 53. 7 H. 4. 14. 23 E. 3. avowrie 255. 4 H. 6.

Ipsæ etenim leges cupiunt, ut jure regantur.

Littl. cap. Taile, Sect†.

Sect. 217. [148. b.]

BUT if a man, by deed indented, at this day maketh such a gift in fee taile (1), *the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heires a certaine rent, and that if the rent be behind, it shall be lawfull for him and his heires to distreine, &c. such a rent is a rent charge; because such lands or tenements are charged with such distresse by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heires a certaine rent,*

† *Probably Sect.* 19.

(2) See Fearne's Ess. on Conting. Rem. 3d ed. p. 5 to 11.
(1) *fee* not in L. and M. Roh. and Redm.

rent, without any such clause put in the deed, that he may distreine, then such rent is rent secke; for that he cannot come to have the rent, if it be denied, by way of distresse; and if in this case he were never seised of the rent, he is without remedie, as shall be said hereafter (2).

"*BY deed indented.*" It cannot be a deed indented unlesse it be actually indented; for albeit the words of the deed be *hæc indentura, &c.* yet if it be not indented indeed, it is no indenture. But if the deed be indented, albeit the words of the deed be not *hæc indentura*, yet it is an indenture (3).

Britton, fol. 10a. Fleta, lib. 3, ca. 14. Vide Sect. 370. Post. 229. a. (5 Co. 20. b. 2 Ro. Abr. 22. 3 Leon. 16. 2 Inst. 672.)

And it is holden that [*p*] if a feoffment in fee be made by deed poll reserving a rent, this reservation is good; for when the feoffee accepts the deed and livery of the land, he agreeth to the rent, and the rent is reserved by the words of the feoffor, and not by the grant of the feoffee. But of this more hereafter. In the mean time it is to be noted, that of ancient time a deed indented was called *charta cyrographata* (4); or *charta-communis*, because each party had a part. And a deed poll was called *charta de unâ parte.* [*q*] *Chartæ autem de purâ donatione et simplici penès donatorium et ejus hæredes debent remanere. Communes verò duplicari debent, ita quòd quilibet habeat partem suam; vel si una sit tantùm, tunc in æquâ manu communis amici utriusque ponatur, salvo custodienda, dum cuilibet partium necesse fuerit exhibendum.*

[*p*] 8 E. 4. 8. 11 H. 7. 22. 35 H. 6. 34. 20 E. 4. 13. 17 E. 3. 12 H. 4. 17. (2 Ro. Abr. 449.)

[*q*] Fleta, lib. 3, ca. 14. Britton, fol. 100.

"*Reserveth to him.*" [*r*] Note, it is a maxime in law, that the rent must be reserved to him from whom the state of the land moveth,

[*r*] 12 E. 2. feoffments 8. 18 E. 2. Ass. 381. (Ant. 47. a. 2 Ro. Abr. 447. Cro. Cha. 289.)

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(2) See post. Sect. 341.

(3) The *indenting* or cutting *in modum dentium*, which is usually at the top, ever supposes two parts, being made in order that the parts when joined may be authenticated by the sameness of the cutting. See as to the use and origin of indenting charters in England, Mad. Formular. Anglican. p. 28, 29, of the dissertation prefixed.—[Note 233.]

(4) Mr. Madox objects to lord Coke's treating the *chirographum* as altogether the same thing with the *indenture;* because anciently many *chirographa* were not *indented*, but cut in the rectilinear form. Mad. Formul. Anglic. Dissert. p. 29. In fact, the name of *chirograph* properly belonged to those deeds, which were at first of two parts, written on the same paper or parchment, with the word *chirographum* in capital letters between the two parts, and were afterwards divided by a cut through the middle of those letters; and thus whether the cutting was *indented* or in a straight line, such deeds were equally *chirographa*. Ibid. 28, 29. Cangii Gloss. voce *chirographa*. Spelm. Gloss. voce *indentura*. Mabill. de Re Diplomat. lib. 1, c. 2. Some indeed apply this explanation to the *syngrapha*, and only describe the *chirographa* as deeds of one part, and so called from being written with the party's own hand. Lyndw. tit. de offic. Archidiac. c. 1. in not. But the same persons allow, that *sometimes syngrapha*, and *chirographa* are used promiscuously; and in the opinion of others, they are more commonly so applied. Ibid. & Mad. ubi supra. Both the *chirograph* and the *indenture*, then, usually importing to be a deed of two parts, they are so far the same; and we do not apprehend, that lord Coke meant to carry the resemblance further. Consequently he is not affected by mr. Madox's observation, which seems to suppose, though too hastily, that lord Coke had considered the *chirograph* and the *indenture* as wholly the same.—[Note 234.]

[s] 35 H. 6. 36. (2 Ro. Abr. 447. 425. Mo. 93. 168.)

moveth, and not to a stranger. [s] But some do hold, that otherwise it is in the case of the king.

Old Tenures. Britton, cap. 66. 164. F. N. B. 210. Bract. 86.

"*Such a rent is a rent charge.*" It is called a rent charge because the land for payment thereof is charged with a distresse. If it be to the whole value of the land, or to the fourth part of the value, then the rent is called a fee farme (5). Here *Littleton* putteth his case, and so did he in the next Section before, of a clause of distresse generally granted. [144. a.]

[t] 7 Co. 28. b. Maund's case. H. 43 El. in Com. Banco. Rot. 1108. inter Maund & Gregory. M. 40 & 41 El. in Com. Banco inter Stanly & Read. 18 El. Dyer 348. (Hut. 23. 42. Post. 153. b. 2 Ro. Abr. 426. Dy. 2. Post. 202. a. 204. a. Dy. 51. Plowd. 7 Perk. s. 101. Mo. 5. March 149.) (Vide Sect. 221. Ant. 47. a.)

[t] A man granted a rent out of certaine land, *pro consilio impenso et impendendo*, to have and to hold to him and to his assignees for terme of his life, payable at four feasts in the yeare, and for default of payment upon demand it should be lawfull for him to distrayne; the grantee granted the rent over; the assignee after one of the dayes demanded the rent, and distreyned, and the distresse adjudged lawfull; for he needs not make a demand at any of the dayes, as in the case of re-entry, but he

(5) The true meaning of *fee-farm* is a perpetual farm or rent; the name being founded on the *perpetuity* of the rent or service, not on the *quantum*. See Mad. Firm. Burg. 3. Here indeed lord Coke seems to intimate the contrary, by confining the denomination of *fee-farm* to rents at least equal to the fourth part of the value of the land; and the word is explained in a like manner by sir Henry Spelman, and the author of the book of *Old Tenures*, with this difference only, that the latter restricts the value to a *third*. See Spelm. Gloss. voce *feodi-firma*, and Old Ten. tit. *fee-firme*. But it would be wrong to understand any of these writers, as intending *absolutely* and *universally* to exclude all rents of *less* value; for the word *fee-farm* most certainly imports every rent or service, whatever the *quantum* may be, which is reserved on a grant in fee; and so lord Coke himself agrees in another work, citing Britton and other books for authorities. 2 Inst. 44. Britt. 164. b. The sometimes confining the term of *fee-farm* to rents of a certain value probably arose, partly from the statute of Gloucester, which gives the *cessavit* only where the rent amounts to one fourth of the value of the land, and partly from its being most usual on grants in *fee-farm* not to reserve less than a third or fourth of such value. See 6 E. 1. c. 4. F. N. B. 210. C. Ant. 142. a. note 2.—After the statute of *quia emptores* granting in fee-farm, except by the king, became impracticable; because the grantor parting with the fee is by operation of that statute without any reversion, and without a reversion there cannot be a rent-service, as Littleton himself writes in Section 216. Yet I have seen a modern grant in fee of a large estate in Ireland, reserving a perpetual rent of great value. But such rent, considered as a fee-farm rent, I thought clearly void. However, as in the case I allude to, the conveyance contained a power for the grantor and his heirs and assigns to distrain for the rent when in arrear, and also a power to enter and receive the profits till all arrears should be paid, the rent might be good as a rent-charge: and so on being consulted I held it to be.—Since writing the preceding part of this note, a most valuable collection of new Reports has been published; and in one of the cases, the learned reporter has given a note relative to fee-farm rents, which well deserves attention. See the case of Bradbury v. Wright, in mr. Douglas's Rep. of Ca. in B. R. 602. However, I so far differ from the last-mentioned note, as to continue of opinion, that the term of *fee-farm* is not properly applicable to any rents except *rents service*.—[Note 235.]

he may demand it when he will, for it is only to entitle him to his remedy for his meere duty (1).

"*Distreine, &c.*" Here by *(&c.)* is implyed what things are distreynable, which elsewhere is expressed at large. Also where the distresse is to be taken in the same land, and in some other, which with many differences is set downe in his proper place.

"*He is without remedie.*" Note, that upon a reservation of a rent upon a feoffement in fee by deed indented, [w] the feoffor shall not have a writ of annuity, because the words of reservation, as *reddendo, solvendo, faciendo, tenendo, reservando, &c.* are the words of the feoffor, and not of the feoffee, albeit the feoffee by acceptance of the estate is bound thereby.

[w] 33 E. 3. Annuity 52. 1 H. 4. 5. 26 Ass. pl. 66. 21 E. 4. (1 Ro. Abr. 226.)

And where *Littleton* putteth his case, when a reservation is made upon an estate that passeth by livery, the same law it is, if a man at this day doe bargaine and sell his land by deed indented and inrolled according to the statute, a rent may be reserved thereupon; for albeit an use had onely passed by the common law, yet now by the statute of 27 *H.* 8. cap. 10, the use and possession passe together, and so it was adjudged. * And so it is of a grant of a reversion or remainder, and any other conveyance of lands or tenements, whereby any estate doth passe.

* Mich. 39 & 40 El. in Com. Banco inter Wicks & Tillard.

Sect. 218.

ALSO, if a man seised of certaine land grant, by a deed poll, or by indenture, a yearely rent to be issuing out of the same land, to another in fee, or in fee taile, or for terme of life, &c. with a clause of distresse, &c. then this is a rent charge; and if the grant be without clause of distress, then it is a rent secke. And note, that rent secke idem est quod redditus siccus; *for that no distresse is incident unto it.*

"*SEISED of land.*" [x] Note, that a rent cannot be granted out of a pischary, a common, an advowson, or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreyne, or which may be put in view to the recognitors of an assise, as hath beene said before in this chapter. And though it be out of lands or tenements, [z] yet it must be out of an estate that passeth by the conveyance (as by all *Littleton's* examples appeareth), and not out of a right: as if the disseisee release to the disseisor of land, reserving a rent, the reservation is void, *et sic de similibus.*

[x] 32 E. 3. tit. scir. fac. 190. 40 E. 3. Pl. Com. 139. (Ant. 47. a. 142. a. Vaugh. 202. 204.) Vide Sect. 213. [z] 10 E. 4. 3. b. 33 H. 6. 5. 50 E. 3. 9. 8 E. 4. 8. 5 E. 3. Fines 1. 9 E. 3. 7. 46 E. 3. 27. 21 H. 6. 8. temp. E. 1. Ass. 42. * 19 E. 3. Title 34. (Ant. 114. a. 6 Co. 58.)

"*Grant by deed.*" * Also a man may have a rent by prescription.

"*Rent secke idem est quod redditus siccus.*" This needs no explanation, for *Littleton* expounds it himselfe.

Sect.

(1) See further as to this difference between a re-entry to avoid an estate and an entry to distrain, the second point in Maund's case above cited, and Gilb. on Rents 73.

☞ Sect. 219. [144. b.]

ALSO, if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may chuse, whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behinde, and the distresse detaine until he be payd. But he cannot do, or have, both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress, &c. And if he doth not sue a writ of annuity, but distreine for the arrerages, and the tenant sueth his replevin (son replegiare), *and then the grantee avow the taking of the distresse in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.*

(7 Co. 24. 1 Ro. Abr. 227.)

"*RENT charge.*" Here it appeareth by *Littleton*, that this *primâ facie* is a rent charge, whereof in this chapter shall be spoken more at large.

And so it is of a rent secke.

"*A man grant.*" Put case, that *A.* be seised of lands in fee, and he and *B.* grant a rent charge to one in fee, this *primâ facie* is the grant of *A.* and the confirmation of *B.* but yet the grantee may have a writ of annuity against both. [*a*] Two men grant an annuity of twenty pounds *per annum* to another, although the persons be severall, yet he shall have but one annuity. But if the grant be, *obligamus nos, et utrumque nostrûm*, the grantee may have a writ of annuity against either of them; but he shall have but one satisfaction.

[*a*] 16 E. 2. tit. Annuity 47. Vide Sect. 314. (5 Co. 86. 1 Ro. Abr. 895. Hob. 59. Plowd. 439.)

"*A writ of annuitie,*" is a writ for the recovery of an annuity. [*b*] An annuity is a yearly payment of a certaine summe of money granted to another in fee for life or yeares, charging the person of the grantor onely. [*c*] But not only the grantee, but his heire and his and their grantee (1), also shall have a writ of annuity. [*d*] But if a rent charge be granted to a man and his heires, he shall not have a writ of annuity against the heire of the grantor,

[*b*] Doct. & Stud. ca. 3. 17 El. Dyer 344. b. 45 E. 3. Executor 72. (Finch's Law, 301. F. N. B. 152. a.)

[*c*] 3 E. 6. Dyer 65. And Sergeante Bendloes reporteth, that so was the opinion of the Court.

[*d*] 2 H. 4. 13. Dyer 17 Eliz. 344. b. (10 Co. 128. Hob. 58. Plowd. 457. a. 1 Ro. Abr. 226.)

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(1) Formerly it was doubted, whether an annuity was assignable, though *assigns* were mentioned in the grant; the argument being, that it was a mere personal contract, and therefore a *chose in action*. See the cases in 2 Vin. Abr. 515, and 3 Vin. Abr. 151. But in a case in C. B. 3 Cha. 1 this objection, which in strictness of law carried force with it, was over-ruled. Gerrard v. Boden Hetl. 80. It seems too, that naming *assigns* is not essential to the making an annuity assignable, the principle of the objection to its being so being the same, whether *assigns* are mentioned or omitted. However, Perkins in the special case of an annuity *pro consilio impendendo* requires naming of *assigns*. Perk. s. 101. Even then too he questions the annuity being assignable. But this was settled in Maund's case, 7 Co. 28. b. one point resolved being, that express words would make such an annuity assignable.—[Note 236.]

grantor, albeit he hath assets, unless the grant be for him and his heires (2).

"*May chuse.*" The grantee hath election to bring a writ of annuity, and charging the person onely to make it personall; or to distraine upon the land, and to make it reall.

But if a man grant a rent charge to a man and his heires, and * dieth, and his wife bring a writ of dower against the heire, the heire in barre of her dower claimes the same to be an annuity and no rent charge; yet the wife shall recover her dower; for he cannot determine his election by claime, but by suing of a writ of annuity (as *Littleton* saith), neither can the heir have after the endowment an annuity for the two parts; for that should not be according to the deed of grant, for either the whole must be a rent charge, or the whole an annuity. But *Littleton* is to be understood with some limitation: [*e*] for of a rent granted for owelty of partition, a writ of annuity doth not lie, because it is of the nature of the land ☞ descended. Also of such a rent as may be granted without a deed a writ of annuitie doth not lie, though it be granted by deed.

(1 Co. 36, and Mo. 83.)

[*e*] 29 Ass. p. 23.

[145. a.]

[*f*] And here it is to be noted, that there is no election given of two severall things, as if the grant were of an annuitie or a robe yearely, &c. for there the grantor hath election at the day to deliver which he would. But here are two remedies given for one yearely summe, and consequently the grantee shall at any time have election to take which of the remedies he will; for in all cases where severall remedies be given, the party to whom the law giveth the remedies, it giveth him withall election to take which of the remedies he will.

[*f*] Sir Rowland Heyward's case. 2 Co. 36. 28 E. 3. 98. 41 E. 3. 10. a. 2 H. 4. 12. 6 H. 4. 10. 36 H. 6. 10. 9 E. 4. 46. 21 E. 4. 55. b. 1 E. 5. 1. F. N. B. 121. (Plowd. 439. Post. 310. b. 1 Ro. Abr. 446. 447. 725. Hob. 58.)

"*But he cannot do, or have, both together.*" For then he should recover one thing twice, which should be a double charge to the grantor.

Note, as to elections, these diversities following: (1)

First, when nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors.

2 Co. 36, 37. in Sir Rowland Meyward's case.

Secondly, when one and the same thing passeth to the donee or

* *The words,* the grantee of the rent charge, *seem to be here requisite to the sense of the passage. See Mr. Ritso's Intr. p.* 115, 116.

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(2) The reason is, because our law presumes, that it is not intended to include the heir in the obligation, where he is not named; and consequently, in the case supposed by lord Coke, it is too late to elect to make the rent-charge an annuity after the death of the grantor. See post. 383. b. 384. b. 386. a. 10 Co. 128. a. Vin. Abr. *Annuity*, B. But this reasoning fails in application, if the grantor of the annuity is a body politic, and as such hath perpetual continuance. Therefore an annuity granted by the king will bind his heirs and successors, though not named, his political capacity never dying, but having continuance in his successor; and so it was adjudged the 15th of Elizabeth in sir Thomas Wroth's case. Plowd. 455.—[Note 237.]

(1) Lord Coke extracts the six following rules concerning election *verbatim* from his own Reports. See 2 Co. 36. b.

or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the partie, his heires, or executors, may make election when they will.

Thirdly, when election is given to severall persons, there the first election made by any of the persons shall stand.

Fourthly, in case an election be given of two severall things, alwaies he, which is the first agent, and which ought to do the first act, shall have the election. As if a man granteth a rent of twentie shillings or a robe to one and to his heires, the grantor shall have the election; for he is the first agent, by payment of the one, or deliverie of the other. So if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election *causâ qua supra*. And with this agree the bookes in the * margent. [*g*] But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hazill or twentie loads of maple to be taken in his wood of *D.* there the grantee shall have election; for he ought to do the first act, *scil.* to fell and take the same.

(1 Ro. Abr. 725. Ant. 46. b. Plowd. 6. post. 146. a. Hob. 174) * 9 E. 4. 36. b. 13 E. 4. 4. b. L. 5 E. 4. 6. b. 11 E. 3. annu. 27. 11 Ass. p. 8. 29 Ass. 55. 3 E. 3. tit. Ass. 175. 43 E. 3. tit. Barre 194. (5 Co. 25. 41.) [g] 2 H. 7. 23. a.

Fifthly, when the thing granted is of things annuall, and are to have continuance, there the election remaineth to the grantor, (in case where the law giveth to him election) as well after the day, as before. Otherwise it is when the things are to be performed, *unicâ vice*. And therefore if I grant to another for life an annuitie or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuitie in the disjunctive; for if he bring his writ of annuitie for the one onely, and recover, this judgment shall determine his † election for ever; for he shall never have a writ of annuitie afterwards, but a *saire facias* upon the said judgement. Which reason, *Fitzherbert*, in his *Natura Brevium* (2), not observing, held an opinion to the contrarie. But if I contract with you to pay unto you twentie shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one or for the other.

(Ant. 90. b. 6 Co. 45.) 9 E. 4. 36. 13 E. 4. 4, and the other above-said bookes.

Sixthly, the feoffee by his act and wrong may lose his election, and give the same to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the act and wrong of the feoffee (3).

(Plowd. 6. 1 Ro. Abr. 726.)

"*If he recovers by a writ of annuity, then the land is discharged of the distress.*" Here is to be observed, that this determination of the election of the grantee must be by action or suit in court of record; [*h*] for albeit the grantee distreine for the rent, yet he may bring a writ of annuitie and discharge the land. And *Littleton* putteth his case here surely upon a recoverie in a writ of annuitie. [*i*] But if the grantee doth bring a writ of annuitie, and

[h] 17 El. Dyer 344. b.

[i] F. N. B. 152. a. 5 H. 7. 93. b.

† *Should it not be* my *instead of* his? *See Mr. Ritso's Intr. p.* 118.

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(2) See F. N. B. 152. G.

(3) But if the grant be to hold one acre for life and the other in fee, and donee makes feoffment of *one* acre only, it is an election to have the fee of that; and this being lawful nothing is forfeited. Perk. s. 78. Plowd. 6. b. —[Note 238.]

and at the returne thereof appeare and count, this is a determination of his election in a court of record, albeit he never proceedeth any further. [k] As if a wife be endowed *ex assensu patris*, and the husband dieth, the wife hath election either to have her dower at the common law or *ex assensu patris* (4); if she bring a writ of dower at the common law, and count, albeit she recover not, yet shall she never after claime her dower *ex assensu patris*.

[k] 12 E. 2. Dower 158.

[l] So if the grantee bring an assise for the rent, and make his plaint, he shall never after bring a writ of annuitie. But the purchasing of a writ of annuitie, and entrie of it in court of record, or of an assise, is no determination of the election; because an estranger may purchase a writ in the name of the grantee, and enter it of record: but if the grantee appeare thereunto, &c. then this doth amount to a determination of his election, as hath been said.

[l] 10 E. 4. 17.

[145. b.] ☞ "*His replevin* (son replegiare)." *Littleton* spake immediately before of *a writ of annuity*, but here he saith *his replevin*; because goods may be replevied two manner of wayes, viz. by writ, and that is by the common law, or by the pleint, and that is by the statutes for the more speedy having againe of the cattell and goods. A *replegiare* lyeth, as *Littleton* here teacheth us, where goods are distreined and impounded, the owner of the goods may have a writ *de replegiari facias*, whereby the sherife is commanded, taking sureties in that behalfe, to redeliver the goods distreined to the owner, or upon complaint made to the sherife he ought to make a replevy in the [county]. *Replegiare* is compounded of *re* and *plegiare*, as much as to say, as to redeliver upon pledges or sureties; and in the statute of *Marlebridge*, *deliberare* is used for *replegiare*. [m] And the sherife ought to take two kinde of pledges, one by the common law, and they be *plegii de prosequendo*, and another by the statute, viz. *plegii de retorno habendo*. *Vide* Sect. 58, what things may lawfully be distreyned, whereupon a *replegiare* may be sued. The formes of the writ you shall reade in the Register and F. N. B.*

(2 Inst. 139.) Glanvil. lib. 12. ca. 12. Marlbr. ca. 21. W. 1. ca. 16, 17. W. 2. ca. 39. Fleta, lib. 2, ca. 40.

Marlb. ca. 21. (Doctr. Plac. 314.) 21 H. 6. Returne de Vic. 17. (Post. 161. a.)

[m] W. 2. ca. 2. Fleta, lib. 4, ca. 5. 4 H. 6. 15.

*Reg. F.N.B. 68.

[n] It is a generall rule, that the plaintife must have the property of the goods in him at the time of the taking. [o] But yet if the goods of a villeine be distrayned, the lord of the villeine shall have a replevy; because the bringing of the replevy amounts to a clayme in law, and vests the property in the plaintife. But in that case if the goods of the villeine be taken by a trespasse, the lord shall have no replevy; because the villeine had but a right.

[n] 3 E. 3. 74. 6 H. 4 2. & 39. 9 H. 6. 39. 20 H. 6. 19.

[o] 33 E. 3. Replev. 43. 42 E. 3. 18. 9 H. 6. 25. F. N. B. 69. F. 6 H. 7. 9. 19 E. 3. Repl. 33.

[p] But there be two kinde of properties; a generall propertie, which every absolute owner hath; and a speciall propertie, as goods pledged or taken to manure his lands, or the like; and of both these a *replegiare* doth lye.

[p] 42 E. 3. 18. 11 H. 4. 17. 23. 47 E. 3. 12. 48 E. 3. 20. 7 H. 4. 17. Marlbr. ca. 21.

(2 Ro. Abr. 430. Plowd. 524.)

And albeit it be provided by the statute of *Marlebridge*, [*cap.* 21,] *quòd*

(4) See acc. before Sect. 41.

quòd vicecomes post querimoniam inde sibi factam ea, sine impedimento vel contradictione ejus qui dicta averia ceperit, deliberare possit, &c. [*q*] yet where the defendant claimes property, the sherife cannot proceed; for it is a rule in law, that property ought to be tryed by writ. And therefore in that case where the tryall is by pleint, the plaintife may have a writ *de proprietate probandâ* directed to the sherife to trie the propertie; and if thereupon it be found for the plaintife, then the sherife to make deliverance (for so be the words of the writ); and if for the defendant he can no further proceed. But that is but an enquest of office; and therefore if thereby it be found against the plaintife, yet he may have a writ of replevy to the sherife; and if he returne the claime of propertie, &c. yet shall it proceed in the court of common pleas where the property shall be put in issue and finally tried. And the sherife may take a pleint upon the said act out of the county, and make replevyn presently; for it should be inconvenient for the owner to forbeare his cattell till the county day.

[q] 30 E. 3. 22. 31 E. 3. Replev. 35, & 4. 7 H. 4. 26. 28. 31 H. 6. Prop. Prob. 5. 1 E. 4. 9. 21 E. 4. 64. 2 Eliz. Dyer 173. 21 E. 4. 66. (2 Ro. Abr. 431.)

[*r*] It is to be noted, that a man cannot claime propertie by his bailife or servant; and the reason is, for that if the clayme fall out to be false he shall be fined for his contempt, which the lord cannot be unlesse he maketh clayme himself; for *nemo punitur pro alieno delicto* (1).

[r] 5 E. 3. 38. 11 H. 4. 4. 17 E. 2. Propr. Prob. 6.

In a speciall case a man may have a replevyn of goods not distreyned. As if the mesne put in his cattell in lieu of the cattell of the tenant paravaile, that he is bound to acquite, he shall have a replevyn of those cattell that never were distreyned.

34 H. 6. 47.

If a man by his deed grant a rent with clause of distresse, and grant further, that he shall keep the goods distreyned against gages and pledges, untill the rent be payd, yet shall the sherife replevy the goods distreyned; for it is against the nature of such a distresse to be irreplevisable, and by such an [invention] the currant of replevyns should be overthrown to the hindrance of the commonwealth; and therefore it was disallowed by the whole court, and awarded that the defendant should gage deliverance, or else go to prison. And *Bracton* is of the same opinion; for he saith, *Eodem modo de viâ obstructâ, per breve quòd justiciet propter communem utilitatem, ne transeuntes ire diù impediantur, quia hoc esset commune damnum; et in hoc vicecomes et justiciarii faciant sicut super detentionem averiorum contra vadium plegii, propter communem utilitatem, ne animalia diù inclusa pereant;* which in mine opinion is an excellent point of learning.

31 E. 3. Gage deliver 5. (Post. 282. b. Doct. & Stud. 129. b.) Bracton, lib. 4, fo. 233. a. & b.

If the beasts of divers severall men be taken, they cannot joyne in a *repleg.* but every one must have a severall replevyn (2). And so in a replevyn it is a good plea to say, that the property is to the plaintife and to a stranger; and where there be two plaintifes, that the property is to one of them.

28 E. 3. 92. 3 H. 4. 12. 34 H. 6. 37. 2 E. 4. 23. (5 Co. 19. a.)

There

(1) This is explained to be intended only in respect to the county court; for in the king's bench the bailiff is not liable to a fine; and therefore it has been held, that there one may make conusance and claim property by a bailiff. Adj. in Hamstead v. Oldham. 1 Lev. 90. and 2 Keb. 441.—[Note 239.]

(2) But in favour of liberty, the law permits two to join in suing the writ *de homine replegiando.* F. N. B. 66. F.—[Note 240.]

There is also a writ *de homine replegiando*. But *Littleton* is ready to give you further instruction: therefore heare him. Regist. fol. 133. Bract. fo. 121. & 154. W. 1. ca. 11. Fleta, lib. 2, ca. 2. F. N. B. 66. b.

"*And avow the taking, &c. in a court of record.*" Here it appeareth, that an avowry in a court of record, which is in nature of an action, is a determination of his election before any judgement given (3). And this is a good proofe of that, which hath beene formerly said of the writs of annuity and assise (4).

[146. a.] ☞ *Electio semel facta et placitum testatum non patitur regressum.* 21 H. 6. 24. per Newton. 27 H. 6. 4.
Quod semel placuit in electionibus amplius displicere non potest.

If a rent charge be granted to *A.* and *B.* and their heires; *A.* distreyneth the beasts of the grantor, and he sueth a replevin; *A.* avoweth for himselfe, and maketh conusance for *B.*; *A.* dyeth and *B.* surviveth: *B.* shall not have a writ of annuity; for in that case, the election and avowry for the rent of *A.* barreth *B.* of any election to make it an annuity, albeit he assented not to the avowry.

But here is another diversity to be observed betweene the case aforesaid of the grant of the rent where he (as hath beene said) may make it either reall or personall, and when a man may have election to have severall remedies for a thing that is meerly personall or meerly reall from the beginning. As if a man may have an action of account or an action of debt at his pleasure, and he bringeth an action of account and appeare to it, and after is nonsuite, yet may he have an action of debt afterwards; because both actions charge the person. The like law is of an assise, and of a writ of entry in the nature of an assise, and the like. (2 Co. 36. b.) 28 E. 3. 98. b. 27 E. 3. 89. b. (6 Co. 7. a. Ant. 139. a.)

Sect. 220.

ALSO, if a man would that another should have a rent charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then he may have such a clause in the end of his deed. Provided alwaies, that this present writing, nor any thing therein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearely rent aforesaid, &c. (1) [Proviso semper, quòd præsens scriptum, nec aliquid in eo specificatum, non aliqualiter se extendat, &c. *] *Then the land is charged, and the person of the grantor discharged.*

BY

* *In the original of Littleton the proviso is in Latin. See lord Coke's remark on the double negative, post.* 146. *b.*

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(3) Acc. post. 268. a. F. N. B. 152. A.
(4) See ante 145. a.
(1) For the operation of this sort of *proviso*, see Dy. 222. a. and 2 Co. 72. a.

BY this Section it appeareth, that when in a generall grant the law doth give two remedies, that the grantor may provide that the grantee shall not use one of them and leave the party to the other (2). But where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant.

28 H. 8. Dier. 9. b. (Hob. 72.)

(1 Ro. Abr. 227. Hutt. 33.)

"*With the yearely rent, &c.*" Here by *(&c.)* and the consequent of this Section be implyed divers excellent points of learning, viz. If a man by his deede granteth a rent charge out of the mannor of Dale (wherein the grantor hath nothing) with such a proviso that it shall not charge his person; albeit the repugnancie doth not appeare in the deed, yet the proviso taketh away the whole effect of the grant, and therefore is in judgement of law repugnant; for upon the matter it is but a grant of an annuity, provided that it shall not charge his person (3). For which cause our author putteth his case of a rent charge issuing truly out of land. But if a man by his deed grant a rent charge out of land, provided that it shall not charge the land, albeit the grantee hath a double remedy, as hath beene said, yet the proviso is repugnant; because the land is expresly charged with the rent, but the writ of annuity is but implyed in the grant, and therefore that may be restrained without any repugnancie, and sufficient remedy left for the grantee; for which cause our author putteth his case of the restraint of bringing a writ of annuity. And yet in some cases where there is a proviso ☞ in the deed that the grantee shall not in any sort charge the person of the grantor generally, notwithstanding the person of the grantor shall be charged. As if a man grant a rent charge out of certaine lands to another for life, with such a *proviso*; the rent is behinde; the grantee dyeth; the executors of the grantee shall have an action of debt against the grantor, and charge his person for the arrerages in the life of the grantee; because the executors have no other remedy against the grantor for the arrerages; for distreine they cannot, because the estate in the rent is determined, and the proviso cannot leave the executors without remedy, as appeareth by that which hath beene said (1). And therefore our author putteth his case of a rent charge continuing. And here is to be observed, that this word *(proviso)* hath divers operations. Sometime it worketh a qualification or limitation, and so it is taken here, and often in our bookes; sometime a condition; and sometime a covenant: whereof you shall reade more hereafter, Sect 320.

So it was resolved by the justices in 11 H. 8. as justice Spilman reporteth. 9 H. 6. 53.

6 Eliz. Dier 227. (4 Co. 49. a. 7 Co. 39. b. 6 Co. 41. b. Post. 162. a.)

[146. b.]

(Post. 203. b. 2 Co. 72. a.)

32 Ass. p. 1. Vide Sect. 384. (Cro. Eliz. 837.

"*In the end of his deed.*" Here *Littleton* putteth his case of one

1 Ro. Abr. 590. Mo. 611.)

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(2) See post. 286. a. & b. 393. a.

(3) Acc. in Brediman's case, 6 Co. 58. b.

(1) At first this may seem contradicted by the statute of 32 H. 8. c. 37. according to the recital of which the executors of tenant for life of a rent-charge had no remedy at common law for arrears due to their testator. But lord Coke in another place observes, that the preamble of 32 H. 8. should be understood to apply not to tenant for his life only, but to tenant *pur autre vie*, so long as *cestui que vie* lives. Post. 162. a.—[Note 241.]

one deed. But though the grant be generall, and want such a proviso, yet may the grantee by another deed by way of defeasance grant, that he shall not charge the person of the grantor, and that if he bring a writ of annuity, that the rent shall cease.

"*Nec aliquid in eo specificatum, non aliqualiter se extendat, &c.*" Here is to be observed a double negative, *nec*, and *non*, which in grammaticall construction amounteth to an affirmative; for *Negatio destruit negationem, et ambo faciunt affirmativum.* Yet the law, that principally respecteth substance, doth judge the proviso to be a negative according to the intent of the parties, and not according to grammaticall construction, to the end the proviso may take effect; and the like you shall finde hereafter in *Littleton* *. *Mala grammatica non vitiat cartam.* Here our author putteth his case of one grantor. Put then the case, that *A.* and *B.* being joyntenants of lands in fee by their deed grant a rent charge out of those lands, provided that the grantee shall not charge the person of *A.* in this case if the grantee bringeth a writ of annuity, he must charge the person of *B.* only.

* Lib. 3. cap. de Condic. Sect. 368. (10 Co. 139. a. Hob. 191. Cro. Cha. 555.)

Sect. 221.

ALSO, if one make a deed in this manner, that if A. *of* B. *be not yearely payed at the feast of Christmasse for terme of his life xx. s. of lawfull money, that then it shall be lawfull for the said* A. *of* B. *to distreyne for this in the mannor of* F. *&c. this is a good rent charge; because the mannor is charged with the rent by way of distresse* (3)*; and yet the person of him, which makes such deed, is discharged in this case of an action of annuitie, because he doth not grant by his deed any annuitie to the said* A. *of* B. *but granteth only, that he may distreine for such annuitie, &c.*

"*THAT if A. of B.*" Here [want] words to precede these, viz. *that he grants to A. of B. &c. that if A. of B. &c.* as it appeareth in the originall (2); and so it appeareth in the close of this Section, viz. *but granteth only, that he may distreine.* And without such a grant the clause should be imperfect. (2 Ro. Abr. 424.)

"*Because the mannor is charged with the rent by way of distresse.*" And yet no rent is expresly granted out of the mannor. But, by the grant that he shall distreine for such a yearely summe of money, in judgement of law the mannor is charged with the rent; but the person of the grantor cannot be charged, because he expresly granteth no rent, for that would charge his person; but that the grantee should distreine, &c. which only chargeth the land. (Plowd. 139.)

"*That*

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(3) In L. and M. and in Roh. *&c.* is added.

(2) The words, here stated by lord Coke to be in the original, are not in L. and M. nor Roh.

"☞ *That he may distreine for such annuitie, &c.*" [147. a.]

18 Ass. p. 1. 18 E. 3. 32. 3 Ass. 7. 3 E. 3. 12. 10 Ass. 24. 31 Ass. p. 17. 33 Ass. (1) Annuity 52. 16 E. 3. grant 64.

Here by *(&c.)* many points worthy of observation are implyed, viz. if a man seised of lands in fee bindeth his goods and lands to the payment of a yearly rent to *A. of B.* this is a good rent charge with power to distreine, albeit there be no expresse words of charge, nor to distreine. Or in these words, *Obligo manerium meum de* C. *et omnia bona in dicto manerio existent'* A. *de* B. *in annuo redditu de xx. s. ad distringend' per balivum domini regis pro redditu prædicto.* By this grant a rent charge issueth out of the mannor: and where the words be, *ad distringendum per balivum domini regis,* this is for the advantage of the grantee. And therefore the king's baily should be but his minister to distreine for his rent; and that which he may do by his servant, he may do by himselfe or by any other of his servants (2).

7 Co. 23, 24, in Butts his case.

If a man by deed, grant a rent of forty shillings to another out of his mannor of *Dale,* to have and to perceive to him and his heirs, and grant over by the same deed, that if the rent be behind, that the grantee shall distreine in the mannor of *Sale* (be the mannor of *Sale* in the same county or in another county, and be this grant by one deed or divers deeds), the rent is onely issuing out of the mannor of *D.* and it is but a paine that he shall distreine in the mannor of *S.*; but both the mannors are charged, the one with the rent, and the other with a distresse for the rent; the one issuing out of the land, and the other to be taken upon the land. And whereas our author puts his case of a grant for life; so it is if I grant to you, that you and your heires, or the heires of your body, shall distreine for a rent of forty shillings within my mannor of *S.* this by construction in law shall amount to a grant of a rent out of my mannor of *S.* in fee simple or fee taile; for if this shall not amount to a grant of a rent, the grant shall be of little force or effect, if the grantee shall have but a bare distresse and no rent in him; for then he shall never have an assise of this, &c. And this is the reason, that it is so often ruled and resolved*, that this amounts to a grant of a rent per construction of law, *ut res magis valeat.* And all this is necessarily implyed in the *(&c.)* and in this case the grantee shall not have a writ of annuity, as our author saith. And whereas our author putteth his case where the distresse is to be taken in the same land out of which the rent by construction of law is issuing, hereby is implyed, that if a rent be granted out of the mannor of *D.* and the grantor grant over, that if the rent be behinde, the grantee shall distreine for the same rent in the mannor of *S.* this is but a penalty in the mannor of *S.* for three causes.

* 3 E. 3. 12. 3 Ass. p. 7. 14 Ass. p. 14. 16 E. 3. tit. Grants 64. 18 E. 3. 32. 26 Ass. 38. 30 Ass. 12. 46 E. 3. 18. 32. 8 H. 4. 19. 9 H. 6. 9. 22 H. 6. 11. (5 Co. 55. Post. 213.)

First, the law needs not to make construction that this shall amount to a grant of a rent, for here a rent is expresly granted to be issuing out of the mannor of *D.* and the parties have expresly limited out of what land the rent shall issue, and upon what land the distresse shall be taken, and the law will not make an exposition against the expresse words and intention of the parties, which this way stands with the rule of the law. *Quod*

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(1) Instead of *Ass.* it should be *E. 3.*

(2) What follows on this side of the folio is taken almost verbatim from Butt's case, in 7 Co. 23. a.

in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est.

Secondly, if in this case this shall amount to a grant of a rent out of the mannor of *S.* then the grantor shall be twice charged. For if the grantee bringeth a writ of annuity, this shall extend onely to the mannor of *D.*; for upon the grant of a distresse in the mannor of *S.* no writ of annuity lyeth, because the mannor of *S.* is only charged, and not the person of the grantor as to this (3); and for this cause the bringing of the writ of annuity cannot discharge the mannor of *S.* of any rent; and so the law by construction against the words and the intention of the parties shall do injury to the grantor to charge him twice.

Thirdly, if in such case the mannor of *S.* in which the distresse is only limited, shall be in another county, then it hath beene often adjudged, that the rent shall not issue out of the same, but the distresse shall be as a meane and remedy to compell the tenant of the land to pay the rent. And it was said, that there was no diversity in reason, that the law in construction shall make the rent to be issuing out of this, when it lyeth in the same county, and not when it lyeth in severall counties; for the words in both cases are all one, and there is no reason to say that he shall faile of a recovery by assise (4). And the bookes in 1 *Ass. p.* 10, and 1 E. 3. 21, and other bookes do not say that the rent issueth in this case out of both, but that the land in which the distresse shall be taken is charged; and this is true, for it is charged with the distresse. And inasmuch as it was charged with the distresse, their opinion was, that the tenants of both of them shall be named in the assise. And the opinion of *Finchden*, in 41 E. 3. 13, was affirmed to be good law, that if the mannor of *D.* out of which the rent is granted, be recovered by an elder title, that all the rent is extinct (5); but if the mannor of *S.* in which the distresse is limited, be evicted, yet all the rent remains*. So if the grantee purchase parcell of the mannor of *S.* the rent is not extinct, for that the rent issueth onely [147. b.] out of the ☞ mannor of *D.* (1). And it is said, that if a man grant a rent out of three acres, and grant over, that if the rent be behind, that he shall distreine for the rent in one of the acres, this rent is entire, and cannot be a rent secke out of two acres, and a rent charge out of the third acre, and therefore it is a rent secke for the whole; and yet hee shall distreine for this in the third acre. So if a rent be granted to two and to their heires out of an acre of land, and that it shall be lawfull for one of them and his heires to distreine for this in the same acre, this is a rent secke; for insomuch as they stand joyntly seised of one intire rent, it cannot be as to the one a rent secke, and as to the other a rent charge, and this distresse is as an appurtenant to the rent: and therefore if he which hath the rent † dieth, the survivor

Vide Bulwar's case. 7 Co. 3. 1 Ass. p. 10. 1 E. 3. 21. Vide 9 E. 3. 13. 31 Ass. 27. 17 E. 4. 6. 10 Ass. 4. 10 E. 3. 18. 2 E. 2 Ass. 360. 1 Ass. 10. 3 Ass. 7. 32 H. 6. 27. 22 Ass. 66. 31 Ass. 27. 29 E. 3. Assise 366. 41 E. 3. 13. per Finchden.

* Vid. 17 E. 4. 6. semblable case. Vide Sect. prox. sequen.

† *Instead of* "rent" *the word* "distress" *should be here inserted, as it seems. See Mr. Ritso's Intr. p.* 118.

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(3) Acc. ant. 146. b.

(4) How the remedy by assise is affected where the rent issues out of the land in several counties, is explained by lord Coke, post. fol. 153. b. 154. a.—[N. 242.]

(5) See post. 148. a. and 349. a. where the same doctrine is expressed; but it is added, that the grantee shall have a writ of annuity.—[Note 243.]

(1) See further as to extinguishment of rent, infra.

survivor shall distreine; and if both grant over the rent to another, he shall distreine for this. But if a man grant a rent out of Blacke Acre to one and to his heires, and grant to him that he may distreine for this in the same acre for terme of his life, this is a rent charge for his life, and a rent secke after, *diversis temporibus*. Otherwise it is if the distresse be limited for certaine yeares in the same land, there this remaines a rent secke intirely, for that the fee and the freehold is seck in such case.

(7 Co. 23.) If a man seised of lands in fee (2), and possessed of a terme for many yeares, grant a rent out of both for life in taile or in fee, with clause of distresse out of both, this rent being a freehold doth issue onely out of the freehold, and the lands in lease are onely charged with a distresse (3). But if he had granted the rent only out of the lands in lease for terme of the life of the grantee, this had issued out of the terme, and the land had beene charged during the terme, if the grantee lived so long.

(Plowd. 524. b. 525. a.)

22 H. 6. 10. b. If a man be seised of twenty acres of land, and grant a rent of twenty shillings *percipiend' de quâlibet acrâ terræ meæ*, (that is) out of every one acre of my land, this is a severall grant out of every severall acre, and the grantee shall have twenty pounds in all.

A. doth bargaine and sell land to *B.* by indenture, and before inrolment they both grant a rent charge by deed to *C.* and after the indenture is inrolled: some have said, that this rent charge is avoided; for, say they, it was the grant of *A.* and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other which had nothing in the land at that time. But the grant is good, and after the inrolment by the operation of the statute (4), it shall be the grant of *B.* and the confirmation of *A.* But if the deed had not beene inrolled, it had beene the grant of *A.* and the confirmation of *B.* and so *quâcunque viâ datâ* the grant is good (5).

(Cro. Cha. 110. 217. Cro. Jam. 52, 53.)

Sect. 222.

ALSO, if a man hath a rent charge to him and to his heires issuing out of certaine land, if he purchase any parcell of this to him and to his heires, all the rent charge is extinct, and the annuitie also [tout le rent charge est extinct et l'annuitie auxy (6)]; *because the rent charge cannot by such manner be apportioned. But if a man, which hath a rent service, purchase parcell of the land out of which the rent is issuing, this shall not extinguish all, but for the parcel. For a rent service in such case may be apportioned according to the value of the land. But if one holdeth his*

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(2) The case here stated is Butt's case, 5 Co. 23.

(3) See post. 196. b. & 197. a.

(4) 27 H. 8. c. 16.

(5) See 1 Com. Dig. 544, where most of the authorities on the relation of the inrolment of a bargain and sale to its execution are referred to. See also post. 186. a. and Hynde's case, 4 Co. 71. a.

(6) *In L. and M. and also in Roh. it is* anyenty *instead of* annuitie aussi; *and so the sense requires.*

his land of his lord by the service to render to his lord yearely at such a feast a horse, a golden speare or a clove, gilliflower, and such like; if in this case the lord purchase parcell of the land, such service is taken away; because such service cannot be severed nor apportioned.

"EXTINCT" commeth of the verbe *extinguere*, to destroy or put out; and a rent is said to be extinguished, when it it is destroied and put out.

"*Apportioned.*" This commeth of the word *portio, quasi partio*, which signifieth a part of the whole; and apportion signifieth a division or partition of a rent, common, &c. or a making of it into parts. (2 Inst. 503, 504.)

[a] The reason of this extinguishment is, because the rent is intire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole, and cannot be [b] apportioned (7). But by act in law it may, as hereafter (8) shall be said. [c] If the grantee of a rent charge purchase parcell of the land, and the grantor by his deed ☞ reciting the said purchase of part granteth that he may distreyne for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent or the same in quantity. And so it is [d] if a man by deed granteth a rent charge out of his land to a man for life, and granteth further by the same deed that he and his heires may distreyne in the land for the same rent, this amounteth to a new grant of a rent in fee simple (1).

[a] Doct. & Stud. lib. 2, cap. 16. 22 H. 7. 2. 21 E. 3. 58. [b] 30 Ass. 12. 9 Ass. 22. (1 Ro. Abr. 234.) [c] 46 E. 3. 32. 14 Ass. p. 14. 26 Ass. 38. (Ante 146. b.) [d] 8 H. 4. 19. (Post. 308. b.)

[148. a.]

But yet a rent charge by the act of the partie may in some case be apportioned. As if a man hath a rent charge of 20 shillings, he may release to the tenant of the land 10 shillings or more or lesse, and reserve part (2); for the grantee dealeth onely with that which is his owne, viz. the rent, and dealeth not with the land, as in case of purchase of part. And so was it holden in the common place, *Hill.* 14 Eliz. which I myselfe heard and observed. So [e] if the grantee of an annuity or rent charge of 20 pound grant 10 pound parcell of the same annuity or rent charge, and the tenant attorne, hereby the annuity or rent charge is divided (3).

(1 Ro. Abr. 235.) Hill. 14 Eliz. [e] 9 H. 6. 12. 53. F. N. B. 152. D. E.

And [f] when the rent charge is extinguished by his purchase of part of the land, he shall never have a writ of annuitie; because it was by the grant a rent charge, and he hath discharged the land of the rent charge by his owne act by purchase of part. And therefore he cannot by writ of annuity discharge the

[f] 14 E. 4. 4. 22 E. 4. le darrein case 51. 7 H. 6. 9 H. 6. 1. 5 H. 7. 33.

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(7) Acc. Sav. 69. Noy 5, the same doctrine prevails as to conditions and common appurtenant, and for a like reason. Post. 215. a. Ante 122. a.

(8) See post. Sect. 224. and fol. 164. a.

(1) Acc. Dy. 253. a. for there is a case, in which it was held, that a rent-charge should go to the heir, though heirs were not mentioned, except in the clause of distress.—[Note 244.]

(2) See acc. in the comment on Sect. 537. post. fol. 305. a.

(3) But Hobart, who *arguendo* puts the like case, observes, that the tenant is not compellable to attorn. Hob. 25.—[Note 245.]

the land of the distresse, as *Littleton* hath before (4) said. But if the rent charge be determined by the act of God or of the law, yet the grantee may have a writ of annuity. As if tenant for another man's life by his deed grant a rent charge to one for 21 yeares, *cesty que vie* dieth, the rent charge is determined; and yet the grantee may have during the yeares a writ of annuity for the arrerages incurred after the death of *cesty que vie*, because the rent charge did determine by the act of God and by the course of law. *Actus legis nulli facit injuriam.* The like law is, if the land out of which the rent charge is granted be recovered by an elder title, and thereby the rent charge is voyded, yet the grantee shall have a writ of annuity, for that the rent charge is avoyded by the course of law; and so it was holden in *Ward's* case above remembred against an opinion *obiter in* 9 H. 6. 42. a.

Ward's case cited in 2 Co. in Hayward's case, fo. 36.

9 H. 6. 42.

"*For a rent service in such case may be apportioned.*" Whether this apportionment was at the common law, or by force of the statute of *quia emptores terrarum*, hath beene a question in our bookes *. And it appeareth by *Littleton*, that it was so at the common law; for when he citeth any thing provided by any statute, he citeth the statute, as he hath done this very act before (5). *Littleton* speaketh here indefinitely of rent service, and there be divers kindes of rent services which are not within that statute; and yet such rent services are apportionable by the common law. As if a man maketh a lease for life or yeares reserving a rent, and the lessee surrender part to the lessor, the rent shall be apportioned. So if the lessor recovereth part of the land in an action of waste, or entereth for a forfeiture in part, the rent shall be apportioned.

* Brookes, tit. Apportionment 28. 18 E. 3. 49. 22 Ass. 52. 3 Ass. 18. 18 E. 2. Avowrie 218. Vid. 6 Co. 1, 2, in Bruerton's case. Vid. 8 Co. 105, 106, in Talbot's case. (1 Ro. Abr. 234. Post. 215.)

[g] So likewise if the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for the rent is incident to the reversion. [h] So it is if tenant by knights service by his last will and testament in writing deviseth the reversion of two parts of the lands, the devisee shall have two parts of the rent.

[g] 14 H. 8. 12. Vid. 8 Co. 79. in Wilde's case. Pasch. 39 Eliz. Rot. 233. So it was adjudged inter Collins and Harding. (13 Co. 57.)

And these cases are in mine opinion rightly adjudged against a sudden opinion in *Hill.* 6 and 7 E. 6, reported by serjeant *Bendloe* to the contrary. Note, what inconvenience should follow, if by the severance of the reversion the rent should be extinct.

[h] Trin. 43 Eliz. Rot. 243, inter West & Lassels, & Hill. 42 Eliz. Rot. 108, in communi banco inter Ewer & Moyle.

"*Purchase parcell of the land.*" This is intended of a fee simple, ☞ for if there be a lord and tenant of 40 acres of land by fealty and twenty shillings rent [i], if the tenant maketh a gift in taile, or a lease for life or yeares, of parcell thereof to the lord, in this case the rent shall not be apportioned for any part, but the rent shall be suspended for the whole: for a rent service (saith *Littleton*) may be extinct for part, and apportioned for the rest; but a rent service cannot be

[148. b.]

[i] 32 H. 8. tit. Extinguishment. Br. 48. 11 Ed. 3. Cessavit 21. 17 E. 3. 57. a. (Goldsb. 44. 1 Ro. Abr. 938. 9 Co. 135. 1 Ro. Abr. 235.)

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(4) This seems a mistake: at least I cannot find any passage of the kind in Littleton. In one copy which I have of the Coke upon Littleton, the whole of this passage is struck through with a pen; and in another it is scored under as doubtful.—[Note 246.]

(5) Ant. Sect. 216.

be suspended in part by the act of the partie, and in *esse* for other (1) part. So it is if the lessor enter upon the lessee for life or yeares into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part. And where our bookes * speake of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part. And yet by act in law a rent service may be suspended in part, and in *esse* for part. † As when the gardian in chivalrie entreth into the land of his ward within age, now is the seigniorie suspended; but if the wife of the tenant be endowed of a third part of the tenancie, now shall she pay to the lord the third part of the rent. ‡ And so it is if the tenant give a part of the tenancie to the father of the lord in taile, the father dieth, and this descends to the lord; in this case by act in law the seigniorie is suspended in part and in *esse* for part, and the same law is of a rent charge (2).

* 21 E. 4. 29. 9 E. 4. 1. 7 H. 6. 26. 4 H. 7. 6. b. 11 E. 3. Cessavit 21. (1 Ro. Abr. 235.)

† 33 E. 3. Dower 138.

‡ 30 Ass. p. 12.

Likewise a seigniorie may be suspended in part by the act of a stranger. § As if two joyntenants or coparceners be of a seigniorie, and one of them disseise the tenant of the land, the other joyntenant or coparcener shall distreine for his or her moietie.

§ 27 E. 3. 88.

Concerning the apportionment of rents, there is a difference betweene a grant of a rent, and a reservation of a rent: for [*k*] if a man be seised of two acres of land, of one in fee simple, and of another in taile, and by his deed grant a rent out of both in fee, in taile, for life, &c. and dieth, the land intailed is discharged, and the land in fee simple remaines charged with the whole rent; for against his owne grant he shall not take advantage of the weakenesse of his owne estate in part. [*l*] But if he make a gift in taile, a lease for life or for yeares of both acres, reserving a rent, the donor or lessor dieth, the issue in taile avoydeth the gift or lease, the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned ratably according to the value of the land, as *Littleton* here saith.

[*k*] 12 H. 4. 17. 17 Ed. 2. Dower 164. 30 Ass. p. 12.

[*l*] 20 H. 6. 3. 9 E. 4. 1, 2. 35 H. 8. Dyer 56. 7 E. 6 Dyer 82. 9 E. 3. 6 H. 4. 17. (1 Ro. Abr. 235.)

[*m*] If a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre: but if the recoverie be by a faint title by covine, then the rent is extinct for the whole, because he claimeth under the grantor.

[*m*] Doct. & Stud. li. 2, c. 17.

If a man infeoffeth *B.* of one acre in fee upon condition, and *B.* being seised of another acre in fee granteth a rent out of both acres to the feoffor, who entreth into the one acre for the condition broken, the whole rent shall issue out of the other acre; because

(1) This position is denied by lord Hale and the court of king's bench in the case of Hodgkins v. Robson and Thornborow, Mich. 27 Cha. 2. See the report of that case in 1 Vent. 277. 2 Lev. 143, and Pollexf. 141.—[Note 247.]

(2) Acc. in Ascough's case, 9 Co. 135. b. and there the reason is expressed, namely, that one coparcener shall not be prejudiced by the tortious act of the other. See also acc. post. 188. a.—[Note 248.]

because his title is paramount the (3) grant. But if a man maketh a lease for life of Blacke Acre and White Acre, reserving two shillings rent, upon condition that if the lessee doth such an act, &c. that then he shall have fee in Blacke Acre, the lessee performes the condition, albeit now by relation he hath the fee simple *ab initio*, yet shall the rent be apportioned, for that the reversion of one acre whereunto the rent was incident is gone from the lessor; and so note a diversitie betweene a rent in grosse and a rent incident to a reversion, concerning the apportionment thereof. And yet in some cases a rent charge shall not be wholly extinct, where the grantee claimeth from and under the grantor. As if *B.* maketh a lease of one acre for life to *A.* and *A.* is seised of another acre in fee, *A.* granteth a rent charge to *B.* out of both acres, and doth wast in the acre which he holdeth for life, *B.* recovereth in wast; the whole rent is not extinct, but shall be apportioned; and yet *B.* claimeth the one acre under *A.* And so it is if *A.* had made a feoffment in fee, and *B.* had entred for the forfeiture, the rent is to be apportioned, and is not wholly extinct: and the reason hereof is, for that it is a maxime of law, that no man shall take advantage of his owne wrong, *nullus commodum capere potest de injuriâ suâ propriâ*; (4) and therefore seeing the wast and forfeiture were committed by the act and wrong of the lessee, he shall not take advantage thereof to extinguish the whole rent: and the whole rent cannot issue onely out of the other acre, because the lessor hath the one acre under the estate of the lessee, and therefore it shall be apportioned. * If the king give two acres of land of equall value to another in fee, fee taile, for life or yeares, reserving a rent of two shillings, and the one acre is evicted by a title paramount, the rent shall be apportioned.

* Dyer Mich. 7 & 8 Eliz. Manuscript. The earle of Huntingdon's case.

Vid. F. N. B. 234. b. Briefe de onerando pro rata port.

"*But if a man holdeth his land, &c. by service to render yearely, &c. a horse, a golden speare, &c. if in this case the lord purchase parcell of the land, such service is taken away* (5)."

☞ "*Horse.*" *Nota*, in Latine *destrarius* is a great horse, or a horse of service, of the French word *destrier; palfridus* a horse to travell on (1), of the French word *palfray;* and *runcinus* a nagge (you shall often read of them in records), it commeth of the Italian word *roncino.* But admit that parcell of the land holden by such entire service come to the lord by descent, whether shall the entire service wholly remaine, or be extinct? And it is holden, that in some cases it shall be extinct for the whole, as suit service, and such other entire annuall suit services. But if the service be to render yearly at such a feast a horse, or the like, and the tenant infeoffe the father of the lord of part, which descends, yet the feoffor shall

[149. a.]

Anno 6 R. 1. Rot. 5. War. Bruerton's case, 6 Co. 2. 34 Ass. 15. 35 H. 6. Exec. 21 Pl. Com. 72. 40 E. 3. 40. 5 E. 2. tit. Avowrie 206. (2 Inst. 503. 8 Co. 105.)

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(3) See the case of dower, post. 150. a.

(4) So also by the tortious act of the lessee a condition may be apportioned; though in general it is not divisible by act of the parties. Post. 275. a. & 4 Co. 120. a. 8 Co. 79 b.—[Note 249.]

(5) What services shall be extinguished by the lord's purchase of part of the land, and what shall be apportioned or remain, is explained much at large in Talbot's case, 8 Co. 105, and in Bruerton's case, 6 Co. 1.—[Note 250.]

(1) It is used in this sense in a writ in F. N. B. 93. I.

shall hold by a horse, because the service was multiplied, and each of them, viz. the feoffor and the feoffee, held by a horse.

A. hath common of pasture *sauns nombre*, in twenty acres of land, and ten of those acres descend to *A.*: the common *sauns nombre* is entire and incertaine, and cannot be apportioned, but shall remaine. But if it had been a common certaine (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, of turbarie, of pischarie, &c. And yet in none of these cases, the descent, which is an act in law, shall worke any wrong to the *terre-tenant*; for he shall have that which belongeth to him, for the act in law shall worke no wrong (2).

If three joyntenants hold by an entire yearely rent, as of a horse, or of a graine of wheat, and the tenants cesse by two yeares, and the lord recover two parts of the land against two of them, and the third saves his part by tendring of the rent, &c. and finding suretie; albeit the lord come to the two parts by lawfull recovery, grounded upon the default and wrong of the two joyntenants, yet shall the entire annuall rent be extinct (3). F. N. B. 209. 40 E. 3. 40.

If the tenant holdeth by fealty and a bushell of wheat, or a pound of comyn, or of pepper, or such like, and the lord purchaseth part of the land, there shall be an apportionment, as well as if the rent were in money: and yet if the rent were by one graine of wheat, or one seed of comyn, or one pepper corne, by the purchase of part, the whole should be extinct. But if an entire service be *pro bono publico*, as knights service, castle gard, cornage, &c. for the defence of the realme, or to repaire a bridge or a way, to keepe a beacon, or to keepe the king's records, or for advancement of justice and peace, as to ayd the sherife, or to be constable of *England* (4), though the lord purchase part, the service (5) remains. So it is if the tenure be *pro opere devotionis sive pietatis*, as to find a preacher, or to provide the ornaments of such a church; or *pro opere charitatis*, as to marry a poore virgin, or to bind a poore boy apprentice, or to feed a poore man. And so note a diversity betweene these cases and entire services for the private benefit of the lord. Vid. Litt. cap. tenant in common 71. b. 6 Co. 1, 2. in Bruerton's case. Litt. f. 49. 11 H. 7. 12. b. 24 H. 8. Tenures 53. Brookes. 35 H. 6. 6. 11 El. Dy. 285. 16 E. 3. Avowrie 93.

Sect. 223.

BUT if a man hold his land of another, by homage fealty and escuage, and certaine rent, if the lord purchase part of the land, &c. in this case the rent shall be apportioned, as is aforesaid: but yet in this case the homage and fealty abide entire to the lord; for the lord shall have the homage

(2) This same maxim is cited and applied ant. fol. 148. a.

(3) A learned observer on the Coke upon Littleton, whose MSS. notes I have, objects to it as against reason, that the lord should lose his service from the third jointenant. However, the Year-Book of E. 4, cited by lord Coke, is an authority for the position; and further it should be considered, that the case supposed is of an *entire* rent, that is, of one incapable of division.—[Note 251.]

(4) See post. 165. a.

(5) Acc. post. 149. b.

homage and fealty of his tenant for the rest of the lands and tenements holden of him, as he had before (1), *because that such services are not yearely services, and cannot be apportioned, but the escuage may and shall be apportioned according to the quantitie and rate of the land, &c.*

Bruerton's case ubi supra. (6 Co. 10.)

"*PURCHASE part of the land, &c.*" Here by this, *(&c.)* is implyed that the reasons, wherefore homage and fealty remaine, and are not extinct in this case, are: First, because it can be no losse to the tenant, as it might in the case of an horse or other entire service; for there it may be the remnant is not sufficient in value to pay it. Secondly, there is no land, but it must be holden by some service or other; and homage and fealty are the freest and least chargeable services to the tenant.

5 E. 2. Avowrie 206.

"*Because that such services are not yearely services, &c*" This is *ratio una*, but not *unica*, as it appeareth by that which ☞ hath beene said. If there be lord and tenant by fealtie and herriot service, and the lord purchase part of the land, the herriot service is extinct, (and yet it is not annuall, but to be paid at the death of the tenant) because it is entire and valuable.

(Plowd. 96. a.) Bruerton's case 6 Co Talbot's case 8 Co. 104. 8 H. 7. 11. (Post. 176. b. 185. b.)

[149. b.]

"*According to the quantitie and rate of the land, &c.*" Here is by this *(&c.)* implyed, that in some cases where it is entire and valuable, and not annuall, it shall not (as hath beene sayd) be extinguished by purchase of part: * as knights service, which is to be performed by the body of a man, if the lord purchase part, yet the tenure by knights service remaines for the residue, *quia pro bono publico & pro defensione regni* (2); but the escuage shall be apportioned, as here *Littleton* saith, because that it is for the benefit of the lord, and yet it is casuall, and not annuall. And where our author speaketh of services, it is implied that a herriot custome, though it be entire, valuable, and not annuall, by the purchase of part shall not be extinct. On the other part, when the tenure is by an entire service, and the tenant aliens part of the tenancie, in what cases the rent shall be multiplyed, (that is) where the feoffor and the alienee shall pay the entire rent severally (3), (for regularly it holdeth, that *quæ in partes dividi nequeunt solida à singulis præstantur)* and where not, you may read at large in my * Reports.

* 7 E. 3. 29. Talbot's case. 8 Co. 104.

* Bruerton's case 6 Co. 1, 2. Talbot's case 8 Co. 104.

And by this *(&c.)* is also implyed, that the apportionment shall not be according to the quantity of the land, but according to the quality or value thereof (4), as by that which hath beene said appeareth.

Sect.

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(1) In L. & M. *&c.* is here added.
(2) Acc. ant. 149. a.
(3) Ant. 67. b.
(4) Acc. infra, Sect. 224.

Sect. 224.

ALSO, if a man hath a rent charge, and his father purchase parcell of the tenements charged in fee, and dieth, and this parcell descends to his son who hath the rent charge, now this (5) *charge shall be apportioned according to the value of the land, as is aforesaid of rent service; because such portion of the land purchased by the father commeth not to the son by his owne fact, but by descent and by course of law.*

NOTE here a diversity, when the grantee of a rent charge commeth to a part of the land charged by his owne act, and when by the course of law (6). 5 E. 2. Avowrie 200. 21 E. 3. 58. b. 34 Ass. 15. tit. Apportionment, b. 28. 9 Ass. 22. 30 Ass. pl. 12.

"*Purchase parcell of the tenements charged in fee.*" And so it is if the tenant giveth to the father of the grantee part of the land in taile, and this descend to the grantee, the rent shall be apportioned; and so by act in law a rent charge may be suspended for one part, and in *esse* for another. (Ant. 148. b.)

And so it is, if the father be grantee of a rent, and the son purchase part of the land charged, and the father dieth after whose death the rent descends to the son, the rent shall be apportioned; and so it is if the grantee grant the rent to the tenant of the land, and to a stranger, the rent is extinct but for a moitie. 34 H. 6. 41. b.

[150. a.] ☞ If a man hath issue two daughters, and grant a rent charge out of his land to one of them, and dieth, the rent shall be apportioned; and if the grantee in this case enfeoffeth another of her part of the land, yet the moity of the rent remaineth issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent. But in all these cases where the rent charge is apportioned by act in law, yet the writ of annuity faileth; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then must he, as it hath beene said, (1) bring it for the whole. 9 Ass. 92.

Annua nec debitum judex non separat ipsum. 5 R. 2. Annuity 21.

Also in respect of the realty the rent is apportioned. But the personalty is indivisible, and by act in law shall not be divided. If execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descend to the conusee, all the execution is avoided; for the duty is personall, and cannot be divided by act in law (2). Pl. Com. 72. 35 H. 6. tit. Execut. 21. 15 E. 4. 5.

"*Commeth*

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(5) The word *rent* is here inserted in L. & M.

(6) Acc. ant. 147. b.

(1) Ant. 144. b. near the end.

(2) Acc. 2 Ventr. 327. For other instances of the indivisibility of debts and personal duties, see F. N. B. 46. a. Kielw. 106. a. Bro. Nov. Cas. pl. 52. 135. Hetl. 53. March. 56. 61.

"*Commeth not to the sonne by his owne fact, but by descent and by course of law.*" If the father within age purchase part of the land charged, and alieneth within age and dyeth, the son recovereth in a writ of *dum fuit infra ætatem*, or entereth; in this case the act of law is mixt with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry the son hath the land by discent.

So it is in case the son recovereth part of the land upon an alienation by his father *dum non fuit compos mentis*, the rent shall be apportioned for the cause aforesaid.

5 E. 2. Avowry 206. A man seised of lands in fee taketh a wife, and maketh a feoffment in fee, the feoffee grants a rent charge of x. pound out of the land to the feoffor and his wife and to the heires of the husband, the husband dieth, the wife recovereth the moity of her dower by the custome; the rent charge shall be apportioned, and she may distreine for five pound, which is the moity of the rent (3). In which case two notable things are to be observed. First, albeit the dower be by relation or fiction of law above the rent (4), yet when the wife recovereth her dower, she shall not have her entire rent out of the residue; for a relation or fiction of law shall never worke a wrong or charge to a third person, but *in fictione juris semper est æquitas*. Secondly, that albeit her owne act do concurre with the act in law, yet the rent shall be apportioned.

3 Co. 29, in Butler and Baker's case.

Sect. 225.

ALSO, if there be lord and tenant, and the tenant holds of his lord by fealty and certaine rent, and the lord grant the rent by his deed to another, &c. reserving the fealty to himselfe, and the tenant atturnes to the grantee of the rent, now this rent is rent seck to the grantee; because the tenements are not holden of the grantor (5) *of the rent, but are holden of the lord who reserved to him the fealtie.*

"*AND the lord grant the rent, &c.*" So it is if the lord release the rent of the tenant saving the fealty, the rent is extinct. But if there be lord and tenant by fealty and rent, and the lord by his deed reciting the tenure release all his right in the land saving his said rent, the seigniory remaines, and he shall have the rent as a rent service, and the fealty incident to it; for the said rent is as much as to say the rent service whereunto fealty is incident.

19 E. 4. 11. 9 E. 3. 1. 40 E. 3. 22. b. 13 E. 3. tit. Releases 36. (Post. 151. a.)

17 E. 3. 72. b. And if the lord hath issue two daughters and dieth, and upon partition the fealtie is allotted to the one and the rent to the other, she shall have the rent as a rent secke.

17 E. 3. 72. b. If there be lord of a mannor and tenant by fealty, suit of court and

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(3) This same case is cited and approved of in Ascough's case, 8 Co. 135. b.
(4) See the case of condition, ant. 148. b.
(5) *Grantee* instead of *grantor* in L. and M. and Roh. which is agreeable to the sense of the passage.

and rent, the lord grants the fealty saving to him the suit of court and rent, the saving is good for the rent, but not for the suit of court; because the ☞ grantee can keepe no court, and there is no tenure of the grantor, and therefore the suit of court is lost and perished in that case.

[150. b.]

If the donee hold of the donor by fealty and certaine rent, and the donor grant the services to another, and the tenant atturne, some have said the rent shall not passe, because the rent cannot passe but as a rent service, being granted by the name of services; and the fealty cannot passe, because as hath been saide (1) the fealty is an incident inseparable to the reversion. But it seemeth, that the rent shall passe as a rent secke (2); because at the time of the grant it was a rent service in the grantor, and therefore there be words sufficient to passe it to the grantee, and it is not of necessity that it shall be a rent service in the hands of the grantee.

If there be lord and tenant by fealty and certaine rent, and the lord by deed grant the rent in fee saving the fealty, and grant further by the same deed that the grantee may distreine for the same rent in the tenancy, albeit a distresse were incident to the rent in the hands of the grantor, and although a tenant attorne to the grant, yet cannot the grantee distraine; for the distresse remaines as an incident inseparable to the seigniory, for then the tenant should be subject to two severall distresses of two severall men (3). And so it is if the lord in that case grant the rent in tayle or for [his] life, saving the fealty, and further grant that the grantee may distreine for it, albeit the reversion of the rent be a rent service, yet the donee or grantee shall have it but as a rent secke, and shall not distreine for it.

7 E. 3. b. Fitz Warren's case.

7 E. 3. 2. 3. Adjudged.

It is to be observed, that where a rent service is become a a rent secke by severance of the same from the seigniory, that now the nature of the rent is changed; for if the grantee purchase part of the land, the whole rent shall be extinct. And whereas in an assise for a rent service, all the tenants of the land need not be named, but such as did the disseisin; yet in assise for the rent seck, which sometimes was a rent service, all the tenants must be named, as in case of a rent charge, albeit he were disseised but by one sole tenant. * But if the lord of a mannor release the fealty to his tenant saving the rent, or that a mesnalty become a rent by surplusage (4), those that are now secke (and sometimes

31 Ass. 31. 17 Ass. 10. 32 Ass. pl. 10. F. N. B. 178. D. 22 H. 6. 3. b. 4 E. 2. Ass. 449. 28 H. 8. Dier 31.

* 31 Ass. 23. 22 Ass. 53. (Mo. 109. 1 Leon. 14.)

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(1) Ant. 143. a.

(2) See post. 152. a. the comment on Sect. 230, and note 6. there.

(3) This only shews, that the tenant cannot be made liable to two several distresses by *act of his lord*. But on *act of law* it is otherwise, of which lord Coke gives an instance post. 164. b.—[Note 252.]

(4) This passage being shortly expressed may to some be obscure. The case intended is that of lord mesne and tenant, where the rent from the tenant to the mesne is greater than the latter pays to the lord, and the lord purchases of the tenant; the consequence of which is, that the mesne becomes entitled to the surplusage rent from the lord, namely, to so much as the rent from the tenant to the mesne exceeds the rent to the lord from the mesne. See W. Jo. 234, and post. Sect. 234 †, and fol. 154. b. and 309. b.—[Note 253.]

† *Sect. 234 is irrelevant to the subject. See sections 231, and 232, which are probably those meant to be referred to, and the commentary thereon, 152, b. and 153. a.*

sometimes were service) are part of the mannor; but a rent charge cannot be part of a mannor.

"*Atturnes, &c.*" Of attornement shall be hereafter said in his proper chapter and place.

Sect. 226.

IN the same manner, where a man holds his land by homage fealty and certaine rent, if the lord grant the rent, saving to him the homage, such rent after such grant is rent seck. But there where lands are holden by homage fealty and certaine rent, if the lord will grant by his deed the homage of his tenant to another, saving to him the remnant of his services, and the tenant atturne to him according to the forme of the grant; in this case the tenant shall hold his land of the grantee, and the lord who granted the homage shall have but the rent as a rent seck, and shall never distrain for the rent (1), *because that homage nor fealty nor escuage cannot be said secke, for no such service may be said secke. For he, which hath or ought to have homage fealty or escuage of his land, may by common right distreine for it, if it be behind; for homage fealtie and escuage are services, by which lands or tenements are holden, &c. and are such services as in no manner can be taken but as services, &c.*

"*IF the lord will grant by his deed the homage, &c.*" It is to be observed, that where the seigniory is by homage fealty and rent, [*a*] if the lord grant away the homage, the fealty shall passe; for fealty is an incident inseparable to homage [*b*], and cannot by any saving in any grant be separated from it, for homage cannot be sole or alone *. But the rent (tho' it be not saved) shall not passe in that case; because the rent is not incident to homage; and so it is if there be lord and tenant by fealty and rent, and the lord grant over the fealty without any savings, the rent passeth not. But fealty hath an incident inseparable belonging to it, which by no saving can be separated, and that is a distresse; for, as *Littleton* saith here, a service cannot be seck, (that is) without some ☞ distresse belonging to it, for then it were not a service, and so of homage and escuage. [151. a.]

[a] 40 E. 3 22. per Curiam.
[b] 44 E. 3. 19, 20. 39 H. 6. 25. 29 Ass. p. 20. 26 Ass. p. 38.

"*Lands or tenements are holden, &c.*" By this (*&c.*) and out of this Section it may be collected, that if [*c*] there be lord and tenant by fealty and rent, the annuall rent, which is a profitable service, is of higher and more respect in law than the fealty; and therefore by the grant of the rent the fealty shall passe as an incident thereunto; but it is an incident separable, and therefore may be by a saving, as *Littleton* hath (2) said, separated from it. And so when the tenure is by fealty and rent, and the rent be recovered,

[c] 44 E. 3. 19. 26 Ass. 38. 29 Ass. p. 20. 9 E. 3. 2. 39 H. 6. 24, 25. 27 H. 8. 20. 8 E. 4. 28.

* *See ante* 68. *a. n.* 1. *and the note under the* * *there.*

(1) In L. and M. here follow these words, viz. "*because that fealty cannot be severed from homage, and.*" But they are not in the Roh. edition.
(2) Sect. 225. fo. 150. a.

recovered, the fealty shall includedly be recovered. [*d*] And where the tenure is by homage fealty and rent, by the recovery of the rent with the appurtenances upon a former right, the homage and fealty also shall be restored by necessity and indulgence of the law; for seeing the law giveth no *præcipe* for the homage and fealty, but for the rent only, reason would, that by the recovery of the rent the whole entire seigniory shall be inclusively restored (3) in that case. But if the recovery be without title (4), there the rent is recovered as a rent seck, for that worketh no more than a grant *; but by the recovery of a mannor, whether it be by title or without title, homage fealty and all other services parcell of the mannor are recovered. And albeit fealty cannot be divided from homage by grant (as hath beene said) yet by extinguishment it may [*e*]. As if there be lord and tenant by homage fealty and rent, and the lord release the seigniory and services, or all his right in the land saving the fealty and rent, or saving the said rent, or if he by expresse words release the homage saving the fealty and rent, there the fealty and rent remain, for the homage is extinct. And so note a diversity betweene a grant and a release in that case. But so long as homage continues, the fealty cannot be divided from it.

[*d*] Temps H. 8. Br. tit. Incidents 24. 44 E. 3. 19. 29 Ass. 20. 39 H. 6. 24, 25.

(Ant. 148. b.)

*Vide Sect. 149.

[*e*] 9 E. 3. 1. (Ant. 150. a.)

"*But as services, &c.*" Here is implyed a diversity betweene these corporall services of homage fealty and escuage, which cannot become secke or dry, but make tenure whereunto distresses escheats and other profits be incident, and other corporall services, as to plough, repaire, attend, and the like, and all rents whatsoever, for they may become secke or dry and make no tenure.

Sect. 227.

BUT otherwise it is of a rent, which was once rent service; because when it is severed by the grant of the lord from the other services, it cannot be said rent service, for that it hath not fealty unto it, which is incident to every manner of rent service; and therefore it is called rent seck. (1) *And the lord cannot grant such a rent with a distresse, as it is said.*

"*AND*

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(3) So if land, to which common is appendant or appurtenant, be recovered in assise of novel disseisin, it is a tacit recovery of the common also. Post. 154. b. It is the same on recovery of a manor, to which a villein is regardant. Post. 306. b. So remitter to the principal is remitter to the accessary. Post. 349. b. All this is agreeable to the rule, that *accessorium sequitur suum principale*, which is cited in the next folio. See 152. a. and the case of trees in 11 Co. 49. b.— Note 254.]

(4) Of recovery *without title*, where used to mean a *common* recovery, see ant. 104 a. Of recovery *without title*, as distinguished from a *common* recovery, read post. 362. a.—[Note 255.]

(1) The words which follow in this Section are not in L. and M. nor in the Roh. edition; nor in the two MSS.

"*AND the lord cannot grant such a rent with a distresse, as it is said.*" [*f*] For ☞ the distresse is an incident inseparable to the fealty, as hath been said [*g*], and therefore a release of distresse is void. [151. b.]

[*f*] 7 E. 3. 2, 3.
[*g*] 7 E. 4. 11. 3 H. 7. 4, 5.

"*Incident*," *Incidens*, a thing appertaining to or following another as a more worthy or principall; whereof you see here, and in divers other places of *Littleton*, examples. And of incidents, some be separable, and some inseparable (2), as hath beene said.

Sect. 228.

ALSO, if a man lett to another lands for tearme of life, reserving to him certaine rent, if he grant the rent to another by his deed, saving to him the reversion of the land so letten, &c. such rent is but a rent seck; because that the grantee had* nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for tearme of life, and the tenant attorne, &c. then hath the grantee the rent as a rent service; for that he hath the reversion for tearme of life.

"*SAVING to him the reversion, &c.*" By this word *(&c.)* is to be observed, [*h*] that this rent reserved is a rent service, and hath fealty incident to it; and both rent and fealty are incident to the reversion, viz. [*i*] the rent incident to the reversion separably, but the fealty incident to the reversion inseparably; but by the grant of the rent, the fealty in this case shall not passe, because the fealty is inseparably incident to the reversion, but the grantee shall have the rent as a rent secke. Also by this *(&c.)* is implyed an attornement of the tenant; for without that, although by the grant the rent is turned to a rent secke, so as the tenant cannot be charged with any distresse, yet to the passing thereof there must be an attornment †.

[*h*] 41 E. 3. 16.

[*i*] 12 E. 4. 3. 32 H. 8. tit. Patents. Br. 26 Ass. 66. 48 E. 3. 9. b. Doct. & Stud. li. 2, ca. 9.

"*Attorne, &c.*" Here is implyed by this *(&c.)* an attornment in the life of the grantee, and other incidents to an attornment, whereof you shall reade at large in the Chapter of Attornment (3).

"*Then hath the grantee the rent as a rent service; for that he hath the reversion for tearme of life.*" And the reason hereof is, because the rent is incident to the reversion, as hath beene said, and (as *Littleton* saith here) passeth away by the grant of the reversion as with the superior, without saying *cum pertinentiis* (4), *&c.*

* *The word* "had" *appears to be here inserted for* "hath;" *see Mr. Ritso's Intr. p.* 111.

† *As to the effect of modern statutes upon the doctrine of attornment, see post. Mr. Butler's n.* 1. *fol.* 309. *a.*

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(2) This distinction of incidents is made before fol. 93. a. For examples of incidents inseparable, see infra, and also ant. 99. a. b. 113. b. 150. b. 151. a. Bro. Nouv. Cas. pl. 7.—[Note 256.]

(3) Post. 309. a.

(4) Acc. ant. 121. b. post. 307. a.

&c. for the reversion cannot be seck (5). But by the grant of the rent the reversion doth not passe (6).

[152. a.]

☞ Sect. 229.

ET issint est a entendue, &c. (1) † *And so it is to be intended, that if a man give lands or tenements in taile yielding to him and to his heires a certaine rent, or letteth land for tearme of life rendring a certaine rent, if he grant the reversion to another, &c. and the tenant atturne,* (Post. 324. a. b.) *all the rent and service passe by this word (reversion) (2) because that such rent and service in such case are incident to the reversion, and passe by the grant of the reversion. But albeit that he granteth the rent to another, the reversion doth not passe by such grant, &c.* (3)

THIS needs no explication, but is evident by that which hath formerly beene said, saving by this *(&c.)* in the end is implied the old rule, That the incident shall passe by the grant of the principall, but not the principall by the grant of the incident. *Accessorium non ducit, sed sequitur suum principale* (4).

Sect. 230. (5)

SO note the diversity. And so it is holden P. 21 E. 4. *But it is adjudged* 26 *of the book of assises, where the services of tenant in taile were granted, that this was a good grant, notwithstanding that the reversion remaine.*

THIS is added to *Littleton*. And therefore as I have done heretofore, and shall do hereafter in like cases, I passe it over.

† *In the four preceding editions, in which the sections of Littleton are given in the original French, with lord Coke's translation, note* 1 *of* 152. *a. is referred to at the end of the part in French, and notes* 2, *&* 3, *are referred to in the translation.*

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(5) Lord Coke only means, that a reversion cannot be without fealty, and its inseparable concomitant the remedy of distress. In respect to present profit, a reversion may be dry and fruitless during the particular estates, and until it comes into possession. To a reversion of this latter kind lord Coke himself gives the description of dry and fruitless, ant. 111. b. Hence it appears, that the word *seck* is used by our lawyers in two senses. According to one, it signifies *want of remedy by distress,* as Littleton expounds the word in Section 218. In another, it imports *want of present fruit and profit,* as in the case of the reversion without rent or other service except fealty.—[Note 257.]

(6) See acc. from Littleton himself at the end of Sect. 229.

(1) The same distinction between granting the *reversion* and granting the rent is taken post. Sect. 572.

(2) According to Bro. Nouv. Cas. pl. 192, this holds in the case of the king as well as in the case of a common person.

(3) See ant. 150. b. 2 Ro. Abr. 59, and infra note b.

(4) See ant. 151. a. note 3, and post. 349. b.

(5) No part of this Section is in L. & M. Roh. or P.

over. And the case here cited in 26 *Ass. p.* 66, was *contra opinionem multorum;* and afterwards that judgement was reversed by writ of error, for that the services remained with the reversion as incidents (6) inseparable.

Sect. 231.

ALSO, if there be lord mesne and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of 12 *pence, if the lord paramont purchase the tenancie in fee, then the service of the mesnalty is extinct; because that when the lord paramont hath the tenancie, he holdeth of his lord next paramont to him, and if he should hold this of him which was mesne, then he should hold the same tenancie immediately of divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief than an inconvenience, and therefore the seigniorie of the mesnalty is extinct.*

IF there be lord mesne and tenant, &c. if the lord paramont purchase the tenancie in fee, &c.

[k] 20 E. 3. avowrie, 126. 2 E. 2. tit. Exting. 6. 26 H. 6. ibid. 7.

[k] Some have said, that ☞ in this case it were reason, that by the purchase of the lord paramount his seigniory should be onely extinct, and that he should become tenant to the mesne, and the mesne to hold over as the lord paramount held. But that cannot be; for that one man cannot be both lord and tenant, nor one land immediately holden of divers lords. [l] If the tenant infeoffe the lord paramount and his wife and their heires, in this case the mesnalty is but suspended; for if the wife survive, both mesnalty and seigniory are revived. [152. b.]

[l] 7 Ass. 2. 7 E. 3. 20.

It is said, that if there be lord mesne and tenant, each of them by fealty and sixe pence, the lord confirme the state of the tenant, to hold of him by fealty and three pence, that the mesnalty is extinct (1). [m] And so in the same case, if the tenant be an abbot, and the lord confirme his estate to hold of him in frank-

[m] 4 E. 3. 19. See for this hereafter in the chapter of Confirmation, Sect. (538).

almoigne,

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(6) This reason is unexceptionable in respect to services, which in their nature are inseparable from the reversion, such as fealty. But it fails in respect to the rent, which lord Coke has before represented to be a seperable incident, ant. 151. b. The true construction of the grant supposed seems to be, that it is sufficient to pass the rent as a rent seck, but that for the other services it is void. It should be recollected too, that this construction is conformable to one by lord Coke on a similar case, which he states and explains in fol. 150. b. See the top of the page there.—[Note 258.]

(1) In the preceding case lord Coke states the doctrine upon it as a mere *dictum;* and by his marginal reference to the chapter of Confirmation, he apparently reserves his own opinion for a future occasion. Afterwards when he resumes the subject, he holds, that, on account of *want of privity* between the lord paramount and the tenant paravail, *confirmation* from the former to the latter cannot abridge the services due to the mesne, and so alter the tenure between the mesne and the tenant paravail. Post. 305. b.—[Note 259.]

almoigne, the mesnalty is (2) extinct. [n] So it is if the lord release to the tenant (3). For whether the lord purchase the tenancie, or the tenant the seigniory, the mesnalty is extinct. And albeit the mesne grant the mesnalty for life, and then the lord release to the tenant, both the reversion and the estate for life are drowned [o]. So if there be lord and tenant, and the tenant make a gift in taile, the remainder to the king, the seigniory is extinct (4).

[n] 8 H. 6. 24. (Post. 280. a.)

[o] 4 & 5 P. & M. Dy. 145. (2 Co. 92. b.)

"*Which should be inconvenient.*" Here it appeareth, that *argumentum ab inconvenienti* is forcible in law *, as hath been said before (5), and shall be often observed hereafter.

Vid. Sect. 138, 139.

[p] "*The law will sooner suffer a mischief than an inconvenience* (6)." *Lex citiùs tolerare vult privatum damnum, quàm publicum malum.* Here be two maximes of the common law.

[p] 13 H. 4. 3. 40 Ass. p. 27. 12 R. 2. Vouch. 81.

First, that no man can hold one and the same land immediately of two severall lords.

Secondly, that one man cannot of the same land be both lord and tenant. And it is to be observed, that it is holden for an inconvenience, that any of the maximes of the law should be broken, though a private man suffer losse; for that by infringing of a maxime, not onely a generall prejudice to many, but in the end a publike incertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non* (7) *debet, et factum unius alteri nocere non debet;* which are true with this exception, unlesse an inconvenience should follow, as our author here teacheth us.

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* *See ante Mr. Hargrave's note* 1. *fol.* 66. *a.*

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(2) Lord Coke, in a subsequent part of his Commentary gives a different decision of this case; for there he holds, that the lord cannot extinguish the mesnalty by *confirmation* to the tenant paravail, there being *no privity* between them. Post. 305. b. But this is not any contradiction of himself; because here he is apparently giving the *dictum* of others.—[Note 260.]

(3) It deserves consideration, whether the *release* of lord paramount is not as insufficient to pass the seigniory to the tenant paravail, as a *confirmation*, both being conveyances in which *privity* is required. See post. Sect. 461.—[Note 261.]

(4) The reason of this is elsewhere explained to be, that the seigniory being extinct for the fee-simple, it cannot remain for the particular estate either for life or in tail. See post. 312. b. Quick's case, 9 Co. 129. b. a case in Gouldsb. 149, and Bingham's case 2 Co. 92.—[Note 262.]

(5) Ante 97. b.

(6) It sounds harshly to prefer a mischief to an inconvenience, the greater evil to the lesser. But the true construction of the rule obviates this objection; for it certainly means, as lord Coke's addition explains, that the law prefers a *private* mischief to a *public* inconvenience.—[Note 263.]

(7) The same maxim is cited post. 319. a. In Wingate's Maxims 327, there is a great variety of cases for illustration of the rule.—[Note 264.]

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BUT in as much as the tenant holds of the mesne by five shillings, and the mesne holds but by twelve pence, so as he hath more in advantage by four shillings, than he paies to his lord, he shall have the said four shillings as a rent secke yearely of the lord which purchased the tenancie.

"*HE shall have the foure shillings as a rent secke.*"

☞ And yet he shall distreyne for it(1); for, seeing the fealtie is extinct, the law reserves the distresse to the rent; for as it hath been said in the like case, seeing the fealtie is extinct, the distresse by act in law may be preserved, *Quia quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest* (2). [r] And therefore if a man maketh a lease for life, reserving a rent, and bind himselfe in a statute, and [the conusee](3) hath the rent extended and delivered to him, he shall distreyne for the rent (4), because he commeth to it by course of law. [153. a.]

[r] 13 H. 4. Avowrie 237. (Post. 225. b. Mo. 36.)

[s] But if a rent service be made a rent secke by the grant of the lord, the grantee shall not distreyne for it, for that the distresse remaines with the fealtie. [t] If there be lord mesne and tenant, and the mesnaltie is a mannor having divers freeholders, and the lord purchase one of the tenancies, and there is a rent by surplusage, this rent albeit it be changed into another nature (as hath beene said) is parcell of the mannor. But yet by purchase of part of the land, the whole rent is extinct, albeit the law did preserve it.

[s] 28 E. 3. 93. (Ant. 150. b. 151. b. 309. b.)
[t] 31 Ass. 23. 22 Ass. 53. 2 H. 6. 14.

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(1) If the rent may be distrained for, can it be properly called seck? Littleton in Sect. 218, describes a rent to be seck, because distress is not incident to it. But if lord Coke is right here, a rent may be seck, and yet be distrained for. According to the resolution of the king's bench in W. Jo. 234. the rent, in a case such as is supposed by Littleton, is *quasi* a rent-service distrainable of common right. In other words, the distress is given, or rather saved, by the law, to prevent the mesne from being prejudiced by acts between lord and tenant to which the mesne is no party. This brings the case to a resemblance of a rent reserved for equality on a partition between coparceners; which by the implication of law is a rent-charge without aid of any clause of distress, and therefore called by Littleton a rent-charge distrainable of common right. See post. Sect. 253.—[Note 265.]

(2) See same maxim ant. fol. 56. a. See also 11 Co. 52. a. Cro. Jam. 170. 189, and Oldfield's case, Noy 123.

(3) The words [the conusee] are not in the original, but are added by the editor as essential to the sense of the passage.

(4) Acc. Bro. Abr. *Executions* 143. Yet it has been said, that the reversion itself is not extendable. Bro. Nouv. Cas. pl. 227. See as to this 1 Bo. Abr. 888. pl. 6 and 7. Mod. 40, and Carth. 126.—[Note 266.]

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ALSO, if a man which hath a rent secke, be once seised of any parcell of the rent, and after the tenant will not pay the rent behind, this is his remedie. He ought to go by himselfe or by others to the lands or tenements out of which the rent is issuing, and there demand the arrerages of the rent; and if the tenant denie to pay it, this deniall is a disseisin of the rent. Also, if the tenant be not then readie to pay it, this is a denial, which is a disseisin of the rent (5). *Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a deniall in law, and a disseisin in deed, and of such disseisins he may have an assise of* novel disseisin *against the tenant, and shall recover the seisin of the rent, and his arrerages and his dammages, and the costs of his writ and of his plea, &c. And if after such recovery* [*and execution had*] (1)† *the rent be againe denied unto him, then he shall have a redisseisin, and shall recover his double damages, &c*

"SEISIN, or *seison*, is common aswel to the English, as to the French, and signifies in the common law possession, whereof *seisina* a Latin word is made, and *seisire* a verbe. (Ant. 29. a.)

"*Of any parcel.*" [*u*] A seisin of parcel is a sufficient seisin in law, to have an assise of the whole rent. [*u*] 5 E. 4. 2. (Post. 315. a. Cro. Cha. 507.)

Concerning the generall learning of seisins, you may reade *lib.* 4. *Bevil's case, fol.* 8. *lib.* 5. *fol.* 98. *lib.* 6. *fol.* 57. *lib.* 7. *fol.* 24. 29. *lib.* 9. *fol.* 33, and many authorities of law there cited, but sufficient is said here to explaine *Littleton*. (9 Co. 23.) T. 18 E. 1. coram rege Nott. in Thesaur.

"*To the lands, &c.*" [*w*] For a demand of the tenant out of the land is not sufficient: but if there be a house and land a demand on the land is sufficient; but for a condition broken, it ought to be at the house (6), as hath been said before (7). [*w*] 49 E. 3. 14. b. 14 E. 4. 4. Pl. Com. 71.

[153. b.] "*Behind,*" *arere*. This word *arere* is to be observed, for it is not necessary, that ☞ the grantee of the rent should demand it at the very time when it becommeth due, but at any time after it is sufficient. For this is not like a demand of a rent upon a condition; because that is penall and overthroweth the whole state; and [*x*] therefore the time of demand must be certaine, to the end the lessee, donee, or feoffee may be there to pay the rent (2). But a demand of a rent secke (Ant. 144. a.) [*x*] 29 Ass. 51. 8 H. 6. 11. Lib. de Entries 79. b. (5 Co. 56. 7 Co. 28. 1 Leon. 305. Cro. Jam. 9, 10. 145.)

or

† *This is note* 1 *of* 153. *b. in the* 13*th and* 14*th editions.*

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(5) The words, *of the rent* not in L. and M. nor Roh.
(6) Acc. F. N. B. 179. A.
(7) Acc. post. 201. b.
(1) † The words between brackets not in L. and M. Roh. nor P.
(2) Acc. as to condition of re-entry, post. 301. a. acc. whether the condition be for re-entry or a sum *nomine pœnæ*, 7 Co. 28. b. Hcb. 82. 207.

or rent charge is but onely a formal meane to recover that which is due; [y] and therefore in that case it may be demanded after it is behind at any time, whether the tenant be present or no, for remedies for rights are ever favourably extended.

[y] Mich. 41 E. 3. coram rege adjudg. accordingly.

"*This is a deniall in law.*" For wheresoever there is a lawfull demand of a rent, and the same is not paid, whether the tenant be present or absent, yet this is a deniall in law (3), albeit there be no words of denyall. It appeareth here, that the demand must be made upon the land, and albeit the tenant nor any for him be there, yet must the grantee demand it, because without a demand there can be no denier in deed, or in law.

(Post. 201. b.)

"*Disseisin.*" (4) [z] *Disseisina* is a putting out of a man out of seisin, and ever implyeth a wrong (5). But dispossessing or ejectment is a putting out of possession, and may be by right or by wrong. * *Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo fortè ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseisinam sed transgressionem, &c. Quærendum est à judice quo animo hoc fecerit, &c.* (6) And of ancient time a disseisin was defined thus: *Disseisin est un personel trespasse de tortious ouster del seisin* (7).

[z] Vid. Bract. lib. 4. fol. 161, 62. 204. Brit. ca. 42, 43, &c. f. 83. 106. 114, 115. 118. Mir. ca. 2, sect. 1. * Flet. lib. 4, ca. 1. Bra. ubi supra †. (4 Leon. 48. a. Cro. Cha. 303.)

"*An assise of novel disseisin.*" *Assisa novæ disseisinæ. Assisa* properly commeth of the Latin word *assideo*, which is to associate or set together; so as properly assise is an association or sitting together. And the writ, whereby certain persons are authorised

Mirr. ca. 2, sect. 25. Bracton lib. 4, ca. 4. Britton ca. 44, 45, &c. Fleta lib. 4, ca. 5, & 2, & 3.

† *See note 6 infra.*

But the case of Thyn v. Cholmley, Mo. 347, is *contra* as to a sum *nomine pœnæ*. —[Note 267.]

(3) For disseisin of rent by denial, see post. Sect. 238.

(4) See Littleton's description of disseisin, post. Sect. 279.

(5) It also implieth force. Post. 257. b.

(6) The preceding passages in Latin are not from Bracton or Fleta in the places cited by lord Coke, but from Bract. 216. b.

(7) For other descriptions of disseisin besides those given or referred to by lord Coke, see post. 377. a. 6 Co. 58. The ancient authors cited by lord Coke, particularly Bracton and Fleta, are very full in explaining the various modes of disseisin. The additional marginal references to 4 Leon. and Cro. Cha. are to cases about disseisin by *election*, as to which see post. 306. b. and 323. a. See also the case of Taylor on demise of Atkyns v. Horde, 1 Burr. 60. In this last case it was attempted to support a common recovery by supposing the tenant to the præcipe to have gained a freehold by disseisin. The nature of a disseisin was therefore elaborately investigated by the counsel. Lord Mansfield, also, who had been recently made chief justice of the king's bench, and delivered the court's opinion in a very distinguished argument, expatiated on the same subject, in order to repel the arguments for a freehold by disseisin in the case before the court, by shewing, that the doctrine in our books about disseisins chiefly applies to disseisin by a person electing, for the sake of certain remedies to suppose himself disseised. There will probably be occasion to refer to some points of the learning displayed in the course of this famous case in a subsequent part of the present work; especially where Littleton writes concerning disseisins by *election*. See post. Sect. 588.—[Note 268.]

authorised and called together, is called *assisa novæ disseisinæ*; so as *assisa* is but *cessio* (8). But because *cessio* is but a generall word, therefore in this sense *assisa* is used in law for a particular cession by force of the writ *de assisâ novæ disseisinæ*; and accordingly it was anciently said, *assise in un case n'est auter chose que cession des justices.* And it is called *assisa novæ disseisinæ*, for that the justices of eire, before whom these assises were taken in their proper counties, did ride their circuits from 7 years to 7 years, and no disseisin before the eire if it were not complained of in the eire could be questioned after the eire; and therefore a disseisin committed before the last eire was called an ancient disseisin, and a disseisin after the last eire was called a new disseisin, or *nova disseisina. Assisa* also signifyeth a jury, of their sitting together, and also a session of parliament, as *Littleton* hereafter in this Chapter sheweth.

Mirror ca. 2. sect. 25.

"*And shall recover the seisin of the rent.*" Here, and by the *(&c.)* in the end of this Section is implyed, that our author intendeth his case where the rent issueth out of lands in one county. For if a man be seised of two acres of land in two severall counties, and maketh a lease of both of them reserving two shillings rent; in this case, albeit severall liveries (9) be made at severall times, yet is it but one entire rent in respect of the necessitie of the case, and he shall distreyne in one county for the whole, and make one avowrie for the whole. But he shall have severall assises *in confinio comitatûs*, and in either countie shall ☞ make his plaint of the whole rent; but there shall be but one patent to the justices. [a] And this assise in *confinio comitatûs* is given by the statute of 7 R. 2. cap. 10, for no assise lay in that case at the common law, but the party might distreine. [b] But for a common of pasture, of turbary, of pischary, of estovers, and the like, in one county, appendant or appurtenant to land in another county, an assise *in confinio comitatûs* did lye at the common law; [c] and so it is of a nusans done in one county to lands, lying in another county, the like assise did lye at the common law.

(7 Co. 3. b.)

[154. a.]

[a] 10 Ass. pl. 4. 18 Ass. p. 1. & 18 E. 3. 32. 22 H. 6. 9, 10.

[b] F. N. B. 180. a. (7 Co. 2, 3, 4.)

[c] F. N. B. 183. k.

[d] And albeit the counties do not adjoyne, but there be no counties meane betweene them, yet the assise *in confinio comitatûs* doth lye (1), and the justices shall sit betweene the said counties, [e] And where it is said before of two counties, the like law it is if the same extend into more counties (2).

[d] 5 E. 4. 2.

[e] F. N. B. 180. a.

[f] If a man hold divers mannors or lands in divers severall counties by one tenure, and the lord is deforced of his services, he shall have severall writs of customes and services; for every county one writ returnable at one day in the court of common pleas,

[f] 30 E. 1. tit. Droit. F. N. B. 151. m.

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(8) It should be *sessio*, the word as Coke spells it tending to a wrong derivation.

(9) As to livery of lands situate in several counties, see ant. Sect. 61, 62.

(1) Acc. Finc. Descript. del Com. L. 59. a. & 49 Ass. pl. 1. & 21 Hen. 6. 3. there cited.

(2) Fitzherbert in the place cited in the margin is a direct authority for this. But according to Finch, more than two counties cannot join. Finc. Descript. del. Com. L. 59. a. See further on trial by two or more counties, 21 Vin. Abr. 103.—[Note 269.]

pleas, and thereupon count according to his case by the common law.

[g] 18 Ass. pl. 1.

[g] But if the tenant in that case do cease, the lord shall not have severall writs of *cessavit ut supra*; for the writ of *cessavit* is

* W. 2. cap. 21.

given by statute *, and the forme and manner of the writ therein prescribed; and thereupon it is holden in our bookes that in that case a *cessavit* doth not lye (3).

[h] Bracton fol. 236. Britton, 133, 246. Flet. li. 4, ca. 29. Merton cap. 3. Regist. 206, 207.

[h] "*He shall have a redisseisin, and shall recover his double damages, &c.*" Here by this *(&c.)* is also to be understood, that a writ of redisseisin is given by the statute of *Merton* * (so called because the parliament was holden at *Merton in Anno* 20 *H.* 3.) the letter whereof is, *Item si quis fuerit disseisitus de libero tenemento, & coram justiciariis itinerantibus seisinam suam recuperaverit per assisam novæ disseisinæ, vel per recognitionem eorum quos fecerint disseisinam, et ipse disseisitus per vicecomitem seisinam suam habuerit, si iidem disseisitores, postea post iter justiciariorum, vel infra, de eodem tenemento iterum eundem conquerentem disseisiverint, & inde convicti fuerint, statim capiantur, &c.* (4) But the double damages are given by the statute of W. 2. cap. 26. (5)

* Mirror ca. 3. W. 2. c. 46. Vid. Sect. 234.

Vide Regist. 206. b. (1 Ro. Abr. 571.)

And *Littleton* in few words hath made a good exposition of this statute; for where the statute saith, *disseisitus de libero tenemento*, *Littleton* expounds it [i] to extend to a rent seck or rent charge (6). Albeit, as hath beene said, they be against common right, yet a man hath a freehold in them, [k] and he that granteth *omnia tenementa sua*, a rent charge or a rent seck doth passe (7).

[i] 40 Ass. 23. ac.

[k] 14 E. 4. 4. 11 H. 6. 22. (Ant. 6. a. 19. b.)

Coram justiciariis itinerantibus, &c. saith the statute. But *Littleton* speaketh generally, and so is the statute to be intended before any other justices that have authority to take assises, &c. justices itinerant are set downe but for an example, which is worthy of the observation, [l] being a penall law.

[l] Fitz. N. B. 180. h.

Recuperaverit per assisam, &c. saith the statute. Here assise is taken for the verdict of the assise, as *Littleton* hereafter in this Chapter expoundeth the same. *Vel per recognitionem*, &c. or by confession. Then the question is, what if the recovery were upon a demurrer, or by pleading of a record and failer of it, or by any other manner. And seeing *Littleton* speaketh generally it must be understood of all manner of recoveries in an assise of *novel disseisin*; and so it is confirmed by the statute of W. 2. cap. 26. (8)

"*Recovery.*" *Recuperatio* commeth of the verbe *recuperare*, *i. e. ad rem per injuriam extortam sive detentam per sente*-

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(3) Acc. F. N. B. 209. K.

(4) Acc. 2. Inst. 82. 115.

(5) See 2 Inst. 416.

(6) Acc. F. N. B. 178. D.

(7) So where lands and *tenements* are devisable by custom of a borough, a rent-charge and rent-service are within the custom. Post. Sect. 585. But sometimes the word *tenement* is used in a more limited sense, and to exclude rents and other incorporeal hereditaments, as by Littleton in writing of discontinuance to toll-entries See post. Sect. 385.—[Note 270.]

(8) See further as to *redisseisin* Fitzherbert's comment on the writ of that name, F. N. B. 188. B.

judicis restitui. And *recuperatio* in the common law is all one with *evictio* in the civill law, which is *alicujus rei in causam alterius adductæ per judicem acquisitio.*

"*And execution had.*" *Per vicecomitem seisinam habuerit,* saith the statute: but *Littleton* speaketh generally, *(and execution had)*; so as whether it be by the sherife or by the party, so as execution or possession be had, it sufficeth (9).

"*Execution,*" *Executio,* and signifieth in law the obtaining of actuall possession of any thing acquired by judgement of law, or by a fine executory levied, whether it be by the sherife or by the entry of the party, whereof you shall reade more hereafter (10). Vide Sect. 504.

Note, it appeareth here by *Littleton,* that [*m*] the recovery in a former writ must be in assise of *novel disseisin,* wherein these words *(such recovery)* are to be observed. And therefore in a writ of right close in ancient demesne, the demandant maketh his protestation to sue in the nature of assise of *novel disseisin,* and after is redisseised, he shall not have a writ of redisseisin, because the first recovery was not by a writ of assise of *novel disseisin.* [*n*] And so it is, if the recovery were in assise of fresh force by bill according to the custome of some city or borough. Also in ancient demesne there be no coroners. (11) [*m*] 14 E. 2. tit. Rediss 9. F. N. B. 189. g. [*n*] 14 E. 3. tit. Redis. 8. Vide the 2 part of the Institutes. Stat. de Merton, cap. 3.

Si iidem disseisitores, saith the statute. [*o*] So as it must be the same disseisors: but here ☞ *iidem* is taken for *non alii.* And therefore if the recovery in the assise were against two disseisors, and one of them redisseise him againe, he shall have a redisseisin against him, for he is not *alius.* But if the recovery had been against one, and he and another redisseise the plaintife, he shall not have a redisseisin; for here is *alius:* and he cannot have a redisseisin against the former disseisor alone, because he is join-tenant with another; [*p*] for joyntenancy in a writ of redisseisin is a good plea, and a stranger shall not be subject to double imprisonment and double damages. [154. b.] [*o*] 9 H. 4. 5. F. N. B. 189. c. 23 Ass. pl. 7. (Cro. Jam. 334.) (F.N.B. 188. c.) [*p*] 33 E. 3. Redisseisin 7. (3 Co. 13. b. Post. 198. a.)

[*q*] If a recovery be had against a woman in an assise of *novel disseisin,* and the plaintife recovereth and hath execution, the woman taketh husband, and both of them redisseise the plaintife, he shall not have a redisseisin, because the husband is *alius.* [*r*] And yet if a feme recover in an assise, and after take baron, and they are redisseised, the husband and wife shall have a redisseisin; because the husband joyneth for conformity, and it is in the right of his wife who was disseised before, so in effect it is *idem disseisitus et idem conquerens* (1). [*q*] 9 H. 4. 5. F. N. B. 188. E. [*r*] F. N. B. 188. E. Registr. 9 H. 4. 5. (Hob. 96.)

If

(9) Acc. ant. 34. b. See also Dy. 278. b. March. 95.

(10) Post. 289. a.

(11) This is an additional reason against a writ of redisseisin; because that writ requires that the coroners be taken to see it executed, and they are not officers of the court of ancient demesne. The same reason applies more strongly in respect of the sheriff, for the writ is directable to him, and he is judge as well as officer in it. See Kitch. 96. a. & Fulwood's case, 4 Co. 65. a. See also Dalt. Sher. 33. b. where the sheriff's duty in executing the writ of disseisin is explained.—[Note 271.]

(1) So if a feme commits a redisseisin, and *afterwards* is married, the writ lies against both; because in that case the husband is named, not as the actor, but

If two coparceners be disseised and recover in an assise, if after they make partition, and after they be severally disseised, they shall have severall redisseisins: and so it is of joyntenants; for they be *iidem conquerentes, & non alii.* Also a redisseisin doth lie against the disseisor which doth redisseise, and against another to whom he made feoffment after the second disseisin; for otherwise the redisseisor might prevent the plaintife of his redisseisin. But in an assise against *A.* and *B.* *A.* is found disseisor, and *B.* tenant, and the plaintife doth recover; and after he which was found tenant disseises the plaintife, he shall not have a redisseisin, because he did disseise him but once (2).

F. N. B. 188. G. *De eodem tenemento*, saith the statute. If the plaintife be redisseised of parcell of the tenement formerly recovered, he shall have a redisseisin.

(Ant. 153. a.) If the mesne recovereth (3) a rent when it is a rent service, and after the rent becommeth a rent seck by surplusage, and † doth redisseise him of the rent, he shall have a redisseisin; for the substance of the rent remaines, though the quality be altered (4).

[s] 26 H. 6. tit. Aid 77. [s] If tenant in speciall taile recovereth in assise, and after becommeth tenant in taile after possibility of issue extinct, and then is redisseised, he shall have a redisseisin; for albeit the state of inheritance be altered, yet the same freehold remaineth (5).

8 E. 3. tit. Redisseisin 6. F. N. B. 189. p. If a man recover land in an assise of *novel disseisin* whereunto there is a common appendant or appurtenant, and after is redisseised of the common, he shall have a redisseisin of the common, for it was tacitly recovered in the assise (6).

† *The sense seems to require that the passage should be read as if lord Coke had used the words,* and the lord doth redisseise him of the rent, the mesne shall have a redisseisin."

Sect. 234.

AND memorandum, *that this name assise is* nomen equivocum; *for sometimes it is taken for a jurie; for the beginning of the record of an assise of* novel disseisin *beginneth thus:* assisa venit recognitura, &c. *which is the same as* jurata venit recognitura. *And the reason is, for that by the writ of assise it is commanded to the sherife* (il est command a la vicont), quòd faceret duodecim liberos & legales homines de vicinèto*, &c. videre tenementum illud, et nomina illorum imbreviare, et quod summoneat eos per bonos summonitores, quòd sint coram justiciariis, &c. parati inde facere recognitionem, &c. *And because that, by such*

* *It is "visineto" in an edition of Littleton in* 1583; *but here, and in several prior editions of Co. Litt. the word is corrected agreeably to lord Coke's remark on the impropriety of spelling it with an s. Vid. post.* 158. *b.*

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but only in conformity to the law, which will not suffer the wife to be sued alone, and to satisfy the damages. Hob. 96.—[Note 272.]

(2) See post. Sect. 278.

(3) Recovery in *assise* must be understood.

(4) The reason is, because the alteration is made by the act of others, namely, of the lord paramount and tenant paravail. Acc. 4 Co. 9. a. and b. in Bevil's case. See ant. Sect. 232. post. 309. b. ant. 152. b.—[Note 273.]

(5) Acc. 11. Co. 81. a. in Lewis Bowles's case.

(6) Other instances of tacit recovery are mentioned ant. fol. 151. a.

such an originall, a pannell by force of the same writ ought to be returned, &c. it is said in the beginning of the record in the assize, assisa venit recognitura, &c. *Also, in a writ of right* (en briefe de droit) *it is commonly said that the tenant may put himselfe on God and the great assise. Also there is a writ in the register, which is called a writ* de magnâ assisâ eligendâ. *So as this is well proved, that this name assise sometimes is taken for a jury. And sometimes it is taken for the whole writ of assise; and according to this purpose it is most properly & most commonly taken, as an assise of* novel disseisin *is taken for the whole writ of assise of* novel disseisin. *And in the same manner an assise of common of pasture is taken for the whole writ of assise of common of pasture, and assise of* mortdauncester *is taken for the whole writ of assise of* mortdauncester, *and assise of* darreine presentment *is taken for the whole writ of* darreine presentment. *But it seemes, that the reason why such writs at the beginning were called assises was, for that by every such writ it is commanded to the sherife,* quòd summoneat 12, *which is as much to say, that he ought to summon a jury. And sometime assise is taken for an ordinance, to wit, to put certaine things into a certaine rule and disposition, as an ordinance, which is called* (1)† assisa panis et cervisiæ.

"*ÆQUIVOCUM.*" (7) For the better understanding hereof, of these there be two kinds, viz. *æquivocum æquivocans;* and *æquivocum æquivocatum.*

Æquivocum æquivocans est plurivocum, polysemus, a word of divers several significations.

Æquivocum æquivocatum est univocum, that is to say, reduced to a certaine signification. As here in *Littleton's* example, *assisa est nomen æquivocum æquivocans;* for sometime it signifieth a jury, sometime the writ of assise, and sometime an ordinance or statute. Now assise, *jurata* (8), is *æquivocum æquivocatum;* and so is *breve de assisâ novæ disseisinæ,* and *assisa panis,* [155. a.] *&c.* Even as *canis est nomen* ☞ *æquivocum; canis latrabilis, canis marinus, canis cœlestis, sunt æquivoca æquivocata.*

"*An assise of novel disseisin.*" Note [*a*], there be foure assises, viz. this writ, an assise of *mordancester,* or *darreine presentment,* and of *utrum* (1). (2 Co. 70.) [*a*] Bracton lib. 4, fo. 160. Britton ca. 42, fo. 105. 134. F. N. B. Fleta lib. 4. ca. 5, &c. Mirr. ca. 2, sect. 13.

"*Sherife (vicont).*" Vide sect. 248, verbo *(sherife.)* (Ant. 109. b. Post. 168. a.)

"*Quod faciat 12 liberos et legales homines de vicineto, &c.*" [*b*] Albeit the words of the writ be *duodecim,* yet by ancient course the sherife must return (2) 24; and this is for expedition of justice: for if 12 should onely be returned, no man should have [*b*] 1 H. 7. 2.

† *This is note* 1 *of* 155. *b. in the* 13*th and* 14*th editions.*

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(1)† The words *among the ancient statutes* are here added in L. & M. Roh. and P.

(7) See Hob. 303.

(8) Lord Coke means "taken for *jurata.*"

(1) *Juris utrum.*

(2) See 3 G. 2. c. 25. s. 8.

have a full jury appear, or be sworn in respect of challenges, without a *tales*, which should be a great delay of tryals. So as in this case usage and ancient course maketh law. And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 *jurors* (3) for the tryall of matters of fact, [*c*] but 12 judges of ancient time for tryall of matters of law *in the Exchequer Chamber*. Also for matters of state there were in ancient time twelve *Counsellors of State*. He that wageth his law must have *eleven others with him*, which thinke he says true. And that *number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, *&c.*

[c] Vid. Pl. Com. in procemio.

Joshua 4. Genes. 49.

[*d*] He that is of a jury, must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as he stands unsworne. Secondly, he must bee *legalis*. And by the law every juror, that is returned for the tryall of any issue or cause, ought to have three properties.

[*d*] 9 E. 4. 16.

(*) First, he ought to be dwelling most neere to the place where the question is moved (2). [155. b.]

(*) Artic. super Cart. ca. 9. Regist. 178. 8 E. 3. 30.

Secondly, he ought to be most sufficient both for understanding, and competencie of estate (3).

Vid. Sect. 102. 193.

Thirdly, he ought to be least suspitious, that is, to be indifferent as he stands unsworne: and then he is accounted in law *liber*

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(3) In a Coke upon Littleton in my possession there is the following marginal note on the necessity of having 12 jurors.—"In the manor of Penryn Farrein, in Cornwall, there was a custome to try an issue with *six* jurors; and this "custome was adjudged no good custome, as Rolle chiefe justice affirmed in "Mich. terme 1652." The printed books also furnish two cases against such a custom; in the first of which cases Rolle appears to have argued for it, and to have noticed that there was a multitude of records in twenty several courts in Cornwall proving its prevalency. See Fredymock v. Perryman, Cro. Cha. 259. 1 Ro. Abr. 564, and Aike et Aimon v. Hunkin, 1 Sid. 233. However, in some special cases the jury may be less than twelve; and in some must or may be more.—1. They may be less. Thus it may be in Wales under the provision of the statute of 34 & 35 H. 8. concerning Wales, which allows of six. See 34 & 35 H. 8. c. 26. s. 74. Cro. Cha. 259. 1 Sid. 233. and 3 G. 2. c. 25. s. 9. So also it is in some special cases in England, as 6 or 8 in inquiry of damages on default, and in inquiry of waste, though this latter has been questioned and even denied. Spelm. Gloss. voce *jurata*. Fitz. N. B. 107. C. Dunc. Trials per Pais, cap. 6. 1 Ventr. 113. Finch. Law 400. Further there is in Glanvil a writ for a jury of 8 to inquire into the age where infancy is alledged. Glanv. lib. 13. c. 14, 15, 16.—2. Instances, in which the law allows or requires more than twelve, are, attaint, in which there must be 24, the great assize, in which there must be 16, the grand jury for indictments, which usually consist of some number between 12 and 23, and writ of inquiry of waste, in which 13 have been allowed. Finch. Law 484. Spelm. Gloss. voce *jurata*. 2 Hal. Hist. Pl. C. 161, and Cro. Cha. 414.—[Note 274.]

(2) See post. 157. a. ant. 125. a. n. 2. This qualification is now become unnecessary in civil cases, the 4 An. c. 16. s. 6 & 7, directing that in them the jury shall be taken from the body of the county. See ant. 125. a. n. 2, and a learned tract by the late mr. serjeant Wynne, intitled, a Dissertation on the writ *de non ponendis in assisis et juratis*. See also 2 Inst. 447, & 561.—[Note 275.]

(3) See post. 156. a.

liber et legalis homo; otherwise he may be challenged, and not suffered to be sworne (4). 9 H. 6. 37.

The most usual triall of matters of fact is by 12 such men; for *ad quæstionem facti non respondent judices:* and matters in law the judges ought to decide and discusse; for *ad quæstionem juris non respondent juratores* (5).

For

(4) Of other modes of trying facts besides that by jury, see ant. 74. a.

(5) This *decantatum*, as lord chief justice Vaughan calls it, on account of its frequency in the books, about the respective provinces of judge and jury, hath since lord Coke's time, become the subject of very heated controversy, especially on prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence. On the trial of John Lilburne for treason, in 1649, high words passed between the court and him, in consequence of his stating to the jury that they were judges both of law and fact, and citing passages in the Coke upon Littleton to prove it. 2 State Tr. 4th ed. 69. and post. 228. a. In the case of Penn and Meade, who in 1670 were indicted for unlawfully assembling the people and preaching to them, the jury gave a verdict against the directions of the court in point of law, and for this were committed to prison. But the commitment was questioned; and, on a habeas corpus brought in the court of common pleas, it was declared illegal; lord chief justice Vaughan distinguishing himself on the occasion by a most profound argument in favour of the rights of a jury. Bushell's case 1 Freem. 1, and Vaugh. 135. However the contest did not cease, as appears by sir John Hawles's famous dialogue between a barrister and a juryman, which was published in 1680, to assert the claims of the latter against the then current doctrine decrying their authority. Since the Revolution also many cases have occurred, in which there has been much debate on the like topic. See King v. Poole in Cas. B. R. temp. Hardwicke 23. Franklin's case 9 State Tri. 275. Peter Zenger's ibid. Owen's case 10 State Tr. p. 196 of Append. and Woodfall's case 5 Burr. 261. By attending to the cases before referred to it will be easy to trace the progress of this controversy on the limits of the jury's province.

In respect to my own ideas on this subject, they are at present to this effect.

On the one hand, as the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable, that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who hereafter writes that *if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.* Post. Sect. 368. and fol. 228.

But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations. —I. If the parties litigating agree in their facts, the cause can never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury. Ant. 71. b.—II. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury; for in that case the law is reserved for the decision of the court from which the issue of fact comes, and the jury is either discharged, or at the utmost only ascertains the damages. Ant. 72. a. Dougl. Rep. 127. 213. Buller's Nisi Pri. 2d edition 313.—III. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon

[e] Vid. Artic. super Cart. ca. 9. Fortesc. ca. 25, &c. 29. [f] Glanvil. lib. 2, cap. 14, 15.

[e] For the institution and right use of this triall by 12 men, and wherefore other countries have them not, and how this triall excells others, see *Fortescue* at large, cap. 25, &c. & 29. [f] And in ancient time they were 12 knights. This trial of the fact Bracton lib. 3, fol. 116. a.

per

upon the judge, who presides at the trial, to inform them what the law is; and, as a check to the judge in the discharge of this duty, either party may under the statute of Westminster the 2d. c. 31, make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See post. 2 Inst. 426. Trials per Pais, 8th ed. 222. 466. Case of Fabrigas and Mostyn in xi. State Trials. Case of Money and others v. Leach, 3 Burr. 1742. Buller's Law of Nis. Pri. 2d ed. 315.—IV. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases, in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Downman's case, 9 Co. 11. b. and the rule now holds both in criminal and civil cases without exception. See post 227. b. Staundf. Pl. C. 165. a. Major Oneby's case, 2 L. Raym. 1494.—V. Whilst attaints, which still subsist in law, were in use, it was hazardous in a jury to find a general verdict where the case was doubtful, and they were apprized of it by the judges; because if they mistook the law they were in danger of an attaint. Post. 228. a. Hob. 227. Vaugh. 144. 2 Hal. Hist. Pl. C. 310. Gilb. Com. Pl. 2d edition 128.—VI. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges; but they have a right to control the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. Staundf. Pl. C. 165. a. Plowd. 114. a. b. 4 Co. 42. b. Hal. Hist. Pl. C. v. 1. p 471. 476, 477, and v. 2. p. 302.—VII. The courts have long exercised the power of granting new trials in civil cases, where the jury find against that which the judge trying the cause or the court at large holds to be law, or where the jury find a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one. King v. Poole, Cas. B. R. temp. Hardwicke 26. Though too in criminal and penal cases the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that *nemo bis punitur aut vexatur pro eodem delicto*, or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shews, that on that account an exception is made to a general rule. 4 Blackst. 8th ed. 361. 2 L. Raym. 1585. 2 Stra. 899. 4 Co. 40. a. and Wingate's Maxims, 695.

Upon the whole, as my mind is affected with this interesting subject, the result is, that the *immediate* and *direct* right of deciding upon questions of law is intrusted to the judges; that in a jury it is only *incidental*; that in the exercise of this incidental right the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore that in all points of law arising on a trial, juries ought to shew the most respectful deference to the advice and recommendation of judges. In favour of this conclusion the conduct of juries bears ample testimony; for to their honour it should be remembered, that the examples of their resisting the advice of a judge in points of law are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity by the misrepresentation and ill practice of others. In civil cases, particularly where the title to *real* property is in question, juries almost universally find a special verdict as often as the

per duodecim liberos et legales homines is very ancient; for heare what the law was before the conquest. [g] *In singulis centuriis comitia sunto, atque liberæ conditionis viri duodeni ætate superiores unà cum præposito sacra tenentes juranto, &c.* Nay the tryall, in some cases, *per medietatem linguæ*, (as we speake) was as ancient. [h] *Viri duodeni jure consulti, Angliæ sex, Walliæ totidem, Anglis et Wallis jus dicunto;* and of ancient time it was called *duodecimvirale judicium* (6).

[g] Lamb. verb. Centuria.

[h] Lamb. fol. 91. 3.

Now seeing we are justly occasioned, and the rather for the *(&c.)* herein, to speak of a challenge to jurors, to make the studious reader capable of the understanding of the bookes of law concerning this matter, it shall be necessary to say somewhat of challenges: and, first, what a challenge is.

Challenge is a word common as well to the English as to the French, and sometimes signifieth to claime, and the Latine word is *vendicare*; sometime in respect of revenge to challenge into the field, and then it is called in Latine *vindicare* or *provocare*; sometime in respect of partiality or insufficiency, to challenge in court persons returned on a jury. And seeing there is no proper Latin word to signify this particular kind of challenge, they have framed a word anciently written, [a] *chalumniare*, and *columpniare*, and *calumpniare*, and now written *calumniare*; and hath no affinity with the verbe *calumnior*, or *calumnia*, which is derived of that, for that is of a quite other sense, signifying a false accuser, and in that sense [b] *Bracton* useth *calumniator* to be a false accuser: but it is derived of the old word *caloir* or *chaloir*, which in one signification is to care for or foresee. And for that to challenge jurors is the meane to care for or foresee, that an indifferent triall be had, it is called *calumniare*, to challenge, that is, to except against them that are returned to be jurors; and this is his proper signification. [c] But sometimes a sommons, *sommonitio*, is said to

[a] W. 2. ca. 32. Vid. Stat. de 12 E. 2. de esson. calumniandis. Fleta lib. 1, cap. 32. Britton fol. 6. a. 12. a. 118. & 134. 12 Ass. 10.

[b] Bract. lib. 3, fol. 137.

[c] Bract. lib. 4, fol. 257. Vet. N. B. fol. 76.

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judge recommends their so doing; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it every person accused of a civil crime is enabled by the general plea of *not guilty* to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this *benefit* may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace; which exception from the necessity of the times is continually increasing, but which however cannot be too cautiously extended to new objects.—Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries.

It would be wrong to conclude this note, without referring the reader to the very forcible reasoning on the same subject, in a modern work, which contains much general legal instruction elegantly conveyed. See "EUNOMUS, " or Dialogues concerning the Law and Constitution of England," vol. 3. p. 196.—[Note 276.]

(6) See further on the origin of English juries, Spelm. Gloss. voc. *jurata*, Dissertat. Epistolar. in Ling. Septentrion. Thesaur. Hickes. Stiernh. de jure Sueon. et Goth. vetust. lib. 1. c. 3, and Dr. Pettingal's Enquiry into the Use and Practice of Juries amongst the Greeks and Romans.—[Note 276*.]

to be *calumniata*, and a count to be ☞ challenged, but this is improperly. And forasmuch as mens lives, fames, lands and goods, are to be tryed by jurors, it is most necessary, that they be *omni exceptione majores*; and therefore I will handle this matter the more largely. [156. a.]

A challenge to jurors is twofold, either to the array, or to the polls: to the array of the principall pannell, and to the array of the *tales*. And herein you shall understand, that the jurors names are ranked in the pannel one under another; which order or ranking the jurie is called the array, and the verbe, to array the jurie; and so we say in common speech, *battaile array*, for the order of the battaile. And this array we call *arraiamentum*, and to make the array *arraiare*, derived of the French word *arroier*; so as to challenge the array of the pannell is at once to challenge or except against all the persons so arrayed or impannelled, in respect of the partialitie or default of the sherife, coroner, or other officer that made the returne.

And it is to be knowne, that there is a principall cause of challenge to the array, and a challenge to the favour.

Principall, in respect of partialitie. As first, if the sherife, or other officers be of [a] kindred, or affinitie (1), to the plaintife or defendant, if the affinitie (2) continue [b]. Secondly, if any one or more of the jurie be returned at the denomination of the partie, plaintife or defendant, the whole array shall be quashed. So it is if the sherife returne any one, that he be more favourable to the one than the other, all the array shall be quashed. [c] Thirdly, if the plaintife or defendant have an action of batterie against the sherife, or the sherife against either partie, this is a good cause of challenge. So if the plaintife or defendant have an action of debt against the sherife; (but otherwise it is if the sherife have an action of debt against either partie) or if the sherife have parcell of the land depending upon the same title [d]; or if the sherife, or his bailife which returned the jurie, be under the distresse of either partie; or if the sherife or his bailife be either of counsell, atturney, officer in fee or of robes, or servant of either partie, gossip or arbitrator in the same matter, and treated thereof. [e] And where a subject may challenge the array for unindifferencie, there the king being a partie may also challenge for the same cause, as for kindred, or that he hath part of the land, or the like: and where the array shall be challenged against the king, you shall reade in our bookes.

[a] 12 Ass. 36. 26 Ass. 31. 3 E. 4. 12. 31 Ass. 7. 29 Ass. 2. 22 E. 4. 2. 12 E. 3. Chall. 114. 21 E. 3. 5. b. 3 H. 7. 5. Pl. Com. 73. 15 H. 7. 9. 7 E. 6. Dier 78. 12 H. 6. Chall. 159. (Plowd. 425. 2 Ro. Abr. 638.)

[b] 21 E. 4. 74. 49 E. 3. 1. 15 E. 3. 43. 22 E. 3. 12. 9 E. 4. 46. 8 H. 5. 5. 28 Ass. 22. 41 E. 3. Chall. 99. (2 Ro. Abr. 640. Dy. 319.)

[c] 11 H. 4. 26. 22 E. 4. 1. 38 E. 3. 25. 38 H. 6. 6. (Mo. 3.)

[d] 14 E. 3. 5. & 38. 44 Ass. 23. 22 E. 4. 1. 3 H. 6. 39. 15 H. 7. 9. b. 27 Ass. 28. 7 H. 7. 10. 26 Ass. 56. 22. 20 H. 6. 34. 33 Ass. 12. 45 Ass. 1. 9 Ass. 8. 8 Ass. 23. 7 E. 3. 56. 21 H. 7. 38. 2 H. 4. 13. 44 E. 3. 43. 20 H. 6. 39. 44 Ass. 18. 3 H. 6. 24. 17 E. 2. Chall. 168. 4 E. 4. 11.

[e] 4 H. 7. 44 E. 3. 38. 38 Ass. 19. 22 E. 4. Chall. 63. Staundf. 162. c.

[f] By

(1) In the case of Mounson and West, 1 Leon. 88, it was argued, that affinity was a challenge to the *favour* only: and to this two judges inclined at first; but after time taken to consider the point, it was adjudged to be a *principal* challenge by three judges, the fourth hesitating.—[Note 277.]

(2) Having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity. Nor is it necessary that the issue should be inheritable to the land, where land is the subject of the action. Both of these positions I infer from the case of Mounson and West before cited from 1 Leon. 88.—[Note 278.]

[f] By default of the sherife, as when the array of a pannell is returned by a bailife of a franchise, and the sherife returne it as of himselfe, this shall be quashed, because the partie should lose his challenges. But if a sherife returne a jurie within a libertie, this is good, and the lord of the franchise is driven to his remedy against him.

[f] 39 Ass. 2. 17 E. 3. 50. 17 Ass. 11. 30 Ass. 5. 8 Ass. 3.

If a peere of the realme or lord of parliament be demandant or plaintife, tenant or defendant, there must a knight be returned of his jurie, be he lord spirituall or temporall, or else the array may be quashed [g]: but if he be returned, although he appeare not, yet the jurie may be taken of the residue. And if others be joyned with the lord of parliament, yet if there be no knight returned, the array shall be quashed against all. [h] So in an attaint there ought to be a knight returned of the jurie (3).

[g] 13 E. 3. Chall. 115. Br. Enquest. 100. 6 Co. 54. Countess de Rutland's case.

Plo. Com. 117. 27 H. 8. 22. 4 El. Dier. 208. 8 Eliz. Di. 246. 14 Eliz. Dier 318. 10 Eliz. Dier 265. b. (1 Leon. 5. 2 Ro. Abr. 636.)

[h] 17 E. 2. Attaint 69.

[i] And when the king is partie, as in travers of an office, he that traverseth may challenge the array, as hereafter in this Section shall appeare; and so it is in case of life; and likewise the king may challenge the array: and this shall be tried by triors according to the usual course. [k] The array challenged on both sides shall be quashed.

[i] 32 E. 4. tit. Chall. 63. Staundf. Pl.Cor. 19 Ass. 6. b. 4 H. 7. 8. 44 E. 3. 38. (2 Ro.Abr.645.)

[k] 8 H. 4. 22. (Mo. 895.)

[l] And if two estrangers make a pannell, and not in favourable manner for the one partie or the other, and the sherife returnes the same, the array was challenged for this cause, and adjudged good.

[l] 6 R. 2. Chall. 102. 13 E. 3. ibid. 108.

[m] If the bailife of a libertie returne any out of his franchise, the array shall be quashed, as an array returned by one that hath no franchise, shall be quashed.

[m] 32 E. 3. Chall. 110, 111. 32 Ass. 6. 38 Ass. 13.

Challenge to the array for favour. [n] He, that taketh this, must shew in certaine the name of him that made it, and in whose time, and all in certainety. This kinde of challenge, being no principall challenge, must be left to the discretion and conscience of the triors. As if the plaintife or defendant be tenant to the sherife, this is no principall challenge; for the lord is in no danger of his tenant; but *è converso* it is a principall challenge; but in the other he may challenge for favour, and leave it to triall. So affinitie betweene the son of the sherife and the daughter of the partie, or *è converso*, or the like, is no principall challenge, but to the favour; but if the sherife marrie the daughter of either partie, or *è converso*, this, (as hath beene said) is a principall challenge, or the like. [o] But where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance he ought to favour the king more (4). But if the sherife be a vadelect of the crowne, or other meniall servant of the king, there

[n] 34 H. 6. Chall. 69. 8 H. 4. 22. 27 Ass. 20. 22 E. 3. 12. Vid. 26 Ass. 21. 38 H. 6. 9. 7 H. 6. 25. 19 H. 6. 48. 20 H. 6. 38. 20 E. 4. 2. 22 E. 4. Chall. 62.

[o] 22 E. 4. Chall. 63. 4 H. 7. 8.

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(3) By a statute of the late king no challenge can now be taken to any pannel for want of a knight in it. See 18 G. 2. c. 18. s. 4. This provision is made in *general* terms; but the recital, which precedes it, is confined to the inconveniencies of such challenges where peers are parties.—[Note 279.]

(4) Acc. Keilw. 102. a. But lord Coke is of a different opinion; for he expressly allows challenges for *favour* to prisoners in treason and felony, and consequently so far against the king. 2 Hal. Hist. Pl. C. 271. Though, too, lord Coke's doctrine should be admitted, the reason he gives for it, which is almost in the words of the case of 22 E. 4, cited in the margin from Fitzherbert's Abridgment, seems rather unsatisfactory. But a better principle to found

there the challenge is good (5). And likewise the king may challenge the array for favour.

Note, upon that which hath been said it appeareth, that the challenge to the array is in respect of the cause of unindifferencie or default in the sherife or other officer that made the returne, and not in respect of the persons returned where there is no unindifferencie or default in the sherife, &c. for if the challenge to the array be found against the partie that takes it, yet he shall have his particular challenge to the polls (1). [156. b.]

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found the rule upon was not unobvious; namely, that from the extensive variety of the king's connections with his subjects through tenures and offices, if *favour* to him was to prevail as an exception to a juror, it might lead to an infinitude of objections, and so operate as a serious obstruction to justice in suits in which he is a party.—[Note 280.]

(5) Lord Coke having immediately before expressed, that the array shall not be challenged for *favour* against the king, he must be here understood to consider *being a vadelet or other menial servant of the crown*, as a *principal* challenge to the array; for otherwise he would be inconsistent; unless, indeed, he is supposed in the first instance to state a general rule, and in the second an exception to it, which, as his words are, would be a strained construction. It is also strong evidence of lord Coke's intending to give this challenge to the *array* as a principal one, that he elsewhere represents *being a servant of either party* where the suit is between subjects, as a principal challenge both to the array and to the polls. See supra, and also post. 157. b. However, lord Hale will not allow this sort of exception to a juror to be more than a challenge to the *favour* in trials for treason or felony; citing for authority from Fitzherbert's Abridgment a case in 3 H. 6, which is a decision in point by the whole court; to which may be added the *dictum* in the Year-Book of 4 H. 7. 3. Also the practice since lord Hale's time seems to have accorded with his doctrine, there being subsequent instances in print in which such an exception when taken to the polls has been disavowed, but not one I believe of its being received. The instances of disallowing the exception as a principal challenge, to which I shall refer, are mr. Hampden's trial in the king's bench, Hill. 36 Cha. 2, for a misdemeanor, and sir William Parkyns's at the Old Bailey in 1695 for high treason. See State Tri. 4th ed. v. 3. p. 825, and v. 4. p. 633. In the former the point was sharply argued on challenges by mr. Hampden of two jurors for having offices in the king's forest; and as the counsel for mr. Hampden relied on lord Coke and on Rolle's Abridgment of the case of 22 E. 4, here cited by lord Coke in the margin, as the ground of his doctrine, so the court adjudged against the exception as a principal challenge on the authority of the case of 3 H. 6, cited by lord Hale. In the latter sir William Parkyns challenged two for being servants of the king; but was informed by lord Holt, that it was no cause of challenge. The first of these instances was a direct adjudication; but, however, it loses part of its weight, in consequence of having occurred in an ill time whilst lord Jefferies presided in the king's bench, and of being accompanied with ungracious and unbecoming language from him in respect to both Coke and Rolle. The second was rather an extra-judicial opinion; because the counsel for the crown consented to put by the jurors objected to on the ground of being king's servants, unless there should be a defect of other jurors, which did not happen. But lord Holt declared against the challenge in the most absolute and unreserved terms, as if it would not bear arguing.—[Note 281.]

(1) Nota, *on writ of right the pannel returned by the four knights shall not be challenged, but challenge ought to be taken before the four knights before the pannel made.* H. 30 El. B. R. Pigott and Clarke. Hal. MSS.—See acc. post. 158. a. 294. a. Mo. 67, and Goulds. 23.—[Note 281 *.]

In some cases a challenge may be had to the polls, and in some cases not at all. Challenge to the polls is a challenge to the particular persons; and these be of foure kinds, that is to say, peremptorie, principall, which induce favour, and for default of hundredors.

[p] Peremptorie. This is so called, because he may challenge peremptorily upon his owne dislike, without shewing of any cause; and this onely is in case of treason or felonie, *in favorem vitæ*. And by the common law the prisoner, upon an endictment or appeale, might challenge thirtie-five, which was under the number of three juries. But now by the statute of 22 H. 8. the number is reduced to twentie in petite treason, murder and felonie; and in case of high treason, and misprision of high treason, it was taken away by the statute of 33 H. 8. but now by the statute of 1 & 2 Phil. & Marie, the common law is revived. For any treason, the prisoner shall have his challenge to the number of thirtie (2) five; and so it hath beene resolved * by the justices upon conference betweene them in the case of sir Walter Raleigh and George Brookes. But all this is to be understood when any subject that is not a peere of the realme, is arraigned for treason or felonie. But if he be a lord of parliament and a peere of the realme, and is to be tryed by his peeres, he shall not challenge any of his peeres at all; for they are not sworne as other jurors be, but finde the partie guiltie or not guiltie upon their faith or allegiance to the king, and they are judges of the fact, and every of them doth separately give his judgement, beginning at the lowest. But a subject under the degree of nobilitie may in case of treason or felonie challenge for just cause as many as he can, as shall be said hereafter. In an appeale of death against divers, they pleade not guiltie, and one joynt *venire facias* is awarded; if one challenge peremptorily, he shall be drawne against all (3). Otherwise it is of several *venire fac.*

[p] 1 H. 5. Chal. 162. 9 H. 5. 7. 15 E. 4. 32. 14 H. 7. 7. 19. Doct. & Stud. lib. 2. Fortescue, cap. 27. 3 H. 7. 2. 2 R. 3. 13. 32 H. 6. 26. 17 Ass. 6. 37 H. 6. 8. 22 H. 8. ca. 14. 33 H. 8. tit. Chal. Br. 21. 33 H. 8. ca. 23. 1 & 2 P. & M. ca. 10. 23 H. 6. 26. 14 H. 7. 14. Staundf. Pl. Cor. 137, 138. (2 Inst. 227.) * Hill. 1 Ja. R.

9 E. 4. 27.

Note, that at the common law before the statute of 33 E. 1. the king might have challenged peremptorily without shewing cause, but only that they were not good for the king, and without being limited to any number. But this was mischievous to the subject, tending to infinite delayes and danger. And therefore it is enacted, [q] *quòd de cætero licèt pro domino rege dicatur, quòd juratores, &c. non sunt boni pro rege; non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumniæ suæ, &c.* whereby the king is now restrained (4).

(1 Vent. 309.)

[q] 33 E. 1, ordinatio de inquisitionibus. Staundf. Pl. Cor. 162.

Principall; so called, because if it be found true, it standeth sufficient of itselfe without leaving any thing to the conscience or discretion of the triors. Of a principall cause of challenge to the array, we have said somewhat already. Now it followeth with like brevitie to speake of principall challenges to the polles, (that is) severally to the persons returned.

Principall challenges to the poll may be reduced to foure heads:

(2) Agreed acc. in petty treason in Swan's case, Fost. 107.
(3) Adj. acc. Plowd. 100.
(4) But according to the construction made of this statute or ordinance the king is not bound to shew cause of challenge till all the pannel is called over, and not then unless from challenges, or otherwise the jury is incomplete. See State Tri. 4th ed. v. 3. p. 468. v. 4. p. 423. v. 5. p. 195. See further on this point sir John Hawles's Remarks on Trials, in State Tri. 4th ed. v. 3. p. 169.—[Note 282.]

heads; first, *propter honoris respectum*, for respect of honour: secondly, *propter defectum*, for want or default: thirdly, *propter affectum*, for affection or partialitie: fourthly, *propter delictum*, for crime or deliet.

6 Co. 52, 53. Countesse de Rutland's case. 48 E. 3. 30. 48 Ass. 6. 35 H. 6. 46. 22 Ass. 24. F. N. B. 165. D. E. & 166. Regist. 179. (1 Sid. 277.)

I. *Propter honoris respectum*, as any peere of the realme, or lord of parliament, as a baron, viscount, earle, marquesse, and duke: for these in respect of honour and nobilitie, are not to be sworne on juries; and if neither partie will challenge him, he may challenge himselfe; for by *Magna Charta* it is provided, *quod nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ*. Now the common law hath divided all the subjects into lords of parliament, and into the commons of the realme. The peers of the realme are divided into barons, viscounts, earles, marquesses, and dukes. The commons are divided into knights, esquires, gentlemen, citizens, yeomen, and burgesses. And in judgement of law any of the said degrees of nobilitie are peers to another. As if an earle, marquesse, or duke, be to be tried for treason or felonie, a baron or any other degree of nobilitie is his peere. In like manner, a knight, esquire, &c. shall be tried *per pares;* and that is by any of the commons, as gentlemen, citizens, yeomen, or burgesses; so as when any of the commons is to have a tryall either at the king's suit, or betweene partie and partie, a peere of the realme shall not be impannelled in any case.

II. *Propter defectum.*

[a] 7 Co. 18. Calvin's case. 10 Co. 104. 14 H. 4. 19. b.

1. *Patriæ*, [a] as aliens borne.

[b] Bract. fo. 185. Brit. fo. 135. Flet. li. 4, ca. 8. 26 Ass. 28. 3 H. 6. 39. 9 E. 4. 16. b. 21 H. 6. 20. 10 H. 7. 20.

2. *Libertatis*, [b] as villeins or bondmen, and so a champion must be a freeman.

[c] Vid. Sect. 464. 38 Ass. 19. 17 Ass. 15. 4 H. 6. 28. 9 H. 5. 5. 10 H. 6, 7, 8. 18. 2 H. 7. 1. 10 H. 7. 14. 19 H. 6. 9. 7 H. 6. 25. 40. 44. 12 E. 4. 13. 3 H. 4. 4. (See the statutes of 23 H. 8. 13, and 4 & 5 W. & M. 24.)

3. *Annui census, i. e. liberi tenementi.* [c] First, what yearely freehold a juror ought to have that passeth upon triall of the life of a man, or in a plea reall, or in a plea personall, where the debt or damage in the declaration amounteth to fortie marks, *Vide* Sect. 464. (3) * Secondly, this freehold must be in his owne right, in fee simple, fee taile, for terme of his owne life, or for another man's life, although it be upon condition, or in the right of his wife, out of ancient demesne, for freehold within ancient demesne will not serve. But if the debt or damage amounteth not to fortie marks, any freehold sufficeth. [d] Thirdly, he must have freehold in that countie where the cause of the action ariseth; and though he hath in another, it sufficeth not (1). [e] Fourthly, if after his returne he selleth away his land, or if *cesty que vie* or his wife dieth, or an entry be made for the condition broken, so as his freehold be determined, he may be challenged for insufficiencie of freehold (2).

[157. a.]

* 9 H. 6. Chal. 27. 9 H. 7. 1. [d] 19 H. 6. 9. 17 Ass. 15. [e] 12 H. 7. 4. 21 H. 6. 38. 7 H. 4. 1. (Post. 272. b.) (2 Ro. Abr. 636. Estates. 56. b. Post. 158. a.)

4. *Hundredorum.*

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(5) See also a learned dissertation on the writ *de non ponendis in assisis et juratis* in the Miscellany of Law-Tracts by the late mr. serjeant Wynne, p. 62 to 74. See too 1 Ventr. 366, and sir John Hawles's Remarks on Trials, in State Trials, 4th ed. v. 3. p. 169. 187.

(1) *Vid. acc. per omnes justiciarios M.* 29, 30 *Eliz. Clench.* 139.—Hal. MSS.

(2) See ant. 102. b.

4. *Hundredorum.* First, by the common law, in a plea reall mixt and personal, there ought to be foure of the hundred (where the cause of action ariseth) returned for their better notice of the cause; for *vicini vicinorum facta præsumuntur scire* (3). And now since *Littleton* wrote [*f*] in a plea personall, if two hundredors appeare, it sufficeth (4); and in an attaint, [*g*] although the jury is double, yet the hundredors are not double. Secondly, [*h*] if he hath either freehold in the hundred, though it be to the value but of halfe an acre, or if he dwell there, though he hath no freehold in it, it sufficeth. [*i*] Thirdly, if the cause of the action riseth in divers hundreds, yet the number shall suffice, as if it had come out of one, and not severall hundredors out of each hundred. [*k*] Fourthly, if there be divers hundreds within one leet or rape, if he hath any freehold, or dwell in any of those hundreds though not in the proper hundred, it sufficeth. [*l*] Fifthly, if the jury come *de corpore comitatûs*, or *de proximo hundredo*, where the one partie is lord of the hundred, or the like, there need no hundredors be returned at all. [*m*] Sixthly, if a hundredor after he be returned sell away his land within that hundred, yet shall he not be challenged for the hundred, for that this notice remains. Otherwise as hath been said for his insufficiencie of freehold; for his feare to offend, and to have lands wasted, &c. which is one of the reasons of law, is taken away. [*n*] Seventhly, he that challengeth for the hundred must shew in what hundred it is, and not drive the other partie to shew it. Eighthly, his challenge for the hundred is not *simpliciter* but *secundùm quid*; for, though it be found that he hath nothing in the hundred, yet shall he not be drawne, but remaine *præter H.* that is, besides for the hundred; and albeit he dwelleth or have land in the hundred, yet must he have sufficient freehold.

[*f*] 27 Eliz. ca. 6.
[*g*] 7 H. 4. 47.
[*h*] 16 E. 4. 7. 4 Mar. Br. Chal. 216.
[*i*] 21 E. 4. 74, 75. 9 H. 6. 66.
[*k*] 20 H. 6. 23. 4 Mar. Br. Chal. 216.
[*l*] 10 H. 6. 5. 12 H. 4. 14. 19 E. 4. 5.
[*m*] 37 H. 6. 11. 25 E. 3. 43. (Cro. Jam. 550.) 21 H. 6. 38. 12 H. 7. 4.
[*n*] 7 Eliz. Dyer 231.

III. *Propter affectum:* And this is of two sorts, either working a principal challenge, or to the favour. And againe a principall challenge is of two sorts, either by judgement of law without any act of his, or by judgement of law upon his owne act.

Bract. fo. 185. Brit. fo. 134, 135. Fleta lib. 4, c. 8. 21 E. 4. 11, 12.

And it is said that a principall challenge is, when there is expresse favor or expresse malice.

1. Without any act of his, as if the juror be [*a*] of blood or kindred to either partie, *consanguineus*, which is compounded *ex con & sanguine, quasi eodem sanguine natus*, as it were issued from the same blood; and this is a principall challenge, for that the law

[*a*] Britton, fol. 135.

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(3) See Brownl. Rep. b. 194.

(4) And now by the 4 An. c. 16, and 24 G. 2. c. 18, the jury must be taken from the *body of the county* in actions or suits in the king's courts of record at *Westminster*, and in actions or informations on penal statutes. But appeals of felony or murder, and indictments or presentments of treason, felony, murder, or other matter, are excepted from this provision; and therefore in them hundredors are still in strictness necessary.—It is observable, that the 24 G. 2. by which this alteration was made as to actions on penal statutes, names the counties palatine of *Lancaster*, *Chester*, and *Durham* and *Wales*, as well as *Westminster*. But in the 4 of An. only the latter place is mentioned. —See further on the subject of hundredors ant. 125. a. note 2, to which add 1 P. Wms. 207, and a case on the 4 An. in mr. serj. Wynne's Miscell. Law Tracts, 60.—[Note 283.]

law presumeth that one kinsman doth favour another before a stranger; [b] and how far remote so ever he is of kindred, yet the challenge is good. And if the plaintife challenge a juror for kindred to the defendant, it is no counterplea to say that he is of kindred also to the plaintife, though he be in a neerer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie.

[b] Mirror, ca. 3, de ordinance d'attaint. Bracton, Britton, Fleta } ubi supra. 14 El. Dier 319. 21 E. 4. 75. 40 Ass. 20. Pl. Com. fo. 41 E. 3. Chal. 99.

[c] If a body politick or incorporate, sole or aggregate of many, bring any action that concernes their body politick or incorporate, if the juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred) yet for that those bodies consist of naturall persons, it is a principall challenge. [d] A bastard cannot be of kindred to any (5), and therefore it can be no principall challenge. And here it is to be knowne, that *affinitas*, affinity, hath in law two senses. In his proper sense it is taken for that neernesse that is gotten by marriage. *Cum duæ cognationes inter se divisæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur affinis.* In a larger sense *affinitas* is taken also for consanguinitie and kindred, as in the writ of *venire facias*, and otherwhere. [e] Affinity or alliance by marriage is a principall challenge, and equivalent to consanguinity when it is betweene either of the parties, as if the plaintife or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintife or defendant, and the same continues, or issue be (6) had. But if the son of the juror hath married the daughter of the plaintife, this is no principall challenge, but to the favour; because it is not betweene the parties. Much more may be said hereof; *sed summa sequor fastigia rerum.*

[c] 7 E. 4. 4. 17 E. 4. 7. 21 E. 4. 20. 28 H. 6. 10. 28 Ass. 18. 34 Ass. 6. Hob. 87. 1 Saund. 344.

[d] 41 E. 3. Chal. 99. 41 E. 3. 9. 26 H. 6. Chal. 163.

[e] Mirror, Bracton, Britton, Fleta } ubi supra. 3 E. 4. 14. 21 E. 3. 5. 41. 43 E. 3. Chal. 93. 43 Ass. 25, 26. 22 E. 4. 2. 14 H. 7. 2. 15 H. 7. 9.

[f] If there be a challenge for cosinage, he that taketh the challenge must shew how the juror is cousin. But yet if the cosinage, that is the effect and substance, be found, it sufficeth; for the law preferreth that which is materiall before that which is formall.

[f] 19 H. 8. 7. 28 H. 8. Dier 27. 1 Maria Dier 91. 2 Eliz. ibid. 177.

[g] If the juror have part of the land that dependeth upon the same title (7).

[g] Bract. Britton, Fleta } ubi supra. Mirr. ubi supra.

[h] If a juror be within the hundred (8), leet, or any way within the seigniory immediately or mediately, or any other distresse of either party, this is a principall challenge. But if either party be within the distresse of the juror, this is no principall challenge, but to the favour.

[h] 9 H. 6. tit. Chal. 27. 38 E. 3. 25. 22 E. 4. Chal. 61.

[i] If a witnesse named in the deed (9) be returned of the jury, it is a good cause of challenge of him. [k] So it is if one within age of one and twenty be returned, it is a good cause of challenge.

4 H. 6. 25. 3 H. 6. 39. 36 H. 6. Chal. 46. 22 E. 4. 1. 27 Ass. 28. 22 E. 3. 12.

[i] 23 Ass. 11. [k] Mirror ubi supra.

2. Upon

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(5) See ant. 123. a.

(6) But the issue must be *living*. See ant. 156. a. n. 2.

(7) Here the sense is incomplete; but I apprehend, that lord Coke means to give the exception as a principal challenge.

(8) Acc. Dy. 176. a.

(9) See ant. 6. a.

[157. b.] 2. [l] ☞ Upon his own act, as if the juror hath given a verdict before for the same cause, albeit it be reversed by writ of error, or if after verdict, judgement were arrested. So if he hath given a former verdict upon the same title or matter though betweene other persons. [m] But it is to be observed, that I may speake once for all, that in this or other like cases, he that taketh the challenge must shew the record if he will have it take place as a principall challenge: otherwise he must conclude to the favour (1), unlesse it be a record of the same court, and then he must shew the day and terme.

[n] So likewise one may be challenged, that he was inditor of the plaintife or defendant, either of treason, felony, misprision, trespasse, or the like in the same cause.

[o] If the juror be godfather to the child of the plaintife or defendant, or *è converso*, this is allowed to be a good challenge in our bookes (2).

[p] If a juror hath beene an arbitrator chosen by the plaintife or defendant in the same cause, and have beene informed of, or treated of the matter, this is a principall challenge. Otherwise if he were never informed, nor treated thereof; and otherwise if he were indifferently chosen by either of the parties, though he treated thereof. But a [q] commissioner chosen by one of the parties for examination of witnesses in the same cause, is no principall cause of challenge; for he is made by the king under the great seale (3), and not by the partie, as the arbitrator is; but he may upon cause be challenged for favour.

3 H. 6. 24. 7 H. 7. 10. (2 Ro. Abr. 665.)

[l] 8 H. 5. 10. 33 H. 6. 1. 10 H. 6. 24. 7 H. 4. 11. 18 E. 4. 12. 21 E. 4. 74. 11 R. 2. tit. Challenge 106. 27 Ass. 13.
[m] 43 E. 3. Chal. 93. 8 H. 5. 10.
[n] Mirror ubi supra. Brit. fo. 12. 11 Ass. 36. 8 H. 4. 2. 7 E. 4. 4. 12 Ass. 26. 19 Ass. 6. 40 Ass. 10. 25 E. 3. c. 3.
[o] 40 Ass. 20. 2 H. 4. 15. 10 H. 6. Chal. 40. 7 H. 6. 40. 19 H. 6. 66. 4 E. 4. 11. 7 E. 4. 4.
[p] 20 H. 6. 39. 9 E. 4. 46. 35 H. 6. 19 H. 6.
[q] 9 Co. 71. Peacock's case

[r] If he be of counsell, servant, or of robes, or fee of either partie, it is a principall challenge (4).

[s] If any after he be returned do eate and drink at the charge of either partie, it is a principall cause of challenge (5). Otherwise it is of a trior after he be sworne.

[t] Actions brought, either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principall challenge; unlesse they be brought by covyn either before or after the returne; for if covin be found, then it is no cause of challenge. Other actions, which do not imply malice or displeasure, are but to the favour.

[u] In a cause, where the parson of a parish is partie, and the right of the church commeth in debate, a parishioner is a principall challenge. Otherwise it is in debt, or any other action where the right of the church commeth not in question.

[w] If either party labour the juror, and give him any thing to

[r] Mir. Bracton, Britton } ubi supra. 12 Ass. 36. 26 Ass. 56. 28 Ass. 19. 31 Ass. 7. 44 Ass. 18.
[s] 13 H. 4. 13. 11 R. 2. Chal. 164.
[t] Brac. Fleta } ubi supra 44 E. 3. 5. 38. 44 Ass. 23. 8 E. 3. 25. 43 E. 3. 31. 22 E. 4. 1. 38 H. 6. 6. 43 E. 3. Chal. 93.

11 H. 4. 26. 11 H. 6. 15. 32 E. 3. Chal. 189. 24 E. 3. 37. 39 Ass. 2. 20 Ass. 11. 43 Ass. 46. [u] 17 Ass. 15. [w] 8 E. 3. 39. 20 H. 6. 39. 33 H. 8. Dyer 48. (Post. 379. a. Hob. 294.)

give

(1) Acc. 2. Brownl. 268.
(2) See Mo. 3.
(3) See an instance of such a commission in Cro. Jam. 65.
(4) See ant. 156. a. n. 4.
(5) The same thing avoids a verdict. Post. 227. b.

give his verdict, this is a principall challenge. But if either partie labour the juror to appeare and to do his conscience, this is no challenge at all, but lawfull for him to do it (6).

[x] That the juror is a fellow servant with either partie is no principall challenge, but to the favour.

[y] Neither of the parties can take that challenge to the polls, which he might have had to the array.

[a] Note, if the defendant may have a principall cause of challenge to the array, if the sherife returne the jury, the plaintife in that case may for his owne expedition alledge the same, and pray processe to the coroners; which he cannot have, unlesse the defendant will confesse it; but if the defendant will not confesse it, then the plaintife shall have a *venire facias* to the sherife, and the defendant shall never take any challenge for that cause (7), and so in like cases. But on the part of the defendant any such matter shall not be alledged, and processe prayed to the coroners; because he may challenge the jury for that cause, and can be at no prejudice.

[b] Challenge concluding to the favour, when either partie cannot take any principall challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triors upon hearing their evidence to find him favourable or not favourable. But yet some of them come neerer to a principall challenge than other. [c] As if the juror be of kindred, or under the distresse of him in the reversion or remainder. or in whose right the avowrie or justification is made, or the like, these be no principall challenges; because he in reversion, remainder, or in whose right the avowrie or justification is, is not partie to the recorde; otherwise it is if they were made parties by aide, resceipt, or voucher: and yet the cause of favour is apparent; so it is of all principall causes, if they were partie to the record. Now the causes of favour are infinite; and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the reader to the reading of our bookes concerning that matter. For all which the rule of law is, that he must stand indifferent as he stands unsworne.

[d] The subject may challenge the polles, where the king is partie. And if a man be outlawed of treason or felony, at the suit of the king, and the party for avoyding thereof alledgeth imprisonment, or the like, at the time of the outlawry; though the issue be joyned upon a collaterall point, yet shall the partie have such challenges as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also (8).

[x] 22 Eliz. Dyer 367.
Bracton, Britton, Fleta } ubi supra.
[y] 29 E. 3. 1.
[a] 9 E. 4. 6. 21 E. 4. 31. 22 E. 4. 3. 14 H. 6. 2. 20 E. 4. 2. 3 H. 7. 5. 22 Eliz. Dyer 367. (2 Ro. Abr. 644. 668, 669. Cro. Jam. 547. Post. 320. b. Plowd. 74. a. Hob. 64.)
[b] Mirror, c. 3, d'ordinance d'attaint. Bract. lib. 4, fol. 165. Britt. fol. 134, 135. Fletalib. 4, c. 8. 7 H. 6. 25.
[c] 9 H. 7. 3. 10 H. 7. 20. 3 H. 7. 2. 10 E. 4. 12. 15 E. 4. 18. 12 Ass. 23. (1 Ro. Rep. 328. Cro. Jam. 547.)
[d] 6 R. 2. Chal. 141. 19 Ass. 6. 38 Ass. 22. 11 R. 2. Chal. 165. 4 H. 5. ibid. 153. (1 Sid. 244.)

IV. *Propter*

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(6) Yet *labouring* a jury, *though it be but to appear*, is afterwards stated to amount to the crime of *maintenance* in a third person. Post. 369. a. Here indeed the author qualifies the *labouring* to appear by supposing it to be to *do his conscience*. But this addition of words seems a slight ground for a difference of construction.—[Note 284.]

(7) Held accordingly Hutt. 22.

(8) Staundford is of the same opinion, citing for authorities from Fitzherbert's Abridgment the cases of 11 R. 2. & 4 H. 5, here referred to by lord Coke. Staundf. Pl. C. 163. a. However the benefit of peremptory challenges on *collateral* issues in capital cases has been denied by the practice of later times. Case of Okey and others East. 14 Cha. 2. 1 Lev. 61. Johnson's case Mich. 2 G. 2. Fost. 46. Mr. Ratcliffe's case Mich. 20 G. 2. Fost. 40.—

In

[158. a.] IV. ☞ *Propter delictum.* [e] As if the juror be attainted or convicted of treason, or felony, or for any offence to life or member, or in attaint for a false verdict, or for perjury as a witnesse, or in a conspiracie at the suite of the king, or in any suite (either for the king, or for any subject) be adjudged to the pillory, tumbrell, or the like, or to be branded, or to be stigmatique, or to have any other corporall punishment whereby he becommeth infamous, (for it is a maxime in law, *repellitur à sacramento infamis*) these and the like are principall causes of challenge. So it is if a man be outlawed in trespasse, debt, or any other action (1), for he is *exlex*, and therefore is not *legalis homo*. And old bookes have said, that, if he be excommunicated, he could not be of a jury.

[e] Mirror, Bracton, Britton, Fleta } ubi supra. 11 H. 4. 41. 12 H. 4. 10. 33 H. 6. 21. (2 Ro. Abr. 660.)

[f] See the statutes of W. 2. and *Artic. supra Cartas*, what persons the sherife ought to returne on juryes. And see *F. N. B. breve de non ponendis in assisis et juratis* (2), and the register in the same writ. And see there what remedy the party hath that is returned against law.

[f] W. 2. ca. 38. Artic. super cart. ca. 9. F. N. B. 165, & 166. Registr.

It is necessarie to be knowne the time when the challenge is to be taken. [g] First, he that hath divers challenges must take them all at once, and the law so requireth indifferent trialls, as divers challenges are not accounted double. [h] Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. [i] Thirdly, after challenge to the array, and triall duely returned, if the same party take a challenge to the polls, he must shew cause presently. [k] Fourthly, so if a juror be formally sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworne. [l] Fifthly, when the king is party or in an appeale of felony, the defendant, that challengeth for cause, must shew his cause presently. Sixthly, if a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the hundred must be taken before so many be sworne as will serve for hundredors, or else he loseth the advantage thereof. Eighthly, [m] in a writ of right, the grand jury must be challenged before the foure knights before they be returned in court (3); for after they be returned in court, there cannot any challenge be taken unto them. Ninthly, *nota*, [n] The array of the *tales* shall not be challenged by any one party, untill the array of the principall be tried; but if the plaintife challenge the array of the principall, the defendant may challenge the array

[g] 9 E. 4. 16. 10 H. 5. 9. 37 H. 6. 8. 3 H. 6. 38. Brooke tit. Chal. 8. 7 H. 6. 40. 14 H. 7. 5. 6. [h] 9 E. 4. 16. 27 H. 8. 2. [i] 43 E. 3. Chal. 93. 20 E. 3. ibid. 116. 22 E. 4. ibid. 61. 7 H. 4. 41. 3 El. Dow. 201. [k] 22 E. 4. 1. 9 H. 5. 6. [l] 1 H. 6. 10. 38 Ass. 22. (Ant. 157. a.) [m] 7 H. 4. 20. 15 E. 4. 1. [n] 9 E. 4. 27. 9 H. 6. 11. 34 Ass. 6. 13 E. 3. Chal. 108.

In the report of the case last cited, lord Hale is referred to as an authority for disallowing such challenges. But lord Hale is not absolute in his opinion; and Staundford, whom lord Hale cites, not only writes with a *quære* in the part so cited, but in a subsequent passage gives an opinion in favour of the challenge. Staundf. Pl. C. 158. a. 163. a.—[Note 285.]

(1) It has been questioned, whether outlawry in a *personal* action is sufficient to disqualify from being a juror; and in sir William Withepole's case, Mich. 3 Cha. 1. the court of king's bench was divided on this point. Cro. Cha. 135. W. Jo. 198, and Ley's Rep. 81.—[Note 286.]

(2) See the late mr. serj. Wynne's Dissertation upon this writ in his Miscellany of Law Tracts, p. 56.

(3) Acc. ant. 156. b. & post. 294. a.

array of the *tales*. After one hath taken a challenge to the polle, he cannot challenge the array.

Now it is to be seene, how challenges to the array of the principall pannell, or of the *tales*, or of the polles shall be tried, and who shall be triors of the same, and to whom processe shall be awarded.

[o] 18 E. 4. 8. (Fortesc. 55.)

1. [o] If the plaintife alledge a cause of challenge against the sherife, the processe shall be directed to the coroners; if any cause against any of the coroners, processe shall be awarded to the rest; if against all of them, then the court shall appoint certaine elisors or esliors (so named *ab eligendo*) because they are named by the court, against whose returne no challenge shall be taken to the array, because they were appointed by the court; but he may have his challenge to the (4) polles.

[p] 15 H. 7. 9. 14 H. 7. 31. 18 E. 4. 3.

[p] Note, if processe be once awarded for the partiality of the sherife, though there be a new sherife, yet processe shall never be awarded to him; for the entrie is, *Ita quòd vicecomes se non intromittat*. But otherwise it is, for that he was tenant to either partie, or the like.

[q] 29 Ass. 3. 19 H. 6. 48. 21 H. 6. Chal. 38. 33 H. 6. 21. 4 E. 4. 17. 43 E. 3. Chal. 95. 2 R. 2. ibid. 101. 34 Ass. 6. 27 Ass. 28. 43 Ass. 26.

2. [q] If the array be challenged in court, it shall be tryed by two of them that be impannelled, to be appointed by the court; for the triors in that case shall not exceed the number of two, unlesse it be by consent. But when the court names two for some speciall cause alledged by either partie, the court may name others. If the array be quashed, then processe shall be awarded, *ut supra*.

[r] 9 E. 4. 46. 19 H. 6. 48. 34 Ass. 6. 7 E. 6. Dier 78. 9 H. 5. 11.

[r] If a pannell upon a *venire facias* be returned, and a *tales*, and the array of the principall is challenged, the triors, which try and quash the array, shall not try the array of the *tales*; for now it is as if there had beene no appearance of the principall pannell: but if the triors affirme the array of the principall, then they shall try the array of the *tales*.

[s] 10 Co. 104, 105. Denbawd's case.

If the plaintife challenge the array of the principall, and the defendant the array of the *tales*, there the one of the principall, and the other of the *tales*, shall try both arrayes. For other matter concerning the *tales*, see [s] in my Reports matters worthy of observation (5).

[t] 19 H. 6. 9. 22 E. 4. Chal. 61, 62.

[t] When any challenge is made to the polls, two triors shall be appointed by the court; and if they try one indifferent, and he be sworne, then he and the two triors shall try another; and if another be tried indifferent, and he be sworne, then the two triors cease, and the two that be sworne on the jury shall try the rest.

[u] 7 H. 4. 41.

[u] If the plaintife challenge ten, and the defendant one, and the twelfth is sworne, because one cannot try alone, there shall be added to him one challenged by the plaintife, and the other by the defendant. When the triall is to be had by two counties, the manner of the triall is worthy of observation, and apparent in our [w] books.

[w] 11 H. 4. 61, 48 E. 3. 30. 11 H. 4. 63.

[x] If the foure knights in the writ of right be challenged they shall try themselves (6), and they shall choose ☞ the grand assise, and try the challenges of the parties.

[x] 22 E. 3. 18. 39 E. 3. 2.

[y] If the cause of challenge touch the dishonor or discredit of the juror, he shall

[y] 49 E. 3. 1, 2. (Hob. 84. 1 Sid. 374. 232. Cro. Jam. 388. 1 Ro. Rep. 110.)

[158. b.]

not

(4) See further on awarding *venires* to coroners and on appointing *elisors*. Umfrev. Lex Coronator. 235, to 242.

(5) See also Trials per Pais, chap. 5.

(6) Acc. post. 294. a.

not be examined upon his oath (1), but in other cases he shall be examined upon his oath, to informe the triors (2). [z] If an inquest be awarded by default, the defendant hath lost his challenge; but the plaintife may challenge for just cause, and that shall be examined and tried.

[z] 2 H. 4. 14. 4 E. 4. 3. 10 E. 3. 32. 22 Ass. 28. 31. 21 H. 6. 56. 16 Ass. 1. 5 E. 5. 35, 36.

Wheresoever the plaintife is to recover *per visum juratorum*, there ought to be sixe of the jury that have had the view or knowne the land in question, so as he be able to put the plaintife in possession if he recover.

In a *proprietate probandâ*, and a writ to inquire for waste, the parties have beene received to take their challenges (3). [a] But passing over many things touching this matter, I will conclude with the saying of * *Bracton*. *Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt sufficiant exempli causâ* (4). And so let us return to *Littleton*.

[a] 8 H. 5. tit. Chal. 167. 2 H. 4. 3. 34 E. 3. Chal. 175. 21 H. 6. 56. 8 E. 4. 3. 16 E. 4. 1.

* Bracton, lib. 4, fo. 185. (7 Co. 1. Bulwer's case.)

"*De visneto, &c.*" It should be *vicineto*. *Vicinetum* is derived of this word *vicinus*, and signifieth neighbourhood, or a place neere at hand, or a neighbour place. And the reason wherefore the jury must be of the neighbourhood, is, for that *vicinus*

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(1) Held accordingly by the Court in Cook's case, Salk. 153.

(2) This is one instance of the examination called a *voir dire;* for as a witness is on a *voir dire* to try an objection to his competency to give evidence, so a juror may be sworn in like manner to try the cause of challenge to him. It is thought fit to take notice of this; because in some of our books, the *voir dire* is described, as if confined to the challenge of a witness, and only used to distinguish such a partial swearing of a witness from swearing of him *in chief*. For instances of examining jurors on a *voir dire* see Francia's case, State Tri. 4th ed. v. 1. p. 59, and mr. Townley's in Fost. 7. But in both of these the challenge not being *to the favour* was examined into by the court without triors.—[Note 287.]

(3) Some seem to understand it as a general rule, that challenges of jurors are excluded, where the inquest is for information merely, or not being so is without an issue joined between the parties; as in inquests of office before sheriffs, coroners, and escheators, and in writs of inquiry for damages. Office of Executor, ed. 1676. p. 240. 1 Ro. Abr. 660. Umfrev. Lex. Coronator. 174. 183, and in the Introduct. 51. Probably lord Coke here means to advert to this doctrine, and to give the *proprietate probandâ* and the writ to inquire of waste, both of which are inquests without any issue joined, as instances of exception to it. Broke adds another exception; for in abridging the case of waste from the Year Book of 2 H. 4. 3, he observes, that the law is the same on a writ of redisseisin. Bro. Error 31.—As to the rule itself for thus excluding challenges, be it well or ill founded, the sheriff, or other officer taking the inquest, certainly ought not to accept any jurors but such as are legally qualified; and if such are received, it seems a just ground for quashing the proceeding, or for error, according to the nature of the case. See sir William Withepole's case reported in W. Jo. 198. Cro. Cha. 134, and Ley 81, and noticed in 2 Hal. H. P. C. 60.—[Note 288.]

(4) See further on challenges of jurors Kitch. French ed. 91. a. Lamb. Just. ed. of 1602. p. 379. Dalt. Sher. 1st ed. 120. Trials per Pa. chap. 9, and title *Trial* in Viner.

vicinus facta vicini præsumitur scire; all which is implied in this word *(&c.)*

"*Quòd summoneat eos, &c.*" *Summoneo* is compounded of *sub & moneo, & euphoniæ gratiâ* it is said *summoneo* to warne or summon, as in this case the sherife must warne or summon the recognitors of the assise to appeare before the justices of assise, &c. And it is truly said [*b*] that in this case *legitimam summonitionem recipere in propriâ personâ ubicunque inventus fuerit in comitatu in quo fuerit res petita; qui quidem si non inveniatur, sufficit si ad domicilium fiat, dum tamen alicui de familiâ suâ manifeste fuerit relata, &c.*

[*b*] Bracton lib. 5, fo. 333, 334. Mirr. cap. 2, sect. 19. Fleta lib. 6, cap. 6. Brit cap. 121.

"*Per bonos summonitores.*" Here two things are to be observed. 1. That the summoners must be *boni (id est) fide digni, ut valeant legitimum testimonium perhibere, cùm inde per justiciarios fuerint requisiti.* [*c*] And another saith, *fems, ne serfs, ne enfans, ne nul enfamys, ne nul que nest fife tenant, ne poet est bone summoner.* 2. It is spoken in the plurall number, *per bonos summonitores*, and therefore there must be two at the least. *Nec sufficit quòd summonitio fiat per unum tantùm, &c. necesse est igitur quòd per duos ad minus fiat, &c.* There is also a summons of a tenant in a reall action; whereof, and of pernors and veiors you shall reade [*d*] plentifully and plainely in our bookes, whereunto being matter of course I referre you.

[*c*] Brac. Britton Fleta ubi supra; Bracton Britton Fleta ubi supra; Mirror

[*d*] Regist. judicial. 1. 2. 107. 43 E. 3. 32. 24 E. 3. 35. 3 E. 3. 48. 50 E. 3. 16. 8 H. 6. 1. b. F. N. B. 97.

Item summonitionum alia est generalis, alia specialis. Whereof you shall finde excellent matter in our [*e*] old bookes, where you shall also reade at large *de summonitione, præsummonitione, & resummonitione.*

[*e*] Mirror Bracton Britton Fleta ubi supra

"*Facere recognitionem.*" *Cognitio* is knowledge, or knowledgement, or opinion, and recognition is a serious acknowledgement or opinion upon such matters of fact as they shall have in charge, and thereupon the jurors are called *recognitores assisæ. Vide* Sect. 233, *recognitio* taken for the confession of the tenant.

"*Pannell*" is an English word, and signifieth a little part; for a pane is a part, and a pannell is a little part; as a pannell of wainscot, a pannell of a saddle, and a pannell of parchment wherein the jurors names be written and annexed to the writ. And a jury is said to be impannelled, when the sherife hath entered their names into the pannell, or little peece of parchment, *in pannello assisæ.*

Register 223.

"*Writ of right* (briefe de droit)," *breve de recto. Writs of* right be of two natures: 1. A writ of right, whereof *Littleton* here speaketh, which is the highest writ of all other reall writs whatsoever, and hath the greatest respect, &c. and the most assured and finall judgement; and therefore this writ is called a writ of right; and this in [*f*] old books *is* called *dreit dreit*; and this writ *est darrein remedie de touts recoveries entur touts ordres des pleas*; and the jury in this writ is called *magna assisa*, or *magna jurata*, as *Littleton* here saith. 2. Writs of right in their nature, as the *rationabili parte*, and *ne injustè vexes.*

[*f*] Bracton lib. 5, fo. 372. Britton fo. 117. Fleta l. 6, ca. 1. Glanvil. lib. 1, c. 4, 6, &c. lib. 2, c. 7. lib. 12. ca. 1. (2 Ro. Abr. 686.)

"*De*

"*De recto.*" *Rectum* is a proper and significant word for the right that any hath, and wrong or injury is in French aptly called *tort*; because injury and wrong is wrested or crooked, being contrary to that which is right and straight. Now the law that is *linea recta est index sui et obliqui.* And *Britton* * saith, that *tort a la ley est contrarye*, and as aptly for the cause aforesaid is injury in English called wrong. And *injuria* is derived of *in* and *jus*, because it is contrary to right; so as a *faire tort* is *facere tortum.* And *Fleta* saith, [g] *est autem jus publicum et privatum, quod ex naturalibus præceptis, aut gentium, aut civilibus est collectum; et quod in jure scripto jus appellatur, id in lege Angliæ rectum esse dicitur.* And in the [h] Mirror, and other places of the law, it is called *droit*; as *droit defend*, the law defendeth. (Post. 265. a. 345. a.) *Britton fo. 116. Fleta lib. 2, ca. 1. [g] Fleta lib. 6, ca. 1. [h] Mirror ca. 2, sect. 16, & cap. 5, sect 2.

"*In the Register.*" *Register* is a most ancient booke of the common law; and it is ☞ two-fold, viz. *registrum brevium originalium*, and *registrum brevium judicialium.* It is a French word, and signifieth a memoriall of writs. Sometimes the register of originall writs is called *registrum cancellariæ*; because all originall writs do issue out of the chancery, as *extra officinam justiciæ*; for the antiquity and estimation of which booke I referre the reader to the epistle before the Tenth Part of my Commentaries (1). [159. a.] 13 E. 1. ca. 24. Pl. Com. 98. b.

"*Magna assisa eligenda*" is a judiciall writ to the sherife to returne foure lawfull knights before the justices, there upon their oathes to returne twelve (2) knights of the vicinage to try the mise in a writ of right. (Cro. Cha. 511.)

"*An assise of common of pasture, &c.*" Of what things an *assise of novel disseisin* lay at the common law, and of what by the statute, you may reade at large in my [k] Reports in *John Webbe's* case, where the authorities of law are plentifully cited, and they and the statute well explained. But since *Littleton* wrote, a man may have [l] an assise of *novel disseisin, assise* of *mord'anc'* or any *præcipe quòd reddat, quòd ei deforceat*, writs of dower, or other writs originall, as the case shall require, of tythes, pensions, or other ecclesiasticall or spirituall profit, if he be disseised, deforced, wronged, or otherwise kept or put from the same, which by the lawes and statutes of the realme are made temporall, or admitted to be or abide in temporall hands; so as by the said act a lay man, having tithes or offerings, may either [k] 8 Co. 45. [l] 32 H. 8. ca. 7.

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(1) See also ant. 16. b. and 73. b.

(2) This is the number mentioned in the writ to the sheriff, and also in the oath of the four knights. Booth on Real Act. 96, 97. But in Mo. 67, it is said, that sometimes *fourteen* have been returned. In *King v. Dryden*, being the case cited above in the margin from Cro. Cha. 511, *twenty* were returned by the four knights; on which it became a question, whether *twelve only* should have been returned, and whether the surplusage did not vitiate the whole return. But no adjudication appears in Croke's Report. However in 2 Ro. Abr. 674, where the same case is shortly reported, it is mentioned, that the court held the return good, it being observed, that several precedents were cited in favour of such a return; and that it resembled the case of a common *venire*, on which it was usual to return *twenty-four*, though the writ is restrained to *twelve*.—[Note 289.]

either sue for the subtraction or with-holding of the same in the ecclesiasticall court, or at the common law, at his election. And seeing no speciall writ is given * by the statute, the party must have a generall writ of *assise de libero tenemento*, and make a speciall pleint. But his *præcipe* must be, *quòd reddat omnes et omnimodas decimas majores, mixtas, et minutas, infra Dale quoquo modo crescen' contingen' ac annuatim rennovan'*, or the like, according to his case. [*m*] But neither assise nor any *præcipe* did lye of them as of tythes or any other ecclesiasticall duty at the common law; for the assise brought of the tenth part of all manner of corne growing in an hundred acres of land, after the tythes of the parson taken, was a lay profit *apprender*, and no ecclesiasticall duty.

* 7 E. 6. Dier 83, &c.

[m] 44 E. 3. 5. Vid. Regist. 165. Vid. le briefe de indicavit. W. 2. ca. 5. Conjunctim feoffatis ca. ultimo. Bracton lib. 5. fo. 402. Britton fo. 200. Regist. fo. 35. 4 E. 3. 27. 29. 16 E. 3, quare imp. 147. Vid. 2 H. 3. tit. Grant 89. (Cro. Cha. 301.)

But tythes or other ecclesiasticall duties, that came to the crowne by the statutes [*n*] of 27 H. 8. 31 H. 8. 37 H. 8, and 1 E. 6, are by those statutes and this of 32 H. 8, and of 1 and 2 Ph. & Mariæ in the hands of laymen temporall inheritances, and shall be accounted assets; and husbands shall be tenants by the curtesie, and wives endowed of them, and shall have other incidents belonging to temporall inheritances. Onely this ecclesiasticall quality they have that the owner or possessor thereof may sue for the subtraction of the same in the ecclesiasticall court.

[n] 27 H. 8, of Monasteries not printed. 31 H. 8. ca. 13. 37 H. 8. ca. 4. 1 E. 6. ca. 14. 1 & 2 Ph. & Mar. ca. 8. 2 E. 3. ca. 13.

But by another [*o*] statute, remedy is given as well to the lay person as to the ecclesiasticall person, for subtraction of all manner of prediall tythes; and he shall recover the treble value if they be not justly divided or set forth; and albeit the treble value be not expresly given to the proprietary of the tythes, yet forasmuch as he is the party grieved, and he hath the propertie and interest in the tythes, the treble value is given to him; and whensoever a statute giveth a forfeiture or penaltie against him which wrongfully detaineth or dispossesseth another of his duty or interest, in that case he that hath the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law, and the king shall not have the forfeiture in that case. And so it was [*p*] adjudged in the exchequer upon conference with other judges in an information for the treble value for not setting out of tythes in *Iclington* in the county of *Cambridge* (3). And if the proprietary will sue for such subtraction of tythes in the ecclesiasticall court, then he shall recover but the double value by the expresse words of the act. Wherein it is to be observed, that the act of parliament doth give a temporall remedy at the common law to parsons and vicars and other ecclesiasticall persons for an ecclesiasticall duty, and to laymen proprietaries of tythes the like remedy; but, as it hath beene said, they have election either to sue for the treble value at the common law, or for the double value in the ecclesiasticall court, or for subtraction of tythes there also (4).

[o] 2 E. 6. ca. 13.

[p] Pasch. 29 Eliz. between the queene and Wood in the exchequer, and so it was resolved by all the judges upon conference Mich. 4 Ja. regis.

" *Assise*

(3) The same case is more fully stated by lord Coke in 2 Inst. 650, being part of his comment on the statute of 2 Ed. 6.

(4) Since lord Coke's time a *third* remedy for tithes, where they are of small value, has been given; for by the 7 & 8 W. 3. c. 6, tithes under 40s. may

"*Assise of mortdauncester.*" *Assisa mortis antecessoris.* [*q*] This writ a man may have after the decease of his immediate ancestor; as where his father, mother, brother, sister, uncle or aunt, dye seised of any lands, and an estranger abate, &c.

[*q*] Britton. fo. 178, 179, &c. Bracton lib. 4. tractat. 3. per totum, fo. 252, &c. Mirror ca. 2. sect. 15. F. N. B. 114. &c.

"*Assise of darreine presentment,*" *Assisa ultimæ præsentationis,* whereof you shall reade [*r*] plentifully in our bookes.

[*r*] Britton ca. 90. fo. 222. Regist. orig. 30. Bract. lib. 4. fo. 238. Mirror ubi supra. F. N. B. 195.

To these may be added *assisa utrum*, or *juris utrum*, [*s*] which is the highest writ a parson, vicar, &c. can have for the recovering of the glebe land, &c. in right of his church. But it may be demanded, wherefore these originall writs are called by the speciall name of assises more than other originall writs; and here *Littleton* yieldeth the reason, because that by these writs it is commanded to the sherife *quòd summoneat* 12, which is as much to say, as to summon a jury. So as in these cases, there is a jury returned the first day, and they are to appeare as soone as the defendant. And because by these writs a jury is to be returned, the law calleth them assises, *ab effectu;* because an assise (which in this sense signifieth

[*s*] Bracton fo. 285, 286. Britton ca. 95. fo. 234. Mirror ubi supra. F. N. B. 48, 49.

[159. b.]

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may be recovered in a summary way before two justices of the peace: and by the 7 & 8 W. 3. c. 34, which was at first temporary, but is now made perpetual, tithes under ten pounds are made recoverable from *Quakers* in the same way. In London tithes by the 37 H. 8. c. 12, are recoverable before the lord mayor, with an appeal to the lord chancellor. To these various modes of proceeding for tithes should be added the equitable remedy by bill either in chancery or the exchequer; both of which courts have long entertained suits for tithes. Formerly, however, the jurisdiction of chancery in this respect was questioned, it being so far from settled in lord Coke's time, that there are instances of controverting it even since the Restoration. 1 Freem. 303. 2 Cha. Cas. 237. But as to the exchequer, tithes are said to have been anciently cognizable there: though this is contradicted by lord chancellor Nottingham, who dates the origin of the proceeding by English bill, and consequently that court's equitable jurisdiction over tithes, from the statute of Hen. 8, erecting the court of augmentation. Hardr. 236. 1 Freem. 303, and 33 H. 8. c. 39. This equitable interference of chancery and the exchequer with tithes is generally considered as merely *incidental* and *collateral;* namely, as a consequence of their jurisdiction in account and in enforcing discovery. 3 Blackst. Com. 9th ed. 437, and the reasons of the appellant in Whitehead and others v. Travis and others, Dom. Proc. January 1779. But some give a broader foundation to this branch of exchequer jurisdiction; and in respect of extraparochial tithes, which are part of the ancient inheritance of the crown, they insist, that suits for tithes must ever have fallen within the compass of the exchequer's *direct* and *substantive* jurisdiction as a court of revenue. See the case of respondent in the appeal before cited, and Hard. 117. Perhaps it is upon this idea, as well as on account of the greater frequency of suits for tithes in the exchequer, that lord Hardwicke calls that court the proper jurisdiction for them. 3 Atk. 247. Yet I confess, it seems to me, that the antiquity of the exchequer jurisdiction in the *particular* case of *extraparochial* tithes is no proof of a jurisdiction as to tithes in *general*. See further as to the jurisdiction of chancery and exchequer over tithes, Rayner's Cases at large, Introduct. xiv. and Vin. Abr. tit. *Dismes.*—[Note 290.]

* Mag. Chart. ca. 12, and W. 2. ca. 25.

sieth a jury) is to be returned. But beside the signification of the writ * of assise, whereof *Littleton* here speaketh, it signifieth the whole proceeding upon the writ.

In other originall writs regularly no jury is to be returned before the appearance of the parties and an issue joyned between them; and therefore these other originalls are not called assises.

[r] 19 H. 3. Juris utrum 16. 39 E. 3. 1. 7. 42 E. 3. 38. 29 E 3. 7. Regist. orig. 189. 33 E. 1. 5 R. 2. ca. 2. Vid. 8 Co. le Princes case.

"*For an ordinance.*" Here *assisa* signifieth an ordinance, &c. Ordinance, *ordinatio*, is derived of the verbe *ordinare*, to ordaine or set in order. And note, an act [r] of parliament (as *Littleton* here proveth) is an ordinance; for it sets downe orders, which are to be kept as lawes: and so is *ordinatio forestæ*, *ordinatio de inquisitionibus*, and *ordinatio contra servientes*, and other statutes many times called ordinances; and it is said almost in every act of parliament, 'Be it therefore ordained, &c. by authority of this parliament,' or the like. But *è converso*, every ordinance is not a statute, as that of 8 H. 6. cap. 29. (1) for every statute must be made by the king, with the assents of the lords and commons; and if it appeare by the act, that it was made by two of them onely, it is no statute (2).

The

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(1) In Dy. 144. b. the reporter questions this same statute or ordinance, and on the same ground as is expressed in the prince's case cited by lord Coke; namely, that the king and the lords are named without the commons. But the editor of the last edition of Dyer gives a note tending to obviate the objection thus taken. The 8 H. 6. c. 29, is also supported as a statute by mr. serjeant Hawkins and mr. Ruffhead in the prefaces to their respective editions of the statutes at large. The latter of these urges two strong arguments in favour of the 8 H. 6. c. 29, exclusive of the general argument for *presuming* the assent of the commons, of which in the next note. According to the first the roll containing the 8 H. 6, has a general preface, which mentions the assent of the commons in terms referrible to all the chapters of that year. The second is, that the 22 H. 8. c. 10, expressly refers to the 8 H. 6. c. 29, as a statute, and therefore that the latter has been legislatively recognized.—[Note 291.]

(2) Acc. 4 H. 7. 18. a. Mo. 824, and the prince's case 8 Co. 20. a. In 4 Inst. 25, lord Coke also describes a statute as having the consent of king, lords, and commons, and an ordinance as made by only one or two of them.—But mr. Prynne is very angry with lord Coke for thus distinguishing between an ordinance and a statute. He first attacked the difference in his *Irenarches Redivivus*; and there he is very copious in his arguments and instances against it. But mr. Prynne did not rest here; for he continued the subject in various subsequent publications; namely, in his preface and index to what is called Cotton's Abridgment of the Records, and in his Animadversions on the 4th Institute. See the latter book p. 13. But in all these works, particularly his *Irenarches Redivivus*, he appears to me to labour the point in a manner which indicates a very considerable misapprehension of lord Coke. It is manifest from his lordship's words here, that he did not mean to deny, that the term of *ordinance* might not be or was not frequently applied to statutes; for he here adduces instances of such an application. His chief intent was to guard against universally and indiscriminately so considering all ordinances in parliament. But mr. Prynne not connecting what is here said by lord Coke with his words in the 4th Institute, but looking to the latter only, tediously and provokingly argues as if lord Coke had denied that an ordinance could be or was in any case a statute. Not content with fighting this imaginary

The example put by *Littleton* is *assisa panis et cervisiæ*. [s] This ordinance was made at a parliament holden *anno* 51 H. 3. and the like ordinance was made, entituled *assisa cervisiæ*, which you may see in old *Magna Charta*, fol. 57. b. [t] And so *assisa de Clarendon*, which was in 10 H. 2. and *assisa forestæ* ordained in *anno* 34 E. 1. and such like. And aptly an ordinance of parliament antiquity hath called an assise, for that an act of parliament doth ordaine such a certaine order, as nothing can be done more or lesse by right. [u] And *Fleta* saith, *et habet rex in potestate sua ut leges et consuetudines et assisas in regno suo provisas et approbatas et juratas, &c.* where assises are taken for statutes, which are the effects of the sessions of parliament.

[s] Mir. ca. 1. sect. 13. & ca. 4. de Articles de Eire. Bract. li. 3. fo. 136.
[t] Staundf. fo. 118. Mir. ca. 2. sect. 15. Hoveden 313. Regist. orig. 279.
[u] Flet. li. 1. ca. 17.

De ponderibus et mensuris, of weights and measures, is a most necessary learning to be knowne, and daily in use, but it belongeth

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ginary proposition, mr. Prynne runs into the contrary extreme of asserting, that acts of parliament and ordinances are universally and invariably the same. Thus the true questions arising on the subject were in great measure lost sight of, or at least were so obscured by being complicated with foreign and needless discussion, as not easily to strike the reader. The real topics for debate with lord Coke, and those which should have been pointedly attended to, were, first, whether the term of ordinance was ever in fact applied to a provision made during the time of parliament by only one or two of the three branches of the legislature; and secondly, and principally, whether naming only one or two parts of the legislature doth exclude the presumption of the third's having assented. As to the former of these questions, it is rather verbal; and therefore I will here only observe upon it, that using the word *ordinance* in the manner stated by lord Coke seems well enough to answer the purpose of discrimination; that the word may have been frequently so applied in ancient times, notwithstanding the numerous examples of a contrary application so industriously collected by mr. Prynne; that lord chief justice Crew partly adopts lord Coke's idea; that mr. Prynne himself in his later writings, though he still denies lord Coke's distinction, brings forward and acknowledges precedents which tend in some degree to affirm it; and that calling the acts of the parliament in the reign of Charles I, without the royal assent to them *ordinances*, seems to have originated from lord Coke's differences between an ordinance and a complete statute. See W. Jo. 103. Prynne's Index to Cott. Abridgm. of Rec. title *ordinances*, and his Animadv. on 4 Inst. 13. As to the second question, besides what may be found in mr. Prynne's pieces, it has been distinctly considered by mr. serjeant Hawkins and mr. Ruffhead, both of whom, in the prefaces to their several editions of the statutes, anxiously oppose lord Coke's idea of not presuming the assent of lords or commons, where the record names one but omits the other. The general purport of the reasons urged by the former is, the various irregular and sometimes inexplicit penning of the more ancient statutes, the allowed force of several statutes in which only the king is named, and the long reception of others which do mention the king and lords without the commons. The latter editor pursues the like topics more at large, but, as it seems to me, in terms less guarded; some passages of his preface being such as may encourage a hasty and unlearned reader to fall into the unwarrantable supposition, that the right of assent in the commons is disputable even as late as the reign of Richard the second, rather than induce him to *presume* the fact of their assent's having been given. See further on this subject, and for the various sense of the word *ordinance*, 2 Whitelocke on the writ of Parliament, Elsynge on Parl. last ed. 26, and Barringt. on Ant. Stat. 4th ed. 46.—[Note 292.]

eth not to this treatise. In some other (if God so please) somewhat shall be said of them (3).

Sect. 235.

ALSO, if there be lord and tenant, and the lord granteth the rent of his tenant by deed to another, saving to him the other services, and the tenant atturneth, that is a rent secke, as it is aforesaid. But if the rent be denied him at the next day of payment, he hath no remedie; because that he had not thereof any possession. But if the tenant when he atturneth to the grantee, or afterwards, will give a penie or a halfepenie to the grantee in name of seisin of rent, then if after at the next day of payment the rent be denied him, he shall have an assise of novel disseisin. *And so it is if a man grant by his deed a yearely rent issuing out of his land to another, &c. if the grantor then or after pay to the grantee a penie, or an halfepennie, in the name of seisin of the rent, then, if after the next day of payment the rent be denyed, the grantee may have an assise, or else not, &c.*

"*AND the tenant atturneth.*" Here it appeareth, that an attornment (that is, an agreement to the grant) is no seisin of the rent.

"*He hath no remedie, &c.*" which is as much to say, as he hath not any remedy either at the common law, or in any court of equity, which is worthy of observation.

See more of this in the Chapter of Attornement Sect. 565. (4 Co. 10. Post. 314. b. 315. a.)

"*Will give a penie or a halfepenie, &c. in name of seisin of rent, &c.*" Here it is to be observed, that payment of any money in name of seisin of the rent, before any rent become due, *is* a good seisin of the rent to have an assise when it is due; and that, which is given in the name of seisin of the rent, worketh his ☞ effect to give seisin, and yet is no part of the rent, nor shall be abated out of the rent: but you shall read more hereof hereafter, Sect. 565. [160. a.]

"*A penie, or a halfepenie, &c.*" Here by this *(&c.)* is implyed, that so it is of the gift of a sheepe, or an oxe, or a ring, or a paire of gloves, or a pound of pepper, or of any valuable thing.

(6 Co. 56. b. 4 Co. 9.)

"*So it is if a man grant by his deed a yearely rent issuing out of his land to another, &c.*" By this *(&c.)* is implyed, that the grant and deliverie of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintaine an assise or any other reall action, but there must be an actuall seisin.

Sect.

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(3) Accordingly lord Coke discourses a little on these subjects in two other works. See 2 Inst. 41, and 4 Inst. 273.

Sect. 236.

ALSO, of rent secke a man may have an assise of mortd'auncester, *or a writ of* ayel *or cosinage, and all other manner of actions realls, as the case lyeth, as he may have of any other rent.*

"*A WRIT of ayel,*" *breve de avo.* This writ lieth, where the grandfather or grandmother was seised of any land in fee the day that he died, and an estranger abate, the heire shall have this writ. [w] And if the great grandfather, *besaiel, proavus,* or great grandmother, *besaieles, proavia,* be seised as is aforesaid, and die, &c. the heire shall have a writ *de besaiel, proavo,* or *besaieles, proavia, &c.*

Bract. li. 2. fo. 67. Brit. c. 89, & c. 76. Flet. li. 5. c. 7, 8, &c. F. N. B. 221.

[w] 6 E. 3. 34. 7 E. 3. 46. Regist. 226.

F. N. B. 221. a. b. Britton ca. 76.

"*A writ of cosinage,*" *breve de consanguinitate.* [a] This writ lieth, where the great grandfather's father, *tritavus (id est) tertius avus,* or *abavus (id est) avus avi,* was seised as is aforesaid, or where grandfather's or grandmother's mother, &c. *ut supra.* And so it is of the seisin of the brother of the grandfather's grandfather, &c. (1)

[a] Bract. lib. 2. fo. 67. Brit. c. 89. & c. 76. Flet. l. 5. ca. 7, 8. F. N. B. 221.

"*Rent secke.*" And so it is of a rent charge to all respects.

"*And all other manner of actions reals,*" Hereupon some have gathered, that a man shall have a writ of right of a rent secke, or of a rent charge albeit they be against common right. But that, which hath beene said by *Littleton* of an assise of *mortdauncester,* a writ of *ayel, cosinage,* and other actions realls, is to be understood after seisin had by some of the ancestors of the demandant; for without an actuall seisin or seisin in deed, none of these are maintainable.

15 E. 2. Hors de son fee 27. 3 E. 3. 35. 4 E. 3. droit 38. F. N. B. 6. 14 E. 4. 5. Diversity des Courts 117. 33 E. 3. Judgm. 25a.

[160. b.]

Sect. 237.

ALSO, there be three causes of disseisin of rent service, that is to say, rescous, replevin, and enclosure. Rescous is, when the lord distraineth in the land holden of him for his rent behind, if the distresse be rescued from him, or if the lord come upon the land, and will distreine, and the tenant or another man will not suffer him, &c. Replevin is, when the lord hath distrained, and replevin is made of the distress by writ or by plaint. Enclosure is, if the lands and tenements be so enclosed (1)†, *that the lord may not come within the lands and tenements for to*

(1) See the table for the degrees of consanguinity placed before fol. 18.

(1)† *enclosed* not in L. and M. but in Roh. P. and Red.

to distrein. And the cause, why such things so done be disseisins made to the lord, is for this, that by such things the lord is disturbed of the meane by which he ought to have come to his rent, scil, *of the distresse* (2).

(Cro. Jam. 485. 2 Ro. Abr. 277. 456, 457. Hob. 180. Dy. 241. Cro. Cha. 109. F. N. B. 101. c.) 18 E. 3. 3. 44 E. 3. 20. b. 20 H. 7. 1. a. 21 H. 7. 40. a. F. N. B. 102. b. 6 H. 6. Disseising 9. 4 E. 2. Ass. 43. 8 E. 1. ibid. 416. W. 2. ca. 6. 12 H. 7. Keilway 20.

"RESCOUS," *Rescussus*, is here described by *Littleton*. It is an ancient French word comming from *rescourrer (id est) recuperare*, that is, to take from, to rescue or recover. *Rescous* is a taking away and setting at liberty against law a distresse taken, or a person arrested by the proces or course of law. And all is one, as to the point of the disseisin, to rescue the distresse after it is taken, and before hand to resist and withstand the taking of it; but yet it is no rescous, until it be distreyned. And therefore you may make sixe disseisins of a rent service; *rescous* of a distresse, resistance to distreyne, replevin (3), inclosure, counterpleading of the title, and vouching of a record and failing. If the tenant rescue the distresse, and after is disseised of the tenancie, yet the assise lieth against him for the disseisin done of the rent by the rescous.

(Post. 323. a.)

[p] 6 R. 2. Rescous 10. 40 E. 3. 33. 31 E. 3. Rescous 17. 22 H. 6. 2. b. 6 E. 4. 11. b. 7 E. 4. 20. 5 E. 4. 8. 34 H. 6. 47. F. N. B. 102. B. 2 H. 4. 21. 16. 4 E. 6. Distresse Br. 24. 39 E. 3. 35. 39 H. 6, 7. 4 Co. 11. Bevill's case. 8 H. 4. 1. (Ant. 47. b. 9 Co. 23.) 7 E. 4. 24. (5 Co. 76.) 17 E. 3. 43.

"*For his rent behind.*" Here *Littleton* decideth an ancient question in our bookes, [*p*] viz. that the rent must be behind, or else the tenant may make rescous: for if no rent be behind when the distresse is taken, how can the rescous amount to a disseisin of the rent when none is due? And so it is, if the tenant resist the lord to distreine, when there is no rent behind, this can be no disseisin of the rent for the cause above sayd, and this (as it appeareth by *Littleton*) holdeth as well in case of a rent service between lord and tenant, as in case of a rent charge, &c. And so I heard sir *Christopher Wray* chief justice say, that he had adjudged it. And that which the tenant may do when there is no rent behind, may a stranger do, if his beasts be distrained. If the tenant tender the rent to the lord when he is to take the distresse, if notwithstanding the lord will distrayne, the tenant may make rescous (4). If the rent of the lord be behind, and the lord distreine the cattell of the tenant in the high way within his fee, the tenant may make ☞ rescous, for that it is defended by law to distreine in the (1) high way. And by the same reason if the lord will distreyne *averia carucæ*, where there [161. a.]

Vid. tit. Rescous 14.

is

(2) *of the distresse* not in L. and M. Roh. nor P.

(3) In a Coke upon Littleton I have with MSS. notes, it is objected to considering replevin here as a disseisin, that bringing a replevin is a course of law, and that neither an express denial of a rent-service, nor keeping the land without any thing distrainable by law upon it, amounts to a disseisin. Yet the annotator allows, that there is an ancient pleading in assise to warrant the doctrine, the material words of which he gives at length.—[Note 293.]

(4) See several authorities accordingly cited in the case of the six carpenters, 8 Co. 146. b. and 147. a. There too lord Coke states the diversities, in point of effect, between tender on the land before distress, tender after distress and before inclosure, and tender after inclosure. See also Hob. 207. —[Note 294.]

(1) It is so provided by the statute of Marlebridge, chap. 15. But the king

is

is a sufficient distresse to be taken (2) besides, or if the lord distrayne any thing that is not distreynable, either by the common law, or by any statute, the tenant may make rescous.

Note, there is a rescous in deed and a rescous in law. Of a rescous in deed somewhat hath already been spoken. A rescous in law is, when a man hath taken a distresse, and the cattle distreyned as he is driving of them to the pownd go into the house of the owner, if he that tooke the distresse demand them of the owner, and he deliver them not, this is a rescous in law, and so of the like. (Ant. 47. b. F. N. B. 102. C.) 3 E. 3. Rescous 12.

And every word of *Littleton* is materiall, for he saith;

"*In the land holden of him.*" And therefore if the lord distreyne out of his fee in lands not holden of him, the tenant may make rescous, unless it be in some speciall cases. 44 E. 3. 20. 6 R. 2. Rescous 11.

As if the lord come to distreyne cattle which he seeth then within his fee, and the tenant or any other to prevent the lord to distreyne, drive the cattle out of the fee of the lord into some place out of his fee; yet may the lord freshly follow, and distreyne the cattle, and the tenant cannot make rescous, albeit the place wherein the distresse is taken is out of his fee, for now in judgement of law the distresse is taken within his fee, and so shall the writ of rescous suppose. 11 H. 7. 4. 21 H. 7. 40. 34 H. 6. 18. 16 E. 4. 10. lib. 9, fol. 22, in case de Avowrie. (9 Co. 22. Plowd. 37. b. 38. a. 2 Inst. 131. Post. 268. b. 1 Ro. Abr. 671.)

But if the lord comming to distreyne had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves after the view go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distresse, then cannot the lord distreyne them out of his fee, and if he doth the tenant may make rescous.

If a man come to distreyne for *damage feasant*, and see the beasts in his soyle, and the owner chase them out of purpose before the distresse is taken, the owner of the soyle cannot distreyne them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distresse; and so note a diversitie. 16 E. 4. 10. 2 E. 2. Avowrie 182, lib. 9, ubi supra.

There is a diversity [a] betweene a warrant of record and a warrant or an authoritie in law; for if a *capias* be awarded to the sherife, to arrest a man for felony, albeit the party be innocent yet cannot he make rescous. But if a sherife will, by authoritie which the law giveth him, arrest any man for felony which is not guiltie, he may rescue himselfe (3). [a] 14 H. 7. 20. tit. Justice de Peace 9. (6 Co. 54. a. 3 Inst. 221.)

"*Replevin*,"

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is excepted. See the commentary on that statute in 2 Inst. 131. Some distresses also by the subject are not within this provision, of which there are instances given with the reasons in 2 Inst. 133, and lord Hale's notes on F. N. B. 90. A.—[Note 295.]

(2) Acc. ant. 47. a. and more at large in 2 Inst. 133.

(3) But, such arrest *virtute officii* being made on a just ground of suspicion of felony, the party rescues himself at his peril; for, according to lord Hale, if in the attempt to make the rescue he is upon necessity slain, it is no felony in the officer; and on the same principle if the officer is killed it will be murder. 2 Hal. H. P. C. 85, 86, 87. 92, 93. The obvious reason is, that the law makes it a duty in the sheriff and certain other officers to arrest for felony on just suspicion; and therefore rescue from such arrest is resistance of a lawful authority. If this be so, lord Coke is here too unqualified in expression. See further on this point, Fost. 270. 1 Burn's Justice, tit. *Arrest*, and Dougl. Rep. 345. —[Note 296.]

"*Replevin*" [*b*] is derived of *replegiare*, to redeliver to the owner upon pledges or suretie.

[*b*] Brit. fol. 108. Fleta, lib. 4. cap. 1. Mirror, cap. 2, sect. 15. (Ant. 145. b.)

[*c*] Also to counterplead the plaintife in an assise, by which he is delayed, maketh him that pleadeth it a disseisor. Otherwise it is, if he had pleaded *nul tort, &c.*

[*c*] 24 Ass. 3. 29 Ass. 52. Fleta, lib. 4. cap. 1. Britton, fol. 108.

"*Enclosure*," is here also described, and need no other explication; for the lord cannot [*d*] breake open the gates, or breake down the inclosures to take a distresse, and therefore the law accounts it a disseisin. But all these are intended by *Littleton* to be disseisins after an actuall seisin had, and when the rent is behind: otherwise none of these are disseisins at all.

[*d*] 10 E. 3. 9. 49 E. 3. 14. 7 E. 3. 3. 11 H. 7. 28. 8 Ass. 18. 10 E. 4. 2. Bract. lib. 4. fol. 161. 204. Britton, fol. 108. Fleta, lib. 4. cap. 1.

But wherefore should a rescous of the distresse by the party himselfe, or a replevin, which is a redelivery of the distresse by the sherife by the course of law to the partie, be any disseisin of the rent service? *Littleton* doth here yield the true reason; because that by the rescue, and by the suing of the replevyn, the lord is disturbed of the meane by the which he ought to have and come to his rent, viz. of the distresse.

And so it is of an incloser; for he that disturbes a man of the meane disseiseth him of the thing it selfe, [*e*] as the turning of the whole streame that runnes to a mill is a disseisin of the mill it selfe.

[*e*] 9 Ass. 19. Mirror, ca. 2, sect. 15. Brit. fol. 108. 114. 118. 141.

So it is if a man be disturbed to enter and manure his land, [*f*] this is a disseisin of the land it selfe; for *qui adimit medium dirimit finem*, and *qui obstruit aditum destruit commodum*. [*g*] And therefore where it is said, that a man shall not be punished for suing of writs in the king's court, be it of right or wrong, it is regularly (4) true, but it fayleth in this speciall case of the writ

[*f*] 26 Ass. 17. 3 E. 4. 2. per Littl. 49 E. 3. 14. b.

[*g*] F.N.B. 42. g. 22 E. 3. 15. 43 Ass. 40. 43 E. 3. 20. faux judg. 10. 8 E. 4. 15. per Moyle. 2 R. 3. 19. (Hob. 205. 266. 1 Mod. 4. Cro. Eliz. 836. 1 Sid. 463.)

of

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(4) Acc. Dy. 285. a. 4 Co. 146. b. 1 Bulstr. 141. But on this rule it may be asked, whether the law of England is so defective as to furnish no remedy for the injury of being harassed by vexatious and groundless suits, or, to use the language of the Roman law, no penalty to restrain the *temeré litigantes?* It may be answered, that the rule is not to be understood so largely; for certainly there are various provisions, the object of which is to discourage the commencement of suits from an unjust or improper spirit of litigation.

I. By the ancient law no person could prosecute a civil action without having in the first stage of it two or more persons as pledges of prosecution; and if judgment was given against the plaintiff, or he deserted his suit, both he and they were liable to amercement to the king, either for not prosecuting, or *pro falso clamore;* and hence the clause of *si fecerit te securum* in writs summoning the defendant to answer. Mirr. c. 1. s. 3. c. 2. s. 24. Ant. 126. b. 127. a. Originally these pledges were or ought to have been real and responsible persons; and the amercement of them and their principal was an actual branch of royal revenue; the ascertainment of the sum to be paid as an amercement being sometimes by the jury impannelled to try the issue, and sometimes by a jury summoned for that special purpose by the coroner on receiving an estreat of the amercement. F. N. B. on the writ of *miserata misericordia* 75. K. Griesley's case 8 Co. 39. a. Beecher's case 8 Co. 61. a. But this guard at length lost all its vigour, and even so early as in the reign of Edward the Fourth appears to have evaporated into mere form. 18 Ed. 4. 9. b. pl. 19. However as a form it still continues; and if omitted was a ground either for a

demurrer

of replevyn for the cause aforesaid. [h] But *denyall* is no disseisin of a rent service without rescous or resistance. [h] 3 E. 3. 75. 8 H. 6. 11.

Sect.

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demurrer or for a writ of error, till the legislature interposed by two different statutes, the last of which has been so liberally construed as scarce to make it possible to take advantage of the non-return or non-entry of pledges in any stage of a *civil* suit. See 3 Bulst. 61, and the case of Hussey v. Moore on a *penal* statute, ibid. 275. where the subject of pledges is most learnedly investigated. See also Fortesc. Rep. 330. 1 Wils. 226. 2 Wils. 142.

II. As the amercement leviable on a plaintiff and his pledges belonged wholly to the king in respect of and by way of penalty for troubling his courts improperly, it became necessary to have a distinct provision in favour of defendants who were unjustly sued; and for this purpose the legislature introduced costs in their favour. The first law giving costs to a defendant is said to be the statute of Marlebridge, c. 6, which gave an action to the lord where he was defrauded of wardship by his tenant's collusively enfeoffing his heir within age, but at the same time directed that the feoffee should have his damages and costs where he was maliciously impleaded. 52 Hen. 3. c. 8, and 2 Inst. 112. This provision for one particular case was, but not till after a long interval, followed by various statutes of a *general* kind, under which at this day a defendant is almost universally entitled to costs where the suit terminates against the plaintiff. See 22 H. 8. c. 15. 4 Jam. 1. c. 3. 8 Eliz. c. 2. 13 Cha. 2. st. 2, c. 2. 8 & 9 W. & M. c. 11. 4 & 5 An. c. 16, to which add Law of Nisi Pri. ed. of 1775, chap. 8, p. 328, mr. serjeant Sayer's Law of Costs, c. 8, 9, & 10, and mr. Crompton's Pract. of K. B. and C. P. commonplaced, 2 ed. v. 2, p. 461. But the statutory provisions are confined to suits in the king's courts of common law. However our courts of equity supply this seeming defect by the exercise of a discretion in awarding costs to a defendant, which is constantly done as often as they think, that, from the want of equity in the plaintiff, or on any other account, he ought to have costs.

III. Where two or more conspire to harass any person by a false and malicious suit, whether *criminally* or *civilly*, it is a crime punishable by indictment, or the parties injured may sue for damages by writ of conspiracy; and both of these remedies lie at common law, that part of the statute or ordinance of *articuli super chartas*, which gives remedy against conspirators by writ out of chancery, being according to both Staundford and lord Coke only an affirmance of the common law. Staundf. P. C. 172. 2 Inst. 561, 562.

IV. There is also a remedy for a *false* and *malicious* prosecution, though the aggravation of a conspiracy or confederacy is wanting, and the injury comes from one only; for in such a case the party prosecuted may have an action upon the case for damages. I apprehend too that such action lies, as well where the vexation is practised by a *civil* suit, as where it is carried on through the medium of a criminal process. F. N. B. 114. D. Indeed the numerous cases to be met with in the books are chiefly for criminal prosecutions. See 1 Vin. Abr. 17 to 35, and the case of Farmer v. Dalling, 4 Burr. 1971. But there seems to be no reason for distinguishing between the writ of conspiracy and an action upon the case in this respect; and exclusively of other authorities which may probably be found upon a search, lord Hobart, mr. serjeant Rolle, and lord Holt, all concur in the idea that where a *civil* suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable. See Hobart's argument in Waterer v. Freeman, Hob. 205. 266. Rolle's words in Sty. 379, and Holt's argument in giving judgment in Savill v. Roberts, reported in 12 Mod. 208. 1 L. Raym. and other books, and the case of an action for falsely and maliciously suing out a commission of bankruptcy, in 1 Blackst. Rep. 427. However from the language of a case in Dyer, and of another in lord

☞ Sect. 238. [161. b.]

AND there be four causes of disseisin of a rent charge: scil. *rescous, replevin, inclosure, and deniall; for denyall is a disseisin of a rent charge, as is said before of a rent secke.*

Britton ubi supra. Fleta, lib. 4. cap. 1.

"*THERE be four causes of disseisin of a rent charge.*" And you may add a fifth, viz. resistance to distreine, counterpleading and vouching a record and fayler thereof, as hath beene said before (1).

14 E. 4. 4. 38 H. 6. 7. 3 Ass. 8.

"*Deniall.*" Deniall is a disseisin of a rent charge, aswell as of a rent secke; albeit he may distreine for the rent charge, as-

10 E. 3. 9. 40 E. 3. 24. 3 H. 6. 35. 3 E. 3. 75. 29 Ass. 51. 39 Ass. 4. 40 Ass. 3. 13 E. 1. 4 Ass. 40. 3 Ass. 8. 8 H. 6. 11. 18 E. 3. Ass. 78. (Cro. Cha. 507.)

well

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lord Coke's Reports, I doubt whether actions on the case for false and malicious prosecutions were in general allowed in the reign of Elizabeth. Dy. 285. a. 4 Co. 14. b.

V. In some special cases, a plaintiff failing in his action is exposed to the *direct* and *immediate* punishment of fine and imprisonment by the court in which he sues, without the benefit of a jury to assess the fine, or the circuity of a separate prosecution to try the malice. This is the law in certain actions which are of a high nature, where the injury of which the defendant is accused concerns life or limb, or is otherwise of an atrocious kind, as in appeals of felony or mayhem, and in attaint; for in all these the plaintiff may be fined and imprisoned by the court, if he be barred or nonsuited, or if the writ abates by his own default. Beecher's case 8 Co. 60. a. It is the same, where the action, though not of so high an order, is *apparently* vexatious; for on this principle a plaintiff, who sues the same person in two different courts for the same cause, may be fined. Ibid. and 14 H. 7. 7.—The result, as to the law at present, and since pledges of prosecution have become a mere formality, seems to be this. No man is actionable for *merely suing*, whether in a criminal or civil form, however false the suit may be in foundation; nor is otherwise punishable, except in the case of a civil suit, by the payment of costs. But if the suit be *malicious* as well as *false*, it is on that account punishable; sometimes by indictment or information, as in the case of a conspiracy; sometimes by immediate fine and imprisonment in the court in which the malicious suit is carried on, as in appeals of felony, or mayhem, or in attaint; and sometimes by action of the party sued, as where a damage can be proved, or where from the grossness or criminality of the charge or imputation the law supposes a damage to be inevitable. —Such are the various provisions of our law to deter men from becoming *plaintiffs* or complainants without justifiable cause. As to the provisions against obstinate or vexatious *defendants*, these being rather beyond the principle for explanation of which this note was begun, and the note itself being already so extended, I shall be content with observing, that, exclusively of the finding of damages and award of costs against such defendants, there is in some few cases of a very special nature a power in the court to punish their misbehaviour by fine and imprisonment. See Dy. 67. a. & b. Beecher's case 8 Co. 59 & 60.—See further on the general subject of this note, Cow. Inst. Jur. Anglic. lib. 4. tit. 16.—[Note 297.]

(1) Ant. 160. b.

well as for a rent service. *Nota*, that when bookes say that a detainer of a rent charge or secke is a disseisin, it must be intended upon a demand made (2).

If there be two joyntenants, and the grantee of a rent charge distreine for the rent, and one of them make rescous, they are both disseisors (3); for a distresse for the rent is a demand in law, and then the non-payment is a deniall and a disseisin; but he that made the rescous is only the disseisor with force.

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AND there be two causes of disseisin of a rent secke; that is to say, deniall and inclosure.

THE reason, wherefore inclosure is a disseisin of a rent secke, is because the grantee cannot come upon the land to demand it. 49 E. 3. 15. 29 Ass. 5. 36 Ass. 7. 10 E. 3. 19. 33 H. 6. 35. 35 H. 6. 7. b.

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AND it seemeth, that there is another cause of disseisin of all the three services aforesaid; that is, if the lord is going to the land holden of him for to distreine for the rent behind, and the tenant hearing this encountreth with him, and forestalleth him the way with force and armes, or menaceth him in such forme that he dare not come to the land to distreine for his rent behinde for doubt of death, or bodily hurt (pur doubt de mort, ou mutilation de ses members), *this is a disseisin, for that the lord is disturbed of the meane whereby he ought to come to his rent. And so it is, if, by such forestalling or menacing, he that hath rent charge or rent secke is forestalled, or dare not come to the land to aske the rent behinde, &c.*

"*FORESTALLETH*," [*] forestallamentum, signifieth *obtrusionem viæ vel impedimentum transitûs, &c.* [*] Fleta, lib. 1, cap. 42. 49 E. 3. 14. 49 Ass. 5. 29 Ass. 49. (3 Inst. 195.)

"*With force and armes*," *vi et armis.*

Force, *vis*, in [i] the common law is most commonly taken in ill part, and taken for unlawfull violence, for *maximè paci sunt contraria vis et injuria*. And therefore *Britton* said well, speaking in the person of the king, *nous volons, que touts gents pluis usent judgement que force* (4). *Arma*, Armes, in the common law signifieth [i] Vid. Sect. 431. (Post. 257. b.)

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(2) This is agreeable to Littleton's description of such a disseisin in Sect. 233. See W. Jo. 414.

(3) See acc. as to attornment by one of two jointenants, Sect. 566.

(4) Britt. 116. a.

signifieth any thing, that a man striketh or hurteth withall. [k] *Omnes illos dicimus armatos, qui habent cum quo nocere possunt. Telorum autem appellatione omnia, in quibus singuli homines nocere possunt, accipiuntur. Sed si quis venerit sine armis, et in ipsâ concertatione ligna sumpserit, fustes et lapides, talis dicetur vis armata: sed si quis venerit cum armis, armis tamen ad dejiciendum non usus fuerit, et dejecerit, vis armata dicitur esse facta, sufficit enim terror armorum ut videatur armis dejecisse.* And, *Armorum quædam sunt tuitionis (et quod quis ob tutelam corporis sui vel sui juris fecerit, justè fecisse videtur) quædam pacis et justitiæ, quædam perturbationis pacis, et injuriæ; quædam usurpationis rei alienæ.* [162. a.]

[k] Bracton, lib. 4, fo. 162, & lib. 3, fol. 144. Fleta, lib. 4, cap. 4.

Againe, *Armorum quædam sunt moluta, et quædam quæ faciunt brusurum, &c. Arma moluta plagam faciunt; sicut gladius, bisacuta, et hujusmodi, ligna verò et lapides brusuras, orbes, et ictus, &c.* To conclude this, it is truly said, that *armorum appellatione non solùm scuta et gladii et galeæ continentur, sed ed fustes et lapides.* As the poet saith:

(2 Inst. 161, 162.)

Virgil 1. Æneid. *Jamque faces et saxa volant; furor arma ministrat.*

Sed vim vi repellere licet, modò fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.

Bracton, lib. 2. 16. Britton, fol. 19. & 88. Fleta, lib. 3, c. 7. (Post. 253. b.)

"*For doubt of death, or bodily hurt* (pur doubt de mort, ou mutilation de ses members)." For it must not be *vagus & vanus timor, sed talis qui cadere possit in virum constantem, et non in hominem vanum et meticulosum, talis enim debet esse metus, qui in se continet mortis periculum et corporis cruciatum.* *Littleton* here saith, it must be for feare of death * or mutilation of members. *Et nemo tenetur exponere se infortuniis et periculis* (1). And therefore a forestalment with such a menace is a disseisin, not onely (saith *Littleton*) of a rent service, but also of a rent charge and rent seck. These be all the disseisins of a rent that our author speakes of. See hereafter [l] where a disseisin shall be by way of admittance of the owner of the rent. And *Littleton* doth adde the binding reason in case of forestalment, because the lord is disturbed of the meane by which he ought to come to his rent, whereof there hath beene spoken sufficient before (2), as well in case of the rent charge and rent secke, as of the rent service.

* See of this in the Chapter of Descents, 49 E. 3. 14. 49 Ass. 5. 29 Ass. 49, &c.

[l] Vid. Sect. 589.

"*&c.*" Of the *(&c.)* in the end of this Section, and what is implied therein, sufficient hath beene spoken before.

Now hath *Littleton* spoken of remedies for the recovery of the arrerages of rents. But since *Littleton's* time a right profitable statute * in the 32 yeare of H. 8. hath beene made for the recovery of arrerages of rents in certaine cases where there lay no remedy at the common law, and giveth further remedy in some cases where at the common law there was some (3) remedy; which statute hath beene well and beneficially expounded; and hereupon eight things are to be observed.

* 32 H. 8. ca. 37. (5 Co. 118. Dy. 375. b. 7 Co. 39. b. Ant. 148. a.)

1. When

(1) See more fully on this subject post. 253. b.
(2) Ant. 161. a.
(3) See as to this point infra note 4, and 162. b. note 1.

1. When *Littleton* wrote, the heires, executors, or administrators, of a man seised of a rent service, rent charge, rent secke, or fee farme, in fee simple or fee taile, had no remedy for the arrerages incurred in the life of the owner of such rents. But now a double remedy is given to the executors or administrators for payment of debts, &c. viz. either to distreine or to have an action of debt. 4 Co. 49, 50. a. Ognell's case.

2. That the preamble of the statute concerning executors or administrators of tenant for life is to be intended of *tenant pur auter vie*, so long as *cestuy que vie* liveth (4), who are also holpen by the said double remedy. But after the estate for life determined, his executors or administrators might have had an action of debt by the common law; but they could not have distreyned, which now they may do by force of this statute; for in that point it addeth [*m*] another remedy than the common law gave (1). 40 E. 3. Execution 98. 45 E. 3. lib. 31. 9 H. 6. 43. 14 H. 8. 20. 19 H. 6. 43. 34 H. 6. 20. 32 E. 3. Det. 9. 9 H. 7. 17. 19 E. 3. jurisdiction 22.

[162. b.]

(Cro. Cha. 471, 472.) [*m*] 23 Eliz. Dier 375. (Ant. 146. b.

3. If a man make a lease for life or lives, or a gift in taile, reserving a rent, this is a rent service within this statute.

4. The distresse is the more plaine and certain remedy than the action of debt; for the action of debt must be brought against them that tooke the profits when the rent became behinde, or against their executors or administrators; but the distresse may be taken upon the land be it either in the tenant's own hands or in the hands of any other that claimes by or from him (that is by interpretation 26 E. 3. 64. 11 H. 4. fol. ult. Ognel's caseub) supra, & 7 Co. 39. b. Billington's case.

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(4) This passage of lord Coke has been cited to prove, that he was of opinion against extending the *remedy* of the statute to the executors of a tenant for his own life, who before the statute were entitled to action of debt, but could not distrain. See Hool v. Bell, in 1 L. Raym. 172. But I think, that lord Coke was misunderstood. He appears to me to have merely intended to guard against an error of law, into which the generality of the *preamble* of the statute might lead uninformed persons; the preamble reciting that the executors of *tenants for life* had no remedy, without distinguishing what kind of tenants for life; whereas in truth the executors of tenant for *his own life*, and also the executors of tenant *pur autre vie*, after death of *cestui qui vie*, had remedy by action of debt before the statute. That it was not the meaning of lord Coke to restrict the benefit of the statute to cases in which there was no remedy before, and on that account to exclude the executors of tenants for their own lives from the remedy of distress given by the statute, is to me clear; because he himself states, both in a preceding and in a subsequent paragraph, that the statute sometimes operates by adding a remedy to that before existing at common law. See further as to this point, infra note 1.—[Note 298.]

(1) This doctrine is impugned by the court's resolution in *Turner* v. *Lee*, Cro. Cha. 471, for according to that case the statute of H. 8, only applies, where the common law gives no remedy. To this construction also the preamble of the statute affords countenance. However in a case in Cro. Eliz. 332, it seems to have been taken for granted, that the statute did not operate thus restrictively; and in *Hoole* v. *Bell*, 1 L. Raym. 172, it was adjudged, that the statute being remedial extends to the executors of *all* tenants for life, as well to those executors who previously to the statute were entitled to action of debt, as to those executors who had no remedy whatever. Ever since too this last case, I apprehend the law to have been taken accordingly. See further as to this construction, supra note 4.—[Note 299.]

interpretation under him) by purchase, gift or descent. And these words, *claiming onely by and from him*, are to be understood claiming onely from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheate claimeth not under the tenant by purchase, gift, or descent, but by reason of his seigniory, which is a title paramount (2).

5. If there be lord and tenant and the rent is behinde, and the lord grant away his seigniory, and dyeth, the executors shall have
(2 Sid. 29.) no remedy for these arrerages; because the grantor himself had no remedy for them when he dyed in respect of his grant, and the statute is (in like manner as the testator might or ought to have done) *Et sic de similibus;* for the act giveth no remedy, when the testator himselfe hath dispenced with the arrerages, or had no remedy when he dyed (3).

6. If the tenant make a lease for life, the remainder for life, the remainder in fee, the tenant for life payes not the rent due to the
(4 Co. 51.) lord, the lord dyeth, the tenant for life dyeth: the executors cannot distreine upon him in remainder, because he claimes not by or from the tenant for life. And so it is of a reversion for the cause aforesaid. But if a man grant a rent charge to *A.* for the life of *B.* and letteth the lands to *C.* for life, the remainder to *D. in fee*, the rent is behinde by divers yeares, *B.* dyeth, and after *C.* dyeth: *A.* may distrein *D.* in remainder for all the arrerages, by the latter branch of the statute of 32 H. 8. And this diversity riseth upon the severall pennings of the former branch and of this latter, which you may reade in the statute it selfe, and so expounded and
[o] 5 Co. 118. Edridge's case. adjudged [o] in *Edridge*'s case, and the latter clause giveth the lesser estate the greater remedy.

7. For the arrerages of a *nomine pœnæ*, and for reliefe, or for
* 40 E. 3. 3. b. 11 H. 4. 85. 14 E. 4. 4. 20 H. 7. 1. a. 28 H. 8. Dier 24. aid *pur faire fits chivaler* or *pur file marier*, this statute * giveth no remedy. For, for the arrerages of the *nomine pœnæ*, the grantee himselfe may have an action of debt, and consequently his executors or administrators: and yet the *nomine pœnæ* as an incident to the rent shall descend to the heire. For reliefe the lord cannot
[p] 34 E. 1. Avowry 233. F. N. B. 122. 10 H. 6. 11. 11 H. 6. 8. Mich. 32 H. 8. Rot. 429. Leake's case. Ognel's case ubi supra. have an action of debt, but distreine; but his executors by [p] the common law shall have an action of debt (4), for it is no rent but a casuall improvement of services. For the said aides, if the lord doth levy them, the son and the daughter respectively shall have an action of debt against the executors or administrators of the lord, and if they have nothing, then against the heire; but this is by the statute (q) of W. 1. *Note*, that all manner of arrerages of rents issuing out of a freehold or inheritance, whether they be
3 E. 3. Debt 157. (3 Co. 66. Cro. Eliz. 893.) in money or corne, cattell, fowle, pepper, comine, victuall, spurres, gloves, or any other profit to be delivered or yielded, and whether they be annuall or every two, three or four yeares, &c. or the like,
[q] W. 1. ca. 36. F. N. B. 82. 122. are within this statute; but work dayes, or any corporall service, or the like, are not within this statute.

8. A feme sole is seised of a rent in fee, &c. which is behinde and unpaid; she taketh husband; the rent is behinde again; the wife

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(2) For other cases not within the statute on a like ground, see Cro. Eliz. 332. 1 Leon. 302. 2 Vern. 612. See also on the extent of this branch of the statute Edridge's case, 5 Co. 118.

(3) Acc. by Vaughan chief justice, in his Reports 40.

(4) Adjudged accordingly in a case in Noy 43, and Cro. Eliz. 883. See also acc. ant. 83. a. & b.

wife dyeth: the husband by the common law should not have the arrerages growne due before the marriage, but for the arrerages become due during the coverture the husband might [r] have an action of debt by the common law. But now this statute * by a particular clause giveth the husband the arrerages due before marriage, and the said double remedy for the same, that he may distreyne for the arrerages growne due during the coverture. So it giveth him that which he could not have before, and further remedy for that which the common law gave him. And so it hath beene [s] adjudged.

[r] 26 E. 3. 64. 10 H. 6. 11. (Cro. Jam. 28.) * 22 H. 6. 25. F. N. B. 121. (Post. 351. b.)

[s] Hill. 17. Eliz. Rot. 457. inter Sharpe & Pole. Vide Ognel's case ubi supra.

The bishop of [t] *Norwich* had the first-fruits of all the clergy within the diocesse at every avoydance; the church became void, and another parson became incumbent, who paid the bishop parcell of his first-fruits according to the taxation of the church, and for the rest he had a day given unto him to pay it; the bishop dyed; the residue was not payd, whereupon his executors brought an action of debt: and it is adjudged that no action doth lie, because it is a meere spirituall thing and no lay contract, and therefore the court had no jurisdiction to hold plea of it.

[t] 19 E. 3. Jurisdict. 22.

I have been the longer in the exposition of the said statute (5), for that it is a generall case, and doth concerne most part of the subjects of England (6).

Finis Libri Secundi.

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(5) In 18 Vin. Abr. 542, most of the cases on this statute since lord Coke's time will be found distributed according to the several clauses. See also Gilbert on Action of Debt, b. 1. chap. 2 & 3.

(6) The only clause in the statute of Ch. 2, for converting military into common socage tenures, which seems to affect rents, is a proviso to preserve rents certain, and to make the reliefs on them universally the same as on the death of tenant in common socage. See 12 Cha. 2. c. 24. s. 5, and as to the difference between relief for knight's service, and relief for common socage, ant. Sect. 112 and 126, with the commentary thereon. But various other statutory provisions relative to rents have been made since lord Coke's time; and as these are very material to the recovery of rents, it may not be amiss here to take a general review of the chief of them, though some have been incidentally noticed before in the chapters on *tenants for years* and *tenants at will*.

I. There are several statutes, which extend the remedy for arrears of rent by action of debt. By the 8 Ann. c. 14, debt is given for rents on leases for a life or lives *during their continuance*, which the common law denied. Ant. 47. a. note 4. The 11 G. 2. c. 19, gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a rent-day, and by his death the lease determines, in which case the lessee or under-tenant by the common law might have avoyded paying any rent. And by the 5 G. 3. c. 17, which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for recovery of rent on such leases. Ant. 47. a. note 4.

II. Other statutory provisions extend the remedy for rents by distress to cases to which it was before inapplicable, particularly to *rents seck*. Thus the 4 G. 2. c. 28, on account of the tediousness and difficulty of the remedy for rent seck, and also rents of assise and chief rents, (though why these two latter were added I do not understand) enables distraining for such rents, where they have been duly answered for three years, within twenty years before the first day of the then session of parliament, *or where created afterwards*, as in

in case of rent on a lease. So too the 4 Ann. c. 14, gives distress for arrears of rent *after determination* of any lease, whether for life or lives, for years or at will, but with a proviso, that the distress be within six calendar months after such determination, and during continuance of the landlord's title and possession of the tenant indebted; whereas by the common law the power of distress ceased with the tenure.

III. Other statutory provisions have variously improved the remedy of distress for rents, where it is applicable; namely, by enabling the sale of the property distrained, and so giving to it the effect of an execution, by making new subjects of property distrainable, by newly regulating the mode of impounding distresses, by authorizing to distrain in *any place* things fraudulently carried off the premises to evade distress, and by preventing the avoidance of the *whole* distress for a mere informality or irregularity in *part* of the process. See 2 W. & M. c. 5. 8 An. c. 14. 4 G. 2. c. 28, and 11 G. 2. c. 19, to which add 3 Blackst. Com. 9th ed. 6 to 15, where the effect of these statutes is admirably incorporated into his view of the law of distresses with his usual excellence of order.

IV. The 8 An. c. 14, s. 1, secures to landlords to the amount of a year's rent where so much or more is in arrear, in preference to persons seizing goods on the land in lease under an execution; but this favour is granted with a proviso to prevent prejudice to the crown in recovering and seizing debts, fines, and forfeitures.—[Note 300.]

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