THE

FIRST PART

OF THE

Institutes of the Laws of England;

OR, A

COMMENTARY upon LITTLETON:

Not the NAME of the AUTHOR only, but of the LAW itself.

Quid te vana juvant miseræ ludibria chartæ?
Hoc lege, quod possis dicere jure meum est. MART.

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

Hæc ego grandævus posui tibi, candide lector,

Authore EDWARDO COKE, MILITE.

The FIFTEENTH EDITION;

Revised and Corrected, with further Additions of NOTES, REFERENCES, and PROPER TABLES.

BY FRANCIS HARGRAVE AND CHARLES BUTLER,
ESQUIRES, OF LINCOLN'S-INN.

Including also the NOTES of
Lord Chief Justice HALE and Lord Chancellor NOTTINGHAM:
AND
An ANALYSIS of LITTLETON, written by an Unknown Hand in 1658-9.

London:
Printed for E. and R. BROOKE, Bell-Yard, near Temple Bar.
M,DCC,XCIV.

TO THE RIGHT HONOURABLE

EDWARD, LORD THURLOW,

BARON THURLOW OF ASHFIELD,

IN THE COUNTY OF SUFFOLK,

LORD HIGH CHANCELLOR OF GREAT-BRITAIN,

THIS WORK

IS,

WITH HIS LORDSHIP'S PERMISSION,

RESPECTFULLY DEDICATED.

THE EDITOR's 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 ſhewn in the additional notes and references. But a work like Sir Edward Coke's Commentary, ſo crouded 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 him to *omit any* part of the *original* work; though, in reſpect to the references, ſuch a liberty is 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. Lit. 22. a. —The various readings of Littleton, taken from the edition by *Lettou* and *Mechlinia*, 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.

very

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 ſhew 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-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 incloſed between *parentheſes*;

* 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 ſhew, 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 ſcarce 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 at all events to make great ſacrifices, rather than ſuffer it to languiſh in his hands.

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, ſhewing 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 *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

* The notes added in the 11th and 12th editions, excluſive of extracts from acts of parliaments, are ſo *few*, that all put together ſcarce 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.

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 accidently 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* 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

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

editor

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 ardor, 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.

* From ſome late circumſtances there is reaſon to apprehend, that the editor's ſituation in reſpect to the work he has undertaken is greatly miſunderſtood. The intire *conduct* of the edition is intruſted to him; but he is not the *proprietor* of it; nor is he perſonally intereſted in the *loſs* or *profits*, which may attend the publication. His engagements to the *proprietors* of the edition are of a very *limited* kind. Thoſe he has entered into with the *public* are very *extenſive*. For the *former* engagements, a benefit, which was offered without any application on his part, is ſecured to him, independently of the event of the publication; but he can truly ſay, that it was the *leaſt* of the conſiderations, which induced him to undertake the work, and that he would ſtill chearfully renounce it, if by ſo doing he could render the work more valuable to the *public*. For his *latter* engagements he deſires no other reward, than the approbation of thoſe for whoſe benefit his labours are intended.—The editor finds, that ſeveral reſpectable perſons have expreſſed ſurprize at publiſhing the work by *Numbers*. This mode of publication, though, in itſelf, not liable to any great exception, has, by the *abuſe* of it, become rather diſreputable in the *appearance*; and therefore when it was firſt propoſed to the *Editor* by the *proprietors* of the Edition, he objected to it. But on conſidering the great and immediate expences incident to their undertaking, and the other reaſons urged by them, they were found too cogent to be reſiſted; and the editor was the more eaſily induced to acquieſce, becauſe he found the proprietors moſt ready to put themſelves to every expence which he recommended, for the purpoſe of rendering the work more acceptable to the public.

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 labors, 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.

IT *. This to be ſure is the moſt favourable point of view for the editor; its tendency being to ſhew, 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 favourite 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 ſtile an undefeaſible abandonment of a work ſo long promiſed to be compleated, 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.

* 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 folios ſhort of one-half of the work.

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

PREFACE

TO THE

THIRTEENTH EDITION.

General observations on Littleton's Tenures.

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, quo 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 "nominis 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 ac procuratoris regii (king's ſerjeant) muneri a° 1455 admotus, 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 honoribus "a° 1475 donaretur. Vivere deſiit a° 1533 *.—Unicum librum ſcripſit, "ſed

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

" ſed qui plurium loco eſt, ſi ſpectas eruditionem et argumentum. In eo " excuſſit doctrinam juris patrii difficillimam, graviſſimam, uſuque quoti- " diano maxime commendabilem ; qualia nempe, et quotuplicia ſint feuda " Angliæ, quænam eorum jura, obligationes, præſtationes atque ſervitia. " In uſus quidem Richardi filii, et aliorum quorundam ad explicanda illis " capita aliquot opuſculi DE TENURIS ab incerto auctore Edoardi III. " ævo conſcripti. Gallicè primo fuit compoſitus, mox Gallice deinde " ſæpius et Anglice, mox vero Gallice et Latine, typis excuſus. Vi- " ginti 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 ſtatuunt Biographi Brit. vol. V. qui " cum Nicolſono, p. 233. late etiam de argumento imprimis, et divi- " ſione libri agunt. Editio duodecima 1738 lucem vidit. Cokius in " præfatione ſui ad Littletonum Commentarii, de quo mox diſſeram, inter " plura quæ auctorem concernunt ejuſque opus XV. ICtos nominis " magni alios appellat, qui eodem tempore floruerunt. Exhibet præte- " rea imaginem Littletonianam. Cæterùm liber ob methodi brevitatem, " argumentandi ſubtilitatem, atque dictorum ordinem, laudem omnino " meretur ; ſed nec minus fatendum eſt, adeo ſæpiſſime obſcuritati bo- " num hominem ſtuduiſſe, ut ænigmata legum maluiſſe, quam præcepta, " tradere videatur. Multa jam immutata eſſe, plura inveterata atque " obſoleta, non urgeo. Interim communis ICtorum Anglorum hæc vox " eſt perfectiſſimum et abſolutiſſimum hoc opus eſſe ex omnibus quæ un- " quam in ulla ſcientia humana ſcripta 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 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 Bar- " tolinis 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 artem digeſtorum "aut principia certa juris ulla perceperunt unquam; ſuaves tamen ad ri- "dendi 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 particular 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.

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 Moulins's Commentarii in "priores tres Titulos Conſuetudinis Pariſienſis †," or the more modern treatiſes of Monſieur Germain Antoine Guyot ‡, and Monſieur Hervé §.

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.

* 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 Penſey, under the title of "Traité des Fiefs de Du Moulin, Analyſé et Conferé 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'Intelli"gence, y repandent de nouvelles Lumieres, et menent a des Definitions 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 entitled, "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 1779, entitled, "Joannes Adami Koppii Hiſtoria Juris Scientiæ Romanæ "Feodalis Privatæ ac Publicæ. 1 vol. 8vo."

"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 dili-"gently, and shew 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, without enquiring 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 of Littleton and sir Edward Coke, and shewn 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 those 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 enquiries 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 feudality. 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 STEWART'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

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 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

* In the preſent *(fifteenth)* edition an attempt is made to continue Mr. Hargrave's enchoate note on the Feudal Tenures, and to render it as uſeful as the nature of the ſubject admits to the practitioner and the ſtudent.

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 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 arite 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

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. Wheate 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 of it was allowed. He ſhews, 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 12th 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 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 1585 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

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 ſhew 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 Abridgement 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 for the communication 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

* The preſent Earl of Hardwicke.

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 cæmeterio Sti. Pauli
London, *27th die* Julii, *anno regis E. 4ti. 20mo.* 10s. 6d.

that this date ſhewed 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 "26. 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 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 MSS. 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.

" 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 compleated 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,

D E O,

P A T R I Æ,

T I B I,

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

But ſhe being fair, and of a noble ſpirit, and having large poſſeſſions and inheritance from her anceſtors de Littleton, and from her mother, the daughter and heir of Richard de Quatermains, 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. 11.

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 afterward 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,

King's ſerjeant, Rot. Pat. 33. H. 6. part. 1. m. 16.

which places he held under king *E.* 4. until he, in the ſixth year 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.

Mich. 34. H. 8. fol. 3. a. Judge of the Common Pleas, Rot. Pat. 6. E. 4. part. 1. m. 15.

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 in that he flouriſhed in the time of many famous and expert ſages of the law. [*a*] Sir Richard Newton, [*b*] ſir John Priſot, [*c*] ſir Robert Danby, [*d*] ſir Thomas Brian, [*e*] ſir Pierce Ardern, [*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

* That Littleton did intend to write of thoſe tenancies, is plain from the 291ſt and 324th Sections; but it may be juſtly queſtioned whether the fact alledged by my lord Coke, to ſupport his opinion, be true; becauſe in the copy of the Rohan edition, now in Lincoln's-Inn Library, and in that at this time in the bookſellers cuſtody, the Table mentions nothing concerning theſe tenancies; nor does it ſeem probable that there ever was any other table, both the copies appearing on the niceſt examination to be complete. *Note to the 11th edition.—See alſo Note on Sect. 241. of the preſent edit.*

courts

courts 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 vertuous 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 them more particularly to ſuch as have been

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

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.

His marriage.

He married with Johan, one of the daughters and coheirs of William Burley, of Broomſcroft-caſtle, in the county of Salop, 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 iſſue.

The re-eſtabliſhment of his poſterity, by the matches of his three ſons with virtue and good blood.

In his life-time, he, as a loving father and a wiſe man, provided matches for theſe three ſons, in virtuous 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 Johan 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 Winſbury 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.

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 Ed-

ward

His executors, his supervisor.

ward the 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 dioceses. 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 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,

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

F. N. B. 212. c.

Note.

When this work was firſt imprinted.

He

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

† 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

His picture.

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,

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, 'twill 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 'tis 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 truly corrected." And in the end, *Expliciunt 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 abovementioned, 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 'twas 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 printed a Chronicle of the Dutchy of Normandy, as appears by his name and cypher 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 'tis 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 abovementioned Chronicle, which hath not so much marks of antiquity, was printed in that year; and from what has been observed concerning the manner 'tis 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.*

that

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: The figure of his mind.

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

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 compleat lawyer; I mean of logick, as you shall perceive by reading of these Institutes, wherein are observed his syllogisms, 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. Good pleading. Logick. Seneca.

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 humane 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 The commendation of his work.

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 further, 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 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

Note.

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

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.

What is endeavoured by theſe Inſtitutes.

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 judgement 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 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

Wherefore called Inſtitutes.

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

him in a ready way to the knowledge of the national laws of England.

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 profeſſion 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*, 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 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 go-"vern 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 no-"bles, and other of the ſaid realm have been, good go-"vernance 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 neminem oportet eſſe ſapientiorem legibus*, No man ought to be wiſer than the law.

36. E. 3. cap. 5.

Regula.

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 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.

36. E. 3. ub. ſupr.

This work we have called "The Firſt Part of the Inſtitutes," 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.

Wherefore called the Firſt Part.

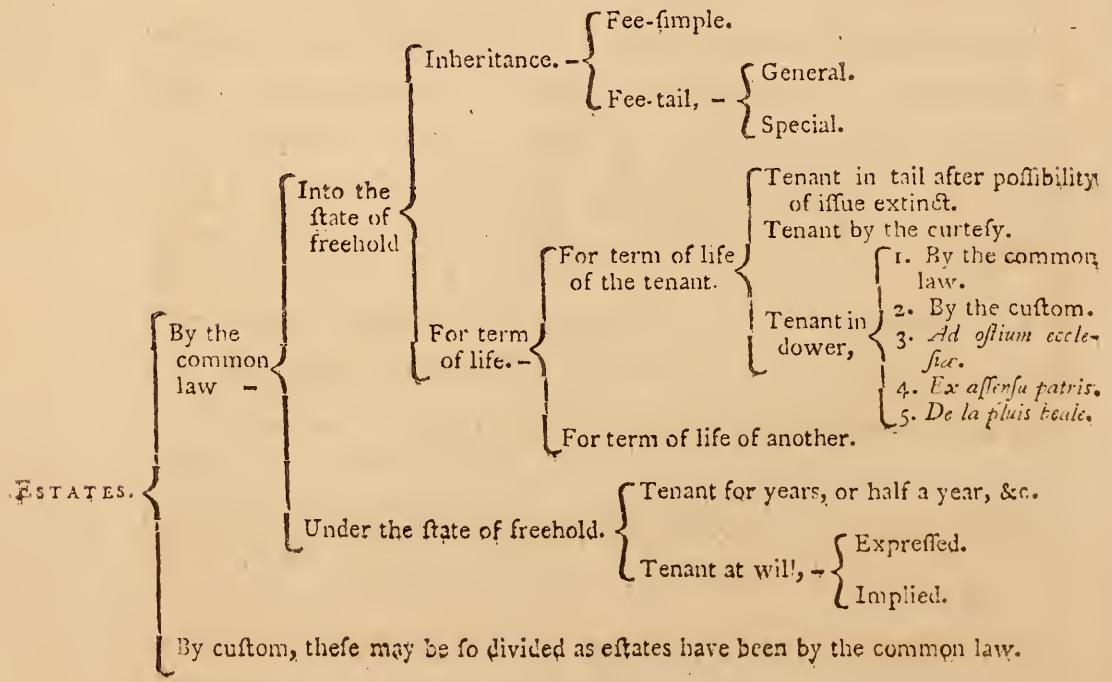
Before I entered into any of theſe Parts of our Inſtitutes, I acknowledging mine own weakneſs and want of judgement to undertake ſo great works, directed my humble ſuit and prayer to the Author of all goodneſs and wiſdom, out of the Book of Wiſdom; *Pater et Deus miſericordiæ, da mihi ſedium tuarum aſſiſtricem 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!* "Oh "Father and God of mercy, give me Wiſdom, the aſſiſtant of thy ſeats! Oh 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 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

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 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;

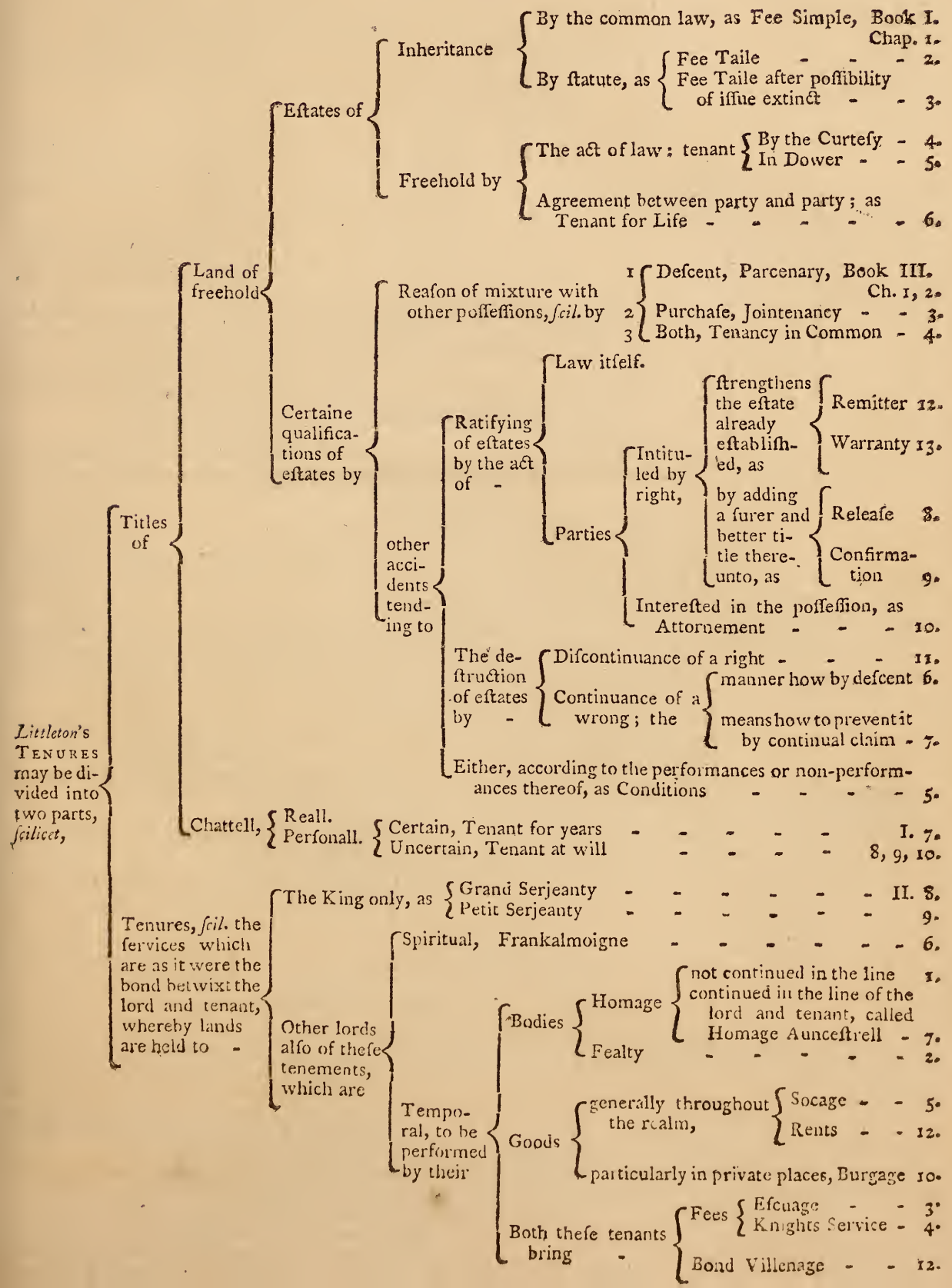
proceed; for on ſome other day, in ſome other place, that doubt will be cleared. Our labours herein are drawn out to this great volume, for that our author is twice repeated, once in French, and again in Engliſh.

ANALYSIS

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.
      - Expresly, 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 o. 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 special, 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 moiety, 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 pluis 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 recompence 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 exchangers 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, 82. 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, 84.
    - 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 bareheaded, 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 king's 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 out of ward at full age, *scil.*
          - 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.
          - Of an heir male at the age of 21 years, which is full age of male and female, except he enters 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 her ancestor, 103.
        - Of the gardian; which is gardein
          - *En droit*, by reason of the tenure, as before, 116.
          - *En fait*, where the other grants 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 the lord marry his ward within the age of 14 years, and he then disagreeth, as he may, or that his wife die during his minority, he shall not be in ward again to him for his body, 104, 105, 106.
          - When the heir shall be said to be married to his disparagement, 108. Of the kinds thereof, *quære*, 109. But generally it cannot be if the ward be above the age of 14 years at the time of his marriage, 107.
        - What penalty if the gardian thus marry him.
          - The friends of the ward may enter upon the gardian, 108. In their default it seems the ward himself may, 108.
      - What remedy, if the ward refuse to marry upon a lawful tender.
        - If he continue unmarried, he shall forfeit the single value of his marriage to his lord, 110.
        - If he marry himself during his minority, the double value, 110.
    - Relief of the heir, if he be at full age at the death of his ancestor, which is after the rate of 100 sol. for a whole knights fee, 112, 113.

Socage. Lib. 2. Cap. 5.

- SOCAGE.
  - The tenure itself; where note
    - The divers forts 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 expences 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 ANCESTRELL.
  - 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*: it 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 ſocage 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 heretofore (which now are cities and counties), from whence come the burgeſſes to the parliament, 164. do hold 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 borough 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 to ſell, or to his wife, 167, 168, 169.
    - And ſuch generally as ſtand with reaſon, and have continued time out of 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 tenant, being a freeman, 209.
    - To have amends at his own pleaſure for damage done unto 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 niefe, 186. hold lands of their lord at will to do villein ſervice, which ſervice a freeman may alſo hold by; for the condition of a villein owner of lands altereth the nature 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. when a man hath a manor to which a villein is regardant, 181.
    - In groſs.
      - When a villein regardant is granted by deed to another, 181.
      - When one is ſeiſed of a villein by preſcription, 175. 182. wherein, as in ſuch like, one may not preſcribe but by ſhewing a deed, &c in him and his anceſtors, whoſe heir he is, 183.
      - When one confeſſeth himſelf to be a villein in court of record, 175. 185. as a baſtard cannot be a villein otherwiſe, 188. and then this iſſue born before ſuch confeſſion is free, 176. born after is bond, although the mother were free, 187.
  - The miſchiefs thereof
    - To the perſon of the villein.
      - The lord may ſeize his villein, although a chaplain ſecular, 202; but if the lord maim his villein, the king it ſeemeth may puniſh it, 194.
    - To his poſſeſſions.
      - His lands and goods are his lord's by ſeizure, not otherwiſe, 177. unleſs the king be lord, *cui nullum tempus occurrit*, 178.
      - His reverſions, 179. and his advowſons *plein d'incumbent* by claim, 180.
- The means how he may be free.
  - Expreſly by charter of manumiſſion, 204.
  - Implied. This is
    - For a time only.
      - When a villein entereth 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, 189. appeal of rape, 190. as executor, 191, 192. if the lord make not proteſtation that he is his villein, 193.
          - Where he ſhall not; for in other actions villenage in the defence or plea is a good plea in abatement of the action, 195, 196. as alſo is outlawry, 197. attainder in *præmunire*, 199. profeſſion in religion, 200. Excommunication pleaded by the letters of the ordinary a good plea till abſolution, 201.
        - Of the lord againſt the villein;
          - If the lord bring a *præcipe*, &c. or other action of debt, treſpaſs, &c. 208.
          - Or an appeal of felony not grounded on an indictment, if it be found with the defendant, 208.
      - Otherwiſe.
        - If the lord make an obligation to his villein, or a leaſe, or feoffment, 205, 206.
        - But it ſeemeth a leaſe at will, for the uncertainty is no franchiſement, 207.

Rents. Lib. 2. Cap. 12.

RENTS are three ſorts.

- 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 fort, 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 this 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 this 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, *scil.* 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.
          - that tenant in taile shall not discontinue, 362, 363. and by such condition it is said the right of the taile may be preserved to the issue; *quære quomodo*, 364.
    - How they may be made.
      - When one maketh a gift in taile, a feoffment in fee, a lease for life or years upon condition, 325, 326.
      - Upon what estates.
        - When lands are mortgaged in such manner, 332, 333, 334, which because it is payment of money, or something in satisfaction thereof, which is as good if it be accepted, 334, there must be considered
          - The persons
            - By whom the payment should be made.
              - By the feoffor only, if no day be limited for the payment, 337.
              - By others; as by the heir, if the feoffor die before the day of payment, 334, or by his executor, 337, or feoffee, 336. of whom the feoffee in mortgage must receive the money upon lawful tender, or else he shall lose the land, and yet be without remedy for the money, 335. 338. but if a stranger tender it, he is not bound to receive it, 334.
              - To whom, *scil.* the feoffee himself, or if he die before the day, to his executor, unless it be expressly appointed to the heir, 339.
            - The place where.
              - If none be appointed, some say the feoffor must seek the feoffee any where within England, 340; others say it sufficeth if he tender it upon the land, *quære, ibid.*
              - If there be a place appointed, (as it is good to have it as certain as may be), 342. the feoffee need not receive the money elsewhere; but if he do, it is good, 343.
      - By what means *A**.
    - In the operation of them, *B* †.
- In law, where the law itself annexeth it, 378; and therefore in pleading there need no deed to be shewed, 378. This is annexed either - -
  - To officers of trust, that the trust reposed be performed by himself or his sufficient deputy, if the grant be to be executed by a deputy, 378, 379.
  - To lands,
    - Where the estate dependeth upon a contingency; as if a lease be made to baron and feme during the coverture; or if a lease be made to have as long as the lessor is abbot, 380, 381, 382. Where it was conveyed upon confidence; as where lands are devised to executors to sell to the behoof of the testator, 383.

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

- *A.* By what means Eſtates upon Condition *in fait* are created,
  - Without deed; as if a condition be made upon the livery, 359.
  - With deed; in which note
    - The force of the deed: for a condition to defeat a franktenement cannot be pleaded without deed, but for a chattel it may, 365. yet the jury, by a verdict at large, may find ſuch a condition without, and the party may take benefit of it if he be not enforced to plead it, 366, 367, 368, 369.
    - The form of it,
      - In regard of the words which import a condition, *ſub conditione*, 328. *proviſo ſemper et ita quòd*, 329. *ſi contingat*, with a clauſe of re-entry, 330, 331.
      - In regard of the faſhion of the deed; for either it is -
        - Poll; and then it is doubted whether the feoffor may plead the condition, becauſe by intendment it appertaineth to the feoffor; yet it ſeemeth he may plead it, *quære*, 375, 376, 377.
        - Indented. In this obſerve
          - The manner of making them.
            - In the firſt perſon, 372.
            - In the third perſon, 371. and both are equally good, if mention be made that both perſons have put to their ſeals, 373.
          - The manner of pleading them, when the ſhewing of one part is as good as of the whole; for be it bipartite or tripartite, it is all but one deed, 370.

- *B.* The operation of Eſtates upon Condition *in fait*.
  - Whom do they tie; *ſcil.* any
    - That come in by deſcent; and although there be divers diſſeiſins and deſcents paſt, yet the working of a condition ſhall take place, 391, 392. 409.
    - That come in remainder, although the particular tenant only receive the condition, 374.
  - How they do tie thoſe that are ſubject thereunto, *ſcil.* either
    - To leave their eſtate entire, and detain but the uſe only for a time; as when a leaſe is made, and rent reſerved with a condition to re-enter upon non-payment, and detain it until, &c. in manner of a diſtreſs, 327.
    - To wipe away the whole eſtate in ſuch degree, diſcharged as it was at the time of the making of the condition, 358. This is
      - Upon breach of the condition, where the feoffor may enter.
        - And in ſuch caſe, where an entry is congeable, the franktenement reſteth not without entry, 351.
        - But ſuch entry or re-entry can be reſerved to none but the feoffor and his heirs, 347. as *Richell's* caſe is, 720, 721, 722, 723, 724. For if a feoffment be made to pay a yearly rent to a ſtranger, the condition is good, yet the rent is but a penalty to the feoffee, *ibid.*
      - Upon ſuch an act done that the condition cannot afterwards be performed.
        - By the act of God; as by the death of them to whom the condition is to be performed: but if ſome of them only be dead, the feoffee muſt perform it to the other as near the meaning of the parties as he may, and ſo be diſcharged, 352, 353, 354.
        - By the act of the party, *C.* Vide *infra*.

- *C.* Acts of the party that the condition cannot be performed afterward by him, and yet he ſhould perform the condition as if it were to make a feoffment, and the feoffee - - - -
  - Make a feoffment or a leaſe for life to another, 355.
  - Or make a leaſe for years, 356.
  - Or take a wife, if he were ſole at the time of the feoffment, 357.
  - Or if he charge the land, *quære de hoc*, 358.

Eſtates upon Condition. Lib. 3. Cap. 6. and 7. *Continued.*

Deſcents. Cap. 6.

DESCENTS.

- When deſcents do take away the entry of ſuch as have right.
  - Upon a diſſeiſin, when a diſſeiſor being a body natural, 413. dieth naturally, 410. ſeiſed in fee ſimple, 385. 387. or a donee in taile from a diſſeiſſor dieth ſeiſed in taile, 386, 387. in poſſeſſion, 388. and this by courſe of law doth immediately deſcend to his iſſue or ſome collateral heir, 389. 394. not party to the diſſeiſin, 395. But an eſcheat for want of his heir is not ſo, 390. And this putteth him that hath right to his action until the impediment be removed; as if the heir endow his mother, 393. or that the diſſeiſee within age entereth upon the heir in by deſcent, 407, 408. in theſe caſes the entry of the diſſeiſee is revived, 409.
  - Upon an abatement between brethren; as if the younger entered upon lands deſcended to the eldeſt, the eldeſt not having made any actual entry, 396, and dieth, ſuch deſcent taketh away no entry, 396. So it is of two coparceners, if one enter into the whole, 398. but if he which abateth were a baſtard in the law of the land, yet a *mulier* in the ſpiritual law, and died ſeiſed without interruption, ſuch deſcent doth not only bar the *mulier* of his entry, but alſo of his action, 399, 400, 401.
- What manner of perſons ſhall not be prejudiced by ſuch deſcents.
  - In regard of their eſtates, leſſee for years; for he leaveth the reverſion in the heir which is in by deſcent, 411. but it is otherwiſe of a tenant for term of life, 411.
  - In reſpect of
    - The circumſtances.
      - Of time in which the diſſeiſin and deſcent was, viz. if it be in time of war, it taketh away no entry, 412.
      - Of making the claim.
        - Expreſly.
        - Implicatively, by bringing of an action; but if a deſcent be caſt *dum curia adviſare vult, quære*, 422.
    - The privileges of the perſons of ſuch as ſhould make their claim.
      - For defects
        - In themſelves,
          - Infancy, 402.
          - Coverture, 403, if no title of entry were given but only the coverture, 404.
        - In others; as the heir ſhall avoid a deſcent caſt in the time of his anceſtor *de non ſane* memory, as well as he ſhall a feoffment; neither of which the anceſtor himſelf could avoid, 405, 406.
      - For impediments. *Vide A. infra.*

A. for impediments.

- For diſtance of place; as if he were out of the realm
  - About the king's affairs, 439.
  - Otherwiſe, for ſuch by intendment cannot have notice of things done in the realm, 440. and ſuch ſhould not have been barred by a fine before the ſtatute of non-claim, 441.
- By recluſe of their perſons of neceſſity.
  - 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.
  - Civil; for the aid of their profeſſion; therefore if one enter into the lands of an abbey in time of vacation, and die ſeiſed, *quære* if ſuch deſcent ſhall bar the next elected abbot of his entry, 443.

Continual Claim. Lib. 3. Cap. 7.

CONTINUAL CLAIM.

- How this claim muſt be made. For this conſider
  - The perſons which ſhould make it.
    - He himſelf which then hath title of entry, whoſe claim ſhall avail for thoſe in remainder or reverſion, 416.
    - Some other for him; as his ſervant; which being made by his commandment, and in his name, ſufficeth, if it be made in ſuch effectual manner as the maſter himſelf durſt have done it at the time of the commandment given, 432, 433, 434. otherwiſe *quære* how it ſhall avail, 435.
  - The circumſtances in making of it.
    - Of time. It muſt needs be made within the year and day of the death of the diſſeiſor, elſe it giveth no benefit of entry to the diſſeiſee, 423, 424, 425, 426, 427, 428.
    - Of place.
      - In the land whereof one is diſſeiſed, or in parcel of it, in the name of all in the ſame county, 417, 418.
      - If one dare not enter into the land itſelf, then in ſome place ſo near the land as he dare, 419, 420, 421.
- The operation of it when it is made.
  - For purging the preſent *tort*, it defeateth the eſtate upon which the claim was made; as if it were upon a tenancy in taile, the continuance of occupation afterwards is a new diſſeiſin, which giveth a fee, 429. for which the claimor may maintain an action of treſpaſs, or *quare vi et armis, &c.* or upon the ſtatute 5 *R.* 2. 7. & 8. *H.* 6. 9. 430, 431.
  - For preſerving the future right of entry after ſuch claim made; for then the entry of the claimor is congeable, notwithſtanding the deſcent of any, 414, 415. 422.

Releaſes. Lib. 3. Cap. 8.

RELEASES.

- The making of them; which is to be conſidered
  - In the matter whereof it is made; for either it is
    - Of lands, 444.
    - Of other things; as - -
      - Actions
        - Real, which barreth not an entry, 496.
        - Perſonal, which barreth not the repriſal of perſonal things, 497, 498.
        - Either of theſe is a bar of mixt actions; as - { Waſte, 492. / Aſſiſe, 494.
      - Appeals; which barreth an appeal of murder or robbery; and ſo doth a releaſe of all manner of actions, 500, 501. and an appeal of mayhem by a releaſe of actions perſonal, 502.
      - Errors; for other releaſes bar not by bringing a writ of error to reverſe an outlawry, 503.
      - Executions; which a releaſe of all actions will not bar, unleſs it be a *ſcire facias* after the year, 504, 505, 506, 507.
      - All manner of demands. This is the ſureſt releaſe, 508, 509, 510. but a releaſe of all manner of quarrels, *quære* of what effect it is, 511.
  - In the manner of making of it in reſpect of
    - The perſons to whom a releaſe of right of land may be made; either to the tenant
      - Of the freehold.
        - In deed, 447.
          - By a deſcent without actual entry, 448.
          - By ſuit in law; as
            - If the tenant in a *præcipe* alien depending the ſuit, a releaſe to him notwithſtanding is good, 490, 491.
            - To the vouchee, who is ſuppoſed tenant in the eye of the law, 491.
          - By reaſon of an ancient right remaining in him to whom the releaſe is made; as between lord and tenant, if the latter be diſſeiſed in regard of the privity, this releaſe is good as to the extinguiſhment of the ſeigniory, 454. 458. but a releaſe to the tenant which hath made a feoffment is void, 457. ſo it is between donor and donee in tail, 455. ſo between leſſor and leſſee, but then the rent only is extinct, and not the reverſion given away, 456.
        - In law, 447.
      - In poſſeſſion; as to - -
        - Leſſee for years, after his actual entry, 459. leſſee at will, as it ſeems, 460. but not to him that occupieth only by permiſſion of the owner without any leaſe, and that is for want of privity, 461. unleſs it be between feoffor and feoffee upon confidence, 461, 462, 463.
      - In reverſion ſometimes; as if a diſſeiſor make a leaſe for life, 449. but not to one in remainder *in droit*, 451. and ſuch a releaſe ſhall benefit the particular tenant, if he have the deed to ſhew, *et è converſo*, 453.
    - The form of a releaſe. *Vide A. infra.*

- The effect of a releaſe.
  - Between the parties to the releaſe, it inureth by way of
    - *Mitter l'eſtate*, as between jointenants, 305.
    - *Mitter le droit*, as between diſſeiſor and diſſeiſee, 306. 466.
    - Extinguiſhment, 307, 308. and this is where he to whom the releaſe is made cannot have the things releaſed; as between lord and tenant for ſervice, or for rent charge, or common, 479, 480.
  - How it inureth.
    - Againſt ſtrangers
      - Entitled by the right; as if the releaſee had accepted it of a ſtranger upon condition, or had granted a rent charge, he ſhall avoid neither of them by a releaſe, without an actual entry of him who had right, 476, 477.
      - Claiming of wrong.
        - If there be two diſſeiſors, and the diſſeiſee releaſe to one of them, he ſhall hold out his companion; but a releaſe to one of the feoffees of a diſſeiſor inureth to both, 472, 473, 474, 475.
        - If an infant diſſeiſor alien in fee, the alienee dies to whoſe heir the diſſeiſee releaſeth, he ſhall bar the diſſeiſor, continuing yet within age, in a writ of right, 478. 481, 482, 483, 484, 485. in which writ the mere right cometh in queſtion, and not his lawfulneſs of poſſeſſion, 486, 487. 489. and he muſt count in ſeiſin of him or his anceſtors, and prove it according to the count, 514.
  - How it muſt be pleaded.
    - A releaſe of real actions can be pleaded by none but the tenant of the land, 494.
    - If a diſſeiſor make a feoffment, &c. and yet take the profits, and the diſſeiſee releaſeth unto him all real actions, and yet ſueth afterwards a writ of entry, in nature of an aſſiſe againſt him, *quære* how the diſſeiſor ſhall plead this releaſe to take any advantage thereby, 499.

A. the form of a releaſe; for the which note,

- That no future right paſſeth by way of releaſe, notwithſtanding the common form, 445, 446. therefore a releaſe
  - Of a debt due upon an obligation before the day of payment is good, 512. of a rent-ſervice before the day void, 513.
- If it be made to enlarge an eſtate, the eſtate intended muſt be made and expreſſed, 465. 468. but if the releaſor hath but a right, 469, 470. or if the releaſee had a fee before, it needeth not, 467.

Confirmation. Lib. 3. Cap. 9.

CONFIRMATION.

- 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.
- The force of it,
  - 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 perpetual, 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. 533.
          - To take effect by way of remainder, 523. where it is neceſſary to have theſe words, *aver et tener*, 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.
  - Unleſs.
    - The party which ſhould attorn
      - Have ſufficient before the grant; as,
        - Where one jointenant releaſeth to another, there leſſee need not attorn, 574.
        - Where there is leſſee for life, the remainder for life, and the leſſor releaſeth in fee to him in the remainder, 575.
      - 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 *quant al faire avowry*, 557. and if there be meſne and tenant, the meſne muſt attorn, 555.
    - Upon grant of a reverſion, the tenant of the freehold, 571. and tenant in tail may attorn, but he is not compellable, 570.
    - Upon grant of a remainder, the particular tenant, 569.
    - Upon grant of a rent-charge, the tenant of the freehold, 556.
  - In what manner.
    - Expreſly, 551. where the attornment by one jointenant, 566, or by one kind of ſervice, if it be held by divers, 563, 564, is as effectual as if it were by all, becauſe the ſeigniory is entire.
    - Implicitely;
      - By accepting of the grant
        - Of a reverſion, 558, 559, 560.
        - Of a remainder; as where the eſtate of the tenant for life is confirmed with a remainder, 573.
      - By giving *un denier* 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,
    - What persons
      - May discontinue. They are either bodies
        - Politick; as an
          - 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.
        - Natural.
          - Tenant in tail, and driven them which have right to their formedon in descender, 595, remainder, 597, reverter, 596, as the case is.
          - The husband, if he alien his wife's land, 594.
      - May not, viz. the parson or vicar of a church, because they have no fee simple, 643, 644, 645, 646, 647. for a fee may be in abeyance, 648. as when tenant in tail releaseth all his right to a disseisor, 649. or when he granteth all his estate, 650.
    - How it may be made.
      - For the means.
        - By feoffment with livery, 611. 631. to some other than he in the reversion, 625, 626.
        - But not by
          - Release without warranty descending on him whose land is discontinued, 598. 600, 601, 602, 603, 604, 605, 606. 612.
          - Confirmation, 607, 608, 609, 610.
          - Grant, 627, 628. altho' the grant by fine, 618, unless there was a new reversion gotten before by the discontinuor; as if tenant in tail make a lease for life, and after grant the reversion in fee, 620, 621. 623. but then it must be executed in the life of the tenant in tail, 622. 629.
          - Devise, 624.
          - Escheat, because the lord in such case claimeth not in by the discontinuance, 642.
      - For the manner of the estate.
        - Before discontinuance, the discontinuor must be seised of that estate which is discontinued at the time, or else there is no discontinuance, 637, 638, 639, 640, 641.
        - After discontinuance, how long it shall so continue.
          - For ever, until the right be re-continued by an action.
          - For a time only. *Vide A. infra.*
  - *A.* For a time only, and that depending upon - -
    - Contingency.
      - Where the tenant in tail maketh a gift in tail, or a lease for life, reserving the reversion to himself, 639.
      - Where a husband having issue by his wife, who had issue also by a former husband, alieneth for life, the feme dyeth, lessee for life surrendereth to the baron after the death of lessee for life, the heir may enter without question; *quære* if he may not before, 636.
    - Condition.
      - *In fait*; for if the discontinuor enter for breach of a condition, the discontinuance is purged, 632.
      - In law; as if an infant discontinue, and die in his infancy; for seeing such alienation should not have barred the infant himself, it seemeth it shall not bar others, 633, 634, 635.

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 furer 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.
  - How this freehold, which is the puiſne poſſeſſion, muſt come.
    - 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.
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    - By purchaſe,
      - By act of law;
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A. Where his entry is not congeable, there his folly in taking any thing from the diſcontinuee muſt be excuſed, - - - -

- By his diſagreement thereunto; as if tenant in taile enfeoffe his ſon, and another maketh livery to the other, 684.
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Warranty. Lib. 3. Cap. 13.

WARRANTY.

- The several kinds of it; which are,
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    - 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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- The quality of it.
  - What words will make a warranty, viz. *Warrantizo* only, 733.
  - What effect a warranty is of, viz. to bar or rebutt, &c. *Vide A. infra.*

A. What effect a warranty is of, viz. to bar or rebutt, &c.; where note,

- What warranties do bar, viz.
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END OF THE ANALYSIS OF LITTLETON.

ADVERTISEMENT

TO THE PRESENT EDITION.

IN this Edition, the Original Work, *comprehending the* Text *of* LITTLETON'S TENURES *in French, with an Engliſh tranſlation, and Lord* COKE'S COMMENTARY, *is printed in Two Volumes, the* Notes *of the Editors being contained in a ſeparate Volume, divided in the order of the Three Books of* LITTLETON, *and made to correſpond therewith by a number affixed in the margin to each* Note, *anſwering to references at the foot of the page of the original work. This Volume includes all the* Notes *containing any diſtinct poſition of law, or any obſervation or comment thereon. Such other* Notes *as conſiſt merely of corrections of the* Text, *and of references to other authorities, are continued to be placed at the foot of the page of the* Text *or* Comment *to which they belong.*

In printing the Text *of* LITTLETON, *which it has been uſual to divide into Sections, it was found neceſſary to give each Section entire, followed immediately by* LORD COKE'S Comment, *inſtead of placing the Section, Tranſlation, and Comment in three collateral columns, as in the former Editions; this arrangement in ſome inſtances occaſions a ſlight tranſpoſition of a part of a Section into the preceding page, as in the firſt Section of the work; but this alteration, while it preſents a more natural order in reading the original* Text *and* Comment, *cannot produce any material inconvenience in referring to and from this work; the references from other books, and from one part to another of the preſent work, being uſually made reſpectively to the number of the Section of* LITTLETON, *as in the preceding* ANALYSIS, *and to the page of*

Lord

Lord COKE'S COMMENTARY; *which laſt is therefore accordingly, in the preſent Edition, always accompanied with the number of the page correſponding with all the former Editions, conſpicuouſly placed in the inner margin.*

An INDEX *of the Names of Caſes cited, ſtated, or commented upon in the courſe of the Notes, is now added; as alſo a more full and comprehenſive* Index *to the ſubject matter contained in the* Notes *of the Editors, including thoſe now added in this* FIFTEENTH EDITION *by* Mr. BUTLER.

THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

Chap. I. Fee ſimple. Sect. 1.

[1. a.] *TENANT en fee ſimple eſt celuy que ad terres ou tenements a tener a luy et a ſes heires a touts jours. Et eſt appel en Latin,* feodum ſimplex, quia feodum idem eſt quòd hæreditas (1), et ſimplex idem eſt quòd legitimum vel purum. Et ſic feodum ſimplex idem eſt quòd hæreditas legitima, vel hæreditas pura. *Car ſi home voile purchaſer terres ou tenements en fee ſimple, il covient de aver ceux parolx en ſon purchaſe, A aver et tener a luy et a ſes heires: car ceux parolx (ſes heires) font l'eſtate d'enheritance. Car ſi home purchaſe terres per ceux parolx, A aver et tener a luy a touts jours; ou per tiels parols, A aver et tener a luy et a ſes aſſignes a touts jours: en ceux deux caſes il ny ad eſtate forſque pur terme de vie, pur ceo que il fault ceux parols (ſes heires), les*

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, and *ſimplex* is as much as to ſay, lawfull or pure. And ſo *feodum ſimplex* ſignifies a lawfull or pure inheritance. For if a man would purchaſe lands or tenements in fee ſimple, it 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

(1) [See N. 1.]

les queux parolx tantſolement font l'eſtate d'enheritance en touts feoffments et grants.

(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 holden; unleſſe you will take *allodium* for *ex ſolido*, as it is 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, *quod 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 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.

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. Dy. 313. a. 1. Co. 47. in Alton Wood's caſe. (Cro. Cha. 82.) Bract. lib. 1. cap. 8.

[1. b.]

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.

Bract. lib. 2. cap. 5, 6, 7.

"*Fee ſimple.*" Fee (4) commeth of the French *fief (i.e.) prædium beneficiarium*, and legally ſignifieth inheritance, as our author himſelfe

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

ſelfe 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.

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.)

"*Terres ou 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 [2. a.] 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 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

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

(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.

(1) [See N. 2.]

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 forinsecos, 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 createth 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. Trin. Pickering, 8. E. 3. Ro. 42.

(7. Co. 33.)

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

" Et est appel en Latin feodum simplex, quia feodum idem est quòd " hæreditas." 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 per ignotius*; and are most necessary, for *ignoratis terminis ignoratur et ars.*

For interpretation of words and etymologies, vid. Sect. 9. 18. 95. 116. 119. 135. 154. 164. 174. 184. 186. 194. 204. 234. 267, 268. 332. 337. 424. 520. 592. 645. 689. 733.

Bract. lib. 2. cap. 30. fo. 92. 62. b. lib. 4. cap. 28. Fleta, lib. 3. cap. 8. Bract. lib. 2. cap. 5. &c. Britt. cap. 34.

" Simplex idem est quòd legitimum vel purum." 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.*

Fleta, lib. 3. ca. 3. Plowd. 58. b.

" Hæreditas legitima vel hæreditas pura." 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 sit 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

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

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.

"*Car ſi home 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 abilitie 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 abilitie 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 (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

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

5. Mar. Br. tit. Denizen. 22.

(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.

[2. b.]
(1) [See N. 3.]
(2) [See N. 4.]
(3) [See N. 5.]
(4) See N. 6.]
(5) See in Plowd. 229. ſeveral caſes, in which, for a like reaſon, the king is intitled without office.
(6) Accord. 7. Co. Calvin's caſe, Dy. 2. b. in marg.
(7) [See N. 7.]
(8) [See N. 8.]

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 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 capacity 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 capacity to take but not to retaine (unleſſe they have a ſufficient licence 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 graunted 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.

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 years) hath, without conſent of any other, capacity to purchaſe, for it is intended for his benefit, and at his full age he may either agree

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

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.

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

(9) [See N. 9.]
(10) [See N. 10.]
(11) As to this, ſee poſt. 98. 20.

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 [3. a.] waive it unleſſe it be upon juſt cauſe, *et ſic de ſimilibus, prælatus eccleſiæ ſuæ conditionem meliorare poteſt, deteriorare nequit.* And in another place he ſaith, *Eſt enim eccleſia ejuſdem conditionis, que fungitur vice minoris.* 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.

43. Aſſ. p. 23.
Bract. lib. 2. fo. 12. & 32.
[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 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 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.

F. N. B. 97. a. 1. Aſſ. 11. 11. H. 4. 33. 9. E. 4. 49. 13. E. 3.

[b] A name of purchaſe. 2. H. 4. 25. 1. H. 5. 8. 46. E. 3. 22. 12. Aſſ. 18. 30. E. 3. 18. 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

[d] 32. E. 3. barre, 261. (Hob. 86. 6. Co. 59.)
[e] 34. E. 3. grant 83. 18. E. 3. 50. 12. Aſſ. 35. 14. H. 6. 12. 34. Aſſ. p. 11. 40. Aſſ. p. 21.

(12) [See N. 11.]
(1) [See N. 12.]
(2) Acc. poſt. 356. a.
(3) See in Dy. 100. the caſe of a grant by the crown *probis hominibus de Iſlington* rendering a rent.
(4) [See N. 13.]

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.

[*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 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). [*b*] 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

[*b*] 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.

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

(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.

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.*

[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. Bre. Noſme 40.

[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).

[k] 15. H. 7. 14.

[l] 8. E. 3. 437. 29. E. 2. 44. 19. E. 4. 1 f. 21. E. 4. 19. 7. H. 6. 29.

[3. b.] [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 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.

[a] 39. E. 3. 11. 24. 17. E. 3. 42. 35. Aſſ. 13. 41. E. 3. 19.

Vide Sect. 118.

[b] So it was reſolved, M. 38. & 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 concernes 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,

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

(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) [See N. 14.]

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

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

(Cro. Jam. 17.) void, and the partie diſabled by law, and incapable to take the ſame, *pro commodo regis et populi*; 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.)

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)

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

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 mortui 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: *Item, purchaſe eſt appel le poſſeſſion de terres ou tenements que home ad per ſon fait, ou per ſon agreement, a quel poſſeſſion il n'avient per title de diſcent de nul de ſes anceſters ou de ſes coſens, mes per ſon fait demeſne.* So as I take it, a purchaſe is to be taken, when one commeth 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, [b] by a ſtatute made ſince *Littleton* wrote (9), whereof you may plainly and plentifully read in my Reports, to which I will adde this caſe. *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.

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

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

[k] 37. H. 8. cap. 6.

(4) [See N. 15.]
(5) [See N. 16.]
(6) See as to this, Plowd. 381.
(7) [See N. 17.]
(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.

tracts may be avoided, ſince *Littleton* wrote, by certaine 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.

13. Eliz. cap. 8. 5. Co. 69. Burton's caſe. Eodem lib. 7. Claiton's caſe. (Lutw. 271.) (5. Co. 69.)

[4. a.]

"*Purchaſe terres.*" *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.

"*Terre,*" *Terra*, Land, 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. * 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; *Cælum cæli 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 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 eſt, quia omnia hâc opus habent ad vivendum*. And the divine 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 ſtones, and many other things for profit, ornament, and pleaſure. And laſtly, the

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.

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

Pſal. 115. 16.

Pſal. 104. 15.

Chriſoſt. hom. 30

(Plowd. 313.)

(1) [See N. 18.] and 4. Co. 39. a.

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

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 beene uſed time out of mind of man to be divided betweene certaine perſons, and that a certaine number of acres appertaine to every 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 mannor, albeit they have no certaine place, but yearely ſet out in ſeverall places, ſo as the number only is certaine, and the particular acres or place wherein they lie after the year incertaine. And ſo it was adjudged in the king's bench upon an eſpeciall verdict (4).

Vide Sect. 648. how theſe 13 acres may be charged. (1 Ro. Abr. 829. Cro. Eliz. 421.) Hill. 34. Eliz. Rot. 489. in 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 heirs, or the one ſhall have it the firſt yeare, and the other the ſecond year, *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 mannor for a year, and the other the other mannor for the ſame yeare, and after that yeare then ſhe that had the one mannor ſhall have the other, *et ſic alternis vicibus* for ever; and albeit the mannors be ſeverall, yet are they certaine, and therefore ſtronger than Bridgewater's caſe; ſo as this doth make a diviſion of eſtates 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. 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

Vide Sect. 114. where advowſons, &c. may be appendant and in gros.
By what names, &c. lands, &c. ſhall paſſe.
[*a*] Vide Sect. 289. (Poſt. 186. b. Contra 1. Ventr. 393.) 14. H. 8. 6. 4. H. 7. 3. 19. 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. [illegible] n. 43. Poſt. 47. a. Cro. Cha. 362. Noy. 54.)
[*c*] Paſch. 12. Ja. inter Dockwray & [illegible] points in evidence al Jury in Banke le Roy.

[4. b.]

(4) S. C. Mo. 302.

(1) [See N. 19.]

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. [*d*] So if a man be ſeiſed of a river, and by deed doe 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).

[*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. Brieſe 685. W. 2. c. 24.

(2. Ro. Abr. 2.) [*e*] Tr. 11. R. 2. in treſp. nient Imprimee ne abridge. 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.

[*b*] 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 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

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

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

(2) [See N. 20.]
(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.

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 ſometime *dena* or *denna* ſignifieth, as *villa* and *denne*, a towne.

[n] Domeſday.

[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*.

[o] Camden 460. 151.
[p] Paſch. 44. E. 3. coram Rege in Theſaur.

[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.

[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] 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.

[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] 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.]

[t] Pl. Com. 169. a. 13. E. 3. Briefe 241. 33. E. 3. Entrie 80.
[u] Domeſday. F. N. B. 2. Regiſt.

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 ruſcaria ſuas*, the ſoile where *ruſci*, *i. e.* kneholme, or butchers pricks, or broome doe grow, 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, 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

[a] Regiſt. 1. E. 3, 4. F. N. B. 2.
[b] 16. Aſſ. p. 9. Regiſter.

Jampna. (Cro. Cha. 179.)

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

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 mannors and lands may paſſe. So by the name of an iſle, *inſula*, many mannors, lands, and tenements may paſſe.

[*d*] Mag. Cart. 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. 2. 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 mannors may be conveyed: *et è converſo*, by the name of a mannor, &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 imbattelled, &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. Eſcheatriæ, 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 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

[*g*] Lamb. Expoſit. verb. Ferme. Pl. Com. 195.

[*h*] Pl. Com. 169. Regiſt. 227. b. Eject. Firmæ.

(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.

time land. [i] Lands making a knight's fee (6), ſhall paſſe by the grant of a knight's fee *de uno feodo militis.*

[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 ox-gate 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. 189. 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.

[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.* [5. b.]

[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. h. Domeſday.

[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 *leue*, which in Latin is called *leuca.*

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

Stadium,

(6) As to the contents of a knights 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.

[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.

[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. transl. 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.) [g] Domesday. [h] Pasch. 30. E. 1. coram rege Kanc. in Thesaur. Statut. de extent manerii. Domesday.

It is to be noted, that in Domesday there be often named *bordarii seu borduanni*, *coscs*, *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 cottages, *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*, 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 frecholders, 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 revecland.* [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). *Lerquarium*, or *bercaria*, commeth of *berc*, an old Saxon word, used at this day for barkes or rindes of trees, and signifieth [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.

(1) [See Note 27.]
(2) See as to *cottages*, 2. Inst. 736.
(3) See further as to *thane* and *thane* land, in Reliq. Spelm. 11, &c. See also post. 6. a. n. 6.

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*.

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

[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.

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

[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.

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

[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.

[o] Regula.

7. R. 1. inter fines Suſſex.

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 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.

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

[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.)

(4) [See Note 22.]
(5) See ante 5. a. n. 11.
(1) [See Note 23.]
(2) See further as to the extent of the word *tenement*, Perk. ſect. 114. and 11. H. 6. 22.

an hereditament, be it corporeall or incorporeall, reall or perſonall, or mixt (3).

[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 warrantie, whereof the feoffor may take advantage. Alſo, he ſhall have ſuch charters 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).

[o] 1. Co. fo. 1. & 2. in Seignior Buckhurſt'scaſe. 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.)

"*A aver et tener.*" Theſe two words do in this place prove a double ſignification, *viz a aver*, to have an eſtate of inheritance of lands deſcendible to his heirs, and *tener*, 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 *premiſſes* of the deed implyed 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

Brit. fo. 101.

(3) [See Note 24.]

(4) [See Note 25.]

(5) See the obſervations on this part of the Commentary in Mad. Form. Angl. Differt. 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 Diplomaticâ.

the reaſon 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 [6. b.] 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 *ſtigmaticus*, branded, or the like (1), whereby they become infamous for ſome offences, *quæ ſunt minoris culpæ ſunt majoris infamiæ.*

[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. Bulſtr. 154. Raym. 369. 1. Ventr. 349. 1. Keiynge 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 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

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

[b] Forteſcu. ca. 25.

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

(6) [See Note 26.] (2) [See Note 28.]
(1) [See Note 27.]

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 processe 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 processe 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 no 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 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.

[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.)

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 judgement 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 *vivâ 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 lævis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment,

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

Fleta lib. 6. ca. 33. 8. E. 3. 290. 39. E. 3. 21. b.

(3) See further on this subject of joining with the jury the witnesses named in a deed, and the processe 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.

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

Glanvil. lib. 10. ca. 12. Fleta lib. 6. ca. 33.

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.*

[b] Paſch. 10. Ja. in Com. Banco upon the ſtat. of bankrouts. (1. Brownl. 47. 2. Ro. Abr. 585. Hutt. 115. Raym. 1. 1. Ventr. 243. 3. Keb. 193. 1. Sid. 431.)

Note, it hath been reſolved by the juſtices, that a wife [b] 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 beare 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 [k], 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 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. [7. a.]

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

[k] 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.)

(2. Inſt. 77.)

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 tearmed 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 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

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

[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.)

(6) [See Note 29.]
(7) [See Note 30.]
(1) [See Note 31.]
(2) [See Note 32.]
(3) [See Note 33.]

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 *Fecklea*, 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 Peter-pence, 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.

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 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,

(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. Engl. Hiſtor. Libr. 2d. ed. 241.

(5) See Poſt. 7. b. n. 1.

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.

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 life-time (1). [7. b.]

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 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. 15. 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*

(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. f. 2.

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 himſelfe 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 queene 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 Cicilie, 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 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.

"*A luy et a ſes 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. fol. 62. b. Flet. lib. 6. cap. 1. & 54. & lib. 1. cap. 13. Glanvil. lib. 7. ca. 1. & ca. 12. & 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*

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

(2) [See Note 34.]

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

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

(5) [See Note 35.]

(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.

natura aliquantulum ampliaverit vel diminuerit, non tamen ſuperabundanter (ut ſi ſex digitos vel niſi quatuor habuerit) bene debet inter liberos connumerari. Si inutilia 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 prævalaſcentiam ſexûs incaleſcentis.* And accordingly it ought to be baptized. See more of this matter Sect. 35. [8. a.]

[b] Vid. Sect. 188. 309. Bract. lib. 2. fo. 92. Brit. fo. Fleta lib. 1. ca. 5. & 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 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.

[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. 23. Hardr. 224. 2. Ventr. 1) 1. Ed. 3. 4. 6. Ed. 3. 55. 27. E. 3. 77. 3. E. 2. deſcent. 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.

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

[d] Stanf. pl. cor. 195, 196. Bract. lib 3. fo. 132, 133. 276. & lib. 5. fo. 374. Britton fo. 215. b. Fleta lib. 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)

(1) [See Note 36.] (2) [See Note 37.]

heritable blood in him (3). See more plentifully of this matter Sect. 746, 747.

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 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. Fleta lib. 1. cap. 58. (1. Sid. 193. 1. Lev. 60. Vaugh. 274. 1. Ventr. 414)

[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 porcitur 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. (1. Ro. Abr. 626.)

18. E. 3. 53. 13. E. 3. Ley 49.

[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. Pancirollus nova rep. 485, &c. Opus eximium 48. b. Lambard de priſcis Anglorum legibus, 120. 72. acc. (1. Ro. Abr. 357. Cro. Jam. 541. 3. S. C. Godb. 281.)

[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, 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

[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. & 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. [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.

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

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

(5) [See 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) [See Note 39.]

(8) [See Note 40.]

(9) Acc. Cro. Eliz. 372.

(10) [See Note 41.]

his heires; but the law is not ſo holden at this day. *Vid.* 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.

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 iſto quòd hæres ſit aſtrarius, vel quòd aliquis anteceſſor reſtituat hæredi in vitâ ſuâ hæreditatem, et ſi 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 cum 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 ſoon 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 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.

[8. b.]

[*a*] Bract. lib. 2. fo. 85. Heref. p. 8. E. 1. Ro. So. 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.)

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

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

The words of the writ *de ventre inſpiciendo* make this evident. *Rex vic. ſalutem. Monſtravit nobis A. quòd cùm R.* quæ fuit uxor *Clementis B. prægnans non ſit, ipſa falsò dicit ſe eſſe prægnantem de eodem Clemente,* ad exhæredationem *ipſius A. deficut 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,*

(1) [See Note 42.] (2) [See Note 43.]

habuerit, &c. But this rather belongs to the treatise of originall writs, and therefore thus much herein shall suffice (3).

And it is to be observed, that every word of Littleton is worthy of observation. (1) 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. (2) Also observable is this conjunctive *(et)*. For if a man give lands to one, To have and to hold to him *or* his heires, he hath but an (5) estate for life, for the uncertainty *(ses, suis)*. (3) 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] "*Et ses 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.

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

"*Ceux parolx (ses heires) tantsolement font l'estate d'enheritance en "touts feoffments et 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 tooke 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 capacity, for it could not go in succession (1), and (his successors) gave him no estate

[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.)

[9. a.]

[h] Pl. Com. 242. Seignior Berkley's case.

[i] Vid. Brit. fo. 86. 121. &. 130. 17. E. 3. 25. b.

33. H. 6. 22. 10. 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.) Fr. 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. Confusans 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 Ansley and Johnson in Com. Banco. (4. Co. 65.)

(3) [See Note 44.]

(4) [See 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) [See Note 46.]

(1) [See Note 47.]

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

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.

[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.)

[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 feoffement, the childe borne afterward ſhall not take (3).

[n] Fleta lib. 3. cap. 8.

Pl. Com. 163.

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 *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 *ſolement*, alone, but *tantſolement*, 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. 234. 236. 241. 405. 485. 478. 651. 655. 646. 620. 614. 637. 674. 692.
[f] Sect. 733.

"*Font l'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.

"*En touts feoffments et 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,

(2) [See Note 48.]
(3) [See Note 49.]
(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.

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. [b] 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: corporalis eſt, quæ tangi poteſt et videri; incorporalis, quæ tangi non poteſt, nec videri.*

[*] Vide Sect. 59. and 66.

[b] 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. agreethherewith. Pl. Com. 171. Hill & Grange. Mirror ca. 5. ſect. 1. Britton cap. 34.

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

[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.

(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. Pref. Ep. p. 8.

viſee hath a fee ſimple by the intent of the deviſor (2), albeit it be not 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 ſanguini ſuo*, that is a fee ſimple; but if it be *ſemini ſuo*, it is an eſtate taile (3).

[l] Vide Sect. 585.

[m] Mich. 40. & 41. Eliz. in Error int. Downhall & Cateſby adjudge. Brooke tit. Taile 21.

[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 giſt in fee.

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

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 recoveror 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 neceſſity 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 finde was of *John B. auchampe* 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.

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

[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

(2) [See Note 50.]

(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.

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 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 communaltie, 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. Fifthly, in grants ſometimes an inheritance ſhall paſſe without this [10. a.] 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].

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 * explaneth it, ſaying, *et memorandum que en touts auters [tiels] caſes, coment que ne ſont icy expreſſment moves et ſpecifies, ſi ſont en ſemblable reaſon*

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

reason sont en semblable ley. 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 it includeth a fee simple, and yet it resteth but in one by purchase.

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

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. 11. E. 4. 9, &c.

(3) [See Note 52.]
(4) [See Note 53.]
(5) See ante 3. b. and post. 18. b.

Sect.

Sect. 2.

ET ſi home purchaſe terres en fee ſimple et devy ſans iſſue, cheſcun que eſt ſon prochein coſin collateral del entire ſanke, de quel pluis long degree qu'il ſoit (6), *poet inheriter et aver meme la terre come heire a luy.*

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, may inherite and have the land as heire to him.

LITTLETON ſheweth 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.)

"*Prochein coſin 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 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. *Prochein couſin collaterall enheritera* 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.* [10. b.]

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

Upon this word (*prochein*) 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 (1)

19. R. 2. tit. Garr. 109.

(2. Inſt. 7.)

(6) *de lui*, L. and M. Roh. Red. (1) [See Note 54.]

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, *de quel pluis long degree que il ſoit.* 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 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).

30. Aſſ. p. 47.

(2)

Sect. 3.

MES ſi ſoit pier et fits, et le pier ad un frere que eſt uncle a le fits, et le fits purchaſe terre en fee ſimple et mort ſans iſſue, vivant ſon pier, l'uncle avera la terre come heire al fits, et nemy le pier, uncore le pier eſt pluis prochein de ſanke; pur ceo que eſt un maxime en le ley, que enheritance poet linealment diſcender, mes nemy (3) *aſcender. Uncore ſi le fits en tiel caſe mort ſans iſſue, et ſon uncle entra en la terre come heire a le fits (ſicome il devoit per la ley) et apres l'uncle devia ſans iſſue, vivant le pier, donques le pier avera la terre come heire al uncle, et nemy come heire a ſon fits, pur ceo que il veigne al terre per collateral diſcent et nemy per lineal aſcention.*

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 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.

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

(Hob. 33.)

(3. Co. 40.)

"*UNCORE le pier eſt pluis prochein de ſanke.*" 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.

[p] Pl. Com. 293. b. Oſborne's caſe.

(Poſt. 67.)

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

" [p] *Eſt un maxime en le ley, que inheritance poet linealment* " *diſcender, mes nemy aſcender.*"

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

(2) [See Note 55.]

(3) *linealment*—P. and Red.

and uncontrolable as that 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 proventientium*; ſo as the lineall aſcent is prohibited by law, and not the collaterall (1). And in prohibiting the lineall aſcent, the common law is aſſiſted with the law of the 12 tables (2).

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

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] Fiftly, from the right entrie of judgements.

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

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

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

Ninthly,

[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. 686. 739.

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

(1) [See Note 56.]

(2) [See Note 57.]

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

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

Eleventhly, [l] *à diviſione*, from a diviſion, *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.

16. [r] *Ex abſurdo*, for that thereupon ſhall follow an abſurditie, *quaſi à ſurdo prolatum*, becauſe it is repugnant to underſtanding and reaſon.

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

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

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

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

From ſtatutes his arguments and proofes are drawne,

1. [x] 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] Sometime by the reaſon of the common law. But ever the generall words are to be intended of a lawfull act, [z] 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).

[i] Sect. 697. 59. 104 288. 332. 478.

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

[l] Sect. 13. where many more are quoted, but ſee chiefly Sect. 281.

[m] Sect. 438, 439. 441.

[n] Sect. 18.

[o] 301, &c.

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

[†] 129. 440.

[q] Sect. 46. 194.

[*] Sect. 360.

[r] Sect. 722.

[ſ] Sect. 114. 223. 129. 211. 107, 108.

[t] Sect. 202.

[u] Sect. 440.

[w] Sect. 481.

[x] Sect. 13, &c. Sect. 731. 692. 635. 633. 441. 103. 193. 154. 140. 2. (Plowd. 57. b. 49. b.)

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

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

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

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

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

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

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

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

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*

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

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

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

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

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

[f] Whereof you ſhall read in our author, and in our bookes. (Poſt. 249.)

[g] Rot. Parl. 2. R. 2. nu. 3. 13. R. 2. ca. 2. Forteſc. ca. 32.

[h] 7. Co. Caudrie's caſe, articul. ſuper cartas, &c.

[i] 37. H. 6. 21. 13. H. 4. 4. 28. H. 8. ca. 15.

(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.

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 repriſall (2)
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.

[*k*] Carta de Foreſta, &c. the eires of the Foreſts.
[*l*] 27. E. 3. ca. 17. Wi. ca. 23. 4. H. 5. ca. 7.
[*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.

"*Et ſon uncle enter en la terre.*" 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 himſelf heire; and therefore *Littleton* ſaith, *et ſon uncle enter en la terre (ſicome devoit per la ley)* 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.

"*Sicome il devoit per la ley.*" Theſe words as a key doe open the ſecrets of the law; for hereupon it 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 himſelf 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

(2) Beſides the books more generally known, ſee Lee's Capt. in War, which is a Treatiſe on this ſubject.
(3) [See Note 58.]
(4) [See Note 59.]

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 (devoit)* cannot take advantage of it. [12. a.]

Vid. Sect. 603. 718. (Poſt. 329.)

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.

Vid. Sect. 735, 736, 737.

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.

35. H. 6. 33. John Crook's caſe. (5. Co. 79.)

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).

Sect. 4.

ET en tiel caſe lou le fits purchaſe terre en fee ſimple, et devie ſauns iſſue, ceux de ſon ſanke de part ſon pier enheriteront come heires a luy, devant aſcun de ſanke de part ſa mere: mes s'il n'ad aſcun heire de part ſon pier, donques la terre diſcendera a les heires de part la mere (4). *Mes ſi home prent* (5) *enheretrix des terres en fee ſimple, queux ont iſſue fits, et deviont, et le fits enter en les tenements, come fits et heire a ſa mere, et puis devie ſans iſſue, les heires de part la mere doyent enheriter les tenements, et jammes les heires de part le pier. Et s'il ny ad aſcun heire de part la*

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. But if a man marrieth an inheritrix 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

(1) [See 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) [See Note 61.]

(4) *Et ceſt l'oppinion de toutes les juſtices M. 12. E. 4. Mes la fuit tenus ſi terre deſcende a un home de part ſon pere, qui devia ſans iſſue, que ſon prochein heire de part ſon pere enheritera a luy c'eſt aſſavoir le prochein que eſt del ſank le pere de part la pere. Et pur defaute de tiel heire, ceux que ſont de ſank le pere del part le mere le pere, S. laileſſe doient enheriter. Et s'il ny ad tiel heire de part le pere donques le ſeignour avera el terre par eſchete.* 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. and M.—Roh.—P.—Red.

la mere, donque le ſeignior, de que la terre eſt tenus, avera la terre per eſcheat. (1) *En meſme le manner eſt, ſi tenements diſcendont a le fits de part le pier, et il enter, et puis moruſt ſans iſſue, cel terre diſcendra as heires de part le pier, et nemy as heires de part la mere. Et s'il ny ad aſcun heire de part le pier, donques le ſeignior de que la terre eſt tenus, avera la terre per eſcheat.* Et ſic vide diverſitatem, *lou le fits purchaſe terres ou tenements en fee ſimple, et lou il veient eins a tiels terres ou tenements per diſcent de part ſa mere, ou de part ſon pier.*

mother ought to inherit, and not the heires on 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. 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 [*] *rejert à quo fiat perquiſitum.* As for example, *Robert Coke* taketh the daughter of *Knightley* to wife, and purchaſeth lands to him and to his neires, 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] *Ceux del ſank de part ſon pier.*" 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.]

[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.

" *Devant*

(1) All between *en meſme* and *ſic vide* 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.

(7) [See Note 62.]

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

"*Devant aſcun del ſanke del part del mere.*" 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 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 of 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 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.]

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. (8. Co. 54. 3. Co. 32. b.)

[*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. 10. Ro. Abr. 780. Poſt. 23. a. 271. b. 1. Co. 127. Hob. 31. 2. Co. 58.)

[*q*] 16. E. 3. age 46.

[*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

(2) [See Note 63.]

[13. a.]

(1) Acc. 8. Co. 54. a. (2) [See Note 64.]

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.

[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*, and tenant, and the meſne bind her ſelfe 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).

[s] 38. E. 3. 12.

"*Mes ſi home priſt feme 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.

"*Avera la terre per eſcheat.*" [u] *Eſcheat* (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 *terre excadentiales* [w]. *Dominus verò capitalis loco*

[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. & cap. 119. F. N. B. 144. b.)

F. N. B. 100. Tr. 19. E. 1. in Banco Rot. 25. (3. Inſt. 21. 4. Inſt. 225.

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

(3) [See Note 65.]
(4) [See Note 66.]
(5) [See Note 67.]
(6) See Wright's Ten. 115. Blackſt. Law Tracts, 8vo. ed. v. 1. p. 236. and 2. Blackſt. Comm. 5th ed. 241.

loco hæredis habetur, quoties per defectum vel delictum extinguitur ſanguis ſui tenentis. Loco hæredis et haberi poterit cui per modum donationis ſit 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.*

[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 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).

[y] Pl. Com. in Nicholl's caſe.

[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.]

[z] 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.)

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 eſcheats in *England*, the one on this ſide of *Trent*, and the other beyond *Trent*, at which time they had ſubeſcheators. But in 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.

[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.

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.

"*Et*

(7) [See Note 68.]
(8) [See Note 69.]
(1) [See Note 70.]

"*Et sic vide, &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 *.

* Sect. 147. 149. 248. 289. 417. 667, &c. (2. Ro. Abr. 816.)

And it is to be well observed, that our author saith, *s'il n'ad ascun heire, &c. la terre eschaetera.* 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.

[*b*] 7. E. 4. 11. 12. Fitz. N. B. 33. 9. E. 3. 26. 17. E. 2. stat. de templariis.

Sect. 5.

ITEM, si soient trois freres, et le mulnes frere purchase terres en fee simple et devie sauns issue, l'eigne frere avera la terre per discent, et nemy le puisne, &c. Et auxi si soient trois freres, et le puisne purchase terres en fee simple, et devie sans issue, l'eigne frere avera la terre per discent et nemy le mulnes, pur ceo que l'eigne est pluis digne de sanke.

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 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

(Post. 237.)

(2) [See Note 71.] (3) [See Note 72.]

hath a lawful eſtate in fee ſimple, hath it either by deſcent, or by purchaſe.

"*L'eigne eſt pluis digne de ſanke.*" 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 *pluis digne de ſanke. 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 dayes ſocage fee was divided between the heires males, and therewith agreeth *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. Bract. 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.

Sect. 6.

ITEM, eſt aſcavoir, que nul ... vera terre de fee ſimple per diſcent come heire a aſcun home, ſi non que il ſoit ſon heire d'entire ſanke. Car ſi home ad iſſue deux fits per divers venters, et l'eigne purchaſe terres en fee ſimple, et moruſt ſans iſſue, le puiſne frere n'avera la terre, mes l'uncle l'eigne frere, ou auter ſon procheine coſin ceo avera, pur ceo que le puiſne frere eſt de demy ſanke al eigne frere.

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

[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) 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 Note 73.]

(5) [See Note 75.]

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).

(1. Ro. Abr. 629.)

[*e*] 7. E. 4. 15.

Sect. 737.

Sect. 7.

[14. b.] *ET ſi home ad iſſue fits et file per un venter, et fits per auter venter, et le fits del primer venter purchaſe terres en fee, et moruſt ſans iſſue, la ſoer avera la terre per diſcent, come heire a ſa frere* (1), *et nemy le puiſne frere, pur ceo que la ſoer eſt de le entire ſanke a ſon eigne frere.*

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, 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. Herewith agreeth *Britton*.

Britton cap. 119.

Sect. 8.

ET auxi, ou home eſt ſeiſie de terres en fee ſimple, et ad iſſue fits et file per un venter, et fits per auter venter, et moruſt, et l'eigne fits enter et moruſt ſans iſſue, la file avera les tenements, et nemy le puiſne fits, uncore le puiſne fits eſt heire a le pere, mes nemy a ſon frere. Mes ſi l'eigne fits ne entra en la terre apres la mort ſon pere, mes moruſt devant aſcun entrie fait per luy, donques le puiſne frere poit entrer, et avera le terre come heire a ſon pere. Mes lou l'eigne fits en le caſe avant dit entra apres la mort

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

(3) [See 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.

(6) [See Note 76.]

[14. b.]

(1) *a ſa frere*, omitted in L. and M. and Rob.

mort ſon pere, et ad ent poſſeſſion, donques la ſoer avera la terre, quia poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem. *Mes ſi ſont deux freres per divers venters, et l'eigne eſt ſeiſie de terre en fee, et moruſt ſans iſſue, [et ſon uncle entra come prochein heire a luy quel auxy moruſt ſans iſſue, (1)] ore le puiſne frere puit aver la terre come heire al uncle, pur ceo que il eſt de l'entier ſanke a luy, coment que il ſoit de demy ſanke a ſon eigne frere.*

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; 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.

"*SEISIE de terres en fee ſimple.*" Theſe words exclude a ſeiſin in fee taile, albeit he hath a fee ſimple expectant. [*f*] (2) And therefore if lands be given to a man and his wife, 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.

[*f*] 24. E. 3. 24. 30. 31. E. 3. Court. 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.)

[*g*] 5. E. 4. fo. 7. Pl. Com. fo. 58. in Wimbiſhe's caſe.

"*Et l'eigne ſits 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,

[15. a.]

[*h*] 10. Aſſ. 27. 34. Aſſ. 10. 35. 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. Ratcliff's caſe. 3. Co. 41.

(1) All between the brackets omitted in Roh. edit.

(2) 7. *H.* 4. 16. *Vid.* 38. *Aſſ.* 8. Hal. MSS.

(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) [See Note 77.]

(5) [See Note 78.]

(6) [See Note 79.]

inherit, and in ſome caſes where the eldeſt ſonne doth enter, yet the younger brother of the half blood ſhall be heire.

[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, and the gardian entreth into the lands. And ſo it is if the gardian in ſocage enter (4). [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.)

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 actuall 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. (Poſt. 191.) * 7. H. 5. 34. per Halls & Logdington. 35. Aſſ. p. 2. [l] 14. E. 2. Baſtard 26. Vid. Sect. 399. (Poſt. 244. a.)

"*Seiſie des terres.*" [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. [m] 7. H. 5. 2, 3, 4. (8. Co. 35. b. Poſt. 191. b. 4. Co. 58. b.)

"*Enter.*" Hereupon the queſtion groweth, whether if the father be ſeiſed of divers ſeverall parcels of lands 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

(2) [See Note 80.]
(3) [See Note 81.]
(4) [See Note 82.]
(5) [See Note 83.]
(6) See poſt. 31. a.
(7) [See Note 84.]

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.

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 possession 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 reduceth that parcell only into actuall possession.

[15. b.]

(Post. 252. b.)

(1. Leon. 265.)

"*Home seisie des terres.*" 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 beene oftentime said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. [b] 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.

[b] 7. E. 3. 66. tit. bar. 293. 3. H. 7. 5. (Post. 29. a.)

"*En 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 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 *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. Fourthly, Of *dignities*, whereof no other possession can be had but such as descend (as

[k] Bracton lib. 2. fo. 65. & lib. 4. fol. 279. Britton cap. 119. Flet. li. 6. c. 1. 24. E. 3. 30.

[l] Ratcliffe's case. 3. Co. 42.

[m] Britton cap. 119.

(8) *Adjudged accordingly in the point* P. 4. *Eliz. B. R.* Hal. MSS.

(1) [See Note 85.]

(2) 8. *E.* 3. 11. 12. *E.* 4. 19. 49. *E.* 3. 12. 4. *E.* 2. *Formedon* 49. Hal. MSS.

(as to be a duke, marqueſſe, earle, vicount, or baron) to a man and his heires, there can be no poſſeſſion of the brother to make the ſiſter inherit (3), but the younger 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. (Cro. Cha. 601.)

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*] 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 ſixt 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. 6. H. 4. 1. [*n*] 34. H. 6. fol. 34. Pl. Com. fol. 245. 25. E. 3. ca. de natis ultra mare. (4. Inſt. 206.)

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. Pl. Com. ubi ſupra.

So king *Henry* the eight 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 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). (7. Co. 12. b. Calvin's caſe.) Pl. Com. fol. 247. (1. Sid. 138.) Pl. Com. 238. 1. H. 7. fol. 4. (Plowd. 105. 244, 245.) [*o*] 43. E. 3. fol. 20.

But hereof this little taſte ſhall ſuffice.

(3) [See Note 86.]
(4) [See Note 87.]
(1) [See Note 88.]
(2) [See Note 89.]

Sect. 9.

ET eſt aſçavoir, que ce parcel (enheritance) n'eſt pas tantſolement entendue lou home ad terres ou tenements per diſcent d'enheritage, mes auxi chaſcun fee ſimple ou taile (3) que home ad per ſon purchaſe puit eſtre dit enheritance, pur ceo que ſes heyres luy purront enheriter. Car en briefe de droit que home portera de terre que fuit de ſon purchaſe demeſne, le briefe dirra, quam clamat eſſe jus et hæreditatem ſuam. *Et iſſint ſerra dit en divers autres briefs queux home ou feme portea de ſon purchaſe demeſne, come apiert per le* Regiſt.

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 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 of 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. 86. 100. 146. 164. 170. 184. 229. 243. 259. 274. 280. 293. 300. 305. 419, 420, 421. 489. 632. 697. 749.

"*ET eſt aſcavoir.*" 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 the forme of the writ in that caſe; and they ſaid that the forme was both 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 ſuâ*, 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 vitâ*, 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

[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. & 53. b.

6. E. 3. 30.

(3) *ou taile*, not in L. and M.

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.

W. 2. ca. 5. 1. E. 2. tit. quare imped. 43. 35. H. 6. 54. F. N. B. 34. b.

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 three manner of [16. b.] wayes, that is to ſay, by creation, by deſcent, and by preſcription (1). By creation two manner of ordinary wayes (for I will not ſpeake 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 *Kederminſter* 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 peeres of our parliament (4). And albeit the creation by writ is the ancienter,

[*c*] 6. Co. 52, 53. Countes de Rutland's caſe. 8. Co. 16, 17. the Prince's caſe. (4. Inſt. 126.)

(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.

(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) [See Note 90.] (3) [See Note 91.] (4) [See Note 92.]

(6. Co. 52. Counteſs of Rutland's caſe.)

ancienter, yet the creation by letters patent is the ſurer, for he may be ſufficiently created by letters patents, 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. Vide 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 nobiltie; and ſo is the rule to be underſtood, *Si mulier nobilis nupſerit ignobili deſinit eſſe nobilis.* [g] But if a dutcheſſe 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. Acton's caſe, tempore Mariæ Reginæ. Brooke noſme de dignity 9. 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.

"*Come appiert per le 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 generally of the regiſter, it is meant of the regiſter originall. For the antiquitie and excellencie of this booke, ſee in my preface to the eight 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. 234. 318. 383. 412. 420. 433. 514. 643, 644. 657. 660. 692. 702. 729.

(5) See 14. H. 8. 42. Dy. 79.
(6) [See Note 93.]
(7) [See Note 94.]
(8) [See Note 95.]
(9) See 2. Inſt. 29. 50.

Sect.

[17. a.]

Sect. 10.

ET de tielx choſes, de queux home poit aver un manuel occupation, poſſeſſion ou reſceit, ſicome des terres tenements rents et hujuſmodi, la home dirra en count countant et en plee pledant, que un tiel fuit ſeiſie en ſon demeſne come de fee. Mes de tiels choſes, que ne giſont en tiel manuel occupation, &c. ſicome de advowſon d'eſgliſe et hujuſmodi, la il dirra, que il fuit ſeiſie come de fee, et nemy en ſon demeſne come de fee. Et en Latin il eſt en l'un cas, quòd talis ſeiſitus fuit, &c. in dominico ſuo ut de feodo, *et en l'auter caſe* quòd talis ſeiſitus fuit, &c. ut de feodo.

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.*

"*EN 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 circumſtance 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). (Doctr. Pla. 83.) Mirror des Juſtices. W. 2. cap. 29.

"*En plee pledant.*" *Placitum.* Here *Littleton* teacheth good pleading in this point, of which in his Third Booke and Chapter of Confirmation, Sect. 534. he thus ſaith, *Et ſaches mon fits, que eſt un des pluis honorables laudables et profitables choſes en noſtre ley, de aver le ſcience du bien pleader en actions reals et perſonels; et pur ceo, jeo toy counſaile eſpecialment de metter ton courage et cure de ceo apprender.* 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.* (Poſt. 303.)

"*Seiſie,*" *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. Bract. lib. 4. fol. 263. Idem. lib. 5. fol. 372. Britton fol. 205, 206. Flet. lib. 5. cap. 5. Stanf. Prær. 8. Pl. Com. fol. 191. Wroteſley's caſe.

"*En ſon demeſne come de fee,* in dominico ſuo ut in feodo." *Dominicum* is not onely that inheritance, wherein a man hath proper dominion

(1) [See Note 96.] (2) [See Note 97.]

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 and 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 redditu 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 recipt (3). And in *Domeſday* demeane land is called inland; as for example, 4 *bovatas terræ de inland, et* 10 *bovatas in ſervitio.*

Domeſday.

"*En tiel manuell 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 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. 209. 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). [17. b.]

Britton 205,206. optimè. Fleta lib. 6. cap. 5 Idem. lib. 3. cap. 15.

"*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

Io.

(3) [See Note 98.]

(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.

Io. S. that is ſonne and heyre, *et ſic de cæteris*, where (*ut*) *denotat ipſam veritatem.*

"*Sicome de 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 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 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).

[*i*] 7 E. 3. 62. 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. Boſwell's caſe.

[*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.

"*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. *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.* 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*.

7. E. 3. 4.

45. E. 3. 5.

[*n*] W. 2. ca. 5.

[*o*] Bract. lib. 4. fo. 240.

[*p*] Fleta lib. 5. cap. 14.

[*q*] Britton cap. 92.

And

(2) [See Note 99.]
(3) [See Note 100.]
(4) [See Note 101.]

[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. 27. E. 2. Dower 163.

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 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). [18. a.]

(4. Co. 75. 5. Co. 102. 2. Inſt. 375.)

(10. Co. 235. F. N. B. 33.)

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.*

[s] Britton, fo. 235. 31. E. 1. droit 68, 69. F N. B. 31. b. & 33. a. 5. H. 7. 8. 17. E. 3. 38. 75, 76. 7. E. 3. 327. 8. E. 3. 425. 22. Aſſ. p. 33. 14. H. 4. 10. 33. E. 3. quar. imp. 196.

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 eglíſe 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.* 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 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.

[t] Britton, fo. 235.

[u] Fleta, lib. 5. ca. 19.

F. N. B. 49. o.

F. N. B. 49. p.

Sect. 11.

ET nota, que home ne poit aver pluis ample ou pluis greinder eſtate d'enheritance (3) *que fee ſimple.*

AND note, that a man cannot have a more large or greater eſtate of inheritance than fee ſimple.

THIS

(5) [See Note 102.]

[18. a.]

(1) [See 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.

(3) *Ou inheritance*, L. and M. Roh. P. and Red.

Gradus Parentelæ & Consanguinitatis, pro meliori intelligentiâ Authoris nostri.

The Degrees of Parentage & of Consanguinity, for the better understanding of our Author.

Approved by
Bracton, lib: 2. cap: 31. fol: 67.
Britton, cap: 89. fol: 220, 221...
Fleta, lib: 5, cap: 7.....
Mirror, cap: 1, §. 3, & que Heritages.

Adnati, quasi Patre concreti.

Adnati ex Parte Patris,
Cousins on the part of the Father, the more worthy in Descent, the further remote.

Cognati, quasi simul nati ex parte matris.

Cognati ex Parte Matris,
Cousins on the part of the Mother, the less worthy in Descent, tho' nearer of Kin.

Linea transversalis, seu collateralis, The side Line.

RECTA LINEA.

Linea transversalis, seu collateralis. The side Line.

	6 **Tritavus.** *The Great Grandfather's Great Grandfather.*	**Tritavia.** *The Great Grandfather's Great Grandmother.*
Abpatruus magnus, *The Great Uncle's Grandfather, On the Father's side.*	5 **Attavus.** *The Great Grandfather's Grandfather.*	**Attavia.** *The Great Grandfather's Grandmother.*
Abamita magna, *The Great Uncle's Grandmother, On the Father's side.*		
Propatruus magnus, *The Great Uncle's Father, on y Father's side,*	4 **Abavus.** *The Great Grandfather's Father.*	**Abavia.** *The Great Grandfather's Mother.*
Proamita magna, *The Great Uncle's Mother, on y Father's side.*		
Patruus magnus, *The Great Uncle, on the Father's side.*	3 **Proavus.** *The Great Grandfather.*	**Proavia.** *The Great Grandmother.*
Amita magna, *The Great Aunt, on the Father's side.*		
Patruus, *The Uncle, or Father's Brother.*	2 **Avus.** *The Grand-father.*	**Avia.** *The Grand-mother.*
Amita, *The Aunt, or Father's Sister.*		
	1 **Pater.** *Father.*	**Mater.** *Mother.*

		Abavunculus magnus, *The Great Uncle's Grandfather. On the Mother's side.*
		Abmatertera magna, *The Great Uncle's Grandmother. On the Mother's side.*
		Proavunculus magnus. *The Great Uncle's Father, on y Mother's side.*
		Promatertera magna. *The Great Uncle's Mother, on y Mother's side.*
		Avunculus magnus. *The Great Uncle, on the Mother's side.*
		Matertera magna, *The Great Aunt, on the Mother's side.*
		Avunculus, *The Uncle, or Mothers Brother.*
		Matertera, *The Aunt, or Mother's Sister.*

Avus, ab Evo, quia patre antiquior.

Patruus, quasi loco patris.

Amita, quasi a me tertia.

Avunculus, quasi Avus minor.

Matertera, quasi Mater altera.

Linea recta ascendens.
The right Line ascending.

Linea transversalis, seu collateralis. The side Line.

Linea transversalis, seu collateralis. The side Line.

Patrueles à Patruo,
Sons or Daughters, Cousin Germans on the Father's side.

Amitini, ab Amita,
Sons or Daughters Cousin Germans on the Father's side.

Avunculini, ab Avunculo
Sons or Daughters, Cousin German on the Mother's side.

Materterini, a Matertera,
Sons or Daughters, Cousin Germans on the Mother's side.

Frater, quasi fere alter.

Frater, *a Brother, Semi Germanus frater, Brother of One Father, & several Mothers.*
Soror, *Sister.*

Frater, *a Brother, Uterinus Frater, Brother of One Mother, & several Fathers.*
Soror, *Sister.*

Uterini, quasi nati ex eodem utero. Fratres ex Separatibus patribus.

Sorer, quasi sorte orta diversa. Semi-Germani fratres, quasi ex eodem patre & separatibus matribus nati.

Horum, *of these,* Filius, *the Son,* Filia, *the Daughter, Right Cousin German.*	**Propo-** *Linea recta* The right Line	**-situs.** *descendens.* descending.
		Horum, *of these,* Filius, *the Son,* Filia, *the Daughter, Right Cousin German.*

Filius,
Filia,
ἀπο της Φιλιας, i.e. ab amore parentum.

	1 **Filius.** *Son.*	**Filia.** *Daughter.*
Eorum, *of these,* Nepos collat: *The collateral Nephew,* Neptis collat: *The collat: Niece.*	2 **Nepos linealis.** *The lineal Nephew.*	**Neptis linealis.** *The lineal Niece.*
	3 **Pronepos linealis.** *The lineal Nephew's or Niece's Son.*	**Proneptis linealis.** *The lineal Nephew's or Niece's Daughter.*
	4 **Abnepos linealis.** *The Grandson of the lineal Nephew or Niece.*	**Abneptis linealis.** *The Grand Daughter of the lineal Nephew, or Niece.*
	5 **Atnepos linealis.** *The Great Grandson of the lineal Nephew or Niece.*	**Atneptis linealis.** *The Great Grand Daughter of the lineal Nephew or Niece.*
	6 **Trinepos linealis.** *The Great Great Grandson of the lineal Nephew or Niece.* et sic in infinitum.	**Trineptis linealis.** *The Great Great Grand Daughter of the lineal Nephew or Niece.* et sic in infinitum.

Nepos, quasi natus post.

Eorum, *of these,* Nepos collat: *The collateral Nephew,* Neptis collat: *The collat: Niece.*

Eorundem, *of these* Pronepos collat: *The collateral Nephews Son.* Proneptis collat: *The collateral Nephew's Daughter.* et sic in infinitum.

Eorundem, *of these,* Pronepos collat: *The collateral Nephew's Son,* Proneptis collat: *The collateral Nephew's Daughter.* et sic in infinitum.

☞ *To follow*

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 principaliorибus ſeu dignioribus eſt inchoandum.*

"*Ne poit aver pluis ample ou greinder 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 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).

[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.

(Plowd. 559. Dy. 4. & 12. Cro. Jam. 590. Finch. 8vo. ed. 113. 1. Ro. Abr. 827. Dy. 156. b.)

Sect. 12.

ITEM, purchaſe eſt appel la poſſeſſion de terres ou tenements que home ad per ſon fait ou per agreement, a quel poſſeſſion il ne avient per title de diſcent de nul de ſes anceſters, ou de ſes couſins, mes per ſon fait aemeſne.

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.

[18. b.]

PURCHASE in Latin is either *acquiſitum*, of the verbe *acquiro*, for ſo I finde it in the original Regiſter 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*.

A purchaſe is alwayes intended by title, and moſt properly by ſome kinde of conveyance either for money or ſome other conſideration,

Bracton lib. 2. fol. 65.

[b] Glanvill. lib 7. cap. 1. Brit. c. 33. fo. 84. & 121. (1. Ro. Abr. 827.)

(4) [See 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.

ration, or freely of gift; for that is in law alſo a purchaſe (1). But a deſcent, becauſe it commeth meerely by act of law, is not ſaid to be a purchaſe; and accordingly the makers of the act of 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).

Pl. Com. Wimbiſhe's caſe 47. b. 1. H. 5. cap. 5.

(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 inſignes 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 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*.

[c] 9. H. 4. 24. Mich. 10. Ja. obiter in Com. banc. in Pym's caſe.

[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.

(1) [See Note 105.]
(2) [See Note 106.]
(3) See acc. ante. 3. b.
(4) See Cro. Jam. 367. 2. Bulſtr. 151. See too the ſeveral books cited in Vin. Abr. *Deſcent* E.
(5) [See Note 107.]
(6) [See Note 108.]
(7) [See Note 109.]

CHAP. 2. Of Fee taile. Sect. 13.

TENANT in fee taile eſt per force de le ſtatute de Weſt. 2. cap. 1. *car devant le dit ſtatute, touts enheritances fueront fee ſimple; car touts les dones que ſont ſpecifies deins meſme le ſtatute fueront fee ſimple conditional al common ley, come appiert per le reherſal de meſme le ſtatute. Et ore per cel ſtatute tenant en le taile eſt en deux maners, c'eſtaſcavoir, tenant en taile generall, et tenant en taile ſpecial.*

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.

"*TENANT en fee taile.*" *Tallium*, or *feodum talliatum*, is derived of the *French* word *tailler, ſcindere*; for ſo *Littleton* himſelfe in this Chapter, Sect. 18. ſaith. (2. Inſt. 331.) Mirror, cap. 2. ſect. 15. & cap. 1. ſect. 5. (Poſt. 22. a.)

"*Le Statute de W.* 2." This ſtatute was made in 13. *E.* 1. and is called *Weſt.* 2. becauſe the parliament was holden at *Weſtminſter*, [19. a.] 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 (2. Inſt 331.) 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 5. E. 3. 14. the cauſe of the making of 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 9. E. 3. 22. ſtatute (1). See more of this in the Chapter of Warranties, Sect. 746.

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 paternâ et maternâ 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.* [*a*] Fleta lib. 3. cap. 9. Bract. lib. 2. cap. 5, &c. Brit. ca. 24. & 36.

"*Devant le dit ſtatute* [*b*] *touts inheritances fueront 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 [*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.)

(1) However lord Coke in other places finds great fault with the ſtatute *de donis*. See poſt. 19. b.

of his body, the having of an iſſue female had beene no performance of the condition; but if he had iſſue male, 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 collaterall 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 ſhould 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. Formdon 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. Formdon 34. 18. Aſſ. 5. 12. E. 4. 3. Pl. Com. 247. b. 18. E. 2 tit. Formdon 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 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] 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. [b] 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 *formdon 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. [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 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;

[g] 30. E. 1. Formdon 5. Temps E. 1. ibidem 62. 19. E. 2. Formdon 61. Pl. Com. 246. [b] 4 E. 2. Formdon 50.

(1. Ro. Abr. 837.) [i] 6. E. 3. 56. Jo. of Eltham's caſe.

[k] 45. Aſſ. p. 6.

[19. b.]

(2) [See Note 110.]
(3) [See Note 111.]
(4) [See Note 112.]
(5) [See Note 113.]

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 purchaſors 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.

[l] Pl. Com. 246. b. (Poſt. 392. 370. b.)

10. Co. 38. in Port. caſe.

"*Common ley.*" See for explication hereof, Sect. 170.

"*Come appiert per le reherſall de meſme le 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.

"*Et ore per cel ſtatute tenant en taile eſt en 2. manners,* ſcil. *tenant en tayle generall, et tenant en tayle eſpeciall.*"

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 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).

(Plowd. 555. 2. Ro. Abr. 780.)

[r] 24. H. 8. tit. feoffments al uſes 4. 27. H. 8. fo.

[ſ] Paſch. 14. Jac. in the king's bench.

(1) [See 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.

(3) [See Note 115.]

Sect. 14, 15.

TENANT en taile generall eſt, lou terres ou tenements ſont dones a un home et a ſes heires de ſon corps engendres. En ceo caſe eſt dit generall taile, pur ceo que quelcunque feme, que tiel tenant eſpouſa, (s'il avoit pluſors femes, et per cheſcun de eux il ad iſſue) uncore cheſcun de les iſſues per poſſibilitie poit enheriter les tenements per force del done; pur ceo que cheſcun tiel iſſue eſt de ſon corps engendre.

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.

EN meſme le maner eſt, lou terres ou tenements ſont dones a un feme, et a les heires de ſa corps iſſuants; coment que el avoit divers barons, uncore l'iſſue, que el poet aver per cheſcun baron, poit enheriter come iſſue en le taile per force de tiel done; et pur ceo tielx dones ſont appelles generall tailes.

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.

"TERRES," *terra*, in his generall and legall ſignification, (as hath been ſaid before) includeth not onely all kinde of grounds, as medow, paſture, wood, &c. but houſes and all edifices whatſoever. In a more reſtrained ſenſe it is taken for arable ground.

(Ante 6. a.)
[*r*] 7. E. 3. 363. 18. E. 3. 27. 7. H. 6. 8. 32 H. 6. 28. 5. E. 4. 3. 2. 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.)
[*u*] 7. Aſſ. p. 12. 7. E. 6. 1. (Fitzh. N. B. 178. f.)

"*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 [*r*] 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 favour 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 favour nothing of the realtie. But examples will illuſtrate and make this learning cleere. [20. a.]

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 common 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

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 forreſter-ſhip 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.

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.

1. H. 5. 1.
[*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 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).

Pl. Com. in Manxel's caſe. (10. Co. 58. 1. Ro. Abr. 837.)

"*Et a ſes heires de ſon corps engendres.*" 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 feoffements 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)* in the ſingular number in
[20. b.] 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

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. b. Ante 9. b.)

(1) [See Note 116.]
(2) [See Note 117.]
(3) [See Note 118.]
(4) [See Note 119.]
(5) [See Note 120.]

[20. b.]
(1) See this caſe poſt. 22. a.

(Cro. Eliz. 121. Ow. 64. S. C. Mo. 103.) Vid. Shelley's case, 1. Co.

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 aforementioned upon this statute, where he holdeth, if a 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).

(1. Ro. Abr. 837.)

(7. Co. 41.)

"*De son corps.*" 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.

[c] 3. E. 3. tit. Brieve 743. 3. E. 3. tit. Estates.
[d] 12. H. 4. 2.
[e] 37. H. 6. 15.
[f] 5. 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.

"*Engendres.*" 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 en taile speciall est, lou terres ou tenements sont dones a un home et a sa feme, et a les heires de lour deux corps engendres. En tiel case nul poet inheriter per force de le dit done, forsque ceux que sont ingendres perenter eux deux. Et est appelle speciall taile, pur ceo que si la feme devy,

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 them two. And it is called especiall taile, because if

(2) [See Note 121.]

(3) [See Note 122.]

devy, et il prent auter feme, et ad iſſue, l'iſſue del ſecond feme ne ſerra jammes inheritable per force de tiel done, ne auxy l'iſſue del ſecond baron, ſi le primer baron devie.

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.

"*A UN home et ſa feme.*" [*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, 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).

[21. a.]

(1)

(2)

(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.)

[*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.)

(1) [See Note 123.]
(2) [See Note 124.]
(3) [See Note 125.]
(4) [See Note 126.]

Sect. 17.

EN meſme le maner eſt, lou tenements ſont dones per un home a un auter ove un feme, que eſt la file ou couſin al donour en frankmariage, le quel done ad un enheritance per ceux parolx (frankmariage) a ceo annexe, coment que ne ſoit expreſſement dit ou reherce en le done, c' eſtaſcavoir, que les donees averont les tenements a eux et a lour heires perenter eux deux engendres. Et ceo eſt dit eſpecial taile, pur ceo que l'iſſue del ſecond feme ne poit inheriter, &c.

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.)

"*AUN home ove un feme.*" 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* 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 of inheritance in eſpeciall taile, as *Littleton* ſaith, *le donee ad un inheritance per reaſon de ceux parolx (frankmariage) a ceo annexe, coment que ne ſoit expreſſement dit, &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 [*b*] 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

[21. b.]

5. E. 3. 17. [*g*] This caſe is vouched in Pl. Com. 158. 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.)

[*b*] 6. E. 3. 33. Fitz. N. B. 172. 7. E. 4. 12. 15. E. 2. Cui in vita. Sect. 24.

(5) *Before or after marriage. Dy.* 147. Hal. MSS.—See acc. poſt. 21. b. and 176. a.

(6) *The caſe is* 4. *E.* 3. 4. Hal. MSS.

(7) [See Note 127.]

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, 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 frankmariage 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).

[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 & faits 9. 17. E. 3. 5. a. 45. E. 3. 20. (1. Ro. Abr. 840.)

[m] 20. E. 2. aid 174. 21. 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.

"*En frankmariage.*" *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

26. Aſſ p. 66. per Wilbye.

[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.

(1) [See Note 128.]
(2) [See Note 129.]
(3) [See Note 130.]

30 E. 1. tit. Formdon 66. adjudg acc. (2. Inſt. 336.)

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. *Per 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 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 frankmariage, 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.

31. E. 3. tit. Gard. 116. Mirr. cap. 2. ſect. 15. acc.

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.

[22. a.]

Sect. 18.

ET nota, quòd hec verbum (Talliare) idem eſt quòd ad quandam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare. *Et pur ceo que eſt limit et mis en certaine, quel iſſue inheritera per force de tiels dons, et come longement l'enheritance endurera, il eſt appelle en Latin*, feodum talliatum, i. e. hæreditas in quandam certitudinem limitata. *Car ſi tenant in general taile moruſt ſans iſſue, le donor ou ſes heirs poient entrer come en lour reverſion.*

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).

"ET

(1) *Keilw.* 104. b. *Accord.* Hal. MSS. See alſo acc. Perk. Sect. 238.
(3) [See Note 132.]

"*ET nota.*" 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 limi-*
"*tata.*" Here our author doth interpret what *feodum talliatum* is. Of all the estates taile most coarcted or restrained, that I 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). West. 2. cap. 3. Pl. Com. 251. n. 39. Ass. Pl. 20. (1. Co. 66. 104. Ante 8. b. 1. Ro. Abr. 838.) Sect. 13. Vid. Pl. Com. fo. 29. b. Regist. Judic. fo. 6.

Sect. 19.

EN meſme le maner eſt del tenant en ſpecial taile, &c. Car en cheſcun done en le taile ſauns pluis ouſter dire, le reverſion del fee ſimple eſt en le donor. Et les donees et lour iſſues ferront al donor et a ſes heires autielx ſervices, come le donor fait a ſon ſeignior prochein a luy paramount, forſpriſe les donees in frankmarriage, les queux tiendront quietment de cheſcun manner de ſervice, ſinon que ſoit per fealtie, tanque le quart degree ſoit paſſe, et apres ceo que le quart degree ſoit paſſe l'iſſue en le cinque degree, et iſſint ouſter l'auters des iſſues apres luy, tiendront del done ou ſes heires come ils teignont ouſter, come il en avant dit.

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.

"*EN cheſcun done en taile ſans pluis ouſter dire, la reverſion del*
"*fee ſimple eſt en le 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, (2. Inſt. 331. 333.) [22. b.] [*t*] 12. E. 4. 23. 5. H. 7. 14. West. 2. ca. 13. Pl. Com. 247, 248. 251. 562. 2. E. 2. tit. reſceit 147. 33. H. 6. 27. 39. E. 3. 18. 45. E. 3. 20

(2) [See Note 131.] (4) [See Note 133.]

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.

(Poſt. 142. b. Plowd. 151. 162. 196, 197. Cro. Cha. 400.)

"*Le reverſion del fee ſimple eſt en le 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, 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 bench, 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 ever 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] 28. 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] 1. H. 5. 8. 4. H 6. 20. 9. Eliz. Dier. Bromley's caſe.

[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.

[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.)

[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 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

(1) By what words a reverſion will paſs, ſee Vi. Abr. *Reverſion* G. and Com. Dig. *Eſtates* B. 12.

(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) [See Note 134.]

(4) [See Note 135.]

is apparent, for a limitation of uſe to himſelfe had without queſtion beene good.

(5) [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. [f] 20. Eliz. Dier.

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.] [g] 13. H. 7. 6. 28. H. 8. Dier 12. (3. Co. 81. b. Cro. Jam. 201. Poſt. 271. b.) 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.

"*Les donees et lour iſſues ferront al donor et a ſes heires autiels ſervices, come le donor fait a ſon ſeignior procheine a luy 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 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 (Doctr. Plac. 53.)

(1) [See Note 136.]
(2) [See Note 137.]
(3) [See Note 138.]
(4) [See Note 139.]

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.

(2. Ro. Abr. 501.) 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; 49. E. 3. 10. 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).

Bracton lib. 2. fo. 21. Britton cap. 119. Fleta lib. 3. cap. 11. & lib. 6. cap. 2. Vide Sect. 17. 20. (Ante 11. b. Poſt. 178. a.) "*Forſpriſe les donees en Frankmarriage.*" It is to be underſtood, that although the land be given *in liberum maritagium*, in free 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 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.

ET les degrees en frankmarriage ſerront accompts en tiel manner, ſcil. *de le donor a les donees en frankmarriage le primer degree, pur ceo que la feme que eſt une des donees covient eſtre file, ſoer, ou autre couſin a le donor. Et de les donees tanque a lour iſſue il ſerra accompt le ſecond degree, et de lour iſſue tanque a ſon iſſue le tierce degree, et iſſint ouſter, &c. Et la cauſe eſt, pur ceo que apres cheſcun tiel done, les iſſues queux veignont de le donor, et les iſſues queux veignont de les donees apres le quart degree paſſe de ambideux parties en tiel forme d'eſtre accompt, poyent enter eux per la ley de ſaint eſgliſe entermarie. Et que le donee en frankmarriage ſerra dit le prime degree de les quart degrees, home poit veier en un plee ſur*

AND the degrees in frankmarriage ſhall be accounted in this manner, viz. from the donor to the donees in frankmarriage the firſt degree, becauſe the wife that is one of the donees ought to be daughter, ſiſter, or other coſen to the donor. And from the donees under 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

(5) Vid. *Keilw.* 125. 129.—Hal. MSS.
(6) [See Note 140.]
(1) [See Note 141.]

ſur un breve de droit de garde, P. 31. E. 3. *lou le pl. counta que ſon tresaiel fuit ſeiſie de certe terre, &c. et ceo tenuſt d'un autre per ſervice de chivaler, &c. quel dona la terre a un* Rafe Holland *oveſque ſa ſoer en frankmarriage, &c.*

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.

[23. b.] 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 ſit data fuit, nullum inde faciat ſervitium uſque ad tertium hæredem, et 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

Rule 1. certaine 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.

[a] Vide Sect. 17. 19. 138. 268, 269. 271. 733.

[b] Glanvill. lib. 7. cap. 18. Bract. lib. 2. fol. 21. Britton cap. 119. Fleta lib. 3. cap. 11. & lib. 6. cap. 2.

[c] Vide 10 E. 3. tit. avowry 157. 31. E. 3. ceſſavit 22. 31. E. 3. gard. 116. 21. H. 7. 30.

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.)

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 [24. a.] 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 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,

(Vid. Stat. 32. H. 8. cap. 38. of marriages. 2. Inſt. 683. 25. H. 8. cap. 22.)

(Plowd. 444.)

(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) [See Note 142.]

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.

" *Les iſſues queux veignont de le donor, et les iſſues queux veignont de* " *les donees apres le 4. degree paſſe d' ambideux parties in tiel forme d'eſtre* " *account, poient enter eux per le ley de ſaint eſgliſe entermarrier.*" *(De ſaint Eſgliſe).* [*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. ca. 119. Accord. Flet. lib. 3. ca. 11. & lib. 6. c. 2.

[*e*] 32. H. 8. ca. 38.

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.

ET touts ceux tailes avauntdits ſont ſpecifies en le dit eſtatute de W. 2. *Auxy ſont divers autres eſtates en le taile, coment que ne ſont ſpecifies per expreſſe parols en le dit eſtatute, mes ils ſont priſes per le equitie de le dit ſtatute. Sicome terres ſont dones a un home et a ſes heires males de ſon corps engendres, en tiel*

AND all theſe entailes aforeſaid be ſpecified in the ſaid ſtatute of *IV.* 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

(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) [See Note 143.]

tiel caſe ſon iſſue male inheritera, et le iſſue femal ne unque enheritera pas, uncore in les auters tailes avant dits auterment eſt.

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.

"*ET touts ceux tailes avauntdits ſont ſpecifies en le dit eſtatute de "Weſtminſter 2.*" And ſo it appeareth by the ſaid ſtatute. *Auxy ſont divers autres eſtates en le 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 lawmakers 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.

"*Sicome terres ſont done a un home et a les* [*f*] *heires males de ſon "corps engendres, en tiel caſe ſon iſſue male inheritera, et l'iſſue female ne "unques inheritera, &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. Com. Seigniour Barkley's caſe. 1. Mar. Dy. 46.

V. Sect. 24.

Sect. 22 & 23.

EN meſme le manner eſt, ſi terres ou tenements ſoient dones a un home et a ſes heires females de ſont corps engendres; en tiel caſe ſon iſſue female luy inheritera per force et form de le dit done, et nemy iſſue male, pur ceo que en tiels caſes de dones faits en le taile, queux doient enheriter, et queux nemi la volunt del donor ſerra obſerve.

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.

ET AND

(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) [See Note 144.]

ET en le caſe que terres ou tenements ſont dones a un home, et a ſes heires males de ſon corps iſſuants, et il ad iſſue deux fits, et devy, et l'eign fits entra come heire male, et ad iſſue file et devy, ſon frere avera la terre, et nemi la file, pur ceo que le frere eſt heire male. Mes auterment ſerra en autres tailes, queux ſont ſpecifies en le dit ſtatute.

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 *(queux doient inheriter)* 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 and heire female, which ſhe is not, becauſe the brother is heire, and therefore the will of the giver cannot be obſerved, becauſe 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 dieth, and lands be given to the daughter, and the heires females of the bodie of her father, the daughter ſhall take nothing but an eſtate for life, becauſe there is no ſuch perſon, ſhe being not heire. But where a gift 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 by deſcent (1), *ſecundum formam doni:* and therefore *Littleton* purpoſely added theſe words, *queux doient inheriter.*

(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. Shelley's caſe. 1. Co. (Poſt. 26. b.)

[25. a.]

Sect. 24.

AUXY, ſi terres ſoient donees a un home et a les heires males de ſon corps engendres, et il ad iſſue file, quel ad iſſue fits, et devy, et puis apres le donee devy; en ceſt caſe, le fits de la file ne inheritera pas per force de la taile; pur ceo que quecunque que ſerra inheriter per force d'un done en le taile fait as heirs males, covient conveyer ſon diſcent tout per les heires males. Mes en tiel caſe le donor poet entrer, pur ceo que le donee eſt mort ſans iſſue male en la ley,

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 this caſe the donor may enter, for that the donee is dead without

(3) [See Note 145.]

(1) [See Note 146.]

ley, entaunt que le iſſue del file ne poet conveyer a luy meſme le diſcent per heyre male.

without iſſue male in the law, inſomuch as the iſſue of the daughter cannot convey to himſelfe the deſcent by an heire male.

"QUECUNQUE *ſerra enheriter per force d'un done en taile,* "&c." *Vide* Tr. [*b*] 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. [*b*] 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 her ſelfe 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 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, *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 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. *Vid.* 20. *H.* 6. fo. 33. the queſtion ſuddenly demanded and debated, and no conſideration

(1. Ro. 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.

[25. b.]

(2. Inſt. 68.) Vid. Seignior de la Ware's caſe. 11. Co. fo. 1.

17. E. 4. 1.

20. H. 6. 33.

or

(2) The word *he,* to deſcribe *the deviſee,* is wanting. See acc. Stath. Abr.

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 entaile 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 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, the remainder to the next heire male of *B.* in taile, and *B.* hath 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.

(Hob. 31.)

11. H. 6. 13. 9. H. 6. 25.

Sect. 25.

EN meſme le manner eſt, lou tenements ſont done a un home et a ſa feme, et a les heires males de lour deux corps engendres, &c.

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.

11. E. 3. Formedon 20.

(Ante 20. b.)

"*AUN home, et a ſa feme.*" 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

[*m*] 15. H. 7. 10. 1. Co. Dilon and Frein's caſe. 40. Aſſ. p. 13.

(1) Vid. hic fol. 10. b. *Harpur's caſe* Hall. MSS. (2) [See Note 147.]

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.

[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.

ITEM, ſi tenements ſoient dones a un home et a ſa feme, et a les heires del corps del home engendres, en ceo caſe le baron ad eſtate en le taile generall, et la feme forſque eſtate pur terme de vie.

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.

ITEM, ſi terres ſoient dones a le baron et ſa feme, et a les heires le baron queux il engendra de corps ſa feme, en ceo caſe le baron ad eſtate en le taile ſpeciall, et la feme forſque pur terme de vie.

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.

Sect. 28.

ET ſi le done ſoit fait al baron et a ſa feme, et a les heires la feme de ſa corps per le baron engendres, donque la feme ad eſtate en eſpecial taile, et le baron forſque pur terme de vie (1). *Mes ſi terres ſont dones a le baron et a la feme, et a les heires que le baron engendra de corps la feme, en ceo caſe ambideux ont eſtate en la taile, pur ceo que ceſt parol*

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. 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,

(3) As to the doctrine of not allowing a poſſibility on a poſſibility, ſee poſt. 184.

(4) [See Note 148.]

[26. a.]

(1) [See Note 149.]

parol (heires) n'eſt limit a l'un pluis que a l'auter (2).

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.

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. & 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.) [r] 20. E. 3. Briefe 377.

"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 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.

Sect. 29.

[26. b.]

ITEM, ſi terre ſoit done a un home et a ſes heires, que il engendra de corps ſa feme, en ceo caſe le baron ad eſtate en eſpecial taile, et la feme n'ad riens.

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.

20. H. 6. 36. [s] 1. Co. fol. 140. b. Chudleigh's caſe adjudge. (7. Co. 41.)

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).

Sect. 30.

ITEM, ſi home ad iſſue fits, et devie, et terre eſt done al fits, et a les heires de corps ſon pier engendres, ceo eſt bone taile, et uncore le pier fuit mort al

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

(2) *Et ils ount en cell caſe tiel eſtate, ſicome terrez furent donez a eux et a lez heires de leur deux corps engendrez*, L. and M.

(3) [See Note 150.]

[26. b.]

(1) [See Note 151.]

al temps de la done. Et mults auters eſtates en taile y ſont per le equitie del dit eſtatute, que icy ne ſont ſpecifies.

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.

"*SI home ad iſſue fits et devie, &c.*" *John de Mandevile* by his wife *Roberge* had iſſue *Robert* and *Mawde*. *Michael de Moreville* 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 tooke 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* tooke no eſtate with *Emme* in the lands, becauſe he was named after the *habendum* (4).

(Ante 20. b.)

17. E. 2. Taile 23. 2. E. 3. 1. tit. Taile 7. 4. and 5. Ph. and 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.)

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 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.)

27. a.]

"*Et a les heires de corps le pier.*" Theſe words *(les heires)* are obſervable; for if they were *(ſes 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

(2) [See Note 152.]
(3) [See Note 153.]
(4) [See Note 154.]

his father, becauſe the grant is to him and to his heires, &c. and conſequently he hath a fee ſimple (1). But 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).

(4)

(Ante 20. b. Poſt. 220. a.)

"*Et mults autres eſtates en le taile y ſont, &c.*". This needeth no explanation.

Sect. 31.

MES ſi home done terres ou tenements a un auter, a aver et tener a luy et a ſes heires males, ou a ſes heires females, il, a que tiel done eſt fuit, ad fee ſimple, pur ceo que n'eſt my limit per le done, de quel corps l'iſſue male ou female iſſera, et iſſint ne poit en aſcun maner eſtre priſe per l'equitie del dit eſtatute, et pur ceo il ad fee ſimple.

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.

"TERRES *ou 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

(1) [See Note 155.]

(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.

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. 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 ſixt 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 reputenter, &c.* By this he had a fee ſimple qualified in the dignity (6). 2. *H.* 5. f. l. 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 Gavelkind gives or deviſes the ſame to a man and to his eldeſt heires. He cannot hereby alter [27. b.] 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.

[*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.)

[*u*] Per literas patentes authoritate parliamenta.

(3. Co. 20, 21.)

Mich. 26. & 27. Eliz. in Com. Banco. Leonard Lovelace's caſe.

"*Et iſſint ne poet eſtre priſe per l'equitie del dit 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.

"*Et pur ceo il ad 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)

(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.

(5) [See Note 156.]

(6) [See Note 157.]

(7) See further as to a qualified fee, ante 1. b. and the books cited in n. 5. there.

[27. b.]

(1) By what acts tenant in taile 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 apres Possibilitie d'Issue extinct.

TENANT en fee taile apres possibilitie d'issue extinct est, lou tenements sont dones a un home et a sa feme en especiall taile, si l'un de eux devy sans issue, celuy que survesquist est tenant en taile apres possibilitie d'issue extinct. Et s'ils avoient issue, et l'un devie, coment que durant la vie l'issue, celuy que survesquist ne serra dit tenant en taile apres possibilitie d'issue extinct; uncore si l'issue devy sans issue, issint que ne soit ascun issue en vie que poit enheriter per force de le taile, donque celuy que survesquist de les donees est tenant en le taile, apres possibilitie d'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 donees 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 casu* 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, 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

(4. Co. 63. 1. Ro. Abr. 296.)
[*a*] Temps E. 1. waste. 125. 39. E. 3. 16. 31. E. 3. aid 35. 42. E. 3. 22. 43. E. 3. 1. 45. 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.
[*b*] 13. E. Entre Cong. 56.

(Cro. Eliz. 671.)

[28. a.]

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. reseit 147. 41. E. 3. 12. 20. E. 3. reseit. 38. E. 3. 33. Lewes Bowles' case ubi supra.

(2) [See Note 158.]

[28. a.]

(1) 43. *Ass.* 24. Hal. MSS.

(2) *So if he mispleads*, 39. E. 3. 16. Hal. MSS.

(3) 28. E. 3. 96. Contra *as to receipt.* Hal. MSS.

in the quantity of the eſtate. And as an eſtate taile was originally caryed 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.

Sect. 33.

ITEM, ſi tenements ſont dones a un home et a ſes heires que il engendra de corps ſa feme, en ceſt cas la feme n'ad ryen en les tenements, et le baron eſt ſeiſie come donee en ſpeciall taile. Et en ceo cas, ſi la feme devy ſans iſſue de ſon corps engendres per ſon baron, donques le baron eſt tenant en taile apres poſſibility d'iſſue extinct.

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.

"*SI la feme devie ſans 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 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

Lewes Bowles' caſe, 11. Co. fol. 80. (1. Ro. Rep. 178. 2. Saund. 383. 387. Cro. Eliz. 315. 1. Co. 76. 2. Co. 61.)

(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.

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 state 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, 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 [28. b.] 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.

[*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.)

(1. Ro. Abr. 841.)

Sect. 34.

ET nota, que nul poit estre tenant en le taile apres possibility d'issue extinct, forsque un des donees, ou le donee en le special taile. Car le donee en general taile ne poit estre unque dit tenant en taile apres possibility d'issue extinct; pur ceo que touts temps durant sa vie, il poit per possibility aver issue que poit inheriter per force de mesme le taile, Et issint en mesme le manere l'issue, que est heire a les donees en un especial taile, ne poit estre dit tenant en taile apres possibilitie d'issue extinct, causâ quâ suprà.

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 above-said.

Et

And

(7) [See Note 159.]
(8) [See Note 160.]

[28. b.]
(1) [See Note 161.]

* Et nota, *que tenant en taile apres poſſibilitie d'iſſue extinct ne ſerra unque puny de waſt, pur l'enheritance que fuit un foits en luy*, 10. H. 6. 1. *Mes ceſtuy en le reverſion poit entrer s'il alien en fee*, 45. E. 3. 22.

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 *apres poſſibilitie, &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.

* 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. (Dr. and Stud. 61. 11. Co. 80.)

[29. a.] CHAP. 4. *Curteſie d'Engleterre.* Sect. 35.

TENANT per la curteſie d'Engleterre eſt, lou home prent feme ſeiſie en fee ſimple ou en fee taile general, ou ſeiſie come heire de le taile ſpecial, et ad iſſue per meſme la feme male ou female oyes ou vife (1), *ſoit l'iſſue apres mort ou en vie, ſi la feme devie, le baron tiendra la terre durant ſa vie per la ley d'Engleterre. Et eſt appel tenant per le curteſie d'Engleterre pur ceo que ceo eſt uſe en nul auter realme forſque tantſolement en Engleterre.*

Et aſcuns ont dit, que il ne ſerra tenant per le curteſie, ſi non que l'enfant, qu'il ad per ſa feme, ſoit oye crie; car per le crie eſt prove, que le enfant fuit nee vife: Ideo Quære (2).

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, 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 child was borne alive. Therefore Quære.

"PRIST

(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.

[29. a.]

(1) Inſtead of *oyes ou vife*, the words are *neez vif* 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.

"*PRIST feme ſeiſie.*" 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 advowſon (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 upon any eſtate of freehold, unleſſe the particular eſtate be determined or ended during the coverture.

[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.)

(8. Co 96.)

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.]

[h] Proceſſ. Fact. ad Coronationem R. 2. Anno regni ſui primo Rot. clauſ. m. 45.

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 Alicià 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 pretextû præmiſſorum habere debet* (1). 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* earle of *Warwicke*, who was earle of *Warwicke* to him and to his heires, and duke of *Warwicke* to him and to the heires males

Rot. Patent. ann. 20. H. 6.

Rot. Patent. de anno 27. H. 6. m.

§

(3) [See Note 162.]
(4) [See Note 163.]
(5) [See Note 164.]
(6) [See Note 165.]
(7) [See Note 166.]
[29. b.]
(1) [See Note 167.]

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.*

[*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.)

"*En fee ſimple ou en fee taile generall, ou ſeiſie come heire de la taile ſpeciall, et ad iſſue per la feme male ou 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 inherite 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 explaneth 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 a *formedon* recover the land againſt his father, becauſe he is to recover by force of the eſtate taile as heire to his mother, and is not inheritable to his father (3). W. 2. ca. 1. Litt. ca. Dower fol. 40. ſect. 52. Paine's caſe 8. Co. fol. 34.

"*Et ad 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 dieth, 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 alledge, 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, (ui 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* [*c*] Bract. lib. 5. 437, 438. Britt. ca. 66. and ca. 83. Fleta, lib. 1. ca. 5. and lib. 6. cap. 54. (Ante 3. b. 7. b. 8. a.)

(2) [See Note 168.]
(3) [See Note 169.]
(4) Yet in ſome caſes the time of having iſſue is of conſequence. See poſt. 40.

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 incalſcentis.

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.

[d] 28. H. 8. 25. Dyer. Paine's caſe, ubi ſupra.

"*Oyes ou vive.*" 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 *mortuus exitus non eſt exitus*, ſo as the crying is but a prooſe 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 jurvequiſſent lour fems dount ills uſſent conceive tenuiſſent les heritages lour fems pur lour vies.* [30. a.]

[e] Mirror, cap. 1. ſect. 3.

[f] 9. E. 3. 38. 16. E. 3. aid. 129. Stat. de Conſuetudinibus Kanciæ.

By the cuſtom of Gavelkind [f] a man may be tenant by the curteſie without having of any iſſue (1).

[g] 21. H. 3. tit. Dower 198. Paine's caſe, ubi ſupra. (1. Leon. 167.)

"*Soit l'iſſue apres mort ou en vie.*" 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 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.

(Poſt. 32. a.)

[b] Brooke tit. per le Curteſie 86. 10. E. 3. 27.

But [b] 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.

"*Si la feme devie, le baron tiendra a la terre, &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

(5) [See Note 170.]

(1) [See Note 171.]
(2) [See Note 172.]

huſband in the life of the wife, as ſhall be ſaid hereafter when we come to the apt place (3). Secondly, if after iſſue [*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.

(6. Co. 57. b. Poſt. 67. a. 124. b.)

[*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.

" *Et eſt appel tenant per le curteſie d'Engleterre, pur ceo que n'eſt uſe* " *en auter realme forſque tantſolement en Engleterre.*"

" *Per le curteſie.*" In Latine *per legem Angliæ.*

" *Tantſolement en Engleterre.*" 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).

" *Et aſcuns ount dit, que il ne ſerra tenant per le curteſie, ſinon que* " *l'enfant que il ad per ſa feme ſoit oye crie, car per le crie eſt prove que* " *le enfant fuit nee vife.*" Our author having delivered his owne opinion before, viz. *oyes ou vife*, 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 prove the life of the enfant.

(8. Co. 34.)

[*k*] Vet. Mag. Car. part. 2. fol. 70.

[*l*] Glanvill. lib. 7. cap. 8. Brac. lib. 5. tract. 5. ca. 30. Britton, cap. 50. fo. 132. Fleta, lib. 6. cap. 54.

" *Aſcuns ount dit.*" 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.

" *Ideo quære.*" This quære is not in the originall 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

(2. Ro. Abr. 90. & Poſt. 183. contra.)

(3) Hic *ſect.* 90. 21. *E.* 3. 35. Hal. MSS.

(4) [See Note 173.]

(5) [See Note 174.]

(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 preſent Edition.*]

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 untill he come to a proper place in the next chapter. If [30. b.] 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 niefe 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, 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 *fauns 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).

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 Hale's 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.)

[*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.)

(1) 1. *H.* 7. 17. *Dy.* 95. Hal. MSS.
(2) [See Note 175.]
(3) See poſt 31. b.
(4) [See 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.

CHAP. 5. Of Dower. Sect. 36.

TENANT en dower eſt, lou home eſt ſeiſie de certaine terres ou tenements en fee ſimple, taile generall, ou come heire de le taile ſpeciall, et prent feme, et devie, la feme apres le deceſſe de la baron ſerra endow de la tierce part de tiels terres et tenements, que fueront a ſa baron en aſcun temps durant le coverture, a aver et tener a meſme la feme en ſeveraltie per metes et bounds pur terme de ſa vie, le quel el avoit iſſue per ſa baron ou nemy, et de quel age que la feme ſoit, iſſint que el paſſe l'age de neuf ans al temps de le mort ſa baron, [car il covient que el ſoit paſſe l'age de neuf ans al temps del mort ſa baron,] (1) ou autrement el ne ſerra my endow.

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, otherwiſe ſhe ſhall not be endowed.

"*TENANT en 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 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.* 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 applyed to them. But it is commonly taken for her third part, which ſhe hath of her huſband's lands or tenements.

[31. a.]

In Domeſday, *Dos* is called *Maritagium.*

To the conſummation of this dower three things are neceſſary; viz. marriage, feiſin, 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

[q] Lib. Rub. cap. 70. Glanvill. lib. 6. cap. 1. Bract. lib. 2. fol. 92. Britt. cap. 101. Fleta, lib. 5. cap. 22.

[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.

[s] Clauſ. 11. H. 3. nu. 17. Regiſt. 142, 143. F. N. B. 150. Ockham fol. 40.

(7) [See Note 177.]
(8) [See Note 178.]
(1) All between the brackets omitted in L. and M. and in Roh.

nant 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 priviledges ſhe hath; of all which *Ockam* yeelds the reaſon, *Doti ejus parcatur quia præmium pudoris eſt* (2).

[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.)

"*Lou home.*" 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 man take a nieſe 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.

"*Seiſie.*" Here this word (ſeiſed) extendeth it ſelfe 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 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 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 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 endowed 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 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 [31. b.]

(Ante 29. a.)

43. E. 3. 32. 45. E. 3. 13. 9. E. 3. 4. F. N. B. 149. 8. E. 3. tit. Aſſ. 393. 19. E. 2. dower 170. 23. E. 3. dower 30. (Perk. ſect. 315, 316. 4. Co. 122. 1. Ro. Abr. 677.)

[w] 5. E. 3. tit. Voucher 249. Paris's caſe 9. E. 3. 4.

(4. Co. 122.)

(2) [See Note 179.]
(3) See ante 30. b. n. 2.
(4) [See Note 180.]
(5) Hic *ſect.* 8. 8. *E.* 3. 13. 8 *Aſſ.* 6.

But by ſome the heir ſhall have mortdanceſter of ſuch ſeiſin. Hal. MSS.
(6) [See Note 181.]

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 indowed, 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 then 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.)

(2) 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.

(3) Likewiſe if two joyntenants be in fee, and the one maketh a feoffment in fee, his wife ſhall not be indowed (4). (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 dotâſſe potuit.*

"*Des terres ou 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 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 ſubſtantial. But of the principal manſion, or capitall meſſuage, the wife ſhall be indowed, [c] *ſi non ſit*

Vide Sect. 242. (Poſt. 165. a. Ante 30. b.)

[a] Paſch. 23. Eliz. 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. ib. 194. [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. 23. Trin. 17. El. in Com. Banco.

(1) 8. *E.* 2. *Recovery in value* 10. Hal. MSS.

(2) Hic *ſect.* 56. *fol.* 42. Hal. MSS.

(3) [See Note 182.]

(3 a) [See 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. Comment. 132.

(5) [See Note 184.]

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*.

"*En fee ſimple, fee taile general, &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 indowed, 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.

"*Et prent feme.*" If a man ſo ſeiſed as is aforeſaid, taketh an alien to wife, and dyeth, ſhe ſhall not be indowed (9); but if 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).

(Doctr. 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 fuit viri ſui, ex quo in converſione ſuâ noluit cum eo adhærere et cum eo converti* (1).

[32. a.]

[*f*] Dorſ. clauſ. 18. H. 3. m. 17.

"*Del tierce part de tiels terres et tenements per ſeveraltie per metes "et 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

(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. Britt. 247. 11. E. 3. tit. Dower 85. 15. E. 3. ibid. 81. 2. E. 3. 57. F. N. B. 8. k.

(6) [See Note 185.]

(7) [See Note 186.]

(8) 21. *E.* 3. 36. 3. *H.* 6. 55. Hal. MSS.

(9) [See Note 187.]

(10) Yet Edmund the queen of Navarre's huſband was only a ſubject, therefore *quære* the reaſon of the caſe.

[32. a.]

(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.

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 marſhalſie, 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).

[i] 4. E. 2. Tr. 233. 26. E. 3. 58. 45. E. 3. Dower 50. (Cro. Jam. 621.)
[k] Bract. 98. 208. Brit. 247. Flet. lib. 5. ca. 23. 17. E. 2. Dower 104. 163. 19. E. 3. Quar. Imp. 154. 7. E. 3. 7.
[l] Bract. 97. Brit. 146, 147.
[m] Lib. Intr. Judgm. 18. fo. 230. 11. Co. 25, 26. Harper's caſe.

But in ſome caſes of lands and tenements, which are diviſible, 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. 6. Co. 78. Seig. Aburganie's caſe. (Poſt. 56. a. 171. a. 179. a. Perk. ſect. 328. contra.)

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).

And

(2) See poſt. 32. b. n. 2.
(3) [See Note 188.]
(4) [See Note 189.]
(5) [See Note 190.]
(6) [See Note 191.]
(7) [See Note 192.]

(F. N. B. 149. C.) V. 30. E. 1. Vouch. 298.

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).

"*Aſcuns temps durant le 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.)

[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. Fitz. N. B. 150. h. 8. E. 2. Dower 153

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 [32. b.] 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.

"*En ſeveraltie per metes et 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 judgment 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 fixe, the demandant ſhall have judgement to recover againſt them the third part of fixe 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,

(8) [See Note 193.]
(9) [See Note 194.]
(10) [See Note 195.]
(1) [See Note 196.]

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. 12. E. 4. 2. 18. H. 6. 27. per Paſton.

"*Le quel el avoit iſſue per ſa baron ou nemy.*" 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*, 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 que ante annum nupſerit dote mulctata fortunis omnibus à priore marito relictus 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 [*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

[*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.)

[*ſ*] Lamb. Sect. 120. 71. & divers ancient manuſcripts. See the 2. part of the Inſtitutes, cap. 7.

[*t*] Bract. lib. 4. 312. & lib. 2. 96. Britton, cap. 103. Fleta, lib. 5. cap. 23.

(Cro. Jam. 621. 1. Leon. 56.)

[*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. 11.

(2) [See Note 197.]

(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) [See Note 198.]

(5) *Damages in ſuch caſe according to the value, not of the land, but of the rent.* P. 22. Jac. C. B. Hal. MSS.

(Dr. and Stud. Dial. 2. c. 13.)

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 alwayes 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.

[w] 5. E. 3. 1. 41. E. 3. Dower 46. and not in the booke at large. (Doctr. Plac. 152.)

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.*

[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.

[33. a.]

(Doctr. Plac. 152.)

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 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 to 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.

(S. C. Mo. 80. N. Bendl. 153. 4. Leon. 198.)

[y] Mich. 8. & 9. Eliz. Rot. 904. in Comm. Banc. (9. Co. 15. b. Redingfield's caſe. 1. Ro. Abr. 679.)

[z] Tr. 37. Eliz. 4. Co. 30. b. Shawe's caſe.

[a] 43. Aſſ. Pl. 32. (F. N. B. 263.)

14. H. 8. 28.

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

(1) [See Note 199.]

(2) Mich. 8. and 9. Eliz Belford and Rows, Moor and Bendl. Hal. MSS. See Mo. 80 and N. Bendl. 153.

(3) [See 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.

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. a 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).

"*De quel age que la feme ſoit, iſſint que el paſſe l'age de neufe ans* "(7) *al temps del mort ſon baron.*" *Feme*, 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 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 yeares 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.

(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.)

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 indowed. 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).

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 lawfull marriage, albeit the man were under fourteene,

(See 1. Salk. 120. S. C. 3. Lec. 410.)

(5) [See 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. Entr.* 228. novem anno. rum et dimid. *She ought to ſhew how much more ſhe is than 9 years.*—Hal. MSS.

(8) [See Note 202.]

(9) Vid. ſupra fol. 31. b.—Hal. MSS.—See note 9. in 31. b.

(5. Co. 98. b. Berrie's caſe.)

fourteene, or the wife above nine, and under twelve (10). So it is 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 doe kill him, the wife ſhall have an appeale: the reaſon of the diverſity ſhall appeare hereafter in this Chapter (5).

[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 136. (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.)

[33. b.]

" *Apres le mort le baron.*" [h] *Mortuo viro huic 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.*

[h] Britton, cap. 106. Bracton, lib. 4. fol. 301.

[i] 31. E. 3. tit. Colluſion 29.

[k] Bract. lib. 2. cap. 39. fol. 92, &c. Fleta, lib. 5. cap. 22. Britton, cap. 101.

(10) [See Note 203.]

(11) [See Note 204.]

[33. b.]

(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.

(5) See poſt. 37. a.

(6) [See Note 205.]

Sect. 37.

ET nota, que per le common ley la feme n'avera pur ſa dower forſque la tierce part des tenements que fueront a ſa baron durant le eſpouſels; mes per cuſtome d'aſcun pais el avera le moitie, et per le cuſtome en aſcun ville et burgh, el avera l'entiertie; et en touts tiels caſes el ſerra dit tenant en dower.

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.

"*NOTA, per le common ley la feme n'avera pur ſa dower "forſque* [*l*] *la tierce 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.*

[*l*] Glanv. lib. 6. cap. 1. Bracton, ubi ſupra. Britton, ubi ſupra. Fleta, ubi ſupra. Mirror, cap. 1. ſect 3. Magna Carta, cap. 7.

"*Mes per cuſtome d'aſcun pais* (7) *el avera le moitie, et per le cuſ-*"*tome en aſcun ville et burgh el avera l'entiertie.*" 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 towns, 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 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).

Fitz. N. B. 150. O. [*m*] 21. E. 4. 53, 54. 7. H. 6. 26. 22. H. 6. 14. 21. H. 7. 17. 40. Aſſ. 27. 41. 16. E. 2. Preſcription 53. 43. E. 3. 32. 45. Aſſ. 8. Dier 363. 39. E. 3. 2. 10. 14. E. 3. Barre 277. 13. E. 3. tit. Dower 65. (1. Ro. Abr. 558. 563.) [*n*] Vide le ſtatute de conſuetud. Kanciæ, &c. Trin. 17. E. 3. coram rege Kan. in Theſaur. in which record Senentia ſignifieth Widowhood.

And as cuſtome may enlarge, (11) ſo may cuſtome abridge dower, and reſtraine it to a fourth part, &c.

Sect. 38.

[34. a.]

AUXY, ſont deux auters manners de dower, c'eſtaſcavoir, dower que eſt appelle dowment ad oſtium eccleſiæ, *et dower appelle dowment* ex aſſenſu patris.

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.

(7) [See Note 206.]
(8) Nota, *the writ ſpecial.* Hal. MSS.
(9) See acc. Robinſ. Gavelk. 159.
(10) [See Note 207.]
(11) [See Note 208.]

Sect.

Sect. 39.

DOWMENT ad oſtium eccleſiæ eſt, lou home de plein age ſeiſie en fee ſimple que ſerra eſpouſe a un feme, quant il vient al huis del monaſtery ou d'eſgliſe d'eſtre eſpouſe, et la, apres affiance enter eux fait, il endowe la feme de ſa entier terre ou de la moity, ou d'autre mendre parcel, et la overtment declare le quantitie et la certainty de la terre que el avera pur ſa dower. En ceo caſe la feme, apres le mort le baron, poit entrer en le dit quantitie de terre dont le baron luy endowe, ſans auter aſſignement de nulluy.

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.

10. H. 3. Dower 200.

IF this dower be made *ad oſtium caſtri ſive meſuagii* it is not good, but ought to be made *ad oſtium eccleſiæ ſive monaſterii.*

[o] Bracton, lib. 2. cap. 39. Mirror, cap. 1. ſect. 3. and cap. 5.

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 201. F. N. B. 150. m. n. Fleta, lib. 5. cap. 22, &c. Britton, cap. 101. 108, &c. (Perk. ſect. 306.)

9. H. 3. Dower 197. (Poſt. 38. a. 1. Ro. Abr. 682.)

"*Ou home de pleine 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.

[p] Glanvil. lib. 6. ca. 1. 40. E. 3. 43. Vide Vernon's caſe, 4. Co. 1, 2.

"*La, apres affiance enter eux.*" (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.

"*De*

* Quære, if this ſhould not be read *lecto maritali.*

(1) [See Note 209.]

(2) [See Note 210.]

(3) [See Note 211.]

[34. b.] "*De ſa entier terre ou de la moitie.*" (4) In ancient time [q] as it appeareth by *Glanvill*, lib. 6. cap. 1. it was taken that a man could not have indowed 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).

[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.

"*Et la overtment* [t] *declare le quantitie et certeintie del terre.*" 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.

"*En ceo caſe la feme poet entrer en le dit quantitie del terre.*" And afterwards *Sectione* 43. he ſaith, *Nota, que en touts caſes lou le certaintie appiert, queux terres ou tenements feme avera pur ſa dower, la feme poet entrer apres le mort ſon baron.* 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 meane 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 ſuâ, et maneat in capituli meſſuagio 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. Marie. Br. 101. (Ante 32. b.)

Nota, ſureſt way.

"*En touts caſes quant le certeintie appiert, &c. la feme poet entrer apres le mort del baron.*" 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

(1. Ro. Abr. 681. 2. Inſt. 678. 32. H. 8. cap. 5. of execution.)

(4) [See Note 212.]

[34. b.]

(1) [See Note 213.]

(2) See further as to *quarentine* ante 32. a. and n. 3. there, and Treat. on Dow. in Gilb. Law of Uſes, 372.

(3) [See Note 214.]

rent charge, and ſhe hath judgement to recover the third part, albeit it be certain that ſhe ſhall have 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).

[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.

"*Sauns auter aſſignement* (6) *de nulluy.*" 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. Scir. 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 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 [35. a.]

[c] 7. H. 6. 34. 10. E. 2. Dower 169. 10. E. 3. 38. (2. Co. 67.) (9. Co. 18. Mo. 26.)

(4) 20. *E.* 4. 14. Hal. MSS.
(5) [See 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. & *ſupra* n. 1.
(8) 12. *H.* 4. 17. Hal. MSS.
(9) [See Note 216.]
(10) [See Note 217.]
(11) *And this ought to be averred in pleading. Dy.* 361. Hal. MSS.—See S. C. in Cro. Eliz. 451. and Noy 55.

[35. a.]
(1) [See Note 218.]
(2) [See Note 219.]
(3) Vid. *the ſtatute of Weſtminſter* 1. *cap.* 48. 4. *E.* 3. 42. *M.* 8. Jack. 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.

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.

[d] 33. E. 3. tit. Judgm. 254. 8. E. 3. 69. 17. E. 3. 58. b. 3. E. 3. tit. Dower 76.

Fiftly, 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 judgement by the sheriffe of an equall third part, yet shall the disseisee, &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).

3. E. 3. Vouch. 196. See the Second Part of the Institut. W. 1. cap. 49. [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. (2. Co. 67. 1. Ro. Abr. 549. 1. Sid. 21. Post. 357. 3. Co. 78. 6. Co. 58. a. 5. Co. 30. b.)

Sixtly, An assignment by [f] (7) a disseisor, abator, intrudor, &c. if there be no covin, is good, unlesse it be prejudiciall to the 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.

[f] 12. Ass. p. 20. 21. E. 3. 12. [g] 3. E. 3. tit. Dower 77. 16. E. 2. tit. dower Statham. (Post. 357.)

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.)

(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.

(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.

Sect. 40.

DOWMENT ex assensu patris est, lou le pier est seisie de tenements en fee, et son fits et heire apparent, quant il est espouse, endowe sa feme al huys del monasterie ou del esglise, de parcel de terres ou tenements son pier de assent son pier, et assigne la quantitie et les parcels. En ceo case apres le mort le fits, la feme entera en mesme le parcell sauns auter assignement de nulluy. Mes il ad este dit en cest case, que il covient a la feme d'aver un fait de le pier provant son assent et consent de cel endowment. M. 44. E. 3. fol. 45. (1).

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 assignement 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.

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.)

"*LOU le pier est seisie de tenements en 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 (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.]

"*Et son fits et heire apparent.*" It must be such a sonne and heire apparent, as must continue an heire apparent, and therefore the yongest 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

[*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.

(14) S. p. acc. Perk. 445.

[35. b.]

(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.

(2) See acc. ante 34. b. n. 3.

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).

[*l*] F. N. B. 150. e. Flet. l. 5. cap. 22. Bract. lib. 4. 305. Ambr. Gorge's caſe. 6. Co. 22.

"*Quant il eſt eſpouſe, endow ſa feme.*" [*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.

"*Et aſſigne le quantitie et les 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.

"*Apres la mort le fitz ſa feme entera.*" In this caſe after the death of the huſband the wife ſhall enter, or have a writ of dower albeit the father be alive.

"*Que il covient al feme d'aver un fait provant ſon aſſent a cel en-*
"*dowment.*"

"*Un fait,*" 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. Fiftly, a perſon able to be contracted with. Sixtly, by a ſufficient name. Seventhly, a thing to be contracted for. Eightly, 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.

[*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.)

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 ſealing, delivery, or other matter of fact is denied, it ſhall be tried by the country.

[*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.)

(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.

(6) [See Note 220.]

(7) [See Note 221.]

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. 16. 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). [36. a.]

[q] Brit. fol. 101. Bract. l. 2. fol. 33. Fleta, lib. 3. ca. 14. (2. Inſt. 673.)

"*Un fait de feoffement.*" 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 bockes (5). And as a deed may be delivered to the partie 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).

(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.)

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.*

Carta

[t] Bract. lib. 2. fol. 33. b. Fleta, lib. 3. cap. 14.

(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) [See Note 222.]

(6) [See 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 Shep. Touchſt. 57. Com. Dig. *Fait* A. 3. Vin. Abr. *Faits*, I. and K.

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. fo. 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.

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.*

[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. Walliæ anno 12 E. 1. fo. 18, in veteri magna carta. 47. H. 3. Glanvil. lib. 6. ca. 1, 2, 3.
[d] F. N. B. 150. p.
Dower 174.

Sect. 41.

ET ſi apres la mort le baron el enter, et agree a aſcun tiel dower de les dits dowers ad oſtium eccleſiæ, &c. *donque el eſt conclude de claimer aſcun auter dower per le common ley d'aſcuns terres ou tenements queux fueront a ſa dit baron. Mes ſi el voit, el poit refuſer tiel dower* ad oſtium eccleſiæ, &c. *et donque el poet eſtre endow ſolonque le cours del common ley.*

AND if after the death 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.

"*EL eſt conclude a claimer aſcun auter dower per la common ley.*"

[36. b.] (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

(Doc. Pla. 149.) Vernon's caſe, 4. Co. 1. 1. Mariæ, Dyer 91. 31. E. 3. Scire fac. 99. 20. E. 4. 3.

(8) Vid. 32. *E.* 1. *Dower* 126. 177.—Hal. MSS. (1) [See Note 224.]

(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.)

not 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 purview 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 fixe things are to be obſerved. Firſt, her joynture by the firſt limitation is to take effect for her life in poſſeſſion or 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 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 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

Leake & Randal's caſe, 4. Co. 4.
(3. Co. 25. 27.)
Vide Vernon's caſe, ubi ſupra, fo. 2. b.
[37. a.]
Dyer 19. Eliz. 358.

§

(2) T. 26. Jac. *Sherwell's caſe Hutt.* 51. *accord.*—Hal. MSS.
(3) [See Note 225.]
(4) Vid. M. 29. and 30. Eliz. C. B. Rot. 334. *Deviſe to the wife for 7 years.*—Hal. MSS.
(5) [See Note 226.]
(6) [See Note 227.]
(7) [See Note 228.]

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* 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.

Brit. cap. 102, 103.

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.

"*Conclude*" 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.* Eſtoppell.

[*c*] Pl. Com. 276. b. per Walſh. Vide Sect. 693. 695. 667. 679.

Sect. 42.

ET nota, que nul feme ſerra endow ex aſſenſu patris *en le forme avantdit, mes lou ſa baron eſt fits et heire apparent a ſon pier.* Quære *de ceux deux caſes de dowment* ad oſtium eccleſiæ, &c. *ſi la feme, al temps del mort ſa baron, ne paſſe l'age de ix. ans, ſi el avera dower ou non.*

AND note, that no wife ſhall be endowed *ex eſſenſu 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.

"*NUL feme ſerra endow, &c.*" Of this ſufficient hath beene ſaid before. (Ante 33. a.)

"*Quære de ceux deux caſes de 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.

ET nota, que en touts caſes lou le certainty appiert queux terres ou tenements feme avera pur ſa dower, la le feme poit entrer apres la mort ſa baron ſans aſſignement de nulluy. Mes lou le certaintie ne appiert, ſi come d'eſtre endow de la tierce part d'aver en ſeveraltie, ou del moitie ſolonque le cuſtome de tener en ſeveraltie, en tielz caſes il covient que ſa dower ſoit a luy aſſigne apres le mort del baron; pur ceo que non conſtat devant aſſignement, quel part des terres ou tenements, el avera pur ſa dower.

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 feveralty, 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.

"*ET nota, que en touts 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 it ſelfe 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.

MES ſi ſoient deux jointenants de certaine terre en fee, et l'un alien ceo que a luy affiert, a un auter en fee, que prent feme, et puis devie; en ceo cas la feme pur ſa dower avera le tierce part de la moitie que ſa baron ad purchaſe, a tener en common (come ſa part amountera) oveſque l'heire ſa baron, et oveſque l'auter jointenant, que ne aliena pas, pur ceo que en tiel cas ſa dower ne poit eſtre aſſigne per metes et bounds.

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

(1) *It ſeems, that though it be aſſigned, the freehold is not in her till entry.* 9. E. 3. 5.— Hal. MSS.

(2) [See Note 229.]

Of this ſufficient hath beene ſaid before, and that in this caſe the wife cannot enter without aſſignement.

Sect. 45.

ET eſt aſcavoir, que la feme ne ſerra my endow de terres ou tenements, que ſa baron tient jointment oveſque un auter al temps de ſon morant; mes lou il tient en common, auterment eſt, come en le caſe prochein avantdit.

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, 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. (1. Ro. Abr. 676.)

[38. a.]

Sect. 46.

ET eſt aſcavoir, que ſi tenant en le taile endowa ſa feme ad oſtium eccleſiæ, *come eſt avantdit, ceo ſervera pur petit ou rien al feme, pur ceo que apres la mort ſa baron, l'iſſue en le taile puit entrer ſur le poſſeſſion la feme; et iſſint puit celuy en le reverſion, ſi ne ſoit iſſue en le taile en vie, &c.*

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.

AUXY, ſi home ſeiſie en fee ſimple, eſteant deins age, endowa ſa feme al huiz del monaſterie ou d'egliſe, et devie, et ſa feme enter, en ceo cas l'heire le baron luy puit ouſter. Mes auterment eſt (come il ſemble) lou le pier eſt ſeiſie en fee, et le fits deins age endow

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

endow ſa feme ex aſſenſu patris, *le pier donque eſteant de plein age.*

is ſeiſed in fee, and the ſonne within age endoweth his wife *ex aſſenſu patris*, the father being then of full age.

Vid. 9. H. 3. tit. dower 197. (Ante 34. a.)

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.

Sect. 48.

AUXY, il y ad un auter endowment, que eſt appel dowment de la pluis beale. Et ceo eſt come en tiel caſe que home ſeiſie de xl. acres de terre, et il tient vint acres de les dits xl. acres de terre, d'un per ſervice de chivalrie, et les autres vint acres de terre d'un auter en ſocage, et prent feme, et ont iſſue fits, et moruſt, ſon fits eſteant deins l'age de xiiii. ans, et le ſeigniour de que la terre eſt tenus en chivalrie entre en les xx. acres tenus de luy, et eux ad come gardein en chivalrie durant le nonage l'enfant, et la mere de l'enfant enter en le remnant, et ceo occupie come gardein en ſocage: ſi en tiel caſe le feme port briefe de dower envers le gardein en chivalrie, d'eſtre endow de les tenements tenus per ſervice de chivalrie, en le court le roy, ou en auter court, le gardein en chivalrie puit pleder en tiel caſe tout ceſt matter, et monſtre coment la feme eſt gardein en ſocage, come devant eſt dit; et prie que ſerra adjudge per la court, que le feme luy meſme endowera de la pluis beale de les tenements que il ad come gardein en ſocage, ſolonque le value de le tierce part que el claime d'aver de les tenements tenus en chivalrie per ſa briefe de dower. Et ſi la feme ceo ne puit dedire, donques le judgement ſerra fait, que le gardeine en chivalrie tiendra les terres tenus de luy durant le nonage l'enfant quit de le feme, &c. (1)

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 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

(1) *Et que la feme poet endower lui meme de la pluis beale parte de la terres, que ele ad come gardein en ſocage a le value, &c.* L. and M.

ment 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.

"*ET le ſeignior de que le terre eſt tenus en chivalrie enter en les "vint acres tenus de luy.*" For he is not poſſeſſed as a gardein againſt whom a writ of dower lieth, untill he doth enter. [38. b.] 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. (Ante 35.) Vid. le ſtatut. de bigamis, cap. 3.

"*Si en tiel caſe el port breve de dower envers le gardein en chival-"rie.*" Albeit [a] the gardein in chivalrie or the grantee of the king of a wardſhip hath but a chattle 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 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 endow herſelfe *de la pluis beale* without judgement, as ſhall be ſaid hereafter. 8. E. 3. 52. 8. E. 3. 15. & 31. 38. E. 3. 37. 47. E. 3. 9. b.

"*Le gardein en chivalrie poit pleader.*" 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 [39. a.] 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 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.)

(1) [See Note 230.] (2) [See Note 231.]

putteth this caſe that the gárdein 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 others it appeareth, that ſhe may in this very caſe retaine for part, and recover againſt the gardein for part (2).

[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.

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. ub. ſup. Admeſ. 4. 12. H. 6. Admeſ. 9. F. N. B. 148. i. F. N. B. 149. a. [h] 7. R. 2. ub. ſu. [i] 7. R. 2. F. N. B. 149. 25. E. 3. 51.

"*Donques le judgement ſerra fait que le gardein en chivalrie tien-*
"*dra les terres tenus de luy durant le nonage l'enfant quit de la feme,*
"*&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

(1. R®. Abr. 201. Cro. Cha. 442. Poſt. 168. a.) 22. E. 4. Dow. 16. 16. E. 3. Waſt. 100. 45. E. 3. 6.

(2) Vid. 2. *E.* 3. *Vouch.* 213. 13. *E.* 3. *Judgment* 165.—Hal. MSS.

(3) Vid. 9. *Rep.* 15. b. *Ann Bedingfield'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.

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 account, and be endowed againſt the heire at his full age (6). But obſerve what *Littleton* ſaith in the next Section: but before you [39. b.] 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.

Sect. 49.

ET nota, que apres tiel judgement done, la feme puit prender ſes vicines, et en lour preſence endower luy meſme per metes et bounds de la pluis beale part de les tenements que el ad come gardein en ſocage (1), *d'aver et tener a luy pur terme de ſa vie; et tiel dower eſt appel* dower de la pluis beale.

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, 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.

ET nota, que tiel dowment ne puit eſte, mes lou le judgement eſt fait en le court le roy, ou en auter court, &c. (2) *et ceo eſt pur ſalvation del eſtate del gardeine en chivalrie durant le nonage l'enfant.*

AND note, that ſuch dowment cannot be, but where a judgement is given in the king's court, or in ſome other court, &c. and this is for the preſervation of the eſtate of the gardein in chivalrie during the nonage of the infant.

"*LOU le judgement eſt fait, &c.*" For without ſuch a judgement, as appeareth before, gardeine in ſocage cannot endow herſelfe, as likewiſe hath bin ſaid before (3). 15. E. 3. Dower 69. 16. E. 3. tit. Waſt. 100.

"*Ou en auter 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. 329. F. N. B. 7. 8.

"*Et ceo eſt pur ſalvation del eſtate del gardein en chivalrie durant le nonage de l'enfant.*" For the heire (before the entre of the gardein)

(6) [See Note 232.]

[39. b.]

(1) *A le valuwe de le tierce partie des tenementez que le gardeyn en chevalerye ad, &c. ad ceo.* L. and M. — Roh. — P. and Red.

(2) *Que le feme ceo puiſt faire,* L. and M. — Roh.

(3) [See Note 233.]

dein) 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.

ET iſſint poyes veier cinque manners de dower, ſcilicet, dower per le common ley, dower per le cuſtome (5), *dower* ad oſtium eccleſiæ, *dower* ex aſſenſu patris, *et dower* de la pluis beale.

AND ſo you may ſee five kinds of dower, viz. dower by the common law, dower by the cuſtome, dower *ad oſtium eccleſiæ*, dower *ex aſſenſu patris*, and dower *de la pluis beale*.

This is manifeſt of itſelfe, and therefore needeth no explanation.

Sect. 52.

[40. a.]

ET memorandum, *que en cheſcun caſe lou home prent feme ſeiſie de tiel eſtate de tenements, &c. iſſint que l'iſſue, que il ad per ſon feme, poit per poſſibilitie enheriter meſmes les tenements de tiel eſtate que la feme ad, come heire al feme; en tiel caſe, apres le mort la feme, il avera meſmes les tenements per le curteſie de Angleterre, et auterment nemy.*

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.

Sect. 234. 301. 335.

"*MEMORANDUM.*" This word doth ever betoken ſome excellent point of learning, which our author hath uſed in other places, as appeareth in the margent.

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.

The matter hereof hath bin partly explaned in the Chapter of Tenant by the Curteſie. If a man [a] taketh a wife ſeiſed of 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 poſſibilitie 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.

"*Come heire al feme.*" This doth implie [b] a ſecret of law, for except the wife be actually ſeiſed, the heire ſhall not (as hath been

(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.

[40. a.]

(1) See ante 29. b. n. 4. and Vin. Abr. *Curteſy*, H.

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.

ET auxy, en cheſcun caſe lou la feme prent baron ſeiſie de tiel eſtate des tenements, &c. iſſint que ſi per poſſibilitie il puiſſoit happer que ſi le feme avoit aſcun iſſue per le baron, et que meſme l'iſſue puiſſoit per poſſibilitie enheriter meſmes les tenements de tiel eſtate que le baron ad, come heire a le baron, de tiels tenements el avera ſa dower, et auterment nemy. Car ſi tenements ſont dones a un home, et a les heires que il engendra de corps ſa feme, en tiel caſe la feme n'ad riens en les tenements, et le baron ad eſtate forſque come donee en eſpeciall taile. Uncore ſi le baron devy ſans iſſue, meſme la feme ſerra endow de meſmes les tenements; pur ceo que l'iſſue, que el per poſſibilitie puiſſoit aver per meſme le baron, puiſſoit enheriter meſmes les tenements. Mes ſi la feme deviaſt, vivant ſa baron, et puis le baron priſt auter feme, et moruſt, ſa ſecond feme ne ſerra my endow en ceſt caſe, cauſâ quâ ſuprà.

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 endowed in this caſe, for the reaſon aforeſaid.

"*ISSINT que ſi per poſſibilitie il puit happer que ſi le feme avoit "aſcun iſſue per ſon baron.*" 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. 12. H. 4. 2. 7. H. 6. 11, 12. (1. Ro. Abr. 675.)

[40. b.]

"*Et*

(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.

" Et que meſme l'iſſue puiſſoit per poſſibilitie inheriter meſmes les tene-
" ments, &c." 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
(Ante 37. a.) huſband be attainted of felony, the wife ſhall be endowed, 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 be barred
(F. N. B. h. 150. Ante 32. a.) of her dower, as hath beene ſaid (2), and yet the iſſue ſhall inherit (3).

Sect. 54.

5. E. 3. Voucher 249. 8. E. 3. Aſſ. 293. 4. H. 6. 24. F. N. B. 149.

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.

NOTA, ſi un home ſoit ſeiſie de certaine terres, et priſt un feme, et puis aliena meſme la terre ove garrantie, et puis le feoffor et le feoffee deviont, et la feme de le feoffor port un action de dower envers le iſſue le feoffee, et il vouch l'heire le feoffor, et pendant le voucher et nient termine, la feme le feoffee port ſon action de dower envers le heire le feoffee, et demaunda la tierce part de ceo de que ſa baron fuit ſeiſie, et ne voile demaunder le tierce part del cux deux parts de que ſa baron fuit ſeiſie; fuit adjudge, que el n'avera judgement tanque l'auter plee fuit determine.

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 brings her action of dower againſt the heire of the feoffee, and [41. a.] 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 judgement untill ſuch time as the other plea were determined.

Sect. 55. (1)

ET nota, que Vaviſour dit, que ſi un home ſoit ſeiſie de terre et fait felonie, et puis alien, et puis eſt attaint,

AND note, *Vaviſor* ſaith, that if a man be ſeiſed of land and committeth felony, and after alieneth, and

(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.

[41. a.]

(1) Sect. 55. is not in L. and M. nor in Roh. but is in P. and the ſubſequent editions.

taint, la feme avera bone action de dower envers le feoffee: mes ſi ſoit eſchete al roy, ou al ſeignior, el n'avera breve de dower. Et ſic vide diverſitatem, et quære inde legem.

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 enquire what the law is herein.

THIS is alſo of the new addition, *et exploſa 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 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.

(Poſt. 392. b.)

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.

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.

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.

(2) *But outlawry in treſpaſs doth not bar.* 3. *E.* 3. 7. 41. Hal. MSS.

(3) [See Note 234.]

(4) [See Note 235.]

(5) [See Note 236.]

CHAP.

CHAP. 6. *Tenant a terme de vie.* Sect. 56. [41. b.]

TENANT pur terme de vie eſt, lou home leſſa terres ou tenements a un auter pur terme de vie le leſſee, ou pur terme de vie d'un auter home. En tiel caſe le leſſee eſt tenant a terme de vie. Mes per common parlance celuy que tient pur terme de ſa vie demeſne, eſt appel tenant pur terme de ſa vie; et ceſtuy que tient pur terme d'auter vie, eſt appel tenant pur terme d'auter vie.

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.

(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.

"*OU per terme de vie d'un auter home.*" 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 *per 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. 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 aſſigne his eſtate to divers men and their heires during the life of *ceſty que vie* (5).

[*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.)

[*b*] 27. Aſſ. p. 31. & Pl. Com. fo. 28. b. in Colthorſt's caſe, tit. Barre 303. (Cro. Jam. 201. Mo. 394. Cro. El 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.)

[*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. F. N. B. 180.

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

21. E. 3. 41. 48. E. 3. 31. 7. E. 4. 28. 21. H. 6. 46. 10. E. 4. 3. 4. Co. 86, 87. in Luttrel's caſe.

(1) [See Note 237.]
(2) [See Note 238.]
(3) [See Note 239.]
(4) [See Note 240.]
(5) [See Note 241.]

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. (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.

(1) As if a leaſe 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 [42. a.] (2) 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. (3) 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 your ſelves for a time. Roſſe's caſe, 5. Co. 13. (5. Co. 9. b.) (Ante 31. b. poſt. 273. b.) 24. E. 3. 32. & 68. 30. Aſſ. p. 47. 19. E. 3. Sur. 8. (1. Co. 76. b.)

(4) As if tenant for life maketh 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). 13. R. 2. Dow. 95. 7. H. 6. 3. per Cur. 18. E. 3. 48. (2. Ro. Abr. 497. Poſt. 335. a.)

(5) 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. 7 H. 5. 4.

(6) 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. 29. Aſſ. p. 64.

(7) *B.* ſeiſed of lands in fee, taketh to wife *If.* and infeoffes *C.* in fee, who takes *Alice* to wife: *C.* dieth, *Alice* is endowed; *B.* dieth, *If.* recovereth dower againſt *Alice* and dieth, *Alice* ſhall enjoy the land againe during her life (2). 8. E. 2. Aſſ. 393. 45. E. 3. 13.

(8) *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). [*a*] 2. H. 5. 7. 13. H. 7. 15. 18. E. 2. br. 835. F. N. B. 59. f.

Tenant

(6) *But affirmative covenants do not reſtrain.* 28. *H.* 8. *Dy.* 19. Hal. MSS.

[42. a.]

(1) [See Note 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 exhæredationem *B.* 13. E. 2. *Brief* 835. Hal. MSS.

[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, dammages (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 x l. &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 a leaſe of a manor, that at the time of the leaſe made is worth xx l. *per annum*, to another until c l. 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 levying of the c l. (7). But if a man grant a rent of xx l. *per annum* untill 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 chattells.

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.

Vid. Sect. 381. 7. Aſſ. Pl. 1. 13. El. Dyer 300.

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.

7. E. 4. 23. (8 Co. 85. b. Poſt. 233. a.)

Vide Sect. 381. (1. Ro. Abr. 846.)

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

(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) [See Note 243.]

(7) [See Note 244.]

(8) *Plowd. Comment.* 273. Hal. MSS.

(9) [See Note 245.]

(10) 21. *H.* 8. 5. *by Shelly.* Hal. MSS.

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.

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. 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. (Poſt. 183.) 4. E. 2. Waſt. 11. 17. E. 3. 7. (Mo. 258. 363. Poſt. 276. a.)

[42. b.]

(1) 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.

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*. 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.

(2)

Sect. 57.

ET eſt aſcavoir, que il y ad le feoffor et le feoffee, donor et le donee, le leſſor et le leſſee. Le feoffor eſt properment lou home enfeoffa un auter en aſcuns terres ou tenements en fee ſimple, celuy que fiſt le feoffment eſt appel feoffour, et celuy a que le feoffment eſt fait eſt appel feoffee. Et le donour eſt properment lou un home done certaine terres ou tenements a un auter en le taile, celuy que fiſt le done eſt appel le donor, et celuy a que le done eſt fait eſt appel le donee. Et le leſſor eſt properment lou un home leſſa a un auter certaine terres ou tenements pur terme de vie, ou pur terme des ans, ou a tener

AND it is to be underſtood, that there is feoffor 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

(11) [See Note 246.]
(1) [See Note 247.]
(2) [See Note 248.]

a tener a volunt, celuy que fist le leas est appel lessor, et celuy a que le leas est fait est appel lessee. Et chescun que ad estate en ascun terres ou tenements pur terme de sa vie ou pur terme d'auter vie, est appell tenant de franktenement, et nul auter de meindre estate poit aver franktenement: mes ceux de greinder estate ont franktenement; car cestuy en fee simple ad franktenement, et celuy en le taile ad franktenement, &c.

or tenements for terme of life, or for terme of years, or to hold at will, he which maketh the leafe is called leffor, and hee to whom the leafe is made is called leffee. And every one which hath an eftate 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 leffer eftate can have a freehold: but they of a greater eftate have a freehold; for he in fee fimple hath a freehold, and tenant in taile hath a freehold, &c.

THIS and the reft that follow in this Chapter concerning the defcription of the feoffor and feoffee, donor and donee, and leffor and leffee, are evident.

"*Et eft afcavoir que il y ad le feoffor et le feoffee, &c.*" *Vide* Sect. 2. where a light touch is given who may purchafe. Now fomewhat is to be faid, who have ability to enfeoffe, &c. and may be a feoffor, donor, leffor, &c. Whofoever is difabled by the common law to take, is difabled to infeoffe, &c. But many that have capacitie to take, have no abilitie to infeoffe, &c. as men attainted of treafon, felony, or of a *præmunire*, aliens borne, the king's villaines, traitors, felons, &c. he that hath offended againft the ftatutes of *præmunire*, after the offences committed (3) if attainders enfue, 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 thefe may be avoyded. But an hereticke, though he be convicted of herefie, a leper removed by the king's writ from the fociety of men, baftards, a man deafe dumbe or blinde, fo that he hath underftanding and found memory, albeit he expreffe his intention by fignes, villaine of a common perfon before entrie, or the like may infeoffe, &c. [43. a.]

Bracton, lib. 5. fo. 415. Britton, fo. 88. Fleta, lib. 3. ca. 3. & lib. 6. ca. 39, 40.

2. H. 5. ca. 7. which is repealed. Doct. and Stud. lib. 2. ca. 29.

[*a*] All feoffments, gifts, grants, and leafes by bifhops, albeit they be confirmed by the deane and chapter, by any of the colledges or halls in either of the Univerfities, or elfewhere, deans and chapters, maftor or gardian of any hofpital, parfon, vicar, or any other having fpirituall or eccleſiaſtical living, are alfo to be avoyded; [*b*] and all the faid bodies politique or corporate are by the ftatutes of the realm difabled to make any conveiances to the king, or to any other, as it hath been adjudged: which ftatutes have bin made fince *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 cafe. Vide Left. de W. 2. ca. 41.

It is provided [*c*] by the ftatute of *Magna Charta, quòd nullus liber homo det de cætero amplius alicui de terrâ fuâ quàm ut de refiduo terræ fuæ poffet fufficient' fieri domino feodi fervitium ei debitum quod pertinet ad*

[*c*] Magna Charta, cap. 32. Mirror, cap. 5. fect. 2. Glanvil. lib. 7. ca. 1. Bract. lib. 1. Brit. 88, &c. Fleta, lib. 3. cap 3.

(3) As to conveyances made by felons or by offenders againft the ftatutes of *præmunire* between indictment and attainder, fee W. Jo. 217. Cro. Cha. 172. and Wilf. vol. 1. part 2. page 219.

(4) [See Note 249.]

[43. a.]

(1) [See Note 250.]

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). 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 afterward 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 yeare 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,

[43. b.]

[*d*] Vide an excellent declaration hereof in 7 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. Magna Charta there vouched which was the charter of King John, for it was cited before 9. H. 3.

(2) [See Note 251.]
(3) [See Note 252.]
(4) [See 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.

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 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.

20. Ass. pl. 17. by Skipwith.

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).

Britt. 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. Britton, 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.)

"*Franktenement.*" 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.*

(2) [See Note 254.]

Chap. 7. Tenant for terme of yeares. Sect. 58.

TENANT pur terme d'ans eſt, lou home leſſa terres ou tenements a un auter pur terme de certaine ans, ſolonque le number des ans que eſt accord perenter le leſſor et le leſſee. Et quant le leſſee entrer per force del leas, donque il eſt tenant pur terme des ans; et ſi le leſſor en tiel caſe reſerve a luy un annuall rent ſur tiel leas, il poit eſlier a diſtrainer pur le rent en les tenements leſſes, ou il poit aver un action de debt pur les arrerages enverz le leſſee. Mes en tiel caſe il covient, que le leſſour ſoit ſeiſie de meſmes les tenements al temps del leas; car il eſt bone plee pur le leſſee a dire que le leſſor n'avoit riens en les tenements al temps de le leas, ſinon que le leas ſoit fait per fait endent, en quel caſe tiel plee donque ne giſt en le bouch le leſſee a pleader.

TENANT for terme of yeares is where a man letteth 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.

"LOU *home leſſa terres, &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 laiſſer*, to depart with or forgoe.

[44. a.] 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

[*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.

[*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 eccleſiaſtica perſons. 11. Co. 66 Magdalen Colledge caſe. Leveſque de Sarum's caſe 10. Co. 60 (1. Sid. 1

ſervation 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.* becauſe theſe ancient offices be of neceſſity, and with the ancient fees, and ſo no diminution of revenue (1).

(Cro. Cha. 16. 4. 50. 10. Co. 58. Dyerexf. 134. 2. Mod. 16. Finch 191, 192, 193. Cro. Cha. 48. Cro. Jac. 173.)

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.

5. Co. 6. Seig. Mountjoye's caſe. 13 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, it muſt be made to begin from the day of the making thereof, or from the making thereof (4). [44. b.]

5 Co. 2. Elmer's caſe.

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.

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).

(Cro Cha. 95. Cro. Ja. 112. 173.)

Fiftly, 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.

[d] 5. Co. 3. Jewel's caſe. 17. E. 3. 75. 9. Aſſ. 24. 14. E. 3. Scire facias 22. 10. H. 6. 2. 9. H. 6. 21. (1. Sid. 316, 3 K. 416. Cro. Eliz. 708.)

Sixtly, 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).

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

(1) [See Note 255.]
(2) [See Note 256.]
(3) See New Abr. *Leaſes*, E. 2.
(4) [See Note 257.]

[44. b.]
(1) [See 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 in New Abr. *Leaſes*, E. rule 3.
(3) [See Note 259.]

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 not by a gardian in chivalry, tenant by the curteſie, tenant in dower, or the like (4).

[e] 6. Co. 37. Deane and Chapter of Worceſter'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 yeilded 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 lawfully reſerved. Secondly, that where not onely a yearly rent was formerly reſerved, but things not annuall, as heriots, or any fine or other profit at or upon the death of the farmor, yet if the yearely 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 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 is in ſubſtance the accuſtomable rent. Fiftly, 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, reſerving the halfe of the accuſtomable rent. Sixtly, 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.

5. Co. 6. Seignior Mountjoye's caſe. (Cro. Jam. 76.) 6. Co. 37, 38. Deane and Chapter of Worceſter's caſe. 5. Co. 5. Seignior Mountjoye's caſe. 6. Co. 37. Lord Mountjoye's caſe ubi ſupra. (Cro. Cha. 16, 17.)

Ninthly, nor to any leaſe to be made without impeachment of waſte. 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 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 archdeacon in *jure archidiaconatûs*, a prebendary and the like are within the ſtatute, for every of them generally is ſeiſed in *jure eccleſiæ* (7).

Deane and Chapter of Worceſter's caſe ubi ſupra. Deane and Chapter of Worceſter's caſe ubi ſupra.

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.*

3. E. 6. 1. Mar. tit. Leaſes. Bro. 62. (Finch. 191.)

(4) [See Note 260.]
(5) 6. *Rep.* 37. T. 3. Jac. *Crook. n.* 6. Hal. MSS. See Cro. Jam. 76.
(6) [See Note 261.]
(7) [See Note 262.]
(8) [See Note 263.]

13. *Eliz.* And what hath beene ſaid concerning a leaſe for three lives, doth hold for a leaſe for one and twenty yeares.

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 [45. a.] 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 by a (Cro. Eliz. 874.) biſhop, or any ſole corporation, but it muſt be confirmed by the deanes and chapters, or others that have intereſt, as hath been ſaid (1. And. 65.) in the caſe of the 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 then 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

(9) [See Note 264.]

[45. a.]

(1) *Accordingly adjudged, though the concurring 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) [See 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.

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 then 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 was made in benefit of the ſucceſſor (5). But let us now returne to our author.

3. Co. 59, 60. Lincolne Colledge caſe, p. 39. Eliz. inter Hunt and Singleton ibidem.

"*Home leſſa.*" 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.

(1. Ro. Abr. 877. Mo. 72. 1. Leon. 177. Cro. El. 701. 6. Co. 15. Treport's caſe. Doc. Pl. 93.)

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) 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 eſtoppell 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,

[*a*] 27. H. 8. f. 13. a. 13. H. 7. 14. 2. H. 5. 7. 1. Co. 76. Bredon's caſe. (Poſt. 302. b.)

[*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.

(4) [See 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) [See Note 267.]

(8) Intratur H. 34. Eliz. Rot. 72. *King and Beny.*—Hal. MSS.

ters, 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.

[45. b.]

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 (3. Co. 64. b.) 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.

[*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. (Plow. 264. b. Cro. Ja. 173.) 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 voide *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*.

[*e*] 33. H. 8. Dier. 3. Co. 59, 60. in Lincolne Colledge caſe. Hunt's caſe vouched.

Some voide *in præſenti*; as if one make a leaſe for ſo many 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. (1. Ro. Abr. 848.)

"*Pur 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 ſurrendred, 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 ſurrendred, yet the ſecond leaſe ſhould not begin till after the 21 yeares be ended by efluxion 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.)

[*f*] 1. Co. 154. in the Rector of Chedington's caſe.

[*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.

[*g*] Vide Sect. 534.

(1) [See Note 268.]

a leaſe. In the king's caſe [*b*] 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.

[*b*] Regiſter F. N. B. 270. c.

[*i*] 8. H. 6. 34.

"*De certaine ans.*" 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 poſſeſſion 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. (1) If *A.* ſeiſed of lands in fee grant to *B.* that when *B.* payes 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. (2) For the ſecond, if *A.* leaſeth his land to *B.* for ſo many yeares as *B.* hath in the mannor 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. (3) 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 then 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 6 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.

(3) If a man make 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.

(4) 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).

Pl. Com. Say and Fuller's caſe. Mirror, ca 2. ſect. 17. & cap. 5. ſect. 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

(2) [See Note 269.]
(3) [See Note 270.]

[46. a.]
(1) [See Note 271.]

fered 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 5 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 the [*n*] 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'*.

11. Co. 33.

[*l*] 21. H. 8. cap. 15.

[*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. reſceit 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. [*n*] 7. H. 4. 12. 33. H. 8. Dier. 32.

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.

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

(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.)

ut

(2) [See Note 272.]

(3) *Or reddition.* 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.

(4) [See Note 273.]

(5) [See Note 274.]

(6) Vid. 7. *Rep. the earl of Bedford's caſe.* Hal. MSS.

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. [*b*] 32. H. 8. ca. 28.

The king made a gift in taile of the mannor 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 *Awſten*'s caſe, as I had it of the report of maſter *Edmond Plowden*, a grave and learned apprentice of law. (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.

(5) 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). 13. Eliz. ca. 10. [*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.)

[46. b.] 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 dye, yet is the appropriation wholly diſſolved, becauſe the incumbent, which came in by preſentation, had the whole ſtate in him; and ſo was it adjudged, as the caſe is to be intended (1). 2. E. 3. 8. per Scroope. (1. Ro. Abr. 240, 241.)

(6) 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 precifely 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.)

"*Et quant le leſſee enter per force del leaſe, donques il eſt tenant pur terme des ans.*" And true it is, that to many purpoſes he is not tenant for yeares until he enter (7) 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. (8) Neither can the leſſor grant away the reverſion by the name of the reverſion, before (2. Ro. Abr. 403. Cro. Car. 110. 400.) V. Sect. 454, 455.

(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.

[46. b.]
(1) [See Note 275.]
(2) [See Note 276.]

(Cro. Ja. 60. 5. Co. 124.)

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 in him: and if it be made to two, and one dye before entry, his intereſt ſhall ſurvive. *Vide* Sect. 281.

V. Sect. 665. more fully of this matter. (Hob. 3.)

(2) 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.

(1. Ro. Abr. 344, 345. Plow. 191.)

(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).

Hil. 17. El. in the king's bench. (Poſt. 351. 10. Co. 51. Hutt. 17.)

(4) 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 barr the wife, for that the wife had but a poſſibility, and no intereſt.

37. Aſſ. p. 11. Pl. Com. 418. b. (1. Ro. Rep. 359.)

(5) 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).

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 then if a leaſe be made to a man and his heires it can goe to his heires. But let us returne to *Littleton* (7).

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.)

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 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 ſixt 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

(3) [See Note 277.]
(4) [See Note 278.]
(5) [See Note 279.]
(6) [See Note 280.]
(7) Hic. *fol.* 9. *a.* Hal. MSS.
(8) [See Note 281.]
(9) [See Note 282.]

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.)

" *Et ſi le leſſor en tiel caſe reſerve a luy un annual rent ſur tiel leaſe* " *il poet eſlier a diſtreyner pur le rent, ou il poet aver action de debt pur* " *les arerages.*"

[47. a.] " *Reſerve a luy un annual 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 of 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 rent, for the apparent poſſibility that it may come in poſſeſſion (6), and they are tenements within the words of *Littleton*.

(*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. 10. 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. 122. 5. E. 3. 68. 17. E. 3. 75. 11. H. 4. 40. 3. H. 6. 21. 45. 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.

[*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).

[*a*] 40. E. 3. 47. 8. E. 3. 67. 21. E. 4. 62. 3. H. 6. 45.

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*] 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

[*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.

(10) [See Note 283.]

[47. a.]

(1) [See Note 284.]

(2) [See Note 285.]

(3) [See Note 286.]

(4) [See Note 287.]

(5) Quære, *how aſſiſe ſhall be brought in caſe of herbage.* 17. E. 3. 75. Hal. MSS.

(6) [See Note 288.]

(7) [See Note 289.]

[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. [e] 5. E. 4. 4. 14. E. 3. bre. 282. 8. Co. 70, 71. [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.

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.

It is further to be observed, that the lessor cannot reserve to any other but to himselfe, for *Littleton* saith, *reserve a luy*, reserve to himselfe. [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] *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 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.

"*Annual 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 this Chapter of Rents, and therefore in this place thus much shall suffice.

[b] 14. H. 8. 25. 2. E. 2. tit. Distress. 6. R. 2. Rescous 11. 7. E. 3. Avower. 199. 15. E. 2. Avower. 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.)

"*A distreyner pur le 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. [b] 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 *ferae naturae* (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

(8) [See Note 290.]
(9) [See Note 291.]
(10) See further as to reservation of rent, Vin. Abr. title *Reservation*, and Gilb. Treat. on Rents.
(11) [See Note 292.]
(12) [See Note 293.]
(13) [See Note 29 .]

or garments in a taylor's ſhop (14), nor ſacks of corne or meale in a mill, nor in a market, nor any thing diſtrayned for damage *feſant*, for it is in cuſtody of law, and the like.

[*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. [*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.)

[*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 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. [47. b.] [*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. [*m*] 21. H. 7. 26. 3. E. 3. Aſſ. 46. 9. [*n*] 7. H. 7. 1. b. 10. H. 7. 21. 11. H. 7. 4. a. 15. H. 7. 17. 18. E. 2. avowrie 219. 6. E. 4. 22. E. 4. 49. 4. E. 3. diſtref. 18. 27. E. 3. 80. 2. H. 4. 16. (2. Leon. 7. Doct. and Stud. lib. 2. c. 27.) [*o*] Marlebr. cap. 4. W. 1. cap. 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. [*p*] 33. H. 8. tit. d ſtref. 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. diſtref. 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 doore 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

(14) [See Note 295]
(15) 20. *H.* 7. 9. 13. 21. *E.* 4. 47. Hal. MSS.
(16) [See Note 296.]
(17) [See Note 297.]
(18) [See Note 298.]

[47. b.]
(1) [See Note 299.]
(2) [See Note 300.]
(3) [See Note 301.]
(4) [See Note 302.]
(5) [See Note 303.]

[t] Regiſt. F. N. B. 100, 101.

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.*

(Doct. and Stud. lib. 2. cap. 9.)

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 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).

(1. Ro. Abr. 601. Poſt. 292. b.)

"*Action de 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] 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. W. 1. cap. 35.

[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. Fleta, lib. 2. cap. 40. and lib. 3. cap. 14. Bracton, lib. 2. fol. 36. 25. E. 3. cap. 11. Britton, fol. 57. & 70. (Poſt. 3. a. 1 Ro. Abr. 596.)

"*Mes en tiel caſe il covient, que le leſſor ſoit ſeiſie* (9) *de meſmes les tenements al temps del leaſe, car eſt bone plea pur le leſſee a dire, que le leſſor n'avoit riens en les tenements al temps del 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).

[x] 45. E. 3. 7. 20. E. 4. 10. 34. H. 6. 48. 35. H. 6. 34. 9. H. 6. 35. 11. H. 4. 22. [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.)

"*Si* [x] *non que le leaſe ſoit per fait indent, &c.*" If the 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,

(6) [See Note 304.]
(7) [See Note 305.]
(8) See New. Abr. *Debt*, B. and Vin. Abr. *Debt*, O.
(9) [See Note 306.]
(10) 18. E. 3. 16. *Brief* 747. *Dy.* 122. *Martyne and Hardye.* Hal. MSS.
(11) [See Note 307.]

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 [48. a.] 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.

[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.

ET eſt aſcavoir, que en leaſe pur terme de ans, per fait ou ſans fait, il ne beſoygne aſcun liverie de ſeiſin d'eſtre fait al leſſee, mes il poit entrer quant il voet per force de meſme le leaſe. Mes des feoffments faits en pais, ou dones en le taile, ou leaſe pur terme de vie; en tiels caſes ou franktenement paſſera, ſi ceo ſoit per fait ou ſauns fait, il covient aver un livery de ſeiſin.

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.

"*LIVERIE de ſeiſin.*" (2) *Traditio*, or *deliberatio ſeiſinæ*, is a ſolemnitie, that the law requireth for the paſſing of a 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).

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.)
[b] Bract. lib. 2. ca. 15.

And there be two kinds of livery of ſeiſin, viz. a liverie in [c] deed, and a livery in law. (1) 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.*

[c] Bract. lib 2. ca. 15. & 18. Brit. ca. 33. in fine fo. 87. Flet. lib. 3. cap. 15.

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

[d] 6. Co. 26. Sharp's caſe.
[e] See of this more Sect. 60. (2. Ro. Abr. 7.)

(12) [See Note 308.]
(13) [See Note 309.]

[48. a.]

(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 2. Blackſt. Comment. 311. Mad. Formul. Anglic. Diſſert. 9. and Spelm. Gloſſ. and Du Freſn. Gloſſ. voce *Inveſtitura.*

(3) [See Note 310.]

(4) 9. *Rep.* 13. *Thoroughgood's caſe.* Hal. MSS.

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. 33. H. 8. Feoff. Br. (9. Co. 136. b. 1. Leon. 207.)

50. E. 3. Rot. Parl. nu. 30.

(Post. 50. a.) 13. E. 3. Estop. 177.

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 Hogge & Crosse for lands in London. Vid. Pl. Com. 395.

* 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.)

Bridgewater's case. (Ante 4. b. Post. 190. b.)

seſſion of this houſe, in the name of all the lands and tenements contained in this deed, according to the forme and effect 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.

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).

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 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 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).

[48. 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

(5) [See 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.

[48. b.]

(1) [See Note 312.]

(2) [See Note 313.]

being in the meadow of 80 acres, generally, without bounding or describing of the same in certaintie; and liverie 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.

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 seisinâ 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 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.

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*] 9. E. 4. 39. 38. E. 3. 11. [*b*] 9. E. 4. 28. 40. 5. H. 7. 9. 3. H. 6. tit. Pleint 1. 11. H. 4. 32. 11. E. 3. Ass. 86. [*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

(3) [See Note 314.]
(4) [See Note 315.]
(5) 1. *Rep. rector of Cheddington's case.*
Hal. MSS.
(6) [See Note 316.]

(2. Ro. Abr. 4. Dy. 33. a. Mo. 11.)

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. 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 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. per touts les Juſt. 11. H. 4. 71. Pl. Com. 152. 10. E. 4. 3.

(Mo. 99.)

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 entendeth 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, 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 [preſerved.] 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

[49. a.]

(7) [See Note 317.]
(8) [See Note 318.]
(1) [See Note 319.]
(2) See ante 9. a. 47. a. 48. a. and poſt. 121. b. and 169. a.

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 then good, when the feoffor is out of possession (4). And yet in some 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 belongeth 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.

2. Co. 55. Buckler's case.

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.

Sect. 60.

MES si home lessa terres ou tenements per fait ou sans fait (7) *a terme des ans, le remainder ouster a un auter pur terme de vie, ou en taile, ou en fee; donque en tiel case il covient, que le lessor fait un liverie de seisin a le lessee pur terme des ans, ou auterment riens passa a eux en le remainder, coment que le lessee enter en les tenements. Et si le termor en tiel case entra devant ascun liverie de seisin fait a luy, donque est le franktenement et auxy le reversion en le lessor. Mes si il fait liverie de seisin a le lessee, donque est le frankteneement ove le fee a eux en le remainder, solonque le forme del grant et le voluntdel lessor.*

BUT if a man letteth lands or tenements by deed or without deed for terme of yeares, 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 liverie 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.

"*PER fait ou sauns fait.*" For seeing that the remainders take effect by livery, there needes no deed (8).

22. H. 6. 1. 10. E. 4. 1. 18. E. 4. 13. (Plow. 25. a. Post. 143. a. Vaugh. 269.)

"*Le 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).

"*Fait un livery de seisin al 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 the livery to

(3) Ante 9. a.
(4) [See Note 320.]
(5) Rot. 74. Hal. MSS.
(6) [See Note 321.]
(7) *Un pur*, L. and M.
(8) 12. *H.* 4. 20. Hal. MSS.
(9) *Sect.* 215. Hal. MSS.

to the leſſee ſhall enure for the benefit of them in the rem': for the liverie of the poſſeſſion could not be made to the next in remainder, [49. b.] becauſe the poſſeſſion belonged to the leſſee for yeares; and for that the particular terme and all the remainders made in law but one (Poſt. 143. a.) eſtate, and take effect at one time, therefore the livery is to be made to the leſſee. (1) 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 (5. Co. 94. b.) 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 10. E. 4. 1. make but one attorney, unleſſe the warrant be joyntly and ſeverally 12. E. 4. 16. (2), but the leſſee for yeares hath an intereſt in the land. Againe, 15. E. 4. 18. if *A.* is to make a feoffment to *B.* and *C.* and their heires without 22. E. 4 35. deed, and *A.* makes livery to *B.* in the abſence of *C.* in the name of 40. E. 3. 10. both, and to their heires; this livery is void to *C.* becauſe a man be- 41. (3) Temps H. 8. ing abſent cannot take a freehold by a livery, but by his attorney Feoffments 72. being lawfully authoriſed to receive livery by deed, unleſſe the feoff- 6. H. 4. 2 b. ment be made by deed, and then the livery to one in the name of Lict. 153. both is good (4).

3. H. 7. 13. (Poſt. 359. a.) (Ante 36. a. 9. Co. 137.) 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.

Ruth cap. 4. verſe 7, 8. Deut. 25. 9, 10. 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 Gen. 23. verſe 11. *Ephron* infeoffed *Abraham* of the field of *Machpelah*, he ſaid to him, *Agrum trado tibi, &c.* I deliver this field to thee.

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.

(Mo. 14.) "*Et ſi le tenmor en tiel caſe enter devant aſcun livery fait, &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.* 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

(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.

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)

[50. a.]

Sect. 61.

ET ſi home voile faire feoffment, per fait ou ſans fait, de terres ou tenements que il ad en pluſors villes en un countie, le liverie de ſeiſin fait en un parcel de les tenements en un ville, en le noſme de touts, ſuffiſt pur touts les autres terres et tenements comprehendes deins meſme le feoffement en toutz les autres villes deins meſme le countie. Mes ſi home fait un fait de feoffement des terres ou tenements en divers counties, la il covient en cheſcun countie aver un liverie de ſeiſin.

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).

"*EN un 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.

(5) [See Note 322.]
(6) 9. *H.* 7. 1. 41. *E.* 3. 17. Hal. MSS.

[50. a.]
(1) [See Note 323.]
(2) [See Note 324.]

Sect. 62.

ET en aſcun cas home avera per le grant d'un auter fee ſimple, fee taile, ou franktenement ſans livery de ſeiſin. Sicome deux homes ſont, et cheſcun d'eux eſt ſeiſie d'un quantitie de terre deins un countie, et l'un granta ſa terre a l'auter en eſchange pur la terre que l'auter ad, et en meſme le manner l'auter granta ſa terre a le primer grantor en eſchange pur la terre que le primer grantor ad; en ceo caſe cheſcun poit entrer en l'autre terre, iſſint miſe en eſchange, ſans aſcun liverie de ſeiſin; et tiel eſchange fait per parolx de tenements deins meſme le countie ſans eſcript eſt aſſets bone.

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 quantity 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).

(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. 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 *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 *(eſchange)* 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.]

"En ceo caſe cheſcun poet 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.

ET ſi les terres ou tenements ſoient en divers counties, c'eſt aſcavoire, ceo que l'un ad eſt en un countie, et ceo que l'auter ad eſt en auter countie, la

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

(1) [See Note 325.]
(2) [See Note 326.]
(3) See acc. poſt. 51. b. and Wilſ. vol. 2. part 3. page 491. 496.

la il covient de aver un fait indent d'eſtre fait enter eux de tiel eſchange.

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). (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). (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.

[a] 30. E. 1. Eſch. 15. 3. E. 4. 10. 9. E. 4. 21. 14. H. 8. 20.
[b] 6. E. 56. 30. E. 1. Ef. 16. 16. E. 3. Eſch. 2. 7. H. 4. 34. 3. E. 4. 11.
[c] 9. E. 4. 21. 9. E. 3. 56. 21. E. 3. 6.

Sect. 64, 65.

ET nota, que en eſchange il covient, que les eſtates ſoient egales, que ambideux tielx parties averont en les terres iſſint eſchanges; car ſi l'un voloit et grant que l'auter averoit la terre en fee taile pur le terre que il averoit del grant de le auter en fee ſimple, coment que l'auter ſoit agree a cel, ceſt eſchange eſt voide, pur ceo que les eſtates ne ſont my egales.

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.

EN meſme le manner eſt, lou il eſt grant et agree enter eux, que l'un avera en l'un terre fee taile, et l'auter en l'auter terre forſque a terme de vie; ou ſi l'un avera en l'un terre fee taile generall, et l'auter en l'auter terre fee taile eſpecial, &c. Iſſint touts foits il covient que en eſchange les eſtates d'ambideux parties ſoient egales, c'eſt aſcavoire, ſi l'un ad fee ſimple en l'un terre, que l'auter avera tiel eſtate en l'auter terre; et ſi l'un ad fee taile en l'un

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

(4) [See Note 327.]
(5) See as to this Fulb. Paral. 33. a. in the dialogue on exchanges.

l'un terre, il covient que l'auter avera ſemblable eſtate en l'auter terre, &c. et ſic de aliis ſtatibus. *Mes n'eſt my riens a charger del egal value des terres; car coment que la terre l'un vault mult pluis que la terre de l'auter, ceo n'eſt riens a purpoſe, iſſint que les eſtates per l'eſchange fait ſoient egales. Et iſſint en l'eſchange ſont deux grants, car cheſcun partie grant ſon terre a l'auter en eſchange, &c. et en cheſcun de lour grants mention ſerra fayt de l'eſchange.*

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 then 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.

"*EN eſchange il covient que les eſtates ſoient egales, &c.*" Equality in lands is threefold, viz. Firſt, equality in value: Secondly, equality in quantity of eſtate given and taken. [51. a.] 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 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. [*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) [*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. Bro. 884. 30. E. 1. tit. Exchange 15.

[*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*] 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 [51. b.] in his proper place. (1. Ro. Abr. 811. 4. Co. 121.)

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

[*e*] F. N. B. 62. m. (Poſt. 172. b.)

(1) [See Note 328.]
(2) [See Note 329.]
(3) 45. *E.* 3. 20. Hal. MSS.

[51. b.]
(1) Vid. 22. *E.* 3. 3. Contra 38. *E.* 3. 15. Hal. MSS.

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.*

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. [*b*] 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.

[*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).

[*f*] 9. E. 4. 21. 25. H. 6. 56. 19. H. 6. 27. 44. E. 3. 24. 50. Aſſ. Dorſet. Wadon. Bedf. Sandeia. 9. E. 4. 39. 15. E. 4. 3. 45. E. 3. 30. 45. E. 3. Eſchange 1. (4. Co. 121.)

[*g*] 28. H. 6. 2.

[*b*] 45. E. 3. 20. 7. H. 4. 11.

[*i*] 4. E. 2. tit. Exch. 10. 12. H. 4. 12.

"*Coment que l'auter agree a cel, ceſt eſchange eſt voide.*" The agreement of the parties cannot make that good which the law maketh void.

Sect. 66.

ITEM, ſi home leſſa terre a un auter pur terme d'ans, coment que le leſſor moruſt devant que le leſſee enter en les tenements, uncore il poit enter en meſmes les tenements apres le mort le leſſour, pur ceo que le leſſee per force de le leaſe ad droit maintenant d'aver les tenements ſolonque le forme de le leaſe. Mes ſi home fait un fait de feoffement a un auter, et un letter d'attorney a un home a deliverer a luy ſeiſin per force de meſme le fait; uncore ſi liverie de ſeiſin ne ſoit fait en la vie celuy que feſoit le fait, ceo ne vault riens, pur ceo que l'auter n'ad pas aſcun droit d'aver les tenements ſolonque le purport de le dit fait, devant le liverie de ſeiſin; et ſi nul liverie de ſeiſin ſoit fait, donque apres le mort celuy que fiſt le fait, le droit de tiels tenements eſt maintenant en ſon heire, ou en aſcun auter.

ALSO, if a man letteth land to another for term of years, 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.

"*SI home leſſa terre a un auter pur terme d'ans, coment que le leſſor moruſt devant, &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*"

(2) [See Note 330.] (3) [See Note 331.]

(9. Co. 75. F. N. B. 156.)

"*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.

Vid. Sect. 196.

"*Et un letter d'attorney a un home a deliverer a luy ſeiſin per force de meſme le fait.*" Here firſt it appeareth that the authority to deliver ſeiſin (as hath bin ſaid) muſt be by deed (1): for *letter d'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*. [52. a.]

[*a*] 24. E. 3. 27. 11. H. 7. 13. Britt. 101. b.

2. *Littleton* here ſpeakes generally *a un home*, 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.

[*b*] 21. E. 4. 18. Br. feoffments 50. 21. H. 6. 30. 13. E. 3. Attorney 73.

[*c*] 12. Aſſ. pl. 24. 26. Aſſ. 39. 11. H. 4. 3. 10. H. 7. 11. H. 7. 13. 40. Aſſ. 38. (9. Co. 76. b.) 27. Aſſ. 61. 41. Aſſ. 10. 41. E. 3. 17. (2. Leon. 73.)

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 *Blacke 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 *Blacke 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 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).

(Poſt. 310. a. 359. a.)

Tr. 7. Eliz. in com. banco (5). (Mo. 11. Cro. Ja. 177.)

17. E. 3. 61. (F. N. B. 35. O.)

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

(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.
(2) [See Note 332.]
(3) [See Note 333.]
(4) [See Note 334.]
(5) *Smith's caſe.* Hal. MSS.
(6) [See Note 335.]
(7) [See Note 336.]

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). (1. Co. 111. Poſt. 265. b.)

2. 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 then his warrant (9); for the eſtate of the diſſeiſor in *White Acre* [52. b.] 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 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). (Poſt. 252. b.) (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.)

3. 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 favorably, *ut res magis valeat quam 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. 2. & 3. Ph. & M. Dyer 131. 17. El. Dyer 40. (Mo. 91. 2. Sid. 65. 2. Leon. 19. Ante 48. b.) [*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 betweene 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.

" *Uncore*

(8) See *ſupra* note 7.
(9) [See Note 337.]

[52. b.]
(1) See ante 49. b. and poſt. 115. a. and 181. b.
(2) [See Note 338.]
(3) [See 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.

22. H. 6. 6.

"Uncore ſi liverie et ſeiſin ne ſoit fait en la vie celuy que feſoit le fait." 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).

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.

18. H. 8. 3. 11. H. 7. 19. (1. Sid. 162.)

Fiftly, 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.*

(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.)

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).

Sect. 67.

ITEM, ſi tenements ſoient leſſes a un home pur terme de demy an, ou pur le quarter de un an, &c. en tiel caſe, ſi le leſſee fait waſt, le leſſor avera envers luy briefe de waſt, et le briefe dirra, quod tenet ad terminum annorum; *mes il avera un ſpeciall declaration ſur le veritie de ſon matter, et le count n'abatera le briefe, pur ceo que il puit aver nul auter briefe ſur le matter.*

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.

"*SI*

(6) [See Note 340.]
(7) [See Note 341.]
(8) 11. *H.* 7. 27. 12. *H.* 8. 12. 5. *H.* 7. 25. 21. *H.* 7. 1. Hal. MSS.
(9) [See Note 342.]
(10) Vid. *Plowd. Com.* 457. contra *in licence to the tenant to alien*, ut videtur. Hal. MSS.

"SI *le leſſee fait waſt.*" 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. (F. N. B. Waſte 55. Poſt. 355.)

[53. a.]

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, furnaces, and the like, annexed or fixed to the houſe, either by him in the reverſion, or the tenant. V. Marlb. ca. 23 2. part of the Inſtit. (F. N. B 55.) [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.

[c] 22. H. 6. 18. 12. H. 8. 1. 13. H. 7. 21. 22. E. 4. 18. 21. E. 4. 39. 10. H. 7. 2. Reg. Judic. 26.

[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. 44. E. 3. 44.

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). [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.

Herlakenden'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 [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.)

(1) Some of theſe were not puniſhable at common law. See poſt. 53. b. and 54. a.
(2) [See Note 343.]
(3) [See Note 344.]
(4) [See Note 345.]
(5) [See Note 346.]
(6) 14. *H.* 4. 12. Hal. MSS.
(7) [See Note 347.]

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).

[i] 22. H. 6. 12. a. 9. H. 6. 1. 66. 11. H. 6. 1. F. N. B. 59. m. [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)

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. [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.

[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. Ab. 569.)

[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.]

[m] 46. E. 3. 17. 9. H. 6. 10. 12. H. 8. 1. [n] 16. El. Dy. 332. 20. E. 3. Waſt. 32. F. N. B. 59. m.

[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.

[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).

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] 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.

[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] 28. H. 8. Dyer 37. 22. H. 6. 24. 10. H. . 5. a. 44. E. 3. 44. (2. Ro. Ab. 814. Cro. Ja. 182.)

[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,

[t] 16. El. Dy. 332. 21. H. 6. 41. 5. E. 4. 100. 12. E. 3. Waſt. 28. 43. E. 3. 25. Temps E. 1. 123. 20. E. 3. Waſt. 32. 19. E. 3. Waſt. 30. (Cro. Ja. 292.)

(8) [See Note 348.]
(9) 7. *H.* 6. 38. *Dy.* 35. Hal. MSS.
(10) [See Note 349.]
(11) [See Note 350.]

[53. b.]
(1) [See Note 351.]
(2) See Call. on Sew. 2d ed. 146.
(3) [See Note 352.]

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.

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.

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.*

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.

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,*

[a] Glouc. cap. 5. W. 1. cap. 21. Magna Charta, cap. 4. Merleb. cap. 23.

[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. Fortunâ autem et ignis vel hujuſmodi eventûs inopinati omnes tenentes excuſant.*

[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, or the like, in the time of the predeceſſor. [g] And ſo

[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) [g] 10. E. 4. 1. 49. E. 3. 25. 23. H. 8. tit. Waſt. 115.

Waſt. Br. 38. E. 3. 17. 44. E. 3. 8. 45. E. 3. 3. 46. E. 3. 31. 11. E. 2. 2. Mar. Waſt. 117. 8. E. 2. Waſt. 110. (9) (Ant. 42. a.)

(4) [See Note 353.]

(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) [See Note 354.]

(8) 21. *H.* 6. 46. 39. *E.* 3. 15. 42. *E.* 3. 22. Hal. MSS.

(9) 18. *E.* 4. 16. 10. *H.* 7. 5. 2. *E.* 3. 2. Hal. MSS.

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).

[b] 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.)

[b] 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 joyntenants, 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. & Stud. lib. 2. ca. 1. 9. H. 3. ibid. Glouc. c. 5.)

[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. 136. (10. Co. 116. b.) (2. Inſt. 145. Poſt. 273. 299. b. 5. Co. 77. Stat.

[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. Dr. & 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 Britt. 168. 34. E. 3. Waſt. 146. 44. E. 3. 27. F. N. B. 59. a. & 60. g. & T.

[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 aſſignement had granted, or after the aſſignement 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 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.

If

[m] 33. E. 3. Waſt. 6. (4)

(10) [See Note 355.]
(11) [See Note 356.]

[54. a.]
(1) 7. *E.* 3. 34. Hal. MSS.

(2) 26. *E.* 3. *Waſte* 10. *is* contra. Hal. MSS.
(3) *Value of wardſhip not loſt.* Vid. *Dy.* 35. 28. *H.* 8. *Bendl. n.* 33 Hal. MSS.
(4) 3. *E.* 3. 18. Hal. MSS.

[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 leaſe 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.

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. [*] 4. E. 3. 18. F. tit. Waſt. 18.

[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). [u] Merlebridge cap. 17. 21. E. 3. 30. 16. E. 3. tit. Waſt. 100.

If

14. E. 3. Waſt. 107. 2. E. 2. Waſt. 1. 28. H. 6. Waſt. 9. 32. H. 6. 7. F. N. B. 59. E.

(5) [See Note 357.]
(6) Vid. *F. N. B.* 58. *Grantee of reverſion ſhall have waſte.* Hal. MSS.

[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. F. N. B. 60. c. temps E. 1. Wast. 124. 19. H. 6. 8. (11)

[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).

"*Briefe de 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.

[z] Vid. Bract. lib. 5. f. 413. b. Fleta, lib. 2. cap. 12. See the Second Part of the Institutes. W. 2. cap. 24.

"*Briefe dirra.*" 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^t^ must make a speciall declaration according to his case, for otherwise he should be 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. [54. b.]

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

[a] 12. H. 8. 1. (11. Co. 47. 79. b. Mo. 23.)

(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) [See Note 358.]
(11) 9. *H.* 6. 66. Hal. MSS.

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 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).

F. N. B. fo. 127.

(Hob. 234.)

[*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.)

(1) [See Note 359.]

(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.

Chap. 8. Of Tenant at Will. Sect. 68. [55. a.]

TENANT a volunt eſt, ou terres ou tenements ſont leſſés per un home a un auter, a aver et tener a luy a la volunt le leſſor, per force de quel leaſe le leſſee eſt en poſſeſſion. En tiel cas le leſſee eſt appel tenant a volunt, pur ceo que il n'ad aſcun certaine ne ſure eſtate, car le leſſor luy poit ouſter a quel temps que il luy plerroit. Uncore ſi le leſſee emblea la terre, et le leſſor, apres l'embleer et devant que les blees ſont matures, luy ouſta, uncore le leſſee avera les blees, et avera frank entre egres et regres a ſcier et de carier les blees, pur ceo que il ne ſcavoit a quel temps le leſſor voloit entre ſur luy. Auterment eſt ſi tenant pur terme d'ans que conuſt le fine de ſon terme emblea ſa terre, et le terme eſt finy devant que les blees ſont matures. En ceo cas le leſſor, ou celuy en la reverſion avera les blees, pur ceo que le termor conuſt le certaintie de ſa terme quant ſa terme ſerroit finy.

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.

Fleta, lib. 3. cap. 15.

"*TENANT a volunt eſt, ou terres ou tenements ſont leſſés per un home a un auter, a aver et tener a luy a la volunt le leſſor, &c.*"

(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)

(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.

"*Pur ceo que il n'ad aſcun certaine ou ſure eſtate, &c.*" *Alia poſſeſſio eſt præcaria, et alia pro prece conceſſâ, ut ſi quis ſine ſcripto conceſſerit 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.*

"*Uncore*

(1) [See Note 360.]
(2) 49. *H.* 6. 18. 20. *E.* 4. 9. Hal. MSS.
(3) [See Note 361.]

"*Uncore ſi le leſſee emblea la terre, et le leſſor apres le embleer, &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 commonwealth, 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 *(pur ceo que il n'ad aſcun certaine ou 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 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 common-wealth 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 ſuâ* 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).

If a diſſeiſor ſow the ground and ſever the corne, and the diſſeiſee 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).

If

(5 Co. 85. a. 1. Sid. 339.)

[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.)

[*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.)

[*d*] Oland's caſe ubi ſuprà. (Dy. 31. 11. Co. 51. b.)

[*e*] 33. E. 3. treſp. F. 254. 42. E. 3. 25. Oland's caſe ubi ſupra.

[*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.

(4) [See Note 362.]
(5) [See Note 363.]

[55. b.]
(1) [See Note 364.]
(2) [See Note 365.]
(3) [See Note 366.]
(4) See Gouldſb. 144.

(5) [See Note 367.]
(6) 7. *Aſſ.* 13. 10. *Aſſ.* 6. 7. *E.* 3. 57. Hal. MSS.
(7) [See Note 368.]
(8) [See Note 369.]
(10) Vid. 20. *E.* 3. *Treſpaſs* 194. 46. *Aſſ.* 2. Hal. MSS.
(11) [See Note 370.]

[g] 44. E. 3. 15. Fleta, lib. 3. cap. 15.

[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).

[b] 35. H. 6. 24. 21. H. 6. 9. 1. E. 4. 3. 21. E. 4. 5. Pl. Com. parſon de Honyland's caſe.

(1. Ro. Abr. 860. Poſt. 245. b. 8. Co. 89. 5. Co. 90.) 14. E. 4. 6. 8. E. 4. 11, &c.

"*Le leſſor luy puit ouſter.*" There is an expreſſe *ouſter*, and implied *ouſter*: an expreſſe, as when the leſſor commeth upon the land, and expreſly 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 the will is not determined untill the leſſee hath notice (15). No more then the diſcharge of a factor, attorney, or ſuch like in their abſence is ſufficient in law untill they have notice thereof.

[a] 5. Co. 10. Henſtead's caſe. 20. Eliz. Dier 269. b.

[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).

"*Apres l'embleer et devant que les blees ſont matures.*" 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.]

[b] Temps E. 1. tit. Grant. 4 9. E. 4. 35. 5. E. 3. treſp. 13. 21. H. 7. 14. b. 3. H. 6. 18. b. 2. R. 2. barre 237. 14. H. 8. 2. 27. H. 8. 18. b. (11. Co. 52.)

"*Et auxi franke entrie, egres et regres.*" [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 caried; and therefore the law giveth

(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) [See Note 371.]

(14) [See Note 372.]

(15) [See Note 373.]

(16) [See Note 374.]

[56. a.]

(1) See further on this maxim Finch. Diſc. on Law 63. and Finch. Deſcript. of Law 16. b.

giveth all that which is convenient, viz. free entry, egreſſe and regreſſe as much as is neceſſary.

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 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 avoyding 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 catteil 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. (1. Ro. Abr. 390.)

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.

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.)

"*Auterment eſt ſi tenant pur terme d'ans que conuſt le fine de ſon terme, &c.*" Well ſaid *Littleton* (which knoweth the end of his terme) that is, where the end of the terme is certaine; but 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.

(2) [See Note 375.]

(3) See further as to *ways* tit. *Chimin* in Com. Dig. and Vin. Abr. and tit. *High-way*, in New Abr. and Burn. Juſt.

Sect.

Sect. 69.

ITEM, ſi un meſe ſoit leſſe a un home a tener a volunt, per force de quel le leſſee enter en le meſe, deins quel meſe il porta ſes utenſils de meaſon, et puis le leſſor luy ouſta, uncore il avera franke entre egreſſe et regreſſe en meſme le meſe per reaſonable temps de carrier ſes biens et utenſils. Sicome home ſeiſie d'un meſe en fee ſimple, fee taile, ou pur terme de vie, lequel ad certaine biens deins meme le meſe, et fait ſes executors et devy; queconque apres ſa mort ad le meſe, uncore les executors averont frank entry egreſſe et regres de carier hors de meſme le meſe les biens lour teſtator per reaſonable temps.

ALSO, if a houſe be letten to one to hold at will, by force whereof the leſſee entreth into the houſe, and brings his houſhold-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.

"*SI un meſe ſoit leſſe a un home a tener a volunt, &c.*" The reaſon of this is evident upon that which hath been ſaid before.

(2. Co. 32. a.)

"*Meſe*," or *Maiſon*, called in legall *Latine meſſuagium*, containeth (as hath beene ſaid) the buildings, curtelage, orchard, and garden (1). [56. b.]

[a] 31. El. ca. 1. in Domeſday.

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*.

[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.)

"*Per reaſonable temps.*" [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] "*Sicome home ſeiſie d'un meſe en fee ſimple, ou fee taile, &c.*" This is ſo evident, as it needeth no explanation.

[e] 2. H. 6. 15. 21. H. 6. 30.

(1) See ante 5. b. note 1. where ſome authorities are cited to ſhew, how much will paſs by the word *meſſuage*.

(2) [See Note 376.]

Sect.

Sect. 70.

ITEM, ſi un home fait un fait de feoffment a un auter de certaine terre, et deliver a luy le fait, mes nemy liverie de ſeiſin; en ceo caſe celuy, a que le fait eſt fait, poit enter en le terre, et tener et occupier a la volunt celuy, que fiſt le fait pur ceo que il eſt prove per les parols del fait, que il eſt la volunt que le auter avera la terre; mes celuy que fiſt le fayt luy poet ouſter quaunt luy pleiſt.

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.

HERE it appeareth, that if the feoffee doth enter, he is tenant at will, becauſe he entreth by the conſent of the feoffor. (1. Ro. Abr. 859. 2. Co. 55. b.)

[57. a.] "*Et deliver a luy le fait.*" 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. [*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. (6. Co. 26. Ante 48. 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.)

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ITEM, ſi un meſe ſoit leſſe a tener a volunt, le leſſee n'eſt pas tenus a ſuſteiner ou repairer le meaſon, ſicome tenant a terme d'ans eſt tenus. Mes ſi le leſſee a volunt fait voluntarie waſt, ſicome en abatement des meaſons, ou en couper des arbres, il eſt dit que le leſſor avera de ceo envers luy action de treſpaſſe. Sicome jeo bayle a un home mes barbits a compeſter ſa terre, ou mes boefes a arerer la terre, et il occiſt mes avers, jeo puiſſoy bien aver un action de treſpaſſe envers luy, nient obſtant le bailement.

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.) "*SI un meſe ſoit leſſe a tener a volunt, le leſſee n'eſt pas tenus, &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).

[g] 21. H. 6. 38. 28. E. 3. 25. 12. H 4. 3. 22. E. 4. 50. (1. Ro. Abr. 860. 2. Ro. Abr. 555.) "*Mes ſi leſſee a volunt fait voluntary waſt, &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 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. "*Sicome jeo baile a un home mes barbits a compeſter ſon terre, &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.) "*Treſpaſſe.*" *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.]

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NOTA, ſi le leſſor ſur tiel leaſe a volunt reſerve a luy un annuall rent, il poit diſtrainer pur le rent arere, ou aver de ceo un action de debt a ſon election.

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).

21. H. 7. 39. b. 2. E. 4. 6. b. 7. E. 4. 27. a. 6. R. 2. Avowrie 86. "*IL poet diſtreyner pur le rent arere, ou aver de ceo un action de 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.

There

(1) [See Note 377.]
(2) [See Note 378.]
(3) [See Note 379.]
(4) [See Note 380.]

[57. b.]
(1) [See Note 381.]

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, then 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 diverſity between particular eſtates made by the *terre tenaunt*, 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 Mordancaſtor doth lye (6). *Et ſic de ſimilibus* (7).

(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. 252, 253. (Poſt. 271. 1. Ro. Abr. 663.)

(2) [See Note 382.]
(3) Vid. 21. *H.* 6. 38. Hal. MSS.
(4) 4. *H.* 6. 12. Hal. MSS.
(5) [See Note 383.]
(6) [See Note 384.]
(7) See further as to tenant by ſufferance in title *Eſtate*, Vin. Abr. and Com. Dig.

CHAP.

Chap. 9. Tenant by Copie. Sect. 73.

TENANT per copie de court rol' eſt (8), *deins quel manor il y ad un cuſtome que ad eſt uſe de temps dont memorie ne court, que certaine tenants deins meſme le manor ont uſe d'aver terres et tenements, a tener a eux et a lour heires en fee ſimple, ou en fee taile, ou a terme de vie, &c. a volunt le ſeignior ſolonque le cuſtome de meſme le manor.*

TENANT by copy of court roll is, as if a man be ſeiſed of a mannor within which mannor there is a 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 per copie, &c.*" *Tenens per copiam rot. Cur'. Copie* 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.* 2. 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. Vid. 4. Co. 2. Browne's caſe.

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 fuer' 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 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] Lamb. verb. Terra ex ſcripto.

[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 fere et pagani poſſidebant* (3).

(4. Inſt. 268.)

"*Court.*" *Curia*, court, is a place where juſtice is judicially miniſtred, and is derived *à cura, quia in curiis publicis curas gerebant.*

(8) *Si come un home ſoit ſeiſie d'un maner.* L. and M.—Roh.—P. and Red.

[58. a.]

(1) [See Note 385.]

(2) [See Note 386.]

(3) See ante 5. b. and note 1. there, and 6. a. and note 6. there.

bant [*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 free-holders 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 copi-holders 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.

[*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 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. & 136. Cambden Brit. fo. 121. b. Britton, fol. 274.

[*f*] Mirror, cap. 1. ſect. 3.

"*Seiſie d'un mannor.*" *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

Domeſday.

[*g*] Bracton, lib. 4. fo. 112. Fleta, lib. 4. c. 15. & lib. 6. cap. 49. Britton, fol. 124.

[*h*] Brac. lib. 5. fo. 434. Fleta, ubi ſupra. Mirror, cap. 1. ſect. 3.

[58. b.]

(4) [See Note 387.]

(5) [See Note 388.]

(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.

[58. b.]

(1) See as to this ante 1. b. and the authorities in note 1. there.

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.

(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.)

There may be a cuſtomary manor granted by copy of court roll (2). So although the word be *(ſeiſie)* 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 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 Rowſe 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*] Dier. Mich. 7. & 8. Eliz. Manuſcript.

[*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).

"*Deins quel mannor il y ad un cuſtome, que ad eſte uſe de temps dont memory ne court, &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, que certeine tenants deins meſme le 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.

"*A volunt le ſeignior ſolonque le 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. Abr. 498.) 11. Co. 17. Sir H. Nevill's caſe. 4. Co. 20, 31. inter Hoe & Tayler.

"*Certeine 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

(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) [See Note 389.]

(4) [See Note 390.]

(5) [See Note 391.]

(6) [See Note 392.]

(7) [See Note 393.]

(8) See note 2. ſupra.

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).

"*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.*

Regiſt. F. N. B. 270. d. V. Mag. Carta in cap. Itin. fol. 151. Bract. lib. 3. 117. Fleta, lib. 1. cap. 20.

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.

ET tiel tenant ne puit alien ſa terre per fait, car donques le ſeignior poit entre come en choſe forfeit a luy. Mes s'il voit alien ſa terre a un auter, il covient ſolonque aſcun cuſtome de ſurrender les tenements en aſcun court, &c. en le maine le ſeignior, al uſe celuy que avera le ſtate, en tiel forme, ou a tiel effect.

Ad hanc curiam venit *A.* de *B.* et ſurſum reddidit in eâdem curiâ unum meſuagium, &c. in manus domini, ad uſum *C.* de *D.* et hæredum ſuorum, vel hæredum de corpore ſuo exeuntium, vel pro termino vitæ ſuæ, &c. Et ſuper hoc venit prædictus *C.* de *D.* et cepit de domino in eâdem curiâ meſuagium prædictum, &c. Habendum et tenendum ſibi et hæredibus ſuis, vel ſibi et hæredibus de corpore ſuo exeuntibus, vel ſibi ad terminum vitæ, &c. ad voluntatem domini, ſecundum conſuetudinem manerii, faciendo et reddendo inde redditus, ſervitia, et conſuetudines inde priùs debita et conſueta, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, &c.

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 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, 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.

(9) [See Note 394.]

(1. Ro. Abr. 509.) Lib. intrat. 131. 4. Co. 25. b. inter Kite & Queinton.

"*ET tiel tenant ne puit aliener ſa terre, &c.*" And this is true in [59. a.] 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).

"*Alien per fait.*" 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).

"*Forfeit a luy.*" 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 copihold caſes 21. 23. 25. 27, 28. 8. Co. 92. 99, 100. 9. Co. 75. 107. 10. Co. 131.

"*En aſcun 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).

[*l*] Bract. lib. 2. cap. 8. & lib. 4. 49. 15. H. 4. 34. 1. H. 5. 11.

(1. Ro. Abr. 500. 9. Co. 76.)

[*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 [59. b.] 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.

[*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.

"*Ad hanc curiam venit A. de B. et ſurſum reddidit, &c.*" Here *Littleton* putteth an example of a ſurrender in court, and in this example three [*c*] things are to be obſerved.

[*c*] Vide 4. Co. inter les caſes de copiholds.

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).

Secondly,

(1) [See Note 395.]
(2) [See Note 396.]
(3) [See Note 397.]
(4) [See Note 398.]
(5) See alſo tit. *Copyhold*, in Vin. Abr. D. c. to E. d. 2. New Abr. L. and Com. Dig. M.
(6) [See Note 399.]

[59. b.]
(1) [See Note 400.]
(2) [See 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.

Thirdly, the lord cannot grant a larger [*d*] eſtate then 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).

[*d*] Mich. 2. & 3. Ph. & M. in Com. Banco, by the whole court in Conſtable's caſe of Pickenham in Norfolke.

"*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 potius conſilio quàm viribus uti, propriove arbitrio. Non conjuſlibet voluntarii juvenis meneſtralli, vel adulatoris, ſed juriſperitorum virorum fidelium et honeſtorum, et in pluribus expertorum, concilio 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 compoſtoriorum.*

[*e*] Fleta, lib. 2. c. 65. & 71.

[*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.

[*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.)

"*Et dat domino de fine.*" For the ſignification of this word (*finis*), *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

(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) [See Note 402.]

(7) Vid. *for taliages in Wales on charge of the lord*, 34. *H.* 8. *c.* 26. Hal. MSS.—See Sect. 93.

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). [60. a.] And ſo was it adjudged: [b] 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.

[b] Paſch 1. Jac. in com. banco rot. 1845. inter Stallon & Brady.

[i] 4. Co. the caſes of copiholds.

Sect. 75.

ET tiels tenants ſont appelles tenants per copie de court rolle; pur ceo que ils n'ont auter evidence concernant lour tenements, forſque les copies des rolles de court.

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.)

"*ILS n'ont auter 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.

ET tiels tenants ne empliederont, ne ſerront empledes de lour tenements per briefe le roy. Mes s'ils voilent empleder auters pur lour tenements, ils averont un plaint fait en le court le ſeignior en tiel forme, ou a tiel effect: A. de B. queritur verſus C. de D. de placito terræ, videlicet, de uno meſuagio, quadraginta acris terr', quatuor acris

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

(8) [See Note 403.]

[60. a.]
(1) [See Note 404.]
(2) [See Note 405.]

acris prati, &c. cum pertin'. et facit proteſtationem ſequi querelam iſtam in naturâ brevis domini regis aſſiſæ mortis anteceſſoris ad communem legem, vel brevis domini regis aſſiſæ novæ diſſeiſinæ ad communem legem, aut in naturâ brevis de formâ donationis in diſcender ad communem legem, *ou en nature d'aſcun auter briefe, &c.* Plegii de proſequendo *F. G.* &c.

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.

"*TIELS tenants ne emplederont, ne ſerront empledes, &c.*" This is evident, and needs no explanation. 4. H. 4. 34. adjudged in parliament.

"*Mes s'ils voilent empleder auters, ils averont, &c.*" Put the caſe that the demandant in a pleint in nature of a reall action recovereth the land erroniouſly, 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.)

"*De formâ donationis in diſcender ad communem legem.*" 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. 3 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. Pl. Com. 240. 4 E. 2. Formdon 50. [*z*] 10. E. 2. Formdon 55. 21. E. 3. 47.

[60. b.]

Sect. 77.

ET coment que aſcun tiels tenants ont inheritance ſolonque le cuſtome del manor, uncore ils n'ont eſtate forſque a volunt

AND although that ſome ſuch tenants have an inheritance according to the cuſtome of the manor, yet

(3) [See Note 406.]
[60. b.]
(1) [See Note 407.]

(2) See further as to intails of copyholds in Vin. Abr. *Copyhold*, F. E. G. e.

a volunt le ſeignior ſolonque le courſe del common ley. Car il eſt dit, ſi le ſeignior eux ouſta, ils n'ont auter remedy forſque de ſuer a lour ſeigniors per petition; car s'ils averont auter remedie, ils ne ſerront dits tenants a volunt le ſeignior ſolonque le cuſtome del manor. Mes le ſeignior ne voile enfreinder le cuſtom que eſt reaſonable en tiels caſes (3).

Mes Brian *chiefe juſtice dit, que ſon opinion ad touts foits eſte, et unquez ſerra, ſi tiel tenant per le cuſtome payant ſes ſervices ſoit eject per le ſeignior, que il avera action de treſpaſs vers luy.* H. 21. Ed. 4. *Et iſſint fuit l'opinion de* Danby *chiefe juſtice, M.* 7. Ed. 4. *Car il dit, que le tenant per le cuſtome eſt cibien enheritor de aver ſon terre ſolonque le cuſtome, come ceſtuy que ad franktenement al common ley.*

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.

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.

"*CAR (il eſt dit) que ſi le ſeignior, &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. & 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 lawfull 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.* 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. [61. a.]

(1) This muſt be underſtood with exception of ſuch copyholds, as by the cuſtom are grantable for life only.

(3) What follows in this Section is neither in L. & M.—Roh.—nor P.—The addition firſt appears in Redm.

(4) [See Note 408.]

Chap. 10. Tenant per le Verge. Sect. 78.

TENANTS per le verge ſont en tiel nature come tenants per le copy de court roll. Mes la cauſe pur que ils ſont appelles tenants per le verge, eſt, pur ceo que quant ils voilent ſurrender lour tenements en le main lour ſeignior al uſe d'un auter, ils averont un petite verge (per le cuſtome) en lour main, le quel ils baileront al ſeneſchall ou al bailife ſolonque le cuſtome et uſe del manor, et celuy que avera la terre prendra meſme la terre en le court, et ſon priſel ſerra enter en le roll, et le ſeneſchal ou le bailife ſolonque le cuſtome delivera a celuy que priſt la terre meſme le verge, ou un auter verge, en noſme del ſeiſin; et pur cel cauſe ils ſont appelles tenants per le verge, mes ils n'ont auter evidence ſinon per copy de court roll.

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 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 per le verge.*" This tenant *per le 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 livere 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 [61. b.] 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 teneri affectet, quique ſubballivos domini in ſuis erroribus et ambiguis ſciat inſtruere et docere, quique egenis parcere, et*

Vide Sect. 92. & 379. Fleta, lib. 2. cap. 66. Vide ſtatut. de extent. maner. 14. E. 1.

(2) [See Note 409.]

et qui nec prece vel pretio velit à tramite juſtitiæ deviare, et perversè judicare; cujus officium eſt curias tenere maneriorum; et de ſubtractionibus conſuetudinem, ſervitiorum, reddituum, 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. 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.

Vide 4. Co. Caſes de Copiholds, fo. 26, 27. 30.

Sect. 79.

ET auxy en divers ſeigniories et mannors il y ad tiel cuſtome, ſi tiel tenant, que tient per cuſtome, voloit aliener ſes terres ou tenements, il poit ſurrender ſes tenements a le baily, ou a le reeve, ou a deux probes homes del ſeigniory, al uſe ceſtuy que avera le terre, d'aver en fee ſimple, fee taile, ou pur terme de vie, &c. Et tout ceo ils preſenteront al procheine court, et donque celuy, que avera la terre per copy de court roll, avera meſme la terre ſolonque l'entent del ſurrender.

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, 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.

"*A Le bailie.*" 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 *balliva ſua*.

Vide Lamb. expoſition of Saxon words.

"*Reve*" 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 verax, et in opere diligens et fidelis, ac pro diſcreto appruatore cognitus plegiatus et electus, qui de communioribus legibus pro tanto*

Fleta, lib. 2. ca. 67. & 69.

[62. a.]

(1) [See Note 410.] (2) See ante 59. a. and note 6. there.

tanto officio ſufficient' 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 ſeneſchallo palam debet præſentari, cui injungatur officium illud indilatè. Non ergo ſit piger aut ſomnolentus. ſed efficaciter et continuè commodum domini adipiſci nitatur et exarare, &c. the reſidue concerning both the offices being worthy your reading.

"*A le bailie ou le reeve.*" *Littleton* intendeth into the hands of the lord by the hands of the bailiffe or the reeve.

"*Ou al deux probes homes del ſeigniorie.*" The cuſtome doth guide theſe ſurrenders out of court, and the cuſtome muſt be purſued. Vid. 4. Co. 25. Kite and Quaintin's caſe.

"*Et tout ceo ils preſenteront al procheine 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, *Cè' 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.

ET iſſint eſt aſçavoire, que en divers ſeigniories, et divers manors, ſont pluſors et divers cuſtomes en tielx caſes, quant a prender tenements, et quant a pleder, et quant as auters choſes et cuſtomes a faire; et tout ceo que n'eſt pas encounter reaſon poit bien eſtre admitte et allow.

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.

"*SONT pluſors et 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 to reaſon; for how long ſoever it hath continued, if it be againſt reaſon, it is of no force in law. (4. Co. 31. Cro. Cha. 220.)

"*Enconter 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.*

(1) [See Note 411.]

(2) See further as to the time of preſenting ſurrenders, Vin. Abr. *Copyhold*, U. a. Com. Dig. *Copyhold*, F. 10.

Sect. 81.

ET tiels tenants que teignont ſolonque la cuſtome d'un ſeigniorie ou d'un manor, coment que ils ont eſtate d'enheritance ſolonque le cuſtome del ſeigniory ou manor, uncore pur ceo que ils n'ont aſcun franktenement per le cours del common ley, ils ſont appelles tenants per baſe tenure.

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.]

"*Ils ſont apelles tenants per baſe tenure.*" Of this ſufficient hath been ſpoken before.

Sect. 82.

ET divers diverſities y ſont perenter tenant a volunt, que eſt eins per leaſe ſon leſſor per le courſe del common ley, et tenant ſolonque le cuſtome del manor en le forme avantdit. Car tenant a volunt ſolonque cuſtom puit aver eſtate d'enheritance (come eſt avantdit) al volunt le ſeignior, ſolonque le cuſtome et uſage del manor. Mes ſi home ad terres ou tenements, queux ne ſont deins tiel manor ou ſeigniorie ou tiel cuſtome ad eſte uſe en le forme avantdit, et voile leſſer tiels terres ou tenements a un auter, a aver et tener a luy et a ſes heires a le volunt le leſſor, ceux parolx (a les heires de le leſſee) ſont voids. Car en ceſt caſe ſi le leſſee devie, et ſon heire enter, le leſſor avera bon action de treſpas envers luy; mes nemy iſſint envers l'heire le tenant per le cuſtome en aſcun cas, &c. pur ceo que le cuſtome de le manor en aſcun cas luy puit aide de barrer ſon ſeignior en action de treſpaſſe, &c.

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 a volunt ſolonque le cuſtom puit aver eſtate d'enheritance, &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.

"*M*

" *Mes ſi home, &c. voile leſſer terres ou tenements a un auter a aver et tener a luy et ſes heires a volunt le leſſor, ceux parols (a les heires de le leſſee) ſont voides. Car en ceſt caſe ſi le leſſee devie, et ſon heire enter, le leſſor avera action de treſpaſſe envers luy, &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.

63. a.] " *Pur ceo que le cuſtome de le manor en aſcun caſe luy puit aider de barrer ſon ſeignior en action de 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.

ITEM, l'un tenant per le cuſtome en aſcuns lieux doit repairer et ſuſteiner ſes meaſons, et l'auter tenant a volunt nemy.

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.

" *PER le 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 copiholder 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. 84.

ITEM, l'un tenant per le cuſtome ferra fealtie, et l'auter nemy. Et pluſors auters diverſities y ſont perenter eux.

ALSO, the one tenant by the cuſtome ſhall do fealty, and the other not. And many other diverſities there be betweene them.

" *L'UN tenant per le cuſtome ferra fealtie, et l'auter nemy.*" 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

Vide Sect. 132. (Poſt. 93. b.)

(1) [See Note 412.] (2) [See Note 413.]

4. Co. 21, 22, 23, &c.

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).

Finis Libri Primi.

(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 Abridgments, the *Lex Cuſtumaria*, and the ſeveral other treatiſes on *copyhold* law, particularly thoſe by Shepherd and Nelſon.

THE

SECOND BOOK

OF THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

CHAP. 1. Homage. Sect. 85.

HOMAGE eſt le pluis honorable ſervice, et pluis humble ſervice de reverence, que franktenant puit faire a ſon ſeignior. Car quant le tenant ſerra homage a ſon ſeignior, il ſerra diſcinct, et ſon teſt diſcover, et ſon ſeignior ſeera, et le tenant genulera devant luy ſur ambideux genues, et tiendra ſes maines extendes et joyntes enſemble enter les maines le ſeignior, et iſſint dirra: Jeo deveigne voſtre home (1) *de ceſt jour en avant de vie et de member, et de terrene honor* (2), *et a vous ſerra foiall et loiall, et foy a vous portera des tenements que jeo claime de tener de vous, ſalve la foy que jeo doy a noſtre ſeignior le roy; et donques le ſeignior iſſint ſeyant luy baſera.*

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 from this day forward of life and limbe, and of earthly worſhip, 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 knowen, for the underſtanding of theſe two other bookes, doth in this ſecond book treat of the tenures (1) and ſervices whereby the ſaid lands

(1) [See Note 1.]

[64. b.]

(1) [See Note 2.]

(2) The words *de vie et membre et de terrene honor* 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.

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 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.

(4. Co. 8. a. Bevil's case.)

Thirdly, *Escuage,* which is *servitium scuti,* the service of the shield. [64. b.]

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.

Fiftly, *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.

Sixtly, *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 fixe 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 camænis.

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 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

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*. 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.

"*Foyal et loyal.*" 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 *foyal et loyal*) *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 *pluis humble de 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*. Fiftly, *per verba omni ſupplici veneratione plena*, he ſaith, *Jeo deveigne voſtre home, &c.* And for three cauſes on the part of the lord. Firſt, the lord doth ſit. Secondly, he incloſeth his tenants 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.

[*c*] 2. H. 4. 6.

Glanvil. et Mir. ubi ſupra.

Nil ſine prudenti fecit ratione vetuſtas.

"*Jeo deveigne voſtre home de vie et de member.*" 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. "*De terrene 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. "*Et a vous ſerra foyal et loyal, et foy a vous portera, &c.*" This faith, *fides*, or *fœdus perpetuum*, this perpetuall league betweene 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 betweene 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.

"*Des tenements queux jeo claime a tener de vous.*" *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, 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.

"*Salve le foy que jeo doy a noſtre ſeignior le roy.*" 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. 9. c. 1. Mir. c. 3. de Fealty. Bract. ubi ſupr. Brit. ubi ſupra. Inter Inquiſ. apud Lanceſton. anno 6. E. 1. Cornub. in Theſ.

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 domino 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 ad 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* [65. b.]

(1) [See Note 3.]
(2) See ante fol. 64. a. note 1. and fol. 1. b. note 1.
(3) [See Note 4.]

vitia contra privilegium prædict', nullâ factâ mentione de homagio et fidelitate domino regi debitis. And judgement in the end was given againſt the ſaid biſhop.

"*Roy.*" 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 *Konincke*. 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).

Second, *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 homagium 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, *Jeo deveigne voſtre feme*, but *Jeo face à vous homage*; and ſo is *Glanvill* to be underſtood, that ſhe ſhall not doe compleate homage.

[*d*] Mirror, ca. 1. ſect. 2 and ca. 2. ſect. 1. and 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.

[*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. age 80. & tit. per quæ ſervit. 9. 13. H. 4. 5.

33. H. 6. 16. 20. E. 3. per quæ ſervic. 24. F. N. B. 157. Regiſt. 296. Britton, ubi ſupra. [*h*] Britton, fol. 171. Mirror, ca. 1. ſect. 3. [*i*] Glanvil. lib. 9. c. 1.

Sect. 86.

MES ſi un abbe, ou un pryor, ou auter home de religion, ferra homage a ſon ſeignior, il ne dirra, Jeo deveigne voſtre home, &c. pur ceo que il ad luy profeſſé pur eſtre tantſolement le home de Dieu. Mes il dirra iſſint: Jeo

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

(1) See note 3. in 65. a.

(2) That is, *aunceſtrel* and *not aunceſtrel*, as to which ſee poſt. 109. b.

(3) *Homage done the king by a biſhop* ſalvo ſuo ordine. *M. Paris* 101. Hal. MSS. —See what is ſaid by lord Coke *infra*.

(4) [See Note 5.]

Jeo vous face homage, et a vous ſerra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, ſalve la foy que jeo doy a noſtre ſeignior le roy.

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.

[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.

NO man of religion when [k] he doth homage ſhall ſay, *Jeo deveigne voſtre home*; becauſe he hath profeſſed himſelfe the man of God; yet ſhall he doe homage, and ſhall ſay, [l] *Jeo face a vous homage, et a vous ſerra foyall et loyall, &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 *(Jeo deveigne voſtre home.)* But yet in judgement of law it is homage, becauſe he ſaith, I doe you homage, &c. and ſo of a woman.

Sect. 87.

[66. a.]

ITEM, ſi feme ſole ferra homage a ſon ſeignior, el ne dirra, Jeo deveigne voſtre feme; pur ceo que n'eſt convenient que feme dirra, que il deviendra feme a aſcun home, forſque a ſa baron, quant el eſt eſpouſe. Mes el dirra, Jeo face a vous homage, et a vous ſerra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, ſalve la foy que jeo doy a noſtre ſeignior le roy.

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 inconvenienti, vid. Sect. 138, 139. 231. 269. 440. 478. 665. 722 730. 21. H. 7. 13. F. N. B. 230. d. 16. H. 7. 9.

"*Pur ceo que n'eſt convenient, &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)

ITEM, home puit veier un bone note en M. 15. E. 3. lou un home et ſa feme fierent homage et fealty en le common

ALSO, a man may ſee a good note in M. 15. *E.* 3. where a man and his wife did homage and fealtie

(1) [See Note 6.]
(2) In the Rohan edition, and in thoſe of Pynſon and Redman, this Section is tranſpoſed to the Chapter of Fealty.

common banke, quel eſt eſcrie en tiel forme. Nota, que I. Leukner *et* Elizabeth *ſa feme fierent homage a* W. Thorpe *en ceſt maner: l'un et l'auter tiendront jointment lour mains enter les mains* W. T. *et le baron dit en ceſt forme: Nous vous ferromus homage, et foy a vous porterons pur les tenements que nous teignomus de A. votre conuſor, que a vous ad graunt noſtre ſervices en* B. *et* C. *et auters villes, &c. encountre touts gents, ſalve la foy que nous devons a noſtre ſeignior le roy, et a ſes heires, et a noſtre auters ſeigniors: et l'un et l'auter luy baſeront. Et puis ils fierent fealtie, et l'un et l'auter tyendront lour mains ſur un livre, et le baron dit les parolx, et ambideux baſeront le livre.*

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 aith 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 (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 this [n] record three things are to be obſerved. [n] Mich. 15. E. 3. tit. Avowrie 109.

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.

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. Hill. 17. E. 2. Rot. Parl. &c.

[66. b.]

Sect. 89.

NOTA, ſi un home ad ſeveral tenancies, queux il tient de ſeveral ſeigniors, ſcilicet, cheſcun tenancy per homage; donque quant il fait homage a un des ſeigniors, il dirra en le fine de ſon homage fait, Salve la foy que jeo doy a noſtre ſeignior le roy, et a mes auters ſeigniors (1).

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.

(3) [See Note 7.] (1) [See Note 8.]

"*Et a mes auters ſeigniours.*" 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.

NOTA, que nul ferra homage mes tiel que ad eſtate en fee ſimple, ou en fee taile, et ſon droit demeſne, ou en droit d'un auter. Car il eſt un maxime en ley, que il que ad eſtate forſque pur terme de vie, ne ferra homage, ne prendra homage. Car ſi feme ad terres ou tenements en fee ſimple, ou en fee taile, queux il tient de ſon ſeignior per homage, et prent baron, et ont iſſue, donque le baron en la vie la feme ferra homage (2), *pur ceo que il ad title d'aver les tenements per le curteſie d'Engleterre s'il ſurveſquiſt la feme, et auxy il tient en droit de ſa feme. Mes ſi la feme devy devant homage fait per le baron en la vie ſa feme, et le baron ſoy tient eins come tenant per le curteſie, donques il ne ferra homage a ſon ſeignior, pur ceo que il adonque n'ad eſtate forſque pur terme de vie.*

Plus ſerra dit de homage en le tenure per homage aunceſtrel.

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 doe 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 ſhall doe homage, 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.

"*EN droit d'un auter.*" 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.

(2) [See Note 9.] (3) 2. *E.* 3. 10. *Accord.* Hal. MSS.

"*Ut maxime en ley.*" 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. (Ante 10. b. Poſt. 343. a.)

"*Il que ad eſtate forſque pur terme de vie.*" [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 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.*

[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. Avowry 175.
[s] 2. E. 2. Avowrie 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. [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. 44. E. 3. 41. 13. H. 6. Avowrie 21. 8. H. 6. 13. 7. E. 4. 27. F. N. B. 257.

"*Et ount iſſue, donque le baron en la vie la feme ferra homage.*" 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 Hiberniâ 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 tenerent 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 rendred afterward, *Quia omnes ſorores ſunt quaſi unus hæres de unâ hæreditate.*

[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.)

(1) [See Note 10.] (2) [See Note 11.]

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 doe 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 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. [67. b.]

[e] F. N. B. 162. 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.)

But if a tenant infeoffe divers men in fee joyntly, [h] all theſe jointenants ſhall joyntly doe their homage, and their fealty alſo. [i] If homage be due by the tenant, and he maketh a feoffement 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.

[h] 7. E. 4. 27, 28. 14. H. 4. 38. 1. H. 5. grant 43. 31. E. 3. gard. 116.
[i] 48. E. 3. 8. 15. E. 4. 13. 5. E. 4. 3.

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.

[k] 22. E. 4. 22.

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.

[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 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).

(1) [See Note 12.]

CHAP.

Chap. 2. Fealty. Sect. 91.

FEALTY idem eſt quòd fidelitas en Latin. Et quant franktenant ferra fealtie a ſon ſeignior, il tiendra ſa maine dexter ſur un livre, et dirra iſſint: Ceo oyes vous, mon ſeignior, que jeo a vous ſerra foyal et loyal, et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les cuſtomes et ſervices queux faire a vous doy, as termes aſſignes, ſicome moy aide Dieu et ſes Saints; et baſera le lievre. Mes il ne genulera quant il fait fealty, ne ferra tiel humble reverence come avant eſt dit en homage.

FEALTY is the ſame that *fidelitas* is in Latine. And when a freeholder doth fealty to his lord, he ſhal 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.

"*Et quant franktenant.*" 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, ſit homagium, ſit tamen inde fidelitatis ſacramentum.* [b] Bracton, lib. 2. fol. 80. a. Brit. fo. 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.

"*Que a vous ſerra foial et loial, &c. et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les cuſtomes et ſervices, &c.*"

[68. a.] [c] Fealtie is a part of homage (1), for all the words of fealtie are comprehended within homage (2), and therefore fealtie is incident to homage. [c] Mirror, cap. 3 de ſer. & de fealtie. (4. Co. 8. b.)

"*Sicome moy aide Dieu.*" 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 allegeance, 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 wel (when a freeholder doth (7. Co. Calvin's caſe.)

(2) [See Note 13.]

[68. a.]

(1) [See Note 14.]

(2) [See Note 15.]

(3) [See Note 16.]

[d] Stat. de 17. E. 2. tit. Homage in le Abridgement.

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.

Sect. 92.

ET graund diverſitie y ad perenter feaſans de fealtie et de homage; car homage ne poit eſtre fait forſque al ſeignior meme; mes le ſeneſchal de court de ſeignior, ou bailife, puit prender fealtie pur le ſeignior.

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. 21. E. 4. 17. acc. 2. E. 3. 10. 32. H. 6. 23. 9. Co. 76.

BRACTON, lib. 2. fo. 80. ſaith thus: *Sciendum eſt, quòd non per procuratores nec per literas fieri poterit homagium; ſed in propriâ perſonâ, tàm domini quàm tenentis, capi debet et fieri.*

Vid. for the ſignification of Seneſchal and Bailife, Sect. 78, 79. 248. & 379.

"*Mes le ſeneſchal, &c. ou bailife poet prender fealtie.*" This is ſo evident, as it needeth no explanation.

Sect. 93.

ITEM, tenant a terme de vie ferra fealtie, et uncore il ne ferra homage. Et divers autres diverſities y ſont perenter homage et fealtie.

ALSO, tenant for terme of life ſhall doe fealtie, and yet he ſhall not doe homage. And divers other diverſities there be betweene homage and fealty.

9. Co. 76.

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).

Sect. 94.

ITEM, home poit veier 15. E. 3. *coment home et ſa feme fieront homage et fealtie en common banke, quele eſt eſcript devant en tenure de homage.*

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.

Plus ſerra dit de fealtie en le tenure en

More ſhall be ſaid of fealtie in the tenure

(4) See the note on this ſuppoſed ſtatute in 67. b. ante.

(5) [See Note 17.]

en ſocage, et en le tenure en frankal-moigne, et en le tenure per homage aunceſtrel.

tenure in ſocage, and in frankeal-moigne, and in the tenure by homage aunceſtrell.

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.

(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.

[68. b.]

(1) [See 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) [See Note 19.]

(5) [See Note 20.]

Chap. 3. Eſcuage. Sect. 95. (6)

Escuage eſt appell en Latine Scutagium, *c'eſtaſcavoir*, Servitium ſcuti; *et tiel tenant, qui tient ſa terre per eſcuage, tient per ſervice de chivaler. Et auxy il eſt communement dit, que aſcun tient per un fee de ſervice de chivaler, et aſcun per le moity d'un fee de ſervice de chivaler, &c. Et il eſt dit, que quant le roy face voyage royal en Eſcoce pur ſubduer les Scotes, donques il, que tient per un fee de ſervice de chivaler, covient eſtre ove le roy pur* 40 *jours, bien et covenablement array pur le guerre. Et celuy, que tient ſa terre per le moitie d'un fee de chivaler, covient eſte ove le roy pur* 20 *jours; et il que tient ſon terre per le quart part d'un fee de chivaler, covient eſte ove le roy pur* 10 *jours; et iſſint que pluis, pluis, et que miens, miens.*

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.

[a] Mir. ca. 1. ſect. 3. Brit. 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.)

"*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.*

Nomina ſi neſcis, perit cognitio rerum. (Poſt 86. b. 177. a.)

And herewith agreeth that which is ſaid, *Primò excutienda eſt verbi vis, ne ſermonis vitio obſtruetur oratio, ſive lex ſine argumentis.*

[b] Bract. li. 2. fo. 36. a. Flet. l. 3. ca. 14. Ockam ubi ſupra. 27. Aſſ. 52. 31. Aſſ. 38.

Scutum in *French* is *Eſcue*, and thereof commeth the *Eſcuer, (i.) 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). (Poſt. 74. b.)

[c] Mirr. cap. 1. ſect. 3. [d] 2. E. 3. 8. b. 19. E. 3. Avowry 294. (4. Inſt. 192.)

[c] *Et tiel tenant que tient ſon terre per eſcuage, tient per ſervice de chivaler.*" [d] For as fealty is incident to homage, ſo homage and knights [69. a.]

26. H. 8. 1. a. 20. E. 3. Per quæ ſervic. 11. 43. E. 3. 22. F. N. B. 83, 84.

(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.

(7) [See Note 21.]

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 then by ſtipendiary forainers. (Poſt. 82. b.) [e] Lib. rub.

"*Un fee de ſervice de chivaler.*" [f] There is great diverſity 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 Ethelredi*; 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 had a leſſe 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 [f] 9. Co. 123. in Lowe's caſe. Vide 7. Co. 33, 34. Nevil's caſe. (Sid. 128.) (2. Ro. Abr. 515, 516. F. N. B. 82. c.)

400

(1) See as to this poſt. 82. b.

(2) [See 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.

(7) [See Note 23.]

400 pound *per annum ad ſuſtinendum nomen et onus* of an earle, and of late time 800 markes *per annum* of a marqueſſe, 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 unâ 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.* [69. b.] *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 homagium et ſervitium militare, unde duodecim carucatæ terræ faciunt unum feodum militis pro omni ſervitio, ipſa diſtrinxit ipſum ad faciendam ſectam ad curiam ſuam de Thorneton in Craven, &c.* (1)

(Poſt. 76. a. 83. b.) 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 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*

(1) [See Note 24.] (2) [See Note 25.]

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.

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.*

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. 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. Abr. 568.)

"*Voyage royal.*" 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 then 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).

"*En Eſcoce,*" *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 knights 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.

"*Il que tient per un fee de ſervice de chivaler, covient eſte ove le roy pur* 40 *jours.*" 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

(3) [See Note 26.]

Magna Charta, cap. 37. Fleta, lib. cap. 60.

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.*

Sect. 96.

[70. a.]

MES il appiert per les plees et arguments faits en un bon plee ſur briefe de detinue de un eſcript obligatorie port per un H. Gray, *Tr. 7. E. 3. que ne beſoigne a celuy que tient per eſcuage, de aler ove le roy luy meſme, s'il voile trover un auter perſon able pur luy convenablement array pur le guerre de aler ove le roy. Et ceo ſemble eſtre bon reaſon. Car poit eſtre, que celuy que tient per tiels ſervices eſt languiſhant, iſſint que il ne poit aler ne chivaucher. Et auxy un abbe ou auter home de religion, ou feme ſole, que tient per tiels ſervices, ne doit en tiel cas aler en proper perſon. Et ſir* W. Herle, *adonque chiefe juſtice de common bank, diſoit en tiel plee, que eſcuage ne ſerra graunt mes lou le roy alaſt luy meſme en ſon proper perſon. Et fuiſt demurre en judgement en meſme le plee, le quels les xl. jours ſerront accompts de le primer jour del muſter de hoſt le roy fait per les commons et per commandement le roy, ou de la jour que le roy primes entra en Eſcoce.* Ideo quære de hoc. (1)

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, 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 and by the commandement of the king, or from the day that the king firſt entred into Scotland. Therefore enquire of this.

Tr. 7. E. 3. fol. 29.

(9. Co. 130. 2. Ro. Abr. 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 apparant, that albeit the tenure is, that he which holdeth by a whole

(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.

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.

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.* (4. Co. 88.)

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 then 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, he may finde out and read the caſe ſo [70. b.] 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. (6. Co. 20.)

"*Et ceo ſemble bone 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.*

"*Un abbe, ou auter home de 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 (Poſt. 99. a.)

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 ipſe lex*; the reaſon of the immunity was in reſpect of the body politique, which by the conveyance over ceaſeth, which is worthy of the obſervation.

And it is to be obſerved, that every biſhop in *England* hath a 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.

"*Ou auter home de 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.*

"*Languiſhant.*" So it may be ſaid of an ideot, a mad man, a leper, a man maymed, blind, deafe, of decrepit age, or the like.

"*Ou fem 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.

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. [71. a.]

"*Convenablement arraie pur le guerre.*" 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, he muſt have ſuch armor as ſhall be neceſſary, and ſo appointed in readineſſe.

(2) [See Note 27.] (1) [See Note 28.]

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.

It is truly said, *quòd miles hæc tria curare debet, corpus ut validissimum et perniciissimum habeat, arma apta ad subita imperia, cætera Deo et imperatori curæ esse.* Livius.

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. Vegetius.

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 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.*

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 defraudare, et dominum regem et regnum offendere.* (Lamb. fo. 135. b.)

Concerning the point in law, demurred in judgement, in the seventh of Edward the third, here mentioned by our author, the law accounteth the beginning of the fortie dayes 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 drawne 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 a 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.]

"*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 ſet 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 ſet; 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 ſtiled *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 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 aſſize brought before the juſtices in eire claimed conuſance and to have writs of aſſize 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

26. Aſſ. p. 24. 4. E. 3. fo. 19. Bracton, lib. 3. fol. 105. b. Britton, fol. 1. & 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.

(1) [See Note 29.]

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, it is evident by that which hath beene ſaid, that it hath juriſdiction of all common pleas. But let us returne to *Littleton*.

"*Demurre en judgement.*" 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, *demurre en judgement*; 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. (Doct. Pla. 115. 5. Co. 114.) (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 councell 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 councell 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 ſhal be determined by the lords in the upper houſe of parliament (1). See the ſtatute, for it extends not onely to the caſe aboveſaid, 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, (Vid. Bract. lib. 5. fo. 352. b.) (14. E. 3. cap. 5. Statut. 1.) [72. a.] (Rot. Parlia. 14. E. 3. nu. 31. a proceeding in ſir John Stanton's caſe upon difficulty in the court of common pleas. 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. [a] 4. E. 3. ca. 14.

(2) [See Note 30.]

[72. a.]

(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.

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.

[b] Bracton, lib. 1. cap. 2. nu. 7. Brit. fo. 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. caſe. 5. Co. 74. Wymek's caſe. 38. E. 3. 25. 11. H. 4. 5. 75. 3. E. 4. 2. [a] 3. Co. 57. Linc. Coll. 10. Co. 88. uſque 98. Doctor Leyfield's caſe. (1. Leon. 178. Doc. Pla. 116, 117.)

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 then in a demurrer upon a count, replication, &c. and ſo *è converſo* may the plaintife demurre in law upon the evidence of the defendant.

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, 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.

[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. [e] 38. H. 8. Dyer 53. (Cro. Eliz. 752.)

"*En judgement.*" For the ſignification of this word, *Vide* Sect. 366.

(2) See 4. Inſt. 9. and Com. Dig. *Parliament*, C.

(3) See 27. Eliz. c. 5. and 4. An. c. 16.

Sect.

Sect. 97.

ET apres tiel voyage royal en Eſcoce, il eſt communement dit, que per authoritie de parliament l'eſcuage ſerra aſſeſſe et mis en certaine; ſcilicet, certeine ſumme d'argent, quant cheſcun, que tient per entier fee de ſervice de chivaler, quel ne fuit per luy meſme, ne per un auter pur luy, ove le roy, paiera a ſon ſeignior de que il tient la terre per eſcuage. Sicome mittomus, que il fuit ordaine per authoritie de la parliament, que cheſcun, que tient per entier fee de ſervice de chivaler, que ne fuit ove le roy, payera a ſon ſeignior xl s. donque celuy que tient per moitie d'un fee de chivaler, ne payera a ſon ſeignior forſque xx s. et celuy que tient per la quart part de fee de chivaler, ne payera forſque x s. et ſic que pluis, pluis, et que meins, meins.

AND after ſuch a voyage royall into Scotland, it is commonly ſaid, that by authority of parliament the eſcuage ſhal 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).

"*APRES voiage royall, &c. il eſt communement dit, que per authority de parliament eſcuage ſerra aſſeſſe.*" *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
[72. b.] by the king or any other but by parliament: [*a*] and this was by the common law (1). [*a*] 13. H. 4. 5.

[*b*] No eſcuage was aſſeſſed by parliament ſince the reigne of *Edward* the ſecond, and in the eight yeare of his reigne eſcuage was aſſeſſed (2). [*b*] 8. H. 3. Rot. Clauſ. & Rot finium, memb. 30. & ante.

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. Staff. P. 14 E. 1. de banco.

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.

(1) [See Note 31.]
(2) See ante 69. b. note 3.
(3) [See Note 32.]
(4) [See Note 33.]
(5) [See Note 34.]

Sect. 98.

ET aſcuns teignont per la cuſtome (6), *que ſi l'eſcuage courge per authoritie de parliament a aſcun ſumme de money, que ils ne paieront forſque la moitie de ceo, et aſcuns teignont que ils ne payeront forſque le quart part de ceo. Mes pur ceo que l'eſcuage que ils paieront eſt non certain, pur ceo que n'eſt certaine coment le parliament aſſeſſera l'eſcuage eux teignont per ſervice de chivaler. Mes auterment eſt de l'eſcuage certaine, de que ſerra parle en le tenure de ſocage.*

AND ſome hold by the cuſtome, that if eſcuage be aſſeſſed by authoritie of parliament at any ſumme of mony, that they ſhal 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.

Vid. Sect. 120.
15. E. 2. tit. Avow. 215.
26. Aſſ. 65.

"*ASCUNS teignont per cuſtome, &c.*" *Nota*, that eſcuage is directed by cuſtome.

30. E. 3. 23. b. 4. Co. 88. in Luttrel's caſe.

"*Mes auterment eſt de eſcuage certaine.*" 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 Chapter of Socage, Sect. 120. [73. a.]

"*Per parliament.*" Of the antiquitie and authoritie of this court, ſee Sect. 164.

Sect. 99.

ET ſi home parle generalment d'eſcuage; il ſerra entendue per le common parlance d'eſcuage non certaine, que eſt ſervice de chivaler. Et tiel eſcuage trait a luy homage, et homage trait a luy fealtie; car fealtie eſt incident a cheſcun manner de ſervice, forſque a la tenure en frankalmoigne, comme ſerra dit apres en le tenure de frankalmoigne. Et iſſint il que tient per eſcuage, tient per homage, fealtie, et eſcuage.

AND if one ſpeake generally of eſcuage, it ſhal 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 ſhal be ſaid afterward in the tenure of frankalmoigne (1). And ſo he, which holdeth by eſcuage, holds by homage, fealty, and eſcuage (2).

"*ET*

(6) The words in L. and M. and Roh. are *aſcun tenantes teignont*, and the words *per la cuſtome* are omitted.

[73. a.]

(1) See acc. Mad. Baron. Angl. 166.

(2) [See Note 35.]

" *ET ſi home parle generalment d'eſcuage, il ſerra intend per le common parlance d'eſcuage non certain.*" (2. Inſt. 485. 6. Co. 20. Poſt. 78. b. 189. a. 381. b. 1. Sid. 265. 11. Co. 39. a.) Entendments en Ley. Sect. 100.

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.*

110. 367. 377. 393. 406. 462, 463. 5. E. 2. Reſceit 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. fo. 163.

" *Et tiel eſcuage trait a luy homage, et homage trait a luy fealtie; car fealtie eſt incident a cheſcun manner de ſervice, forſque a tenure en frankealmoigne.*" 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. 40. E. 3. 21. 8. H. 7. 4.

Sect. 100.

ET eſt aſcavoire, que quant eſcuage eſt tielment aſſeſſe per authoritie de parliament, cheſcun ſeignior, de que le terre eſt tenus per eſcuage, avera l'eſcuage iſſint aſſeſſe per parliament; pur ceo que il eſt intendus per la ley, 73. b.] *que al commencement tiels tenements fueront dones per les ſeigniors a les tenants de tener per tielx ſervices, a defender lour ſeigniors auxy bien come le roy, et mitter en quiet lour ſeigniors et le roy de les Scotes avantdits.*

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, ſhal have the eſcuage ſo aſſeſſed by parliament; becauſe it is 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 aſwell as the king, and to put in quiet their lords and the king from the Scots aforeſaid.

Sect. 101.

ET pur ceo que tiels tenements devienront primes des ſeigniors, il eſt reaſon que ils averont l'eſcuage de lour tenants. Et les ſeigniors en tiel caſe purront diſtreiner pur l'eſcuage iſſint aſſeſſe, ou ils en aſcuns caſes purront aver briefe le roy direct as viconts de meme les counties, &c. de levier tiel eſcuage pur eux, ſicome appiert per le Regiſter. Mes de tiels tenants, queux teignont per eſcuage de roy, queux ne fueront ove le roy en Eſcoce, le roy meſme avera l'eſcuage.

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 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.

" *LES*

F. N. B. 84. Regiſter 88. de Scutagio habendo.

"LES *ſeigniours averont l'eſcuage, &c.*" This is evident.

"*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, lib. 5. fol. 413. Fleta, lib. 2. cap. 12. Britton, fol. 122. 227. (1. Sid. 187.)

[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.*

(7. Co. 4. a. 4. Inſt. 10.)

Of writs ſome be original, *brevia originalia*, and ſome be judiciall, *brevia judicialia*.

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 ſhal read plentifully in the *Regiſter*, whereof *Littleton* maketh mention in this place, and alſo in *Fitzh. N. B.*

(Plowd. 228. a. 4. Inſt. 79.) Bracton, ubi ſupra. Britton, ubi ſupra. Regiſt. 88. F. N. B. 84.

"*Sicome appiert per le 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 ſhal 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, en tiel caſe avantdit, lou le roy face un voyage royall en Eſcoce (1), *et l'eſcuage eſt aſſeſſe per parliament, ſi le ſeignior diſtreine ſon tenant, que tient de luy per ſervice d'entier fee de chivaler, pur*

ITEM, in ſuch caſe aforeſaid, where the king maketh a voyage royall into *Scotland*, 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,

(1) See further as to the Regiſter of Writs, Nicholſ. Engl. Hiſtor. Libr. 2d ed. 205.

(2) See ante 72. b. note 3.

[74. a.]

(1) [See Note 36.]

pur l'eſcuage iſſint aſſeſſe, &c. et le tenant plede, et voit averrer, que il fuit ove le roy en Eſcoce, *&c. per xl. jours, et le ſeignior voit averrer le contraire, il eſt dit, que il ſerra trie per le certificat del marſhall del hoſt le roy* (2) *en eſcript ſouth ſon ſeale* (3), *que ſerra mis a les juſtices.*

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 in writing under his ſeale, which ſhall be ſent to the juſtices.

"ET *voit averrer, que il fuit ove le roy en* Eſcoce *per* 40 *jours, &c.* [*a*] *il eſt dit, que il ſerra trie per le certificat del marſhall.*" This is a tryall appointed by the law, *ne curia regis deficeret in juſticiâ exhibendâ.* [*b*] Herewith agreeth the *Regiſter*, where the marſhall is called *conſtabularius exercitûs noſtri.* (6. Co. 21.)

[*a*] 2. E. 4. 1. 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.

"*Marſhall del hoſte le roy*," *Mareſchallus exercitûs*, in *Saxon Mariſchalk, i. e. equitum magiſter.* This word *Marſhall* is either derived of *Mars*, or of *mare* 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 præliis 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 trial 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. Tryall 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, generall baſtardie, excommengement, profeſſion; theſe and the like are regularly to be tried by the certificate of the ordinarie (4).

[*c*] Lamb. fo. 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

(4. Inſt. 124.)

(2) In L. and M. the words are *conſtable de la hoſte le roy.*

(3) In L. and M. there is an *&c.* after *ſeale*, and the words *que ſera mis a les juſtices* are omitted.

(4) See further as to trial by certificate, Com. Dig. tit. *Certificate*, and title *Trial* in Viner and the other Abridgments.

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.

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.

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 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. 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.* [74. b.]

[*] Anno 25. Eliz. (Poſt. 261. Hut. 3.)

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).

(1) [See Note 37.]

CHAP.

Chap. 4. Of Knights Service. Sect. 103.

TENURE per homage fealty et eſcuage eſt a tener per ſervice de chivaler, et trait a luy gard mariage et relief. Car quant tiel tenant moruſt, et ſon heire male eſt deins l'age de 21 ans, le ſeignior avera la terre tenus de luy tanque al age del heire de 21 ans; le quel eſt appel pleine age, pur ceo que tiel home, per entendement del ley, n'eſt pas able de faire tiel ſervice de chivaler devant l'age de 21 ans. Et auxy ſi tiel heire ne ſoit marie al temps de mort de tiel aunceſter, donque le ſeignior avera le garde et le mariage de luy. Mes ſi tiel tenant devie, ſon heire female eſteant d'age de 14 ans ou de plus, donque le ſeignior n'avera my le garde del terre, ne de corps; pur ceo que feme de tiel age poit aver baron able de faire ſervice de chivaler. Mes ſi tiel heire female ſoit deins l'age de 14 ans, et nient marie al temps de la mort ſon aunceſter, donque le ſeignior avera le garde de la terre tenus de luy tanque al age de tiel heire female de 16 ans; pur ceo que il eſt done per le ſtatute de Weſtm. 1. cap. 22. que per 2 ans procheine enſuant les dits 14 ans, le ſeignior poit tender convenable mariage ſans diſparagement a tiel heire female. Et ſi le ſeignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine des dits 2 ans poit enter et ouſte ſon ſeignior. Mes ſi tiel heire female ſoy marie deins l'age de 14 ans en la vie ſon anceſter, et ſon aunceſter devy, el eſteant deins l'age de 14 ans, le ſeignior n'avera forſque la garde de la terre juſques a fine de 14 ans d'age de tiel heire female, et donque ſon baron et luy poient enter en la terre, et ouſte le ſeignior. Car ceo eſt hors de cas de le dit eſtatute, entant que le ſeignior ne poit tender mariage a luy que eſt marie, &c. Car devant le dit eſtatute Weſtm. 1. tiel iſſue female, que fuit deins age de 14 ans al temps de mort ſon aunceſter, et

TENURE by homage fealty and eſcuage is to hold by knights ſervice, and it draweth to it ward 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 ſhal 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 yeres 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

et puis que el avoit accomplisſh l'age de 14 *ans, ſans aſcun tender de mariage per le ſeignior a luy, tiel heire female donque puiſſoit enter en le terre et ouſle le ſeignior, ſicome appiert per le reherſall et parolx de le dit ſtatute; iſſint que le dit ſtatute fuit fait en tiel cas tout pur l'advantage de ſeigniors, come il ſemble. Mes uncore ceo touts foits eſt entendue per les parolx de meme le ſtatute, que le ſeignior n'avera le deux ans apres les* 14 *ans, come eſt avantdit, mes lou tiel heire female ſoit deins l'age de* 14 *ans, nient marie al temps de mort ſon anceſter.*

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 rehearfall 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 years 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).

(6 Co. 73. b.) "SERVICE *de chivaler.*" *Nota*, it appeareth by [*a*] the *Regiſter*, that it is [*b*] ſaid *unum feodum 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 tenent 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. Bracton, lib. 2. fo. 85. Britton, fol. 162. & fo. 28. & 95. Ockam in diverſis locis. Mirror, cap. 1. ſect. 3. Sud. Diton.

"*Chivaler*," *i. e. eques*, knight, 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

(1) In L. and M. and the Pap. MS. there is the following addition: *Item ſi un home tient un maner de un auter per ſervyce de chivaler, et il tient un auter maner de un auter home per un tiel ſervyce, mez il tient l'un maner per prioritie, &c. et l'auter maner per poſteriorite, et ad iſſue file, et devie, et les maners deſcendont al file adonques eſteant deins l'age de* 14 *auns, et le ſeignour de que un dez maners eſt tenu per priorite ſeiſit le garde del corps del heire et de le maner tenuz de luy, et l'auter ſeignour ſciſit le garde del auter maner tenuz de luy, en ceſt caſe quant la file vient al age de* 14 *auns, ele entrera en le maner tenuz per poſteriorite coment que ele ſoit adonques deſmarie. Qar les parols de meme l'eſtatute de* Weſtminſter premier *ſont en tiel forme que enſuyſt. Les heires femels, puis que eles avyront complie age de* 14 *aunz, et le ſeignour, a qui le mariage appent, celes ne voudra marier, mez per coveitiſe de la terre celes voudra tener diſmariez, purveu eſt que le ſeignour ne puiſe aver ne tener per encheſon de la mariage les terres de celes heirez females outer deuz auns aprez le terme dez avauntdiz* 14 *auns, &c. per queux parols il poet eſtre prove, que apres les* 14 *aunz null doit aver les terrez en tiel caſe, &c. forſque celui, a qui le mariage appent, &c. et pur ceo que tiell mariage n'appent a celuy, de qui la terre eſt tenus per poſteriorite, &c. tiell heir femel, quant ele vient al age de* 14 *auns, poet bien entre en tiel terre, que iſſint eſt tenus per poſteriorite, &c.*—See 35. H. 6. 52.

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 ſit domino capitali.* [75. a.] 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 hauberticum*. And in ancient time, ſuch as held by knights ſervice for the defence of the realme had many priviledges 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 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: [75. b.] *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.

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 ſhal have the cuſtody of them, not for benefit onely, but that the lord might ſee, that they be in their yong yeares taught the deeds of chivalry, and other vertuous and worthy ſciences.

[*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 meliùs 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.*

[*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. 8. 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.

[*k*] Carta H. 1. in libro rub. fol. 41. in ſcaccario.

[*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*] Forteſcue, cap. 44.

Amongſt

[n] Lamb. fol. 135. a.

[n] Amongſt the lawes 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 ei 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 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.

[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. Doc. Pla. 106.)

"*Et trait a luy gard, mariage, et 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. 35. 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. 11. H. 4. 34. 5. E. 3. 11. rege Rot. 43.

"*Gard,*" or *Ward*, 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.

Vid. Sect. 110. [b] 8. H. 3. Præſcript. 38. Paſch. 21. E. 1. Coram Nota pro Hibernia Prior del St. Trinitie de Dublin's caſe.

"*Marriage,*" *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

(1) [See Note 38.]

match him vertuously and in a good family without disparagement, as shall be said hereafter, which is the principall foundation of his estate.

[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 acciperet.*

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).

See also the statutes of 3. H. 7. c. 4. & 50. E. 3. ca. 6. Vide Mich. 12. & 13. Eliz. Dier 295.

" *Son 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 iiis 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
76. b.] heire, 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).

" *Quant*

[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. & lib. 7. ca. 9. Ockam de differentiis releviorum. (Ante 69. b. Post. 83. a.)
[*] Ockam ubi supra. Bracton, lib. 2. fo 85.
[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.
[f] Brit. 168. Fleta, lib. 1. ca. 9.
[g] Merton, 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 Curzon's case. 8. Co. 163. Might's case. Eod. lib. fo. 171. in Vigil Parker's case.
[k] Mir. ca. 1. sect. 3.

(2) See a note on the subject of *relief*, post. 83. a.

[76. b.]

(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.

"*Quant tiel tenant mort.*" 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 (1 Co. 99.) 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.

[*] 39. E. 3. 36. tit. Gard. 92. 33. E. 3. Gard. 162. 11. H. 7. 12. 19. E. 3. Gard. 114. [*] 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 his tenant is within age, and not able to doe him ſervice, and no default in the lord to barre him of his wardſhip.

18. Aſſ. 18. 40. Aſſ. 36. 20. El. 362. 4. H. 6. 16. b. F. N. B. 143. 6. H. 4. 4. a.

[*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. 3. 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 anceſter was never tenant to the lord, and ſo there is a manifeſt diverſitie betweene this and the other caſes. *Et ſic de cæteris.*

13. El. Dyer 298. (Poſt. 248. a.) 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.

[*] 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.

If

If the diſſeiſee dyeth, his heire being within age, [m] the lord ſhall have the wardſhip of the heire of the bodie of the diſſeiſee. [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 heir of the diſſeiſee is not tenant unto him untill he hath recovered the land.

[m] 41. E. 3. 225.

[n] 15. E. 4. 11.

If *ceſtui que uſe* before the ſtatute of 27. *H.* 8. had dyed, his 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. 7. E. 4. 27.

Gard. 116. 18. E. 3. 7. 14. H. 4. 38. 1. H. 5. Grant 43. 5. E. 4. 3. 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 dieth, 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 and noted, in ſir Thomas Wyat's caſe.

[r] So was it reſolved in ſir Tho. Wyat's caſe ubi ſupra.

[a] "*La terre tenus de luy, &c.*" *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 honony* 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. Liverey 58. 28. H. 8. ibid. 55. (2. Ro. Abr. 503.)

When

(1) [See Note 39.]

[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 *ouster le maine cum exitibus*, albeit he never made tender.

[e] 32. H. 8. tit. Liv. Br. 62.

[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 others.

[g] 20. El. Dy. 362. F. N. B. 259. b.

[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.

[b] F. N. B. 263. 7. E. 4. 17. Stanf. Prær. 13. Br. tit. Liv. 64.

[b] 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 liverie is void, and the king may reseise 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, or the like, the king shall reseise, as is aforesaid.

[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.

[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.

41. E. 3. 5. 5. E. 6. 6. 27. Ass. 48. Pl. Com. 252. 20. El. Dyer 360. (10. Co. 64. a.)

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 in grants by letters patents.

[c] 32. H. 8. 46. 33. H. 8. cap. 21. (4. Inst. 188.)

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

[77. b.] 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. 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. Co. 56. & 60. Sadler's caſe. Stanf. Prærog. 58. b. 52. 5. E. 4. 4. 16. E. 4. 4. 1. H. 7. 14. 2. H. 7. 12. 4. H. 7. 15. 8. H. 7. 11. F. N. B. 262. 12. R. 2. Livery 28. F. N. B. 233. 7. Co. 44, 45. Ken's caſe.

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.

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.

[*b*] 6. Where it is untruly found by office, that any perſon attainted of treaſon, felony, or *præmunire*, is ſeiſed of any lands, &c. 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.

[*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.

[*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 *melius 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 *melius 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 *melius*, &c. is in nature of the *diem clauſit extremum*

[*c*] Vide 6. Co. 6. Wheeler's caſe.

[*d*] 12. Eliz. Dier f. 292. a. 8. Co. 168. Paris Stoughter's caſe.

mum 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 *melius* 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 *melius* a tenure be found of the king *ut de manerio per quæ ſervitia, &c.* it ſhall be taken for knights ſervice.

13. Eliz. Dier 306.
4. H. 6. 13.
10. 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, *tenus de luy*, 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 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. [78. a.]

[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 then the common law gave them, and ſome advantage given to the heires, which before they had not, which ſhall be touched briefly.

Merlebridge, ca. 1.
Pl. Com. 82.
27. H. 8. 10.
33. H. 6. 14.

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 heir 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.

[a] 31. E. 3. Colluſion 29.
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*.

[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 feoffement 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 yonger 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's caſe, and Northcot's caſe 10. Co. 80. b. Leonard 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 *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.

[f] 6. Co. 77. Sir George Curſon's caſe. 2. Eliz. Dier 181. 8. Eliz. Dier 252.

[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.

(1) Vid. Trin. 8. Jac. *Ley* 21. *Allicock's caſe*. Hal. MSS.

(2) [See Note 40.]

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).

* 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 feoffement 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.

"*Pleine age.*" Full age regularly is one and twenty yeares.

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.

"*Entendement de ley.*" *Entendement, 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 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, demiſe, 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.

Vide Britton, fol. 169.

"*Si le heire ne ſoit marie al temps del mort de tiel aunceſter, &c.*" *Aunceſter* 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.*

Glanvil. lib. 7. cap. 1. Mirror, cap. 5. ſect. 2. Britton, fol. 168. b. 39. H. 6. cap. 2.

"*Mes ſi tiel tenant devie ſon heire female eſteant del age de* 14 *ans, &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,

(3) [See Note 41.]

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.

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.)

"*Mes ſi tiel heire female ſoit deins l'age de* 14 *ans et nient marie, &c. le ſeignior avera la gard del terre.*" 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 mariage belongeth not to him. Alſo if the lord marieth 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.*

35. H. 6. 52. tit. Gard. 71. Stanford. 3. b. F.N.B.256.253. 35. H. 6. 40. Britton, fol. 169. 35. H. 6. 52.

79. a.] If the lord tender a convenable mariage to the heire within the two yeares, and ſhe mary elſewhere within thoſe two yeares, the lord ſhall not have the forfeiture of the mariage; for the ſtatute giveth the two yeares onely to make a tender.

35. H. 6. 52. 35. H 6. tit. Gard. 71. 6. Co. 71. the lord Darcie's caſe.

"*Et ſi le ſeignior deins les dits* 2 *ans ne luy tender tiel mariage, &c. donque el al fine del dits* 2 *ans poet entrer, et ouſte le ſeignior.*" This is ſo evident, as it needeth no explication.

"*Mes ſi tiel heire female ſoit marie deins l'age de* 14 *ans en la vie ſon anceſter, et ſon anceſter devie el eſteant deins age de* 14 *ans, le ſeignior n'avera la gard forſque de la terre jeſque al age de* 14 *ans, &c.*" Note, albeit the heire female be maried 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

F. N. B 143.

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 maried 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.

" *Car ceo eſt hors del caſe del dit ſtatute, intant que le ſeignior ne poet tender mariage a luy que eſt marie.*"

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 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).

27. H. 8. 3.
11. E. 3. Exec. 77.
4. E. 3. 55.
28. Aſſ. p. 7.

It is further provided by the ſaid ſtatute, that if the lord tender a convenable mariage 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 mariage. But if the lord doth not tender a mariage within the two yeares, he ſhall loſe the value of the mariage, and content himſelfe with the two yeares value.

31. Aſſ. p. 26. (Cro. Jam. 151.)

6. Co. 71. L. Darcie's caſe.

" *Car devant le dit ſtatute, &c. ſicome appiert per le rehearſall et parols de le dit 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 mariage 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 mariage 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.

NOTA, que le pleine age de male et female, ſolonque le common parlance, eſt dit l'age de 21 *ans. Et l'age de diſcretion eſt dit l'age de* 14 *ans; car a tiel age, le enfant que eſt marie deins tiel age a un feme, puit agreer a tiel mariage ou diſagreer.*

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 maried within ſuch age to a woman, may agree or diſagree to ſuch mariage.

OF

(1) See 6. Co. 74. a.

(2) [See Note 42.]

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 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 mariage, if they so agree; but disagree they can not before the said ages, and then they may disagree, and marie againe to others [79. b.] 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 of the age of ten, at her age of twelve he may aswell disagree as she may, though he were of the age of consent; becaufe in contracts of matrimony, either both muft 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).

(Ante 78. b.) 5. 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. (1. Ro. Abr. 341. 3. Inſt. 89.)

Sect. 105.

ET ſi le gardein en chivalrie marie un foits le garde deins l'age de 14 ans a un feme, et puis s'il al age de 14 ans diſagree a le mariage, il eſt dit per aſcuns, que l'enfant n'eſt pas tenuz per le ley d'eſtre autrefoits marie per ſon gardeine, pur ceo que le gardeine avoit un foits le mariage de luy, et pur ceo il fuit hors de ſon garde quant al garde de ſon corps. Et quant il avoit un foits le mariage de luy, et un foits fuit hors de ſon garde, il n'avera plus avant le mariage de luy (3).

AND if the gardian in chivalrie doth once marie the ward within his age of 14 yeares to a woman, and if afterward at his age of 14 yeares he diſagree to the mariage, it is ſaid by ſome, that the infant is not tied by the law to be againe maried by his gardian, for that the gardian had once the mariage of him, and becauſe he was once out of his ward as to the ward of his bodie. And when he had once the mariage of him, and he was once out of his wardſhip, he ſhall no more have the mariage of him.

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 mariage is *de facto*, and not *de jure*, and though the diſagreement diſſolveth it *ab initio*, yet the lord ſhall never have the mariage of him. 13. E. 1. Gard. 137. Brit. fol. 169. acc. Glanvil. lib. 7. cap. 12. 27. H. 6. Gard. 118.

And ſo if the gardian marieth his ward to a woman, and after the mariage is diſſolved by reaſon of a precontract (4), yet the gardian ſhall never have the mariage of the ward againe. 27. H. 6. Gard. 118.

But if one raviſheth a ward from the lord and marieth 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 mariage, the lord ſhall have the mariage of him, for he never had it before. 27. H. 6. Gard. 118.

So

(3) [See 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.

[79. b.]

(1) [See Note 44.]

(2) [See Note 45.]

(3) In L. and M. the words *quære de hoc* are added.

(4) [See Note 46.]

F. N. B. 243. 7. H. 6. 11.

So likewiſe, if the anceſtor marieth his heir apparent *infra annos nubiles*, and dieth his heire within age, the ward diſagreeth, the 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 mariage 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. [b] 27. H. 6. gard. 118. F. N. B. 143. m.

And ſo note a diverſity when the ward is maried by the anceſtor or by a raviſher, and when by the gardian himſelfe. [a] For if the anceſtor marie his heire apparent *infra annos nubiles* and dyeth, in this caſe, if the mariage be diſſolved by diſagreement either of the ward or of his wife, the gardian ſhall have the mariage of him. [b] And ſo it is if a raviſher marry a ward *infra annos nubiles*, and the mariage is diſſolved, *ut ſupra*, the gardein ſhall have the mariage. If the heire male in ward of the age of tenne yeares be maried without the conſent of the lord, he may tender unto the heire *infra annos nubiles* a mariage, albeit he be ſo maried; and if he refuſe, and agree to the former marriage, the lord ſhall have the forfeiture of his mariage, 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 mariage 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.*

19. E. 3. judgement 123. 45. E. 3. 16. [c] 47. E. 3. tit. Action ſur le ſtatute 38. and the bookes aboveſaid.

[80. a.]

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 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.

[d] 7. H. 6. 11. adjudged in the booke at large.

Sect. 106.

EN meſme le manner eſt, ſi le gardein luy marie, et la feme devie, eſteant l'enfant deins l'age de xiiii. ans ou xxi.

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.

Sect. 107.

ET que tiel enfant poit diſagreer a tiel marriage, quant il vient al age dex iiii. ans, il eſt prouve per les parolx del ſtatute de Merton *cap.* 6. *que iſſint dit.*

AND that ſuch 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 ei impoſitum. Si autem fuerit 14 *ans et ultra*, quòd conſentire poſſit et tali matrimonio conſenſerit, nulla ſequatur pœna.

Et iſſint eſt prove per meſme le eſtatute, que nul diſparagement eſt, mes lou celuy que eſt en garde eſt marie deins l'age de xiiii. ans.

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.

"*LE ſtatute de Merton.*" So called becauſe the parliament was holden at *Merton.*

"*Et que tiel enfant poit diſagreer, &c. il eſt prove, &c.*" Note, the time of diſagreement is ſet downe by act of parliament, and ſo obſerved by *Littleton*, who ſeekes no other proofe therein then 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 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 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 diſcretè ſciverit denarios numerare, et pannos ulnare, et alia paterna negotia ſimiliter exercere.* 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.

[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; fiftly, great and continuall

(1) [See Note 47.]

continuall infirmitie; as a conſumption, and ſuch like: ſixtly, 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.

The fourth kinde of diſparagement was *propter jacturam privilegii, &c.* as to marry the heire to a widow, whereby he ſhould by reaſon of the bigamie have loſt the benefit of his cleargie, 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 be many other diſparagements which are not ſpecified in the ſaid ſtatute, for thoſe two mentioned are put but for examples. In a word, it muſt be *competens maritagium abſque diſparagatione.*

1. E. 6. cap. 12.

[*d*] Vide Sect. 109.

F. N. B. 149.

"*Si talis hæres fuerit infra* 14 *annos, et talis ætatis quòd 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 avoydable by diſagreement.

"*Tunc ſi parentis illi conquerantur.*" *Littleton* in the next Section expoundeth theſe words in this manner, viz. *Si parentes conquerantur*, i. e. *ſi parentes inter eos lamententur, quæ eſt tant a dire, que ſi les coſens de tiel infant ont cauſe de faire lamentation ou complaint pur le hont faire lour coſen iſſint diſparage, quel eſt in manner un hont a eux. 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 *bonâ 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 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

(1) [See Note 48.]

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.*

"*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. Britton, fol. 169. acc.

Sect. 108.

[81. a.] *NOTA, que il ſoloit eſtre queſtion, coment ceux parolx ſerront entendes*, Si parentes conquerantur, &c. *Et il ſemble a aſcuns, que conſiderant le ſtatute de* Magna Charta, *que voit*, quòd hæredes maritentur abſque diſparagatione, &c. *ſur quel cel ſtatute de* Merton *ſur tiel point eſt foundue* (1), *que nul action poit eſtre pris ſur cel ſtatute*, (2) *entant que il ne fuit unques view ne oye, que aſcun action fuit port ſur cel ſtatute de* Merton *pur cel diſparagement envers le gardeine pur ceſt matter avantdit* (3), *&c. et ſi aſcun action puiſſoit eſtre priſe ſur tiel matter, il ſerra entendue aſcun foits* (4) *eſtre miſe en ure.* Et nota (5) *que ceux parolx ſerront entendes* (6), Si parentes conquerantur, id eſt, ſi parentes inter eos lamententur *que* (7) *eſt taunt a dire, que ſi les couſins de tiel enfant ont cauſe de faire lamentation ou complaint enter eux, pur le hont fait a lour couſin iſſint diſparage, quel eſt en maner un hont a eux, donques puit le prochein couſine, a que l'enheritage ne puit diſcender, enter et ouſter le gardeine en chivalrie. Et s'il ne voile, un auter couſin del enfant poit ceo faire, et les iſſues et profits prender al uſe del enfant, et*

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, that no action can be brought upon this ſtatute, 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, &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. And note that theſe words ſhall be underſtood thus, *Si parentes conquerantur, id eſt, 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 amongſt themſelves, for the ſhame done to their 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

(1) *que nul action poit eſtre pris ſur cel ſtatute*, not in L. and M.

(2) *come ſemble et*, L. and M.

(3) *per ceſt matter avant dit*, not in L. and M.

(4) *per comen preſumption devaunt ceux heurez* inſtead of *entendue aſcun foits*, in L. and M.

(5) *Et nota* not in L. and M.

(6) *en tiel maner* in L. and M.

(7) *ou* inſtead of *que* in L. and M.

et de ceo render accompt al enfant quant il vient a ſon plein age. Ou autermẽt l'enfant deins age poit enter luy meſme, et ouſter le gardein, &c. Sed quære de hoc.

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 himſelfe, and ouſte the gardein, &c. *Sed quære de hoc.*

9. H. 3. (2. Inſt. 1.)

"*LE ſtatute de 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.

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.*

Bracton, 414. and 291. Fleta, lib. 2. cap. 48. & lib. 3. cap. 3. Mirror, cap. 2. ſect. 18. Brit. fol. 177. b.

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.*

This ſtatute of *Magna Charta* is but a confirmation or reſtitution of the common law, as in the ſtatute called *Confirmatio Chartarum* 25. E. 1. *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.

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 Foreſtâ*, 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.

"*Sur le ſtatute de Magna Charta le ſtatute de Merton eſt foundue ſur tiel point, viz. Quòd hæredes maritentur abſque diſparagatione* (1)." [81. b.]

"*Foundue.*" So as *Magna Charta* is the foundation of other acts of parliament. This act extendeth as well to females as to males.

"*Nul action poit eſtre priſe ſur cel ſtatute, entant que il ne unques fuit view ou oye, &c. Et ſi aſcun action puiſſoit eſtre priſe ſur ceſt matter, il ſerra intend a aſcun foits eſtre miſe in ure.*"

Hereby

(1) See 9. Hen. 3. c. 6.

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.

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.

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.

"*Si les 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.*

"*Ont cause a faire lamentation, &c.*" Note, if they have cause to make lamentation, it sufficeth, though they never complaine.

"*Pur le hont fait a lour cousin.*" For when their cousin is disparaged in his mariage, it is not only a shame and infamie to the heire, but in him, to all his bloud and kindred.

"*Donques poit le procheine cousin, a que le enheritance ne poit discender, enter et ouster le 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.

"*Et s'il ne voile, un auter cousin del enfant poit ceo faire.*" Still pursuing the reason of the common law in case of gardian in socage.

"*Et les issues et profits prender al use del enfant, &c.*" This is so evident as it needeth no explication.

"*Ou auterment l'enfant deins age poit enter luy mesme et ouste le 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 mariage; yet shall not this give any advantage to the lord, for that he had lost the wardship before.

(2) [See Note 49.]

Sect. 109.

[82. a.]

ITEM, mults auters divers diſparagements y ſont, que ne ſont ſpecifies en meſme le ſtatute. Come ſi le heire que eſt en gard eſt mary a un que n'ad forſque un pee, ou forſque un maine, ou que eſt deforme, decrepite, ou ayant horrible diſeaſe, ou graund et continual infirmitie; et (ſi ſoit heire male) ſi ſoit marry a feme que eſt paſſe l'age d'enfanter. Et mults auters cauſes de diſparagements ſont; ſed de illis quære, *car il eſt bon matter d'apprender.*

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.

ET des heires males que ſont deins l'age de 21 *ans apres le mort lour anceſter nient marries, en tiel cas le ſeignior avera le mariage de tiel heire, et avera temps et ſpace de tender a luy convenable mariage ſans diſparagement deins meme le temps de* 21 *ans. Et eſt aſcavoir, que l'heire en tiel caſe poit eſlier s'il voit eſtre marry ou non; mes ſi le ſeignior, que eſt appel gardein en chivalry a tiel heire, tender convenable mariage deins l'age de* 21 *ans ſans diſparagement, et l'heire ceo refuſe, et ne ſoy marie deyns le dit age, donques le gardeine avera le value del mariage del tiel heire male. Mes ſi tiel heire luy meme marie deins l'age de* 21 *ans encounter la volunt le gardeine en chivalrie, donquez le gardein avera le double value del mariage per force de le ſtatute de* Merton *avantdit, come en meme le ſtatute eſt compriſe pluis a pleine.*

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 mariage 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 mariage 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 mariage 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.

"*De tender a luy convenable marriage, &c.*" But it is in the election of the lord, whether for the ſingle value the lord will tender a marriage or no, for he ſhall have the ſingle value without any tender (1). 6. Co. 70. Lo. Darcie's caſe. Vid. Britton, fol. 169. (5. Co. 127.)

And of this there needeth no other explication. The value of the mariage 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. Merton, cap. 6. 18. E. 3. 18.

"*Le heire en tiel caſe poit eſlier s'il voit eſtre marrie, ou non, &c.*" And ſo on the other ſide, though there be a tender made of a covenable mariage without diſparagement, yet the heire may refuſe, [82. b.] for in everie mariage there muſt be a free conſent.

"*Si tiel 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 marieth another within age, he ſhall forfeit double the value; but if he before any tender marieth himſelfe within age, he ſhall pay but the ſingle value of the mariage.

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.

ITEM, divers tenants teignont de lour ſeigniors per ſervice de chivaler, et uncore ils ne teignont per eſcuage, ne paieront eſcuage; come ceux que teignont de lour ſeigniors per caſtle-garde, c'eſt-aſcavoir, a garder un tower del caſtle lour ſeignior, ou un huis ou un auter lieu

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 p'ace

(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.

lieu del caſtle, per reaſonable garniſhment, quant lour ſeigniors oyont, que enemies voylent vener, ou ſont venues en Engleterre. *Et en pluſors auters caſes home poit tener per ſervice de chivaler, et uncore il ne tient per eſcuage, ne payera eſcuage, ſicome ſerra dit en le tenure per graund ſerjeantie. Mes en touts caſes ou home tient per ſervice de chivaler, tiel ſervice trait all ſeignior gard et mariage.*

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 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 mariage.

4. Co. 88. in Luttrel's caſe. 6. Co. 20. a. Gregorie's caſe. 29. R. 2. Gard. 195.

"*PER caſtel-gard, wardum caſtri, ſeu caſtel-gardum, ſeu caſtri-gardum.*" He that holdeth by caſtle-gard, holdeth by knight's 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.

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. [83. a.]

Vide Mag. Chart. cap. 19. 20. W. 1. cap. 7. Bract. lib. 5. fol. 363. Fleta, lib. 2. cap. 43.

"*A garder un tower del 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.

"*Del ſeignior.*" For it cannot be of a caſtle of another.

(2. Ro. Abr. 513)

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 knight's 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.

[*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. Luttrel'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.

"*Per reaſonable garniſhment.*" This warning muſt be given by the lord or ſome other for him, and the tenant need not to ſtirre untill 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.

"*Voylent*

"*Voylent vener.*" 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 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.* Fleta, lib. 1. cap. 42.

Sect. 112.

ET ſi un tenant, que tient de ſon ſeignior per ſervice de entier fee de chivaler, moruſt, ſon heire donques eſteant de plein age, ſcil. de 21 ans, donque le ſeignior avera 100s. pur reliefe, et del heire celuy que tient per le moitie d'un fee de chivaler, 50s. et de celuy que tient per le quart part de fee d'un chivaler, 25s. et ſic que pluis, pluis, et que meins, meins.

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 reliefe, 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.

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 [83. b.] diſtreine (3), but cannot have an action of debt (4), but his executors or adminiſtrators may have an action of debt, and cannot diſtraine (1). [*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.)

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. de 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,

(1) [See Note 50.]
(2) [See Note 51.]
(3) [See Note 52.]
(4) Acc. ante 47. b. But there are ſome opinions to the contrary. See 2. Leon. 179. 2. Ro. Rep. 371.

[83. b.]
(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.

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 earledome 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 heirs 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 baroniâ integrâ, &c.* Now what an entire earledome entire baronie is, hath beene declared before.

Vide Bracton, fol. 84. 14. H. 4. in recordo longo. 10. H. 7. 19. 29. E. 3. Aſſ. 122. tit. Avowrie 126. 18. Aſſ. pl. ultimo. 23. E. 3. 8.

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. Eſchange 2. 46. E. 3. Forfeiture 18.

"*Son heire de pleine age, ſcil. de 21 ans.*" 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 knight's ſervice *in capite*, and of a common perſon other lands by knight's 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

(4) See 2. Inſt. 7, 8. and Wright's Ten. 99. (5) [See Note 53.]

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.

[84. a.] "*Son heire.*" [*k*] And yet the ſucceſſor of a biſhop or abbot may pay reliefe by preſcription or grant.

[*k*] 3. E. 5. 13. 76. 8. R. 2. Reliefe 14. 3. H. 4. 2. 2. H. 3. Avowrie 124.

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.

ITEM, home puit tenere ſon terre de ſon ſeignior per le ſervice de deux fees de chivaler; et donque l'heire, eſteant de pleine age al temps de mort ſon aunceſter, paiera a ſon ſeignior x. l. pur reliefe.

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.

NOTA, ſi ſoit aiel pier et fits, et la mere moruſt vivant le pier de le fits, et puis l'aiel, que tient la terre per ſervice de chivaler, moruſt ſeiſie, et ſa terre diſcendiſt al fits la mere come heire al aiel, que eſt deins age; en ceſt cas le ſeignior avera le garde de la terre, mes nemy le garde del corps del heire, pur ceo que nul ſerra en garde de ſon corps a aſcun

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

(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.

a aſcun ſeignior vivant ſon pier, pur ceo que le pier durant ſon vie avera le mariage de ſon heire apparant, et nemy le ſeignior. Auterment eſt, ou le pier eſt mort vivant la mere, lou le terre tenus en chivalrie diſcendiſt al fits de part ſon pier, &c.

ſhip 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.

Fleta, lib. 1. cap. 5. 16. E. 3. Diſſeiſin 6. 31. E. 1. Gard. 154. 8. E. 2. Treſp. 235. F. N. B. 243.

"*FITZ.*" 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. Ambroſia Gorge's caſe. 6. Co. 22.

"*Le ſeignior avera le gard del terre,*" 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 age and dieth, yet the lord ſhall have the wardſhip of the land.

"*Vivant ſon pier.*" 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 mariage 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,* *quitamen ex filiâ tuâ naſcitur in poteſtate tuâ non eſt, ſed patris ejus.* [84. b.]

9. E. 2. 18. E. 3. 25. 29. Aſſ. 35. 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. See W. 2. c. 35.

F. N. B. 143. 31. E. 3. Br. 357. 9. E. 4. 53. *Vide Flet. lib. 1. cap. 6. (2. Ro. Abr. 39.)

"*A aſcun ſeignior.*" Put the caſe there is lord, *et 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

(2) [See Note 54.]

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. §. Cum Patr. de feodo, &c. (Ante 8. a. 2. Ro. Abr. 39.)

"*De ſon 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.

NOTA, ſi home ſoit ſeiſie de terre que eſt tenus per ſervice de chivaler, et fait feoffment en fee a ſon uſe, et moruſt ſeiſie del uſe, ſon heire deins age, et nul volunt per luy declare, le ſeignior avera briefe de droit de gard de corps et del terre, ſicome tenant uſt devie ſeiſie del demeſne. Et ſi le heire ſoit de pleine age al temps del morant ſon anceſtor, en tiel caſe il payera reliefe, ſicome il fuiſſoit ſeiſie del demeſne. Et c'eſt per le ſtatute de anno 4. H. 7. *cap.* 17.

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 no force, for that by the ſtatute of 27. *H.* 8. cap. 10. all uſes are transferred into poſſeſſion.

[85. a.]

Sect. 116.

NOTA, il y ad gardein en droit en chivalrie, et gardein en fait en chivalrie. Gardein en droit en chivalrie eſt, lou le ſeigniour per cauſe de ſon ſeigniorie eſt ſeiſie de gard de terres et del heyre, ut ſuprà. *Gardein en fayt en chivalrie eſt, lou en tiel caſe le*

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 ſuprà.* Gardian in deede in chivalrie is,

(1) It was firſt introduced in Red.

le ſeigniour apres ſon ſeiſin graunt, per fayt ou ſauns fayt, le gard des terres, ou del' heire, ou d'ambideux, a un auter per force de quel grant le grauntee eſt en poſſeſſion. Donque eſt le grauntee appel gardein en fait.

is, where in ſuch caſe the lord after his ſeiſin grants, by deed 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 grauntee 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 no explanation.

(2. Ro. Abr. 62.)

"*Per fait ou ſans fait.*" 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.

12. E. 3. tit. Grant 59. 7. E. 3. 63. 26. E. 3. 65. 28. E. 3. 96. 14. E. 3. Act. ſur le ſtat. 17. 25. E. 3. 40. 31. E. 3. Vouch. 5. 46. E. 3. 25. 20. E. 4. 16. 12. H. 4. 19. 5. H. 7. 17. 36. 22. El. Dyer 371. 35. H. 8. Br. tit. Grant 85.

36. H. 8. tit. Grant B. 125. 22. H. 6. 34. 19. H. 6. 33. (Poſt. 325. b.)

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.

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. 43. E. 1. 6. 5. H. 7. 37. 11. H. 6. 4. 6. H. 7. 3. 18. H. 8. 16. El. Dyer 323.

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)

(1) [See Note 55.]

[85. b.] CHAP. 5. Of Socage. Sect. 117.

TENURE en ſocage eſt, lou le tenant tient de ſon ſeignior ſon tenement per certeine ſervice pur touts maners de ſervices, iſſint que les ſervices ne ſont pas ſervices de chyvaler. Sicome lou home tient ſon terre de ſon ſeignior per fealtie et per certeine rent, pur touts maners de ſervices; ou lou home tient per homage et fealtie et certeine rent, pur touts maners de ſervices; ou lou il tient per homage et fealty pur touts maners de ſervices; car homage per ſoy ne fait pas ſervice de chivaler.

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 in ſocage* (1)."

Mirror, ca. 1. ſ 3.

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.

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 arrable 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

(1) See Wright's Ten. 142. and 2. Blackſt. Comment. 5th ed. 79.

Cic. lib. 1. Offic. *Omnium rerum, ex quibus aliquid exquiritur, nihil agriculturâ melius, nihil uberius, nihil dulcius, nihil libero homine dignius.*

Virgil. lib. 1. Georg.

O fortunatos nimium, sua si bona nôrint
Agricolas, quibus ipsa procul discordibus armis
Fundit humo facilem victum justissima tellus.

Seneca in Epist. *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.

[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. un soke ou un carue.* (1)

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. Wescesterse. * Mich. 10. E. 3. Coram rege Wilts in Thesaur. [d] For etimologies vid. Sect. 95. 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.

"*Issint que les services* [f] *ne sont pas services de chivaler.*" 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 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

(1) [See Note 56.] (2) [See Note 57.]

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. quæ per solam consuetudinem, &c.

Ockam, fo. 31. a. & b.

"*Car homage de soy ne fait service de chivaler.*" But it is a presumption where homage is due, that the land is holden by knight's service, as hath beene said.

Sect. 118.

(4. Co. 8.) *ITEM, home poit tener de son seignior per fealty tantum, et tiel tenure est tenure en socage; car chescun tenure que n'est pas tenure in chivalry, est tenure en socage.*

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.

ET il est dit, que la cause, pur que tiel tenure est dit et ad le nosme de

[86. b.] *tenure en socage, est ceo*; quia socagium idem est quod servitium socæ, et soca idem est quod caruca, *scil. un soke ou un carue. Et en ancient temps, devant le limitation de temps de memorie, grand part de les tenants, que tyendront de lour seigniors per socage, devoient vener ove lour sokes, chescun de les dits tenants pur certein jours per an pur arer et semer les demesnes le seignior. Et pur ceo que tielx overages fueront fait pur le viver et sustenance de lour seigniors, ils fueront quits envers lour seigniors de touts maners de services, &c. Et pur ceo que tielx services fueront faits ove lour sokes, tiel tenure fuit appel tenure en socage. Et puis apres tiels services fueront changes en*

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

en denyers, per conſent des tenants et per deſire des ſeigniors, ſcil. en un annuall rent, &c. Mes uncore le noſme de ſocage demurt, et en divers lyeux les tenants uncore font tiels ſervices ove lour ſokes a lour ſeigniors; iſſint que touts maners de tenures, que ne ſont pas tenures per ſervice de chivaler, ſont appels tenures en ſocage.

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 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.

"*TEMPS de 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.

20. E. 3. Avowrie 124. 39. E. 3. 17. 39. Aſſ. p. 3. 20. Aſſ. 1. Cap. Confirmation, Sect. 539.

4. E. 3. 161. 6. E. 3. 283.

"*Devoient vener ove lour ſokes.*" 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 plough-land, may contain 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.

"*Uncore le noſme de ſocage demurt.*" 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.]

Sect. 120.

ITEM, ſi home tient de ſon ſeignior per eſcuage certaine, ſcil. en tiel forme, quant l'eſcuage curge et eſt aſſeſſe per parliament a greinder ſumme ou meinder ſumme, que le tenant paiera a ſon ſeignior forſque demy marke pur eſcuage, et nient pluis ne miens, a quel graund ſumme ou a quel petite ſumme que l'eſcuage curge, &c. tiel tenure eſt tenure en ſocage, et nemy ſervice de chivalrie. Mes lou le ſumme que le tenant paiera pur l'eſcuage eſt non certaine,

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,

taine, ſcil. lou il poit eſtre que le ſumme que le tenant paiera pur l'eſcuage a ſon ſeignior, poit eſtre a un foits le greinder et a auter foits le meinder, ſolonque ceo que eſt aſſeſſe, &c. donques tiel tenure eſt tenure per ſervice de chivaler.

certaine, *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.

"*ESCUAGE certain*" 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. (6. Co. 6. b.)

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.

excellently reſolved in parliament. Hill. 3. E. 2. coram Rege Rot. 34. Agnes Frowick's 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.

ITEM, ſi home tient ſa terre pur paier certaine rent a ſon ſeignior pur caſtle-garde, tiel tenure eſt tenure en ſocage. Mes lou le tenant doit per luy meme ou per un auter faire caſtle-garde, tiel tenure eſt tenure per ſervice de chivaler.

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.

[87. b.] 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. Vid. Sect. 98, 99. 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.

(1) [See Note 58.]

Sect. 122.

ITEM, en touts caſes lou le tenant tient del ſeignior a paier a luy aſcun certaine rent, cel rent eſt appelle rent ſervice.

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.

ITEM, en tielx tenures en ſocage, ſi le tenant ad iſſue et devie, ſon iſſue eſteant deins l'age de 14 ans, donques le prochein amy del heire (1), a que le heritage ne poit diſcendre, avera la garde de la terre et del heir jeſque al age del heir de 14 ans, et tiel gardein eſt appelle gardein en ſocage. Car ſi la terre deſcendiſt al heire de part le pier, donques la mere, ou auter procheine coſen de part la mere, avera la garde. Et ſi le terre diſcendiſt al heire de part la mere, donques le pier ou le prochein amy de part del pier avera le garde de tielx terres ou tenements. Et quant l'heire vient al age de 14 ans compleat, il poit enter et ouſter le gardein en ſocage, et occupier la terre luy meſme, s'il voit. Et tiel gardeine en ſocage ne prendra aſcuns iſſues ou profits de tielx terres ou tenements a ſon uſe demeſne, mes tantſolement al uſe et profit del heire; et del ceo il rendra accompt al heire, quant pleaſt al heire apres ceo que l'heire accompliſt l'age de xiiii. ans. Mes tiel gardein ſur ſon accompt avera allowance de touts ſes reaſonable coſts et expences en touts choſes, &c. Et ſi tiel gardein maria l'heire deins xiiii. ans, il accomptera al heire, ou a ſes executors, de value del mariage, coment que il ne priſt riens pur le value del mariage;

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 of that heire, to whom the inheritance cannot deſcend, 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 ſhal 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 ſhal 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.

(1) [See Note 59.]

mariage; pur ceo que il ſerra rette ſa folly demeſne, que il luy voiloit marier ſans prender la value del mariage, ſinon que il luy maria a tiel mariage, que eſt tant en value come le mariage del heire, &c. &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 mariage, although that he tooke nothing for the value of the mariage; for it ſhall be accounted his own folly, that he would marry him without taking the value of the mariage, unles that he marrieth him to ſuch a marriage, that is as much worth in value as the marriage of the heire.

"*EN tiels tenures en ſocage.*" If a man be ſeiſed of a rent charge, rent ſecke, common of paſture, and ſuch like inheritances, which doe 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 [88. a.] 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.

"*Si le tenant ad iſſue et devie.*" 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.

"*Deins l'age de 14 ans.*" Of this ſufficient hath been ſpoken in the next preceding Chapter.

"*Donques le procheine amy del heire, a que le enheritance ne poit diſcender.*" The next friend of the heire, &c. Here *amy* or friend 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, wherby affinity without blood is excluded. Glanvil. lib. 7. cap. 11. Britton, 163. Fleta, lib. 1. cap. 9 Stat. de Hibernia, tit. Partition. (Plowd. 446.)

"*Le prochein,*" 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. [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 ſeaſeth the heire ſhall have his cuſtody (1). But 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 ſeaſed it, becauſe the mother was the cauſe [b] Vid. 30. Aſſ. 47. [c] Pl. com. Carrel's caſe. 47. H. 3. Gard. 146. (2. Ro. Abr. 40. Ante 22. a.)

(2) See poſt. 88. b.

[88. a.]

(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.

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 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). [88. b.]

[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. [b] 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 yeeldeth this reaſon, *alium regere non poteſt, qui ſeipſum regere non novit.* And *Fleta* ſaith, [b] 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.) [m] Lit. lib. 1. fo. 2, 3.

"*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 yonger 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 yongeſt 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, hoc 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 undeſi 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).

[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.

"*Donques la mere.*" 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

(1) See ante 88. a. note 1.
(2) [See Note 60.]
(3) [See Note 61.]
(4) *Sine* inſtead of *ſanè* ſeems neceſſary to the ſenſe of this paſſage.
(5) [See Note 62.]
(6) [See Note 63.]
(7) As to the conſtruction of the words *next of blood* in other caſes, ſee ante 10. b. and note 2. there.

cage but the next of blood; and the like is to be ſaid of the father, as hereafter next appeareth.

"*Donques le pier.*" 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 mariage, 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 apparant 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, 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 of the eldeſt ſon, of whom *Littleton* hath ſpoken Sect. 114, (12) gardian in ſocage, treated of by *Littleton* in this Section, and gardian *per cauſe de nurture*; (13) all frequent in [*a*] our 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 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 orphans by the cuſtome of the city of *London*, and of other cities and boroughes (16).

[*a*] 8. E. 3. 43. 8. E. 4. 5. (5. Co. 37.)

[*b*] 3. Co. 57. Ratcliffe's caſe.

[*c*] 32. E. 3. Gard. 31. 8. R. 2. Gard. 166. (Cro. Jam. 99.)

"*Tantſolement al uſe et profit del heire.*" And therefore gardian in ſocage ſhall not forfeit his intereſt by outlawrie or attainder of felony or treaſon; becauſe he hath nothing to his owne uſe, but to the uſe of the heire.

[89. a.] 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.

Pl. Com. (3. Co. 39.)

A gardian in ſocage ſhall not [*d*] preſent to a benefice in the right of the heire; becauſe 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 then gardians.

[*d*] 8. E. 2. Præſentment 10. 7. E. 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. (2. Ro. Abr. 41. Cro. Jam. 99. 3. Inſt. 156, Poſt. 120. a.)

"*If*

(8) Ante 84. b.
(9) [See Note 64.]
(10) Ante 84. a.
(11) [See Note 65.]
(12) [See Note 66.]
(13) [See Note 67.]
(14) [See Note 68.]
(15) [See Note 69.]
(16) [See Note 70.]

[89. b.]
(1) [See Note 71.]

" *Il rendra account, &c. apres que l'heire ad accomplisshe l'age de* 14 *ans.*" 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. 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 or 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).

[e] It is called the statute of Merlebridge, because the parliament in 52. H. 3. was holden there.
[f] 16. E. 3. Wast. 100. 18. E. 3. 55. 77. 29. E. 3. 5. Vide 32. E. 3. Gard. 31. F. N. B. 118. 6. E. 3. 38.
[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.*

" *Mes tiel gardein sur son account avera allowance de touts ses reasonable costs et expences en touts choses.*" (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 missis suis.*

The statute of Merlbr. intended by Littl. is ca. 17.

" *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

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.)

(2) [See Note 72.]
(3) [See Note 73.]
(4) [See Note 74.]
(5) [See Note 75.]

wiſe 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.)

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 undertooke to keepe them ſafely, and therefore he muſt keepe them at his perill.

29. Aſſ. p. 28. (Cro. Jam. 188, 189.)

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 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 then 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 ſhipwracke 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.

"*Et ſi tiel gardein maria le heire deins* 14 *ans, &c.*" For if he marry the heire after 14, he is out of his cuſtody, and no account ſhall be made therefore.

"*Il accountera a luy.*" He ſhall account for the mariage of the heire, viz. for ſo much as any man *bonâ fide* had offered for the mariage, or would give in mariage unto him.

"*Ou a ſes 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 mariage he accompliſh his age of 18 yeares, at what time he may make his teſtament (6), and conſtitute

(1. Ro. Abr. 908..910. Cro. Cha. 79.)

(6) [See Note 76.]
(7) [See Note 77.]
(8) 5. C. Mo. 462. Ow. 57. 1. Ro. Abr. 2.
(9) [See Note 78.]
(10) [See Note 79.]

[89. a.]
(1) [See Note 80.]
(2) [See Note 81.]
(3) [See Note 82.]

(4) We have already obſerved, that *in general* this diſtinction is now 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) [See Note 83.]

tute 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 adminiſtrators.

7. E. 3. 62. 19. E 3. Account 56. 38. E. 3 7. 31. E. 3. tit. Account 57.

"*Que il voile luy marier ſans prender le 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.

"*Sinon que il luy marier a tiel mariage que eſt tant en value, &c.*" This needeth no explanation.

If the heire in ſocage be raviſhed out of the cuſtody of the gardian, and the raviſher marieth the heire, the gardian ſhall have a writ of raviſhment of ward, and recover the value of the mariage, &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 maried 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.

ET ſi aſcun auter home, que n'eſt procheine amy, occupie les terres ou tenements del heire come gardeine en ſocage, il ſerra compell' de render accompt al heire, auxi bien ſicome il fuſſoyt prochein amy; car il n'eſt pas plee pur luy en briefe d'accompt a dire, que il n'eſt procheine amie, &c. mes il reſpondra lequel il ad occupie les terres ou tenements come gardeine en ſocage ou nemy. Sed quære, *ſi apres ceo que le heire ad accompliſh l'age de* 14 *ans, et gardeine en ſocage continualment occupia la terre tanque l'heire vient a plein age, ſcil.* 21 *ans, ſi le heire a ſon plein age avera action d'accompt envers le gardein, de temps que il occupia apres les dits* 14 *ans, come envers gardeine en ſocage, ou envers luy come ſon baylife.*

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 yeeld an account to the heire, as wel 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 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.

"*ET ſi aſcun auter home, que n'eſt pas procheine amy, &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.

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. 13. E. 3. Account 77. 22. E. 3. 11. 41. E. 3.

[90. a.]

Account 35. 10. H. 7. 7. 4. H. 7. 6. b. 7. H. 7. 9. a.

"*Sed 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).

6. E. 3. 38. 32. E. 3. Account 60. 7. E. 4. F. N. B. 118.

Sect. 125.

ITEM, ſi gardein en chivalry face ſes executors et devy, le heire eſteant deins age, &c. les executors averont le garde durant le nonage, &c. Mes ſi gardein en ſocage face ſes executors et devy, le heire eſteant deins l'age de 14 ans, ſes executors n'averont pas le garde; mes un auter procheine amy, a que le heritage ne poyt my diſcender, avera la garde, &c. Et la cauſe de diverſity eſt, pur ceo que gardein en chivalrie ad le garde a ſon proper uſe, et gardian en ſocage n'ad le garde a ſon uſe, mes al uſe del heire (1). *Et en cas lou le gardein en ſocage devy devant aſcun accompt fait per luy al heire, de ceo le heire eſt ſans remedie, pur ceo que nul briefe d'accompt giſt envers les executors, ſi non pur le roy ſolement.*

ALSO, if gardian in chivalrie makes his executors and die, the heire being within age, &c. the executours ſhall have the wardſhip during the nonage, &c. But if the gardian in ſocage make his executours and die, the heire being within the age of 14 yeares, his executours 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 heire. And in this caſe where the gardian in ſocage dyeth before any 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.

"*A SON*

(1) [See Note 84.]

(2) Notwithſtanding lord Coke's obſervation on the *quære*, it is in L. and M. Roh. P. and both of the MSS.

[90. b.]

(1) [See Note 86.]

(2) [See Note 87.]

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.

"*A SON proper 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).

24. E. 3. 26. 44. E. 3. F. N. B. 33. See more of this in the Chapter of Warranty, Sect. 740. (Cro. Jam. 248.)

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). And so it is in 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. [90. b.]

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.

"*Le heire est saun remedie, &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.

"*Si non pur le roy solement.*" [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 before-hand, 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.

[90. a.]

(3) Acc. ante 9. a. 46. b. post. 388. a.

(4) [See Note 85.]

[90. b.]

(3) [See Note 88.]

(4) [See Note 89.]

(5) [See Note 90.]

(6) See post. 119. a. and the note there.

Sect.

Sect. 126.

ITEM, le ſeignior, de que la terre eſt tenus en ſocage, apres le mort ſon tenant avera reliefe en tiel forme. Si le tenant tient per fealtie et certein rent a paier annualment, &c. ſi les termes de payment ſont a payer per deux termes del an, ou per quater termes del an, le ſeignior avera del heire ſon tenant tant, come le rent amount, que il payt per an. Sicome le tenant tient de ſon ſeignior per fealtie, et xs. de rent payable a certaine termes del an, donques l'heire paiera al ſeignior xs. pur reliefe, outſter les xs. que il paiera pur le rent.

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.

"*CERTEINE 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.*

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.)

[91. a.]

"*A paier annuelment.*" 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 relieſe, 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.

En meſme le manner eſt, ſi home ſoit ſeiſie de certaine terre que eſt tenus en ſocage, et fait feoffement en fee a ſon uſe, et moruſt ſeiſie del uſe, (ſon heire del age de 14 ans ou pluis, et nul volunt per luy declare) le ſeignior avera reliefe del heire, ſicome avant eſt dit. Et c'eſt per

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

(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.

per le ſtatute de cap. 15. (2) ann. 19. Hen. 7.

reliefe of the heire, as afore is ſaid. And this by the ſtatute of 19. *H.* 7. cap. 15.

This is an addition to *Littleton*, whereof I omit it the rather, for that the ſtatute of 19. *H.* 7. is for the cauſe above-mentioned become of none effect.

Sect. 127.

ET en tiel cas, apres la mort le tenant, tiel reliefe eſt due al ſeignior maintenant, de quel age que le heire ſoit; pur ceo que tiel ſeignior ne poit aver le garde de corps, ne de terre le heire. Et le ſeignior en tiel caſe ne doit attendre a le payment de ſon reliefe, ſolonques les termes et jours de payment de rent; mes il doit aver ſon reliefe maintenant, et pur ceo il poet incontinent (1) *diſtraine apres le mort ſon tenant pur reliefe.*

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 diſtreine after the death of his tenant for reliefe.

16. H. 7. 4. 18. E. 3. 26. p. 18. Bracton, lib. 2. fol. 85. dabit hæres una vice redditum ſuum unius anni duplicatum.

"*MAINTENANT*;" 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 tendred, at his pleaſure (2). [91. b.]

45. E. 3. 19. 35. H. 6. 52. 20. Eliz. Dier 361. Stanf. Prær. 13. b. F. N. B. 256. 259.

"*De quel age que le heire ſoit.*" 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 (*iſſint que il paſſa l'age de* 14 *ans*), thoſe words ſo added are againſt the law, and no part of *Littleton*'s worke (3).

(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.

[91. b.]

(1) [See 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.

Sect.

Sect. 128.

EN meſme le maner eſt, lou le tenant tient de ſon ſeignior per fealtie et un li. de peper ou cummin, et le tenant moruſt, le ſeignior avera pur relief un lib. de cummin, ou un lib. de peper, ouſter le common rent. En meſme le maner eſt, lou tenant tient a payer per an certaine number de capons, ou de gallines, ou un paire de gaunts, ou certaine buſhels de frument, et hujuſmodi.

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.

"*UN lib. de pepper ou cumyn.*" 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.)

"*Ou certaine buſhels de frument.*" 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.

(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.

Sect. 129.

MES en aſcun caſe le ſeigniour doit demurrer a diſtreiner pur ſon reliefe jeſque a certeine temps. Sicome le tenant tient de ſon ſeignior per un roſe, ou per un buſhel de roſes, a paier al feaſt de Nativitie de Saint John Baptiſte, *ſi tiel tenant devie en yver, donque le ſeigniour ne poit diſtreiner pur ſon reliefe, tanque al temps que les roſes per le courſe del an poient aver lour creſſer, &c.* Et ſic de ſimilibus.

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 buſhell 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.

(Poſt. 197. b.) "*PER le courſe del an.*" *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.*

Sect. 130.

ITEM, ſi aſcun voile demander, pur que home poit tener de ſon ſeignior per fealty tantſolement pur touts maners de ſervices, entant que quant le tenant ferra fealtie, il jurera a ſon ſeignior que il ferra a ſon ſeigniour touts maners des ſervices dues, et quant il ad fait fealtie, en tiel caſe nul auter ſervice eſt due: a ceo il poyt eſtre dit, que lou un tenant tient ſa terre de ſon ſeignior, il covient que il doit faire a ſon ſeignior aſcun ſervice. Car ſi le tenant ne ſes heires devoyent faire nul manner de ſervice al ſeignior ne a ſes heires, donque per long temps continue il ſerroit hors de memorie et de remembrance, lequel la terre fuit tenus de le ſeignior, ou de ſes heires,

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

heires, ou nemy, et donques pluis toſt et pluis rediment voilont homes dire, que la terre n'eſt pas tenus del ſeignior ou de ſes heires, que auterment; et ſur ceo le ſeignior perdra ſon eſcheat de la terre, ou per caſe auter forfeiture ou profit que il poet aver de le terre. Iſſint il eſt reaſon, que le ſeignior et ſes heires ont aſcun ſervice fayt a eux, pur prover et teſtifier, que la terre eſt tenus de eux.

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.

"QUANT *le tenant ferra fealty, il jurera a ſon ſeignior, &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.

[92. b.] "*Il covient que il doit faire a ſon ſeignior aſcun ſervice.*" For there can be no tenure without ſome ſervice; becauſe the ſervice maketh the tenure.

"*Son eſcheat de la terre.*" *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 hapneth 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 of all caſuall profits, and them to ſeiſe into the king's hands, that the ſame may be anſwered to the king (1).

See of this in the Chapter of Fee Simple, Sect. 4. (1. R.o. Abr. 816. F. N. B. 144. Ante 13. a.)

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.

"*Ou per caſe auter 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 priviledge 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. 31. 32. H. 8. ca. 24. (F. N. B. 144.)

"*Ou profit.*" As *reliefe, aid pur file marier, aid pur faire fitz chivaler*, and the like.

(1) See further as to *eſcheat* and *eſchaetor*, ante 13. b. and 18. b. and note 2. there. 4. Inſt. 225. Mad. Exchеq. chap. 10. ſ. 2.

(2) [See Note 92.]

Sect.

Sect. 131.

[93. a.]

ET pur ceo que fealtie eſt incident a touts manners de tenures, forſpris le tenure in frankalmoigne, (ſicome ſerra dit en le tenure de frankalmoign) et pur ceo que le ſeignior ne voiloit al commencement del tenure aver aſcun auter ſervice forſque fealtie, il eſt reaſon, que home poet tener de ſon ſeignior per fealtie tantſolement; et quaunt il ad fait ſon fealtie, il ad fait touts ſes ſervices.

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.

(4. Co. 8. Poſt. 143. a.) "*FEALTIE eſt 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. 132.

ITEM, ſi un home leſſee a un auter pur terme de vie certaine terres ou tenements, ſauns parler de aſcun rent render a le leſſor, uncore il ferra fealtie a le leſſor, pur ceo que il tient de luy. Auxy ſi un leaſe ſoit fait a un home pur terme de ans, il eſt dit, que le leſſee ferra fealtie a le leſſor, pur ceo que il tient de luy. Et ceo eſt prove bien per les parols del brief de waſt, quant le leſſour ad cauſe de porter briefe de waſt envers luy; lequel briefe dirra, que le leſſee tient les tenements de le leſſor pur terme de ans. Iſſint le briefe prova un tenure entre eux. Mes celuy, que eſt tenant a volunt ſolonque le courſe del common ley, ne ferra fealtie; pur ceo que il n'ad aſcun ſure eſtate. Mes auterment eſt de tenant a volunt ſolonque le cuſtome del maner; pur ceo que il eſt oblige pur faire

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, ſhal not do fealty; becauſe he hath not any ſure eſtate. But otherwiſe it is of

(1) [See Note 93.] (2) [See Note 94.]

faire fealtie a ſon ſeignior pur deux cauſes. L'un eſt per cauſe del cuſtome; et l'auter eſt, pur ceo que il priſt ſon eſtate en tiel forme pur faire a ſon ſeignior fealty.

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.

"*SI un home leſſe pur terme de vie ſauns parler de rent, &c. il ferra fealtie, &c.*" And the reaſon is; becauſe there is a tenure, and fealtie (as hath beene ſaid) is incident to al manner of tenures; [93. b.] 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.)

"*Auxi ſi leaſe ſoit fait pur ans, &c. le leſſee ferra 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.

"*Et ceo eſt prove bien per les parols del briefe, &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.

"*Pur ceo que il n'ad 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.)

(1) See ante 67. b. note 2.
(2) See ante 73. b.
(3) [See Note 95.]

CHAP. 6. *Frankalmoigne.* Sect. 133.

TENANT en frankalmoigne eſt, lou un abbe, ou prior, ou un auter home de religion, ou de ſaint egliſe, tient de ſon ſeignior en frankalmoigne; que eſt a dire en Latin, in liberam eleemoſynam. *Et tiel tenure commencoit adeprimes en auncient temps en tiel forme. Quant un home en auncient temps fuit ſeiſie de certain terres ou tenements en ſon demeſne come de fee, et de meſmes les terres ou tenements enfeoffa un abbe et ſon covent, ou un pryor, &c. a aver et tener a eux et lour ſucceſſors a touts jours en pure et perpetual almoigne ou en frankalmoigne;* [*ou per tielx parols, a tener de le grantor, ou de le feoffor, et de ſes heires en frankalmoigne:*] (1) *en tiels caſes les tenements ſont tenus en frankalmoigne.*

TENANT in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankealmoigne; 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: in ſuch caſe the tenements were holden in frankalmoigne.

Bract. lib. 2. cap. 5. 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.)

"*UN abbe, prior, ou auter home de religion, ou de ſaint egliſe.*" It is to be obſerved, that of eccleſiaſticall 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 *home de religion*, 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, *de ſaint egliſe*, of holy church; and none of theſe are in law ſaid to be *homes de religion*, or religious. [94. a.]

Where *Littleton* ſaith *(infeoffa un abbe et ſon 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 houſes of monkes, canons, friers and nuns, &c. have been diſſolved, and their poſſeſſions given to the crowne (2).

See the Statutes of 27. H. 8. not printed, but in the abridgement. 31. H. 8. cap. 13. and 32. H. 8. ca. 24, &c. Vide Sect. 530.

(4. Inſt. 321.) The eccleſiaſticall ſtate of *England*, as it ſtandeth at this day, (which is neceſſary for our ſtudent to know) is divided into two provinces,

(1) The words between brackets are in L. and M. but not in Roh.

(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.

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.

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 archdeacon is called *oculus epiſcopi*; and every archdeaconry 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.

"*Frankalmoigne, que eſt a dire en 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 miniſtrallis, 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 feo-*

Vide Sect. 1. Bract. l. 4. c. 37, 38. Britton, cap. 32.

uum,

(3) [See Note 96.]
(4) See ante 70. b. note 2. poſt. 164. a.
(5) [See Note 97.]
(6) [See Note 98.]

Britton, cap. 66. Bract. lib. 4. F. N. B. 150. Bract. lib. 4. fol. 288.247.292. Brit. fol. 245. Fleta, lib. 5. cap. 11. Forteſcue, c. 26. 24. E. 3. 34. 43. E. 3. Conſpir. 11. 27. Aſſ. 59. Stanf. 175. Vide Sect. 199. Fleta, lib. 1. cap. 47.

dum, 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 birth-right 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.]

Glanvil. lib. 7. ca. 1. fo. 44, 45. acc.

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*.

Britton, ca. 66. fol. 164. Bract. lib. 2. ca. 5. & 10. F. N. B. 211.

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:

Fleta, lib. 1. cap. 42.

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 ſummum pontificem tranſmiſſo continetur, in quo illam contributionem Churchſed appellant, quaſi ſemen eccleſiæ.

"*Et tiel tenure.*" For albeit neither fealty, nor any other temporall ſervice, is due, yet it is a tenure.

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.)

"*En ancient temps.*" [*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).

"*Enfeoffa un abbe et ſon 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 a deane and chapter, or any other corporation aggregate of many, there the gift muſt be by deed (3).

39. H. 6. 30. b.

(1. Ro. Abr. 832.)

"*A aver et tener a eux et a lour 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

Vid. Litt. in the Chapter of Fee ſimple, Sect. 1, 2.

(1) See Wright's Ten. 167.
(2) See poſt. Sect. 140.
(3) [See Note 99.]
(4) [See Note 100.]

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 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. 39. H. 6. 30.

Bracton, lib. 2. cap. 10. *Poteſt donatio fieri in liberam eleemoſinam eccleſiis cathedralibus, conventualibus, parochialibus, et viris religioſis.*

"*En pure et perpetuall almoigne.*" 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. Vid. Bract. lib. 2. ca. 10.

"*Ou en frankalmoigne.*" But one of theſe words, either *pura* or *libera*, muſt be uſed, or elſe it is no tenure in frankalmoigne. 35. H. 6. 56. 7. E. 4. 11. Bract. ubi ſupr. 44. E. 3. 24.

"*Ou per ceux parolx, a tener de le grantor ou feoffor et ſes heires en frankalmoigne.*" 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. 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. Conuſans 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.

[95. a.]

Sect. 134.

EN meſme le manner eſt, lou terres ou tenements fueront grant en ancient temps a un deane et chapter et a lour ſucceſſors, ou a un parſon d'un eſglis et a ſes ſucceſſors, ou a aſcun auter home de ſaint eſglis et a ſes ſucceſſors, en frankalmoigne, ſi il avoit capacity d'apprender tiels grants ou feoffments, &c.

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 graunts or feoffments, &c.

"*EN meſme le 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

(5) [See Note 101.]

rate 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).

(3. Co. 73.) " *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, thoſe which were tranſlated or founded by king *Henry* the eight, 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 eight (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).

" *S'il avoit capacitie a prender.*" For eccleſiaſticall perſons have not capacitie to take in ſucceſſion, unleſſe they be bodies politique; as biſhops, archdeacons, deanes, parſons, vicars, &c. or lawfully incorporate by the king's letters patents, or preſcription; as deanes and chapters, colledges, &c. But a colledge of religious perſons, chauntry prieſts, and ſuch like, that are not lawfully incorporated, but onely conſiſt in vulgar reputation, have no capacity to take in ſucceſſion. Therefore *Littleton* added materially *(s'il ad capacitie à prender).*

Sect. 135.

ET tiels, que teignont en frankealmoigne, ſont oblige de droit devant Dieu de faire oriſons, praiers, meſſ. et autres divine ſervices, pur les almes de lour grantor ou feoffor, et pur les almes de lour heires queux ſont mortes, et pur le proſperitie et bon vie et bon ſalute de lour heires que ſont en vie. Et pur ceo ils ne ferront a nul temps aſcun fealtie a lour ſeignior; pur ceo que tiel divine ſervice eſt melieur pur cux devant Dieu, que aſcun feaſans de fealtie; et auxi pur ceo que ceux parolx (frankealmoigne) exclude le ſeignior d'aver aſcun

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, then any doing of fealty; and alſo becauſe that theſe words (frankalmoigne) exclude

(1) [See Note 102.]
(2) [See Note 103.]
(3) [See Note 104.]
(4) [See Note 105.]

aſcun terrein ou temporall ſervice, mes d'aver tantſolement divine et ſpirituall ſervice d'eſtre fait pur luy, &c.

clude 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.] "*Oblige de droit.*" 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.

"*De faire oriſons, prayers, meſſes, et auters 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. *à chaunter un meſſe, &c. ou à chaunter un 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.

"*Ne ſerront aſcun fealtie.*" Herein tenant in frankalmoigne differeth from a tenant in frankmariage; for tenant in frankmariage 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.*

"*Tiel divine ſervice eſt melieur pur eux.*" And it is alſo ſaid 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.

[*d*] 33. H. 6. 6. 13. E. 1. tit. Count de Voucher 118.

And certaine it is, that *nunquam res humanæ proſperè ſuccedunt, ubi negliguntur divinæ.*

Sect. 136.

ET ſi tiels, que teignont lour tenements en frankalmoigne, ne voilont ou failont de faire tiel divine ſervice (come eſt dit) le ſeignior ne poit eux diſtrainer pur cel non feſant, &c. pur ceo que n'eſt mis en certaine queux ſervices ils doient faire. Mes le ſeignior de ceo poit complaine a lour ordinary ou viſitour, luy preyant, que il voiloit mitter puniſhment et correction de ceo, et auxy de provider que tiel negligence ne ſoit pluis avant fait, &c. Et l'ordinary ou viſitour de droit ceo doit faire, &c.

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.

"*LE ſeignior ne poet eux diſtreiner pur c'eſt non feaſant, &c.*"

"*Diſtreine.*" 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.]

"*Pur ceo que n'eſt miſe en certeine queux ſervices ils doient faire.*" 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 mannor; 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.

"*Poet complayner.*" That is, to complaine in courſe of juſtice, according to the eccleſiaſticall law. (5. Co. 73. a.)

"*A lour ordinarie,*" *Ordinarius*; and ſo he is called [*g*] in the eccleſiaſticall law, *quia habet ordinarium 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 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 diſ-

[*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. Bre. 822. Regiſt. 141. Lindwood, tit. de Conſtit. cap. exter. Bract. lib. 5 ca. 2. fo. 400. & 401, and the other authors above-ſaid. (Poſt. 344. 9. Co. 39. 2. Inſt. 398.)

tribution 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.

"*Ou viſitor.*" 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.

"*De droit doit ceo faire.*" *De droit*, of right, (that is to ſay) he ought to doe 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.

MES ſi un abbe, ou prior, tient de ſon ſeignior per certaine divine ſervice, en certaine d'eſtre fait, ſicome a chaunter un meſſe cheſcun Vendredie *en le ſemaine pur les almes*, ut ſupra, *ou cheſcun an a tiel jour a chaunter* placebo *et* dirige, &c. *ou de trover un chapleine de chanter meſſe*, &c. *ou de diſtributer en almoigne al cent povres homes cent deniers a tiel jour; en tiel caſe, ſi tiel divine ſervice ne ſoit fayt, le ſeignior poet diſtreyner*, &c. *pur ceo que le divine ſervice eſt miſe en certaine per lour tenure, que le abbe ou prior devoit faire. Et en tiel caſe le ſeignior avera fealtie*, &c. *come il ſemble. Et tiel tenure n'eſt paſſe dit tenure en frankalmoigne, eins eſt dit tenure per divine ſervice. Car en tenure en frankalmoigne*

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 frankealmoigne, but is called tenure by

moigne nul mention eſt fait d'aſcun manner de ſervice; car nul poet tener en frankealmoigne, ſi ſoit expreſſe aſcun manner de certain ſervice que il doit faire, &c.

by divine ſervice. For in tenure in frankealmoigne no mention is made of any manner of ſervice; for none can hold in frankealmoigne, if there be expreſſed any manner of certaine ſervice that he ought to doe, &c.

2. E. 3. 27, 28. "*PER certaine divine ſervice d'eſtre fait, ſicome a chaunter un meſſe, &c. ou de diſtributer en almoign, &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 temporal 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 feigniory 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 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. (4. Co. 20.)

"*Ou de diſtributer en almoigne al cent povres homes.*" Here note, that the almes and reliefe of poore 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.

"*Poet diſtreiner, &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.]

"*En tiel caſe le ſeignior avera fealtie, &c. come ſemble.*" 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.

"*Et tiel tenure n'eſt pas dit tenure en frankalmoigne, eins eſt dit tenure per 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.

(2. Inſt. 460.) 13 E. 1. Count. de Vouch. 118.

"*S'il ſoit expreſſe aſcun manner de 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. 252. f. 15. E. 3. Corody 4. 14. Aſſ. 22. 50. Aſſ. Pl. 6.

Vide

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 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.

"*Que il doit faire, &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 beene 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, ſcituri 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 corum 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.

(1) See ante 94. a.

(2) See ante 70. b. and note a. there.

(3) [See Note 106.]

Sect. 138.

ITEM, ſi ſoit demande, ſi tenant en frankmariage ferra fealtie a le donor ou a ſes heires devant le quart degree paſſe, &c. il ſemble que cy. Car il n'eſt pas ſemble quant a cel entent a tenant en frankalmoigne; pur ceo que tenant en frankalmoigne ferra per cauſe de ſon tenure divine ſervice pur ſon ſeignior, come devant eſt dit; et ceo il eſt charge a faire per la ley del ſaint egliſe, et pur ceo il eſt excuſe et diſcharge de fealtie: mes tenant en frankemariage ne ferra pur ſon tenure tiel ſervice; et s'il ne ferra fealtie, donque il ne ferra a ſon ſeignior aſcun manner de ſervice, ne ſpirituall ne temporal, lequel ſerroit inconvenient et encounter reaſon, que home ſerra tenant d'eſtate d'enheritance a un auter, et encore le ſeignior avera nul manner de ſervice de luy. (1) *Et iſſint il ſemble que il ferra fealtie a ſon ſeignior devant le quart degree paſſe. Et quant il ad fait fealty, il ad fait touts ſes ſervices.*

ALSO, if it be demanded, if tenant in frankmariage ſhall do fealty to the donor or his heires before the fourth degree be paſt, &c. it [97. b.] 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 frankmariage ſhall not do for his tenure ſuch ſervice; and if he doth not fealty, he ſhal 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. 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.

Littleton fo. 50. b. 42. E. 3. 5. 28. E. 3. 395. 20. H. 6. 28.
(Ante 23. a.)

"*LEQUEL ſerra 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, eſt licitum.* And the law, that is the perfection of reaſon, cannot ſuffer any thing that is inconvenient.

It is better, ſaith the law, to ſuffer a miſchief that is peculiar to one, then an inconvenience that may prejudice many. See more of this after in this Chapter.

Note, the reaſon of this diverſitie betweene frankalmoigne and frankmariage, 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 frankmariage ſhall do fealty, for otherwiſe he ſhould doe to his lord no ſervice at all; and yet it is frankmariage, 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.

"*Et encounter reaſon.*" And this is another ſtrong argument in law, *Nihil quod eſt contra rationem eſt licitum*; for reaſon is the life of the

(1) *Come il ſemble*, L. and M.

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 of *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 gouvernment of this realme, as the old rule may be juſtly verified of it, *Neminem 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.

ET ſi un abbe tient de ſon ſeignior en frankalmoigne, et l'abbe et le covent ſouth lour common ſeale alien meſmes les tenements a un ſeculer home en fee ſimple, en ceo cas le ſeculer home ferra fealtie a le ſeignior; pur ceo que il ne poit tener de ſon ſeignior en frankalmoigne. Car ſi le ſeignior ne doit aver de luy fealtie, donque il avera nul manner de ſervice, que ſerroit inconvenient, ou il eſt ſeignior, et le tenement eſt tenus de luy.

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

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.

ing 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.*

42. Aſſ. Pl. 6. Britton, 164. b.

Sect. 140.

ITEM, ſi home graunta a cel jour a un abbe, ou a un prior, terres ou tenements en frankalmoigne, ceux parolx (frankalmoigne) ſont voides; pur ceo que il eſt ordeine per le ſtatute que eſt appelle quia emptores terrarum (*quel eſtatute fuit fait* anno 18. Ed. 1.) *que nul poit aliener ne graunter terres ou tenements en fee ſimple a tener de luy meſme. Iſſint ſi home ſeiſie de certaine tenements, queux il tient de ſon ſeignior per ſervice de chivaler, et a cel jour il, &c. granta per licence meſmes les tenements a un abbe, &c. en frankealmoigne, l'abbe tiendra immediatment meſmes les tenements per ſervice de chivaler de meſme le ſeignior de que ſon grauntor tenoit, et ne tiendra my de ſon grantor en frankalmoigne, per cauſe de meſme le ſtatute. Iſſint que nul poit tener en frankalmoigne, ſi non que ſoit per title de preſcription, ou per force de graunt fait a aſcun de ſes predeceſſors devant que meſme le ſtatute fuit fait. Mes le roy poit doner terres ou tenements en fee ſimple a tener en frankalmoigne, ou per auters ſervices; car il eſt hors de cas del eſtatute.*

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 certain 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. [98. b.]

"*ORDEINE per le eſtatute.*" 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

Vid. 8. Co. the Prince's caſe.

may take knowledge, and therefore it is to be determined by them, whether it be a ſtatute or no (1). Now for the divers formes of acts of parliament, you may read them in the Prince's caſe, *ubi ſupra.*

" *Appel quia emptores terrarum.*" This ſtatute is called ſo, becauſe the ſtatute beginneth with theſe words, *Quia emptores terrarum.* (Poſt. 143. 2. Inſt. 500.)

" *Nul poet aliener, &c. terres in fee ſimple a tener de luy meſme.*" 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.

" *Granta per licence meſme les 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,* [99. a.] *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 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.* 13. E. 3. tit. Releaſe 33. 27. H. 8. F. N. B. 211. I. 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.)

" *L'abbe tiendra, &c. per ſervice chivaler.*" For although by the death of the abbot there is neither ward, mariage, 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 the covent, alien the land over to a man and his heires, there is the ward, mariage, 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 (Ante 70. b.) Lit. fol. 20. a. (2 Ro. Abr. 518.) 8. R. 2. Relief 14. 3. H. 4. 2. a. (Ante 84. a.) Vide Little. fol. 20.

(1) [See Note 107.]

[99. a.]

(1) [See Note 108.]

ficient 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. 255.

12. E. 4. 4. 27. H. 8. 2. E. 2. Avowrie 185.

"*Iſſint que nul poet tener en frankalmoigne, ſi non que ſoit per title de 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.*

[*n*] 4. E. 3. 21. 22. E. 3. 15. 38. H. 6. 25. Litt. cap. Confirmat. 123.

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.

11. Co. 66. Magdalen Colledge caſe.

"*Mes le roy poet, &c. car il eſt hors de caſe del 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.

Sect. 141.

ET nota, que nul poit tener terres ou tenements en frankalmoigne, forſprise del grantor, ou de ſes heires. Et pur ceo il eſt dit, que ſi ſoit ſeignior meſne et tenant, et le tenant eſt un abbe, que tient de ſon meſne en frankalmoigne, ſi le meſne devy ſans heire, donque le meſnaltie deviendra par eſcheate al dit ſeignior paramount, et l'abbe adonque tient de luy immediate per fealtie tantum, et ferra a luy fealty; pur ceo que il ne puit tener de luy en frankalmoigne, &c.

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.

14. E. 3. tit. Meſne, 7. 14. H. 3. tit. Diſclaim. Br. 33.

"*FORSPRISE del grantor, ou de ſes heirs.*" The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to

to any other, no more than a founderſhip of a houſe of 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.]

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. 22. H. 6. 50.

10. H. 7. 11. 28. Aſſ. 33. 18. E. 3. 18. 22. E. 3. 18. Corody Broke 5. 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.

"*Ou de ſes 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.

Vide 15. E. 4. (2. Ro. Abr. 447. contra.—Hob. 130. Poſt. 143. 213. b.)

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.

"*Et pur ceo eſt dit, ſi ſoit ſeignior meſne et tenant, et le tenant eſt un abbe, &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.

"*Donques le meſnaltie deviendra per eſcheat al dit ſeignior 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.

2. E. 4. 46. (2. Ro. Abr. 501. 513.) 7. E. 4. 12. a.

Sect. 142.

ET nota, que lou tiel home de religion tient ſes tenements de ſon ſeignior en frankalmoign, ſon ſeignior eſt tenus per la ley de luy acquitter de cheſcun manner de ſervice que aſcun ſeignior paramont de luy voet aver ou demander de meſmes les tenements; et s'il

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 paramont will have or demand of him for the ſame tenements; and if he

s'il ne luy acquita pas, mes ſuffra luy d'eſtre diſtraine, &c. donque il avera envers ſon ſeignior un briefe de meſne, et recovera envers luy ſes damages et ſes coſtes de ſon ſuit, &c.

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.

"*HOME de 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.

"*De luy acquiter.*" *Acquiter* 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 judgement, is ſaid to be acquitted of the felony, *acquietatus de felonia*; and if he be drawne in queſtion againe, he may plead [*e*] *auterfoits 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. [100. a.]

[*b*] Fleta, lib. 2. ca. 43. Britton, fol. 58, 59. Vide hereafter in this Sect. in briefe de 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. 35. 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 frankalmoigne, whereof *Littleton* here ſpeaketh. 3. Tenure in frankmariage. 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. 39.

"*De cheſcun manner de 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. Britton, fol. 58.

and F. N. B. fol. 135. Mirror, cap. 2. ſect. 13. Bracton, lib. 2. fol. 84. Fleta, lib 2. ca. 43. Weſtm. 2. cap. 9.

"*Briefe de meſne,*" *Breve de medio*, a writ of meſne, 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

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.

"*Et recovera vers luy ſes damages.*" It is to be knowne, that there be two ſeverall judgements 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 meſnalty; 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 amiſſo 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 forjudgement, 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.

W. 2. ca. 9. Vide 8. Co. 134. Mary Shepley's caſe.

* 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.)

[100. b.] 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 forjudgement 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.*

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*. And *Bracton* hath this writ, *Rex vicecomiti, &c. et non permittas, quòd A. capitalis dominus feodi illius habeat cuſtodium 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. li. 2. ca. 43.

(1) [See Note 109.]

CHAP.

Chap. 7. *Homage Auncestrel.* Sect. 143.

TENURE per homage ancestrel est lou un tenant tient sa terre de son seignior per homage, et mesme le tenant et ses auncestors, que heire il est, ont tenus mesme le terre del dit seignior et de ses auncestors, que heire le seigniour est, de temps dont memorie ne court, per homage, et ont fait a eux homage. Et ceo est appel homage auncestrel, per cause de continuance, que ad est, per title de prescription, en le tenancie en le sanke le tenaunt, et auxy en le seigniorie en le sanke le seignior. Et tiel service de homage ancestrel traite a luy garrantie, c'estascavoir, que le seignior, que est en vie et ad receive le homage de tiel tenant, doit garranter son tenant, quant il est implede de la terre tenus de luy per homage ancestrel.

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.

"*PER title de prescription en le tenancy, en le sanke le tenant, et auxy en le seignior en le sanke le seignior.*" 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 holdeth by homage auncestrel.

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.

101. a.] "*Trait a luy garranty.*" 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, then inheritances lately, or within memory acquired.

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.) [*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) *receſſit 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. "*Et ad receive homage de tiel 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 proceſſe, 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.

ET auxy tiel ſervice per homage aunceſtrel traite a luy acquital, ſcil. que le ſeignior doit acquiter le tenant envers touts auters ſeigniors paramont luy de cheſcun manner de ſervice.

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.) "*Traite a luy acquital.*" Of acquitall ſomewhat hath been ſaid in the Chapter of Frankalmoigne.

Sect. 145.

ET il eſt dit, que ſi tiel tenant ſoit emplede per un præcipe quòd reddat, &c. *et il vouche a garrantie ſon ſeignior, que vient eins per proces, et demanda del tenant que il ad de luy lier a garranty, et il monſtre, comment il et ſes aunceſtors, quel heire il eſt, ount tenus ſa terre del vouchee et de ſes aunceſters de temps dont memorie ne curt; et ſi le ſeignior, que eſt vouche, ne avoit reſceive pas homage del tenant, ne d'aſcun de ſes aunceſters, le ſeignior (s'il voit) poit diſclaimer en le ſeigniorie, et iſſint ouſte le tenant de ſon garrantie. Mes ſi le ſeignior, que eſt vouch, ad receive homage de le tenant, ou de aſcun de ſes aunceſters, donques il ne diſclaimera, mes il eſt oblige per la ley*

AND it is ſaid, that if ſuch tenant be impleaded by a *præcipe quòd 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 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 [101. b.

ley de garranter le tenant; et donque si le tenant perd sa terre en default del vouchee, il recovera en value envers le vouchee de terres et tenements, que le vouchee avoit al temps de le voucher, ou unques puis.

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.

"*UN 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 yeeld 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. (Post. 139. b.) Regist. 159.

"*Et il vouche a garrantie.*" *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 yeeld 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, unless 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 default, and the demandant hath judgment against the

[*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. Advocare. (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.)

the tenant, and after brings a *scire facias* to have execution, the tenant may have a *warrantia cartæ*, and if he were impleaded by a ſtranger, he may vouche again; but if he had judgment to recover in value, he ſhall never have a *warrantia cartæ*, or vouche againe, for by this judgement to recover in value he hath benefit of the warrantie. And you ſhall finde in bookes a recovery with a ſingle voucher, and that is when there is but one voucher; and with a double voucher, and that is when the vouchee voucheth over; and ſo a treble voucher, &c. Againe, you ſhall finde there alſo a foraine voucher; and that is, when the tenant, being impleaded within a particular juriſdiction, (as in *London* or the like) voucheth one to warranty, and prayes that he may be ſummoned in ſome other county out of the juriſdiction of that court. This is called a foraine voucher, but might more aptly be called a voucher of a forainer, *de forinſecis vocatis ad warrantizandum*. Note, that by the civill law every man is bound to warrant the thing that he ſelleth or conveyeth, albeit there be no expreſſe warranty; but the common law bindeth him not, unleſſe there be a warranty, either in deed or in law; for *caveat emptor*, as ſhall be ſaid more at large in the Chapter of Warrantie in the Third Booke.

Gloue. c. 12. F. N. B. 6. c.

(Cro. Jam. 4. 1. Ro. Abr. 96. F. N. B. 94.)

Brit. 174.

"*Le ſeignior (s'il voet) poet diſclaymer en le ſeigniorie.*" *Diſclaimer, diſclamare*, is compounded of *de* and *clamo*, and ſignifieth 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.)

[a] Note, there be divers kinds of diſclaymer, that is to ſay, a diſclaimer in the tenancie; a diſclaymer in the bloud; and a diſclaymer in the ſeigniorie; whereof *Littleton* here putteth his caſe.

[b] 14. H. 3. tit. Diſclaim. B. 33.

[b] But if the tenant in frankalmoigne bring a writ of meſne againſt his lord, the lord cannot diſclayme in the ſeignorie; becauſe he cannot hold of any man in frankalmoigne, but of his donor and his heires. And ſo note a diverſity between a tenure in frankalmoigne, whereby divine ſervice is maintained, and homage anceſtrell, which reſpecteth temporall ſervice. But if the lord will not diſclayme in the ſeigniory, in the caſe of homage anceſtrell, then albeit he hath not received homage, he ſhall warrant the land.

47. H. 3. Diſclaim. 35. Vide Bract. l. 4. 252. b. 16. H. 7. 1. Brit. 172, 174. (Doctr. Plac. 131.)

"*Si le ſeignior que eſt vouche ad receive homage, &c. il ne diſclaymera.*" Therefore it is good for the tenant, to the intent to ouſt the lord of his diſclaymer, in his voucher to allege, that the lord hath taken homage of him; and if he alledge it not, and the lord offer to diſclayme, the tenant may counterplead the ſame by acceptance of homage. And the reaſon that the lord cannot diſclayme in that caſe is, for that he hath accepted his humble and reverent acknowledgement, to become his man of life and member and terrene honour, and to be faithfull and loyall to him, for the tenements which he holds of him, and againſt the acceptance hereof the lord cannot diſclayme.

"*Que il avoit al temps del 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 continuance of both ſides time out of minde created the warranty. And that is the reaſon that

a writ

a writ of annuity shall not [c] lye against the heire by prescription; because it cannot be knowne, whether he hath any land by descent from the said ancestor, that first granted the annuity. And here is a point worthy of observation, that in the case of homage ancestrell, (which is a special warranty in law) by the authority of *Littleton*, the lands generally, that the lord hath at the time of the voucher, shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an expresse warrantie, the heire shall be charged but only for such lands as he hath by descent 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 operation of law) hath more than the expresse warranty. And so you may observe, that in this case *firmior et potentior est operatio legis quàm dispositio hominis.*

28. E. 1. Voucher 291. 9. E. 2. War. Car. 20. 19. Fines 127.

"*Al temps de voucher ou unques puis.*" This is evident and worthy of diligent observation, viz. that the lands of the vouchee shall be liable to the warranty that the vouchee hath at the time of the voucher, for that the voucher is in lieu of an action; and in a *warrantia cartæ*, the land which the defendant hath at the time of the writ brought, shall be lyable to the warranty.

29. E. 3. 3. 18. E. 3. 1. 2. H. 4. 10. 23. E. 3. Recov. invalu. 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 execution, but only of that land which the defendant had at the time 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 charged, for that the action was brought against the heire in respect of the land. [e] If a man be nonsuit, the land only which he had at the time of the amerciament assessed, shall be charged, and not that which he had at the finding of the pledges. For the amerciament is not in respect of the land, but of his want of prosecution, which was a default in his person. But the issues of a juror shall be levied upon the feoffee, albeit they were not lost before the feoffment, because he was returned and sworne in respect of the land. Note the diversity.

[d] 2. 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.)

[102. b.]

If a man give lands in fee with warranty, and binde certaine lands specially to warranty, the person of the feoffor is hereby bound, and not the land, unlesse he hath it at the time of the voucher.

32. E. 1. Voucher 292. (2. Ro. Abr. 771.)

Sect. 146.

ET est ascavoir, que en chescun cas ou le seignior poit disclaimer en son seigniorie per la ley, et de ceo voit disclaimer en court de record, son seigniorie est extinct, et le tenant tiendra del seignior procheine paramont le seignior que issint disclaime. Mes si un abbe ou prior soit vouch per force de homage ancestrel, &c. comment que il ne unque prist homage, &c. uncore il ne poit disclaimer en tiel cas,

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,

cas, ne en nul auter cas; car ils ne poient anienter ou devester chose de fee, que ad este vestue en lour meason.

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.

Vide Britton, fol. 58. 110. (Doctr. Plac. 133.)

"SON *seigniorie est extinct, et le tenant tiendra de seignior prochein 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.

[*f*] 45. E. 3. 7. 22. E. 4. 35.

Secondly, that after the disclaymer the tenant shall hold of the next lord paramount by the same services as the mesne so disclayming held before.

Vide Sect. 143.

"*Si un abbe ou prior soit vouch, &c. comment, &c. uncore il ne poet disclaymer, &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 auncestrell is gone. But if a prior and covent be translated, *concurrentibus hiis quæ in jure requiruntur*, to an abbot and covent, or to deane and chapter, there the homage auncestrell 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 auncestrell, for that continuance faileth; and though ancestor is ever properly applyed to a naturall body, yet it is called homage auncestrell when the tenure is of a body politique, for that it is auncestrell of the tenant's side. But on the other side, an abbot or prior cannot hold by homage auncestrell; for, as appeareth by *Littleton*'s examples, it must ever be auncestrell 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.

14. H. 6. 12. 2. H. 6. 9. 38. Ass. p. 22. 37. Ass. 6. Co. 3. 73, &c. Deane and Chapter de Norwich case.

40. E. 3. 27. 5. E. 4. 1. 6. E. 3. 51, 52. (7. Co. 10, 11.)

10. E. 4. 2. a. 21. H. 7. 20.

[103. a.]

"*Ils ne poient anienter ou devester chose de 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 binde their successors. If an abbot or prior had acknowledged the action in a writ of annuitie, this should have bound the successour; because

6. E. 3. 51, 52.

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.

38. E. 3. 33. 16. E. 3. tit. Abbot 13. 19. 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.

"*Per force de homage anceſtrell, &c.*" Here (*&c.*) implyeth or by any other warrantie [*i*], as by the reaſon, which our authour here yeeldeth, appeareth.

[*i*] 12. H. 8. 7.

"*Choſe de fee.*" [*k*] For if in an action of debt upon an obligation againſt an abbot, the abbot acknowledgeth the action, and dieth, the ſucceſſour 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.

ITEM, ſi home, que tient ſon terre per homage anceſtrel, alien a un auter en fee, le alienee ferra homage a ſon ſeignior: mes il ne tient de ſon ſeigniour per homage auncestrel; pur ceo que le tenancie ne fuit continue en le ſanke de les aunceſters l'alienee; ne l'alienee n'avera jammes garrantie de la terre de ſon ſeignior; pur ceo que le continuance del tenancie en le tenant et a ſon ſanke per l'alienation eſt diſcontinue. Et ſic vide, *que ſi le tenant, que tient la terre per homage anceſtrell de ſon ſeignior alien en fee, coment que il repriſt eſtate de l'alienee arrere en fee, il tient la terre per homage, mes nemy per homage auncestrell.*

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 ſhal 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 a un auter en 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 argu-

(Poſt. 202. a.)

ment

[m] 1. Mich. 14. & 15. Eliz. 5. H. 7. (F. N. B. 135.)

ment [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. [103. b.]

[n] 5. E. 3. per Cantrel.

[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 tenancie was not continued in the bloud.

[o] Britton, fol. 170. a.

[o] And *Britton* saith, *et come ascun nequedent soit vouche per homage, et le seigniour tende de averrer, que le tenement, dount il 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.

"*Coment que il reprist estate del alienee en 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.

10. E. 3. Voucher 87. 18. E. 3. 30. 44. E. 3. Litt. fol. 169.

Sect. 148.

ITEM, il est dit, que si home tient sa terre de son seignior per homage et fealty, et il ad fait homage et fealty a son seignior, et le seignior ad issue fits, et devy, et le seigniory discendist a le fits; en ceo cas le tenant, que fist homage al pere, ne ferra homage al fits; pur ceo que quant un tenant ad fait un foits homage a son seignior, il est excuse pur terme de sa vie de faire homage a ascun auter heire del seignior. Mes uncore il ferra fealtie al fits et heire le seignior, coment que il fist fealty a son pere.

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 do fealtie to the sonne and heire of the lord, although he did fealtie to his father.

"*NE ferra homage al fitz.*" 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

mage to *B.* *B.* dieth seised, the issue in taile entreth; *A.* shall doe homage againe to the heire in taile of *B.* 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 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.

(Post. 348. a.)

[*p*] Britton, 175, 176.

[104. a.]

Sect. 149.

ITEM, si le seignior, apres le homage a luy fait per son tenant, grant le service de son tenant per le fait a un auter en fee, et le tenant atturna, &c. donque le tenant ne serra my compel de faire homage. Mes il serra fealty, coment que il fist fealtie devant a le grauntor; car fealtie est incident a chescun atturnement del tenant, quant le seigniorie est graunt. Mes si ascun home soit seisie d'un mannor, et un auter home tient de luy la terre, come del mannor avantdit per homage, lequel tenant ad fait homage a son seignior que est seisie del mannor, si apres un estrange port præcipe quòd reddat *envers le seignior del mannor, et recovera le mannor envers luy, et suist execution; en cest case le tenant serra auterfoits homage a celuy, que recovera le manor, coment que il fist homage devant; pur ceo que l'estate celuy, que receivoit le primer homage, est defeate per le recovery, et ne girra en le bouche le tenant a fauxer ou defeater le recoverie, que fuit envers son seignior.* Et sic vide diversitatem *en ceo case, lou home vient a le seigniorie per recoverie, et lou il vient per discent ou per graunt al seigniorie.*

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 quòd reddat* against the lord of the mannor, and recovereth the mannor against him, and sues execution; in this case the tenant shal 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 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.

"*ITEM, si le seignior, &c. grant le service de son tenant per fait, &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

Britton 176. 13. E. 1. tit. Per quæ servitia 22. & tit. Gar. 91. (8. Co. 102.)

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.

[*] 8. E. 4. 27. b.

"*Attorne, &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.]

"*Mes si ascun home soit seisie d'un 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 recovery 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, 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 recoverors may distreyne and make avowrie, &c. as those persons, against*

[*a*] 39. H. 6. 22. 37. H. 6. 38. 35. H. 6. 22.

against whom the said recovery is, should have done, &c. if the same recovery had not been had, and have like remedie, &c.

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. 28. H. 8. Dyer 41. (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.

ITEM, si un tenant, que doit per son tenure faire a son seignior homage, vient a son seignior, et dit a luy, sir, jeo doy a vous faire homage pur les tenements que jeo teigne de vous, et jeo sue icy prist a vous faire homage pur mesmes les tenements; pur que jeo vous pry, que ore ceo voiles receiver de moy.

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.

"*VIENT a son seigniour.*" 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 commodè 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. 151.

ET ſi le ſeignior adonques refuſa de ceo receiver, donque apres tiel refuſall le ſeignior ne poet diſtreiner le tenant pur le homage aderere, devant que le ſeignior requiroit le tenant de faire a luy homage, et le tenant a ceo faire refuſa.

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 doe it.

Vide Bracton, fol. 83. Britton 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.

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.

20. H. 6. 31. (9. Co. 79.)

Sect. 152.

ITEM, home poit tener ſa terre per homage auncestrel, et per eſcuage, ou per auter ſervice de chivaler, auxi bien ſicome il poyt tener ſa terre per homage anceſtrel en ſocage.

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).

(1) [See Note 110.]

[105. b.] CHAP. 8. *Grand Serjeantie.* Sect. 153.

TENURE per graund ſerjeantie eſt, lou un home tient ſes terres ou tenements de noſtre ſeignior le roy per tiels ſervices que il doit en ſon proper perſon faire al roy; come de porter le banner de noſtre ſeignior le roy, ou ſa lance, ou de ameſner ſon hoſte, ou d'eſtre ſon marſhal, ou de porter ſon eſpee devant luy a ſon coronement, ou d'eſtre ſon ſewer a ſon coronement, ou ſon carver, ou ſon butler, ou d'eſtre un de ſes chamberlains de le reſceit de ſon eſchequer, ou de faire auters tiels ſervices, &c. Et la cauſe que tiel ſervice eſt appell grand ſerjeanty eſt, pur ceo que il eſt pluis grand et pluis digne ſervice, que eſt le ſervice en le tenure d'eſcuage. Car celuy, que tyent per eſcuage, n'eſt pas limite per ſa tenure de faire aſcun pluis eſpecial ſervice que aſcun auter, que tyent per eſcuage, doit faire. Mes celuy, que tient per grand ſerjeanty, doit faire un eſpecial ſervice al roy, que il, que tient per eſcuage, ne doit faire.

TENURE by grand ſerjeanty is, where a man holds his lands or tenements of our ſoveraign 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.

"*TENURE per 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.*

[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.

"*De noſtre ſeignior le roy.*" 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

Bracton, lib. 2. 84. 11. H. 4. 34. 10. H. 4. Avowry 267. F. N. B 83. 10. H. 6. Ant. Demeſne 11.

(1) [See Note 111.]

6. It is ſubject to neither *aid pur faire fitz chivaler*, or *file marier*. And 7. it payeth no eſcuage.

23. H. 3. tit. Gard. ſtat. de Ward. et Relev. 28. E. 1.

"*Come de porter le banner de noſtre ſeignior le roy, ou de ameſner ſon hoſt.*" This great ſervice to the king may (as it appeareth hereby) concerne the warres and matters 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.]

(4. Inſt. 123.) [*] Fleta, lib. 1. cap. 10. 11. Eliz. Dier. 285. Camd. Brit. 286, 287. [*] Ockam. cap. Officium Conſtabularii.

"*Ou d'eſtre ſon 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.*

[z] In Rot. Patent. de anno 20. R. 2.

"*Ou de porter ſon eſpee, &c. ou d'eſtre ſon ſewer a ſon coronement, &c.*" Theſe and ſuch like grand ſerjanties at the king's coronation are ſervices of honour in time of peace.

(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. c. 16. 11. E. 4. fo. 1. Pl. Com. 207, 208. [b] Ockam, cap. Quid ſit Scaccarium. Gervaſius Tilburienſis in Libro Nigro ſub cuſtodiâ cameratiorum.

"*D'eſtre un de ſes chamberlaines, &c. ou de faire auters tiels 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.*

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.

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.

Ex lecturâ Marrowe.

Or by any office concerning the adminiſtration of juſtice, *quia juſtitiâ firmatur ſolium.*

[c] Ex inquiſitione poſt mortem Variani de Sancto Petro, 4. E. 2. Ceſtr. Vid. 7. Aſſ. 12. 7. E. 3. 57.

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.*

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.

"*Tiels 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

chamberlayne of *England*, and other honourable ſervices, whereof more ſhall be ſaid in this Chapter.

" *Ou un eſpeciall ſervice al roy.*" 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.

ITEM, ſi tenant que tient per eſcuage moruſt, ſon heire eſteant de pleine age, s'il tenoit per un fee de chivaler, le heire ne paiera forſque c. s. pur reliefe, come eſt ordaine per le ſtatute de Magna Charta, cap. 2. *Mes ſi celuy que tient de roy per grand* 106. b. *ſerjeantie moruſt, ſon heire eſteant de plein age, le heire paiera al roy pur reliefe le value de les terres ou tenements per an (ouſter les charges et repriſes) queux il tient del roy per grand ſerjeantie* (1). *Et eſt aſcavoir, que* ſerjeantia *en Latin* idem eſt quod ſervitium, et ſic magna ſerjeantia idem eſt quod magnum ſervitium.

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. 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.)

" *Paiera al roy pur reliefe de value de ſes terres, &c.*" And herewith agreeth 11. *H.* 4. 72. b. 11. H. 4. 72. b.

" *Serjeantia idem eſt 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.

ITEM, ceux, que teignont per eſcuage, doient faire lour ſervice hors de roialme; mes ceux, que teignont per graund ſerjeantie, pur le greinder part doient faire lour ſervices deins le roialme.

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 do their ſervices within the realme.

(1) See as to reliefs ante 69. b. 76. a, 83. a.

"*TENANTS per eſcuage doient faire lour ſervice hors del roialme.*"

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 *per eſcuage*, and not tenant by knights ſervice (2).

"*Pur le greinder 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.

ITEM, il eſt dit, que en les marches de Scotland *aſcuns teignont de roy per cornage, c'eſtaſcavoir, pur ventier un cornu, pur garner homes de pais, quant ils oyent que le* Scottes *ou auters enemies veignont ou voilent enter en* Engleterre; *quel ſervice eſt graund ſerjeanty. Mes ſi aſcun tenant tient d'aſcun auter ſeignior, que de roy, per tiel ſervice de cornage, ceo n'eſt pas grand ſerjeantie, mes eſt ſervice de chivaler, et trait a luy garde et marriage; car nul poit tener per grand ſerjeanty ſi non de roy tantſolement.*

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, then 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 mariage (2); for none may hold by grand ſerjeanty but of the king only.

4. H. 5. cap. 7. 22. E. 4. cap. 8. Camden in Britannia.

"*EN les marches de* 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.

"*Per 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.

(2) [See Note 112.]

[107. a.]

(1) See further as to the *marches* of Scotland, 4. Inſt. 281. and Nicholſ. Leges March.

(2) [See Note 113.]

(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*.

Sect.

Sect. 157.

ITEM, home poit veier anno 11. H. 4. *que* Cokayne, *adonque chiefe baron d'eſchequer, vient en le common banke, portant oveſques luy la copie d'un recorde* in hæc verba. Talis tenet tantam terram de domino rege per ſerjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c. *Et il demaunda, s'il fuit graund ſerjeanty, ou petite ſerjeantie. Et* Hanke *adonques diſoit, que il fuit graunde ſerjeantie; pur ceo que il ad ſervice a faire per corps d'un home, et s'il ne purra trover nul home a faire le ſervice pur luy, il meſme doit faire.* Quod alii juſtitiarii conceſſerunt. Cokaine *donque, Doit le tenant en ceo cas paier reliefe al value de terre per an?* Ad quod non fuit reſponſum.

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.*

"*ET s'il ne purra trover nul home a faire le ſervice pur luy, &c.*" Hereby it appeares, that tenant by grand ſerjantie 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 archerie, &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. Eſchaetor. 41. H. 3. nu. 23. Stephen Haringdon's caſe.

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 therunto, but ought to make a ſufficient deputy. At the 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 ſerjantie, the judgement followeth. *Et quia*

107. b.]

[a] 1. R. 2. Rot. Clauſ. m. 45.

(5) [See Note 114.] (6) [See Note 115.]

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 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 dignity, 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.

Vid. 1. R. 2. memb. 45.

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.

And ſir *John de Argentine, chivalier*, performed the ſervice of grand ſerjanty, to be the king's cup-bearer at the ſame coronation.

[m] Vid. 1. R. 2. m. 45.

[*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.

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 records, et evidentias, quòd ipſe ſervitium prædictum facere deberet, conſideratum extitit, quòd 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.

Sect.

Sect. 158.

ET nota, que touts que teignont de roy per grand ſerjeanty, teignont de roy per ſervice de chivalrie; et le roy pur ceo avera garde, mariage, et reliefe; mes le roy n'avera de eux eſcuage, s'ils ne teignont de luy per eſcuage.

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, mariage, and reliefe; but he ſhall not have of them eſcuage, unleſſe they hold of him by eſcuage.

[108. a.] 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 mariage and reliefe, which are the effects of knights ſervice, &c. 46. E. 3. 15. a. per Finchden.

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). (Ante 75. a.)

(1) [See Note 116.]

CHAP. 9. *Petit Serjeantie.* Sect. 159.

TENURE per petit ſerjeanty eſt, lou home tient ſa terre de noſtre ſeignior le roy, de render al roy annualment un arke, ou un eſpee, ou un dagger, ou un cuttel, ou un launce, ou un paire de gants de ferre, ou un paire de ſpoures d'ore, ou un ſete, ou divers ſetes, ou de render autres tiels petit choſes touchants le guerre.

TENURE by petite ſerjeanty is, where a man holds his land of our ſoveraigne lord the king, to yeeld 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 yeeld ſuch other ſmall things belonging to warre.

Britton, fol. 164. Bracton, lib. 2. fol. 35. Fleta, lib. 2. cap. 9. Ockam, cap. Quid de avibus oblatis. (6. Co. 6.)

"*De noſtre ſeignior le roy.*" 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.

[*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. 8. ibid. 58. 6. H. 8. Dier 58. Vide Leſtatute de 1. E. 6 cap. 4. F. N. B. 5. K. (2. Ro. Abr. 72, 73.)

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).

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.

"*De render al roy annualment un arke, ou un eſpee, &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 his paſſage is called [108. b.]

(2) [See Note 117.]
(3) [See Note 118.]
(4) [See Note 119.]
(5) [See Note 120.]

called *liberum servitium*; and therefore it is said, *per liberum servitium, ad inveniendum nobis quinque naves ad transitum nostrum ad mandatum nostrum*. And therefore cleerly 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* yeeldeth 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.

Sect. 160.

ET tiel service ne est forsque socage en effect; pur ceo que tiel tenant per son tenure ne doit aler, ne fayre ascun chose, en son proper person, touchant le guerre, mes de render et payer annualment certaine choses al roy, sicome home doyt payer un rent.

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.

"*TIEL service n'est forsque 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. Vide Stat. de Wardis & Relevis 28. E. 1.

Sect. 161.

ET nota, que home ne poyt tener per graund serjeantie, ne per petit serjeanty, sinon de roy, &c.

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.

(1) [See Note 121.]

CHAP. 10. *Tenure en Burgage.* Sect. 162.

TENURE en burgage eſt, lou antient burgh eſt, de que le roy eſt ſeignior, et ceux, que ont tenements deins le burgh, teignont del roy lour tenements; que cheſcun tenant per ſon tenement doit payer al roy un certain rent per an, &c. Et tiel tenure n'eſt forſque tenure en ſocage.

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.

"*De que le roy eſt ſeignior.*" But it may be holden of another, as by that, which immediately followeth, appeareth.

Sect. 163.

ET meſme le manner eſt, lou un auter ſeignior eſpiritual ou temporall eſt ſeignior de tiel burgh, et les tenants de tenements en tiel burgh teignont de lour ſeignior a payer, cheſcun de eux, un annual rent.

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.

(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) [See Note 122.]

THIS

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.

Sect. 164.

ET eſt appel tenure en burgage, pur ceo que les tenements deins le burgh ſont tenus del ſeignior del burgh per certaine rent, &c. Et eſt aſcavoire, que les antient villes appel burgh, ſont les pluis ancient vills que ſont deins Engleterre; *car ceux villes, que ore ſont cities ou counties, en antient temps fueront burghes, et appelles burghes; car de tielx ancient villes appelles burghes, veignont les burgeſſes al parliament, quant le roy ad ſummon ſon parliament* (1).

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.

"*PER certaine rent, &c.*" By (*&c.*) here is implyed fealtie, or other ſervice, as to repaire the houſe of the lord, &c.

"*Les ancient villes appel burghes.*"

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,* [109. b.] *Banburie, Heyteſburie, Malmeſburie, Shafteſburie, Teukeſbury,* and others ſend burgeſſes to the parliament. *Vide pro villis, parochiis et hamletis, poſtea, Section.* 171.

"*Cities,*" *Civitas,* whereof commeth the word city. A city is a borough incorporate (2); which hath or have had a biſhop; 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 poſſunt, nec defraudari, nec violari, ſed omnia ritè et per judicium et juſtitiam fieri debent: 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* Lamb. fol. 125.

(1) See ante 108. b. note 4. (2) [See Note 123.]

træ 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.

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 encorporate, 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 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.*

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.

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.

(Poſt 168. a.)

"*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 gouvernment 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.

1c. Co. 123, 124. Vid. devant Sect. 97.

"*Veignont les burgeſſes al 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 [110. a.]

Vide Sect. 3. (4. Inſt. 2.)

(3) [See Note 124.]

ancient noblemen; some by creation, as nobles newly created; some by succession, as bishops; some by election, as knights, citizens, and burgesses.

It is called parliament, because every member of that court should sincerely and discreetly *parler la ment* (1) for the general 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 Confessour, *William* the Conquerour, &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.

4. H. 8. cap. 8.
[*a*] Treatif. 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 councels, one whereof is called *commune concilium*, and that is the court of parliament, and and so it is legally called in writs and judicial proceedings *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 fift 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 chancellour 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 dorso. 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. Jugement 174. W. 1. ca. 1. Lestat. de Templar. 16. R. 2. Stat de Præmunire.

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 counties, &c. et ordeina pur usage perpetual, que deux foitz per an ou pluis 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*

See the same published by Mr. Lambard.
[*f*] Mirror, ca. 1. sect. 2. Vide Statutes de 4. E. 3. ca. 14. & 36. E. 3. ca. 10.

(1) [See Note 125.]
(2) [See Note 126.]
(3) [See Note 127.]
(4) [See Note 128.]
(5) [See Note 129.]
(6) [See Note 130.]

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.*

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.

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).

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.
(Doctor & Stud. 32.)

Sect. 165. [110. b.]

ITEM, pur le greindr part tielx burghes ont divers cuſtomes et uſages, que n'ont pas auters villes. Car aſcuns burghes ont tiel cuſtome, que ſi home ad iſſue pluſors fits et moruſt, le puiſne fits enheritera touts les tenements que fueront a ſon pere deins meſme le burgh, come heire a ſon pere per force de cuſtome; et tiel cuſtome eſt appel burgh Engliſh.

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 et 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.

"*Que*

(7) See Pref. to Ruffhead's Stat. 21.

[110. b.]
(1) [See Note 131.]

"*Que n'ont pas autres villes.*" 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 borroughes. [*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 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).

(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.
[*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.

"*Le puiſne fits inheritera.*" And yet by ſome cuſtomes the youngeſt *brother* ſhall inherit; for *conſuetudo loci eſt obſervanda* (3).

"*Touts les terres ou 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 *I. 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. 166.

ITEM, en aſcun burghes, per le cuſtome, feme avera pur ſa dower touts les tenements que fueront a ſa baron, &c.

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.] "*Que fueront a ſa baron, &c.*" Here is implyed by (*&c.*) that in ſome places the wife ſhall have the moity 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.

(2) [See Note 132.]
(3) [See Note 133.]
(4) [See Note 134.]
(5) See as to the denomination of Borough Engliſh and the ſubject in general, Append. to Robinſ. Gavelk.

[111. b.]

(1) [See Note 135.]

Sect.

Sect. 167.

ITEM, en aſcuns burghes, per le cuſtome, home poit deviſer per ſon teſtament ſes terres et tenements, que il ad en fee ſimple deins meſme le burgh al temps de ſon morant; et per force de tiel deviſe, celuy a que tiel deviſe eſt fait, apres le mort le deviſor, poit entrer en les tenements iſſint a luy deviſes, a aver et tener a luy, ſolonque la forme et effect del deviſe, ſans aſcun liverie de ſeiſin d'eſtre fait a luy, &c. (4)

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.

(5. Co. 73. b.) "*DEVISER.*" This is a *French* word, and ſignifieth *ſermocinari* to ſpeake, for *teſtamentum eſt teſtatio mentis, et index animi ſermo* (2). So as *a deviſer per ſon teſtament* is to ſpeake by his teſtament, what his minde is to have done after his deceaſe.

[*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.

"*Per ſon 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 legari, ut catallum, tam hæreditas, quàm perquiſitum, per barones London' 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. 118. b.

"*Ses terres ou 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.

"*Que il ad en fee ſimple.*" For lands in taile are not deviſable by will; and therefore he in this place neceſſarily added *(que il ad en 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.)

"*Poit entrer.*" 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,

[*p*] 2. H. 6. 16. 27. H. 6. 8. 2. E. 4. 13. 21. E. 4. 21. 4. H. 7. 16.

(2) See ante fol. 110. a. note 1.
(3) [See Note 136.]
(4) The *&c.* is not in L. and M.
(5) [See 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.

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.

[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 from one to another, but by ſolemne livery of ſeiſin, matter of record, or ſufficient writing (2); but as *Littleton* here ſaith, that by certain 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 [t] 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 [u] theſe ſtatutes take not away the cuſtome to deviſe, (4) whereof *Littleton* 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.

[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.)
[s] 27. H. 8. cap. 10. Britton, fol. 212. 78. b. 164. Vide before in this Sect.
32. H. 8. cap. 2. 34. H. 8. ca. 5.
[t] Vide 3. Co. 25, &c. in Butler and Baker's caſe. 6. Co. 16. & 76. 8. Co. 84, 85. 9. Co. 133. 10. Co. 82, 83, 84. 11. Co. 24. 1. Co. 25. a.
[u] Dier 4. & 5. Phil. & Mar. 155. an. 6. Eliz. Daliſon. Paſch. 20. Eliz. betweene Barber and his wife plaintife, and William Long defendant, in a writ of partition. Bendloe's adjudged. (9. Co. 133.)
[x] 6. Co. 17, 18. ſir. Edward Clere's caſe. 3. Co. 34. b. Butler and Baker's caſe. 10. Co. 80, 81. Leon. Lovey'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.

Leon. Lovey's caſe and Butler and Baker's caſe, ubi ſupra.

If

(1) [See Note 138.]
(2) See note 1. above.
(3) [See Note 139.]
(4) [See Note 140.]

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 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 fruitles. 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.

8. Co. 84, 85. ſir Richard Pexhall'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 therof) 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 he deviſeth the land [112. a.]

(5) Adjudged acc. in Mytton and Lutwich, W. Jo. 7. [112. a.]

(1) [See Note 141.]

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.)

"*Sauns aſcun liverie de ſeiſin d'eſtre fait a luy, &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.

NOTA, coment que home ne poit granter, ne doner, ſes tenements a ſa feme, durant le coverture, pur ceo que ſa feme et luy ne ſont forſque un perſon en ley; uncore per tiel cuſtome il poit deviſer per teſtament ſes tenements a ſa feme, a aver et tener a luy en fee ſimple, ou en fee taile, pur terme de vie, ou pur terme des ans, pur ceo que tiel deviſe ne priſt effect forſque apres la mort le deviſor; car touts deviſes ne preignont effect forſque apres la mort le deviſor. Et ſi home fait a divers temps divers teſtaments, et divers deviſes, &c. uncore le darrein deviſe et volunt fait per luy eſtoiera, et l'auters ſont voides (5).

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.

"*HOME ne poit granter, ne doner, ſes tenements a ſa feme, &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 feoffement 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 yeeldeth (4). [*a*] 4. H. 7. [*b*] 27. H. 8. cap. 10. (Plowd. 111. Dy. 106. a. 2. Ro. Abr. 788.)

"*Durant le 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

(2) [See 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 *et l'autres ſont voides* are not in L. and M. Roh. nor P.

[c] Bracton, lib. 2. ca. 15.

tract with any without the conſent of the huſband. [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.

"*Un perſon en ley.*" *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).

"*Per 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.

[f] Britton 264.

"*A ſon feme.*" And *Littleton* himſelfe yeeldeth 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 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.

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.

2. H. 5. 8. 2. R. 3. 22. (Cro. Eliz. 9. Cro. Jam. 49. 290. 649.)

"*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.

"*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).

Sect. 169.

ITEM, per tiel cuſtome home poit deviſer per ſon teſtament, que ſes executors poyent aliener et vender ſes tenements que il ad en fee ſimple, pur certaine ſumme de money, a diſtributer pur ſon alme (2). *En ceſt cas, coment que le deviſor devie ſeiſie de les tenements, et*

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. In this caſe, though the deviſor die ſeiſed of the tenements, and

(6) [See Note 143.]

(7) See the note on this ſort of etymology in fol. 110. a.

[112. b.]

(1) [See Note 144.]

(2) [See Note 145.]

et les tenements diſcendont a ſon heire; uncore les executors, apres le mort lour teſtator, poyent vender les tenements iſſint a eux deviſes, et ouſter l'heir, et ent faire feoffment, alienation et eſtate per fait, ou ſans fait, a eux a queux le vend eſt fait. Et iſſint pois veier icy un cas, ou home poit faire loial eſtate, et uncore il n'avoit riens en les tenements al temps del eſtate fait. Et la cauſe eſt, pur ceo que la cuſtome et uſage ad eſte tiel (1). Quia conſuetudo, ex certâ, cauſâ rationabili uſitatâ, privat communem legem.

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. For a cuſtome, uſed upon a certain reaſonable cauſe, depriveth the common law.

"*QUE ſes executors poient aliener ou vender ſes 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. 28. 34. H. 8. cap. 5.

"*Les executors apres le mort lour teſtator poient vender.*" 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 ſel. 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 [113. a.] 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 a bare truſt, and a truſt coupled with an intereſt. In both thoſe caſes the executors

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. 2. 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. 181. b. 236. a. 315. b.)

(1) &c. in L. and M.

[a] 1. Co. 173. in Digges's caſe.

tors may [a] ſell part of the land at one time, and part at another, as they may finde purchaſers.

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.)

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.)

"*Et ent faire 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.

19. H. 6. (1. Leon. 31.)

"*Per fait ou ſauns fait.*" 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.

"*Conſuetudo ex certâ cauſâ rationabili uſitatâ privat communem legem.*" *Quia conſuetudo contra rationem introducta potiùs uſurpatio quàm conſuetudo appellari debet. Conſuetudo præſcripta et legitima vincet legem.*

4. E. 4. 4. 11. H. 4. 7. 39. H. 6. 39. 7. H. 6. 1, 2. 9. H. 6. 56.

"*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.

8. H. 7. 4. 8. Eliz. Dier 247. (2. Roll. Abr. 266. 4. Inſt. 274. 298. 303.)

(2) [See Note 146.]

(3) The caſe cited in the margin from 19. H. 6. is in fo. 25.

(4) See 115. a.

Sect. 170.

[113. b.] *ET nota, que nul cuſtome eſt alowable, meſque tiel cuſtome, que ad eſt uſe per title de preſcription, ſcil. de temps dont memorie ne curt. Mes divers opinions ont eſte de temps dont memory, &c. et de title per preſcription, que eſt tout un en ley. Car aſcuns ont dit, que temps de memory ſerra dit de temps de limitation en un briefe de droit; ſcilicet, de temps le roy* R. *le* 1. *puis le Conqueſt, come eſt done per le ſtatute de* Weſtminſter 1. *pur ceo que le briefe de droit eſt le pluis haut briefe en ſa nature, que poit eſtre. Et per tiel briefe home poit recover ſon droit de la poſſeſſion ſon aunceſtors de pluis auncient temps, que home purroit per aſcun briefe per le ley, &c. Et entant que il eſt done per le dit eſtatute, que en briefe de droit nul ſoit oye a demander de le ſeiſin ſon aunceſtors del puis longe temps que de temps le roy* R. *avantdit, iſſint ceo eſt prove, que continuance de poſſeſſion, ou auters cuſtomes et uſages uſes puis le dit temps, eſt le title de preſcription, &c.* Et hoc certum eſt. *Et auters ont dit, que bien et verity eſt, que ſeiſin et continuance puis le dit limitation* (1) *eſt un title de preſcription, come eſt avantdit, et pur cauſe avantdit. Mes ils ont dit, que il y auxy un auter title de preſcription, que fuit a la common ley devant aſcun eſtatute de limitation de briefe, &c. et ceo fuit, lou un cuſtome, ou un uſage, ou auter choſe, ad eſte uſe de temps dont memorie des homes ne curt a le contrarie. Et ils ont dit, que il eſt prove per le pleder un title de preſcription de cuſtome* (2). *Il dirra, que tiel cuſtome ad eſte uſe* de tempore cujus contrarium memoria hominum non exiſtit, *et ceo eſt autant a dire, quant tiel matter eſt plede, que nul home adonque en vie ad oye aſcun proofe a le contrary, ne avoit aſcun conuſans a le contrary:*

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 mind, &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, 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, 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. Hee ſhall

(1) *&c.* in L. and M. and Roh.

(2) *&c.* in L. and M. and Roh.

contrary; *et entant que tiel title de preſcription fuit a le common ley, et nient ouſte per aſcun eſtatute*, ergo, *il demurt come il fuit a le common ley*; *et le pluis toſt, entant que la dit limitation de briefe de droit* (3) *eſt de cy long temps paſſe* (4). Ideo de hoc quære. *Et pluſors auters cuſtomes et uſages ont tiels ancient burghes.*

ſhall ſay, that ſuch cuſtome hath beene uſed from time whereof the memory of men runneth not to the contrary, that is as much 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 is of ſo long time paſſed. *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. 36.)

"*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 is ſaid to have predeceſſors. And a cuſtome, which is locall, 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. 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 talis viribus repellere, et expellere, licèt id quod inceperit perducere non poſſit ad effectum, dum tamen cùm acceperit, diligens ſit ad impetrandum et proſequendum. Longus uſus nec per vim, nec clam, nec precariò, &c.*

[114. a.]

(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. fol. 222. b.

13. E. 4. 6.

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.

"*Un*

(3) *&c.* in L. and M. and Roh. (4) *&c.* in L. and M. and Roh.

"*Un title de 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 [114. b.] that be put in exigent, deodands, conusance of pleas, to make a corporation, to have a 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. 2. Roll. Abr. 270.) [*] Fleta, lib. 1. cap. 25. Brit. f. 6. & 15. 44. Ass. p. 8. 49. E. 3. 3. Stanf. Pl. Cor. 21. 51. 5. Co. 109, 110. 9. Co. 29. (Post. 195. a. 114. 265.) (2. Ro. Abr. 270. 9. Co. 29. Post. 195. a.) 2. Roll. Abr.

[*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.

[*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 25. 12. Eliz.

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.*

Prescr. 57. 44. Ass pl. [*] 8. H. 6. 16. [*f*] 12. E. 4. 16. 32. H. 6. 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 tooke 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,

(2. Ro. Abr. 271. 278.)

(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.

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 minde 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 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).

[*] Mich. 43. & 44 Eliz. in a prohibition betweene Newell pl. and Hicks vicar of Edmonton defendant in the King's Bench. (2. Co. 3 ſhop of Winton's caſe. 6. Co. 69. 3 Co. 9. 2. Ro. Abr. 292.)

"*Temps dont memory, &c. et de title per preſcription, que eſt tout un en ley.*" 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.

"*Temps de 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.)

"*En briefe de droit.*" 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.

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. [115. a.]

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

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. & f. 179. 253. 373.

(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.

[115. a.]

(1) See cap. 39. and lord Coke's Commentary upon it in 2. Inſt. 238.

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), 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).

[*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.

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.

"*De temps le roy R.* 1." 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.

"*Briefe de droit,*" *Breve de recto*, a writ of right; ſo called, for that the words in the writ of right are, *quòd ſine dilatione plenum rectum teneas.*

"*Title de preſcription al common ley, &c. de temps dont memorie des homes ne curge al contrarie.*" *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.)

"*Aſcun proofe al contraire.*" 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 memorialis; 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

(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.)

(2) [See Note 148.]
(3) Acc. 3. Lev. 21.
(4) [See Note 149.]
(5) [See Note 150.]
(6) [See Note 151.]
(7) [See Note 152.]

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 been 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 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 the ſtatute [*n*] was but in affirmance of the common law (12).

Magna Charta, cap. 35. (2. Leon. 28.) [*n*] 6. H. 7. 2. 8. H. 4. 34. 12. H. 7. 18. 31. H. 6. Leet 11. 18. H. 6. 13.

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 was it adjudged in 16. *Eliz.* in the exchequer by ſir *Edward Sanders* chiefe baron, and other the barons of the exchequer, as ſir *John Popham* chiefe juſtice of the king's bench reported to me.

[*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. Cro. Jam. 155. Dr. & Stud. 164.)

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 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 præſentandâ 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 aſſiſum 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.)

[115. b.]

"*Il eſt prove per le pleader.*" Note, one of the beſt arguments or proofes in law is drawne from the right entries or courſe of pleading;

(Poſt. 126. a. 283. a. Ante 17. a. 10. Co. 88. 1. Sid. 336.)

(8) [See Note 153.]
(9) [See Note 154.]
(10) [See Note 155.]
(11) [See Note 156.]
(12) [See Note 157.]
(13) [See Note 158.]
(14) Acc. Manw. Forr. L. 1ſt ed. 41. a. and Fitz. Abr. *Treſpaſs* 239. there cited.
(15) [See Note 159.]

ing; 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.*

" *Entant que tiel title per preſcription fuit al common ley, &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 was the firſt time of limitation ſet downe by any act of parliament, and ſo from the raigne 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.

" *Common ley.*" 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. (Ante 110. b. Poſt. 344. a.)

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. (Pref. to 8th Co.)

Sect. 171.

ITEM, cheſcun burgh eſt un ville, mes nemy è converſo. Plus ſerra dit de cuſtome en le Tenure de Villenage.

ALSO, every borough is a towne, but not *è converſo.* More ſhall bee ſayd of cuſtome in the Tenure of Villenage.

" *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 (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. Forteſcue, cap. 24.

towne is not a borough. *Et ſub appellatione villarum continentur burgi & civitates.*

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.

Bract. ubi ſup. Flet. li. 4. c. 15. & lib. 6. ca. 49. Brit. fo. 124, & 274, &c. See more *de villis, parochiis et hamlettis*, in the ancient authors of the law, and plentifully in our other bookes. But let us now heare what *Littleton* ſaith (1).

(1) [See Note 160.]

CHAP. 11. Of Villenage. Sect. 172.

TENURE en villenage eſt plus properment, quant un villein tient de ſon ſeignior, a que il eſt villein, certaine terres ou tenements ſolonque le cuſtome del manor, ou auterment, a la volunt ſon ſeignior, et de faire a ſon ſeignior villein ſervice; come de porter et de carier le fime le ſeignior hors del city, ou del manor (2) *ſon ſeignior, jeſques a le terre ſon ſeignior, en giſant ceo* (3) *ſur le terre*, et hujuſmodi. *Et aſcuns franke homes teignont lour tenements ſolonque le cuſtome del certaine manors, per tiels ſervices. Et lour tenure auxy eſt appel tenure en villenage, et uncore ils ne ſont pas villeines; car nul terre tenus en villenage, ou villeine terre, ne aſcun cuſtome ſurdant de la terre, ne unques ferra franke home villein. Mes un villein puit faire franke terre d'eſtre villein terre a ſon ſeignior. Sicome lou un villein purchaſe terre en fee ſimple, ou en fee taile, le ſeignior del villein poet enter en la terre, et ouſte le villein et ſes heires a touts jours; et puis le ſeignior (s'il voloit) puit leſſer meſme la terre a le villeine, a tener en villenage.*

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. 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 en 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 cannot produce his warrant of that which hee bought according to his voucher. (F. N. B. 77. a.)

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. li. 2. cap. 44. Idem, li. 4. cap. 11. & 12. Mir. ca. 2. ſect. 18. Ockam.

[*a*] Flet li. 1. ca. 24. [*b*] Vide Lamb. inter leges Sanct. Edw. fo. 132. nu. 25.

"*Villenage*," *Villenagium*, (as in like caſes hath been ſayd where the termination is in *age*) is the ſervice of a bondman. And yet a free

(2) In L. and M. and Roh. the words are *del cite* (which ſeems uſed in the ſame ſenſe as *ſcite*) *del manner*.

(3) Inſtead of *en giſant ceo*, the words in L. and M. and Roh. are *giſaunt warrette et de ſpreder le fyme le ſignour*.

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 deſerere, 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 faith 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 liberas 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 eâ ratione perſonarum, ſed ratione tenementorum, &c.*

(F. N. B. 12. 2. Rol. Abr. 73.)
[c] Hil. 29. E. 1. Coram reg. Ebor. in theſaur.
[d] Bract. li. 4. fo. 170.
[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 ab 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, and 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. 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.*

[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.

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,

(F. N. B. 77. f.) Bract. li. 1. ca. 6. Britton, ca. 31. & ubi ſupr. Fleta, lib. 1. ca. 2. & 3.

[116. b

[m] *Et tout ſoyt que touts creatures duiſſont eſte frank ſolonque le ley de nature, per conſtitution nequidant, et fait de homes ſont auters creatures enſervies, ſicome eſt dit beaſts en parkes, piſſons en ſervors, et oyſeux en cages.* [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 nakednes 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.

" *Hors del citie ou del 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. [17. a.]

" *Et aſcuns frank homes teignont, &c.*" This is apparent enough, eſpecially upon that which hath beene ſaid. Mirror, cap. 2. ſect. 18. acc.

" *Ou un villeine purchaſe terre en 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, *purchaſe terre*. 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 heirs 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 heirs; 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 apparant, 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 acquiritur 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* 15. E. 4. 9. b. Pl. Com. 555. in Walſingham's caſe.

or

(1) [See Note 161.]

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 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.

ET nota, ſi feoffment ſoit fait a certaine perſon ou perſons en fee, al uſe de un villeine; ou ſi un villeine, ove auters perſons, ſoient enfeoffes al uſe le villeine; quel eſtate que le villeine ad en le uſe, en fee taile, pur terme de vie ou d'ans, le ſeignior del villeine poit entrer en touts ceux terres et tenements, ſicome le villeine uſt eſte ſole ſeiſie del demeſne. Et c'eſt per l'eſtatute de anno 19. H. 7. cap. 15. (2).

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 demeſne. And this is given by the ſtatute of *anno* 19. *H.* 7. *ca.* 15.

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).

Sect. 174. [117. b.

MES ſi aſcun franke home voile prender aſcun terres ou tenements, a tener de ſon ſeignior per tiel villein ſervice, ſcil. a payer un fine a luy (1) *pur le mariage de ſes fits ou files, donque il paiera tiel fine pur le mariage; et nient obſtant que il eſt le follie de tiel frank home de prender en tiel forme terres ou tenements a tener de le ſeignior per tiel bondage, uncore ceo ne fait le franke home villeine* (2).

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 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.

[117. b.]

(2) This Section was firſt introduced in Redman's edition.

(3) [See Note 162.]

(1) In Roh. the words *pur ſon marriage ou* come in here.

(2) This Section in L. and M. ſtands the laſt in the Chapter of Villenage.

"*A PAIER un fine pur le mariage, &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 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.

[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.

Sect. 175.

ITEM, cheſcun villeine ou eſt un villeine per title de preſcription, c'eſtaſcavoir, que il et ſes aunceſtors ont eſte villeins de temps dont memorie ne curt; ou il eſt villeine per ſon confeſſion demeſne en court de record.

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.

"*CHESCUN villeine ou eſt villeine per title de 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).

(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.

"*En court de record.*" Record is derived of the *Latine* word *recordor*, that is, to keepe in minde, as the poet ſaith, *Si ritè 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
118. a.] judgement, for that they are no courts of record, becauſe they cannot hold plea of debt or treſpaſſe, if the debt 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.

491. b. 1. Sid. 94. 2. Ro. Abr. 573. 576. 1. Sid. 314.) (14 H. 8. 15. 1. Rol. Abr. 543.)

[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. Britt. 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. 2. Ro. Abr. 862. 863. Plow.

(3) [See Note 163.]
(4) [See Note 164.]

[118. a.]
(1) See poſt. 260. a.

Sect. 176.

MES ſi frank home ad divers iſſues, et puis il confeſſe luy meme d'eſtre villein a un auter en court de record; uncore les iſſues que il avera devant le confeſſion ſont franks, mes les iſſues que il avera apres le confeſſion ſerront villeines.

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.

ITEM, ſi le villein purchaſe terre, et alien la terre a un auter devant que le ſeignior enter, donques le ſeignior ne poit enter; car il ſerra adjudge ſon follie, que il n'entra pas, quant la terre fuit en le maine le villein. Et iſſint eſt dez biens. Si le villeine achate biens, et eux vend ou done a un auter, devant que le ſeignior ſeiſiſt les biens, adonques le ſeignior ne poit eux ſeiſer. Mes ſi le ſeignior, devant aſcun tiel vender ou done, vient deins la ville la lou tielx biens ſont, et la, ovértment enter les vicines, claima les biens, et ſeiſiſt parcel des biens, en noſme de ſeiſin de touts les biens que le villeine ad ou aver poit (1), *&c. ceo eſt dit bon ſeiſin en ley; et le occupation que le villeine ad apres tiel claime en les biens,* (2) *ſerra pris en le droit le ſeignior.*

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 neighbors, 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, &c. this is a good ſeiſin in law, and the occupation which the villaine hath after ſuch clayme in the goods, ſhall be taken in the right of the lord.

(Dr. & Stud. 140. 2. Rol. Abr. 735.)

IN this caſe before the lord doth enter, hee hath neither *jus in re nec 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

(1) The words *que le villein ad ou aver poit* not in L. and M. nor Roh.

(2) Inſtead of *les biens*, it is *ley* in L. and M. and Roh.

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 office found, the king ſhall not have the meane profits; becauſe the title is by the ſeiſure.

[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.)

" *Purchaſe terre.*" The like law is of ſeigniories, advowſons, reverſions, remainders, rents, commons certaine, and ſuch like certaine
118. b.] 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.

" *Alien la terre.*" 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 villaine 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.

" *Et iſſint eſt des biens, &c.*" *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, houſholdſtuffe, 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 years of lands or tenements, wardſhips, the intereſt of tenant by ſtatute ſtaple, by ſtatute merchant, by *elegit*, and ſuch like.

(2. Ro. Abr. 732. 5. Co. 109. 2. Ro. Abr. 58. Cro. Eliz. 386.)

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

(2) See poſt. 119. a.
[118. b.]
(3) See farther as to chattels, Bro. Abr. tit. *Chattels*, Com. Dig. tit. *Biens* and *Aſſets*, and Vin. tit. *Executors*, U—Y—Z.

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 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 mariage, 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.

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.)

"*Et claime les biens, et ſeiſiſt parcel des biens.*" 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.

[c] 18. H. 6. 23. b. per Aſcough. 3. H. 4. 16. 46. E. 3. Barre 217.

"*Ad ou aver poit, &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.

MES ſi le roy ad un villein, que purchaſe terre, et alien devant que le roy entra; uncore le roy poit enter, en que maines que la terre deviendra. Ou ſi le villein achata biens, et eux vendiſt devant que le roy ſeiſiſt les biens; uncore le roy poit ſeiſer les biens, en que maines que les biens ſont. Quia nullum tempus occurrit regi.

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 ſhal 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).

Vide Sect. 125. Vide Stamford Prær. f. 32. e.

"*SI le roy ad villein, &c.*" This is evident upon that which hath beene ſaid before.

"*Ou*

(4) *Contra*, as to the goods *afterwards* acquired, Dr. and Stud. dial. 2. chap. 4. [119. a.]

(1) [See Note 165.]

"*Ou ſi tiel villeine achata biens, &c.*" If the king's villeine acquire any goods or chattels, 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.*

35. E. 3. tit. Villenage 22.
[*d*] Mirror, cap. 3.
[*e*] Britton, fol. 88. Bract. lib. 1. quæ res dari poſſint.

Sect. 179.

ITEM, ſi home leſſa certaine terre a un auter pur terme de vie, ſervant le reverſion a luy, et un villein purchaſe del leſſor le reverſion; en ceſt cas il ſemble, que le ſeignior del villeine poit maintenant vener a la terre, et claime le reverſion come le ſeignior le dit villeine, et per cel claime le reverſion eſt maintenant en luy. Car en auter forme il ne poit vener a le reverſion. Car il ne poit enter ſur le tenant a terme de vie. Et s'il doit demurrer tanque apres le mort le tenant a terme de vie, donques per cas il viendra trope tarde. Car peraventure le villeine voile granter ou aliener le reverſion a un auter en le vie le tenant a terme de vie, &c.

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 this 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.

"*PUIT maintenant vener a la terre.*" For he cannot claime the reverſion but upon the land, and he by his comming upon the land for that purpoſe is no treſpaſſor; 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
19. b.] 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.

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).

"*En*

(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) [See Note 166.]

" *En la vie del tenant pur vie, &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.

EN meſme le maner eſt, lou un villein purchaſe un advowſon d'un eſgliſe plein d'un incumbent, le ſeignior del villein poit vener al dit eſgliſe, et claime le dit advowſon, et per cel claime l'advowſon eſt en luy. Car s'il doit attendre tanque apres le mort l'incumbent, et adonque a preſenter ſon clerke a le dit eſgliſe, donque, en le meane temps, le villeine poit aliener le advowſon (3), *et iſſint ouſter le ſeignior de ſon preſentment.*

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 in him. For if he will attend till after the death of the incumbent, and then to preſent his clarke to the ſaid church, then, in the mean time, the villein may alien the advowſon, 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. found'rs, 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 collation to the church. *Advocatus eſt ad quem pertinet jus advocationis*
Fleta, lib. 5. cap. 14. *alicujus eccleſiæ, ad eccleſiam nomine proprio, non alieno, poſſit præſentare.* Every church is either preſentative, collative, donative, or elective. *Vide* Section 645. 648.

" *Plein d'un incumbent.*" If the church be preſentative, the
24. E. 3. 30. 25. E. 3. 47. 38. E. 3. 9. 44. E. 3. 3. church is full by admiſſion and inſtitution againſt any common perſon; but againſt the king it is not full untill induction.
9. H. 6. 31. 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 *incumbent*, as
20. H. 6. 7. *Littleton* doth here (4). And therefore the law doth intend him to be reſident on his benefice.

" *Le ſeignior del villeine poit vener al egliſe, et claime le dit advowſon*" Note, albeit the advowſon is a thing incorporeall, and not viſible, yet becauſe the principall duty of the preſentee of the [120. a.
patron

(3) *&c.* L. & M.
(4) However, in L. and M. and Roh. the word is *encombent.*

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 moſt apt for that purpoſe.

"*Apres la mort del 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. Doct. & Stud. lib. 2. ca. 31. 5. E. 3. 180. 10 E. 3. 482. 25. E. 3. 49. 9. E. 3. 462.

11. H. 4. 37. 59. & 76. 41. E. 3. 5. F. N. B. 31, 32.

"*Et donques a preſenter ſon clerke al dit egliſe, &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 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 thereupon and from thenceforth be adjudged a diſabled perſon in law to have or enjoy the ſame benefice.

(2. Ro. Abr. 353.)

[*d*] Adjudge 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. 477. Cro. Cha. 331.)

7. Co. 32. Poſt. 234. 11. Co. 68.

(1) [See Note 167.]
(2) [See Note 168.]
(3) [See Note 169.]

[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.

fice. [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 not only extend to benefices with cure, but to dignities, prebends, and all other ecclesiastical livings.

4. H. 4. ca. 12.

"*Clerke*," *Clericus*, is twofold: *ecclesiasticus* (which *Littleton* here intendeth), and he is either secular or regular, so 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.

(Ante 117. a.)

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; [b] but otherwise it is of a bond made to the wife; because that is meerly in action.

[g] 14. H. 4. 12. 38. E. 3. 35. 13. E. 3. quare imp. 57. [b] 43. E. 3. 10. 39 E 3. 5. 4. H. 6. 5.

(Post. 351. a. 1. Ro. Abr. 345.)

Sect. 181.

ITEM, il y ad villeine regardant, et villeine en gros. Villein regardant est, sicome home est seisie d'un mannor a que un villein est regardant, et celuy que est seisie del dit mannor, ou ceux que estate il ad en mesme le mannor, ount este seisies de le dit villein et de ses auncestors come villeins et niefs (1) *regardants a mesme le mannor de temps dont memorie ne curt. Et villeine en grosse est, lou un home seisie d'un mannor a que un villeine est regardant, et il graunt mesme le villein per son fait a un autre, donques il est villein en grosse, et nemy regardant.*

ALSO, there is a villeine regardant, and a villeine in grosse. [120. b.] 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 niefs regardant to the same mannor time out of memory of man. And villein in grosse is, where a man is seised of a mannor wherunto a villein is regardant, and granteth the same villein by his deed to another, then he is a villein in grosse, and not regardant.

H. 7. 5.

"*VILLEIN 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*

Bract. li. 2. fo. 26. Mir. ca. 2. sect. 18.

[120. b.]

(4) [See Note 170.]

(1) *et niefs* not in L. and M.

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. 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. 182.

ITEM, ſi un home et ſes anceſtors, que heire il eſt, ount eſte ſeiſies d'un villeine et de ſes anceſtors come des villeins en groſſe de temps dont memorie ne curt, tiels ſont villeines en groſſe.

ALSO, if a man and his anceſtours, whoſe heire he is, have beene ſeiſed of a villeine and of his aunceſtors 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.

ET hic nota, que tiels choſes, que ne poient eſtre grants, ne alienees, ſans fait ou fine, home que voile aver tiels choſes per preſcription, ne poet autrement preſcriber forſque en luy et en ſes aunceſters, que heire il eſt, et nemy per ceux parols, En luy et en ceux que eſtate il ad; pur ceo que il ne poet aver lour eſtate ſans fait ou auter eſcripture, le quel covient d'eſtre monſtre a le court, ſi il voile aver aſcun advantage de ceo. Et pur ceo que le grant et alienation d'un villeine en groſs (3) *ne giſt ſans fait, ou autre eſcripture, home ne poit preſcriber en un villein en gros, ſans monſtrans d'eſcripture, ſinon en ſoy meſme que claime le villeine, et en ſes anceſtors que heire il eſt. Mes de tiels choſes, que ſont regardants ou appendants a un mannor, ou a auters terres et tenements, home poet preſcriber, que il et ceux que eſtate il ad, queux ſueront ſeiſies de le mannor, ou de tiels terres et tenements,*

[121. a.]

AND heere note, that ſuch things, which cannot be granted, nor aliened, without deed or fine, a man which will have ſuch things by preſcription, cannot otherwiſe preſcribe, but in him and in his aunceſtors, 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 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 aunceſtours whoſe heire he is. But of ſuch things, which are regardant or appending to a mannour, or to other lands and tenements, a man may preſcribe,

(3) *en gros* not in L. and M. nor Roh.

tenements, &c. ont eſte ſeiſies de tiels choſes come regardants ou appendants a le mannor, ou a tiels terres et tenements (4) *de temps dont memorie, &c.* (5) *Et la cauſe eſt pur ceo que tiel manor, ou terres et* (1) † *tenements poyent paſſer per alienation ſans fait, &c.*

ſcribe, that he and they whoſe eſtate he hath, who were ſeiſed of the manor, 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 time out of mind of man. And the reaſon is, for that ſuch manor or lands and tenements may paſſe by alienation without deed, &c.

Vid. Sect. 441. 194. 174. 74.

"OU *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 domini regis, vel ejus juſticiariorum* (1). [*n*] *Talis concordia finalis dicitur, eò quòd finem imponit negotio, adeo ut neutra pars litigantium ab eo de cætero poterit recedere* (2). Of the ſeverall parts of a fine, and many incidents to the ſame, you ſhall reade in my Reports.

[*l*] Bract. li. 5. tract. 5. c. 28. (Poſt. 262. a.)
[*m*] Glanv. li. 8. ca. 1.
[*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.

"*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, *(home que voile aver tiels choſes per preſcription).* Therefore [*q*] when a thing that lyeth in grant, is but a conveyance to the thing claimed by preſcription, 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.

[*o*] 22. Aſſ. 53. 23. Aſſ. 6. 12. H. 7. 16. 18. (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.)

[*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.

[*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.)

[*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 yeares (6), or at will.

[*s*] 41. Aſſ. 2. 40. Aſſ. 28. 2. H. 4. 20. 27. H. 6. 3. 15. E. 4. 1. 5. H. 7. 39. 18. E. 4. 10. 7. E. 6. tit. Que eſtate Br. 31. 7. El. Dyer 238. (1. Co. 46. 1. Sid. 298. Doc. Plac. 304.)

[*t*] A diſſeiſor, abatour, intruder, recoveror, or any other that cometh in the *poſt* ſhall plead a *que eſtate.* [121. b.]

[*t*] 22. H. 6. 34. 6. E. 4. 12. 31. H. 8. Que eſtate Br. 48. 39. H. 6. 14. 9. H. 6. Eſtop. 25.

A *que*

(1) [See Note 171.]
(2) [See Note 172.]
(4) *&c.* in L. and M. and Roh.
(5) *court* inſtead of *&c.* in L. and M. and Roh.
(6) But ſee 1. Lev. 100. and 1. Sid. 298.
(1) † *ou* inſtead of *et* in L. and M.

[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.

eſtate 8. 1. E. 6. Que eſtate Br. 49. (Cro. Cha. 54.

[u] 11. H. 4. 81. 27. H. 6. 32. 9. E. 4. 3. 2. E. 6. tit. Que 1. Lev. 190.)

"*Le quel covient d'eſtre monſtre al 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.

"*Per alienation ſauns fait, &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. 184.

ET eſt aſçavoir, que nul choſe eſt noſme regardant a un mannor, &c. forſque villeine. Mes certeine auters choſes come advowſon et common de paſture, &c. ſont noſmes appendants al mannor ou al terres et (3) *tenements, &c.*

AND it is to be underſtood, that nothing is named regardant to a mannor, &c. but a villeine. But certaine other things, as an advowſon and common of paſture, &c. are named appendant to the mannor, or to the lands and tenements, &c.

"*REGARDANT:*" *Vide* Sect. 181.

"*Appendants.*" 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 leavant 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.)

If

(2) [See Note 173.]
(3) *ou* for *et* in L. and M.
(4) See note 2. to 122. a.
(5) Acc. 1 Ventr. 407.
(6) [See Note 174.]

[x] 43. Aſſ. p. 10. 43. E. 3. 22. (10. Co. 64, 65. 2. Ro. Abr. 185.)

[x] If *A.* be ſeiſed of a mannor, whereunto the franchiſe of waiſe and ſtray and ſuch like are appendant, and the king purchaſeth the mannor with the appurtenances, now are the royall franchiſes reunited 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.

[y] Hill and Grange's caſe, Pl. Com. 168.

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 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.

(1. Rol. Abr. 230.)

[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. a.]

[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.

(12. Co. 104.) 5. E. 6. Dier. 70 b. (1. Rol. Abr. 230.)

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).

(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*.

31. H. 6. 15. b.

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.

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.

Note, that an advowſon at one turne may be appendant, and at another turne in groſſe. As if the mannor be divided betweene copareeners, 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

(7) [See Note 175.] (1) [See Note 176.]

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 de 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 appendent 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. 69.)

[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, and yet the tenant of the land muſt common or feed there alſo (5). (1. Saund. 345.)

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 [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.)

(2) [See Note 177.]
(3) See Fulb. Prepar. 68. b. and 1. Saund. 351.
(4) [See Note 178.]
(5) [See Note 179.]

able 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 piſchăriam* 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.]

[*] 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.

[m] 20. H. 6. 4. 10. H. 7. 24. Temps E. 1. Aſſiſe 422. (2. Rol. Abr. 258.)

[*] Inter Chinery & Fiſhen in le Com. Banke in replevin, & Mich. 29. & 30. Eliz. inter Shirland & White in com. Oxon. et inter Foiſton & Crachrode eodem termino in Eſſex. (2. Rol. Abr. 267.)

[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 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.

[n] 19. H. 6. 33.

[o] Vide Sect. 541. (4. Co. 31. a. Poſt. 307. 349. b. 363. b.)

Sect. 185.

ITEM, ſi home voile en court de record ſoy confeſſer d'eſtre villeine, que ne fuit villein adevant, tiel eſt villeine en groſſe.

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).

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 *præcipe* 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.

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.

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

19. H. 6. 32. b.

(6) [See Note 180.]
(7) [See Note 181.]

[122. b.]

(1) See ante 117. b. n. 3.
(2) [See Note 181.]

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 entred of record, doth ſo bind, that, albeit if 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.

ITEM, home que eſt villein eſt appelle villeine (3), *et feme que eſt villein eſt appelle niefe: ſicome home que eſt utlage eſt dit utlage, et feme que eſt utlage eſt dit waive.*

ALSO, a man which is villeine is called a villeine, and a woman which is villein 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.

"*Feme que eſt utlage eſt dit waive.*"

Waive, waiviata, and not *utlagata* 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 *utlagati, 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.

ITEM, ſi un villein prent frank feme a feme, et ad iſſue enter eux, l'iſſues ſerront villeines. Mes ſi niefe prent franke home a ſa baron, lour iſſues ſerra franke.

* *Et c'eſt contrarie a le ley civil; car la eſt dit,* partus ſequitur ventrem * (1).

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* *.

"*SURCULUS*

(3) *et 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. Bibl. Polit. 4th ed. 907. Elleſmere's argument in Calvin's caſe 76.

[123. a.]

(1) The ſentence between the ſtars is not in L. and M. Roh. or P.

Forteſcue, cap. 42. Glanv. lib. 5. cap. 6. Hil. 29. E. 1. coram rege Eborum in theſaur.

"*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.

[q] Lib. Rub. cap. 77.

[r] Forteſcue, ubi ſupra.

[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] *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 marieth 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 altera 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.

"*Et ceo eſt contrarie al ley civil.*" (7) For true it is, that by 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.

Sect. 188.

ITEM, nul baſtard poit eſtre villein, ſi non que il voile ſoy conuſter eſtre villeine en court de record; car il eſt en ley quaſi nullius filius, *pur ceo que il ne poit enheriter a nulluy.*

ALSO, no baſtard may be a villeine, unleſs he will acknowledge himſelfe to be a villeine in a court of record; for he is in law *quaſi nullius filius*, becauſe he cannot be heire to any.

[a] Vide Sect. 399. 13. E. 1. tit. Villein 36. (Ante 3. b. Poſt. 244. b.)

"*NULLIUS* [a] *filius.*" *Cui pater eſt populus, pater eſt ſibi nullus et omnis.*

Cui pater eſt populus, non habet ille patrem.

[b] Bract. lib. 1. fo. 5. a. Fleta, lib. 1. cap. 3. Britton, fol. 78.

[b] Some hold that the baſtard of a niefe ſhall be a villeine.

[c] 39. E. 3. 34. 43. E. 3. 4. Britton, ubi ſupra.

[c] And others hold, that if a villeine hath a baſtard by a woman, and after marieth 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

(2) [See Note 183.]
(3) [See Note 184.]
(4) [See Note 185.]
(5) [See Note 186.]
(6) [See Note 187.]
(7) [See Note 188.]

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 yeelds; becauſe in judgment of law he is *nullius filius*. [*e*] (8) And, for the ſame reaſon, 123. b.] 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.

[*d*] 23. Eliz. Dier 374.

[*e*] 13. Eliz. Dier 296. 14. Eliz. Dier 313. 18. Eliz. Dier 345.

[*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 conſtitui*' (1). Now *legitimum tempus* in that caſe appointed by law at the furtheſt is nine moneths, or forty weeks (2); but ſhe may be delivered before that time, which judgement I thought good to mention. And this agreeth with 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.*

[*f*] Trin. 18. E. 1. rot. 61. Bedf. coram rege. (Cro. Jam. 541. 1. Roll. Abr. 536. Godb. 281. Palm. 9.)

4. Eſdras 4. 41. Vide Panciroll. Nova Reporta, page 485, &c.

Sect. 189.

ITEM, cheſcun villein eſt able et franke de ſuer touts manners d'actions envers cheſcun perſon, forſpris envers ſon ſeignior, a que il eſt villeine. Et uncore en certain choſes il poit aver action envers ſon ſeignior. Car il poit aver envers ſon ſeignior un action d'appeal de mort ſon pere, ou d'auters de les aunceſters, que heire il eſt.

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.

"*CHESCUN villeine eſt able et franke de ſuer, &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*] 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*] *Examinatio villenagii non tenet, niſi ex ore veri domini fuerit pronunciata.*

[*g*] Bract. lib. 4. fol. 196. Britton, cap. 49. fo. 125.

[*h*] 14. E. 4. 6. b. 15. E. 4. 32. 20. E. 3. tit. Villein 10. 38. E. 3. 21.

[*i*] Fleta, lib. 2. cap. 4. (3. Inſt. 131.)

"*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.

[*k*] Brit. cap. 22. fo. 38. Bracton, lib. 1. fo. 6.

"*De mort.*" [*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

[*l*] 18. E. 3. 32. 11. H. 4. 93. 1. H. 4. 6. 29. H. 6. tit. Corone 17.

[123. b.]

(8) [See Note 189.]

(1) [See Note 190.]

(2) [See Note 190*.]

villein as his own. [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.

[m] Fleta, li. 1. c. 5. 1. H. 4. 6.

Sect. 190.

AUXY, un niefe, que eſt ravie per ſa ſeignior, poit aver un appeale de rape envers luy.

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 de 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.

[p] And this word *rape*, which our author here uſeth, is ſo appropriated by law to this caſe, as without this word (*raput*) it cannot be expreſſed by any periphraſis or circumlocution; for *carnaliter cognovit eam*, or the like, will not ſerve. [124. a.]

[p] 9. E. 4. 26. Mirror, ca. 1. ſect. 13.

Sect. 191.

AUXY, ſi un villein ſoit fait executor a un autre, et le ſeignior del villein fuit en dette a le teſtator en un certeine ſumme d'argent, que n'eſt my paie; en ceo caſe, le villeine, come executor de le teſtator, avera action de det envers ſon ſeignior; pur ceo que il ne recovera le det a ſon uſe demeſne, mes al uſe le teſtator.

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 villein, 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.

(Doc. Plac. 388.) 21. E. 4. 50. a.

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.

Sect. 192.

ITEM, le ſeignior ne poit prender hors del poſſeſſion de tiel villein, que eſt executor, les biens le mort; et s'il face, le villeine come executor avera action de treſpaſſe de meſmes les biens iſſint priſes envers ſon ſeignior, et recovera damages al uſe le teſtator. Mes en touts tielx caſes il covient, que le ſeignior, que eſt defendant en tielx actions, face proteſtation, que le plaintife eſt ſon villein; ou auterment le villeine ſerra enfranchiſe, coment que le matter ſoit trove pur le ſeignior, et encounter le villein, come eſt dit.

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.

"*LE ſeignior ne poet prender hors del poſſeſſion, &c.*" Of this alſo ſufficient hath been ſaid before.

"*Et recovera damages al uſe del teſtator.*" [q] Note, damages recovered by the executor in an action of treſpaſſe ſhall 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

24. b. [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.)

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 [illegible] 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.

ITEM, ſi villeine ſuiſt un action de treſpaſſe, ou un auter action, envers ſon ſeignior en un county; et le ſeignior dit, que il ne ſerra reſpondus, pur ceo que il eſt ſon villein regardant a ſon manor en auter county (1); *et le plaintife dit, que il eſt franke, et de franke eſtate, et nemy villein; ceo ſerra trie en le county lou le plaintife avoit conceive ſon action, et nemy en le county lou le manor eſt: et ceo eſt* in favorem libertatis. *Et pur cel cauſe un eſtatute fuit fait* an. 9. R. 2. cap. 2. *le tenor de quel enſuiſt en tiel forme. Item, pur la ou pluſors villeins, et nieſes, ſibien des graundes ſeigniors come des auters gentes, ſibien eſpirituals come temporals, s'enfuent deins cities, villes, et lieux enfranchiſe, come en la citie de* Londres, *et auters ſemblables, et feignont divers ſuits envers lour ſeigniors, a cauſe de eux faire franks per le reſpons de lour ſeigniors: accorde eſt et aſſentus, que les ſeigniors ne auters ne ſoyent my forbarres de lour villeines per cauſe de lour reſpons en ley. Per force de quel eſtatute, ſi aſcun villein voylloit ſuer aſcun maner de action a ſon uſe demeſne en aſcun county, ou il eſt fort a trier envers ſon ſeignior, le ſeignior poyt eſlyer de pleader, que le plaintife eſt ſon villeine, ou de faire proteſtation que il eſt ſon villeine, et de pleder ſon auter matter en barre. Et ſi ils ſont a iſſue, et l'iſſue ſoit trove pur le ſeignior, donque le villein eſt villein, come il fuit devant per force de meſme l'eſtatute. Mes ſi le iſſue ſoit trove pur le villeine, donque le villeine eſt franke; pur ceo que le ſeignior ne priſt al commencement pur ſon plee, que le villeine fuit ſon villeine, mes ceo priſt per proteſtation, &c.*

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; 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 nieſs, 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, 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.

(1) *&c.* in L. and M. and Roh.

"CEO *ſerra trie en le countie, &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 s, 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. 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. 7. Co. 1.)

Vide Sect. 534. [*b*] 2. Mar. Dier 112. (Poſt. 125.

"*In favorem libertatis.*" 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*] Fortelcue, 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 miſ-tryall, (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 neereſt thereunto, the inhabitants whereof may have the better and more certaine knowledge of the fact (2). As if the fact be alledged *in quâdam plateâ vocat' King-ſtreet in civitate Weſtm. in com' Midd.* in this caſe the viſne cannot come out of the *platea*; 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 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

[125. a.] [125. b.]

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.) [*e*] 4. E. 3. 30. 8. E. 3. 68. 39. H. 6. 13. Brooke Pleading 61.

for

(1) See poſt. 155. b. 228. a. (2) [See Note 191.]

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 parochiâ*, 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 then the city..

[f] 4. E. 4. 41. 5. E. 4. 20. 22. E. 4. 2. 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.

[b] 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 tiel 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*. [*].

[b] 22. E. 4. tit. Visne, f. 27. 6. H. 7 3. b. 11. H. 7. 22. b. 9. E. 4. 3. a. 3. E. 4. 26. 39. H. 6. Tresp. 90. 4. E. 3 30. (Hob. 89. 266. 6. Co. 65. b. 1. Leon. 109. Cro. Car. 17. Cro. Jac. 302, 303. 308.)

[*] 6. Co. 14. Arundel's case.

[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 denied 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 the surer and more certain 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 then 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.

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] 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] 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

[i] 45. E. 2. 5. a. 46. E. 3. 6. & 7. Gernon's case. 18 E. 3. 58. 11. H. 4. 56. b. 57. 17. E. 3. 36. b. 39. Ass. 10. 38. Ass. 30. 35. Ass. 7. (Cro. Jac. 239.)

[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.)

[l] 8. 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.

[m] 15. E. 4. 25. 9. H. 6. 46. 26. E. 3. 7. E 4. 31. 39. E. 3. 16, 17. (Cro. Jac. 154. 1. Sid 75. Hob. 54. 66. Noy 144.

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] 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 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.

[126. a.]

[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. 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.

"*Eſtatute*," or 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.

"*Et s'ils ſont a 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 ſpeciall 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 advers 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.)

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.*

7. E. 3. 34. (Cro. El. 372.)

[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.

An

(1) [See Note 192.]

[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. 5. H. 7. 8.

[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*.

21. E. 3. 49. 30. E. 3. 8. 10. E. 3. 32. 22. E. 3. 13. 18. E. 3. Iſſue 35. 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] 12. El. Dy. 253. 22. H. 6. 19. 32. H. 6. 23. 2. R. 3. 6. H. 7. 5. 11. H. 4. 79.

[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 left the iſſue ſhould not be tried.

[u] 2. H 7. 4. 5. H. 7. 12. 26. 11. H. 4. 83. 6. E. 4. 6. b.

[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.

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] 26 H. 8. 3. 18. El. Dy. 353. (1. Sid. 215. 290. 340, 341. Cro. Cha. 164.)

[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.*

[x] 22. H. 6. 57. 59. 33. H. 6. 21. 3. H. 7. 9. 12. E. 4. 13. 17. E. 3. 53. 77, 78. 22. E. 3. 16, 17. 24. E. 3. 50. 40. E. 3. 19.

[x] There be ſome negative pleas that be iſſues of themſelves, 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 aunceſtors 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] 41. E. 3. 11. b.

[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).

[z] 10. E. 4. Proteſt. 5. 11. E. 4. 12. 32. Aſſ. 9. 30. E. 3. 14. 9. H. 6. 59. Vid. Sect. 192. (Plowd. 276. Cro. Cha. 365. Dyer. Plac. 295.)

[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.

[*] 30. E. 3. 14.

Sect. 194.

ITEM, le ſeignior ne poet mayhemer ſon villeine; car s'il maihema ſon villein, il ſerra de ceo indite a le ſuit le roy, et s'il ſoit de ceo attaint, il ſerra pur-

ALSO, the lord may not mayme his villeine; for if he mayme his villeine, he ſhall of that be indicted at the king's ſuit, and if he be of that attainted,

(2) [See Note 193.]

pur ceo un grievous fine et ranſome al roy. Mes il ſemble, que villeine n'avera pas per le ley un appeale de mayhem envers ſon ſeignior; car en appeale de mayheme home recovera forſque damages; et ſi le villeine en ceo cas recovera damages envers ſon ſeignior, et ent avoit execution; le ſeignior poit prender ceo que le villeine avoit en execution de le villeine, et iſſint le recoverie voide, &c.

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.

"*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] Stamf. lib. 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.)

"*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 ενδείκνυμι to accuſe.

[b] Lamb. Juſt. of Peace.

[c] *N'avera, &c. appeale de 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 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 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.

Here it is good to ſee, what a fine differeth from an amerciament. [g] Amerciament 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

[e] Regiſt. Judic. 25. 8. Co. 59. Beecher's caſe. (8. Co. 38.)

[f] Vide Sect. 74. 174. 441. (11. Co. 42.)

[g] 8. Co. 59. Beecher's caſe. F. N. B. 76. (1. Ro. Abr. 238.)

[b] Glanvil. lib. 9. cap. 11. Magna Charta, cap. 14. Flet. lib. 2. c. 43. & 60. & lib. 1. cap. 43. Bract. lib. 3. fol. 116.

thereof *Glanville* saith thus. [b] *Est autem misericordia domini regis, quâ quis per juramentum legalium hominum de vicineto eatenus amerciandus est, ne aliquid de suo honorabili contenemento amittat.*

[i] 22. E. 3. 1. & 2. 14. E. 3. Amerciam. 16. 8. R. 2. ibid. 26, &c.

[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] Pl. Com. 401. Cole's case. 37. H. 6. 21. 5. Co. 49. Vaughan's case.

[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] Vaughan's case ubi supra. Beecher's case ubi supra. (1. Roll. Rep. 11.)

[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, hee shall be likewise amerced *pro falso clamore.* [127. a.]

(5. Co. 49. a. Cro. Cha. 410. 8. Co. 62. b.)

[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. Amerciam 53. 43. Ass. 45, &c.

[m] And for the payment of this amerciament the demandant or plaintife, &c. shall finde pledges; and those demandants or plaintifes that shall find 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 prosequenda.*

[n] Beecher's case. 8. Co. 60. b. (1. Ro. Abr. 213.)

[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).

[o] Fleta. lib. 1. cap. 47. Stat. de exposit. verborum.

[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.

[p] Lamb. explication of Saxon words. Leges Inæ, cap. 19.

[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.*

[q] Lamb. ubi supra, and Fleta, lib. 1. cap. 47.

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.

[r] Dier, 6. Eliz. 232.

"*Ransome,*" [r] *Redemptio,* is here taken for a grand summe of money for redeeming of a great delinquent from some heynous crime,

(1) [See Note 194.]

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 law 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, *Il ferra pur ceo un grie-vous fine et 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.

[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. Comb'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, lib. 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 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 ſhal 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 between 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 bin 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* (2). And in my circuit in *anno* 1. *Jacobi regis*, in the county of *Leiceſter*, one *Wright*,

[x] Bract. lib. 1. fol. 6. Paſch. 19. E. 1. coram Rege, Rot. 36. Northt.

[y] Mirror, cap. 5. ſect. 1. & 3.

(2) [See Note 195.]

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. [127. b.]

"*Voyde, &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.

ITEM, ſi un villein ſoit demandant en action real, ou plaintife en action perſonal envers ſon ſeignior, ſi le ſeignior voile pleder en diſabilitie de ſon perſon, il ne poit faire pleine defence; mes il defendera forſque tort et force, et demandera judgment, s'il ſerra reſpondus, et monſtra ſon matter maintenant, comment il eſt ſon villein, et demandera judgment s'il ſerra reſpondue.

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; 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, how he is villeine, and demand judgement if he ſhall be anſwered.

"*DEMAUNDANT,*" *Petens*, is hee which is actor in a reall action, becauſe hee 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 himſelfe 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

[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.

(1) It ſhould be *full*.
(2) [See Note 196.]
(3) Held *contra* by three judges againſt Holt chief juſtice. Carth. 220.

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.

[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. 196.

ITEM, 6 *maners de homes y ſont*, (5) *queux, s'ils ſuont action, judgement poit eſtre demand, s'ils ſerront reſpondus, &c. Un eſt, lou villeine ſuiſt action envers ſon ſeignior, come en le cas avantdit.*

ALSO, there are ſixe manner of men, 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.

[128. a.] "*UN eſt lou villeine ſuiſt action, &c.*" *Littleton* here rehearſeth ſix kinds of diſabilities of the perſon, diſabling him to ſue any action reall, perſonall, or mixt.

[e] Bract. lib. 5. fol. 421. Britton, cap. 49. fol. 125. Mirror, cap. 2. ſect. 18. 13. H. 4. Surety 12. A Gardian ſhall diſable.

"*S'ils ſerront reſpondus.*" 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 alleage 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,*

(Poſt. 352. b.)

[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.

(4) Adjudged acc. on Demurrer, Carth. 229.

(5) In L. and M. Roh. P. and Red. the reading is *contre queux.*

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.

Sect. 197.

LE 2. eſt, lou un home eſt utlage ſur action de det ou treſpas, ou ſur auter action ou indictment, le tenant, ou defendant, poit monſtrer tout le matter de record, et l'utlagarie, et demaunder judgement, s'il ſerra reſpondue; pur ceo que il eſt hors de la ley de ſuer aſcun action durant le temps que il ſoit utlage.

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.

"*LE 2. eſt* [k] *lou un home eſt utlage, &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 communalty 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 men's 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 provors 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. 38. E. 3. 5.

[q] Bract. lib. 3. fo. 125. 3. H. 5. Utlagary 11.

[r] Britton, fo. 39.

"*Monſtrer tout le matter de record.*" Here note two things: firſt, by this word (*monſtrer*), that [s] when any man pleads an utlary in diſability of the perſon, hee 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

[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.)

(1) Rot. Parl. 20. H. 6. n. 18. c. 2. Ha'. MSS.

cient, until the writ of *exigent* be returned, and the outlawrie appeare of record: which is manifeſt by *Littleton*'s owne words, (viz.) *matter de 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.

[*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. Err. 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.

"*Durant le temps que il eſt utlage.*" [*x*] If the defendant plead an outlawrie in the plaintife, in diſability of his perſon, and 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*.

[*x*] 44. E. 3. 27. (Doct. Plac. 162. 396.)

"*Judgement s'il ſerra reſpondue.*" [*y*] If the ground or cauſe of the action bee forfeited by the outlawry, then may the outlawry bee 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.

[*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.)

[*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. [*] *Utlagatus et waiviata capita gerunt lupina, quæ ab omnibus impunè poterunt amputari; meritò enim ſine lege perire debent, qui ſecundum legem vivere recuſant.* And another ſaith, [*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*] *Utlagatus lupinum gerit caput, quod Anglicè woolfeſhead dicitur; et hæc eſt lex communis et generalis de omnibus utlagatis.* [*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

[*z*] Mir. c. 1. ſect. 3. & c. 3 & 4. ſæpe. cap. 5. ſect. 1.

[*] Fleta, lib. 1. ca. 27. Bract. li. 5. f. 421. Brit. f. 20. b.

[*a*] Mir. ca. 4. ſect. 4. defaults puniſhable.

[*b*] Lamb. fol. 128.

[*c*] 2. Aſſ. P. 3. 2. E. 3. tit. Coron. 148.

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*, *woolfeſhead* and *wulferfod* is all one.) [*] 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 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.

[*] Bracton, lib. 5. fol. 421. 8. H. 6. 9. b. 40. E. 3. 5. 35. H. 6. 6. 40. E. 3. 2.

Sect. 198.

LE 3. eſt un alien, que eſt née hors de la ligeance noſtre ſeignior le roy, ſi tiel alien voile ſuer un action reall ou perſonall, le tenant ou defendant poit dire, que il fuit née en tiel pais, que eſt hors de la ligeance le roy, et demander judgement ſi il ſerra reſpondue.

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 judgement if he ſhall be anſwered.

"ALIEN," [a] *Alienigena*, is derived from the *Latine* word *alienus*, and according to the etymologie of the word, it [129. a. 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 *hors del realme*, but *hors de 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. a provors. 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. Calvin's caſe.

14. H. 4. 19, 20. 3. H. 6. 55. 22. H. 6. 38. Stanf. Pl. Cor. 197. a. 7. Co. 1. 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 (2. Inſt. 741.) 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 oriundas, 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.

[b] 9. E. 4. f. 8. Pl. Com. 130. b.

[c] Rot. Parl. 22. E. 1. Elias de Daubenie.

There

(1) [See Note 197.] (2) [See Note 198.]

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 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 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. (Cro. Cha. 601.)

" *Ligeance*," *à ligando*, being the higheſt and greateſt obligation of dutie and obedience that can be. Liegeance 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.* Vide Calvin's caſe ubi ſupra.

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.* [*d*] 13. El. Dier fo. 300. b. Doctor Storie's caſe.
  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.* (Hob. 271.) [*e*] 3. & 4. P. & M. Di. 144. 7. Co. 6, &c. Calvin's caſe.
  - *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. [*f*] 9. E. 4. 7. Calvin's caſe ubi ſupra. (Cro. Jam. 539. 2. Ro. Rep. 95.)

[*] 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 hee bee an alien borne out of the king's ligeance; becauſe he bringeth it not in his owne [129. b.] right, but in the right of his monaſtery, and not in his naturall but in his politique capacity (1). [*] 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 ou perſonall.* [*b*] 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 (Doct. Plac. 8. Dy. 2. b.) [*b*] Bracton, 426, 427. 430. 8. F. 3. 51. 5. E. 2. Aiel 8.

[129. b.]

(1) [See Note 199.]
(2) [See Note 200.]

(1) [See Note 201.]
(2) [See Note 202.]

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.

tions 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.*

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. Vid. 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.

[*] 29. E. 3. Br. Denizen 15. Vid. Stanf. Pl. Co. 197. a.

[*] 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).

"*Hors del ligeance nostre seignior le roy.*" 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 so much and so plentifully spoken in our bookes, and especially in the case of *Calvin ubi supra*, as this shall suffice.

"*Et demaunder judgment s'il serra respondue.*" So as the tenant or defendant shall neither plead *alien nee* 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.

LE 4. est un home, que per judgment done envers lui sur un briefe de præmunire facias, &c. *est hors de protection le roy. Si il suist aſcun action, et le tenant ou le def. monstrera tout le record envers luy, il poit demaunder judgement s'il serra respondue; car la ley le roy et les briefs le roy sont les choses, per queux home est protect et aide; et issint, durant le temps que home en tiel cas est hors de la protection le roy, il est hors de estre aide ou protect per la ley le roy, ou per briefe le roy.*

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.

"*PRÆMUNIRE.*"

(3) [See Note 203.]
(4) [See 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.

"*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 appeare. 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 doe 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*. (3. Inſt. 119.)

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. 1. Eliz. ca. 1.

6. H. 4. c. 1. 24. H. 8. c. 12. 25. H. 8. c. 19, 20. 26. H. 8. c. 16. 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, & 430. & ibid. Mich. 9. H. 7. f. 23.

"*Hors del protection le roy.*" The judgement in a *præmunire* is, that the defendant ſhall be from thenceforth out of the king's pro-
[130. a.] tection, 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 bin ſlaine by any man, without danger of law; becauſe [*k*] it was provided by law, that a man might doe 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 lawfull 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 bee underſtood of ſuch an eſtate as he may lawfully forfeite, and that is during his owne life. And theſe generall words doe not take away the force of the ſtatute *de donis conditionalibus*, but hee ſhall forfeit all his fee ſimple lands, ſtates for life, goods and chattels; and ſo was it reſolved in *Trudgin*'s caſe.

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. 105. Doct. & Stud. Lib. 2. cap. 32. Brooke tit. Præmunire 21. Temps E. 6. Biſhop Barloe's caſe.

[*k*] 24. H. 8.

Brooke Coron. 196. [*] 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.)

"*Car la ley le roy et les briefes le roy, &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,

[*l*] 4. E. 4. 8. 1. E. 4. 1. b. 30. E. 3. 4. 8. Eliz. Dier 245.

treason, or felony, is disabled to bring any action: for he is [*] *extrà legem positus*, and is accounted in law *civiliter mortuus*.

[*] Mich. 9. E 3. coram rege, Rot. 84. Warw.

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.)

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 bee 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 bee 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.

[a] 39. H. 6. 39. 3. H. 6. tit. Protection 2. 13. R. 2. ca. 16. [b] Mirror, cap. 3. Sect. 23. Britton, fo. 281. Fleta, lib. 6. cap. 7, 8, &c. Bracton. [*] 5 Marie Dyer 162. (Cro. Cha. 389.) [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.

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.

[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

(1) [See Note 205.]

neceſſary attendants upon the campe, and that in three caſes, *quia lotrix, ſeu nutrix, ſeu obſtetrix.*

[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 lawe. [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 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-ſommons 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.

[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.
[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. 10. E. 3. 54. 13. E. 3. Amerciament 18. 7. Co. 7, 8. Calvin's caſe. 13. R. 2. cap. 16. (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 bee granted againſt body, lands,

[l] 4. H. 6. 22. 17. E. 3. 76. 33. E. 3. tit. Protect. 115. 34. E. 3. ibid.

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.

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 bee 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.

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] 22. E. 3. 4. 16. E. 3. Protect. 47. 44. E. 3. 16. 3. E. 3. Amerciament 18. 34. E. 3. Protection 123.

[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.

[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. 125. 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 Caliciæ*, *&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. 33. E. 3. ib. 99.

[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

[131. a.]

21. E. 3. 13. [s] 10. H. 6. Protect. 105.

are

are expreſly ouſted. A protection may be caſt againſt the queene the conſort of the king.

[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 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. [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.

[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.

[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 plaintife, 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.

[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 bee 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 bee 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 bee but upon a day of appearance.

[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*.

[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. Bozom's caſe. Bract. lib. 5. fo. 139, 140. (2. Ro. Abr. 325, 326.)

[u] 13. E. 3. tit. Protection 52. 12. E. 3. ibid. 69. 31. E. 1. ibid. 112.

[w] 19. E. 2. Protect. 111.

32. E. 3. ibid. 54.

[x] 23. H. 8. c. 3. 34. E. 1. Protection 38. 7. H. 4. c. 4. 1. R. 2. cap. 8.

[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. 220.)

[a] Paſch. 12. Ja. Regis in the King's Bench.

[b] 13. E. 3. Protect. 72. Fleta, l. 2. c. 12. 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] 20. E. 3. Protect. 83.

To

(1) S. C. Mo. 844.

[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.

[d] To the ſixth, no writ of protection can be allowed, unleſſe it be under the great ſeale, [*] and it is directed generally.

[e] 43. E. 3. Protect. 96.

[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 or not of record, and not the ſherife, or any other officer or miniſter.

[f] 21. E. 4. 18. [g] 38. H. 6. 23.

[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 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.

[b] 44. E. 3. 12. 47. E. 3. 6.

[b] 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 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.

[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. 20. E. 3. Protect. 80. 34. E. 3. ibid. 119.

[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 tranſmarinis redire.* Whereupon there be two concluſions to bee obſerved. [131. b.

[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.

Firſt, that though the protection be allowed by the court for a yeare, yet if it be repealed by an *Innoteſcimus*, that the re-ſommons 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 281. 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 duty

or

(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.

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 hee 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 certain time limited in it; [*o*] whereof you ſhall read 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 bookes, becauſe they ſtayed no actions or ſuites. [*q*] Of the divers formes of theſe you ſhall read 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. 280, &c. F. N. B. 29. A. B. C. D. E. F. G. H. Regiſter 280. 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).

(1) See ante 30. b. (2) [See Note 206.]

Sect.

Sect. 200.

LE 5. eſt, un home que eſt enter et profeſſe en religion. Si tiel ſuiſt un action, le tenant ou defendant poit monſtrer, que tiel eſt enter en religion en tiel lieu, en l'order de Saint Benet, *et la eſt moigne profeſſe, ou en l'order des friers, preachers ou minors, et la eſt frere profeſſe, et iſſint des auters orders de religion, &c. et demaundera judgement s'il ſerra reſpondue. Et la cauſe eſt; pur ceo que quant un home entra en religion, et eſt profeſſe, il eſt mort en ley, et ſon fits, ou auter couſin maintenant luy enheritera, auxy bien ſicome il fuit mort en fait. Et quant il entra en religion, il poit faire ſon teſtament, et ſes executors; les queux executors averont un action de det due a luy devant l'entre en religion, ou auter action que executors poient aver, ſicome il fuit mort en fait. Et s'il ne fait ſes executors quant il entra en religion, donques l'ordinarie poit committer l'adminiſtration de ſes biens a auters homes, ſicome il fuit mort en fait.*

THE fifth is, where a man is entred and profeſſed in religion. If ſuch a one ſue an action, the tenant [132. a.] 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. tra. 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. Doct. & Stud. 141. 21. R. 2. Judgment 263. 11. R. 2. ibid. 107. (Poſt. 136. a.)

"*ENTRE et profeſſe en religion.*" [a] It is to be obſerved, that a man doth enter into religion at his firſt comming, and liveth under obedience; but hee 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 authour ſaith here, *enter et profeſſe.*

[b] 4. H. 4. ca. 17. 25. H. 8. ca. 12.

"*En l'order des frieres, preachers ou* [b] *minors.*" 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 bee 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.*

[c] Bracton, fo. 421. b.

"*Il eſt mort en ley.*" *Civiliter mortuus,* or *mortuus ſæculo.* [d] There is a death in deede, and there is a civill death, or a death

[d] Bracton, fo. 301. 426.

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.*

Britton, fo. 226. 250, 251. Fleta, lib. 6. ca. 41.

[e] F. N. B. 196. 5. E. 4. 3.

132. b.] "*Auxibien come il fuit mort en fait.*" 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 a 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 foraine 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.

And

(1) [See Note 207.]

[132. b.]

(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.

[o] 2. H. 4. 7. 8. H. 5. 6. 7. E. 4. 30. 44. E. 3. 4. 20. E. 3. Vill. 10. & Nonability 9. 49. E. 3. 4. [*] Bract. fo. 415, 416. 429. Mir. c. 2. sect. 14. 14. H. 4. 37. b. 5. H. 7. 26. Vid. Sect. 296. 14. E. 4. 36.

[o] And if a monke be farmer of the kinge, yeelding 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 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 damnum ipsius prioris*, the writ is good; and if it be *ad damnum 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. Nonabilitie 3. 9.

[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.*

[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 shee 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 bin given before at the parliament holden in *Craft. 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

[133. a.]

Pl. in Parliam. 19. E. 1.

(1) See Ellesm. Argum. in the case of the *post nati* 56.

claiming the land by eſcheat, had taken the poſſeſſion thereof) alledged, *quòd non fuit juri conſonum, quòd aliqua fœmina intraret 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.*

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.

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 habilitie 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 bee 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 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*.

(3. Inſt. 217.) 8. E. 2. Coron. 425. So reſolved in parliament upon 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.)

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.

But

(2) [See Note 208.]
(3) [See Note 209.]
(4) [See Note 210.]

[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.

The queene nor the king's ſonne are reſtrained by the ſtatute of 1. *H.* 4. cap. 6. concerning grants by the king.

[b] 18. E. 3. 2. 33. E. 3. Brief 916. F. N. B. 101. a.

[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.

[133. b.

[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 bailiſe. Otherwiſe it is when any other is lord.

[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 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 county.

[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. [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.

"*Il poet faire ſon teſtament et ſes 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. 4. 25. 6. E. 4. 4. 45. E. 3. 10. a. 18. E. 4. 19. 22. H. 6. 5. 5. H. 7. 25. b.

"*Donques l'ordinary poet committer adminiſtration, &c. ſicome il fuit mort en fait.*" [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.

(1) [See Note 211.]

Sect.

Sect. 201.

LE 6. eſt, lou un home eſt excommenge per la ley de ſaint eſgliſe, et il ſuiſt un action real ou perſonal, le tenant ou defendant poit pleder, que celuy, que ſuiſt, eſt excommenge, et de ceo covient monſtrer lettre de l'eveſque ſouth ſon ſeale, teſmoignant l'excommengement, et demaundera judgement, s'il ſerra reſpondue, &c. Mes en ceſt cas, ſi le demandant ou plaintife ceo ne poit dedire, le breve n'abatera my, mes le judgement ſerra, que le tenant ou defendant alera quite ſans jour, pur ceo, que quant le demandant ou plaintiſe ad purchaſe les letters de abſolution, et ceux ſont monſtres a le court, il poit aver un reſommons, ou reattachment, ſur ſon original, ſolonque la nature de ſon briefe. Mes en les auters 5. caſes le briefe abatera, &c. ſi le matter monſtre ne poit eſtre dedit.

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 demandant or plaintife cannot deny it, the writ ſhall not abate, 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.

"*EXCOMMENGE, 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.*

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 bailifes 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.

[a] Bracton, lib. 5. fol. 415. 426, 427. Fleta, lib. 6. c. 44. Britton, ca. 49. fol. 125. (F. N. B. 62. Doctr. Plac. 8.)

[*] 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.

[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.

[134. a.]

"*Lettre*

"*Lettre del eveſque ſouth ſon 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.

[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 foraine 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.*

"*Eveſque.*" *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, 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).

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

[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] 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] Hil. 14. E. 3. Coram rege, London, in Theſaur. (Ante 97. a. Poſt. 344.)

[l] 17. E. 3. fo. 40. 25. E. 3. cap. de Proviſ. 25. H. 8. ca. 10. 3. Co. 73. le caſe de deane & chapter de Norwich. Mat. Par. pag. 62. Vid. Sect. 133, 134.

[m] Rot. Patent. 15. January, 17. Regis Johannis. Mat. Par, pag. 252. 35. E. 1. Leſtat. de Carliſle. 25. E. 3. Leſtatut. de Proviſ. 13. R. 2. ca. 2.

[n] 25. H. 8. ca. 20.

[o] 2. E. 3. Corone, 160. 8. E. 3. 59. 24. E. 3. 33. 44. E. 3. 28. 8. R. 2. Conuſans 88. (2. Ro. Abr. 589.) [p] 41. E. 3. 42. E. 3. fo. 18. E 3. 61. 14. H. 4. 25. 3. H. 4. 12. Regiſt. 7. a. F. N. B. 6. E.

common

(1) [See Note 212.]
(2) [See Note 213.]
(3) [See Note 214.]
(4) [See Note 215.]
(5) [See Note 216.]

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
134. b.] 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 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.

[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.
[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.

"*Le briefe n'abatera, &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.

[*] "*Alera quite ſauns jour, &c.*" That is, to goe 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 bee 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.

"*Jour.*" *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 originall be returned *tarde*, and *ſommons alias* goeth forth, there muſt be nine returnes betweene 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 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 ent 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 reſpens,*

Britton, fol. 10. b.

(1) [See Note 217.]

ſpons, 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. [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 doe 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. 8 H. 5. Error 87. 12. E. 4. 15. [b] 41. E. 3. Jour 16. 8 E. 4. 4. 1. H. 6. 4. 27. Aſſ. 33.

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, 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. [135. a.

[c] 3. E. 2. Avowrie 188. 15. E. 3. Jour 20. 22. E. 3. 20. 1. E. 3. 4. 9. Co. 49. Countee de Salop'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. [e] 22. E. 4. Jour 39. 18. E. 3. ibid. 20. 38. E. 3. 20. 9. Aſſ. 21. 21. E. 3. 13. 39. H. 6. 29.

41. E. 3. ibid. 16. 33. H. 6. 42. 34. H. 6. 27. 10. Eliz. Dier 269. 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,

[f] 21. E. 3. 43. 3. H. 6. 2. a. 22. H. 6. 20.

*

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.

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. 8. 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 an excellent preamble; viz. *Et pur ceo que grand charitie ſerra de faire droit a touts en tout temps, ou meſtior ſerroit; purvieu eſt per 'aſſentment des prelates, que aſſiſes de novel aiſſeiſin, mortdaunceſter, et darreine preſentment, fuiſſent priſes en le Advent, en Septuageſime, et en Quareſme, auxibien come (le home) prent lenqueſtes: et cco pria le roy as eveſques.*

[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.

[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 noſtantre, ou en diſhoneſt lieu.*

[l] 7. Aſſ. p. 7. 14. Aſſ. 5. F. N. B. 177, &c. Britton, fol. 134. b.

[m] W. 1. cap. 51. fait anno 3. E. 1. Britton, fol. 134. ca. 53.

[n] Mirror, lib. 5. ſect. 1.

Furthermore,

(1) [See Note 218.]
(2) [See Note 219.]
(3) See further, as to *dies non juridici*, Spelman's Treatiſe on the Terms amongſt his Poſthuma, page 87.

[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, doe 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 definit in occaſu:* and of this day the law of *England* takes hold in many caſes. Now divers nations beginne the day at divers times. The *Jewes*, the *Chaldeans*, and *Babylonians*, beginne the day at the riſing of the ſunne; the *Atheneans* 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. [q] 17. Eliz. Dier 345. (2. Ro. Abr. 521.) [r] 21. H. 3. ſtat. de anno biſſextili.

[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. 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.*

[135. b.

[s] 6. Co. 62. Cateſbye's caſe. (2. Ro. Abr. 521. Cro. Jam. 167.)

"*Reſommons ou re-attachment.*" 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.)

But in the caſe of outlawry the writ ſhall abate if he obtaine not his pardon. 4. E. 3. 27.

"*Sur ſon originall.*" 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 reattachement.

In ancient times more perſons ſeemed to be diſabled then theſe ſixe recited by *Littleton*. As firſt, he that was a leper, and by the writ

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. Numer. cap. v. verſe 1, 2. iv. Regum, c. 15.

[*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 hee muſt bee 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.

[*c*] Bract. l. 5. 420, 421. Britton, f. 39. Fleta, 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.)

Sect. 202.

136. a.] *ITEM, ſi un villein eſt fait un chapleine ſeculer, uncore ſon ſeignior poit luy ſeiſer come ſon villein, et ſeiſer ſes biens, &c. Mes il ſemble, que ſi le villein entre en religion, et eſt profeſſe, que le ſeignior ne poit luy prender ne ſeiſer, pur ceo que il eſt mort en ley; nient*

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

(1) [See Note 220.]

(2) Vide tamen Paſch. 8. E. 1. rot. 7. *the caſe of Edward Rowald* contra.—Hal. MSS.

nient pluis que ſi un frank home prent un niefe a ſa feme, le ſeignior ne poit prender ne ſeiſer la feme de le baron, mes ſon remedy eſt d'aver un action envers le baron, pur ceo que il priſt ſa niefe a feme ſans ſon licence et volunt, &c. Et iſſint poit le ſeignior aver action envers le ſoveraign del meaſon, que priſt et admittaſt ſon villein d'eſtre profeſſe en meſme le meaſon, ſans licence et la volunt le ſeignior, et recovera ſes damages a la value de le villein. Car celuy que eſt profeſſe moigne, ſerra un moigne, et come un moigne ſerra pris pur terme de ſa vie natural, ſinon que il ſoit deraigne per la ley de ſaint eſgliſe. Et il eſt tenus per ſon religion de garder ſon cloiſter, &c. Et ſi le ſeignior luy puiſſoit prender hors de ſa meaſon, donques il ne viveroit come un mort perſon, ne ſolonque ſon religion, le quel ſerroit inconvenient, &c.

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 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.

"CHAPLEINE [a] *ſeculer*" is he that is *infra ſacros ordines*; but he is not regular, (that is) liveth not under certaine rules, nor hath vowed thoſe three things above ſpecified.

[a] Mirror, cap. 2. ſect. 18. Doct. & Stud. fol. 141. 4. E. 4. 25. per Danby. 27. Aſſ. pl. 49.

[b] "*Enter en religion, et eſt profeſſe.*" 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. Nonabilit 26. 47. E. 3. Caſu. ult. (12. Co. 9. 1. Ro. Abr. 340.)

But if a man marieth a nunne, or a monke marieth, theſe marriages were holden void, and the iſſues baſtards; becauſe (as it was then holden) the mariage was utterly voyde, for that the nunne and the monke (as *Littleton* here ſaith) were dead perſons in law. And that is the reaſon yeelded by *Littleton*, wherefore a villeine, being profeſſed in religion, cannot be ſeiſed 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 priviledged. [d] *In decretalibus*

[d] Glanvil, lib. 5. cap. 5. Britton, fo. 79. & 82.

(1) See 2. Inſt. 687.

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 diſ-
[136. b.] graded. 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.*

[e] Fleta, lib. 2. cap. 44. Britton, ubi ſupra.

"*Si un frank home prent un 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 ſhee ſhall be privileged during the coverture onely, unleſſe the lord himſelf 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 manor, 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] 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.

[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. [g] 16. H. 3. nuper obiit 17. 8. H. 3. Breve 789.

"[h] *Mes ſon remedie eſt d'aver un action vers le baron, &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 marieth 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.

[h] Vide Britton, fol. 82. Forteſc. c. 43. 46. E. 3. 6. a. [i] 7. R. 2. tit. Barre 240. (F. N. B. 168. b. 1. Leon. 240.) [k] Britton, fol. 82. b.

"*Sovereigne,*" *præcipuus, chiefe*; as here, *ſovereigne del meaſon*, is the chiefe of the houſe.

31. H. 6. ca. 5. 12 H. 7. c. 7. 11. H. 4. 5. b.

"*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 and turned out of his order of religion, and become a lay man.

31. H. 8. cap. 29.

"*Le quel ſerroit 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

40. Aſſ. 27. per Finchden.

(1) See ante 123. n. 3. Poſt. 137. b.

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.

"*Si le ſeignior luy puiſſoit, prender, &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.

EN meſme le manner eſt, ſi ſoit gardeine en chivalrie de corps et de terre d'un enfant deins age, ſi l'enfant, quant il vient al age de 14 ans, entra en religion, et eſt profeſſe, le gardein n'ad auter remedy (quant a le garde de le corps) forſque breve de raviſhment de garde envers le ſoveraigne de le meaſon. Et ſi aſcun eſteant de plein age, que eſt coſin et heire del enfant, enter en le terre, le gardein n'ad aſcun remedie quant al garde de la terre, pur ceo que l'entrie del heire l'enfant eſt congeable en tiel caſe.

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.

"*BRIEFE de raviſhment de garde.*" 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 judgement 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 treſpas in that caſe. [137. a.

9 Co. Doctor Huſſey's caſe, fol. 72.

"*Apres l'age de 14 ans, &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.

"*Le gardein n'ad aſcun remedie, &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 it is

abſque

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). (Noy 184. 1. Ro. Abr. 107. Poſt. 197. b.)

Sect. 204.

ITEM, en mults et divers caſes le ſeignior poit faire manumiſſion et enfranchiſement a ſon villein. Manumiſſion eſt properment, quant le ſeignior fait un fait a ſon villein de luy enfranchiſer per hoc verbum (manumittere), quod idem eſt quod extra manum vel extra poteſtatem alterius ponere. *Et pur ceo que per tiel fait le villein eſt mis hors de la main et de la poier ſon ſeignior, il eſt appell' manumiſſion. Et iſſint cheſcun maner de enfranchiſement fait a un villein poet eſtre dit manumiſſion.*

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 maner of infranchiſement made to a villein may be ſaid to be a manumiſſion.

"*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.

[*l*] Glanvill. lib. 5. cap. 5. Britton, fol. 78, &c. 82. 97. 110. Fleta, lib. 3. cap. 13. & lib. 2. cap. 44.

[137. b.] "[*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 bee 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 villein 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*

[*m*] Mirror, ca. 2. ſect. 18.

[*n*] Mirror, cap. 2. ſect. 18.

[*o*] Forteſcue, cap. 46.

priſtinam redigunt ſervitutem, ſed leges Angliæ ſemel manumiſſum ſemper liberum judicant, gratum et ingratum.

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 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 wiſedome 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.

[p] 39. E. 3. 6. b. F. N. B. 79. a. (Dy. 266. b. 283. b.)

[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, ſi le ſeignior fait a ſon villeine un obligation de certeine ſomme d'argent, ou grante a luy per ſon fait un annuity, ou leſſa a luy per ſon fait terres ou tenements pur terme des ans, le villeine eſt enfranchiſe.

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.

(1) Ante 123. a. n. 3.

Sect.

[138. a.]

Sect. 206.

AUXY, ſi le ſeignior fait un feoffment a ſon villeine d'aſcun terres ou tenements, per fait ou ſans fait, en fee ſimple, fee taile, ou pur terme de vie ou ans (1), *et a luy livera ſeiſin, ceo eſt un enfranchiſement.*

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, and delivereth to him ſeiſin, this is an enfranchiſement.

This is evident, and agreeth with our bookes.

Vide 24. E. 3. 32. 12. H. 3. tit. Vill. 42.

Sect. 207.

MES ſi le ſeignior fait a luy un leaſe des terres ou tenements, a tener a volunt le ſeignior, per fait ou ſauns fait, ceo n'eſt aſcun enfranchiſement; pur ceo que il n'ad aſcun manner de certainty ne ſuertie de ſon eſtate, mes le ſeignior luy poit ouſter quant il voilet.

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.

"*PER fait.*" 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.

AUXY, ſi le ſeignior ſuiſt envers ſon villein un præcipe quòd reddat, *s'il recover, ou ſoit nonſue apres appearance, ceo eſt un manumiſſion, pur ceo que il puiſſoit loyalment enter en la terre ſans tiel ſuit. En meſme le manner eſt, s'il ſuiſt envers ſon villeine un action de debt ou d'account, ou de covenant, ou de treſpaſſe, ou de hujuſmodi, ceo eſt un enfranchiſement, pur ceo que il puiſſoit empriſon le villein, et prender*

ALSO, if the lord ſueth againſt his villeine a *præcipe quòd reddat*, if he recover, or be nonſuite after appearance, this is a manumiſſion, for that he might lawfully have entred 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,

(1) The words *ou ans* not in L. and M. Roh. nor P. They firſt appear in Redm.

prender ſes biens ſans tiel ſuit. Mes ſi le ſeignior ſuiſt ſon villeine per appeale de felony, ou il fuit endict de ceo devant, (1) *ceo ne enfranchiſera pas le villeine, coment que le matter de l'appeale ſoit trove encounter le ſeignior, pur ceo que le ſeignior ne puiſſoit aver le villein d'eſtre pendue ſans tiel ſuit. Mes ſi le villeine ne* (2) *fuit endict de meſme le felonie devant l'appeale ſue envers luy, et puis eſt acquite de ceſt felony, iſſint que il recovera dammages envers ſon ſeignior pur le faux appeale, donques le villeine eſt enfranchiſe, pur le cauſe de le judgement de dammages a luy d'eſtre done envers ſon ſeignior. Et pluſors autres caſes et matters y ſont, per queux un villein poit eſtre enfranchiſe envers ſon ſeignior, &c.* Sed de illis quære (3).

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, 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 indited of the ſame felonie before the appeal ſued againſt him, 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.

"*SI ſeignior ſuiſt envers ſon villeine un* præcipe quòd reddat, &c. *ceo eſt un 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 entred. [*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 hee 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.

(Ante 122. b. 2. Ro. Rep. 409.)

[138. b.]

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 bee 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.

"*Soit*

(1) *Ou il fuit endict de ceo devant* in Red. but not in L. and M. Roh. nor P.

(2) *ne* in Roh. and Red. but not in L. and M. nor P.

(3) *de illis quære* not in L. and M. nor Roh.

" *Soit nonſue (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 bee 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 [139. a.] 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 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 prædictâ 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 reptere 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.

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.

[*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,

[*x*] 8. Co. 58. 62. Becher's caſe. 3. H. 6. 13. Brooke tit. Nonſuit 1. 8. H. 6. 7. 50. E. 3. 12.

[*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.

[*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*] 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.

(1) [See Note 221.]

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.

[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. 7. H. 7. 5. 40. E. 3. Dam. 77. 17. E. 2. Coron. 386. 3. E. 2. Action ſur l'eſtat 28.

[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.

[e] 43. Aſſ. 39. 40. Aſſ. 1. (1. Sid. 32.)

[e] If the plaintife in an appeale of mayhem be nonſuit after appearance, it is peremptory; for the writ ſaith, *felonicè maihemavit*, and therefore the nonſuit is peremptory.

[f] 32. Aſſ. 13. 19. Aſſ. 13. 20. E. 3. Attaint 42. 22. E. 3. 7. F. N. B. 108. d.

[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 judgement 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.

[g] 11. H. 6. 23. 35. F. N. B. 35. b. 19. E. 3. tit. Sever. 14. 3. E. 2. Nonſuit 38. E. 3. 35. 10. Co 134.)

[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.

18. 19. E. 3. Sev. 16. 12. E. 3. ib. 22. 38. E. 3. 9. 29. H. 6. 45. 41. E. 3. Nonſuit 10. 45 E. 3. 10. 2. H. 4. 2. (2. Ro. Abr. 132.

[b] 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. 5 E. 3. ibid. 20. 7. E. 3. 12.

[b] 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 accoant as executors by the receit of their owne hands.

[i] 15. E. 3. Sever. 23. 6. Co. 25. Ruddock's caſe.

[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.

[k] 20. E. 3. Severance 17.

[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.

[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.

[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. [139. b

18. E. 3. ibid. 31. 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. 37.)

The

[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; 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.

[n] 2. H. 4. ca. 7. 3. E. 3. 21. 47. E. 3. 1, 2. 3. E. 4. f. 11.

[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.

[o] 2. H. 5. 5. 8. R. 2. Nonſuit 34.

[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).

[p] 9. H. 7. 1. 21. E. 3. 32. 11. Co. 39. 41. Metcalf's caſe. (2. Ro. Abr. 131. contra.)

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] "*Apres appearance.*" For otherwiſe a ſtranger may purchaſe a writ in his name; and therefore *Littleton* materially added theſe words after appearance.

[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.

"*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 quòd faciat*, whereof you may read plentifully in the *Regiſter* and *Fitzherbert's Natura Brevium*, and belongs not properly to this treatiſe.

"*Account.*" Of this ſufficient hath beene ſaid before.

"*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.

Vid. Sect. 748. 4. Co. 80. Noke's caſe. F. N. B. 145.

"*Ou il fuit endite de ceo.*" [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 formerly indited of the felony, then though the villeine be acquited 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] 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.

[r] W. 2. cap. 12. 22. Aſſ. p. 39. 33. H. 6. 2. 14. H. 7. 2. 40. Aſſ. 18. 40. E. 3. 42.

[s] Kelway 134.

(1) [See Note 222.]

Sect.

Sect. 209.

ITEM, ſi ſeignior d'un manor voile preſcriber, que il ad eſte cuſtome deins ſon manor de temps dont memory ne curt, que cheſcun tenant deins meſme le mannor, que maria ſa file a aſcun home ſans licence de le ſeignior del mannor, ferra fine, (1) *et ont fait fine al ſeigniour del mannor pur le temps eſteant, ceſt preſcription eſt void. Car nul doit faire tiels fines forſque tantſolement villeins. Car cheſcun franke home poit frankement marier ſa file, et que pleiſt a luy et ſa file. Et pur ceo que ceſt preſcription eſt encounter reaſon, tiel preſcription eſt voyd.*

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 marieth his daughter to any man without licence of the lord of the mannour, ſhall make fine, 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.

"*QUE il ad eſte 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 mariage 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 mariage 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

[*a*] 10. E. 3. 23. Roger de Vale's caſe. 15. E. 3. Aid. 33.

[*b*] 34. H. 6. 15. a. per Litt.

[140. a]

[*b*] 43. E. 3. 5. 14. H. 6. 15.

[*c*] Bracton, lib. 1. cap. 10. Britton, fol. 79. b.

[*d*] 27. Aſſ. 44.

(1) The words *a le volunte le ſeignior* 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.

other gifts yearly in name of *chevage*, becauſe they take upon them to be their chiefe heads or leaders (3).

" *Pur ceo que ceſt preſcription eſt encounter reaſon, ceo eſt 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.

MES en le county de Kent, *ou terres et tenements ſont tenus en gavelkind, la, ou, per le cuſtome et uſe de temps dont memory ne curt, les fits males doient ovelment enheriter, ceo cuſtome eſt allowable, pur ceo que il eſtoit ove aſcun reaſon; pur ceo que cheſcun fits eſt auxy graund gentlehome come l'eigne fits eſt, et per caſe a pluis graunde honor et valour creſſera, ſil avoit rien per ces anceſters, ou autrement peradventure il ne puiſſoit tielment creſſer, &c.*

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 ſonne is as great a gentleman as the eldeſt ſonne 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.

" *EN* [e] *le county de* 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.

" *En gavelkinde.*" That is, *gave all kinde:* for this cuſtome giveth to all the ſonnes alike (4).

" *Les fits males inheriter.*" And this is the generall cuſtome extending to ſonnes. 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. Abr. 624.)

[40. b.]

" *Cheſcun fitz eſt auxy grand gentlehome come l'eigne fitz eſt.*" By this it appeareth, that gentry and armes is of the nature of gavelkinde; for they deſcend to all the ſonnes, every ſonne 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 father's armes without any difference, for that, as *Littleton* ſaith, *Sectione* 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 civile eſt dividenda.* [h] Forteſcue, cap. 40.

" *Ou*

(3) [See Note 223.]
(4) [See Note 224.]

[140. b.]
(1) [See Note 225.]

" *Ou auterment peradventure il ne puiſſoit tielment creſſer.*" The reaſon of this is rendered by the poet.

Horace.

Haud facile emergunt, quorum virtutibus obſtat
Res anguſta domi.———

31. H. 8. ca. 3. V. 18. H. 6. cap. 1. (1. Sid. 136.)

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.

In plures quoties rivos deducitur amnis,
Fit minor, ac undâ deficiente, perit.

Sect. 211.

ITEM, lou per cuſtome appel Burgh Engliſh *en aſcun burgh, le fits puiſne inheritera touts les tenements, &c. ceo cuſtome eſtoit ove aſcun certaine reaſon; pur ceo que le fits puiſne (s'il fault pere et mere) pur cauſe de ſon juventute, poit le pluis meins de touts ſes freres luy meſme aider, &c.*

ALSO, where by the cuſtome called Burrough *Engliſh* in ſome burrough, the yongeſt ſon ſhall inherit all the tenements, &c. this cuſtome alſo ſtands with ſome certaine reaſon; becauſe that the yonger ſonne (if he lacke father and mother) becauſe of his yonger age, may leaſt of all his brethren helpe himſelfe, &c.

Vide Sect. 165.

" PER *cuſtome apel Burgh* 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 yonger ſonne, if he be not of the halfe blood; and if he be, then to the eldeſt ſonne (3).

[*i*] 32. E. 3. tit. Age 81.

[*k*] Mich. 10. Ja. Eliot's caſe in Briefe de faux Judgement.

[*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 yongeſt. 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 lieu, dount en aſcun lieu le tient lieu per uſage, que le heritage ſoit departable 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.*

[*l*] Brit. 187. b.

" *Pur cauſe de ſon juventute, poit le pluis meins de touts ſes freres luy meſme aider, &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.
Gaudet equis, canibuſque, et aprici gramine campi,
Cereus

(2) [See Note 226.] (3) [See Note 227.]

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:

Nil homine infirmum tellus animalia nutrit Homer.
Inter cuncta magis.——

Sect. 212.

MES si home voile prescriber, que si ascuns avers fueront sur les demesnes de son mannor là dammage feasants, que le seignior del mannor pur le temps esteant ad use eux de distreyner, et le distresse retainer tanque fine fuit fait a luy pur le dammage a la volunt, cest prescription est void; pur ceo que il est encounter reason, que si tort soit fait a un home, que il de ceo serroit son judge demesne; car per tiel voy, s'il avoit dammages forsque al value d'un mail, il puissoit assesser et aver pur ceo C. lib. *que serroit encounter reason. Et issint tiel prescription, ou ascun auter prescription use, si ceo soit encounter reason, ceo ne doit* (1) *estre allow devant judges*; quia malus usus abolendus est (2).

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 dammages 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 bee allowed before judges; *quia malus usus abolendus est.*

"*EST encounter reason, que si tort soit fait a un home, que il de ceo serra son judge demesne.*" 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). 10. E. 3. 23. 4. E. 3. 54. 7. E. 3. 24. 38. E. 3. 18. 2. H. 3. 4. (2. Ro. Abr. 92, 93. 1. Ro. Abr. 492. 496.)

3. H. 4. 8. H. 6. 19. 5. H. 7. 9. b. * Hil. 4. H. 4. coram rege Salop.

"Malus usus abolendus est:" and every use is evill, that is (as our author saith) against reason, *quia in consuetudinibus non diuturnitas temporis, sed soliditas rationis est consideranda* (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 An. 40. E. 3. at Kilkenny. The Brehon law.

(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.

(4) See Dav. Rep. 32. & 7. Vin. Abr. 180. 185.

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).

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 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*. *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 Hyberniâ, ita quòd leges eaſdem in ſcripturas redactas reliquit ſub ſigillo ſuo ad Scaccarium Dublin.*

(Vaugh. 293.)

[141. b.

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, ſcituri pro certo, quòd ſi feceritis, dedimus in mandatis juſtitiario noſtro Hyberniæ ſtatuta curiæ noſtræ in Angliâ contra tranſgreſſiones hujus mandati noſtri cum juſtitiâ proceedat, et quòd noſtram eſt exequatur. In cujus, &c. teſte rege apud Winchcomb, 28 die Octobris, anno regni noſtri 18. Et mandatum eſt juſtitiario Hyberniæ, per literas clauſas, quòd prædictas literas patentes publicè legi et teneri faciat.

Rot. Patent. 18. H. 3. M. 17. N. 21.

Rex, &c. pro communi utilitate terræ Hyberniæ, et pro unitate terrarum, proviſum eſt, quòd omnes leges et conſuetudines, quæ in regno Angliæ tenentur, in Hyberniâ teneantur, et eadem terra eiſdem legibus ſubjaceat, ac per eaſdem regatur, ſicut Johannes rex, cùm illic eſſet, ſtatuit et firmiter mandavit. Ideo volumus, quòd omnia brevia de communi jure, quæ currunt in Angliâ, ſimiliter currant in Hyberniâ ſub novo 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. * *Una et eadem lex eſſe debet tam in regno Angliæ quàm Hyberniæ.* [m] *Terra Hyberniæ inter ſe habet parliamentum et omnimodas curias prout in Angliâ, et per idem parliamentum facit leges et mutat leges, et alii de eâdem terrâ non obligantur per ſtatuta in Angliâ, quia illi non habent milites parliamenti* (2).

Rot. Patent. 30. H. 3.

* Tri. 13. E. 1. coram rege in Theſaur. in longo placito.

[m] 2. R. 3. 12. in Camera Stellato. 1. H. 7. 3. (4. Inſt. 350.)

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).

(5) [See Note 228.]

[141. b.]

(1) [See Note 229.]

(2) [See Note 229 *.]

(3) Iriſh ſtat. 10. H. 7. c. 22.

(4) [See Note 230.]

CHAP.

CHAP. 12. Of Rents. Sect. 213.

TROYS maners de rents y ſont, c'eſtaſcavoir, rent ſervice, rent charge, et rent ſecke. Rent ſervice eſt, lou le tenant tient ſa terre de ſon ſeignior per fealty et certaine rent, ou per homage fealtie et certain rent, ou per auters ſervices et certaine rent. Et ſi rent ſervice ſoit a aſcun jour, que doit eſtre pay, aderere, le ſeignior poit diſtrainer pur ceo de common droit.

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 reddendo, quia retroit, et quotannis redit.* * And others ſay it is derived of *redae.e*, for that the rent is reſerved out of the profi s of the land, and is not due till the tenant or leſſee take the profits; for *reddendo inde* [142. a.] 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.

Here note, for the better underſtanding of antient records, ſtatutes, charters, &c. *gabel*, or *gavell*, *gablum*, *gabellum*, *gabellettum*, *galbellettum*, and *gavillettum*, doe ſignifie a rent (1), cuſtome, duty, or ſervice, yeelded 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 [illegible] Alpharo* 10 *libras.* And this is the legall ſignification thereof (2).

[a] Fleta 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 Bedling's caſe. 35 H. 6. 34. Domeſday. Statutum de gaviletto anno 10. E. 2. (Ante 87. b. Poſt. 144. 2. Ro. Abr. 446.)

" *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.

" *Sa terre.*" [c] A rent ſervice cannot be reſerved out of any 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;

Vide Sect. 218. (Ante 47. a.)

[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.

[d] 3. H. 6. 21.

(1) See acc. ante 140. a. note 4. (2) [See Note 231.]

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.

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 doe issue out of the land, the mesnalty immediately, and the seigniory mediately, which is worthy of due consideration and observation.

[e] Britton fol. 100. a. (Ante 96. a.)

"*Certaine rent.*" [e] For the rent must be certaine, or which may bee reduced to a certainty; for *id certum est, quod certum reddi potest.* [f] *Continetur charta 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.*

[f] Fleta lib. 3. ca. 14. (Ante 91. b.)

[g] 38. H. 6. 38. a. (Ante 47. a. 4. b.)

"*Poet distreiner pur ceo.*" 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 dammage feasaunt one may distreine in the night, otherwise it may bee 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.

[i] W. 1. ca. 1. 2. H. 4. ca. 1. 7. H. 4. ca. 1. 4. H. 8. ca. 8.

"*De common droit.*" 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 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 peers 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*

Lamb fo. 78. inter Leges Regis Edgari. Fleta, lib. 1. c. 29.

(3) See Bro. A. *Reservation* 46. Dr. & Stud. Dial. 2. c. 22.

riter 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
142. b.] 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 droit.* *Littleton* in this his treatiſe nameth *common droit* ſixe times.

Vide Sect. 214. 216. 226. 252. 331.

Sect. 214.

ET ſi home voyloit doner terres ou tenements a un auter en taile, rendant a luy certain rent per an (1), *il de common droit poit diſtreiner pur le rent aderere, coment que tiel done fuit fait ſans fait, pur ceo que tiel rent eſt rent ſervice. En meſme le maner eſt, ſi leas ſoit fait a un home pur terme de vie, ou d'auter vie* (2), *rendant al leſſor certaine rent, ou pur terme de ans rendant certaine rent.*

AND if a man will give lands or tenements to another in the taile, yeelding to him certaine rent by the yeare, hee 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, rendring to the leſſor certaine rent, or for tearme of yeares rendring rent.

"*SAUNS fait.*" For it is a rule in law, that a rent ſervice may be reſerved without deed. 35. H. 6. 34. (Cro. Eliz. 33. Poſt. 225. b.)

"*En meſme le manner, ſi leaſe ſoit fait, &c.*" For theſe be rents ſervices, becauſe fealty is incident to theſe rents; for (as it hath bin ſaid before) a leſſee for life or years ſhall doe fealty. And if a man make a leaſe at will, reſerving a rent, the leſſee ſhall not doe fealty, and yet the leſſor ſhall diſtreine for the rent of common right. Vide Sect. 131, 132.

"*Rendant*" commeth of the word *reddo, i. e. rem pro re dare,* and ſignifieth yeelding or repaying: but of this I have ſpoken before in this Chapter, Sect. 213.

Sect. 215.

MES en tiel cas, ou home ſur tiel done ou leaſe voile reſerver a luy rent ſervice, il covient, que le reverſion de les terres et tenements ſoit en le donor ou leſſor. Car ſi home voile faire feoffement en fee, ou voile doner terres en taile, le remainder ouſtre en fee ſimple, ſans

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 fee, or will give lands in taile, the remainder

(1) *Per an* not in L. and M. nor Roh. but in P. and Red.

(2) *Ou d'auter vie* not in L. and M. nor Roh. but in P. and Red.

ſans fait, reſervant a luy certaine rent, tiel reſervation eſt void, pur ceo que nul reverſion remaine en le donor, et tiel tenant tient la terre immediatment de la ſeignior, de que ſon donor tenoit, &c.

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.

(Ante 22. b. Plowd. 151. a. 162. a. Cro. Cha. 400. 548. 2. Ro. Abr. 60.)

"*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 47. a.)

"*Il covient, que le reverſion, &c. ſoit en le donor ou 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.

"*Reſervant.*" *Reſerver* 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). [143. a.]

[*k*] 8. E. 4. 48. 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.

"*Le remainder ouſtre en fee ſimple ſans fait.*" 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 judgement 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. 38. E. 3. 36. 44. E. 3. 8. (Ant. 49. b.)

"*Remainder,*" in legall Latine, is *remanere,* coming of the Latine 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.)

(1) [See Note 232.]

(2) See Fearne's Eſſ. on Conting. Rem. 3d ed. p. 5. to 11.

Sect.

Sect. 216.

ET ceo eſt per force de le ſtatute de quia emptores terrarum. *Car devaunt le dit eſtatute, ſi home feſoit un feoffement en fee ſimple, per fait ou ſans fait, rendant a luy et a ſes heires certaine rent, ceo fuit rent ſervice, et pur ceo il puiſſoit diſtreiner de common droit; et s'il fuit nul reſervation d'aſcun rent, ne d'aſcun ſervice, uncore le feoffee tenuſt del feoffor per autiel ſervice, que le feoffor tenuſt ouſtre de ſon ſeignior procheine paramont.*

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, yeelding to him and to his heires a certaine rent, this was a rent ſervice, and for this hee 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.

"*QUIA emptores terrarum.*" Hereof is ſpoken before in the Chapter of *Frankalmoigne, Sectione* 140. (2. Inſt. 500. Ant. 98. b.)

"*Per fait ou ſans fait, &c.*" For all rent ſervices may be reſerved without deed (as hath been ſaid), and as it appeareth here. (Ant. 142. b.)

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.

"*Et s'il fuit nul reſervation, &c. le feoffee tenuſt del feoffor per autiels ſervices, &c.*" This is evident, and agreeth with our bookes [*], that in this caſe the law created the tenure; wherein it is to bee obſerved, how the law regardeth equitie and equalitie, without any proviſion or reſervation of the party. (Dy. 146. b. Ant. 23. a.)

[*] Britton fol. 100. 2. E. 3. 33. 25 E. 3. gard. 21. 49. E. 3. 10. 22. Aſſ. pl. 53.

Ipſe etenim leges cupiunt, ut jure regantur.

7. H. 4. 14. 23. E. 3. avowrie 235. 4. H. 6. Littl. cap. Taile, Sect.

143. b.]

Sect. 217.

MES ſi home, per fait endent, a cel jour fait tiel done en fee taile (1), *le remainder ouſter en fee; ou leaſe a terme de vie, le remainder ouſter en fee; ou un feoffment en fee; et per meme l'endenture il reſerve a luy et a ſes heires un certaine rent, et que ſi le rent ſoit aderere, que bien lirroit a luy*

BUT if a man, by deed indented, at this day maketh ſuch a gift in fee taile, 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

(1) *Fee* not in L. and M. Roh. and Redm.

luy et a ſes heires a diſtreiner, &c. tiel rent eſt rent charge; pur ceo que tielx terres ou tenements ſont charges ove tiel diſtreſſe per force de le ſcripture tantſolement, et nemy de common droit. Et ſi tiel home, ſur fait endent, reſerva a luy et a ſes heires certain rent, ſans aſcun tiel clauſe miſe en le fait, que il poit diſtreiner, donque tiel rent eſt rent ſecke; pur ceo que il ne poit vener de aver le rent, ſi ceo ſoit deny, per meane de diſtreſſe; et s'il ne fuit unques en ceſt cas ſeiſie de le rent, il eſt ſans remedie, come ſerra dit apres.

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, without any ſuch clauſe put in the deed, that he may diſtreine, then ſuch rent is rent ſecke; for that hee cannot come to have the rent, if it be denied, by way of diſtres; and if in this caſe hee were never ſeiſed of the rent, he is without remedie, as ſhall be ſaid hereafter (2).

Britton fol. 100. 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.)

"*PER fait endent.*" It cannot be a deed indented unleſſe it bee 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).

[*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.)

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*] Fleta lib. 3. ca. 14. Britton fol. 100.

[*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.*

[*r*] 12. E. 2. feoffments 8. 18. E. 2. Aſſ. 381. (Ant. 47. a. 2. Ro. Abr. 447. Cro. Cha. 289.)

"*Reſervant a luy.*" [*r*] Note, it is a maxime in law, that the rent muſt be reſerved to him from whom the ſtate of the land moveth, and not to a ſtranger. [*ſ*] But ſome doe hold, that otherwiſe it is in the caſe of the king.

[*ſ*] 35. H. 6. 36. (2. Ro. Abr. 447. 425. Mo. 93. 168.)

Old Tenures. Britton cap. 66. 164. F. N. B. 210. Bract. 86.

"*Et tiel rent eſt 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 [144. a.

[*t*] 7. Co. 28. b. Maund's caſe. H. 43. El. in. Com. Banco. Rot. 1 08. inter Maund & Gregory.

clauſe of diſtreſſe generally granted. [*t*] A man granted a rent out of certaine land, *pro conſilio impenſo et impedendo,* 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

(2) See poſt. Sect. 341.
(3) [See Note 233.]
(4) [See Note 234.]
(5) [See Note 235.]

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 may demand it when he will, for it is only to entitle him to his remedy for his meere duty (1).

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.)

"*Diſtreyner, &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.

"*Il ſerra ſans 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.

AUXY, ſi home ſeiſie de certain terre graunt, per un fait polle, ou per indenture, un annual rent iſſuant hors de meſme la terre, a un auter en fee, ou en fee taile, ou pur terme de vie, &c. oveſque clauſe de diſtreſſe, &c. donques ceo eſt rent charge; et ſi le grant ſoit ſans clauſe de diſtreſſe, donques il eſt rent ſeck. Et nota, *que rent ſecke* idem eſt quod redditus ſiccus; *pur ceo que nul diſtreſſe eſt incident a ceo.*

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.

"*SEISIE de terre.*" [*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.

[*x*] 32. E. 3. tit. ſcir. fac. 100. 40. E. 3. Pl. Com. 139. (Ant. 47. a. 142. a. Vaugh. 202. 204.)

(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.

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*.

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.

"*Grant per fait.*" * Alſo a man may have a rent by preſcription.

* 19. E. 3. Title 34.
(Ant. 114. a. 6. Co. 58.)

"Rent ſecke *idem eſt quod redditus ſiccus.*" This needs no explanation, for *Littleton* expounds it himſelfe.

Sect. 219. [144. b.]

ITEM, ſi home granta per ſon fait un rent charge a un auter, et le rent eſt arrere, le grantee poet eſlier, s'il voet ſuer un briefe de annuitie de ceo envers le grantor, ou diſtreyner pur le rent arrere, et le diſtreſſe retainer tanque il ſoit de ceo pay. Mes il ne poit faire, ne aver, ambideux enſemble, &c. Car s'il recover per briefe d'annuity, donques la terre eſt diſcharge de le diſtreſſe, &c. Et s'il ne ſuiſt briefe de annuitie, mes diſtreine pur les arrerages, et le tenant ſuiſt ſon replegiare, et donques le grantee avowa le priſel de le diſtreſſe en le terre en court de record, donques eſt la terre charge, et la perſon del grantor diſcharge d'action d'annuity.

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 doe, 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, 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.

"*Home 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.)

"*Briefe de annuitie*" is a writ for the recovery of an annuity. [b] An annuity is a yearly payment of a certaine ſumme of mo-

[b] Doct. & Stud. ca. 3.

45. E. 3. Executor 72. (Finch's Law 301. F. N. B. 152. a.) 1. El. Dyer 344. b.

ney

ney 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, albeit he hath aſſets, unleſs the grant be for him and his heires (2.)

[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.)

"*Poet eſlier.*" 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 hee 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. 19. 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.)

"*Mes il ne poet faire ou aver ambideux enſemble.*" 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 heires or executors.

2. Co. 36, 37. in Sir Rowland Heyward's caſe.

Secondly, when one and the ſame thing paſſeth to the donee 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 parte, his heires or executors, may make election when they will.

Thirdly,

(1) [See Note 236.]
(2) [See Note 237.]

[145. a.]

(1) Lord Coke extracts the ſix following rules concerning election *verbatim* from his own Reports. See 2. Co. 36. b.

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 doe 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, rendring a rent or a robe, the leſſee ſhall have the election *cauſâ quâ 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 doe 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.

Fiftly, 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 judgement ſhall determine his election for ever; for he ſhall never have a writ of annuitie afterwards, but a *ſcire 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. (Plowd. 6. 1. Ro. Abr. 726.)

Sixtly, 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)

"*S'il recover en briefe de annuitie, donques eſt la terre diſcharge de diſtreſſe.*" Here is to be obſerved, that this determination of the election of the grantee muſt be by action or ſuit in court of record; [b] for albeit the grantee diſtreine for the rent, yet hee 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 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*.

[b] 17. El. Dyer 344. b.
[i] F. N. B. 152. a. 5. H. 7. 33. b.
[k] 12. E. 2. Dower 158.

So

(2) See F. N. B. 152. G.
(3) [See Note 238.]
(4) See acc. before Sect. 41.

[l] So if the grantee bring an affiſe 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 affiſe, 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.] "*Son replegiare.*" *Littleton* ſpake immediately before of *un briefe d'annuity*, but here he ſaith *ſon replegiare*; 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.) Glanvill. lib. 12. ca. 12. Marlbr. ca. 21. W. 1. ca. 16, 17. W. 2. ca. 39. Fleta lib. 2. ca. 40. Marlbr. 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. * Regiſtr. 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. 32.

[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. (2. Ro. Abr. 430. Plowd. 524.)

And albeit it be provided by the ſtatute of *Marlebridge*, [*cap.* 21.] *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 bee 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 propertie 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.

Marlbr. ca. 21. (2. Ro. Abr. 431.) [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] 5. E. 3. 38. 11. H. 4. 4. 17. E. 2. Propr. Prob. 6.

[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 himſelfe; for *nemo punitur pro alieno delicto* (1).

34. H. 6. 47.

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.

31. E. 3. Gage deliver. 5.

(Poſt. 282. b. Doct. & Stud. 129. b.)

If a man by his deed grant a rent with clauſe of diſtreſſe, and grant further, that hee 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 common wealth; and therefore it was diſallowed by the whole court, and awarded that the defendant ſhould gage deliverance, or elſe goe 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.

Bracton lib. 4. fo. 233. a. & b.

28. E. 3. 92. 3. H. 4. 12. 34. H. 6. 37. 2. E. 4. 23. (5. Co. 19. a.)

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.

Regiſt. fol. 133. Bract. fo. 121. & 154. W. 1. ca. 11. Fleta lib. 2. ca. 2. F. N. B. 66. b.

There is alſo a writ *de homine replegiando.* But *Littleton* is ready to give you further inſtruction: therefore heare him.

"*Et avowa le priſe, &c. en court de 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).

21. H. 6. 24. per Newton. 27. H. 6. 4.

Electio ſemel facta et placitum teſtatum non patitur regreſſum. [146. a.]
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.

(2. Co. 36. b.)

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

(1) [See Note 239.]
(2) [See Note 240.]
(3) Acc. poſt. 268. a. F. N. B. 152. A.
(4) See anſe 145. a.

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.

28. E. 3. 98. b. 27. E. 3. 89. b. (6. Co. 7. a. Ant. 139. a.)

Sect. 220.

ITEM, si home voile qu'un auter averoit un rent charge issuant hors de sa terre, mes il ne voile que sa person soit charge en ascun maner per briefe d'annuitie, donques il poit aver tiel clause en la fine de son fait: Proviso semper, quòd præsens scriptum, nec aliquid in eo specificatum, non aliqualiter se extendat ad onerandum personam meam per breve vel actionem de annuitate, sed tantummodo ad onerandum terras et tenementa mea de annuali redditu prædict', &c. (1) *Donques la terre est charge, et le person del grantor discharge.*

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 hee 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.* Then the land is charged, and the person of the grantor discharged.

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.)

"*De annuali redditu, &c.*" Here by (*&c.*) and the consequent of this Section bee implyed divers excellent points of learning, viz. If a man by his deede granteth a rent charge out of the mannour 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 bee 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

(1. Ro. Abr. 227. Hutt. 33.)

So it was resolved by the justices in 11. H. 8. as justice Spilman reporteth. 9. H. 6. 53.

(1) For the operation of this sort of *proviso*, see Dy. 222. a. and 2. Co. 72. a.

(2) See post. 286. a. & b. 393. a.

(3) Acc. in Brediman's case, 6. Co. 58. b.

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. *Quoties 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 doe 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 doe 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 manor

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.

(3) Acc. ant. 146. b.
(4) [See Note 242.]
(5) [See Note 243.]

nor 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 out of [147. b.] 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 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.

*Vide 17. E. 4. 6. ſemblable caſe. Vide Sect. prox. ſequen.

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.

(7. Co. 23.)

(Plowd. 524. b. 525. a.)

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.

22. H. 6. 10. b.

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.)

(1) See further as to extinguiſhment of rent, infra.

(2) The caſe here ſtated is Butts' 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 inrollment of a bargain and ſale to its execution are referred to. See alſo poſt. 186. a. and Hynde's caſe, 4. Co. 71. a.

Sect. 222.

ITEM, ſi home ad un rent charge a luy et a ſes heires iſſuant hors de certein terre, s'il purchaſe aſcun parcel de cel a luy et a ſes heires, tout le rent charge eſt extinct, et l'annuitie auxy (6); *pur ceo que rent charge ne poit per tiel maner eſtre apportion. Mes ſi home, que ad rent ſervice, purchaſe parcel de la terre dont le rent eſt iſſuant, ceo n'extinguera tout, mes pur le parcel. Car rent ſervice en tiel cas poit eſtre apportion ſolonque le value de la terre. Mes ſi un tient ſa terre de ſon ſeignior per le ſervice de render a ſon ſeignior annuelment a tiel feaſt un chival, ou un eſperon d'or, ou un clove, gylofer, et hujuſmodi; ſi en tiel cas le ſeignior purchaſe parcel de la terre, tiel ſervice eſt ale; pur ceo que tiel ſervice ne poit eſtre ſever ne apportion.*

ALSO, if a man hath a rent charge to him and to his heires iſſuing out of certaine land, if hee purchaſe any parcell of this to him and to his heires, all the rent charge is extinct, and the annuitie alſo; becauſe the rent charge cannot by ſuch manner bee apportioned. But if a man, which hath a rent ſervice, purchaſe parcel of the land out of which the rent is iſſuing, this ſhal 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 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 is deſtroied and put out.

(2. Inſt. 503, 504.)

"*Apportion.*" 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.

[a] Doct. & Stud. lib. 2. cap. 16. 22. H. 7. 2. 21. E. 3. 58.

[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 bee [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 hee 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 [148. a.

[b] 30. Aſſ. 12. 9. Aſſ. 22. (1. Ro. Abr. 234.)

[c] 46. E. 3. 32. 14. Aſſ. p. 14. 26. Aſſ. 38. (Ant. 146. b.)

[d] 8. H. 4. 19. (Poſt. 308. b.)

(6) In L. and M. and alſo in Roh. it is *anyenty* inſtead of *annuitie auſſi*; and ſo the ſenſ requires.

(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.

land for the ſame rent, this amounteth to a new grant of a rent in fee ſimple. (1)

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.)

Hil. 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 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.

[*f*] 14. E. 4. 4. 22. E. 4. le darrein caſe 51. 7. H. 6. 9. H. 6. 1. 5. H. 7. 33.

Ward's caſe cited in 2. Co in Hayward's caſe fo. 36.

9. H. 6. 42.

"*Car rent ſervice en tiel caſe poet eſtre apportion.*" 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.)

[*h*] Trin. 43. Eliz. Rot. 243. inter Weſt & Laſſels. & Hil. 42. Eliz. Rot. 108. in communi banco inter Ewer & Moyle.

And

(1) [See Note 244.]
(2) See acc. in the comment on Sect. 537. poſt. fol. 305. a.
(3) [See Note 245.]
(4) [See Note 246.]
(5) Ant. Sect. 216.

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.

"*Purchaſe parcell de la terre.*" This is intended of a fee ſimple, for if there be a lord and tenant of 40 acres of land by fealty and [148. b.] 20 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 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)

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 moitie.

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.

[*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.

If

[*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.)

* 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.

* 27. E. 3. 88.

[*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*] Doct. & Stud. li. 2. c. 17.

(1) [See Note 247.] (2) [See Note 248.]

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 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.

" Mes ſi un homme tient ſa terre, &c. per ſervice de render annuelment, &c. un chival, ou un eſperon d'or, &c. ſi en tiel caſe le ſeignior purchaſe parcel de la terre, tiel ſervice eſt ale. (5)

Vid. F. N. B. 234. b. Briefe de onerando pra rata port.

[149. a.] " *Chival.*" *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 hold by a horſe, becauſe the ſervice was multiplied, and each of them, viz. the feoffor and the feoffee, held by a horſe.

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.)

A. hath

(3) See the caſe of dower, poſt. 150. a.
(4) [See Note 249.]
(5) [See Note 250.]

[149. a.]
(1) It is uſed in this ſenſe in a writ in F. N. B. 93. I.

A. hath common of paſture *ſauns nombre*, in twenty acres of land, and tenne 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).

F. N. B. 209. 40. E. 3. 40.

If three joyntenants hold by an entire yearly 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).

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.

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.

Sect. 223.

MES ſi une home tient ſa terre d'un auter, per homage fealtie et eſcuage, et per certaine rent, ſi le ſeignior purchaſe parcel de la terre, &c. en tiel cas le rent ſerra apportion, come eſt avant dit: mes uncore en ceſt caſe l'homage et fealty demurront entier a le ſeignior; car le ſeignior avera le homage et fealtie de ſon tenant pur le remnant de les terres et tenements tenus de luy, come il avoit adevant (1), *pur ceo que tiels ſervices ne ſont pas annual ſervices, et ne poyent eſtre apportion, mes l'eſcuage poit et ſerra apportion ſolonque l'aſſerance et rate de la terre, &c.*

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 and fealty of his tenant for the reſt of the lands and tenements holden of him, as hee had before, becauſe that ſuch ſervices are not yearely ſervices, and cannot be apportioned, but the eſcuage may and ſhall bee apportioned according to the quantitie and rate of the land, &c.

« *PUR-*

(2) This ſame maxim is cited and applied ant. fol. 148. a.

(3) [See Note 251.]

(4) See poſt. 165. a.

(5) Acc. poſt. 149. b.

(1) In L. & M. *&c.* is here added.

"*PURCHASE parcel de la terre, etc.*" 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 bee 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.

Bruerton's caſe. ubi ſupra. (6. Co. 10.)

5. E. 2. Avowrie 266.

"*Pur ceo que tiel ſervices ne ſont paſſe annual ſervices, &c.*" This is *ratio una*, but not *unica*, as it appeareth by that which hath beene [149. b.] 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 bee 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.)

"*Solonque l'afferance et rate de la terre, &c.*" Here is by this 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 parts: * 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 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. 224.

ITEM, ſi home ad un rent charge, et ſon pier purchaſe parcel de les tenements charges en fee, et moruſt, et cel parcel deſcend a ſon fits, que ad le rent charge, ore cel (5) *charge ſerra apportion ſolonque le value de la terre, come eſt avantdit de rent ſervice; pur ceo que tiel portion de la terre purchaſe per la piere ne vient al fits per ſon fait demeſne,*

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 ſonne who hath the rent charge, now this 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

(2) Acc. ant. 149. a.
(3) Ant. 67. b.
(4) Acc. infra, Sect. 224.
(5) The word *rent* is here inſerted in L. & M.

meſne, mes per diſcent et per courſe del ley.

the father commeth not to the ſonne by his owne fact, but by deſcent and by courſe of law.

5. E. 2. Avowrie 200. 21. E. 3. 58. b. 34. Aſſ. 15. tit. Apportionment. b. 28. 9. Aſſ. 22. 30. Aſſ. pl. 12. (Ant. 148. b.)

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)

"*Purchaſe parcel de les tenements charges en 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 bee ſuſpended for one part, and in *eſſe* for another.

34. H. 6. 41. 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.

9. Aſſ. 92.

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. [150. a.]

5. R. 2. Annuity 21.

Annua nec debitum judex non ſeparat ipſum.

Pl. Com. 72. 35. H. 6. tit. Execut. 21. 15. E. 4. 5.

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).

"*Ne vient al fitz per ſon fait demeſne, mes per diſcent & per courſe del ley.*" If the father within age purchaſe part of the land charged, and alieneth within age and dyeth, the ſonne 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 ſonne hath the land by diſcent.

So it is in caſe the ſonne 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

(6) Acc. ant. 147. b.

[150. a.]

(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. Keilw. 106. a. Bro. Nov. Caſ. pl. 52. 135. Hetl. 53. March. 56. 61.

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 doe concurre with the act in law, yet the rent shall be apportioned.

3. Co. 29. in Butler and Baker's case.

Sect. 225.

ITEM, si soit seignior et tenant, et le tenant tient de son seignior per fealty et certaine rent, et le seignior granta le rent per son fait a un auter, &c. reservant a luy le fealty, et le tenant atturna al grantee de le rent, ore tiel rent est rent seck a le grantee; pur ceo que les tenements ne sont tenus del grantor (5) *de le rent, mes sont tenus del seignior que reserve a luy fealtie.*

ALSO, if there bee lord and tenant, and the tenant holds of his lord by fealtie 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 of the rent, but are holden of the lord who reserved to him the fealtie.

"*ET le seignior granta le 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.

12. E. 4. 11. 9. E. 3. 1. 40. E. 3. 22. b. 13. E. 3. tit. Releases 36. (Post. 151. a.)

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 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; 150. b.] 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.

17. E. 3. 72. 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

(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.

vered. And albeit fealty cannot bee 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.

[e] 9. E. 3. 1. (Ant. 150. a.)

"*Forſque come 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 bee 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.

MES autermẽt eſt de rent, que fuit un foits rent ſervice; pur ceo que quant il eſt ſever per le grant le ſeignior de les auters ſervices, il ne poet eſtre dit rent ſervice, pur ceo que il ne ad a ceo fealty, que eſt incident a cheſcun manner de rent ſervice; et pur ceo eſt dit rent ſecke (1). *Et le ſeignior ne poet grant tiel rent ove diſtreſſe, come eſt dit.*

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 bee 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. And the lord cannot grant ſuch a rent with a diſtreſſe, as it is ſaid. [151. b.]

"*ET le ſeignior ne poet grant tiel rent ove diſtres, come eſt dit.*" [f] For the diſtreſſe is an incident inſeparable to the fealty, as hath been ſaid [g], and therefore a releaſe of diſtreſſe is void.

[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.

(1) The words which follow in this Section are not in L. and M. nor in the Roh. edition; nor in the two MSS.

(2) [See Note 256.]

Sect.

Sect. 228.

ITEM, ſi home leſſa a un auter terres pur terme de vie, reſervant a luy certain rent, s'il grant le rent a un auter per ſon fait, ſavant a luy le reverſion de la terre iſſint leſſé, &c. tiel rent n'eſt forſque rent ſeck; pur ceo que le grantee n'ad riens en le reverſion del terre, &c. Mes s'il grant le reverſion del terre a un auter pur terme de vie, et le tenant atturne, &c. donques ad le grantee le rent come rent ſervice; pur ceo que il ad le reverſion pur terme de vie.

ALSO, if a man lett to another lands for tearme of life, reſerving to him certaine rent, if hee 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.

"*SAVANT a luy le reverſion, &c.*" By this word (*&c.*) is to be obſerved [*b*], 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.

[*b*] 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).

"*Donques ad le grantee le rent come rent ſervice; pur ceo que il ad le reverſion pur terme de vie.*" 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.* for the reverſion cannot be ſeck (5). But by the grant of the rent the reverſion doth not paſſe (6).

(3) Poſt. 309. a.
(4) Acc. ant. 121. b. poſt. 307. a.
(5) [See Note 257.]
(6) See acc. from Littleton himſelf at the end of Section 229.

Sect. 229. [152. a.]

ET iſſint eſt a entendue, que ſi home dona terrez ou tenements en le taile rendant a luy et a ſes heires certaine rent, ou leſſa terre pur terme de vie rendant certaine rent, s'il granta le reverſion a un auter, &c. et le tenant atturna, tout le rent et ſervice paſſe per ceſt parol (reverſion) pur ceo que tiel rent et ſervice en tiel cas ſont incidents a le reverſion, et paſſont per le grant de le reverſion. Mes coment que il granta le rent a un auter, le reverſion ne paſſa my per tiel grant, &c. (1)

AND ſo it is to be intended, that if a man give lands or tenements in taile yeilding to him and to his heires a certaine rent, or letteth land for tearme of life rendring a certaine rent, if hee grant the reverſion to another, &c. and the tenant atturne, all the rent and ſervice paſſe by this word (reverſion) (2) becauſe that ſuch (Poſt 324. a. b.) rent and ſervice in ſuch caſe are incident to the reverſion, and paſſe by the grant of the reverſion. But albeit that hee 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)

ISSINT nota le diverſitie. Et iſſint eſt tenus P. 21. E. 4. *Mes il eſt adjudge*, an. 26. lib. aſſiſarum, *ou les ſervices del tenant en taile fueront grants, que ceo fuit bone grant, nient obſtant que le reverſion demurt.*

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 doe hereafter in like caſes, I paſſe it 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.

(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. & 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.

(6) [See Note 258.]

Sect.

Sect. 231.

ITEM, ſi ſoit ſeignior meſne et tenant, et le tenant tient del meſne per ſervice de v. s. et le meſne tient ouſter per ſervice de xii. d. ſi le ſeignior paramont purchaſe le tenancie en fee, donques le ſervice de le meſnaltie eſt extinct; pur ceo que quant le ſeignior paramont ad le tenancie, il tient de ſon ſeignior procheine paramont a luy, et s'il doit tener ceo de luy que fuit meſne, donques il tiendra un meſme tenancie immediate de divers ſeigniors per divers ſervices, que ſerroit inconvenient, et la ley voit plus toſt ſuffer un miſchiefe que un inconvenience, et pur ceo le ſeigniory del meſnaltie eſt extinct.

ALSO, if there bee 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 then an inconvenience, and therefore the ſeigniorie of the meſnalty is extinct.

"*SI ſoit ſeignior meſne et tenant, &c. ſi le ſeignior paramont purchaſe le tenancie en fee, &c.*"

152. b.] [*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 bee; 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.

[*k*] 20. E. 3. avowrie, 126. 2. E. 2. tit. Exting. 6. 26. H. 6. ibid. 7.

[*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 bee an abbot, and the lord confirme his eſtate to hold of him in frankalmoigne, 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 bee lord and tenant, and the tenant make a gift in taile, the remainder to the king, the ſeigniory is extinct. (4)

[*m*] 4. E. 3. 19. See for this hereafter in the chapter of Confirmation, Sect. (538.)

[*n*] 8. H. 6. 24. (Poſt. 280. a.)

[*o*] 4. & 5. P. & M. Dy. 145. (2. Co. 92. b.)

"*Que ſerra 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.

"*Le*

(1) [See Note 259.]
(2) [See Note 260.]
(3) [See Note 261.]
(4) [See Note 262.]
(5) Ante 97. b.

[p] 13. H. 4. 3. 40. Aſſ. p. 27. 12. R. 2. Vouch. 81.

[p] "*Le ley veet pluis toſt ſuffer miſchiefe que inconvenience.*" (6) *Lex citiùs tolerare vult privatum damnum, quam publicum malum.* Here be two maximes of the common law.

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 helden 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.

Sect. 232.

MES entant que le tenant tenuſt del meſne per v. s. et le meſne tenuſt forſque per xii. d. iſſint que il avoit pluis en advantage per iiii. s. que il payaſt a ſon ſeignior, il avera les ditz iiii. s. come rent ſeck annuelment de le ſeignior que purchaſe le tenancie.

BUT in as much as the tenant holds of the meſne by five ſhillings, and the meſne hold but by twelve pence, ſo as he hath more in advantage by foure ſhillings, than he paies to his lord, he ſhall have the ſaid foure ſhillings as a rent ſecke yearely of the lord which purchaſed the tenancie.

"*IL avera le iiij. s. come rent ſecke.*"

And yet hee 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). [153. a.

[r] 13. H. 4. Avowrie 237. (Poſt. 225. b. Mo. 36.)

[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.

[s] 28. E. 3. 93. (Ant. 150. b. 151. b. 300. b.) [t] 31. Aſſ. 23. 22. Aſſ. 53. 2. H. 6. 14.

[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.

(6) [See Note 263.]
(7) [See Note 264.]

[153. a.]
(1) [See 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) [See Note 266.]

Sect.

Sect. 233.

ITEM, ſi home, que ad rent ſeck, eſt un foits ſeiſi d'aſcun parcel de le rent, et apres le tenant ne voyt payer le rent aderere, ceo eſt ſon remedie. Il covient de aler per luy ou per autres a les terres ou tenements dont le rent eſt iſſuant et là demander les arerages del rent; et ſi le tenant denia ceo de payer, ceſt denier eſt un diſſeiſin de le rent. Auxy, ſi le tenant ne ſoit adonques priſt a payer, ceo eſt un denier, que eſt un diſſeiſin de rent. (5) Auxy, ſi le tenant, ne nul auter home, ſoit demurrant ſur les terres ou les tenements pur payer le rent quaunt il demaund les arrerages, ceo eſt un denier en lev, et un diſſeiſin en fait, et de tiels diſſeiſins il poit aver aſſiſe de novel diſſeiſin *envers le tenant, et recovera le ſeiſin del rent, et ſes arrerages et ſes dammages et les coſtages de ſon breve et de ſon plee, &c. Et ſi apres tiel recovery [et execution ewe] (1) † le rent ſoyt auter foits a luy denie, donque il avera un rediſſeiſin, et recovera ſes double damages, &c.*

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. Hee ought to goe 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. 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, the rent be againe denied unto him, then he ſhall have a rediſſeiſin, and ſhall recover his double dammages, &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.)

"*D'aſcun 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.

"*A les terres, &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 beene ſaid before (7). [w] 49. E. 3. 14. b. 14. E. 4 4. Pl. Com. 71.

"*Arere.*" This word *arere* is to bee obſerved, for it is not
153. b.] neceſſary, that the grantee of the rent ſhould demand it at the very time

(5) The words *de 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.

(Ant. 144. a.)

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 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 behinde at any time, whether the tenant be preſent or no, for remedies for rights are ever favourably extended.

[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.)

[y] Mich. 41. E. 3. coram rege adjudge accordingly.

"*Ceo eſt un denier en ley.*" 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.)

[z] Vid. Bract. lib. 4. fol. 161, 162. 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.)

"*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 bee by right or by wrong. * *Omnis diſſeiſina eſt tranſgreſſio, ſed non omnis tranſgreſſio eſt diſſeiſina. Si eo animo fortè ingrediatur fundum alienum, non quòd 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).

Mirr. ca. 2. ſect. 25. Bracton lib. 4. ca. 4. Britton ca. 44, 45, &c. Fleta lib. 4. ca. 5, & 2. & 3.

"*Aſſiſe de 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 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 ſignifieth a jury, of their ſitting together, and alſo a ſeſſion of parliament, as *Littleton* hereafter in this Chapter ſheweth.

Mirror ca. 2. ſect. 25.

(7. Co. 3. b.)

"*Et recovera le ſeiſin del rent.*" Here, and by the (&c.) in the end of this Section is implyed, that our author intendeth his caſe where

(2) [See 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) [See Note 268.]

(8) It ſhould be *ſeſſio*, the word as Coke ſpells it tending to a wrong derivation.

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
154. a.] 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.

[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 doe not adjoyne, but there be 20 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, and thereupon count according to his caſe by the common law.

[f] 30. E. 1. tit. Droit. F. N. B. 151. m.

[g] But if the tenant in that caſe doe ceaſe, the lord ſhall not have ſeverall writs of *ceſſavit ut ſupra*; for the writ of *ceſſavit* is 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)

[g] 18. Aſſ. pl. 1.
* W. 2. cap. 21.

[b] *Il avera un rediſſeiſin & recovera ſes 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 qui fecerint diſſeiſinam, & 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)

[b] Bracton fol. 236. Britton 133. 246. Fleta lib. 4. cap. 29. Merton cap. 3. Regiſt. 206, 207.
* Mirror ca. 3. W. 2. c. 46. Vid. Sect. 234.
Vide Regiſt. 206. b. (1. Ro. Abr. 571.)

And

(9) As to livery of lands ſituate in ſeveral counties, ſee ant. Sect. 61, 62.

[154. a.]
(1) Acc. Finc. Deſcript. del Com. L. 59. a. & 49. Aſſ. pl. 1. & 21. Hen. 6. 3. there cited.
(2) [See Note 269.]
(3) Acc. F. N. B. 209. K.
(4) Acc. 2. Inſt. 82. 115.
(5) See 2. Inſt. 416.

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 ſecke 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 ſecke 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, and 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 *aſſiſa* 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)

"*Recoverie.*" *Recuperatio* commeth of the verbe *recuperare, i. e. ad rem per injuriam extortam ſive detentam per ſententiam judicis reſtitui.* And *recuperatio* in the common law is all one with *evictio* in the civill law, which is *alicujus rei in cauſam alterius abductæ per judicem acquiſitio.*

"*Et execution ewe.*" *Per vicecomitem ſeiſinam habuerit*, ſaith the ſtatute; but *Littleton* ſpeaketh generally, *(et execution ewe)* and execution had; ſo as whether it bee by the ſherife or by the party, ſo as execution or poſſeſſion be had, it ſufficeth. (9)

Vide Sect. 504.

"*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)

[*m*] 14. E. 2. tit. Rediſſ. 9. F. N. B. 189. g.

Note, it appeareth here by *Littleton*, that [*m*] the recovery in a former writ muſt be in aſſiſe of *novel diſſeiſin*, wherein theſe words *(tiel recoverie)* 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, hee ſhall not have a writ of rediſſeiſin, becauſe the firſt recovery was not by 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 borrough. Alſo in ancient demeſne there be no coroners. (11)

[*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,

[*o*] 9. H. 4. 5. F. N. B. 189. c. 23. Aſſ. pl. 7. (Cro. Jam. 334.) (F. N. B. 188. c.)

[154. b.]

(6) Acc. F. N. B. 178. D.

(7) [See Note 270.]

(8) See further as to *rediſſeiſin* Fitzherbert's comment on the writ of that name. F. N. B. 188. B.

(9) Acc. ant. 34. b. See alſo Dy. 278. b. March. 95.

(10) Poſt 289. a.

(11) [See Note 271.]

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 diſſeiſſor alone, becauſe he is jointenant 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 dammages.

[*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 & 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 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 lye 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)

De eodem tenemento, ſaith the ſtatute. If the plaintife be rediſſeiſed of parcell of the tenement formerly recovered, he ſhall have a rediſſeiſin.

F. N. B. 188. G.

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)

(Ant. 153. a.)

[*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)

[*ſ*] 26. H. 6. tit. Aid 77.

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 tacitely recovered in the aſſiſe. (6)

8. E. 3. tit. Rediſſeiſin 6. F. N. B. 189. p.

(1) [See Note 272.]

(2) See poſt. Sect. 278.

(3) Recovery in *aſſiſe* muſt be underſtood.

(4) [See 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.

Sect. 234.

ET memorandum, que ceſt noſme aſſiſe eſt nomen æquivocum; *car aſcun foits eſt priſe pur un jurie; car le commencement de le record de aſſiſe de novel diſſeiſin iſſint commencera:* aſſiſa venit recognitura, &c. quod idem eſt quòd jurata venit recognitura, &c. *Et la cauſe eſt, pur ceo que per le briefe de aſſiſe il eſt command a la vicont,* quòd faceret duodecim liberos et legales homines de vicineto, &c. videre tenementum illud, & nomina illorum imbreviare, et quòd ſummoneat eos per bonos ſummonitores, quòd ſint coram juſticiariis, &c. parati inde facere recognitionem, &c. *Et pur ceo que, per tiel original, un panel per force de meſme le briefe devoit eſtre returne, &c. il eſt dit en le commencement del record en le aſſiſe,* aſſiſa venit recognitura, &c. *Auxy, en briefe de droit il eſt communement dit, que le tenant luy poit mitter en Dieu et grand aſſiſe, &c. Auxy, il y ad un briefe en le* regiſter, *que eſt appel briefe* de magnâ aſſiſâ eligendâ. *Iſſint eſt ceo bien prove, que ceſt noſme aſſiſe* aliquando ponitur pro jurat'. *Et aſcun foits il eſt priſe pur tout le briefe d'aſſiſe; et ſolonque cel entent il eſt pluis properment et pluis communement priſe, ſiccome* aſſiſe de novel diſſeiſin *eſt priſe pur tout le breve de* aſſiſe de novel diſſeiſin. *Et en meſme le maner aſſiſe de common de paſture eſt priſe pur tout le briefe d'aſſiſe de common de poſture, et aſſiſe de mortdanceſter eſt priſe pur tout le briefe d'aſſiſe de mortdanceſter, et aſſiſe de darraine preſentment eſt priſe pur tout le breve d'aſſiſe de darraine preſentment. Mes il ſemble, que le cauſe pur que tiels briefes al commencement fueront appels aſſiſes fuit, pur ceo que per cheſcun tiel briefe il eſt commande al viſcount,* quòd ſummoneat xii, *le quel eſt a tant a dire, que doit ſummoner un jurie. Et aſcun foits*

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, *quòd facerit duodecim liberos & legales homines de vicineto, &c. videre tenementum illud, et nomina illorum imbreviare, et quòd ſummoneat eos per bonos ſummonitores, quòd ſint coram juſticiariis, &c. parati inde facere recognitionem, &c.* And becauſe that, by 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 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

foits assise est prise pur un ordinance, scil. pur mitter certaine choses en certaine rule et dispositio, sicome ordinance, que est appel (1) † assisa panis et cervisiæ.

which is as much to say, that hee ought to sommon 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 *assisa panis et cervisiæ.*

"*ÆQUIVOCUM.*" (7) For the better understanding hereof, of these there bee two kinds, viz. *æquivocum æquivocans*; and *æquivocum æquivocatum.*

Æquivocum æquivocans est plurivocum, polysemus, a word of divers severall 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*, &c. Even as *canis est nomen* 155. a.] *æquivocum*; *canis latrabilis, canis marinus, canis cœlestis, sunt æquivoca æquivocata.*

"*Assise de novel disseisin.*" Note [*a*], there be foure assises, viz. this writ, an assise of *mortdancester*, of *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.

"*Vicount.*" Vide Sect. 248. verbo (*Shireve.*) (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 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 & 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 hee sayes true. And that *number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, &c. [*b*] 1. H. 7. 2. [*c*] Vid. Pl. Com. in proœmio. 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 hee 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,

(7) See Hob. 303.

(8) Lord Coke means "taken for *jurata.*"

(2) See 3. G. 2. c. 25. s. 8.

(3) [See Note 274.]

(1)† The words *entre les aunciens estatutes* are here added in L. & M. Roh. and P.

[155. a.]

(1) *Juris utrum.*

(*) Artic. super Cart. ca. 9. Regist. 178. 8. E. 3 30.

(*) First, hee ought to bee dwelling most neere to the place where the question is moved. (2) [155. b.]

Secondly, he ought to bee most sufficient both for understanding, and competencie of estate. (3)

Vid. Sect. 102. 193.

Thirdly, he ought to bee least suspitious, that is, to be indifferent as he stands unsworne: and then hee is accounted in law *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)

[c] Vid. Artic. super Cart. ca. 9. Forteſc. ca. 25, &c. 29.

[c] 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. *et* 29. [f] And in ancient time they were 12 knights. This trial of the fact *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 *duodecim virale judicium.* (6)

[f] Glanvil lib. ca. 14, 15. Bracton lib. 3. fol. 116. a.

[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 bee *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] 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.

A chal-

(2) [See Note 275.]
(3) See post. 156. a.
(4) Of other modes of trying facts bethat by jury, see ant. 74. a.
(5) [See 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.

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 bee 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. 38. E. 3. 25. 3. H. 6. 39. 33. Ass. 12. 44. E. 3. 43.

(2. Ro. Abr. 640. Dy. 319.) [c] 11. H. 4. 26. 22. E. 4. 1. 38. H. 6. 6. (Mo. 3) [d] 14. E. 3. 5. & 38. 44. Ass. 23. 22. E. 4. 1. 15. H. 7. 9. b. 27. Ass. 28. 17. H. 7. 10. 26. Ass. 56. 22. 30. H. 6. 34. 45. Ass. 1. 9. Ass. 8. 8. Ass. 23. 7. E. 3. 56. 21. H. 7. 38. 2. H. 4. 13. 20. H. 6. 39. 44. Ass. 18. 3. H. 6. 24. 17. E. 2. Chall. 168. 4. E. 4. 11. 44. E. 3. 38. 38. Ass. 19. 22. E. 4. Chall. 63. Staml. 162. c.

[e] 4. H. 7.

[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 remedie 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,

[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. 16. Eliz. Dier 265. b. (1. Leon. 5. 2. Ro. Abr. 636.)

yet

(1) [See Note 277.] (2) [See Note 278.]

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. [b] So in an attaint there ought to be a knight returned of the jurie (3).

[b] 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 uſuall courſe. [k] The array challenged on both ſides ſhall be quaſhed.

[i] 32. E. 4. tit. Chall. 63. Stanf. 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 hee may challenge for favour, and leave it to triall. So affinitie betweene the ſonne 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 the challenge is good (5). And likewiſe the king may challenge the array for favour.

[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.

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.]

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

[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.

(3) [See Note 279.]
(4) [See Note 280.]
(5) [See Note 281.]

[156. b.]
(1) [See Note 281*.]

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 hee 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 party 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 ſeverall *venire fac.*

17. Aſſ. 6. 37. H. 6. 8. 22. H. 8. ca. 14. 33. H. 8. tit. Chal. Br. 237. 33. H. 8. ca. 23. 1. & 2. P. & M. ca. 10. 23. H. 6. 26. 14. H. 7. 14. Stanf. 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. Ventr. 309.) [q] 33. E. 1. ordinatio de inquiſitionibus. Stanf. 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: 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 delict.

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, *quòd 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

6. Co. 52, 53. Counteſſe de Rutland's caſe. 43. 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.)

per

(2) Agreed acc. in petty treaſon. in Swan's caſe, Roll. 107.
(3) Adj. acc. Plowd. 100.
(4) [See Note 282.]

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.*

1. *Patriæ*, [a] as aliens borne.

2. *Libertatis*, [b] as villeins or bondmen, and ſo a champion muſt be a freeman.

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 dammage in the declaration amounteth to fortie markes, *Vide* Sect. 464. (5) * 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 antient demeſne, for freehold within ancient demeſne will not ſerve. But if the debt or dammage 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.]

[a] 7. Co. 18. Calvin's caſe. 10. Co. 104. 14. H. 4. 19. b.
[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.
[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.) * 9. H. 6. Chal. 27. 9. H. 7. 1. (2. Ro. Abr. 647. Poſt. 272. Forteſc. 56. 62. a.) [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. Forteſc. 56. b. Poſt. 158. a.)

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 hee hath no freehold in it, it ſufficeth. [i] Thirdly, if the cauſe of the action riſeth in divers hundreds, yet the number ſhal 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] Fiftly, 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] Sixtly, 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 remaines. Otherwiſe

[f] 27. Eliz. ca. 6.
[g] 7. H. 4. 47.
[h] 16. E. 4. 7. 4. Mar. Br. Chal. 216. 21. E. 4. 74, 75. 9. H. 6. 66.
[i] 20. H. 6. 23. 4. Mar. Br. Chal. 216.
[k] 10. H. 6. 5. 12. H. 4. 14. 19. E. 4. 5.
[l] 37. H. 6. 11. 25. E. 3. 43. (Cro. Jam. 550.)
[m] 21. H. 6. 38. 13. H. 7. 4.

(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.

[157. a.]

(1) *Vid. acc. per omnes juſticiarios M.* 29. 30. *Eliz. Clench* 139.—Hal. MSS.

(2) See ant. 102. b.

(3) See Brownl. Rep. b. 194.

(4) [See Note 283.]

wife as hath bin 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. Eightly, his challenge for the hundred is not *ſimpliciter* but *ſecundùm quid*; for, though it bee 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.

[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.

Brac. 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 bee [a] of blood or kindred to either partie, *conſanguineus*, which is compounded *ex con & ſanguine, quaſi eodem ſanguine natus*, at it were iſſued from the ſame blood; and this is a principall challenge, for that the law preſumeth that one kinſman doth favour another before a ſtranger; [b] and how farre remote ſo ever he is of kindred, yet the challenge is good. And if the plaintife chalenge a juror for kindred to the defendant, it is no counter plea to ſay that he is of kindred alſo to the plaintife, though hee bee in a neerer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie.

[a] Britton fol. 135.

[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. 21. E. 4. 75.

[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

[f] 9. H. 8. 7. 28. H. 8. Dier 37. 1. Mariæ Dyer 91. 2. Eliz ibid. 177.

(5) See ant. 123. a.

(6) But the iſſue muſt be *living*. See ant. 156. a. n.

the law preferreth that which is materiall before that which is formall.

[g] Brac. Britton Fleta Mirror ubi supra } ubi supra

[g] If the juror have part of the land that dependeth upon the same title. (7)

[h] 9. H. 6. tit. Chal. 27. 38. E. 3. 25. 22. E. 4. Chal. 61. 4. H. 6. 25. 3. H. 6. 39. 36. H. 6. Chal. 46. 22. E. 4. 1. 27. Ass. 28. 22. E. 3. 12.

[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.

[i] 23. Ass. 11. [k] Mirror ubi supra.

[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 bee returned, it is a good cause of challenge.

[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.

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 hee 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, hee 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. [157. b.

[m] 43. E. 3. Chal. 93. 8. H. 5. 10.

[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.

[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] 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).

[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. 7. H. 7. 10.

[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 hee 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.

[p] 20. H. 6. 39. 9. E. 4. 46. 35. H. 6. 19. H. 6. 3 H. 6. 24. (2. Ro. Abr. 665.) [q] 9. Co. 71. Peacock's case.

[r] Mir. Bracton Britton } ubi supra

[r] If hee 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 drinke at the charge of either partie, it is a principall cause of challenge (5). Otherwise it is of a trior after he be sworne.

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.

Actions

(7) Here the sense is incompleat; 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.]

(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.

[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 doe 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 give his verdict, this is a principall challenge. But if either partie labour the juror to appeare and to doe his conſcience, this is no challenge at all, but lawfull for him to do it. (6)

[u] 17. Aſſ. 15. [w] 8. E. 3. 39. 20. H. 6. 39. 33. H. 8. Dyer 48. Hob. 294.)

[t] Brac. } ubi
Fleta } 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.
(Poſt. 379. a.

[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 bee 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 then 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 hee ſtands unſworne.

[d] The ſubject may challenge the polles, where the king is partie. And if a man bee 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 bee joyned upon a collaterall point, yet ſhall the partie have ſuch challenges

[x] 22. Eliz. Dyer 367.
Bracton } ubi
Britton } ſupra.
Fleta }
[y] 49. 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 ca. 3. d'ordinance d'attaint. Bract. lib. 4. fol. 185. Britt. fol. 134, 135. Fleta lib. 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.)

(6) [See Note 284.] (7) Held accordingly Hutt. 22.

challenges as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also (8).

[e] Mirror, Bracton, Britton, Fleta } ubi supra. 11. H. 4. 41. 12. H. 4. 10. 33. H. 6. 21. (2. Ro. Abr. 650.)

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. [158. a]

[f] W. 2. ca. 38. Artic. super cart. ca. 9. F. N. B. 165, & 166. Registr.

[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.

It is necessarie to be knowne the time when the challenge is to be taken. [g] First, hee 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, hee must shew cause presently. [k] Fourthly, so if a juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworne. [l] Fiftly, when the king is party or in an appeale of felony, the defendant, that challengeth for cause, must shew his cause presently. Sixtly, 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 bee taken before so many bee sworne as will serve for hundredors, or else hee loseth the advantage thereof. Eighthly, [m] in a writ of right, the graund jury must bee 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 bee 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 of the *tales*. After one hath taken a challenge to the polle, he cannot 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. Dower 201.
[k] 22. E. 4. 1. 9. H. 5. 6.
[l] 1. H. 5. 10. 38. Ass. 22. (Ant. 157. a.)
[m] 7. H. 4. 20. 15. E. 4. 1.
[n] 9. E. 4. 27. 9. H. 5. 11. 34. Ass. 6. 13. E. 3. Chal. 108.

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 bee 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

(8) [See Note 285.]

[158. a.]

(1) [See 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.

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 hee may have his challenge to the (4) polles. [*p*] Note, if proceſſe be once awarded for the partiality of the ſherife, though there be a new ſherife, yet proceſſe ſhall never bee 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.

[*p*] 15. H. 7. 9. 14. H. 7. 31. 18. E. 4. 3.

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.*

[*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.

[*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*. 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*] When any challenge is made to the polls, two triors ſhall bee appointed by the court; and if they trie 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*] 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 apparant in our [*w*] books. [*x*] If the foure knights in the writ of right be challenged they ſhall try themſelves (6), and they ſhall chooſe the graund aſſiſe, and try the challenges of the parties. [*y*] If the cauſe of challenge touch the diſhonor or diſcredit of the juror, he ſhall 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 bee awarded by default, the defendant hath loſt his challenge; but the plaintife may challenge for juſt cauſe, and that ſhall be examined and tried.

[*r*] 9. E. 4. 46. 19. H. 6. 48. 34. Aſſ. 6. 7. E. 6. Dier 78. 9. H. 5. 11.

[*s*] 10. Co. 104, 105. Denbawd's caſe.

[*t*] 19. H. 6. 9. 22. E. 4. Chal. 61, 62.

[*u*] 7. H. 4. 41.

[*w*] 11. H. 4. 61. 48. E. 3. 30. 11. H. 4. 63.

[*x*] 22. E. 3. 18. 39. E. 3. 2.

[*y*] 49. E. 3. 1, 2. (Hob. 84. 1. Sid. 374. 232. Cro. Jam. 388. 1. Ro. Rep. 110.)

[*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

[*a*] 8. H. 5. tit. Chal. 167. 2. H. 4. 3.

(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.

[158. b.]

(1) Held accordingly by the Court in Cook's caſe Salk. 153.

(2) [See Note 287.]

(3) [See Note 288.]

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.)

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.*

"*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 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 bee 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 fiſe 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 Bracton } ubi ſupra

Britton Fleta Mirror } ubi ſupra.

[*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 entred their names into the pannell, or little peece of parchment, *in pannello aſſiſæ.*

Regiſter 223.

"*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

(4) See further on challenges of jurors Kitch. French ed. 91. a. Lamb. Juſt. ed. of 1602. p. 378. Dalt. Sher. 1ſt ed. 120. Trials per Pa. chap. 9. and title *Trial* in Viner.

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 toutes recoveries enter 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 injuste vexes*.

[f] Bracton lib. 5. fo. 372. Britton fo. 117. Fleta l. 6. ca. 1. Glanvil lib. 1. c. 4, 5, &c lib. 2. c. 7. lib. 12. ca. 1. (2. Ro. Abr. 686.)

"*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.

"*En le Registre.*" *Registre* 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 registre of originall writs is called *registrum cancellariæ*; because all originall writs doe issue out of the chancery, as *extra officium 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. 28. 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 misе in a writ of right.

(Cro. Cha. 511.)

"*Assise de common de 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 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 annualim*

[k] 8. Co. 45.

[l] 32. H. 8. ca. 7.

* 7. E. 6. Dier 83, &c.

(1) See also ant. 16. b. and 73. b. (2) [See Note 289.]

annuatim renovan', 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.

[*m*] 44. E. 3. 5. Vid. Regiſt. 165. Vid. le briefe de Indicavit. W. 2. ca. 5. Conjunctum 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 aſwell 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 de mord'anceſter*," *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. tract. 3. per totum, fo 252, &c. Mirror ca. 2. ſect. 15. F. N. B. 114, &c.

"*Aſſiſe de darreine preſentment*," *Aſſiſa ultimæ præſentationis*, whereof you ſhall reade [*r*] plentifully in our bookes.

[*r*] Britton ca. 30. fo. 222. Bract. l. b. 4. fo 238. Mirror ubi ſupra. F. N. B. 195. Regiſt. orig. 30.

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 gleebe 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* yeeldeth the reaſon, becauſe that by theſe writs it is commanded to the ſherife

[*s*] Bracton fo. 285, 286. Britton ca. 95. fo. 234. Mirror ubi ſupra. F. N. B. 48, 49.

(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) [See Note 290.]

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
[159. b.] 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 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.

* Mag. Chart. ca. 12. and W. 2. ca. 25.

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.

"*Pur un 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 bee 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)

[*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.

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 ſuâ 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*] Stanf. 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 bee knowne, and daily in uſe, but it belongeth not to this treatiſe. In ſome other (if God ſo pleaſe) ſomewhat ſhall be ſaid of them. (3)

Sect. 235.

ITEM, ſi ſoit ſeignior et tenant, et le ſeignior granta le rent de ſon tenant per ſon fait a un auter, ſavant a luy les ſervices, et le tenant atturna, ceo eſt un rent ſecke, come eſt dit adevant. Mes

ALSO, if there bee 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,

(1) [See Note 291.]
(2) [See Note 292.]
(3) Accordingly lord Coke diſcourſes a little on theſe ſubjects in two other works. See 2. Inſt. 41. and 4. Inſt 273.

Mes ſi le rent a luy ſoit denie al prochein jour de payment, il ny ad aſcun remedie; pur ceo qu'il n'avoit de ceo aſcun poſſeſſion. Mes ſi le tenant, quaunt il atturna al grantee, ou apres, voile doner al grantee un denier, ou un maile, &c. en noſme de ſeiſin de le rent, donques ſi apres a le procheine jour de payment le rent a luy ſoit denie, il avera aſſiſe de novel diſſeiſin. Et iſſint eſt lou home granta per ſon fait un annual rent iſſuant hors de ſa terre a un auter, &c. ſi le grantor adonques ou apres paya al grantee un denier, ou un maile, en noſme de ſeiſin de le rent, donques, ſi apres al procheine jour de payment le rent ſoit denie, le grantee poet aver aſſiſe, ou auterment nemy, &c.

ſecke, as it is aforeſaid. But if the rent be denied him at the next day of payment, hee hath no remedie; becauſe that he had not thereof any poſſeſſion. But if the tenant when he atturneth to the grauntee, 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 bee 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 grauntor then or after pay to the grauntee 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 grauntee may have an aſſiſe, or elſe not, &c.

"*ET le tenant attorna.*" Here it appeareth, that an attornament (that is, an agreement to the grant) is no ſeiſing of the rent.

"*Il ne ad aſcun 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.)

"*Voile doner al grantee un denier, ou un maile, &c. en noſme de ſeiſin de 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.]

"*Un denier, ou un maile, &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.)

"*Iſſint ſi home grant per ſon fait un annual rent iſſuant hors de ſon terre a un auter, &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.

Sect. 236.

ITEM, de rent ſecke home poet aver aſſiſe de mortd'anceſter, ou briefe de ayel ou de coſinage, et touts auters manners d'actions reals, come la caſe giſt, ſicome il poet aver d'aſcun autre rent.

ALSO, of rent ſecke a man may have an aſſiſe of *mortd'aunceſtor*, or a writ of *ayel* or coſinage, and all other manner of actions realls, as the caſe lyeth, as hee may have of any other rent.

"*BRIEFE de 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, proaviâ, &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.

"*Briefe de 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 ſupr.* And ſo it is of the ſeiſin of the brother of the grandfather's grandfather, &c. (1)

Britton ca. 76. [*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.

"*Et touts auters manners d'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 31. F. N. B. 6. 14. E. 4. 5. Diverſity des Courts 117. 33 E. 3. Judgm. 252.

Sect. 237.

[160.b.]

ITEM, ſont trois cauſes de diſſeiſin de rent ſervice, ſcil. reſcous, replevin, et incloſure. Reſcous eſt, quaunt le ſeignior en la terre tenus de luy diſtreine pour ſon rent arere, ſi le diſtres de luy ſoit reſcous, ou ſi le ſeignior vient ſur la terre, et voile diſtreyner, et le tenant ou auter home ne luy voile ſuffer, &c. Replevin eſt quaunt le ſeignior ad diſtreine,

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,

(1) See the table for the degrees of conſanguinity placed before fol. 18.

treine, et replevin ſoit fait de le diſtreſſe per briefe ou per plaint. Encloſure eſt, ſi les terres ou les tenements ſont iſſint encloſes (1), *que le ſeignior ne poyt vener deins les terres ou tenemens pur diſtreyner. Et la cauſe, pur que tiels choſes iſſint faits ſont diſſeiſins al ſeignior, eſt pur ceo, que per tiels choſes le ſeignior eſt diſturbe de le mean per que il doit avoire et vener a ſon rent, ſcil. de le diſtreſſe.* (2)

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 bee ſo encloſed, that the lord may not come within the lands and tenements for 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 hee ought to have come to his rent, *ſcil.* of the diſtreſſe.

(Cro. Jam. 485. 2. Ro. Abr. 277. 456, 457. Hob. 180. Dy. 241. Cro. Cha. 109. F. N. B. 101. c.)

"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.

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. Diſſeiſin 9. 4. E. 2. Aſſ. 43. 8. E. 1. ibid. 416. W. 2. ca. 6. 12. H. 7. Keilway 20. (Poſt. 323. a.)

"*Pur ſon rent arere.*" Here *Littleton* decideth an antient 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 doe, 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, [161. a.] 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 is a ſufficient diſtreſſe to be taken (2) beſides, or if the

[*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. E. 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. Vid. tit. Reſcous 14.

lord

(1) *encloſes* not in L. and M. but in Roh. P. and Red.

(2) *de le diſtreſſe* not in L. and M. Roh. nor P.

(3) [See Note 293.]

(4) [See Note 294.]

[161. a.]

(1) [See Note 295.]

(2) Acc. ant. 47. a. and more at large in 2. Inſt. 133.

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 goe 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;

"*En la terre tenus de luy.*" And therefore if the lord diſtreyne out of his fee in lands not holden of him, the tenant may make reſcous, unleſs it bee in ſome ſpeciall caſes.

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. 44. E. 3. 20. 6. R. 2. Reſcous 11. 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 goe 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*" [*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.

"*Encloſer*" 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.

But

(3) [See Note 236.]

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 yeeld 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.

[*e*] 9. Aſſ. 19. Mirror ca. 2. ſect. 15. Brit. fol. 108. 114. 118. 141.

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.

[*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. Cro. Eliz. 836.

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 of replevyn for the cauſe aforeſaid. [*b*] But *denier* is no diſſeiſin of a rent ſervice without reſcous or reſiſtance.

8. E. 4. 15. per Moyle. 2. R. 3. 19. (Hob. 205. 266. 1. Mod. 4. 1. Sid. 463.) [*b*] 3. E. 3. 75. 8. H. 6. 11.

Sect. 238. [161. b.]

ET ſont 4 cauſes de diſſeiſin de rent charge; ſcilicet, reſcous, replevin, encloſure, et denier; car denier eſt un diſſeiſin de rent charge, come eſt avantdit de rent ſeck.

AND there bee foure 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.

"*SONT 4 cauſes de diſſeiſin de rent charge.*" And you may adde a fifth, viz. reſiſtance to diſtreine, counterpleading and vouching a record and fayler thereof, as hath beene ſaid before. (1)

14. E. 4 4. 35. H. 6. 7. 3. Aſſ. 8. 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.

"*Denier.*" Deniall is a diſſeiſin of a rent charge, aſwell as of a rent ſecke; albeit he may diſtreine for the rent charge, aſwell 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 onely the diſſeiſor with force.

8. H. 6. 11. 18. E. 3. Aſſ. 78. (Cro. Cha. 507.)

(4) [See Note 297.]

[161. b.]

(1) Ant. 160. b.

(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.

Sect.

Sect. 239.

ET deux ſont cauſes de diſſeiſin de rent ſeck; ceſtaſcavoir, denier et enclosure.

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.

Sect. 240.

ET il ſemble, que il y ad un auter cauſe de diſſeiſin de touts les trois ſervices avantdits; c'eſtaſcavoir, ſi le ſeignior ſoit en alant a la terre tenus de luy pur diſtreyner pur le rent arere, et le tenant ceo oyant luy encounter, et luy forſtala la voy oveſque force et armes, ou luy menace en tiel forme que il ne oſaſt vener a ſa terre pur diſtreiner pur ſon rent arere pur doubt de mort, ou mutilation de ſes membres, ceo eſt un diſſeiſin, pur ceo que le ſeignior eſt diſturbe de le meane per que il doit vener a ſon rent. Et iſſint eſt, ſi, per tiel forſtalment ou menace, celuy que ad un rent charge ou rent ſecke eſt forſtalle, ou ne oſaſt vener a la terre a demaunder le rent arere, &c.

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 hee dare not come to the land to diſtreine for his rent behinde for doubt of death, or bodily hurt, this is a diſſeiſin, for that the lord is diſturbed of the meane whereby hee ought to come to his rent. And ſo it is, if, by ſuch foreſtalling or menacing, hee that hath rent charge or rent ſecke is foreſtalled, or dare not come to the land to aſke the rent behinde, &c.

"FORSTALLA," [*] foreſtellamentum, 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)

"*Ove force et 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 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* [i] Vid. Sect. 431. (Poſt 257. b.) [k] Bracton lib. 4. fo 162 & 162. 3. fol. 144. Fleta lib. 4. cap. 4.

[162. a.]

(4) Brit. 116 a.

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 dejeciisse. And, *Armorum quædam sunt tuitionis (et quod quis ob tutelam corporis sui vel sui juris fecerit, juste feciisse videtur) quædam pacis et justitiæ, quædam perturbationis pacis, et injuriæ; quædam usurpationis rei alienæ.*

Againe, *Armorum quædam sunt moluta, et quædam quæ faciunt brusurum, etc. Arma moluta plagam faciunt; sicut gladius, bisacuta, et hujusmodi, ligna verò et lapides brusuras, orbes, et ictus, etc.* To conclude this, it is truly said, that *armorum appellatione non solùm scuta et gladii et galeæ continentur, sed et fustes et lapides.* As the poet saith:

(3. 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. ca. 7. (Post. 253. b.) * See of this in the Chapter of Descents, 49. E. 3. 14. 49. Ass. 5. 29. Ass. 49. &c. [l] Vid. Sect. 589.

"*Pur doubt de mort, et 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.

"*&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 bee observed.

* 32. H. 8. ca. 37. (5. Co. 118. Dy. 375. b. 7. Co. 39. b. Ant. 148. a.)

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

(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.

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 com- 162. b.] mon law; but they could not have diſtreyned, which now they may doe 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. 71. 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. juriſ-diction 22. (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 owne hands or in the hands of any other that claimes by or from him (that is by 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)

26. E. 3. 64. 11. H. 4. fol. ult. Ognel's caſe ubi ſupra. & 7. Co. 39. b. Lillington's caſe.

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 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)

(2. Sid. 29.)

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 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 adjudged [*o*] in *Edridge*'s caſe, and the latter clauſe giveth the leſſer eſtate the greater remedy.

(4. Co. 51.)

[*o*] 5. Co. 118. Edridge's caſe.

7. For the arrerages of a *nomine pœnæ*, and for reliefe, or for 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

* 40. E. 3. 3. b. 11. H. 4. 85. 14. E. 4. 4.

(4) [See Note 298.]

[162. b.]

(1) [See Note 299.]

(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.

20. H. 7. 1. a. 28 H. 8. Dier 24. [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. 3. E. 3. Debt 157. (3. Co. 66. Cro. Eliz. 893.) [q] W. 1. ca. 36. F. N. B. 82. 122.

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 relieſe the lord cannot 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 sonne 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 in money or corne, cattell, fowle, pepper, comine, victuall, spurres, gloves, or any other profit to be delivered or yeelded, and whether they be annuall or every two, three or four yeares, &c. or the like, are within this statute; but work dayes, or any corporall service, or the like, are not within this statute.

[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. [t] 19. E. 3. Jurisdict. 22.

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 dyeth: the husband by the common law should not have the arrerages growne due before the mariage, 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 mariage, 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.

The bishop of [t] *Norwich* had the first-fruits of all the clergy within the dioceſe 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.

I have beene 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.

(4) Adjudged accordingly in a case in Noy 43. and Cro. Eliz. 883. See also acc. ant. 83. a. & b.

(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 Actions of Debt, b. 1. chap. 2. & 3.

(6) [See Note 300.]

[163. a.]

THE

THIRD BOOK

OF THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND. (1)

CHAP. 1. Of Parceners. Sect. 241.

PARCENERS ſont en deux maners, c'eſtaſcavoir; parceners ſolonque le courſe del common ley, et parceners ſolonque cuſtome. Parceners ſolonque le courſe del common ley ſont, lou home, ou feme, ſeiſie de certaine terres ou tenements en fee ſimple ou en taile, n'ad iſſue forſque files, et devie, et les tenements diſcendont a les iſſues (2), et les files entront en les terres ou tenements iſſint diſcendus a eux, donques els ſont appels parceners, et quaunt a files els ſont (1)† forſque un heire a lour anceſtor. Et els ſont appel parceners; pur ceo que per le briefe, que eſt appel briefe de participatione faciendâ, *la ley eux veet cohercer, que partition ſerra fait enter eux. Et ſi ſont deux files al queux les terres diſcendont, donque els ſont appels deux parceners; et ſi ſont trois files, donque els ſont appels trois parceners; et ſi quater files, quater parceners; et iſſint ouſter.* (2)†

PARCENERS are of two ſorts, to wit; parceners according to the courſe of the common law, and parceners according to the cuſtome. Parceners after the courſe of the common law are, where a man, or woman, ſeiſed of certaine lands or tenements in fee ſimple or in taile, hath no iſſue but daughters, and dieth, and the tenements deſcend to the iſſues, and the daughters enter into the lands or tenements ſo deſcended to them; then they are called parceners; and be but one heire to their anceſtour. And they are called parceners; becauſe by the writ, which is called *breve de participatione faciendâ*, the law will conſtraine them, that partition ſhall be made among them. And if there be two daughters to whom the land deſcendeth, then they bee called two parceners; and if there be three daughters, they bee called three parceners; and foure daughters, four parceners; and ſo forth.

OUR

(1) [See Note 1.]

(2) In L. and M. and in Roh. it is *filles* inſtead of *iſſues*.

(1)† See below note 3.

(2)† In L. and M. and in Roh. an &c. comes in here.

OUR author having treated in his two former bookes, first of estates of lands and tenements, and in his second booke of tenures whereby the same have beene holden, now in his third booke doth teach us divers things concerning both of them; as, 1. The qualities of their estates. 2. In what cases the entry of him that right hath may bee taken away. 3. The remedies, and in what cases the same may be prevented, or avoyded. 4. How a man may bee barred of his right for ever, and in what cases the same may be prevented or avoyded.

For the first, he, having spoken of sole estates, divideth the quality of estates into individed and conditionall. Individed, into coparcenary, joyntenancy, and tenancy in common. Coparcenary into parceners by the common law, and parceners by the custome; and he beginneth his third book with parceners claiming by descent, which, comming by the act of law and right of bloud, is the noblest and worthiest meanes whereby lands doe fall from one to another. Conditional, into conditions expresse or in deed, and conditions in law. Conditions in deed, into gages; which he divideth into *vadia mortua*, and *vadia viva*. *Vadia mortua*, so called becaus either money or land may be lost: and *viva*, becaus neither money nor land can be lost, but both preserved. Then speaketh he of descents, wherby the entry of him that right hath may be taken away. And next to that of the remedy how to prevent the same, viz. by continuall claim. Then he teacheth, how a man, having a defeasible or an imperfect estate, may perfect and establish the same by three meanes, viz. by release, by confirmation, and attournment, where that is requisite. Having spoken of a descent, being an act in law which taketh away an entry, he doth then speake of a discontinuance, the act of the party, whereby the entry of them that right have shal be taken away. And next unto that he teacheth in what case the same may be avoided by remitter. After he had treated of descents and discontinuances, which take away entries, but barre not actions, lastly, he setteth forth the learning of warranties, (a curious and cunning kind of learning I assure you) whereby both entry, action, and right may be barred, and the remedies how they may be prevented before they fall, and in what cases they may be avoyded after they be fallen. And thus have you an account of the thirteene severall chapters of his third booke. And now his method being understood, let us heare what our author will say unto us concerning parceners.

Vide Sect. 385.

[163. b

"*Et quant a files els sont ferſque un heire a lour* [a] *anceſter.*" This is false printed; for the originall is, *et quanque files els sont, els sont parceners, et sont ferſque un heire a Lur auncestor.* (3)

[a] Bract. lib. 2. fo. 66. 71. &c. & 76. &c. & lib. 5. fo. 443. Brit. fo. 58. 112. 128. 183, 184, 185. 189. 193. Flet. lib. 5. ca. 9. li. 6. ca. 47. Glan. li. 7. ca. 3. & li. 13. c. 11.

"*Parceners.*" [b] *Jus descendit quasi uni hæredi propter juris unitatem, sicut sunt plures filiæ, &c. Et ubi omnes simul et in solidum hæredes sunt, plures cohæredes sunt quasi unum corpus, propter unitatem juris quod habent.* Whereupon it followeth, that albeit where there bee two parceners [c] they have moities in the lands descended to them, yet are they both but one heyre; and one of them is not the moity of an heire, but both of them are but *unus hæres.*

[b] Bract. li. 2. fo. 66. 76. Flet. ubi supr. Brit. ubi sup. & Statut. de Hiberh.

And it is to be observed, that there is a diversity betweene a descent, which is an act of the law, and a purchase, which is an act of

[c] Vide Sect. 8. vers. fin.

(3) The words are as here corrected by lord Coke both in L. and M. and in Roh.

of the party. [*d*] For if a man be ſeiſed of lands in fee, and hath iſſue two daughters, and one of the daughters is attainted of felony, the father dieth both daughters being alive; the one moitie ſhall deſcend to the one daughter, and the other moitie ſhall eſcheat. But if a man make a leaſe for life, the remainder to the right heires of *A.* being dead, who hath iſſue two daughters, whereof the one is attainted of felony; in this caſe ſome have ſaid, that the remainder is not good for a moitie, but voyd for the whole, for that both the daughters ſhould have beene (as *Littleton* ſaith) but one heire. (4)

[*d*] Fleta lib. 5. ca. 9. Fleta lib. 6. ca. 47.

[164. a.] A man makes a gift in taile, reſerving two ſhillings rent to himſelfe during his life, and if he die his heire within age then reſerving a rent of twentie ſhillings to his heires for ever; he dieth having iſſue two daughters, the one of full age, the other within age: in this caſe the donee ſhall hold by fealtie onely, inſomuch as the one daughter as well as the other is his heire, and both of them (as *Littleton* ſaith) make but one heire, *ergo*, his heire is not within age, neither is his heire in that caſe of full age. But if the reſervation had been, "and if he die, his heire neither being within "age, nor of full age, &c." in this caſe the reſervation had beene good. And if it doth not begin in his next heire, it ſhall never begin as this caſe is, for that the precedencie is not performed. [*e*] But yet if one of them be of age, and the other within age, ſhe ſhall have her age and other priviledges and advantages that an heire within age ſhall have; and when they are demandants, for the nonage of the one the paroll ſhal demurre againſt them both (1). [*f*] *Sunt autem plures participes quaſi unum corpus in eo quòd unum jus habent; et oportet quòd corpus ſit integrum, et quòd in nullâ parte ſit defectus.* And when the right heire doth claime by purchaſe, he muſt be (ſay they) a compleat right heire in judgement of law. (2) And therefore if lands be given to a man and to the heires females of his bodie, and he hath iſſue a ſon and a daughter, and dieth, the daughter ſhall have the land by deſcent; but if a remainder be limited to the heires females of the bodie of *I. S.* and he hath iſſue a ſonne and a daughter, his daughter ſhall never take it by purchaſe, for that ſhe is not heire female of the body of *I. S.* becauſe he hath a ſonne.

(Poſt. 196. b.)

[*e*] Temps E. 1. Age 128. S. E. 2. Judgement 240. 30. E. 3. 7. 44. E. 3. Age 47. 26. Aſſ. 65. 13. E. 3. Age 51. 28. Aſſ. 22. 29. Aſſ. 25. 57. 34. H. 6. 4. Aſſ. 17.

[*f*] Fleta lib. 5. ca. 9. et lib. 6. cap. 47. (1. Co. 103. 2. Ro. Abr. 416.)

If a man give lands to another, and to the heires males of his body, upon condition, that if he die without heire female of his bodie, that then the donor ſhall re-enter, this condition is utterly voyd, (3) for he cannot have an heire female, ſo long as he hath an heire male.

And as they be but one heire, and yet ſeverall perſons; ſo have they one entire freehold in the land, as long as it remaines undivided, in reſpect of any ſtranger's *præcipe*. [*g*] But betweene themſelves to many purpoſes they have in judgement of law ſeverall freeholds; for the one of them may infeoffe another of them of her part, and make liverie. [*b*] And this coparcenarie is not ſevered or divided by law by the death of any of them; for if one die, her part ſhall deſcend to her iſſue, and one *præcipe* ſhall lie againſt them, for they ſhall never joyne as heires to ſeverall auncеſtors in any action auncеſtrell, but when one right deſcends from one auncеſtor;

[*g*] 10. E. 4. 17. E. 3. 46. (Mo. 69.)

[*b*] 37. H. 6. 8. 19. H. 6. 45. (Poſt. 196. a.)

(4) [See Note 2.]

(2) [See Note 4.]

(3) As to effect from a condition's being void, ſee poſt. 206. a. & b.

[164. a.]

(1) [See Note 3.]

aunceſtor: and then *propter unitatem juris*, though they be in ſeverall degrees from the common aunceſtor, yet ſhall they joyne. But the iſſues of ſeverall coparceners, becauſe ſeverall rights deſcend, ſhall never joyne as heires to their mothers; and yet when they have recovered, a writ of partition lieth betweene them.

Vid. Sect. 313.

For example, [*i*] If a man hath iſſue two daughters, and is diſſeiſed, and the daughters have iſſue and die, the iſſues ſhall joyne in a *præcipe*; becauſe one right deſcends from the aunceſtor; and it maketh no difference, whether the common aunceſtor, being out of poſſeſſion, died before the daughters or after, for that in both caſes they muſt make themſelves heires to the grandfather which was laſt ſeiſed, and when the iſſues [*k*] have recovered they are coparceners, and one *præcipe* ſhall lie againſt them. And likewiſe if the iſſues of two coparceners, which are in by ſeverall deſcents, be diſſeiſed, they ſhall joyne in aſſiſe. But in the ſame caſe if the two daughters had beene actually ſeiſed, and had beene diſſeiſed, after their deceaſes the iſſues ſhall not joyne; becauſe ſeverall rights deſcended to them from ſeverall aunceſtors: and yet when they have ſeverally recovered, they are coparceners, (4) and one *præcipe* lieth againſt them, and a releaſe made by one of them to the other is good. And ſo note a diverſitie *inter deſcenſum in capita, et in ſtirpes.*

[i] 7. E. 3. 30. 34. 48. E. 3. 14. 24. E. 3. 13. F. N. B. 221. 35. H. 6. 23. 27. E. 3. 89. 31. H. 6. 14. b. [k] 37. H. 6. 8. 9. E. 4. 13. b. 42. E. 3. 16, 17. (8. Co. 86. Poſt. 196. a. 364. b.)

And the ſtatute of *Glouceſter*, cap. 6. made *anno* 6. Edw. 1, ſpeaketh *ſi home murge, &c.* if a man dieth: ſo as that ſtatute extendeth not but where one dieth, and hath divers heires, whereof one is ſonne or daughter, brother or ſiſter, nephew or neece, and the others be in a further degree, all their heires from henceforth ſhall have their recoverie by writ of mortdaunceſtor. And this ſeemeth to me to be the common law; for *Bracton*, who writ before this ſtatute, ſaith, [*l*] *in caſu cùm ſit aſſiſa mortis anteceſſoris conjungenda cum conſanguinitate, non erit poſtea recurrendum ad præcipe de conſanguinitate, ſed ad aſſiſam mortis; quia perſona, quæ propinquior eſt, et facit aſſiſam, et trahit ad ſe perſonam et gradum remotiorem ut ubi potius procedat aſſiſa quàm præcipe, quia id, quod eſt magis remotum, non trahit ad ſe quod eſt magis junctum, ſed è contrario in omni caſu.* And herewith agreeth the moſt of our [*m*] bookes; and two coparceners ſhall have a writ of *ayel*, and by their count ſuppoſe the common aunceſtor to be grandfather to the one, and great grandfather to the other. (5)

(F. N. B. 195. H.)

[l] Bracton, lib. 4. 254. b. Britton fol. 181, 182. & 178. 204. Fleta lib. 5. cap. 1. et 2. & 9. in fine.

[m] 19. E. 3. tit. Joyndre in Action 31. 7. E. 3. 30. et 34. 27. E. 3. 89. 48. E. 3. 14. 24. E. 3. 13. F. N. B. 221. Regiſter. Vide 32. E. 1. Joindre in Action 34. 13. E. 3. ibid. 29. temps E. 2. ib. 35. 30. E. 1. ibid. 36. 25. H. 6. 23.

I have beene the longer herein, for that this inheritance of coparceners is the rareſt kind of inheritance that is in the law.

Furthermore it is to be obſerved that herein alſo in caſe of coparceners, [*n*] ſometimes the deſcent is *in ſtirpes* (viz.) to ſtockes or roots; and ſometime *in capita*, to heads. As if a man hath iſſue two daughters and dyeth, this deſcent is *in capita*, viz. that every one ſhall inherit alike, as *Littleton* here ſaith. But if a man hath iſſue two daughters, and the eldeſt daughter hath iſſue three daughters, and the youngeſt one daughter, all theſe foure ſhall inherit; but the daughter of the youngeſt ſhall have as much as the three daughters of the eldeſt, *ratione ſtirpium*, and not *ratione capitum*, for in judgement of law every daughter hath a ſeveral ſtocke or root. [164. b.

[n] Bracton lib. 2. 66. Britton cap. 71. Fleta lib. 5. cap. 9. et 6. cap. 47.

Alſo if a man hath iſſue two daughters, and the eldeſt hath iſſue divers ſonnes and divers daughters, and the youngeſt hath iſſue divers daughters, the eldeſt ſon of the eldeſt daughter ſhall onely inherit;

(4) See the like as to jointenants, poſt. 182. a.

(5) See F. N. B. 197. B.

inherit; for this descent is not *in capita*, but all the daughters of the yongest shall inherit, and the eldest son is coparcener with the daughters of the yongest, and shall have one moitie (viz.) his mother's part; so that men descending of daughters may be coparceners, as well as women, and shall joyntly implead and be impleaded, as is aforesaid.

[o] If there be two coparceners, and the one bring a *rationabili parte* or a *nuper obiit* against the other, the defendant claime by purchase, and disclaime in the blood, the plaintife shall have a *mordauncester* against her as a stranger for the whole. (1)

[o] 20. E. 2. nuper ob. 14. F. N. B. 197. 7. E. 3. 13.

"*Parceners sont en deux manners.*" Here *Littleton* doth divide parceners; and herewith doe agree the ancient bookes of law.

Bract. lib. 2. fo. 66. 71, &c. Brit. ca. 71. Fleta li. 5. ca. 9.

"*Et ils sont appels parceners, &c.*" Parceners, *participes, et dicuntur participes, quasi partis capaces, sive partem capientes; quia res inter eas est communis ratione plurium personarum.* This tenancie in the ancient books of law is called *adæquatio*, and sometime *familia hircisçunda*, (2) an inheritance to be divided; and many times parceners are called coparceners.

"Breve de participatione faciendâ." This is false printed, (3) and should be *De partitione faciendâ*, (4) a writ whereby the coparceners are compelled to make partition. [p] *Item est alia actio mixta, quæ dicitur actio familiæ hircisçundæ; et locum habet inter eos qui communem habent hæreditatem, &c. Et locum habet, ut videtur, inter cohæredes, ubi agitur de proparte sororum; vel inter alios, ubi res inter partes et cohæredes dividi debeat, sicut sunt plures sorores, quæ sunt quasi unus hæres, vel inter plures fratres, qui sunt quasi unus hæres ratione rei quæ divisibilis est inter plures, masculos, &c.*

[p] Regist. Orig. 76. 316. Regist. Jud. 80. Brit. ubi sup. Flet. ubi sup. Bract. ubi supra. & 5. Co. 443. b.

"*Des terres et tenements.*" It is to be considered of what inheritances daughters shall be coparceners, and how and in what manner partition shall be made betweene them. Wherein it is to be observed, that of inheritances some be entire and some be severall: againe, of entire, some be divisible, and some be indivisible. And here it appeareth by *Littleton*, that parceners take their appellation, because they are compelled to make partition by writ of *partitione faciendâ*; where, note, that *Littleton* alloweth well to finde out the true derivation of words, as often hath beene and shall be observed.

(Ant. 32. a. 150, 151.)

If a villeine descend to two coparceners, this is an entire inheritance; and albeit the villeine himselfe cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one weeke, &c. and the other another day or weeke, &c. And for the same reason a woman shall be endowed of a villeine, as before it appeareth in the Chapter of Dower. (5) Likewise an advowson is an entire inheritance; [q] and yet in effect the

[q] 13. E. 2. tit. Quar. Imp. 170. 17. E. 3. 38. Flet. li. 5. c. 9. Mirr. ca. 2. sect. 17.

(1) See post. 175. 242. a.

(2) See the verb *hercisco* or *ercisco* used ant. 86. a.

(3) But in L. and M. and in Roh. it is the same.

(4) *Monsieur Houard* derives this writ from the capitulars of the first French kings. 1. Hou. Littl. 318.

(5) Ant. 32. a.

the ſame may be divided betweene coparceners, for they may divide it to preſent by turnes. (6)

[r] 44 E. 3. tit. Partic. 6 & tit. Avowrie 75. (2. H. 6. fol. 11. Ant. 148. a.)

[r] A rent charge is entire, and againſt common right; [r] yet may it be divided betweene coparceners, and by act in law the tenant of the land is ſubject to ſeverall diſtreſſes, and partition may be made before ſeiſin of the rent.

Entire inheritances not diviſible, we finde divers in our bookes; and ſome inheritances that are diviſible, and yet ſhall not be parted or divided betweene coparceners, as hereafter ſhall appeare.

[s] 2. E. 2. tit. Dower 123.

[s] If a man have reaſonable eſtovers, as houſebote, heybote, &c. appendant to his freehold, they are ſo entire as they ſhall not be divided betweene coparceners. [t] So if a corody incertaine be granted to a man and his heires, and he hath iſſue divers daughters, this corodie ſhall not be divided betweene them; but of a corodie certaine partition may be made.

[t] 17. E. 2. nuper obiit 12. 16. E. 2. ibid. 11. 5. Mariæ Dier 153.

[u] 17. E. 3. 72.

[w] 13. E. 2. Quare Imped. 170. Fleta lib. 5. ca. 9.

[u] Homage and fealtie cannot be divided betweene coparceners (7). [w] So a piſcharie incertaine, or a common *ſauns nombre*, (8) cannot be divided betweene coparceners, for that would be a charge to the tenant of the ſoile.—[x] The lord *Mountjoy*, ſeiſed of the mannor of *Canford* in fee, did by deed indented and inrolled bargaine and ſell the ſame to *Browne* in fee, in which indenture this clauſe was contained. *Provided alwayes, and the ſaid Browne did covenant and grant to and with the ſaid lord Mountjoy, his heires and aſſignes, that the lord Mountjoy, his heires and aſſignes, might dig for ore in the lands (which were greate waſts) parcell of the ſaid mannor, and to dig turfe alſo for the making of allome.* And in this caſe three poynts were reſolved by all the judges. Firſt that this did amount to a grant of an intereſt and inheritance to the lord *Mountjoy*, to digge, &c. Secondly, that notwithſtanding this grant *Browne* [165. a. his heires and aſſignes might dig alſo, and like to the caſe of common *ſauns nomber*. Thirdly, that the lord *Mountjoy* might aſſigne his whole intereſt to one, two, or more; but then, if there be two or more, they could make no diviſion of it, but work together with one ſtocke; neither could the lord *Mountjoy*, &c. aſſigne his intereſt in any part of the waſt to one or more, for that might worke a prejudice and a ſurcharge to the tenant of the land; and therefore if ſuch an incertaine inheritance deſcendeth to two coparceners, it cannot be divided betweene them. (1)

[x] Mich. 24. et 25. Eliz. inter Comitem de Huntingdon et Seignior Mountjoy. (Mo. 174.)

(Ant. 122. a. 1. Saund. 351.) Vide 5. Mariæ Dier 153. (Noy 145. Cro. Jam. 256, 257. 1. Mod. 74.)

(6. Co. 1.)

But then it may be demanded, what ſhall become of theſe inheritances? The anſwer is, that it appeareth in our bookes, that regularly [y] the eldeſt ſhall have the reaſonable eſtovers, common, piſchary, corody incertaine, &c. and the reſt ſhall have a contribution, that is, an allowance of the value in ſome other of the inheritance, and ſo of the like. But what if the common anceſtor left no other inheritance to give any thing in allowance, what contribution or recompence ſhall the younger coparceners have? It is anſwered, that if the eſtovers or piſchary or common be incertaine, then ſhall one coparcener have the eſtovers, piſchary, or common, &c. for a time, and the other for the like time; as the one for one yeare, and the other for another, or more, or leſſer time, whereby no

[y] 2. E. 2. dower 123. 13. E. 2. quar. imp. 170. Fleta ubi ſupra. Vide Mirror ca. 2. ſect. 17.

(6) See an inſtance of a partition of an advowſon between joyntenants in Carth. 55.

(7) See ant. 67. b. and Dav. Rep. 61. b.

(8) Acc, as to common *ſans nombre*, ant. 149. a. See the note on this ſort of common, ant. 122. a.

[165. a.]

(1) [See Note 5.]

no prejudice can grow to the owner of the ſoile. Or in caſe of the piſchary, the one may have one fiſh, and the other the ſecond, &c. or the one may have the firſt draught, and the ſecond the ſecond draught, &c. And if it be of a park, one may have the firſt beaſt, and the ſecond the ſecond, &c. And if of a mill, one to have the mill for a time, and the other the like time; or the one one toll diſh, and the other the ſecond, (2) &c. And this appeareth to be the ancient law; for it is ſaid [z] *Sunt aliæ res hæreditariæ quæ veniunt in partitionem, quæ, cùm dividi non poſſunt, conceduntur uni; ita quòd aliæ cohæredes alibi de communi hæreditate habeant ad valorem, ſicut ſunt vivaria, piſcariæ, parci; vel ſaltem quòd partem habeant pro defectu, ſicut ſecundum piſcem, tertium vel quartum; vel ſecundum tractum, tertium vel quartum. Item, in parcis ſecundam, tertiam aut quartam beſtiam.*

[z] Bracton lib. 2. 76. Britton cap. 71, 72. Fleta lib. 5. cap. 9.

But now let us turne our eye to inheritances of honor and dignity. And of this there is an ancient booke caſe, [*] in 23. H. 3. tit. *partition* 18. in theſe words: Note, if the earldome of *Cheſter* deſcend to coparceners, it ſhall be divided betweene them as well as other lands, and the eldeſt ſhall not have this ſeigniory and earledome entire to herſelfe; *quod nota*, adjudged *per totam curiam*. (3) By this it appeareth, that the earledome (that is, the poſſeſſions (4) of the earledome) ſhall bee divided; and that where there bee more daughters than one, the eldeſt ſhall not have the dignity and power of the earle, that is, to bee a counteſſe. What then ſhall become of that dignity? The anſwer is, [a] that in that caſe the king, who is the ſoveraigne of honour and dignity, may for the incertainty conferre the dignity upon which of the daughters he pleaſe. And this hath beene the uſage ſince the Conqueſt, as it is ſaid. (6)

(Ant. 18. b. 27. a.)
[*] 23. H. 3. tit. partition 18.
[a] 3. H. 3. tit. preſcription. (5)

But if an earle that hath this dignity to him and his heires dieth, having iſſue one daughter, the dignity ſhall deſcend to the daughter; for there is no incertainty, but onely one daughter, and the dignity ſhall deſcend unto her and her poſterity, as well as any other inheritance. And this appeareth by many precedents, and by a late judgement given in *Sampſon Leonard*'s caſe, who maried with *Margaret* the only ſiſter and heire of *Gregory Fines lord Dacre* of the South, and in the caſe of *William lord Ros*. (7)

But there is a difference betweene a dignity or name of nobility, and an office of honor. For if a man hold a mannor of the king to be high conſtable of *England*, and dye having iſſue two daughters, the eldeſt daughter taketh huſband, he ſhall execute the office (8) ſolely, and before mariage it ſhall be exerciſed by ſome ſufficient deputy: and all this was reſolved by all the judges of *England*, in the caſe of [b] the duke of *Buckingham*. But the dignity of the crowne of *England* is without all queſtion deſcendible to the eldeſt daughter alone, and to her poſterity, (10) and ſo hath it beene declared by act of parliament, [*] For, *regnum non eſt diviſibile*. And ſo was the deſcent of *Troy*.

[b] 11. Eliz. Dier 285. the duke of Buckingham's caſe. (9)
[*] 25. H. 8. cap. 22.

Præterea ſceptrum, Ilione quod geſſerat olim
Maxima naturam Priami.——— Virgil 1. Æneid.

If

(2) How dower is to be aſſigned out of indiviſible inheritances, ſee ant. 32. a.
(3) See Dav. Rep. 61. b.
(4) [See Note 6.]
(5) Fitz. Abr. *partition* 56.
(6) [See Note 7.]
(7) [See Note 8.]
(8) [See Note 9.]
(9) S. C. Keilw. 170. b. 4. Inſt. 127.
(10) See ant. 15. b.

[b] Bracton lib. 2. fol. 76. Fleta lib. 5. cap. 9.

[b] If a caſtle that is uſed for the neceſſary defence of the realme, deſcend to two or more coparceners, this caſtle might be divided by chambers and roomes, as other houſes be. But yet, for that it is *pro bono publico et pro defenſione regni*, it ſhall not be divided: for as one ſaith, *propter jus gladii dividi non poteſt*; and another ſaith, [*] *pur le droit del eſpée que ne ſoeffre diviſion en aventure que la force del realme ne defaille pax taunt.* But caſtles of habitation for private uſe, that are not for the neceſſary defence of the realme, ought to bee parted betweene coparceners as well as other houſes; and wives may thereof be endowed, as hath beene ſaid in the Chapter of Dower. (11)

[*] Britton 186. 187.

Vide Sect. 36.

If there be two coparceners of certaine lands with warranty, and they make partition of the land, the warranty ſhall remayne; becauſe they are compellable to make partition. [c] But otherwiſe it was of joyntenants at the common law, as ſhall be ſaid hereafter in his proper place.—[d] *Thomas de Eberſton*, ſeiſed of the mannor of *Eberſton* within the forreſt of *Pickering*, had kept time out of mind a woodward for keeping of the woods parcell of that mannor, and had the barke of all the trees felled in the ſaid woods by any of the forreſters of that foreſt as belonging to his mannor (which he could not have without a preſcription). (1) *Thomas* of *Eberſton* infeoffed two of the ſaid mannor; betweene whom partition was made, ſo as one of them had the one halfe in ſeveralty, and the other the other halfe. (2) *Robert Wyerne* afterwards had the one halfe, and *Thomas Thurniſe* the other; and they in the eyre of *Pickering* claimed to keepe a woodward within the ſaid woods, and the barke aforeſaid; and the truth hereof and the uſage being ſpecially found by the forreſtors verderors and regardors, *Willoughby Hungerford* and *Hanburie* juſtices itinerants within that forreſt gave judgment as followeth. *Ideo conſideratum eſt, quòd prædict' Robertus et Thomas habeant woodwardum et corticem in boſco prædicto de quercubus prædictis ſibi et haredibus ſuis imperpetuum. Salvo ſemper jure, &c.*

[165. b.]

[c] 29. E. 3. garrantie 70. (6. Co. 12. b.)

[d] Itin. Pickering. 8. E. 3. Rot. 34. (Ant. 115. a.)

Sect. 242.

AUXY, ſi home ſeiſie de tenements en fee ſimple ou en fee taile devy ſauns iſſue de ſon corps engender, et les tenements diſcendont a ſes ſoers, els ſont parceners, come eſt avantdit. Et en meſme le maner, lou il n'ad pas ſoers, mes les tenements diſcendont a ſes aunts, els ſont parceners, (3) *&c. Mes ſi home n'ad forſque une file, el ne poit eſtre dit parcener, mes el eſt appelle file et heire, &c.*

ALSO, if a man ſeiſed of tenements in fee ſimple or in fee-tayle dieth without iſſue of his bodie begotten, and the tenements deſcend to his ſiſters, they are parceners, as is aforeſaid. And in the ſame manner, where he hath no ſiſters, but the lands deſcend to his aunts, they are parceners, &c. But if a man hath but one daughter, ſhe ſhal not be called parcener, but ſhee is called daughter and heire, &c.

« *OU*

(11) Ant. 31. b.

[165. b.]

(1) [See Note 10.]

(2) [See Note 11.]

(3) *Els ſont parceners* not in L. and M. nor Roh.

"*OU en fee taile.*" This muſt be intended of an eſtate taile made to the father and to the heires of his body; for otherwiſe if the ſtate tayle were made to a man and to the heires of his body, his ſiſters cannot inherit. And not only daughters ſhall be coparceners, but ſiſters, aunts, great aunts, &c.

"*File et heire, &c.*" Here by (*&c.*) is implyed ſiſter and heire, aunt and heire, great aunt and heire, and ſo upward.

Sect. 243.

ET eſt aſçavoir, que partition enter parceners poit eſtre fait en divers manners. Un eſt, quant els agreeont de faire partition, et font partition de les tenements; ſicome ſi ſoyent deux parceners, a devider enter eux les tenements en deux parts, cheſcun part per ſoy en ſeveraltie et d'egal value; et ſi ſont 3 parceners, a devider les tenements en trois parts per ſoy en ſeveraltie, &c.

AND it is to bee underſtood, that partition may be made in divers maners. One is, when they agree to make partition, and do make partition of the tenements; as if there bee two parceners to divide between them the tenements in two parts, each part by it ſelfe in ſeveralty and of equall value; and if there bee three parceners, to divide the tenements in three parts by it ſelfe in ſeveralty, &c.

BY this Section, and the (*&c.*) in the end of it, it is to be underſtood, that there are two kind of partitions betweene coparceners; the one in deed or expreſſe, and the other in law or implicite. (Ant. 46. a.) Of partitions in deed or expreſſe, ſome bee voluntary, whereof *Littleton* enumerates foure manners; and one compulſary, that is, by writ of partition. (4)

166. a.] The firſt partition in deed betweene coparceners, is that which (F. N. B. 167.) *Littleton* here ſpeaketh of, viz. *Quant els agreont et font partition de les tenements, &c. cheſcun part per ſoy en ſeveralty et de egall value, &c.* If coparceners make partition, at full age and unmarried, and of *ſane memorie*, of lands in fee ſimple, it is good and firme for ever, albeit the values be unequall; but if it be of lands entailed, or if any of the parceners be of *non ſane memorie*, it ſhall bind the parties themſelves, but not their iſſues unleſſe it be equall; or if any be *covert*, it ſhall bind the huſband, but not the wife or her heires; or if any be within age, it ſhall not bind the infant; as ſhall be ſaid more fully hereafter (1). The ſecond partition followeth in the next Section. And here the (*&c.*) implyeth further, that if there be foure parceners, then foure parts, if five, five parts, and ſo forth. It further implyeth, that all this muſt be in (Vide Sect. 241.) ſeveralty; whereof, and with what limitations this is to bee underſtood, it hath beene declared before.

[166. a.]

(4) [See Note 12.]

(1) See poſt. Sect. 255. to 258. inclusive. See alſo 173. b.

Sect.

Sect. 244.

UN auter partition eſt, a eſlier, per agreement enter eux, certaine de lour amies, de faire partition des terres ou tenements en le forme avantdit. Et en tiels caſes, apres tiel partition, le eigne file prymerment eſleira un des partes iſſint divides, que el voit aver pur ſa part, et donques la ſecond file procheine apres luy auter part, et donques la tierce ſoer auter part, donques le quarte auter part, &c. ſi iſſint ſoit que ſoient pluſors ſoers, &c. ſi ne ſoit auterment agree enter eux. Car il poit eſtre agree enter eux, que un avera tiels tenements, et un autre tiels tenements, &c. ſans aſcun tiel primer election, &c.

ANOTHER partition there is, viz. to chooſe, by agreement betweene themſelves, certaine of their friends, to make partition of the lands or tenements in forme aforeſaid. And in theſe caſes, after ſuch partition, the eldeſt daughter ſhall chooſe firſt one of the parts ſo divided, which ſhe will have for her part, and then the ſecond daughter next after her another part, and then the third ſiſter another part, then the fourth another part, &c. if ſo bee that there bee more ſiſters, &c. unleſſe it bee otherwiſe agreed betweene them. For it may be agreed betweene them, that one ſhall have ſuch tenements, and another ſuch tenements, &c. without any primer election.

31. Aſſ. 26. "*DONQUES le quarte auter part, &c.*" Here the (*&c.*) implyeth the 5 ſiſter, and after her the 6, and ſo forth.

"*Car il poet eſtre agree enter eux, que un avera tiels tenements, et un auter tiels tenements, &c.*" Here by this (*&c.*) is implyed divers rules of law proving the concluſion of *Littleton* in this Sect. viz. *Modus et conventio vincunt legem. Pacto aliquid licitum eſt, quod ſine pacto non admittitur. Quilibet poteſt renunciare juri pro ſe introduct.*' but with this limitation that theſe rules extend not to any thing, that is againſt the common-wealth or common right. For *conventio privatorum non poteſt publico juri derogare.*

(1. Sid. 193. 269. Cro. Eliz. 664.)

(1. Sid. 339.)

Sect. 245. [166. b.]

ET la part, que l'eigne ſoer ad, eſt appelle en Latin enitia pars. *Mes ſi les parceners agreeont, que l'eigne ſoer ferra partition de les tenements en le forme avantdit, et ſi ceo el fait, donque il eſt dit, que l'eigne ſoer eſliera pluis darreine pur ſa part, et apres cheſcun de ſes ſoers, &c.* (1)

AND the part which the eldeſt ſiſter hath, is called in Latine *enitia pars.* But if the parceners agree, that the eldeſt ſiſter ſhall make partition of the tenements in manner aforeſaid, and if ſhe doe this, then it is ſaid, that the eldeſt ſiſter ſhall chooſe laſt for her part, and after every one of her ſiſters, &c.

"*ENITIA*

(1) The *&c*, not in L, and M. nor Roh.

"*ENITIA pars.*" It is called in old bookes * *æisnetia*, which is derived of the French word *eisne* for eldeſt, as much as to ſay the part of the eldeſt; for *Bracton* ſaith, *quòd eisnetia ſemper eſt præferenda propter privilegium ætatis; ſed eſto, quòd filia primogenita relicto nepote vel nepte in vitâ patris vel matris, deceſſerit, præferenda erit ſoror antenata tali nepoti vel nepti quantum ad eiſnetiam, quia mortem parentum expectant.* And herewith agreeth *Fleta* alſo, *quod nota:* whereby it appeareth, that *enitia pars* is perſonall to the eldeſt, and that this prerogative or priviledge deſcendeth not to her iſſue, but the next eldeſt ſiſter ſhall have it. [*f*] And here is a diverſity to be obſerved betweene this caſe of a partition in deed by the act of the parties, for there the priviledge of election of the eldeſt daughter ſhall not deſcend to her iſſue; and where the law doth give the eldeſt any priviledge without her act, there that priviledge ſhall deſcend. As if there be divers coparceners of an advowſon *, and they cannot agree to preſent, the law doth give the firſt preſentment to the eldeſt; and this priviledge ſhall deſcend to her iſſue; nay her aſſignee ſhall have it; (2) and ſo ſhall her huſband, that is tenant by the curteſie, have it alſo (3).

* Bract. li. 2. 77. Fleta lib. 5. ca. 9. Britton ca. 72.

[*f*] 45. E. 3. fines 41. 19. E. 3. quar. imp. 59. 18. E. 2. ibid. 176. 5. H. 5. 10. 38. H. 6. 9. Doct. & Stud. 116, 117. Vid. Bract. 238. 249.

* 5. H. 7. 8. 34. H. 6. 40. 11. H. 4. 54. 20. E. 3. quar. imp. 63. 34. E. 3. ibid. 198. 15. E. 3. Dar. Preſentment 11. 17. E. 3. 20, 21. 21. E. 3. 21. F. N. B. 32. (Poſt. 18. b.)

"*Donques il eſt dit l'eigne ſoer eſliera pluis darreine, &c.*" By this and the *&c.* in the end of this Section is implyed, the rule of law is, *cujus eſt diviſio, alterius eſt electio.* And the reaſon of the law is for avoyding of partiality,

(*Ipſe etenim leges cupiunt ut jure regantur*)

which might apparently follow if the eldeſt might both divide and chooſe (4). Now followeth the third partition in deed.

Sect. 246.

UN auter partition ou allotment eſt, ſicome ſoient quater parceners, et apres le partition de les terres fait, cheſcun part del terre ſoit per ſoy ſolement eſcript en un petit eſcrovet, et ſoit covert tout en cere en le maner d'un petit pile, iſſint que nul poit veier l'eſcrovet, et donque ſoient les 4 piles de cere mis en un bonnet a garder en les
167. a.] *maines d'un indifferent home, et donques l'eigne file primerment mettra ſa maine en le bonnet, quel prendra un pile de cere oveſque le ſcrovet deins meſme le pile pur ſa part, et donques le ſecond ſoer mettra ſa maine en le bonnet et prendra un auter, le tierce ſoer le 3 pile, et le 4 ſoer le 4 pile, &c. et en ceo cas covient cheſcun*

ANOTHER partition or allotment is, as if there be foure parceners, and after partition of the lands be made, every part of the land by itſelfe is written in a little ſcrowle and is covered all in waxe in manner of a little ball, ſo as none may ſee the ſcrowle, and then the 4 balls of waxe are put in a hat to bee kept in the hands of an indifferent man, and then the eldeſt daughter ſhall firſt put her hand into the hat, and take a ball of waxe with the ſcrowle within the ſame ball for her part, and then the ſecond ſiſter ſhall put her hand into the hat and take another, the 3 ſiſter the 3 ball, and the 4 ſiſter the 4 ball, &c.

(2) [See Note 13.]

(3) Agreed by lord Anderſon in the caſe from Cro. Eliz. cited in the preceding note.

(4) See Hob. 107. where the doctrine is cited with approbation.

cheſcun de eux luy tener a ſa chance et allotment.

&c. and in this caſe every one of them ought to ſtand to their chance and allotment.

"*ALLOTMENT.*" Of this partition by lots ancient authors * write, that in that caſe coparceners *fortunam faciunt judicem.* And *Littleton* here tearmeth it chance; for in the end of this Section he ſaith, that in this caſe every of them ought to hold her ſelfe to her chance; and of this kinde of diviſion you ſhall read in holy ſcripture, where it is ſayd, *dedi vobis poſſeſſionem quam dividetis ſorte.*

The *&c.* in the end of this Section implyeth, that if there be more coparceners there muſt be more balls according to the number of the parceners.

* Flet. lib. 5. ca. 9. Bracton lib. 2. 75. Britton cap. 72.

Vide Numbers. ca. xxvi. verſe 54, 55. & ca xxxiii. ver. 54. of diviſion by lots.

Sect. 247.

ITEM, un auter partition il y ad. Sicome ſont quater parceners, et ils ne voilent agreer a partition d'eſtre fait entar eux, donque l'un poit aver brief de partitione faciendâ *envers les auters trois, ou deux d'eux poient aver brief* de partitione faciendâ *envers les auters deux, ou trois de eux poyent aver brief* de partitione faciendâ *envers le quart, à lour election.*

ALSO, there is another partition. As if there bee foure parceners, and they will not agree to a partition to bee made betweene them, then the one may have a writ of *partitione faciendâ* againſt the other three, or two of them may have a writ of *partitione faciendâ* againſt the other two, or three of them may have a writ of *partitione faciendâ* againſt the fourth, at their election.

HERE followeth the fourth partition in deed. *Littleton* having ſpoken of voluntary partitions, or partitions by conſent: now he ſpeakes of a partition by the compullary means of law where no partition can be had by conſent. Now of what inheritance partition may be made by the writ of *partitione faciendâ* may partly appeare by that which hath beene ſayd. Moreover it is to bee obſerved that the words of the writ *de partitione faciendâ* be, * *quòd cùm eædem* A. *et* B. *inſimul et pro indiviſo teneant tres acras terræ cum pertinen', &c.* And note that this word *(tenet)* (1) in a writ doth alwayes imply a tenant of a freehold. And therefore [*g*] if one coparcener maketh a leaſe for yeares, yet a writ of partition doth lie (2). But if one or both make a leaſe for life, a writ of partition doth not lye betweene them: becauſe *non inſimul et pro indiviſo tenent,* they doe not hold the freehold together, and the writ of partition muſt be againſt the tenant of the freehold. [*b*] If one coparcener diſſeiſe another, during this diſſeiſin a writ of partition doth not lie betweene them; for that *non tenent inſimul et pro indiviſo.*

* 3. E. 3. 47, 48.

[*g*] 21. E. 3. 57. F. N. B. 62. g. 28. H. 6. 2. 11. H. 4. 3. 4. H. 7. 10. b. (Poſt. 176. b.)

[*b*] 4. H. 7. 9. 11. Aſſ. 23. (Poſt. 167. b. 187. a.)

But

(1) See the various applications of the verb *tenet* explained ant. fol. 1. a. & b.

(2) [See Note 14.]

But there be other partitions in deed then here have beene mentioned. [i] For a partition made between two coparceners, that the one ſhall have and occupy the land from *Eaſter* untill the firſt of Auguſt only in ſeveralty by himſelfe, and that the other ſhall have and occupie the land from the firſt of Auguſt untill the feaſt of *Eaſter* yearely to them and their heires, this is a good partition (3). Alſo if two coparceners have two mannors by deſcent, 167. b] and they make partition, that the one ſhall have the one manor for one yeare, and the other the other manor for this yeare, and ſo *alternis vicibus* to them and their heires, this is a good partition. The ſame law is, if the partition be made in forme aforeſaid, for two or more yeares, and each coparcener have an eſtate of inheritance, and no chattell, albeit either of them *alternis vicibus* have the occupation but for a certaine terme of yeares.

[i] Temps E. 1. partition 21. F. N. B. 62. I. (7. Co. 5.)

Of partitions in law, ſome be by act in law without judgement, and ſome be by judgement, and not in a writ *de partitione faciendâ*. And of theſe in order.

[k] If there be lord, three coparceners meſnes, and tenant, and one coparcener purchaſe the tenancy, this is not onely a partition of the meſnalty, being extinct for a third part, but a diviſion of the ſeigniory paramount, for now he muſt make ſeverall avowries (1).

[k] 36. H. 6. 7. (Poſt. 192. a.)

[l] If one coparcener make a feoffment in fee of her part, this is a ſeverance of the coparcenarie, and ſeverall writs of *præcipe* ſhall lie againſt the other coparcener and the feoffee (2).

[l] 37. H. 6. 8. 43. E. 3. 1.

[m] If two coparceners be, and each of them taketh huſband and have iſſue, the wives die, the coparcenary is divided, and here is a partition in law.

[m] 17. E. 3. 14. 15.

[n] If two coparceners be, and one diſſeiſe the other, and the diſſeiſee bringeth an aſſiſe, and recover, it hath beene ſaid, that ſhe ſhall have judgement to hold her moity in ſeveralty. And this ſeemeth (ſay they) verie ancient, and thereupon vouch *Bracton*, * *ſi res fuerit communis locum habere poterit communi dividendo judicium*. And [o] ſo (ſay they) if the one coparcener recover againſt another in a *nuper obiit*, or a *rationabili parte*, the judgement ſhall be, that the demandant ſhall recover and hold in ſeveralty. But *Britton* is to the contrary; for he ſaith, * *et ſi aſcun des parceners ſoit enget ou diſturbe de la ſeiſin per ſes auters parceners, un, ou pluſors, al diſſeiſee viendra aſſiſe per ſeverall pleint ſur les parceners et recovera, mes nemy a tener en ſeveraltie, mes en common ſolonque ceo que avant le fiſt, &c.* [p] And this ſeemeth reaſonable; for he muſt have this judgement according to his plaint, and that was of a moitie, and not of any thing in ſeveraltie, and the ſherife cannot have any warrant to make any partition in ſeveralty or by metes and bounds.

[n] 12. E. 3. Judgm. 162. 7. Aſſ. 10. 7. E. 3. 49. 10. Aſſ. 17. 12. Aſſ. 5. 17. 10. E. 3. 40. 43. 28. Aſſ. 35. 23. Aſſ. 18. 20. E. 3. Aſſ. 62. 3. E. 3. 48. b. 19. H. 6. 45. 7. H. 6. 4. 3. E. 4. 10. * Bract. lib. 4. fo. 216. b. [o] 3. E. 3. 48. 21. R. 2. tit. nuper ob. 22. 4. H. 7. 10. 30. E. 1. nuper ob 18. F. N. B. 9. b. * Britton fol. 112. a. [p] 6. Co. 12, & 13. Morrice's caſe accorde. (Poſt. 187. a.)

(3) See the caſe of a *moveable* fee ſimple, ſtated ant. fol. 4. a.

[167. b.]

(1) [See Note 15.]

(2) [See Note 16.]

Sect. 248.

ET quant judgment ſera done ſur tiel brief, le judgment ſerra tiel; que partition ſerra fait enter les parties, et que le vicount en ſon proper perſon alera a les terres et tenements, &c. et que il per le ſerement de xii loyalx homes de ſon bayliwicke, &c. ſerra partition enter les parties, et que l'un part de meſnes les terres et tenements ſoyent aſſignes al plaintif ou a l'un des plaintifs, et un auter part a un auter parcener, &c. nient feaſant mention en le judgement de l'eigne ſoer pluis que de puiſne.

AND when judgement ſhall be given upon this writ, the judgment ſhall be thus; that partition ſhall be made betweene the parties, and that the ſherife in his proper perſon ſhall go to the lands and tenements, &c. and that he by the oath of 12 lawful men of his bailiwicke, &c. ſhall make partition between the parties, and that one part of the lands & tenements ſhall be aſſigned to the plaintif or to one of the plaintifs, and another part to another parcener, &c. not making mention in the judgement of the eldeſt ſiſter more than of the youngeſt.

Bract. fo. 66, &c. Brit. 71, &c. Brit. ca 72. Fleta lib. 5. ca. 9.

NOTE, the firſt judgement in a writ of partition, whereof *Littleton* here ſpeaketh, is, *quòd partitio fiat inter partes prædictas de tenementis prædictis, cum pertinentiis*, after which judgement. By this *&c.* viz. *tenements, &c.* is implyed, that a writ ſhall be awarded to the ſherife, *quòd aſſumptis tecum 12 liberis et legalibus hominibus de vicineto tuo, per quos rei veritas meliùs ſciri poterit, in propriâ perſonâ tuâ accedas ad tenementa prædicta cum pertinentibus, et ibidem per eorum ſacramentum, in præſentiâ partium* (3) *prædictarum per te præmuniendarum ſi intereſſe voluerint, prædicta tenementa cum pertinentibus per ſacramentum bonorum et legalium hominum prædictorum, habito reſpectu ad verum valorem earundem, in duas partes æquales partiri et dividi, et unam partem partium illarum, &c.*

This laſt *&c.* in this Section is evident.

Ockam ca. quid ſit liber judiciarius. (4) 40. E. 3. 45. 9. Aſſ. 2. 8. Aſſ. 35. 49. E. 3. 2. Regiſt. F. N. B. 16.

"*Judgement,*" *Judicium eſt quaſi juris dictum*, ſo called, becauſe [168. a.] ſo long as it ſtands in force *pro veritate accipitur* (1) and cannot be contradicted. And thereupon antiquitie called that excellent booke in the exchequer, *Domeſday, Dies judicii. Sicut enim diſtricti et terribilis examinis illa noviſſima ſententia nullâ tergiverſationis arte valet eludi, &c. ſic ſententia ejuſdem libri inficiari non poteſt, vel impunè declinari; ob hoc nos eundem librum judiciarium nominamus, &c. quòd ab eo ſicut a prædicto judicio non licet ullâ ratione diſcedere.* By *Littleton* it appeareth, that the formes of judgements, pleas, and other legall proceedings, doe conduce much to the right underſtanding of the law and of the reaſon thereof; as here *Littleton* rightly collecteth upon the forme of the judgement, that the ſherife ſhall deliver to them ſuch parts as he thinkes good, and that the eldeſt coparcener ſhall have no election when partition is made by the ſherife. And it is to bee obſerved, that there bee two judgement

(3) [See Note 17.]

(4) See Dialog. de Scaccar. lib. 1. cap. 16. which hath the ſame title.

[168. a.]

(1) See ſame explanation of *judicium*, ant. 39. a.

ments in a writ of partition. Of the former *Littleton* ſpeaketh in this place. And when partition is made by the oath of twelve men, and aſſignement and allotment thereof, and ſo returned by the ſherife, then the latter judgment is, *ideo conſideratum eſt, quòd partitio prædicta firma et ſtabilis imperpetuum teneatur*, and this is the principall judgement. [9] And of the other, before this be given, no writ of error doth lie. (2)

[9] 11. Co. 40. Hill. 39. Eliz. Rot. 327. in Banke le Roy inter An. Countes de War. & le Seignior Berkley. (Forteſc. 52. Ant. 50. a. 109. b.)

"*Shireve*" is a word compounded of two Saxon words, viz. *ſhire*, and *reve*. *Shire, ſatrapia*, or *comitatus*, commeth of the Saxon verbe *ſhiram, i. e. partiri*, for that the whole realme is parted and divided into ſhires; and *reve* is *præfectus*, or *præpoſitus*; ſo as *ſhireve* is the *reve* of the ſhire, *præfectus ſatrapiæ, provinciæ*, or *comitatûs*. And he is called *præfectus*, becauſe he is the chiefe officer to the king within the ſhire; for the words of his patent be, *commiſimus vobis cuſtodiam comitatûs noſtri de &c.* And he hath a threefold cuſtodie, *triplicem cuſtodiam*, viz. Firſt, *vitæ juſtitiæ*; for no ſuit begins, and no proceſſe is ſerved but by the ſherife. Alſo he is to returne indifferent juries for the triall of mens lives, liberties, lands, goods, &c. Secondly, *vitæ legis*; hee is, after long ſuits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vitæ reipublicæ*; he is *principalis conſervator pacis*, within the countie, (3) which is the life of the common wealth, *vita reipublicæ pax*.

He is called before, Sect. 234. *viſcount*, in Latyne, *vicecomes, i. e. vice comitis*, that is, in ſtead of the earle of that countie, who in antient time had the regiment of the countie under the king. For it is ſaid in the *Mirror*,* that it appeareth by the ordinance of antient kings before the Conqueſt, that the earles of the counties had the cuſtodie or gard of the counties, and when the earles left their cuſtodies or gards, then was the cuſtodie of counties committed to viſcounts, who therefore (as it hath beene ſayd) are called *vicecomites*. And *Ockam cap. quid centuria, &c. porro vicecomes dicitur, quòd vicem comitis ſuppleat*.

Vide the Second Part of the Inſtitutes. W. 1. c. 10.

* Mirror cap. 1. ſect. 3.

Ockam cap. Quid Centur. &c

Marculphus ſaith, this office is *judiciaria dignitas*; *Lampridius*, that it is *officium dignitatis*. *Forteſcue* ſaith, *quòd vicecomes eſt nobilis officiarius*. And ſee there, and obſerve well his honourable and ſolemne election and creation at this day. But to confirme all that hath beene ſaid touching this point, and to conclude the ſame, among the lawes of *Edward* the Confeſſor (4) I finde it thus recorded. *Verùm quod modò vocatur comitatus olim apud Britones temporibus Romanorum in regno iſto Britanniæ vocabatur conſulatus et qui modò vocantur vicecomites tunc temporis vice-conſules vocabantur; ille verò dicebatur viceconſul, qui conſule abſente ipſius vices ſupplebat in jure et in foro.* (5) Herein many things are worthy of obſervation. Firſt, for the antiquitie of counties. Secondly, that which wee called *comitatum*, the Romanes more latinely called *conſulatum*. Thirdly, whom the Saxons afterwards called (as hath beene ſaid) *ſhireve* or *earle*, the Romanes called *conſul*. Fourthly, that the ſherife was deputy of the conſull or earle; and therefore the Romanes called him *viceconſul*, as we at this day call him *vicecomes*. Fiftly,

Forteſcue cap. 24. 12. R. 2. cap.

Lambert fol. 129. 12.

(2) [See Note 18.]
(3) See Lamb. Juſt. ed. of 1602. p. 12, 13. and 2. Inſt. 174. in both of which books the coroner is ſo ſtiled.
(4) [See Note 19.]
(5) [See Note 20.]

Fiftly, that the ſherife in the Romanes time, and before, was a miniſter to the king's courts of law and juſtice, and had then a court of his owne, which was the county court, then called *curia conſulatûs*, as appeareth by theſe words, *ipſius vices ſupplebat in jure et in foro*. Sixtly, that this realme was divided into ſhires and counties, and thoſe ſhires into cities, burroughes, and townes, by the Brittaines: ſo that king *Ælfred*'s diviſion of ſhires and counties was but a renovation or more exact deſcription of the ſame. (6) Laſtly, the conſequence that will follow upon theſe things being ſo ancient, (as in the time of, and before the Romanes) the ſtudious reader will eaſily collect. And afterwards, fol. 135. amongſt the lawes of the ſame king it appeareth, that thoſe whom the Saxons ſometimes called (and now we call) *ældermen* or *eorles*, the Romanes called *ſenatores, et ſimiliter olim apud Britones temporibus Romanorum in regno iſto Britanniæ vocabantur ſenatores, qui poſtea temporibus Saxonum vocabantur aldermani, non propter ætatem, ſed propter ſapientiam et dignitatem, cùm quidam adoleſcentes eſſent, juriſperiti tamen et ſuper hoc experti.* (7)

Cæſar Polichro. Huntingdon. Polidor. inter leges Molmucii. Hooker lib. 2.

" *De ſon Bayliwicke.*" It appeareth before, that the enqueſt must be *de vicineto* of the place where the lands doe lie, and not generally *de balivâ tuâ*. By this it appeareth, that the ſherife is *balivus*, and his county called *baliva*; and therefore it is good to be ſeene what *balivus* originally ſignified, and whereof it is derived. [168. b.]

Baylife (1) is a French word, and ſignifies an officer concerned in the adminiſtration of juſtice of a certaine province; and becauſe a ſherife hath an office concerning the adminiſtration of juſtice within his county or bailiwicke, therefore he called his county *baliva ſua*. For example, when he cannot find the defendant, &c. he returneth, *non eſt inventus in balivâ meâ*.

Flet. lib. 2. cap. 67. (Cro. Jam. 178. Plowd. 28. b. 1. Ro. Abr. 339.) Bract. lib. 3. tract. 2. cap. 33. nu. 3. Idem lib. 3. fo. 121. b.

I have heard great queſtion made, what the true expoſition of this word *balivus* is. In the ſtatute of *Magna Charta*, cap. 28. the letter of that ſtatute is, *nullus balivus de cætero ponat aliquem ad legem manifeſtam nec ad juramentum ſimplici loquelâ ſuâ ſine teſtibus fidelibus ad hoc inductis*. And ſome have ſaid, that *balivus* in this ſtatute ſignifieth any judge; for the law muſt be waged and made before the judge. And this ſtatute (ſay they) extends to the courts of common pleas, king's bench, &c. for they muſt bring with them *fideles teſtes*, &c. and ſo hath beene the uſage to this day.

Bract. li. 3. 156. b. Brit. fo. 56. Flet. li. 2. ca. 63. (10. Co. 103. Poſt. 195. a.)

But I have peruſed a very ancient and learned reading upon this ſtatute; and the reader taketh it, that, at the common law before this ſtatute, he, that would make his law in any court of record, muſt bring with him *fideles teſtes*. And this opinion herein is warranted by *Glanvil*, who wrote in the reigne of *Henry* the ſecond. But the reader holdeth, that in the courts which were not of record, (2) as the county court, the hundred court, the court baron, &c. there the defendant without any faithfull witneſſes might before this ſtat. have made his law, for remedy whereof this act was made; and therefore (ſaith he) the ſtatute extendeth to the judges of ſuch courts as are not of record. In 10. H. 4. it is holden,

Glanv. li. 1. ca. 9.

10. H. 4. 4. (Cro. Jam. 551. 584.)

(6) [See Note 21.]

(7) [See Note 22.]

[168. b.]

(1) See ant. 61. b. at the bottom. The additional references in the margin on the ſide of the word *bailiff* relate to *bailiffs of manors*.

(2) Concerning the diſtinction of courts of record, ſee ant. 117. b.

den, that if a lord, that hath a franchiſe in a leet, doth not enquire of things enquirable, and puniſh them, the ſherife ſhall enquire in his turne, *et ſi le vicount ne faire en ſon torne, le baylie le roy enquirer' quant il vient, ou auterment ſerra inquiſe per juſtice en eire*, where *baylie le roy* is underſtood *juſtice le roy*. And in the *Mirror* * it is holden, that the ſtatute doth extend to everie juſtice, miniſter of the king, ſteward, &c. and all comprehended under this word *baylife*.

The chiefe magiſtrates in divers antient corporations are called baylifs, as in Ipſwich, Yarmouth, Colcheſter, &c. And *baylife* in French is *diœcetes*, *nomarcha*, in Engliſh, a bailife or governor. But of this thus much ſhall ſuffice.

* Mirr. ca. 5. ſect. 2. Vi. Bract. fo. 409. Flet. li. 2. ca. 63. 56.

Sect. 249.

ET de la partition que le vicount ad iſſint fait, il ferra notice as juſtices (3) *ſouth ſon ſeale et les ſeales de cheſcun de les* 12, *&c. Et iſſint en ceo caſe poies veier, que l'eigne ſoer n'avera my la primer election*, (4) *mes le vicount luy aſſignera ſa part que il avera, &c. Et poit eſtre que le vicount doit aſſigner primerment un part a le plus puiſne, &c. et darreinement a l'eigne, &c.*

AND of the partition which the ſherife hath ſo made, he ſhall give notice to the juſtices under his ſeale, and the ſeales of every of the 12, &c. And ſo in this caſe you may ſee, that the eldeſt ſiſter ſhal not have the firſt election, but the ſherife ſhall aſſigne to her her part which ſhee ſhal have, &c. And it may be that the ſherife will aſſigne firſt one part to the youngeſt, &c. and laſt to the eldeſt, &c.

"*SOUTH ſon ſeale, &c.*" Note, the partition, made and delivered by the ſherife and jurors ought to bee returned into the court under the ſeale of the ſherife, and the ſeales of the twelve jurors; for the words of the judiciall writ of partition, which doth command the ſherife to make partition, are *aſſumptis tecum* 12 *&c.* (ſo as there muſt be twelve) *et partitionem inde, &c. ſcir' facias juſticiariis, &c. ſub ſigillo tuo, et ſigillis eorum per quorum ſacramentum partitionem illam feceris, &c.* And this is the reaſon, wherefore in this caſe the partition, which they make upon oath ought to be returned under their ſeales: and the reaſon of that is for the more ſtrengthening of the partition by the 12, and that the ſherife ſhould not returne what partition he would. Now after all this, this (*&c.*) viz. 12, *&c.* doth imply, that the principall judgement upon the partition ſo returned is, *ideo conſideratum eſt per curiam quòd partitio firma et ſtabilis imperpetuum teneatur.* (1) The latter two (*&c.*) are evident. (2)

Brit. fo. 185. b. acc. Bract. l. 2. fo. 71, &c. Flet. l. 5. ca. 9.

[169. a.]

Lib. 11. fol. 40. in Metcalf's caſe.

(3) In L. and M. and in Roh. there is an *&c.* here.

(4) An *&c.* here in L. and M. and in Roh.

[169. a.]

(1) See acc. ant. 168. a.

(2) [See Note 23.]

Sect. 250.

ET nota, que partition per agreement perenter parceners poit eſtre fait per la ley enter eux, auxibien per parol ſans fait, come per fait.

AND note, that partition by agreement betweene parceners may bee made by law betweene them, as well by paroll without deed, as by deed. (3)

[r] 3. E. 4. 9, 10. 9. E. 4. 38. 11. H. 4. 3. 9. H. 4. partition 12. 21. E. 3. 38. (Dy. 350. b. Poſt. 187. a. 198. b.)

[s] Vide Sect. 290. 3. H. 4. 1. 19. H. 6. 25. 28. H. 6. 2. 3. E. 4. 9, 10. 47. E. 3. 22. 47. Aſſ. 8. 19. H. 6. 1. 17. E. 3. 46. 30. Aſſ 8. lib. 4 fo 73 lib. 6. fo. 12, 13. 2. H. 7. 5. Dier 18. Eliz. 358. 31. H. 8. Dier 46. 2. Eliz. Dier 179. 28. H. 8. Dier 29. 1. Mar. Dier 98. (1. Leon. 103.

HERE it appeareth, that [r] not onely lands and other things that may paſſe by livery without deed, but things alſo that do lie in grant, as rents commons advowſons and the like that cannot paſſe by grant without deed, whether they bee in one county or in ſeverall counties, may be parted and divided by paroll without deed. [s] But a partition betweene joyntenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the ſtatutes of 31. H. 8. cap. 10. and 32. H. 8. cap. 32. becauſe ~~they muſt purſue that act by writ~~ *de partitione faciendâ*; and a partition betweene joyntenants without writ remaines at the common law, which could not be done by paroll. And ſo it is and for the ſame reaſon of tenants in common. But if two tenants in common be, and they make partition by paroll, and execute the ſame in ſeveralty by livery, this is good, and ſufficient in law. And therefore where bookes ſay, the joyntenants made partition without deed, it muſt be intended of tenants in common and executed by liverie.

Nota, betweene joyntenants there is a two-fold privity, viz. in eſtate and in poſſeſſion: betweene tenants in common, there is privity onely in poſſeſſion, and not in eſtate: but parceners have a threefold privity, viz. in eſtate, in perſon, and in poſſeſſion.

(6. Co. 12. 8. Co. 42. Poſt. 186. a. 193. b. 200. b. 335 a. 2. Inſt. 403.)

Sect. 251.

ITEM, ſi deux meaſes diſcendont a deux parceners, et l'un meaſe vault per an 20 s. l'auter forſque 10 s. per an, en ceſt cas partition poit eſtre fait enter eux en tiel forme; c'eſtaſcavoir, que un parcener avera l'un meaſe, et que l'auter parcener avera l'auter meaſe; et celuy que avera le meaſe que eſt de value de 20 s. et ſes heires paycront un annual rent de v. s. iſſuant hors de meſme le meaſe a l'auter parcener et a ſes heires a touts jours pur ceo que cheſcun de eux auroit ewelty en value.

ALSO, if two meſes deſcend to two parceners, and the one meaſe is worth twenty ſhillings *per annum*, and the other but ten ſhillings *per annum*, in this caſe partition may bee made betweene them in this manner; to wit, the one parcener to have the one meaſe, and the other parcener the other meaſe; and ſhe which hath the meaſe worth 20 ſhillings *per annum* and her heires ſhal pay a yeerely rent of five ſhillings iſſuing out of the ſame meaſe to the other parcener and to her heires for ever, becauſe each of them ſhould have equality in value.

(3) [See Note 24.]

Sect.

Sect. 252.

ET tiel particion fait per parol eſt aſſets bone; et meſme le parcener, que avera le rent, et ſes heires, purront diſtreiner de commen droit pur le rent en le dit meaſe de le value de 20 s ſi le rent de 5 s. ſoit aderere en aſcun temps, en quecunque mains que meſme le meaſe deviendra, coment que ne fuit unques aſcun eſcripture de ceo fait enter eux de tiel rent.

AND ſuch partition made by parol is good enough; and that parcener, who ſhall have the rent, & his heires, may diſtrein of common right for the rent in the ſayd meaſe worth twenty ſhillings, if the rent of 5 ſhillings be behinde at any time, in whoſe hands ſoever the ſame meaſe ſhall come, although there never were any writing of this made betweene them for ſuch a rent.

"*PER parol.*" *Nota*, here [*t*] a rent may be granted for owelty of partition without (4) deed, even as a rent in caſe of a leaſe for yeares, for life, or a gift in taile, may bee reſerved, without deed; and ſo may a rent be aſſigned to a woman out of the land, whereof ſhee is dowable, &c. without deed. But albeit an exchange for lands in the ſame county may be without deed; yet a rent granted for egality (5) of the ſame exchange cannot be without deed. And the cauſe of the difference is apparent; for coparceners are in by deſcent, and compellable to make partition.

[*t*] 8. E. 3. 16. 21. Aſſ. p. 1. 21. E. 3. 38. 11. H. 4. 61. 45. E. 3. 21. 2. H. 6. 14. 21. H. 6. 11. 1. Mar. Dier 91. (Ant. 34. b.) (Mo. 29.)

"*Le rent, &c.*"

The ſame law is of common of eſtovers, or a corodie, or a [169. b.] common of paſture, &c. or a way granted upon the partition by the one coparcener to the other. All which and the like, albeit they lie in grant, yet upon the partition may they be granted without deed.

"*Iſſuant hors de meſme le meaſe, &c.*" [*x*] For if it be granted out of other lands, then deſcended to the coparceners, then there muſt be a deed. [*z*] But if the rent be granted generally (out of no land in certaine) for owelty of partition, *pro reſiduo terræ*, it ſhall bee intended out of the purpartie of her that granteth it.

[*x*] 1. Mariæ Dyer 91. [*z*] 29. Aſſ. 23. 29. E. 3. 9. b. Pl. Com. 34. (Poſt. 252. b.)

[*a*] If there be three coparceners, and they make partition, and one of them grant twenty ſhillings *per annum* out of her part to her two ſiſters and their heires for equality of partition, the grantees are not joyntenants of this rent; but the rent is in nature of coparcenary, and after the death of the one grantee the moity of the rent ſhall deſcend to her iſſue in courſe of coparcenary, and not ſurvive to the other, for that the rent doth come in recompence of the land, and therefore ſhall enſue the nature thereof; and if the grant had beene made to them two of a rent of twenty ſhillings, viz. to the one ten ſhillings, and to the other ten ſhillings, yet ſhall they have the rent in courſe of coparcenary, and joyne in action for the ſame.

[*a*] 15. H. 7. 14. 29. Aſſ. 23. 29. E. 3. 9. b. (5. Co. 8. a. Wyndham's caſe. 3. Co. 22. b. Hob. 172. Poſt. 177. b.)

If

(4) [See Note 25.]
(5) Of *equality* in exchanges, ſee ant. 50. b. 51. a. & b.

[b] 29. Aſſ. 23. 29. E. 3. 9. 17. E. 3. 10.

[b] If one coparcener be maried, and for owelty of partition the huſband and wife grant a rent to the other two out of the part of the fem covert, this partition being equall ſhall charge the part of the fem covert for ever.

[c] 38. E. 3. 26. b.

[c] If two coparceners by deed indented alien both their parts to another in fee, rendring to them two and their heires a rent out of the land, they are not joyntenants of this rent, but they ſhall have the rent in courſe of coparcenary; becauſe their right in the land, out of which the rent is reſerved, was in coparcenary.

[d] 1. Mariæ Dyer 91. 8. E. 3. 16. and other the bookes aboveſaid.

"*Purront diſtreiner de common droit, &c.*" That is, [d] in this caſe the law doth give a diſtreſſe, leſt the grantee ſhould bee without remedy, for the which upon the partition ſhe hath given a valuable recompence in land, which deſcended, &c. And ſo in the caſe of dower abovementioned. (1)

Sect. 253.

EN meſme le maner eſt de touts maners de terres et tenements, &c. lou tiel rent eſt reſerve a un ou a divers parceners ſur tiel partition, &c. Mes tiel rent n'eſt pas rent ſervice, mes eſt rent charge de common droit (1) *ewe et reſerve pur egaltie de partition* (2).

IN the ſame manner it is of all manner of lands and tenements, &c. where ſuch rent is reſerved to one or to divers parceners upon ſuch partition, &c. But ſuch rent is not rent ſervice, but a rent charge of common right had and reſerved for equality of partition.

"*TERRES et tenements, &c.*" Here (*&c.*) implyeth a caution, viz. that they be ſuch lands and tenements out of which a rent for egaltie of partition may be granted, whereof ſufficient hath beene ſaid before. [170. a.]

"*Reſerve al un.*" Here reſervation is taken for a grant; and if it be uſed upon the partition, doth amount in this caſe to a grant, which is worthy the obſervation.

Sect. 254.

ET nota, que nulles ſont appelles parceners per le common ley, mes females ou les heires de females, que veignont a terres et tenements per diſcent: car ſi ſoers purchaſe terres ou tenements, de ceo ils ſont appelles joyntenants, et nemy parceners.

AND note, that none are called parceners by the common-law, but females or the heires of females, which come to lands or tenements by diſcent: for if ſiſters purchaſe lands or tenements, of this they are called joyntenants, and not parceners.

This needs no explanation.

[170. a.]

(1) See ant. 153. a. note 1.

(2) In L. and M. *&c.* here.

(1) See ant. 34. b. 153. a. and Sheph. Comm. Aſſur. 425.

Sect. 255.

ITEM, ſi deux parceners de terres en fee ſimple font particion enter eux, et la part de un vault pluis que le part de l'auter, ſi els fueront al temps de la particion de pleine age, ſcil. de 21 ans, donques la particion touts dits demurrera, et ne ſerra unques defeat. Mes ſi les tenements (dont els font particion) ſoyent a eux en fee taile, et le part que l'un ad eſt melieux en annuall value que eſt la part le l'auter, coment que els ſont concludes durant lour vies a defeater la particion ; uncore ſi le parcener, que ad le meinder part en value, ad iſſue et devy, l'iſſue poit diſogreer a la partition, et enter et occupier en common l'auter part que fuit allotte a ſa aunt, et iſſint l'auter poit enter et occupier en common l'auter part allotte a ſa ſoer, &c. ſi come nul partition uſt eſte fait. (1) †

ALSO if two parceners of land in fee ſimple make partition between themſelves, and the part of the one valueth more then the part of the other, if they were at the time of the partition of full age, *ſc.* of 21 yeares, then the partition ſhall alway remaine, and be never defeated. But if the tenements (whereof they make partition) be to them in fee taile, and the part of the one is better in yearly value then the part of the other, albeit they be concluded during their lives to defeat the partition ; yet if the parcener, which hath the leſſer part in value, hath iſſue and dye, the iſſue may diſagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and ſo the other may enter and occupy in common the other part allotted to her ſiſter, &c. as if no partition had beene made.

"*DONQUES le partition touts dits demurrera, &c.*" Hereby it appeareth, that the inequality of the value ſhall not impeach a partition made of lands in fee ſimple betweene coparceners of full age, (3) no more then it ſhall doe in caſe of an exchange. (4)

9. H. 6. 5. and other the bookes aboveſaid.

"*Ils ſont concludes durant lour vies.*" This inequall partition doth ſo conclude the parceners themſelves, as ſhee that hath the unequall part ſhall not avoid it during her life.

"*Concludes.*" This word is derived of *con* and *claudo,* (5) and in this ſenſe ſignifieth to cloſe or ſhut up her mouth that ſhe cannot ſpeake to the contrary.

(Poſt. 352. a.)

[170. b.] Huſband and wife tenants in ſpeciall taile of certaine lands in fee have iſſue a daughter, the wife dyeth, the huſband by a ſecond wife hath iſſue another daughter, both the daughters enter (where the eldeſt is only inheritable) and make partition : the eldeſt daughter is concluded during her life to impeach the partition, or to ſay that the youngeſt is not heire, and yet ſhe is a ſtranger to the taile, but in reſpect of privity in their perſons the partition ſhall conclude,

11. Aſſ. p. 2.

See after the chapter of Garr. (2) (Doctor & Stud. 65.)

[170. b.]

(1)† [See Note 26.]

(2) See the caſe of diſcontinuance ſtated by lord Coke poſt. 373. b.

(3) Ant. acc. 166. a.

(4) Ant. 51. a.

(5) Acc. ant. 37. a.

clude, for a partition between meere ſtrangers in that caſe is voyd, but the iſſue of the eldeſt ſhall avoid this partition as iſſue in taile.

[g] 21. E. 3. 34, 35. 2. E. 2. Baſtardy 19. 11. Aſſ. 23. 30. Aſſ. 7. 17. E. 3. 59.

[g] *T. S.* ſeiſed of lands in fee hath iſſue two daughters, *Roſe* and *Anne*, baſtards eigne and *mulier puiſne*, and dieth. *Roſe* and *Anne* doe enter and make partition. (3) *Anne* and her heires are concluded for ever. (4)

(8. Co. 101. b. Poſt. 244 b.)

Sect. 256.

ITEM, ſi deux parceners de tenements en fee preignent barons, et cls et lour barons font partition enter eux, ſi la part l'un eſt meinder en annual value que la part l'auter, durant les vies lour barons la particion eſtoyera en ſa force. Mes coment que il eſtoyera durant les vies les barons, uncore apres la mort le baron, celuy feme, que ad le meinder part, poit enter en la part ſa ſoer come eſt avantdit, et defeatera la particion.

ALSO, if two parceners of lands in fee take huſbands, and they and their huſbands make partition betweene them, if the part of the one bee leſſe in value then the part of the other, during the lives of their huſbands the partition ſhall ſtand in its force. But albeit it ſhal ſtand during the lives of their huſbands, yet after the death of the huſband, that woman which hath the leſſer part may enter into her ſiſters part as is aforeſaid, and ſhall defeat the partition.

"*ELS et lour barons.*" Here it appeareth, that the wife muſt be party to the partition, and ſo are the bookes * to bee intended that ſpeake of this matter.

* 42. Aſſ. 22. 8. E. 4. 4. 9. E. 3. 38. 15. E. 4. 20. F. N. B. 62. 29. Aſſ. 23. 9. H. 6. 5. 43. Aſſ. 14.

"*Et defeatera la particion.*" Note, the partition ſhall not be defeated for the ſurpluſage onely to make the partition equall, but here it appeareth that it ſhall bee avoyded for the whole. But of this more ſhall be ſaid hereafter in this chapter, *ſectione* 264.

[b] Vid. 2. E. 2. Cui in vita 17.

[b] And though the partition be unequall, yet is not the partition voyd, but voydable; for if after the deceaſe of the huſband, the wife entereth into the unequall part, and agreeth thereunto, this ſhall binde, and therefore *Littleton* uſed the word *(defeatera,)* which proveth it to bee voydable. [171. a.]

Sect. 257.

MES ſi le partition fait perenter les barons (1) fuit tiel, que cheſcun part al temps d'allotment fait fuit de egall annuall value, donque il ne poit apres eſtre defeat en tielx caſes.

BUT if the partition made betweene the huſbands were thus, that each part at the time of the allotment made was of equall yearely value, then it cannot afterwards be defeated in ſuch caſes.

"*PERENTER*

(3) [See Note 27.]
(4) [See Note 28.]

[171. a.]
(1) Inſtead of *les barons* it is *eux* in L. and M. and Roh.

"PERENTER *les barons.*" This is miſtaken, for the originall is *parenter eux*, that is, betweene the barons and fems, and not as it is here betweene the barons, therefore this error would be hereafter reformed.

"*Al temps del allotment.*" Hereby it appeareth, that if the parts at the time of the partition bee of equall yearely value, neither the wives nor their heyres ſhall ever avoyd the ſame; and the reaſon hereof is, for that the huſbands and wives were compellable by law to make partition, and that which they are compellable to doe in this caſe by law, they may doe by agreement without proceſſe of (2) law. If the annuall value of the land be equall at the time of the partition, and after become unequall by any matter ſubſequent, as by ſurrounding, ill huſbandry, or ſuch like, yet the partition remaines good.

9. H. 6. 5. and other the bookes aboveſaid. (Poſt, 179.)

Judicis officium eſt, ut res ita tempora rerum
Quærere; quæſito tempore tutus eris.

But if the partition be made by force of the king's writ, and judgement thereof given, it ſhall binde the fem-coverts for ever, albeit the parts be not of equall annuall value; becauſe it is made by the ſherife by the oath of twelve men by authority of law; and the judgement is, that partition ſhall remaine firme and ſtable for ever, as hath beene ſaid. [*a*] But a partition in the chancery where one coparcener is of full age and ſueth livery, and one other is within age and hath an unequall part allotted to her, this ſhall not binde her at full age; for in a writ directed to the eſcheator to make partition, there is a *ſalvo jure*, and there is no judgement upon ſuch a partition. But if ſuch a partition be equall, it ſhall binde, ſo that a part of the land holden *in capite* bee allotted to every of the coparceners, for to that end there is an expreſſe *proviſo* in the writ. [*b*] And this partition may be avoyded either by *ſcire fac'* in the chancery, or by a writ *de partitione faciendâ* at the common law at her full age (3).

[*a*] F. N. B. 256. 259, 260, 261, 262, 263. 9. H. 6. 6. 21. E. 3. 31.

[*b*] Vide 21. E. 3. 31.

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ITEM, ſi deux parceners ſont, et le puiſne eſtant deins l'age de 12 *ans, et particion eſt fait enter eux, iſſint que la purpartie que eſt allot al puiſne eſt de meindre value que la purpartie l'auter, en ceſt caſe le puiſne, durant le temps de ſon nonage, et auxy quaunt el vient a pleine age, ſcil. de* 21 *ans, poit enter en la purpartie a ſa ſoer allot, et defeatera la partition. Mes bien ſoy gard tiel parcener quant el vient a ſa plein age, que el ne preigne a ſon uſe demeſne touts les profits des terres ou tenements*

ALSO, if two coparceners be, and the yongeſt being within the age of twenty-one years, partition is made betweene them, ſo as the part which is allotted to the yongeſt is of leſſe value than the part of the other, in this caſe the yongeſt, during the time of her nonage, and alſo when ſhee commeth to full age, *ſcil.* of 21 yeares, may enter into the part allotted to her ſiſter, and ſhall deſeat the partition. But let ſuch parcener take heed when ſhe comes to her full age, that

(2) [See Note 29.] (3) Acc. F. N. B. 62. H.

nements que a luy furent allots; car donques el ſoy agreea a le partition a tiel age, en quel caſe la partition eſtoyera et demurra en ſa force. Mes peraventure les profits de la moitie el poit prender, r l'inquiſant les profits de l'auter moitie a ſa ſoer. (1)

that ſhee taketh not to her owne uſe all the profits of the lands or tenements which were allotted unto her; for then ſhee agrees to the partition at ſuch age, in which caſe the partition ſhall ſtand and remaine in its force. But peradventure ſhe may take the profits of the moitie, leaving the profits of the other moitie to her ſiſter.

[c] 43. Aſſ. 14. 9. H. 6. 5, 6. 7. E. 3. 13. 8. E. 3. 24. 10. H. 4. 5. 31. Aſſ. 16. 21. H. 6. 25. (1. Ro. Abr. 138. Hob. 179.)

AS before in the caſe of the fem-covert, [c] ſo it is in the caſe of the enfant; for if the partition be equall at the time of the allotment, it ſhall binde him for ever, becauſe he is compellable by law to make partition, and he ſhall not have his age in a *partitione faciendâ*; (2) and though the partition be unequal, and the infant hath the leſſer part, yet is not the partition void but voidable by his entry; for if he take the whole profits of the unequall part, after his full age, the partition is made good for ever. And therefore *Littleton* here giveth him a caveat, that in that caſe he take not the whole profits of his unequal part, neither ſhall an unequall partition in the chancery binde an infant, as appeareth before. (3) But a partition made by the king's writ *de partitione faciendâ* by the ſherife by the oath of twelve men, and judgement thereupon given, ſhall binde the infant, though his part be unequall, *cauſâ quâ ſuprà*. [171. b.]

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ET eſt aſcavoir, que quant il eſt dit, que males ou females ſont de pleine age, ceo ſerra entendue d'age de 21 ans; car ſi devant tiel age aſcun fait ou feoffement, grant, releaſe, confirmation, obligation, ou auter ſcripture, ſoit fait per aſcun de eux, &c. ou ſi aſcun deins tiel age ſoit baylife ou receiver a aſcun home, &c. tout ſerve pur nient, et poit eſtre avoyde. Auxy home devant le dit age ne ſerra my jure en un enqueſt, &c. (1)†.

AND it is to be underſtood, that when it is ſaid, that males or females bee of full age, this ſhall be intended of the age of 21 yeares; for if before ſuch age any deed or feoffement, grant, releaſe, confirmation, obligation, or other writing, bee made by any of them, &c. or if any within ſuch age bee baylife or receiver to any man, &c. all ſerve for nothing, and may be avoided. Alſo a man before the ſayd age ſhall not be ſworne in an enqueſt, &c.

* Vid. Sect. 402, 403. 2. Inſt. 673. F. N. B. 192. g. Poſt. 246. a. 337. b. 350. a. &. b. 380. a. Ant. 171. a. 8. Co. 44. b.)

THE law hath provided for the ſafety of a man's or woman's eſtate, that * before their age of twentie one yeares they cannot binde themſelves by any deed, (4) or alien any land (5), goods, or chattels (6).

" *Age*

(1) In L. and M. and Roh. an &c. here.
(2) [See Note 30.]
(3) See the caſe of partition of an advowſon between coparceners, where one is within age, in F. N. B. 36. D.
(4) See ant. 51. b. note 2. and 52. a. note 2. To the references there add 3. P. Wms. 208.
(5) [See Note 31.]
(6) [See Note 32.]

(1)† No &c. in L. and M. nor Roh.

"*Age de* 21 *ans.*" Before this age a man or woman is called an enfant.

"*Fait,*" *Factum, Anglicè* a deed, and ſignifieth in the common law, an inſtrument conſiſting of three things, viz. writing, ſealing, and delivery, comprehending a bargaine or contract between party and party, man or woman. It is called of the civilians *literarum obligatio.* Brit. fo. 65, 66. & 101. Flet. li. 3. ca. 14. (Perk. ſect. 135.)

[172. a.] "*Feoffment.*" Of this word ſufficient hath bin ſayd before in the firſt chapter of the firſt booke.

"*Grant,*" *Conceſſio,* is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot paſſe without deed; as advowſons, ſervices, rents, commons, reverſions, and ſuch like. Of this alſo ſufficient likewiſe hath beene ſaid in the firſt chapter of the firſt booke. Lib. 3. fol. 63. in Lincolne Colledge caſe.

"*Releaſe, confirmation, &c.*" Of theſe ſhall bee ſpoken hereafter in their proper places and chapters.

"*Obligation*" is a word of his owne nature of a large extent; but it is commonly taken in the common law, for a bond containing a penalty, with condition for payment of money or to do or ſuffer ſome act or thing, &c. and a bill is moſt commonly taken for a ſingle bond without condition.

"*Ou auter ſcripture ſoit fait per aſcun de eux, &c.*" Here by this *&c.* is implied ſome exceptions out of this generality, [*d*] as an infant may bind himſelfe to pay for his neceſſary meat, drinke, apparell, neceſſary phyſicke, and ſuch other neceſſaries, and likewiſe for his good teaching or inſtruction, whereby he may profit himſelfe afterwards: but if he bind himſelfe in an obligation or other writing with a penalty (2) for the payment of any of theſe, that obligation ſhall not bind him. [*e*] Alſo other things of neceſſity ſhall bind [him], as a preſentation to a benefice, (3) for otherwiſe the laps ſhall incurre againſt him. Alſo if an infant be an executor upon payment of any debt due to the teſtator, hee may make an acquittance; but in that caſe a releaſe without payment is voyd (4): and generally whatſoever an infant is bound to do by law, the ſame ſhall bind him, albeit he doth it without ſuit of law. (5) But of this common learning this little taſt ſhall ſuffice.

[*d*] 18. E. 4. 2. 21. H. 6. 3. lib. 9. fol. 87. Pinchon's caſe. (2. Ro. Abr. 146. Cro. Eliz. 920. 2. Inſt. 483. Cro. Cha. 179. Cro. Jam. 494. 560. 1. Ro. Abr. 729. Plowd. 364.)
[*e*] 8. E. 4. 4. 9. H. 6. 5. 17. E. 3. 9. 29. Aſſ. 25. 2. Mariæ Dyer 104, 105. (5. Co. 29. b. 27. a. 6. Co. 3. Cro. Cha. 324. 590. 502. Mo. 105. Cro. Jam. 320. 1. Sid. 41. 259. 446.)

"*Baylife ou receiver al aſcun home, &c.*" By this *&c.* many things are implied, as that by baylife is underſtood a ſervant that hath adminiſtration and charge of lands goods and chattels to make the beſt benefit for the owner againſt whom an action of account doth lie for the profits which he hath raiſed or made or might by his Fleta lib. 2. ca. 64. & ca. 67. Britton fol. 62. 70. Fleta lib. 2. cap. 64. 41. E. 3. 39. 46. E. 3. account 40.

(2) [See Note 33.]
(3) See acc. ant. 89. a. and note 1. there.
(4) Acc. poſt. 264. b.
(5) See F. N. B. 168. d. and the notes b. &c. in the 4to. edition as to infant's binding himſelf to ſerve.

his induſtry or care have reaſonably raiſed or made, his reaſonable charges and expences deducted. [f] But one under the age of twenty one yeares ſhall not be charged in any ſuch account; (6) becauſe, by intendment of law, before his full age hee hath not ſkill and ability to raiſe or make any ſuch improvement and profit.

2. R. 2. ibid. 45. 6. R. 2. ibid. 3. E. 3. 10. (Cro. Jam. 177. 1. Leon. 219.)
[f] 13. E 3. infant 9. 17. E. 2. account 121.
21. E. 3. 8. 10. H. 4. 14. 2. H. 4. 13. regiſt. 135. (Finch L. 302, 303. Noy. 12.)

An account againſt a receiver is, when one receiveth money to the uſe of another to render an account: but upon his account he ſhall not be allowed his expences and charges. [g] And therefore a man cannot charge a baylife as a receiver; becauſe then the baylife ſhould loſe his expences and charges.

[g] 43. E. 3. 31. 46. E. 3. 3. b. 4. H. 6. 27. (1. Ro. Abr. 119. 2. Inſt. 379. 4. Leon. 39. 1. Ro. Rep. 87.)

In an account againſt a receiver, the plaintife muſt declare by whoſe hands the defendant received the money, which he ſhall not doe in the caſe of a baylife. [b] But in ſome caſe in an action of account againſt one as *receptor denariorum*, he ſhall have allowance of his expences and charges, and alſo ſhall account for the profit he received (7) or might reaſonably receive; and this was provided by law in favour of merchants, and for advancement of trade and traffick.

[b] 30. E. 3. 1. account 127. 47. E. 3. 22. 10. H. 7. 16. Bract. li. 5. fo. 334. Brit. f. 62. Fleta l. 2. ca. 64. & 51. 5. E. 3. 1. lib. intrat. 17, 18, 19. (F. N. B. 117. d. Poſt. 182. a. Cro. Jam. 410.)

As if two joynt merchants occupy their ſtocke goods and merchandizes in common to their common profit, one of them naming himſelfe a merchant ſhall have an account againſt the other naming him a merchant, and ſhall charge him as *receptor denariorum ipſius* B. *ex quâcunque cauſâ & contractu ad communem utilitatem ipſorum* A. & B. *provenien' ſicut per legem mercatoriam rationabiliter monſtrare poterit.*

[i] 45. E. 3. 10. 3. E. 3. 27. 39. E. 3. 27. 47. E. 3. 22. F. N. B. 118. (Poſt. 186. 2co. b.)

[i] If there be two joyntenants or tenants in common of lands, and the one make the other his baylife of his moity, he ſhall have an action of account againſt him as bailiife: and ſo are the bookes to be intended, that ſpeake of an action of account in that caſe. (8)

So as there be but three kinds of writs of account, viz. againſt one as gardian, whereof *Littleton* hath ſpoken before in the Chapter of Socage; the ſecond againſt one as baylife; and the third as receiver; as here it appeareth. (k) For a man ſhall not bee charged in an account as ſurveyor, controller, apprentice, reve, or heyward. And to maintaine an action of account, there muſt be, either a privity (9) in deed by the conſent of the partie, for [l] againſt a diſſeiſor or other wrongdoer no account doth lie; or a privity in law *ex proviſione legis* made by the law, as againſt a gardian, &c. whereof ſufficient hath been ſpoken in the Chapter of Socage. (10)

[k] 13. E. 3. account 76. 41. E. 3. ibidem 34. 8. E. 3. 46. 8. E. 4. 6. b. F. N. B. 119. d. (2. Inſt. 379. F. N. B. 119. c. 1. Ro. Abr. 119.)

[l] 2. Mar. B. account 89. F. N. B. 117. Pl. Com. 542. 2. H. 4. 12. 33. H. 6. 2. 4. H. 7. 6, &c. (F. N. B. 119 c.)

"*Ne ſerra jure en un enqueſt, &c.*" By this *&c.* is implied a maxime in law, [m] *quòd minor jurare non poteſt.* For example [n] an infant cannot make his law of *non ſummons*; [o] and therefore the default ſhall not grieve him; for ſeeing the meane to excuſe the default is taken away by law, the default it ſelfe ſhall not prejudice [172. b.]

[m] Bract. lib. 5. fo. 340. b. [n] 13. E. 3. Lcy 50. [o] 26. E. 3. 63. 2. Mariæ Dyer 104, 105.

(6) See acc. ant. 88. b.
(7) See Dy. 21 b.
(8) [See Note 34.]
(9) See as to this and the king's prerogative in charging perſons as accountants the earl of Devonſhire's caſe 11. Co. 89. a.
(10) Ant. 90. b.

prejudice him. But yet this rule hath an exception, that [p] an infant, when he is of the age of 12 yeares, ſhall take the oath of allegeance to the king (1): and this was, as *Bracton* ſaith, *ſecundùm leges ſancti Edwardi*; but indeed ſuch was the law in the time of king *Arthur*. (2) [q] An infant cannot upon his oath make his law in an action of debt. [r] And the huſband and wife of full age, for the debt of the wife before the coverture, ſhall make their law.

[p] Vid. devant cap. de Homage et cap. de Fealty, Sect. 85. 91. Bract. li. 2. fo. 124. Britton fo. 73, 74. et fol. 19. Fleta lib. 1. cap. 27.

[q] 11. H. 40.

1. H. 7. 25. 15. E. 4. 24. (Poſt. 295.) [r] 46. E. 3. 10. 9. E. 4. 24. 15. E. 4. 2. 21. H. 3. 23. (Poſt. 295. a. Cro. Eliz. 161.)

Sect. 260.

ITEM, ſi terres ou tenements ſoyent dones a un home en le taile, quel ad tant des terres en fee ſimple, et ad iſſue deux files et devie, et ſes deux files font partition enter eux, iſſint que la terre en fee ſimple eſt allot a la file puiſne en allowance des terres et (3) *tenements tailes allottes a la file eigne, ſi, apres tiel partition fait, la puiſne file alienaſt ſa terre en fee ſimple a un auter en fee, et ad iſſue fits ou file et devie, l'iſſue poit bien entrer en les tenements tailes et eux tener et occupier en purpartie oveſque ſon aunt. Et ceo eſt pur deux cauſes. Un eſt, pur ceo que l'iſſue ne poit aver aſcun remedie de la terre alien per ſa mere, pur ceo que la terre fuit a luy en fee ſimple; et pur tant que il eſt un de les heires en taile, et n'ad my aſcun recompence de ceo que a luy affiert de les tenements tailes, il eſt reaſon, que el eit ſa purparty de les tenements tailes, et noyſment quant tiel partition ne fait aſcun diſcontinuance* (1)†.

ALSO, if lands or tenements be given to a man in taile, who hath as much land in fee ſimple, and hath iſſue two daughters and die, and his two daughters make partition betweene them, ſo as the land in fee-ſimple is allotted to the younger daughter in allowance for the lands and tenements in taile allotted to the elder daughter, if, after ſuch partition made, the yonger daughter alieneth her land in fee ſimple to another in fee, & hath iſſue a ſon or daughter and dies, the iſſue may enter into the lands in taile and hold and occupy them in purparty with her aunt. And this is for two cauſes. One is, for that the iſſue can have no remedie for the land ſold by the mother, becauſe the land was to her in fee ſimple; and in as much as ſhe is one of the heires in taile, & hath no recompence of that which belongeth to her of the lands in taile, it is reaſon that ſhe hath her portion of the lands tailed, and namely when ſuch partition doth not make any diſcontinuance.

Mes le contrary eſt tenus M. 10. H. 6. *ſcil que le heire ne poit enter ſur le parcener que ad la terre taile, mes eſt mis a* formedon.

But the contrary is holden M. 10. H. 6. *ſcil.* that the heire may not enter upon the parcener who hath the intailed land, but is put to a *formedon*.

"*LA*

(1) [See Note 35.]

(2) See notes 3. and 4. of fol. 68. b.

(3) In L. and M. inſtead of *terres* & it is *autres*.

(1)† In L. and M. Roh. and the two Cambridge MSS. theſe words are added, *de le taille, ſi come ſera dit en apres en le chapitre de diſcontinuance*. What follows in this Section is not in L. and M. Roh. nor the MSS.

"*LA terre en fee ſimple eſt allot a la file puiſne.*" It is firſt to be obſerved upon this whole caſe, that the fee ſimple land is allotted to the yongeſt daughter, and the land entailed to the eldeſt. This partition *primâ facie* is good; (4) and herein the partition differeth from the exchange, where in the exchange the eſtates muſt be equal.

(4. Co. 121. b.)

(Ant. 51. a.)

But yet this partition by matter ſubſequent may become voidable (as *Littleton* here puts the caſe). The eldeſt coparcener hath by the partition and the matter ſubſequent barred herſelf of her right in the fee ſimple lands, inſomuch as when the yongeſt ſiſter alieneth the fee ſimple lands and dieth, and her iſſue entreth into halfe the lands entailed, yet ſhall not the eldeſt enter into halfe of the lands in fee ſimple upon the alienee: for by the alienation, the privitie of the ſtate is deſtroyed.

"*Le puiſne file alien la terre en fee ſimple, &c.*" The ſame law it is, if the youngeſt daughter had made a gift in tayle, for the reverſion expectant upon an eſtate tayle is of no account in law (2), for that it may bee cut off by the tenant in tayle. Otherwiſe it is of an eſtate for life or yeares. If in this caſe the youngeſt daughter alien part of the land in fee ſimple, and dieth, ſo as a full recompence for the land entailed deſcends not to her iſſue, ſhe may waive the taking of any profits thereof and enter into the land entailed; for the iſſue in taile ſhall never be barred without a full recompence, though there be a warranty (3) in deed or in law deſcended. If on the other ſide the eldeſt coparcener alien the land entayled and dyeth, her iſſue ſhall have a *formedon* alone (4) for the whole land entailed; for ſo long as the partition continueth in force (5), ſhe is only enheritable to the whole land entailed.

(Poſt. 174. b.)

[173. a.]

"*Et n'ad my aſcun recompence.*" This is intended, as it appeareth, of a full recompence.

See more of this in the Chapter of Diſcontinuance, Section .

"*Tiel partition ne fait aſcun diſcontinuance.*" And the reaſon thereof is, for that it paſſeth not by livery of ſeiſin, but the partition is in truth leſſe then a grant, for that it maketh no degree, but each coparcener is in by deſcent from the common anceſtor.

"*Mes le contrary eſt tenus, &c.*" This is no part of *Littleton*, and is contrary to law, as appeareth by *Littleton* himſelfe; and beſides, the caſe intended is not truly vouched, for it is not in 10. H. 6. but in 20. H. 6. and yet there is but the opinion of *Newton*, *obiter*, by the way. *Vide F. tit. part* 1.

20. H. 6. 14.

(4) [See Note 36.]

[173. a.]

(2) For the effect of this doctrine about reverſions on eſtates tail, and with what qualification it ſhould be underſtood, ſee the authorities collected in 1. Vin. Abr. 141. pl. 2. to which add 2. Atk. 206. and poſt. 174. b.

(3) [See Note 37.]

(4) [See Note 38.]

(5) See poſt. 176, b. and Sect. 274.

Sect.

Sect. 261.

UN auter cauſe eſt, pur ceo que il ſerra rette la folly del eigne ſoer, que el voit ſuffer ou agree a tiel partition, ou el puiſſoit aver ſi el voile la moitie de la terre en fee ſimple et ſon moitie des terres en le taile pur ſa purparty, et iſſint eſtre ſure ſans dammage.

ANOTHER reaſon is, for that it ſhall be accounted the folly of the eldeſt ſiſter, that ſhe would ſuffer or agree to ſuch a partition, where ſhee might if ſhee would have had the moity of the land in fee ſimple and a moity of lands entailed for her part, and ſo to be ſure without loſſe.

"*UN auter cauſe, &c.*" This is another reaſon to prove, that by the partition the eldeſt daughter hath concluded her ſelfe, as is aforeſaid.

"*Son moitie des terres en le taile.*" For if a writ of partition had beene brought, the eldeſt ſhould not have beene compelled to take the whole eſtate in tayle, for the prejudice that might after enſue, but might have challenged the one moity of the lands in taile, and another moity of the lands in fee ſimple, and this ſhe might doe *ex proviſione legis*. But when ſhe will not ſubmit her to the policie and proviſion of the law, but betake herſelfe to her owne policy and proviſion, there the law will not ayde her, as here by *Littleton* it manifeſtly appeareth. And ſo it is in the other caſe. (*) As if a man be ſeiſed of three mannors of equal value in fee, and taketh wife, and chargeth one of the mannors with a rent charge, and dyeth, ſhe may by the proviſion of the law take a third part of all the mannors and hold them diſcharged; but if ſhe will accept the entire mannor charged, it is holden that ſhe ſhall hold it charged.

(*) 26. E. 3. dower 133. 17. E. 2. tit. dower 164. 18. H. 6. 27. (Ant. 32. b. 33. a.)

73. b.] A partition of lands intailed betweene parceners, if it be equall at the time of the partition, ſhall bind the iſſues in taile for ever (1), albeit the one doe alien her part. Dyer 1. Mar. 98.

Bnt here it may be demanded, that ſeeing *Littloton* ſaith, that it ſhall be taken to be the folly of the eldeſt parcener, &c. what if ſo be the eldeſt did not know of the eſtate tayle either in reſpect of the antiquity thereof, or for want of having of the evidence, or for any other cauſe, what folly can be imputed to her?

The anſwer is, that it is preſumed in law, that every one is conuſant of her right and title to her owne land; and on the other ſide it ſhould be arrected (2) great folly in her to bee ignorant of her owne title. And therefore the reaſon of *Littleton* doth firmly hold.

(1) Acc. ant. 166. a. 2. Vern. 333. (2) [See Note 39.]

Sect. 262.

AUXY, ſi home ſoit ſeiſie en fee d'un carve de terre per juſt title, et diſſeiſiſt un enfant deins age d'un auter carve, et ad iſſue deux files, et moruſt ſeiſi d'ambideux carves, l'enfant adonque eſteant deins age, et les files entront et font partition, iſſint que l'un carve eſt allotte al purparty l'un, come per caſe al puiſne en allowance d'auter carve que eſt allotte a le purparty de l'auter, ſi puis l'enfant enter en le carve dont il fuit diſſeiſiſt ſur la poſſeſſion le parcener que ad meſme le carve, donques meſme le parcener poit entrer en l'auter carve que ſa ſoer ad, et tener en parcenary oveſque luy. Mes ſi le puiſne aliena meſme la carve a un auter en fee ſimple devant l'entrie l'enfant, et puis l'enfant enter ſur le poſſeſſion l'alienee, donque el ne poit enter en l'auter carve; pur ceo que per ſon alienation el ad luy tout ouſterment diſmiſſe d'aver aſcun part de les tenements come parcener. Mes ſi le puiſne devant l'entrie l'enfant fait de ceo un leaſe pur terme d'ans, ou pur terme de vie, ou en fee tayle ſavant la reverſion a luy, et puis l'enfant enter, là peraventure auterment eſt; pur ceo que el ne ſoy diſmiſſe de tout ceo que fuit en luy, mes ad reſerve a luy le reverſion et le fee, &c.

ALSO, if a man bee ſeiſed in fee of a carve of land by juſt title, and hee diſſeiſe an infant within age of another carve, and hath iſſue two daughters, and dyeth ſeiſed of both carves, the infant being then within age, and the daughters enter and make partition, ſo as the one carve is allotted for the part of the one, as *per caſe* to the youngeſt in allowance of the other carve which is allotted to the purpartie of the other, if afterward the infant enter into the carve whereof hee was diſſeiſed upon the poſſeſſion of the parcener which hath the ſame carve, then the ſame parcener may enter into the other carve which her ſiſter hath, and hold in parcenary with her. But if the yongeſt alien the ſame carve to another in fee before the entry of the infant, and after the infant enter upon the poſſeſſion of the alienee, then ſhe cannot enter into the other carve; becauſe by her alienation ſhee hath altogether diſmiſſed her ſelf to have any parte of the tenements as parcener. But if the youngeſt before the entry of the infant make a leaſe of this for terme of yeares, or for terme of life, or in fee tayle ſaving the reverſion to her, and after the infant enter, there peradventure otherwiſe it is; becauſe ſhe hath not diſmiſſed her ſelfe of all which was in her, but hath reſerved to her the reverſion and the fee, &c.

BEFORE (3) it appeareth that when the privity of the eſtate is deſtroyed by the feoffment of one coparcener, that upon eviction of a moity by force of an entayle againſt the other ſhe ſhall not enter upon the alienee. But in this caſe that *Littleton* here putteth, when the privity of the ſtate remaineth, and the part of the one is evicted, (*) ſhe ſhall enter and hold in coparcenary with her other coparcener; and ſo it is in the caſe of an exchange. By reaſon of the *&c.* in the end of this Section there may two queſtions be juſtly demanded.

(*) 15. E. 4. 3. a. per Littleton. lib. 4. fo. 121, 122. Baſtard s caſe.

What if the whole eſtate in part of the purparty of one parcener be evicted by a title paramont; whether is the whole partition avoyded,

(3) Ant. 172. b.

avoyded, for that *Littleton* here putteth the caſe that the whole purpartie of the one is defeated ?

The ſecond queſtion is, whether if but part of the ſtate of one coparcener be evicted, as an eſtate in taile, or for life, leaving a reverſion in the coparcener, whether that ſhall avoid the partition in the whole ?

To the firſt it is anſwered, that if the whole eſtate in part of the purparty bee evicted, that ſhall avoyd the partition in the whole, bee it of a mannor, that is entire, or of acres of ground, or the like, that bee ſeverall ; [*n*] for the partition in that caſe implyeth for this purpoſe both a warrantie and a condition in law (4), and either of them is entire, and giveth an entry in this caſe into the
174. a.] whole. And ſo hath it beene lately reſolved [*o*] both in the caſe of exchange and of the partition.

[*n*] 13. E. 4. 3. 42. Aſſ. 22.

[*o*] Baſtard's caſe lib. 4. fol. 121.

To the ſecond, if any eſtate of freehold be evicted from the coparcener in all or part of her purparty, it ſhall be avoyded in the whole. (1) As if *A.* bee ſeiſed in fee of one acre of land in poſſeſſion, and of the reverſion of another expectant upon an eſtate for life, and hee diſſeiſe the leſſee for life who makes continuall clayme ; *A.* dyeth ſeiſed of both acres, and hath iſſue two daughters ; partition is made, ſo as the one acre is allotted to the one, and the other acre to the other ; the leſſees enter : the partition is avoided for the whole, and ſo likewiſe hath [*p*] it beene lately reſolved.

[*p*] Baſtard's caſe, ubi ſupra.

[*q*] Yet there is a diverſity betweene the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law, (2) ſhe defeateth the partition in the whole. But when ſhee voucheth by force of the warranty in law for part, the partition ſhall not bee defeated in the whole, but ſhee ſhall recover recompence for that part. And therein alſo there is another diverſity betweene a recovery in value by force of the warranty upon the exchange and upon the partition. For upon the exchange he ſhall recover a full recompence for all that he loſeth. But upon the partition ſhe ſhall recover but the moity, or halfe of that which is loſt, to the end that the loſſe may be equall. (3)

[*q*] Vide 5. E. 3. tit. Voucher 249.

(6. Co. 12. b. 1. Ro. Abr. 815. 4. Co. 122.)

Many other diverſities there be between exchanges and partitions ; for there are more and greater privities in caſe of partitions in perſons bloud and eſtates, than there is in exchanges ; all which were too tedious to rehearſe in this place, ſeeing ſo much as hath beene ſaid herein is ſufficient for the explanation of the caſes of partition which *Littleton* hath put.

18. E. 2. tit. Aid 171. 19. H. 6. 26. (Ant. 50. b.)

" *Donques el ne poet enter en l'auter carve, &c.*" By this is alſo approved that which hath beene often ſaid before, that when the whole privity betweene coparceners is deſtroyed, there ceaſeth any recompence to be expected either upon the condition in law or warranty in law by force of the partition.

" *Per*

(4) That is, a condition to give re-entry and a warranty to vouch and have recompence. See poſt. 384. a.

(2) That is, *by entry*.

(3) See acc. the caſe of dower poſt. 384. b. See alſo the proviſion in favour of the lord for the third part not deviſable by the ſtatute of wills 34. and 35. H. 8. c. 5. ſ. 11.

[174. a.]
(1) [See Note 40.]

(Poſt. 243. b.) "*Per ſon alienation el ad luy tout ouſterment diſmiſſe d'aver aſcun part de les tenements come parcener.*" Hereupon it followeth, that if one parcener maketh a feoffement in fee, and after her feoffee is impleaded and voucheth the feoffor, [r] ſhe may have aid of her coparcener to deraigne a warranty paramount, (4) but never to recover *pro ratâ* againſt her by force of the warranty in law upon the partition; for *Littleton* here ſaith, that by her alienation ſhe hath diſmiſſed her ſelfe to have any part of the land as parcener, and without queſtion as parcener ſhe muſt recover *pro ratâ*, upon the warranty in law, againſt the other parcener.

[r] 41. E. 3. 24. 11. H. 4. 22, 23. 14. E. 3. Aid 24. (Hob. 21. 26.)

And yet in ſome caſe the feoffee of one coparcener ſhall have aid of the other parceners to deraigne the warranty paramount. And therefore [a] if there be two coparceners, and they make partition, and the one of them enfeoffes her ſonne and heire apparent and dieth, the ſonne is impleaded, albeit he be in by the feoffement of his mother, yet ſhall he pray in ayd of the other coparcener to have the warranty paramount; and the reaſon [b] of the granting of this aid is, for that the warranty betweene the mother and the ſonne is by law annulled, (1) and therefore the law giveth the ſonne albeit he be in by feoffment, to pray in ayd of the other parcener, to deraigne the warranty paramount; wherein is to bee obſerved the great equity of the common law in this caſe;

[a] 43. E. 3. 23. Pl. Com. 4. E. 3. 15. 5. E. 3. 7. 38. E. 3. 17, &c. [b] 32 E. 1. tit. Aid 178. 3. E. 2. ibid. 163. (Poſt. 384. b.)

[174. b.]

Ipſæ etenim leges cupiunt ut jure regantur.

[*] But if a man be ſeiſed of lands in fee, and hath iſſue two daughters, and make a gift in taile to one of them, and dye ſeiſed of the reverſion in fee which deſcends to both ſiſters, and the donee or her iſſue is impleaded, ſhe ſhall not pray in ayd of the other coparcener, either to recover *pro ratâ* or to deraigne the warranty paramount; for that the other ſiſter is a ſtranger to the ſtate taile, whereof the eldeſt was ſole tenant, and never partition was or could be thereof made. (2)

[*] 2. H. 6. 16. (Plowd. 9. b. Manſel's caſe.)

(Ant. 173 a.) "*Mes ſi le puiſne devant l'entrie l'enfant fait de ceo un leaſe, &c. ou en fee taile ſavant le reverſion a luy, &c.*" This (upon that which hath beene ſaid) (3) needeth no explanation. Only this is to be obſerved, that, albeit it is in the power of tenant in taile to cut off the reverſion, yet if the infant enter before it be cut off, the law hath ſuch conſideration of this reverſion, that ſhe that loſeth it ſhall enter into her ſiſter's part, and hold with her in coparcenary, for that the privity betweene them was not wholly deſtroyed. (4)

(4) See 31. H. 8. c. 1. ſ. 3. 4. H. 7. 3. a. and Plowd. Manſel's caſe 7. a. & b.

[174. b.]

(1) Acc. poſt. 390. a.

(2) See poſt. 177. b. *contra* as to land given in frankmarriage. See alſo 2. H. 6. 16.

(3) Ant. 173. a. and note 2. there.

(4) See ant. 103. a. & b.

Sect.

Sect. 263.

(F. N. B. 162. c.)

ITEM, ſi ſoient trois ou quater parceners, &c. que font partition enter eux, ſi le part d'un parcener ſoit defeat per tiel loyal entrie, el poit enter et occupier les auters terres oveſque touts les auters parceners, et eux compeller de faire novel partition de les auters terres enter eux, &c.

ALSO, if there be three or foure coparceners, &c. which make partition betweene them, if the part of the one parcener be defeated by ſuch lawfull entrie, ſhe may enter and occupie the other lands with all the other parceners, and compell them to make new partition betweene them of the other lands, &c.

"*INTER eux, &c.*" This *&c.* implieth, that ſo it is betweene the ſurviving parceners and the heires of the other, or betweene the heires of parceners, all being dead.

Sect. 264.

ITEM, ſi ſont deux parceners, et l'un prent baron, et le baron et ſa feme ont iſſue enter eux, et la feme devy, et le baron ſoy tient eyns en le moity come tenant per le curteſie, en ceo cas le parcener que ſurveſquiſt et le tenant per le curteſie bien poient faire partition enter eux, &c. Et ſi le tenant per le curteſie ne voit agreer al partition d'eſtre fait, donques le parcener que ſurveſqueſt poit aver envers le tenant per le curteſie briefe de partitione faciendâ, &c. *et luy compeller de faire partition. Mes ſi le tenant per le curteſie voile aver partition enter eux d'eſtre fait, et le parcener que ſurveſquiſt ne voit ceo aver, donque le tenant per le curteſie n'avera aſcun remedy pur aver partition, &c. Car il ne poit aver briefe de* partitione faciendâ, *pur ceo que il n'eſt parcener. Car tiel briefe giſt pur parceners tantſolement. Et iſſint poyes veyer, que briefe de* partitione faciendâ *giſt envers tenant per le curteſie, et uncore il meſne ne poit aver tiel briefe.*

ALSO, if there bee two parceners, and the one taketh husband, and the husband and wife have iſſue betweene them, and his wife dieth, and the husband keepes himſelfe in as tenant by the curteſie, in this caſe the parcener which ſurviveth, and the tenant by the curteſie may well make partition between them, &c. And if the tenant by the curteſie will not agree to make partition, then the parcener which ſurviveth may have againſt the tenant by the curteſie a writ *de partitione faciendâ, &c.* and compel him to make partition. But if the tenant by the curteſie would have partition to be made between them, and the parcener which ſurviveth will not have this, then the tenant by the curteſie cannot have any remedy to have partition, &c. For hee cannot have a writ of *partitione faciendâ*, becauſe he is no parcener. For ſuch a writ lyeth for parceners only. And ſo you may ſee, that a writ of *partitione faciendâ* lyeth againſt tenant by the curteſie, and yet he himſelfe cannot have the like writ.

"*Le baron ſoy tient eins come tenant pur le curteſie.*" This is no ſeverance of the ſtate in coparcenary, [*b*] for the other coparcener and the tenant by the curteſie ſhall be joyntly impleaded; for he doth continue the ſtate of coparcenary, as the other parcener did. (5)

[*b*] 24. E. 3. 29. 31. E. 3. Briefe 339. 9. E. 4. 13. 19 H. 6. 26. 3. H. 6. 26. 3. H. 6. Aſſ. 1. 37. H. 6. 8. 21. E. 3. 14. (Ant. 167. b.)

"*Vers le tenant per le curteſie brief de partitione faciendâ, &c.*" Here by the *&c.* is implyed, that albeit that the tenant by the curteſie be an eſtranger in blood, yet the [*c*] writ *de partitione faciendâ* clearly lies againſt the tenant by the curteſie, becauſe he continueth the eſtate of coparcenary.

[*c*] 3. E. 3. 47. 9 E. 5. 13. 16. E. 3. Aid. 129. 19. E. 3. ibid. 144.

28. E. 3. 5.

If two coparceners be, and one doth alien in fee, they are tenants in common, and ſeverall writs of *præcipe* muſt be brought againſt them; (1) and yet the parcener ſhal have a writ of partition againſt the alienee at the common law, which is a far ſtronger caſe then the caſe put of tenant by the curteſie.

"*Tiel briefe giſt pur parceners tantſolement.*" Hereby it appeareth, that neither the tenant by the curteſie, nor (much leſſe) the alienee of a coparcener ſhall have a writ of *partitione faciendâ* at the common law; (2) for *Littleton* ſaith here, that ſuch a writ lyeth onely for parceners, [*] but it may be brought by a parcener againſt ſtrangers, as it appeareth before. But a *nuper obiit* and a *rationabili parte* (3) doe lye onely betweene two coparceners on both ſides.

[*] 3. E. 3. 47, 48. (F. N. B. 197. Plowd. 306. b.)

Dier 1. Mariæ 98.

If three coparceners be, and the eldeſt doth purchaſe the part of the youngeſt, the eldeſt, having one part by deſcent and the other by purchaſe, ſhall have a writ of partition at the common law againſt the other middle ſiſter, *et ſic de ſimilibus.* And ſo it is in a far ſtronger caſe, if there be three coparceners, and the eldeſt taketh huſband, and the huſband purchaſe the part of the youngeſt, the huſband for his part is a ſtranger and no parcener, and yet he and his wife ſhall have a writ of partition againſt the middle ſiſter at the common law, becauſe he is ſeiſed of one part in the right of his wife who is a parcener. (4)

F. N. B. 52. Regiſtr.

"*Pur aver partition, &c.*" Here by this *&c.* is included all others that be ſtrangers in blood, whether they come to their eſtates by purchaſe or by act in law. Since *Littleton* wrote, by the ſtatutes [*d*] one joyntenant or tenant in common may have a writ of partition againſt the other; and therefore at this day the alienee of one parcener may have a writ of partition againſt the other parcener, becauſe they are tenants in common: and the like had beene attempted in former parliaments [*], but prevailed not untill theſe latter ſtatutes.

[*d*] 31. H. 8. cap. 1. 32. H. 8. cap. 32. Vid. Sect. 290.

[*] Rot. Parl. 1. R. 2. nu. 82.

[*e*] The tenant by the curteſie ſhall have a writ of partition upon the ſtatute of 32. H. 8. ca. 32. for albeit he is neither jointenant nor tenant in common, for that a *præcipe* lyeth againſt the parcener and [175. b.]

[*e*] Brooke tit. partition 41.

(5) Acc. poſt. 175. b. See alſo fo. 192. a. and Bro. Joinder in action 40.

[175. a.]

(1) Acc. ant. 167. b. But it is no ſeverance, if the alienation be only for life. Poſt. 192. a.

(2) See acc. Dy. 98. b.

(3) See ant. 161. b.

(4) See in F. N. B. 62. S. the form of the writ in ſuch a caſe.

and tenant by the curteſie, as hath been ſaid, yet he is in equall miſchiefe as another tenant for life.

[f] If there be three coparceners and a ſtranger purchaſe the part of one of them, he and one other of the coparceners ſhall not joyne in a writ of partition, neither by the common law, nor by force of the ſtatute; for the words of the preamble of the ſtatute be *(and none of them by the law doth or may know their ſeverall parts, &c. and cannot by the laws of this realme make partition thereof, without other of their mutuall aſſents, &c.)* Now in this caſe the one of the plaintifes, viz. the parcener, may have a writ of partition at the common law, and the other parcener being a purchaſer may have it by the ſtatute; and therefore they ſhall not joyne in one writ.

[f] Mich. 7. & 8 Eliz. Bendloes inter Wotton & Cooke. (1) Dier 3. Mariæ 128. A. & 7. Eliz. 243.

(1) S. C. is alſo in Dy. 260. b.

Chap. 2. Parceners by Cuſtome. Sect. 265.

PARCENERS per le cuſtome ſont, lou home ſeiſie en fee ſimple, ou en fee taile, de terres ou tenements que ſont de tenure appel gavelkind deins le county de Kent, et ad iſſue divers fits et devie, tielx terres ou tenements diſcenderont a touts les fits per le cuſtome, et ovelment enheriteront et ferront partition enter eux per le cuſtome, ſicome females ferront, et briefe de partitione faciendâ *giſt en ceo cas, ſicome enter females. Mes il covient en la declaration de faire mention de le cuſtome. Auxy tiel cuſtome eſt en auters lieux d'Engleterre. Et auxi tiel cuſtome eſt en North Gales, &c.* (2)

PARCENERS by the cuſtome are, where a man ſeiſed in fee ſimple, or in fee tayle, of lands or tenements which are of the tenure called gavelkind within the countie of Kent, and hath iſſue divers ſonnes and die, ſuch lands or tenements ſhall deſcend to all the ſons by the cuſtome, and they ſhall equally inherit and make partition by the cuſtom, as females ſhall do, and a writ of partition lieth in this caſe as between females. But it behooveth in the declaration to make mention of the cuſtome. Alſo ſuch cuſtome is in other places of England, and alſo ſuch cuſtome is in North-Wales, (3) &c.

(1. Sid. 136. Ant. 140. a.) See before all the ancient authors of the law concerning gavelkind ubi ſupra. Lambert verbo. Terra exſcript.

"*MES il covient en le declaration de faire mention de la cuſtome.*" Well ſaid *Littleton*, [*g*] that he in his declaration muſt make mention of the cuſtome, as to ſay, that the land is of the cuſtome of *gavelkinde*; but hee ſhall not preſcribe in it. And ſo is it of *Burgh Engliſh*. And theſe two vary in that point from other cuſtomes; for the law, when they are generally alledged, taketh knowledge of theſe two. (4)

[*g*] 5. E. 4. 8. b. 21. E. 4. 56. b. Plo. Com. 129. b. in Buckleis caſe. Vide Sect. 8. verſus finem.

In [*h*] *Domeſday* it is thus ſaid, *duo fratres tenuerunt in paragio* (5) *quiſque habuit aulam ſuam, et potuerint ire quò voluerint.*

(1. Sid. 138. Doctr. Plac. 105.) [*h*] Berocheſcire. Hereford.

"*Auxy tiel cuſtome eſt en auters lieux Angleterre.*" Of this ſufficient hath beene ſaid before. (6)

"*North Gales,*" Wales, *Wallia.* It commeth [*i*] of the Saxon word *wealth*, which ſignifieth *peregrinus*, or *exterus*; for the *Saxons* ſo called them, becauſe in troth they were ſtrangers to them, being the remaine of the old and ancient Britons, a wiſe and warlike nation inhabiting in the weſt part of England. Theſe men have kept their proper language for above theſe thouſand yeares paſt; and they to this day call us Engliſhmen *Saiſons* (that is) Saxons. And the like cuſtome, as our author here ſaith was in North Wales, was alſo in Ireland; for there the lands alſo (which is one marke of the ancient Brittons) were of the nature of *gavelkinde:* but where by their

[*i*] Lamb. verb. Weiſhmen Silveſter Giraldus.

(2) In L. and M. and the two MSS. it is *en Northumberland et North Walez, &c.*

(3) [See Note 41.]

(4) [See Note 42.]

(5) [See Note 43.]

(6) Ant. 14. a. and 140. a. See alſo book 1. chap. 7. of Robinſon on Gavelkind, where the reader will ſee a moſt learned diſſertation on the origin antiquity and univerſality of partible deſcents.

[176. a.] their *Brehon* law the baſtards inherited with their legitimate ſons, as to the baſtards that cuſtome was aboliſhed. (1) And agreeing with *Littleton* in this point, ſee an old ſtatute. * *Aliter uſitatum eſt in Walliâ quàm in Angliâ, quoad ſucceſſionem hæreditatis, eò quòd hæreditas partibilis eſt inter hæredes maſculos, et à tempore cujus non extitit memoria partibilis extitit, dominus rex non vult, quòd conſuetudo illa abrogetur, ſed quòd hæreditates remaneant partibiles inter conſimiles hæredes ſicut fieri conſuevit, et fiat partitio illius ſicut fieri conſuevit.* (2)

Vide Sect. 212.

* Stat. Walliæ, an. 12. E. 1.

"*Parceners per le cuſtome, &c.*" Well ſayd *Littleton*, "by the cuſtome," for ſons are parceners in reſpect of the cuſtome of the fee or inheritance, and not in reſpect of their perſons, as daughters and ſiſters, &c. be. [*b*] *Et ſunt participes quaſi partem capientes, &c. ratione ipſius rei quæ partibilis eſt, et non ratione perſonarum, quæ non ſunt quaſi unus hæres et unum corpus, ſed diverſi hæredes, ubi tenementum partibile eſt inter plures cohæredes petentes, qui deſcendunt de eodem ſtipite et ſemper ſolent dividi ab antiquo.*

[*b*] Bract. l. 5. fo. 428. Brit. cap. 71. Flet. lib. 5. cap. 9.

Sect. 266.

ITEM, il y ad autre particion quel eſt d'auter nature et d'auter forme que aſcuns des partitions avaunt dits ſont. Sicome home ſeiſie de certain terres en fee ſimple ad iſſue deux files, et l'eigne eſt mary, et le piere dona parcel de ſes terres a le baron ove ſa file en frankmariage, et moruſt ſeiſie de le remnant, le quel remnant eſt de pluis greinder value per an que ſont les terres dones en frankmariage.

ALSO, there is another partition which is of another nature and of another forme then any of the partitions aforeſaid be. As if a man ſeiſed of certaine lands in fee ſimple hath iſſue two daughters, and the eldeſt is maried, and the father giveth part of his lands to the huſband with his daughter in frankemariage, and dyeth ſeiſed of the remnant, the which remnant is of a greater yearely value then the lands given in frankmariage.

"*DONA parcel de ſes terres a le baron ove ſa file en frankmariage.*"

Here it appeareth, that a gift in frankemarriage may be made ater mariage, as hath beene ſayd in the chapter of Fee Tayle. (3)

"*Le quel remnant eſt de pluis greinder value per an, &c.*" Admit, that the lands given in frankmariage are of greater value than the lands deſcended in fee ſimple, ſhall the other ſiſter have any remedy againſt the donees? It is plaine ſhe ſhall not; becauſe it is lawfull for a man to diſpoſe of his own lands at his will and pleaſure.

(1) [See Note 44.]
(2) See ant. 175. b. note 4.
(3) See ant. 21. b. See alſo acc. as to dower *ex aſſenſu patris* after marriage F. N. B. 151. L.

Sect. 267.

EN cel caſe, le baron, ne le feme, avera riens pur lour purpartie de le dit remnant, ſinon que ils voilent mitter lour terres dones en frankmariage en hotchpot *oveſque le remnant de la terre oveſque ſa ſoer. Et ſi iſſint ils ne voilent fayre, donques le puiſne poet tener et occupier meme le remnande, et prendra a luy les profits tantſolement. Et il ſemble, que ceſt parol* (hotchpot) *eſt en Engliſh* a pudding; *car en tiel* pudding *n'eſt communement miſe un choſe tantſolement, mes un choſe oveſque autres choſes enſemble. Et pur ceo il covient en tiel caſe de mitter les terres dones en frankmariage oveſque les auters terres en* hotchpot, *ſi le baron et ſa feme voilent aver aſcun part en les auters terres.*

IN this caſe, neither the huſband, nor wife, ſhall have any thing for their purpartie of the ſaid remnant, unleſs they will put their lands given in frankmariage in *hotchpot*, with the remnant of the land with her ſiſter. And if they will not doe ſo, then the youngeſt may hold and occupie the ſame remnant, and take the profits onely to her ſelfe. And it ſeemeth, that this word *(hotchpot)* is in Engliſh a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this caſe to put the lands given in frankemariage with the other lands in *hotchpot*, if the huſband and wife will have any part in the other lands.

"*EN cel caſe, le baron, ne le feme, avera riens pur lour purpartie, &c.*" [*i*] This gift in frankmariage ſhall *primâ facie* be intended a ſufficient advancement; and therefore the remnant ſhall deſcend to the other coparcener, onely with this proviſion in law *tacitè* annexed, that if the donees will put the land into *hotchpot*, then ſhe ſhall out of the remnant make up her part equall. But the donees muſt doe the firſt act, and in the meane time the whole fee ſimple land deſcends to the other. And this is warranted here by *Littleton*, viz. that the donees ſhall have nothing for the purpartie of the remnant, unleſſe they will put their lands given in frankemariage in *hotchpot* ſo as the donees muſt doe the firſt act; and more expreſly after in this Chapter, (1) where he directly ſaith, that the other ſiſter ſhall enter into the remnant, and them to occupy to her owne uſe, unleſſe the huſband and wife will put the lands given in frankmariage into *hotchpot*. And herewith agreeth *Fleta*, (2) who ſaith, *cùm dicat tenens excipiendo, quòd non tenetur petenti reſpondere, quia* A. *participem habet, &c. replicari poterit à petente quòd prædict'* A. *tenet quandam partem in maritagium de communi hæreditate, nec vult illud in partem ponere.* And here are three things (that I may ſpeake once for all) to be obſerved. Firſt, that in this ſpeciall caſe where there be two daughters, one of them onely ſhall inherit the lands in fee ſimple. Secondly, that in this caſe there lieth no writ of partition: becauſe *non tenent inſimul et pro indiviſo*. Thirdly, if the parcener, to whom the land in fee ſimple deſcended, will not put the lands in *hotchpot*, then may the donees enter into the fee ſimple lands, and hold them in coparcenarie with her.

[*i*] 8. H. 3. breve 880. 34. E. 1. nuper obiit 15. adjudge 4. E. 3. 49. 10. Aſſ. p. 14. Vi. 10. E. 3. 38. & 30. Aſſ. 7. Bracton lib. 2. fol. 77. lib. 5. fol. 428. Brit. ca. 72. Fleta lib. 6. cap. 47.

[176. b.]

And

(1) See Sect. 268. (2) See alſo acc. F. N. B. 197. O.

And it ſeemeth by our old bookes, [*k*] that by the ancient law there was a kind of reſemblance hereof concerning goods. *Si autem poſt debita deducta, et poſt deductionem expenſarum quæ neceſſariæ erunt, id totum, quod tunc ſuperfuerit, dividatur in tres partes; quarum una pars relinquatur pueris* (3) *ſi pueros habuerit defunctus, ſecunda uxori ſi ſuperſtes fuerit, et de tertiâ parte habeat teſtator liberam diſponendi facultatem. Si autem liberos non habeat, tunc medietas defuncto, et alia medietas uxori: ſi autem ſine uxore deceſſerit liberis exiſtentibus, tunc medietas defuncto, et alia medietas liberis tribuatur: ſi autem ſine uxore et liberis, tunc id totum defuncto remanebit.* And by the law before the Conqueſt it * was thus provided, *ſive quis incuriâ ſive morte repentinâ fuerit inteſtatus mortuus, dominus tamen nullam rerum ſuarum partem (præter eam quæ jure debetur heriotî nomine) ſibi aſſumito, verùm eas judicio ſuo uxori liberis et cognatione proximis juſtè pro ſuo cuique jure diſtribuito.*

But it appeareth by the *Regiſter* [*l*] and many of our bookes, that there muſt be a cuſtome alledged in ſome county, &c. (5) to inable the wife or children (5)† to the writ *de rationabili parte bonorum*; (6) and ſo hath it beene reſolved in parliament. [*m*] But ſuch children, as be reaſonably advanced by the father in his life time with any part of his goods, ſhall have no further part of his goods; for the words of the writ be, *nec in vitâ patris promoti fuerunt.* (7)

Note, the cuſtom of *London* is, that if the father advance any of his children with any part of his goods, that ſhall bar them to demand any further part, unleſſe the father under his hand or in his laſt will do expreſſe and declare, that it was but in part of advancement, (8) and then that child ſo partly advanced ſhall put his part in *hotchpot* with the executors and widow, (9) and have a full third part of the whole, accounting that which was formerly given unto him as part thereof. And this is that in effect, which the civilians call *collatio bonorum.* (10)

[*k*] Glanvil. lib. 7. cap. 5. Bracton lib. 2. fol. 60. Fleta lib. 2. cap. 5. (4) Magna Carta cap. 18. 3. F. N. B. 222. 30. E. 3. 25. 31. E. 3 Reſp. 60. 31. Aſſ. 14. 17. E 2. Detinew 17. E. 3. 17. 1. E. 2. Detinew 56. 31. H. 8. tit. rationab. parte bonorum 6.

* Lamb. f. 119. 68. (Poſt. 185. b, Ant. 149. b.)

[*l*] Regiſt. 142. 34. E. 1. Detinew 60. 1. E. 4. 6. 7. E. 4. 21. 43. E. 3. 38. (F. N. B. 122. L.)

[*m*] 3. E. 3. dette 156. 40. E. 3. 18.

[177. a.] "*Et il ſemble que ceſt parol (hotchpot) eſt en Engliſh* a pudding, *&c.*" *Littleton* both here and in other places ſearcheth for the ſignification of words, in all arts; a thing moſt neceſſary; for *ignoratis terminis ignoratur et ars. Vide* for *Etymologies*, Sect 95. 119. 135. 154. 164. 204, 234 *&c.*

Hutſpot or *hotſpot* is an old Saxon word, and ſignifieth ſo much as *Littleton* here ſpeaks. And the French uſe *hotchpot* for a commixion of divers things together. It ſignifieth here metaphorically *in partem poſitio.* In Engliſh we uſe to ſay *hodgepodge*, in Latine *farrago* or *miſcellaneum.*

Vide Brit. cap. 72. 4. E. 3 49. 6. E. 3. 30. 10. E. 3. 38. 24. E. 3. 27. F. N. B. 262. Regiſt. 320.

The reſidue of this Section needeth no explication.

Fleta lib. 6. ca. 47. (1) Mich. 10. E. 1. coram rege Hereford in theſaur.

(3) [See Note 45.]
(4) The chapter of Fleta is here referred to erroneouſly. It ſhould be cap. 57.
(5) [See Note 46.]
(5)† [See Note 47.]
(6) [See Note 48.]
(7) [See Note 49.]
(8) [See Note 50.]
(9) [See Note 51.]
(10) [See Note 52.]

[177. a.]
(1) This reference to Fleta is wrong. It ſhould be lib. 5. cap. 9. p. 314.

Sect. 268.

ET ceſt terme (hotchpot) n'eſt forſque un terme ſimilitudinarie, et eſt a tant a dire, c'eſtaſcavoir, de mitter les terres en frankmarriage et les auters terres en fee ſimple enſemble; et ceo eſt a tiel entent de conuſter le value de touts les terres, ſcil. de les terres dones en frankmarriage, et de le remnant que ne fueront dones, et donques partition ſerra fait en le forme que enſuiſt. Sicome, mittomus que home ſeit ſeiſie de 30 *acres de terre en fee ſimple, cheſcun acre de value de* 12 *d. per an. et que il ad iſſue deux files, et l'une eſt covert de baron, et le pier dona* 10 *acres de les* 30 *acres a le baron ove ſa file en frankmarriage, et moruſt ſeiſie de le remnant, donques l'auter ſoer entra en le remnant, ſcil. en les* 20 *acres, et eux occupiera a ſon uſe demeſne, ſi non que le baron et ſa feme voile mitter les* 10 *acres dones en frankemarriage ove les* 20 *acres en hotchpot, c'eſtaſcavoir, enſemble; et donque quant le value de cheſcun acre eſt conus, c'eſtaſcavoir, que cheſcun acre vault per an, et eſt aſſeſſe ou enter eux agree, que cheſcun acre vault per an* 12 *d. donques le partition ſerra fait en tiel forme, c'eſtaſcavoir, le baron et ſa feme averont ouſtre les* 10 *acres dones a eux en frankmarriage* 5 *acres en ſeveraltie de les* 20 *acres, et l'auter ſoer avera le remnant, ſcil.* 15 *acres de les* 20 *acres pur ſa purpartie, iſſint que accomptant les* 10 *acres que le baron et ſa feme ount per le done en frankmarriage, et les auters* 5 *acres de les* 20 *acres, le baron et ſa feme ont autant en annual value que l'auter ſoer ad.*

AND this tearme *(hotchpot)* is but a tearme ſimilitudinary, and is as much to ſay, as to put the lands in frankmariage and the other lands in fee ſimple together; and this is for this intent, to know the value of all the lands, *ſcil.* of the lands given in frankmarriage, and of the remnant which were not given, and then partition ſhall be made in form following. As, put the caſe that a man be ſeiſed of 30 acres of land in fee ſimple, every acre of the value of 12 pence by the yeare, and that he hath iſſue two daughters, and the one is covert baron, and the father gives ten acres of the 30 acres to the huſband with his daughter in frankmarriage, and dyeth ſeiſed of the remnant, then the other ſiſter ſhall enter into the remnant, viz. into the 20 acres, and ſhall occupie them to her owne uſe, unleſſe the huſband and his wife will put the 10 acres given in frankmariage with the 20 acres in hotchpot, that is to ſay, together; and then when the value of everie acre is knowne, to wit, what every [177. b.] acre valueth by the year, and it is aſſeſſed or agreed between them, that every acre is worth by the yeare 12 pence, then the partition ſhall be made in this manner, viz. the huſband and wife ſhall have beſides the 10 acres given to them in frankmariage 5 acres in ſeveraltie of the 20 acres, and the other ſiſter ſhall have the remnant, *ſcil.* 15 acres of the 20 acres for her purpartie, ſo as accounting the 10 acres which the baron and fem have by the gift in frankmariage, and the other 5 acres of the 20 acres, the huſband and wife have as much in yearly value as the other ſiſter.

Pract. lib. 2. fol. 77. lib. 5. fol. 428. Brit. cap. 72. and Fleta lib. 6. ca. 47.

AND herewith in expreſſe tearmes agreeth *Bracton*, *Britton*, and *Fleta*, and all the bookes abovesaid and many others. And it is worthy the obſervation [*n*], that after this putting into hotchpot,

[*n*] 10. E. 3. 37. 10. Aſſ. 14. 4. E. 3. 49.

and

and partition made, the lands given in frankmariage are become as the other lands which deſcended from the common anceſtor, and of theſe lands if ſhe be impleaded [o] ſhe ſhall have aide of the other parcener as if the ſame lands had deſcended. (1) So the coparcener that hath a rent granted to her for owelty of partition, as is aforeſaid, hath the rent, as if it had deſcended to her from the common anceſtor.

[o] 29. Aſſ. 23. (Ant. 169. b.)

Sect. 269.

(Hob. 10.) (Ant. 23. a.)

ET iſſint touts foits ſur tiel partition les terres dones en frankmarriage demurgent a les donees et a lour heires ſolonque le forme de le done: car ſi l'auter parcener averoit riens de ceo que eſt done en frankmarriage, de ceo enſueroit enconvenience et choſe encounter reaſon, que la ley ne voit ſuffer. Et la cauſe, pur que les terres dones en frankmarriage ſerront mis en hotchpot, eſt ceo. Quant home done terres ou tenements en frankmarriage ove ſa file, ou ove auter coſin, il eſt entendus per la ley, que tiel done fait per tiel parol (frankmarriage) eſt un avancement, et pur avancement de ſa file, ou de ſon auter coſin, et noſmement quant le donor et ſes heyres n'averont aſcun rent ne ſervice de eux, ſinon que ſoit fealty, tanque le quart degree ſoit paſſe, &c. Et pur tiel cauſe la ley eſt, que el avera riens de les auters terres ou tenements diſcendus a l'auter parcener, &c. ſinon que el voile mitter les terres dones en frankmariage en hotchpot, come eſt dit. Et ſi el ne voille mitter les terres dones en frankmariage en hotchpot, donque el n'avera riens del remnant, pur ceo que ſerra entendu per la ley, que el eſt ſufficientment avance, a que avancement el ſoy agree et luy tient content.

[178. a.]

AND ſo alwaies upon ſuch partition the lands given in frankmarriage remaine to the donees and to their heires according to the forme of the gift: for if the other parcener ſhould have any of that which is given in frankmarriage, of this would enſue an inconvenience and a thing againſt reaſon, which the law will not ſuffer. And the reaſon, why the lands given in frankmariage ſhal bee put in hotchpot, is this. When a man giveth lands or tenements in frankmariage with his daughter, or with his other couſin, it is intended by the law, that ſuch gift made by this word (frankmariage) is an advancement, and for advancement of his daughter, or of his couſin, and namely when the donor and his heires ſhall have no rent nor ſervice of them, but fealtie, untill the fourth degree be paſt (1). And for this cauſe the law is, that ſhe ſhall have nothing of the other lands or tenements deſcended to the other parcener, &c. unleſſe ſhee will put the lands given in frankmariage in hotchpot, as is ſaid. And if ſhe will not put the lands given in frankmariage in hotchpot, then ſhe ſhall have nothing of the remnant, becauſe it ſhall be intended by the law, that ſhee is ſufficiently advanced, to which advancement ſhee agreeth and holds her ſelfe content.

(1) See ant. 174. b. *contra* as to gift in tail to a daughter not being in frankmarriage.

[178. a.]
(1) See ant. 21. b.

"*DE ceo enſueroit enconvenience et choſe encounter reaſon, que la ley ne voet ſuffer.*"

Regula.

Quod eſt inconveniens aut contra rationem non permiſſum eſt in lege. Hereby it appeareth, as it hath beene often noted, (*o*) that an argument *ab inconvenienti aut ab eo quod eſt contra rationem* is forcible in law. [*p*] *Nihil enim quod eſt inconveniens, eſt licitum.*

[*o*] Vid. Sect. 138, 139. 231. 440. 478. 488. 722.

[*p*] 40. Aſſ. 27. (Ant. 23. b.) Sect. 20.

"*Tanque le quart degree ſoit paſſe, &c.*" Here by *&c.* is implyed how the degrees ſhall be accounted, whereof ſufficient hath beene ſaid before.

Sect. 270.

MESME la ley eſt perenter les heires de les donees en frankmariage et les auters parceners, &c. ſi les donees en frankmariage deviont devant lour aunceſter, ou devant tiel partition, &c. quant a mitter en hotchpot, &c.

THE ſame law is between the heirs of the donees in frankmariage, and the other parceners, &c. if the donees in frankmariage die before their anceſtor, or before ſuch partition, &c. as to put in hotchpot, &c.

BY theſe three *&c.* in this Section is implied, that if either the donees dye before the anceſtor, or ſurvive the anceſtor and die before ſuch a partition, or if the donees and all the parceners die before ſuch partition upon the putting into hotchpot, their iſſues ſhall have the ſame benefit to put the lands into hotchpot; for that benefit is heritable, and deſcendible to the iſſues.

Sect. 271.

ET nota, que donees en frankmariage fueront per la common ley devant le ſtatute de Weſtminſter ſecond, et tout temps puis ad eſte uſe et continue, &c.

AND note, that gifts in frankmarriage were by the common law before the ſtatute of Weſtm. ſecond, and have beene alwaies ſince uſed and continued, &c.

"*CONTINUE, &c.*" By this *&c.* is to be underſtood, that before the ſtatute it was a fee ſimple, and ſince the ſtatute a fee taile. So as it is true, that [*q*] the gifts doe continue (as our author here ſaith) but not the eſtates; for the eſtate is changed, as at large appeareth in the Chapter of Eſtates in Taile. And albeit our author here ſaith, that ſuch gifts have beene alwaies ſince uſed and continued, yet now they be almoſt growne out of uſe, and ſerve now principally for moote caſes and queſtions in law that thereupon were wont to riſe. [178. b.]

[*q*] 12. H. 4. 11. 31. E. 3. Gard. 116. (Ant. 21. a.)

Sect.

Sect. 272.

ITEM, tiel mitter en hotchpot, &c. eſt, lou les auters terres ou tenements que ne fueront dones en frankmariage deſcendont de les donors en frankmariage tantſolement; car ſi les terres deſcenderont a les files per le pier le donor, ou per le mere le donor, ou per le frere le donor ou auter anceſtor, et nemy per le donor, &c. là auterment eſt; car en tiel cas el, a quel tiel done en frankmariage eſt fait, avera ſa part, ſicome nul tiel done en frankmarriage uſt eſte fait, pur ceo que el ne fuit avance per eux, &c. eins per un auter, &c.

ALSO, ſuch putting in hotchpot, &c. is, where the other lands or tenements which were not given in frankmariage deſcend from the donors in frankmariage only; for if the lands ſhall deſcend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other anceſtor, and not by the donor, &c. there it is otherwiſe; for in ſuch caſe ſhee, to whom ſuch gift in frankmariage is made, ſhal have her part, as if no gift in frankmariage had beene made, becauſe that ſhe was not advanced by them, &c. but by another, &c.

THE lands given in frankmariage and the lands in fee ſimple muſt move from one and the ſame anceſtor, for the lands given in frankmariage are in reſpect of the advancement accounted in law, as hath beene ſaid (1), as if the ſame had deſcended from the ſame anceſtor who died ſeiſed of the fee ſimple lands, and there is no reaſon to barre the donee of her full part of the fee ſimple lands that deſcended from another anceſtor from whom ſhee had no ſuch advancement.

"*Nemy per le donor, &c.*" Here *&c.* implieth no more but that donor that made the gift of frankmariage. The other two *&c.* in this Section need no explanation.

Sect. 273.

ITEM, ſi home ſeiſie de 30 *acres de terre cheſcun acre de ovel annual value, eiant iſſue deux files come eſt avantdit, et dona* 15 *acres de ceo a le baron ove ſa file en frankmarriage, et moruſt ſeiſie de les auters* 15 *acres, en ceſt caſe l'auter ſoer avera les* 15 *acres iſſint diſcendus a luy ſole, et le baron et ſa feme ne mitteront en tiel cas les* 15 *acres a eux dones en frankmarriage en hotchpot; pur ceo que les tenements dones en frankmarriage ſont de auxy grand et de bone annual value comes les auters*

[179. a.]

ALSO, if a man be ſeiſed of 30 acres of land everie acre of equall annuall value, and have iſſue two daughters as aforeſaid, and giveth 15 acres hereof to the huſband with his daughter in frankmariage, and dies ſeiſed of the other 15 acres, in this caſe the other ſiſter ſhall have the 15 acres ſo deſcended to her alone, and the huſband and wife ſhall not in this caſe put the 15 acres given to them in frankmariage into hotchpot; becauſe the tenements given in frankmariage are

(1) Ant. 177. b.

auters terres diſcendus, &c. Car ſi les terres dones en frankmarriage ſont de tant egal annual value que le remnant ſont, ou de pluis value, en vaine et a nul entent tielx tenements dones en frankmarriage ſerront mis en hotchpot, &c. pur ceo que el ne poit riens aver de les auters terres diſcendus, &c. car ſi el averoit aſcun parcel de les tenements diſcendus, donques el avera pluis de annual value que ſa ſoer, &c. que la ley ne voit, &c. Et ſicome eſt parle en les caſes avantdits de deux files ou de deux parceners; en meſme le maner eſt en ſemblable cas, lou ſont pluſors ſoers ou pluſors parceners, ſolonque ceo que le caſe et le matter eſt, &c.

are of as great and good yearly value as the other lands deſcended, &c. For if the lands given in frankmariage bee of equall or of more yearely value then the remnant, in vaine and to no purpoſe ſhall ſuch tenements given in frankmariage bee put in hotchpot, &c. for that ſhe cannot have any of the other lands deſcended, &c. for if ſhee ſhould have any parcell of the lands deſcended, then ſhe ſhall have more in yearly value then her ſiſter, &c. which the law will not, &c. And as it is ſpoken in the caſes aforeſaid of two daughters or of two parceners; in the ſame manner it is in the like caſe, where there are more ſiſters or more parceners, according as the caſe and matter is, &c.

BY this Section and the *&c.* herein ſome have gathered, that the value of the lands ſhall be accounted as they were at the time of the gift in frankmariage. But it is clear, that the value ſhall bee accounted as it was at the time of the partition; for if the donor purchaſe more land after the gift, or if the land given in frankmariage be by the act of God decayed in value, or if the remnant of the lands in fee ſimple be improved after the gift, or *è converſo*, the law ſhall adjudge of the value as it was at the time of the partition, (unleſſe it bee by the proper act or default of the parties) as hath beene ſaid before in the former Chapter. And ſome have collected upon this Section, that the reverſion in fee of the lands given in frankmariage ſhall only deſcend to the donee; for otherwiſe the other ſiſter ſhal have more benefit then the donee, which ſhould bee againſt the reaſon of our author.

(Ant. 32. a. 171. a.)

Regula. Vid. Sect. 194. 578. ib. 5. fo. 89.

"In vaine et a nul entent, &c." For it is a maxime in law, *lex non præcipit inutilia, quia inutilis labor ſtultus.*

Sect. 274.

(Ant. 172. b.) [179. b.]

ET eſt aſcavoir, que terres ou tenements dones en frankmariage ne ſerra miſe en hotchpot, *forſque ou terres diſcendont en fee ſimple; car de terre diſcendus en fee taile partition ſerra fait, ſicome nul tiel done en frankmariage uſt eſte fait.*

AND it is to be underſtood, that lands or tenements given in frankmariage ſhall not bee put in *hotchpot*, but where lands deſcend in fee ſimple; for of lands deſcended in fee taile partition ſhall be made, as if no ſuch gift in frankemariage had beene made.

FOR

FOR of lands intailed the donee in frankmarriage ſhall have as much part as the other coparcener, becauſe, over and beſides the land given in frankmariage, the iſſue in taile claimeth *per formam doni*, and both of the parceners muſt equally inherit by force of the gift, *et voluntas donatoris, &c. obſervetur.* 31. Aſſ. pl. 14.

Sect. 275.

ITEM, nuls terres ſerra miſe en hotchpot *ove auters, ſinon terres que fueront done en frankmariage tantſolement: car ſi aſcun feme ad aſcuns auters terres ou tenements per aſcun auter done en le tayle, el ne unques mittera tiel terre iſſint done en* hotchpot, *mes el avera ſa purpartie de le remnant diſcendus, &c. ſcilicet, a tant que l'auter parcener avera de le meſme remnant.*

ALSO, no lands ſhall bee put in *hotchpot* with other lands, but lands given in frankmariage only: for if a woman have any other lands or tenements by any other gift in taile, ſhe ſhal never put ſuch lands ſo given in *hotchpot*, but ſhe ſhal have her purparty of the remnant deſcended, &c. (*videlicet*) as much as the other parcener ſhall have of the ſame remnant.

FOR if the anceſtor infeoffeth one of his daughters of part of his land, or purchaſe lands to him and her, and their heires, or giveth to her part of his lands in tailé ſpeciall or generall, ſhe notwithſtanding this ſhall have a full part in the remnant of the lands in fee ſimple; for the benefit of putting, &c. into *hotchpot* is onely appropriated to a gift in frankmariage, *(quia maritagium cadit in partem)* which ſhall be (as is aforeſaid) accounted as parcel of her advancement. 13 E. 2. tit. taile 26. 6 E. 3. 30. b. 4. H. 3. 49, 50. Bract. li. 2. fo. 77.

Sect. 276.

ITEM, un auter partition poet eſtre fait enter parceners, que variaſt de les partitions avantdits. Sicome y ſont trois parceners, et le puiſne voet aver partition, et les auters deux ne voillont, mes voilent tener en parcenarie 180. a.] *ceo que a eux affiert ſans partition, en ceſte caſe, ſi un part ſoit alot en ſeveralty al puiſne ſoer, ſolonque ceo que el doit aver, donques les auters poient tener le remnant en parcenarie, et occupier en common ſans partition, ſi els voilent, et tiel partition eſt aſſets bone. Et ſi apres l'eigne ou le mulnes parcener voile fayre partition inter eux de ceo que ils teignont, ils poient ceo bien faire quant a eux pleiſt. Mes lou partition ſerra*

ALSO, another partition may be made betweene parceners, which varieth from the partitions aforeſaid. As if there bee three parceners, and the youngeſt will have partition, and the other two will not, but will hold in parcenarie that which to them belongeth, without partition, in this caſe, if one part be allotted in ſeveralty to the youngeſt ſiſter, according to that which ſhee ought to have, then the others may hold the remnant in parcenarie, and occupy in common without partition, if they will, and ſuch partition is good enough. And if afterwards the eldeſt or middle parcener will make partition betweene them

ſerra fait per force de briefe de partitione faciendâ, *là auterment eſt*; *car là covient, que cheſcun parcener avera ſa part en ſeveraltie, &c.*

them of that which they hold, they may well do this when they pleaſe. But where partition ſhall be made by force of a writ of *partitione faciendâ*, there it is otherwiſe; for there it behoveth, that every parcener have her part in ſeveraltie, &c.

Pluis ſerra dit des parceners en le Chapter de Joyntenants, et auxy en le Chapter de Tenants in Common.

More ſhall be ſaid of parceners in the Chapter of Joyntenants, and alſo in the Chapter of Tenants in Common.

24. H. 3. tit. Partic. 19.

HERE it is to be obſerved, that this partition is good by conſent, for *conſenſus tollit errorem*; but if it be by the king's writ, then everie parcener muſt have his part. And here you may ſee

Regula.

that *modus et conventio vincunt legem.*

"*En ſeveraltie, &c.*" Here by this *&c.* is implied another kind of ſeveraltie than our author hath mentioned: and that is, that the one parcener ſhall have the land in ſeveraltie from the feaſt of Eaſter until the gule of Auguſt, (that is, the firſt of Auguſt) and the other in ſeveraltie from thence untill the feaſt of Eaſter, or the like, *et ſic alternis vicibus* to them and their heires *in perpetuam*, whereof ſufficient hath beene ſpoken before. (1)

(1) Ant. 4. a. and 167. a.

CHAP.

Chap. 3. Of Joyntenants. Sect. 277.

JOYNTENANTS ſont, ſicome home ſeiſie de certaines terres ou tenements, &c. et enfeoffe deux, trois, quater, ou pluſors, a aver et tener a eux pur term de lour vies, ou pur terme d'auter vie, per force de quel feoffment ou leaſe ils ſont ſeiſies, tiels ſont joyntenants.

JOYNTENANTS are, as if a man bee ſeiſed of certaine lands or tenements, &c. and infeoffeth two, three, foure, or more, to have and to hold to them for term of their lives, or for terme of another's life, by force of which feoffement or leaſe they are ſeiſed; theſe are joyntenants.

THIS agreeth not with the original, (2) for it ſhould bee, *joyntenants ſont, ſicome home ſeiſie de certaine terres ou tenements, &c. et* ent *enfeoffe deux, ou trois, ou quater, ou pluſors, a aver et tener a eux* et a lour heires, ou leſſa a eux *pur terme de lour vies, ou pur terme d'auter vie, per force de quel feoffement ou leaſe, &c.* The error may eaſily bee perceived by that which is in print, viz. "by [180. b.] "force of which feoffment or leaſe," &c. *ergo* there muſt be feoffment and leaſe ſpoken of before. Bract. li. 4. fo. 262. (3) Brit. ca. 35. & fo. 112. Flet. lib. 3. ca. 4. 10. & li. 6. ca. 47. (4) (2. Ro. Abr. 86.)

There be alſo joyntenants by other conveyances than *Littleton* here mentioneth, as by fine, recoverie, bargaine and ſale, releaſe, confirmation, &c. So there be divers other limitations than *Littleton* here ſpeaketh of: as if a rent charge of ten pounds be granted to *A.* and *B.* to have and to hold to them two, viz. to *A.* untill he be married, and to *B.* untill he be advanced to a benefice, they be joyntenants in the meane time, notwithſtanding the ſeverall limitations; (1) and if *A.* die before marriage, the rent ſhall ſurvive; but if *A.* had married, the rent ſhould have ceaſed for a moitie, *et ſic è converſo* on the other ſide.

Littleton having ſpoken of one kinde of tenants *pro indiviſo*, viz. of parceners, commeth now to another, viz. joyntenants: and firſt of joyntenants of freehold. If an alien and a ſubject purchaſe lands in fee, they are joyntenants, and the ſurvivorſhip ſhall hold place, (2) *et nullum tempus occurrit regi*, upon an office found. 7. E. 4. 29. 11. H. 4. 26. (5. Co. 52.)

"*Joyntenants.*" So called, becauſe the lands or tenements, &c. are conveyed to them joyntly, *conjunctim feoffati, &c.* or *qui conjunctim tenent*, and are diſtinguiſhed from ſole or ſeverall tenants, from parceners, and from tenants in common, &c. and anciently they were called *participes, et non hæredes*. And theſe joyntenants muſt joyntly implead and joyntly be impleaded by others, (3) which propertie is common betweene them and coparceners; but Flet. lib. 6 ca. 47. Bract. lib. 5. fol. 435. a. (Noy 13. Ant. 164. Cro. Jam. 83. 166. Poſt. Sect. 311.)

(2) [See Note 53.]

(3) I take this reference to Bracton to be erroneous. But in fol. 28. a. of Bracton there is a chapter, which connects with Littleton's on jointenancy; the firſt branch of it being *de donationibus factis pluribus mul ſive ſucceſſivè*. See alſo Bract. fo. 12. 1. and 13. a.

(4) It ſhould be cap. 48. to which as a correſponding part of an almoſt co-ſt m- porary writer add Bract. fol. 428. a.

[180. b.]

(1) [See Note 54.]

(2) [See Note 55.]

(3) See the ſtatute *de conjunctim feoffatis* 34. E. 1. lord Coke's notice of it in 2. Inſt. 527. and Doderidge's Dig. Orig. Br. in the Chapter on *Jointenants* in b. 2. fol. 456.

but joyntenants have a ſole qualitie of ſurvivorſhip, which coparceners have not. *Littleton*, having now ſpoken of parceners and of joyntenants of right, doth next ſpeake of joyntenants by wrong.

Sect. 278.

ITEM, ſi deux ou trois, &c. diſſeiſont un auter d'aſcun terres ou tenements a lour uſe demeſne, donques les diſſeiſours ſont joyntenants. Mes s'ils diſſeiſont un auter al uſe d'un de eux, donques ils ne ſont joyntenants; mes celuy a que uſe le diſſeiſin eſt fait eſt ſole tenant, et les auters n'ont riens en le tenancie, mes ſont appels coadjutors a le diſſeiſin, &c.

ALSO, if two or three, &c. diſſeiſe another of any lands or tenements to their own uſe, then the diſſeiſors are joyntenants. But if they diſſeiſe another to the uſe of one of them, then they are not joyntenants; but hee to whoſe uſe the diſſeiſin is made is ſole tenant, and the others have nothing in the tenancy, but are called coadjutors to the diſſeiſin, &c.

IT is to bee obſerved, that ſome diſſeiſors be tenants of the land, and ſome be no tenants of the lands; and of both theſe kinds *Littleton* here ſpeaketh.

50. E. 3. 2. 17. Aſſ. 14. 14. Aſſ. 12. 8. Aſſ. p. 30. 10. E. 3. 47. 10. Aſſ. 22. 23. H. 8. tit. diſſeiſ. p. 77. 29. Aſſ. 21. 27. Aſſ. 30. 12 E. 4. 9. 7. E. 4. 7. b. 38. Aſſ. 7. 21. H. 7. 35. 29. Aſſ. 50. 21. H. 8. 25. 35. H. 6. 61. 21. E. 4. 46. Abr. 660. Poſt. 188. a.)

"*&c.*" In the firſt *&c.* nothing is implied but foure or five, or more. But in the latter *&c.* many things be to bee underſtood. As of diſſeiſors that be no tenants, ſome are coadjutors, whereof *Littleton* here ſpeaketh, ſome counſellors, commanders, &c. when the diſſeiſin is not to bee done to any of their uſes. Alſo if *A.* diſſeiſe one to the uſe of *B.* who knoweth not of it, and *B.* aſſent to it, in this caſe til the agreement *A.* was tenant of the land, and after agreement *B.* is tenant of the land, but both of them be diſſeiſors: for *omnis ratihabitio retrotrahitur et mandato equiparatur.* (4) And it is worthie of the obſervation, and implied alſo in the latter *&c.* that ſeeing coadjutors, counſellors, commanders, &c. are all diſſeiſors, that albeit the diſſeiſor which is tenant dieth, yet the aſſiſe lieth againſt the coadjutor, counſellor, commander, &c. and the tenant of the land, (5) though he be no diſſeiſor. (6)

15. E. 4. 15. F. N. B. 179. g. (Mo. 53. Poſt. 374. a. Ant. 10. a. 1. Ro. Abr. 660. Poſt. 188. a.) (Poſt. 245. a. 258. a.) 1. Ro. Abr. 663.)

[a] 50. E. 3. 2. (Cro. Cha. 303. 1. Ro. Abr. 661, 662. Poſt. 323. a.)

[a] The demandant and others in a *præcipe* did diſſeiſe the tenant to the uſe of the others, and the writ did not abate; for the demandant was a diſſeiſor, but gained no tenancy in the land, for that he was but a coadjutor.

A man diſſeiſeth tenant for life to the uſe of him in the reverſion, and after he in the reverſion agreeth to the diſſeiſin, it is ſaid, that he in the reverſion is a diſſeiſor in fee, for by the diſſeiſin made by the ſtranger, the reverſion was diveſted, (7) which (ſay they) cannot bee reveſted by the agreement of him in the reverſion, [181. a.] for that it maketh him a wrong doer, and therefore no relation of an eſtate by wrong can helpe him. (1)

"*Coadjutor.*"

(4) [See Note 56.]
(5) That is, he that is ſeiſed of the freehold by title from the diſſeiſor, as by feoffment leaſe or deſcent from him.
(6) See ant. 154. b.
(7) [See Note 57.]
[181. a.]
(1) [See Note 58.]

"*Coadjutor.*" *Coadjutor eſt qui auxiliatur alteri,* and is derived *à coadjuvando. Anglicè* a fellow helper.

Sect. 279.

ET nota que diſſeiſin eſt properment, lou un home entra en aſcun terres ou tenements lou ſon entre n'eſt pas congeable, et ouſta celuy que ad franktenement, &c.

AND note that diſſeiſin is properly, where a man entreth into any lands or tenements where his entry is not congeable, and ouſteth him which hath the freehold, &c.

THIS deſcription of a diſſeiſin and the *&c.* in this place is underſtood onely of ſuch lands and tenements whereunto an entry may bee made, and not of rents, commons, &c. (2) whereof ſufficient hath been ſaid before (3) in the Chapter of Rents; and ſo in effect *Littleton* deſcribed it before the edition of his book. And note here, that every entry is no diſſeiſin, unleſſe there be an ouſter alſo of the freehold. And therefore *Littleton* doth not ſet downe an entrie onely but an ouſter alſo, as an entry and a claimer, or taking of profits, &c.

3. E. 4. 2. 34. Aſſ. 11, 12. 26. Aſſ. 17. 41. Aſſ. 10. 24. E. 3. 31. Pl. Com. 89. Parſon de Hony Lane 7. Aſſ. 10. 11. Aſſ. 25. 12. E. 3. tit.

Now as there be joyntenants by diſſeiſin, ſo are there joyntenants by abatement, intruſion, and uſurpation, all which are included in the latter *&c.*

Aſſ. 88. 45. Aſſ. 7. 9. Aſſ. 19. 39. Aſſ. 1. 18. E. 2. Aſſ. 374.

Sect. 280.

ET eſt aſçavoir, que la nature de joyntenancie eſt, que celuy que ſurveſquiſt avera ſolement l'entier tenancie ſolonques tiel eſtate que il ad, ſi le joynture ſoit continue, &c. Sicome ſi trois joyntenants ſont en fee ſimple, et l'un ad iſſue et devie, uncore ceux que ſurveſquont averont les tenements entier, et l'iſſue n'avera riens. Et ſi le ſecond joyntenant ad iſſue et devie, uncore le tierce que ſurveſquiſt avera les tenements entier, et eux avera a luy et a ſes heires a touts jours. Mes autrement eſt de parceners; car ſi trois parceners ſont, et devant aſcun partition fait l'un ad iſſue et devie, ceo que a luy affiert diſcendra a ſon iſſu. Et ſi tiel parcener moruſt

AND it is to be underſtood, that the nature of joyntenancy is, that he which ſurviveth ſhall have only the entire tenancie according to ſuch eſtate as he hath, if the joynture be continued, &c. As if three joyntenants bee in fee ſimple, and the one hath iſſue and dieth, yet they which ſurvive ſhall have the whole tenements, and the iſſue ſhall have nothing. And if the ſecond joyntenant hath iſſue and dye, yet the third which ſurviveth ſhall have the whole tenements to him and to his heires for ever. But otherwiſe it is of parceners; for if three parceners be, and before any partition made the one hath iſſue and dyeth,

(2) In reſpect to diſſeiſin of rents, read poſt. 306. b. 323. a. and b.

(3) Ant. Sect. 233. and the comment thereon.

moruſt ſans iſſue, donques ceo que a lui affiert diſcendra a ſes coheires, iſſint que ils averont ceo per diſcent, et nemy per ſurvivor, come joyntenants averont, &c.

eth, that which to him belongeth ſhall deſcend to his iſſue. And if ſuch parcener die without iſſue, that which belongs to her ſhal deſcend to her coheires, ſo as they ſhal have this by deſcent, and not by ſurvivor, as joyntenants ſhall have, &c.

"*SI le joynture ſoit continue, &c.*"

Here, by this *&c.* many points of learning are to bee obſerved. As that it is proper to joyntenants onely to have lands by ſurvivor; for no ſurvivor of other tenants *pro indiviſo* ſhall have the whole by ſurvivor, but only joyntenants: and this is called in law *jus accreſcendi. Omnes feoffati ſunt ſimul habendi et tenendi, nec totum nec partem ſeparatam nec per ſe, ſed ut quilibet eorum totum habeat cum aliis in communi; et cùm unus moriatur, non deſcendit aliqua pars hæredi morientis, nec ſeparata nec in communi ante mortem omnium, ſed pars illa communis per jus accreſcendi accreſcit ſuperſtitibus de perſonâ ad perſonam uſque ad ultimum ſuperſtitem.* But although ſurvivorſhip bee proper to joyntenants, yet it is not proper *quarto modo* (that is) *omni, ſoli et ſemper*; for there may bee joyntenants, though there be not equall benefit of ſurvivor on both ſides. As if a man letteth lands to *A.* and *B.* during the life of *A.* if *B.* dyeth, *A.* ſhall have all by the ſurvivor, but if *A.* dyeth, *B.* ſhall have nothing. (1) [181. b.]

Bracton lib. 4. fol. 262. b. Britton cap. 35. Fleta lib. 3. ca. 4. & ca. 10. 49. E. 3. fol. 5, 6.

(9. Co. 75. b.)

Two or more may have a truſt or an authoritie committed to them joyntly, and yet it ſhall not ſurvive. But herein are divers diverſities to be obſerved. Firſt, there is a diverſitie betweene a naked truſt or an authoritie, and a truſt or authoritie joyned to an eſtate or intereſt. (2) Secondly, there is a diverſitie between authorities created by the partie for private cauſes, and authoritie created by law for execution of juſtice. As for example, [*b*] if a man deviſe that his two executors ſhall ſel his land, if one of them dye, the ſurvivor ſhall not ſell it; (3) but if he had deviſed his lands to his executors to be ſold, there the ſurvivor ſhall ſell it; which diverſitie is implyed by our author, for hee ſaith, that he that ſurviveth ſhall have the entire tenancie.

(1. Sid. 6.)

[*b*] 39. Aſſ. p. 17. 30. H. 8. tit. deviſe B. Dyer 3. Eliz. 190. 49. E. 3. 16. 2. Eliz. Dyer 177. 23. Eliz. Dyer 371. 4 Eliz. Dyer 210. (Mo. 61. 341.) 10. H. 4. 2, & 3. 14. H. 4. 34. 39. H. 6. 42. 31. Aſſ. 20. 33. H. 8. joynt. Br. 62. 30. H. 8. condition Br. 190.

If a man make a letter of atturney to two, to do any act, if one of them dye, the ſurvivor ſhall not do it: but if a *venire facias* be awarded to foure coroners to impannell and returne a jury, and one of them dye, yet the other ſhall execute and returne the ſame.

If a charter of feoffment [*c*] be made, and a letter of atturney to foure or three joyntly or ſeverally to deliver ſeiſin, two of them cannot make liverie; becauſe it is neither by them foure or three joyntly, nor any of them ſeverally; but if the ſherife upon a *capias* directed to him make a warrant to foure or three joyntly or ſeverally to arreſt the defendant, two of them may arreſt him, becauſe it is for the execution of juſtice [*d*], which is *pro bono publico*, and therefore

[*c*] 38. H. 8. 8. Dyer 62. 27. H. 8. fol. 6. (5. Co. 91. Yelv. 25, 26. Cro. Eliz. 913, 914.) (Hutt. 127.)

[*d*] Paſch. 45. Eliz. in the king's bench betweene King and Hobbes.

(1) See further as to benefit of ſurvivorſhip, on one ſide only, poſt. 193. a. 239. b. & Dy. 10. b.

(2) See ant. 112. b. 113. a. poſt. 297. a.

(3) [See Note 59.]

therefore ſhall be more favourably expounded, then when it is onely for private; and ſo hath it beene adjudged. (4) *Jura publica ex privato promiſcuè decidi non debent.*

"*Et devie.*" Note, there is a naturall death and a civil death, and *Littleton*'s caſe is to be intended of both; and therefore [e] if two joyntenants be, and one of them entreth into religion, the ſurvivor ſhall have the whole. (5)

[e] 21. R. 2. Judgment 263. (Ant. 132. b)

Sect. 281.

ET come le ſurvivor tient lieu enter joyntenants, (6) *en meſme le maner il tient lieu enter eux queux ont joynt eſtate ou poſſeſſion ove auter de chattel, real ou perſonal. Sicome ſi leas de terres ou tenements ſoit fait a pluſors pur terme des ans, celuy, que ſurveſquiſt de les leſſees, avera les tenements a luy entier durant le terme per force de meſme*
[182. a.] *le leas. Et ſi un chival, ou un auter chattel perſonal ſont done a pluſors, celuy que ſurveſquiſt avera le chival ſolement.*

AND as the ſurvivour holds place betweene joyntenants, in the ſame manner it holdeth place betweene them which have joynt eſtate or poſſeſſion with another of a chattell, reall or perſonall. As if a leaſe of lands or tenements bee made to many for terme of yeares, hee, which ſurvives of the leſſees, ſhall have the tenements to him only during the terme hy force of the ſame leaſe. (1) And if a horſe, or any other chattell perſonall be given to many, hee which ſurviveth ſhall have the horſe onely.

HEREBY it is manifeſt, that ſurvivor holdeth place regularly as well betweene joyntenants of goods and chattels in poſſeſſion or in right, as joyntenants of inheritance or freehold. (Cro. Eliz. 33. 2. Ro. Abr. 86, 87.)

"*Chattell,*" or *Catell,* whereof commeth the word uſed in law [f] *Catalla,* and is, as *Littleton* here teacheth, two-fold, viz. reall and perſonall, and putteth examples of both. [f] Regiſt. origin. 139. 244. Bract. lib. 2. 39. H. 6. 35. Standford Pr. 45.

Sect. 282.

EN meſme le maner eſt de dets et duties, &c. car ſi un obligation ſoit fait a pluſors pur un debt, celuy que ſurveſquiſt avera tout le det ou dutie. Et iſſint eſt d'auters covenants et contracts, &c. (3)

IN the ſame manner it is of debts and duties, &c. for if an obligation be made to many for one debt, hee which ſurviveth ſhall have the whole debt or dutie. And ſo is it of other covenants and contracts, &c.

NOW

(4) See acc. as to warrant of the peace to two, Lambard's Juſtice ed. 1602. p. 84.

(5) See ant. note 7. of fol 3. b. and note 1. of fol. 132. b. Add Ley's caſe 2. Ro. Abr. 43.

(6) *&c.* in L. & M. and Roh.

[182. a.]

(1) [See Note 60.]

(3) No *&c.* in L. & M. nor Roh.

NOW he ſpeaketh of debts, duties, covenants, contracts, &c. (2)

(1. Ro. Abr. 6.) F. N. B. 117. E. 38. E. 3. 7.

"*Dets et dutyes, &c.*" Here by force of this *&c.* an exception is to bee made of two joynt merchants; for the wares, merchandizes, debts or duties, that they have as joynt merchants or parteners, ſhall not ſurvive, but ſhall goe to the executors of him that deceaſeth; and this is *per legem mercatoriam,* which (as hath beene ſaid) is part of the lawes of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accreſcendi inter mercatores pro beneficio commercii locum non habet.* (4)

(Ant. 172. a. Cro. Jam. 306. 1. Ro. Abr. 6. Cro. Cha. 301. 1. Sid. 236. 179.) (5)

And to the latter *&c.* in this Section the like exception muſt be made.

Sect. 283.

ITEM, aſcuns jointenants poient eſtre, que poient aver joint eſtate, et eſtre jointenants pur terme de lour vies, et uncore ils ont ſeverall enheritances. Sicome terres ſoient dones a deux homes et a les heires de lour deux corps engendres, en ceſt caſe les donees ont joint eſtates pur terme de lour deux vies, et uncore ils ont ſeverall inheritances; car ſi l'un des donees ad iſſue et devy, l'auter que ſurveſquiſt avera tout per le ſurvivor pur terme de ſa vie, et ſi celuy que ſurveſquiſt auxy ad iſſue et devy, donques l'iſſue del un avera l'un moitie, et l'iſſue del auter avera l'auter moitie de la terre, et ils tiendront la terre enter eux en common, et ne ſont pas joyntenants, mes ſont tenants en common. Et la cauſe, pur que tielx donees en tiel cas ont joynt eſtate pur terme de lour vies, eſt, pur ceo que al commencement les terres fueront dones a eux deux, les queux parols ſans pluis dire font joint eſtate a eux pur terme de lour vies. Car ſi home voit leſſer terre a un auter per fait ou ſans fait, nient feaſant mention quel eſtate il averoit, et de ceo fait liverie de ſeiſin, en ceo caſe le leſſee ad eſtate

ALSO, there may be ſome joyntenants, which may have a joint eſtate, and be jointenants for terme of their lives, and yet have ſeverall inheritances. As if lands be given to two men and to the heires of their two bodies begotten, in this caſe the donees have a joint eſtate for term of their two lives, and yet they have ſeverall inheritances; for if one of the donees hath iſſue and dye, the other which ſurviveth ſhall have the whole by the ſurvivor for terme of his life, and if he which ſurviveth hath alſo iſſue and die, then the iſſue of the one ſhall have the one moitie, and the iſſue of the other ſhall have the other moity of the land, and they ſhal hold the land betweene them in common, and they are not joyntenants, but are tenants in common. And the cauſe, why ſuch donees in ſuch caſe have a joynt eſtate for terme of their lives, is, for that at the beginning the lands were given to them two, which words without more ſaying make a joint eſtate to them for terme of their lives. For if a man will let land to another by deed or without deed,

(2) See further, as to things of which there ſhall be a ſurvivorſhip, and where expreſs words are neceſſary to give that benefit, 11. Co. 3. b. 2. Ro. Abr. 86. B. 2. 1. P. Wms. 672. and tit. *ſurvivor* in Vin. Abr. and tit. *jointenants* B. 1. & D. ibid.

(4) See more fully as to this 2. Brownl. 99. See alſo acc. Noy 55.

(5) Theſe additional references are retained, though they ſcarce deſerve it; for they only relate to different inſtances of the *lex mercatoria,* and do not touch the particular rule againſt the *jus accreſcendi.*

tate pur terme de ſa vie ; et iſſint entant que les terres fueront dones a eux, ils ont joint eſtate pur terme de lour vies. Et la cauſe pur que ils averont ſeveral enheritances eſt, ceo, entant que ils ne poient aver per nul poſſibility un heire enter eux engender, ſicome home et feme poient aver, &c. donque la ley voet que lour eſtate et lour enheritance ſoit tiel come reaſon voet, ſolonque la forme et effect des parols del done, et ceo eſt a les heires que l'un engendra de ſon corps per aſcun de ſes femes (1) [*et a les heires que l'auter engendra de ſon corps per aſcun de ſes femes*] *&c. iſſint il covient per neceſſitie de reaſon, que ils averont ſeveralx inheritances. Et en tiel cas ſi l'iſſue d'un des donees apres la mort des donees devie, iſſint que il n'ad aſcun iſſue en vie de ſon corps engendre, donque le donor ou ſon heire poit enter en la moity come en ſon reverſion, &c. coment que l'autre des donees ad iſſue en vie, &c. Et la cauſe eſt que entant que les enheritances ſont ſeveral, &c. le reverſion de cux en ley eſt ſeveral, &c. et le ſurvivor del iſſue del auter ne tiendra pas lieu d'aver l'entiertie.*

deed, not making mention what eſtate he ſhall have, and of this make liverie of ſeiſin, in this caſe the leſſee hath an eſtate for terme of his life ; and ſo in as much as the lands were given to them, they have a joint eſtate for term of their lives. And the reaſon why they ſhall have ſeveral inheritances is this, inaſmuch as they cannot by any poſſibility have an heir between them ingendred, as a man and woman may have, &c. the law will that their eſtate and inheritance be ſuch as is reaſonable, according to the forme and effect of the words of the gift, and this is to the heires which the one ſhall beget of his body by any of his wives, and to the heirs which the other ſhall beget of his body by any of his wives, &c. ſo as it behoveth by neceſſitie of reaſon, that they have ſeveral inheritances. And in this caſe if the iſſue of one of the donees after the death of the donees dye, ſo that he hath no iſſue alive of his body begotten, then the donor or his heire may enter into the moity as in his reverſion, &c. although the other donee hath iſſue alive, &c. And the reaſon is, foraſmuch as the inheritances be ſeveral, &c. the reverſion of them in law is ſeverall, &c. and the ſurvivor of the iſſue of the other ſhall hold no place to have the whole.

"*ILS ont joynt eſtate pur terme de lour deux vies, &c.*" Note, albeit they have ſeverall inheritances in taile, and a particular eſtate for their lives, yet the inheritance doth not execute and ſo breake the joyntenancy, but they are joyntenants for life, and tenants in common of the inheritance in tayle. Vide Sect. 296. (Poſt. 189. b.)

[182. b.] "*Sicome home et feme poient aver, &c.*" Here a diverſity is implyed, when the eſtate of inheritance is limited by one conveyance, as in this caſe it is, there are no ſeverall eſtates to drowne one in another. But when the ſtates are divided in ſeverall conveiances, their particular eſtates are diſtinct and divided, and conſequently the one drownes the other. As if a leaſe bee made to two men for terme of their lives, and after the leſſor granteth the reverſion to them two, and to the heires of their two bodies, the joynture is ſevered, and they are tenants in common in poſſeſſion. And it is further implied, that in this caſe of *Littleton* there is no diviſion betweene the eſtate for lives, and the ſeverall inheritances ; for in this caſe they cannot convey away the inheritances after their deceaſe, Vide Weſtcote's caſe. 2. Co. 60, 61. (1. Sid. 83.) Vid. 12. E. 4. 2. b.

(1) In L. and M. and Ro. the following words here placed between brackets are omitted.

ceaſe, (1) for it is divided only in ſuppoſition and conſideration of law, and to ſome purpoſes the inheritance is ſaid to be executed, as ſhall bee ſaid hereafter. (Sect. 285.)

If a man make a leaſe for [f] life, and after granteth the reverſion to the tenant for life and to a ſtranger and to their heires, they are not joyntenants of the reverſion, but the reverſion is by act of law executed for the one moitie in the tenant for life, and for the other moity he holdeth it ſtill for life, the reverſion of that moity to the grantee. [f] 39. H. 6. 2. b. (4. Leon. 37. Poſt. 299. b. Cro. Jam. 260, 261.)

And ſo it is, if a man maketh a leaſe [g] to two for their lives, and after granteth the reverſion to one of them in fee, the joynture is ſevered, and the reverſion is executed for the one moitie, and for the other moitie there is tenant for life the reverſion to the grantee. (2) [g] Weſcot's caſe, ubi ſupra.

If leſſee for life granteth his eſtate to him in the reverſion, and to a ſtranger, the joynture is ſevered and the reverſion executed for the one moitie by the act of law. (3) Ibidem 7. H. 6.

If a man maketh a leaſe for life and granteth the reverſion to two in fee, the leſſee granteth his eſtate to one of them, they are not joyntenants of the reverſion; for there is an execution of the eſtate for the one moitie, and an eſtate for life, the reverſion to the other of the other moity (2). [183. a.]

Here *Littleton* hath well reſolved a doubt; for of ancient time it hath beene ſaid, [h] that when lands have beene given to two women and to the heires of their two bodies begotten (which caſe our author putteth in the next Section) that the huſband having iſſue ſhould bee tenant by the courteſie living the other ſiſter; for that as ſome held the inheritance was executed, and that the ſiſters were tenants in common in poſſeſſion, and conſequently the huſband to be tenant by the curteſie, which hee could not bee if the women had a joynt eſtate for terme of their lives: and likewiſe it was laid [i] that the iſſue of the one ſhould recover the moytie in a *formedon* living the other ſiſter. But *verba ſunt hæc*, and *Littleton*, grounding himſelfe upon good authority in law, hath cleered this doubt. [h] 17. E. 3. 51. 18. 18. E. 3. 39. 50. E. 3. Statham tit. done. 50. E. 3. feoffements & faitz 97. (Ant. 13. a.) [i] 44. E. 3. taile 13. 8. Aſſ. 33. 24. E. 3. 29. 7. H. 4. 16. Corbet's caſe 1. Co. 84. l. 4. Mariæ Dier 145.

"*Nient feaſant mention quel eſtate il averoit.*" Here *Littleton* addeth materially (not making mention of what eſtate); for [k] if in the premiſſes lands bee letten, or a rent granted, the general intendment is, that an eſtate for life paſſeth; but if the *habendum* limit the ſame for yeares or at will, the *habendum* doth qualifie the generall intendment of the premiſſes. And the reaſon of this is, for that it is a maxime in law, that every man's grant ſhall be taken by conſtruction of law moſt forcible againſt himſelfe. *Qualibet conceſſio fortiſſimè contra donatorem interpretanda eſt*; which is ſo to be underſtood, that no wrong be thereby done; for it is another maxime in law, *quòd legis conſtructio non facit injuriam*. And therefore if tenant for life maketh a leaſe generally, this ſhall bee taken by conſtruction of law an eſtate for his owne life that made the leaſe; for if it ſhould be a leaſe for the life of the leſſee, it ſhould be a wrong to him in the reverſion. And ſo it is if tenant in taile [183. b.] make See before in the Chapter of Ten. by the Curteſie, Sectione . (Ant. 30. a. 2. Ro. Abr. 90.) [k] Pl. Com. in Throgmorton's caſe. (2. Co. 23. 55. 5. Co. 111 2. Ro. Abr. 66.) Regula. (5. Co. 8. a. Plowd. 161. a. Ant. 42. a.)

(1) See poſt. 184. b. [183. a.]
(2) [See Note 61.] (3) [See Note 62.]
(3) See poſt. 192, 209. b. 335. a.

make a leaſe generally, the law ſhall contrive this to be ſuch a leaſe as hee may lawfully make, and that is for terme of his owne life; for if it ſhould be for the life of the leſſee, it ſhould be a diſcontinuance, and conſequently the ſtate which ſhould paſſe by conſtruction of law ſhould worke a wrong. (1)

" *Et iſſint entant que les terres fueront dones a eux ils ount joynt eſtate pur lour vies.*" This is plaine, but with this exception, unleſſe the *habendum* doth otherwiſe limit the ſame. And therefore if a leaſe be made [*l*] to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the generall intendment of the premiſſes, (2) and ſo hath it beene oftentimes reſolved. And ſo it is if a leaſe be made to two, *habendum* the one moity to the one, and the other moitie to the other, the *habendum* doth make them tenants in common; and ſo one part of the deed doth explaine the other, and no repugnancy betweene them, *et ſemper expreſſum facit ceſſare tacitum.* (3)

[*l*] 8. E. 3. 427. tit. feoffem. & faits 73. 30. H. 8. tit. joynt. Br. 53. Dyer fo. 361. Pl. Com. 160. (Hob. 171. Poſt. 190. b. 2. Ro. Abr. 65. 68. 1. Leon. 10, 11)

" *Per nul poſſibilitie.*" Here it is to be obſerved, that where the grant is impoſſible to take effect according to the letter, there the law ſhall make ſuch a conſtruction as the gift by poſſibilitie may take effect, which is worthy of obſervation. *Benignæ faciendæ ſunt interpretationes cartarum propter ſimplicitatem laicorum, ut res magis valeat quàm pereat.*

Bracton. (2. Ro. Abr. 66. 5. Co. 19 a. Hob. 313.)

" *Iſſint il covient per neceſſitie de reaſon.*" The reaſon of the law is the life of the law; for though a man can tell the law, yet if he know not the reaſon thereof, he ſhall ſoone forget his ſuperficiall knowledge. But when hee findeth the right reaſon of the law, and ſo bringeth it to his natural reaſon, that he comprehendeth it as his own, this will not onely ſerve him for the underſtanding of that particular caſe, but of many others; for *cognitio legis eſt copulata et complicata*; and this knowledge will long remaine with him. All which is plainly implyed by the words and *&c.* of our author in this Section.

" *Et en tiel caſe ſi l'iſſue d'un des donees apres la mort des donees devie, iſſint que il n'ad aſcun iſſue en vie de ſon corps engendre, donques le donor ou ſon heire poet enter en le moitie.*" This is miſtaken in the imprinting, and varieth from the originall, (4) which is, *ſi l'un donee ou l'iſſue d'un des donees apres la mort de donees devie, iſſint que il n'ad aſcun iſſue, &c.* For it is evident, that if the one donee himſelfe dieth without iſſue, the inheritance doth revert for a moitie, and after the deceaſe of the other donee, the donor may enter into that moitie; and whether the iſſue of the one donee dieth without iſſue at any time, either in the life of the other donee, or after his deceaſe, it is not materiall, for whenſoever no iſſue is remaining of the one donee, ſo as the ſtate taile is ſpent, the donor may after the deceaſe of the ſurviving donee enter into that moity. (5)

" *Et*

(1) Acc. ant. 42. a. and there the reaſon is more fully expreſſed.

(2) Acc. Perk. ſect. 174.

(3) Acc. Sect. 298. See alſo 2. Co. 55. a. & b. ant. 180. b. poſt. 189. a. 293. b.

(4) But lord Coke's correction is not conformable either to L. and M. nor the Roh. edition.

(5) See Hob. 33.

" *Et la cauſe eſt, que entant que les inheritances, &c.*" *Littleton* in this Chapter hath often ſaid, *et la cauſe eſt*, which is worthie of obſervation, for then wee are truely ſaid to know any thing when we know the true cauſe thereof. *Tunc unumquodque ſcire dicimur, cùm primam cauſam ſcire putamus. Scire autem propriè eſt rem ratione et per cauſam cognoſcere.*

Ariſt. 1. Metaphyſ.

Fælix qui potuit rerum cognoſcere cauſas.

Virg. 1. Georg.

And therefore all ſtudents of law are to apply their principall indeavour to attaine therunto, all which is implyed by the words and ſeveral *&c.* in this Section.

Here the cauſe of the entrie of the donor into a moitie in this caſe is, that in as much as the inheritance is ſeverall, the reverſion is ſeverall. Therefore upon the ſeverall determination of the eſtate in taile, the donor may enter. And the law termeth a reverſion to bee expectant upon the particular eſtate: becauſe the donor or leſſor, or their heirs, after every determination of any particular eſtate, doth expect or looke for to enjoy the lands or tenements againe.

(Poſt. 191. b. Hob. 33.)

" *Le reverſion de eux en ley eſt ſeverall, &c.*" Hereby, and by this *&c.* is implyed, that upon one joint or entire gift or leaſe there is one joynt or entire reverſion, and upon ſeverall gifts or leaſes there bee ſeverall reverſions. And this is to be underſtood of the reverſion in the donor or his heires. But albeit the gifts or leaſes be ſeverall, yet if the donors or leſſors grant the reverſion to two or more perſons and their heires, they are joyntenants of the reverſion. And ſo it is of a remainder. And therefore if a gift be made to two men and the heires of their two bodies begotten, the remainder to them two and their heirs, they are joyntenants for life, tenants in common of the ſtate taile, and joyntenants of the fee ſimple in remainder; for they are joynt purchaſers of the fee ſimple, and the remainder in fee is a new created eſtate, but the reverſion remaining in the donor or his heires is a part of his ancient fee ſimple.

Dyer 14. El. 300.

(2. Co. 60. b. poſt. 299. b.)

[184. a.]

Sect. 284.

ET ſicome eſt dit de males, en meſme le manner eſt lou terre eſt done a deux females, et a les heires de lour deux corps engendres.

AND as it is ſaid of males, in the ſame manner it is where land is given to two females, and to the heires of their two bodies engendred.

IF a man giveth lands to two men and one woman, and the heires of their three bodies begotten, in this caſe they have ſeverall inheritances; for albeit it may be ſaid, that the woman may by poſſibility marry both the men one after another; yet firſt, ſhe cannot marrie them both *in præſenti*, and the law will never intend a poſſibilitie upon a poſſibility, as firſt to marry the one, and then to marry the other (1); ſecondly, the form of the gift is, to the heires

44. E. 3. tit. Taile 13. (Ant. 25. b.) (2. Ro. Abr. 48. 1. Co. 120. 156. b. Ant. 46. b. 10. Co. 50. b.)

(1) [See Note 63.]

heires of their three bodies, which is not poſſible, and therefore they ſhall have ſeveral inheritances. And ſo it is, if a gift be made to one man and to two women, *mutatis mutandis*. In the ſame manner, if a gift in taile be made to a man and his mother, [*m*] or to a man and his ſiſter (2), or to him and his aunt, &c. in this and like caſes, albeit the gift is made to a man and a woman, yet they have ſeverall inheritances; becauſe they cannot marry together, and are within the rule and reaſon of our author.

[*m*] 18. E. 3. 39. 7. H. 4. 16.

Sect. 285.

ITEM, ſi terres ſoyent dones a deux et a les heires de l'un de eux, ceo eſt bone jointure, et l'un ad franktenement, et l'auter ad fee ſimple. Et ſi celuy que ad le fee devie, celuy que ad le franktenement avera l'entiertie per le ſurvivor pur terme de ſa vie. En meſme le manner eſt, lou tenements ſont dones a deux et les heires del corps d'un de eux engendres, l'un ad franktenement, et l'auter ad fee taile, &c.

ALSO, if lands be given to two and to the heires of one of them, this is a good joynture, and the one hath a freehold, and the other a fee ſimple. And if he which hath the fee dieth, he which hath the freehold ſhall have the entiertie by ſurvivor for terme of his life. In the ſame manner it is, where tenements bee given to two and the heirs of the body of one of them engendred, the one hath a freehold, and the other a fee taile, &c.

BY this Section, and the *&c.* in the end of it, they are joyntenants for life, and the fee-ſimple or eſtate taile is in one of them; and becauſe it is by one and the ſame conveyance, they are joyntenants, and the fee-ſimple is not executed to all purpoſes as hath beene ſaid before (3). (2. Co. 60. b.) (Sect. 283.)

If a fine bee levied to two, [*n*] and to the heires of one of them, by force whereof hee is ſeiſed, he that hath fee dieth, and after the joyntenant for life dieth, and an eſtranger abates, in this caſe the heire may either ſuppoſe the fee ſimple executed, and have an aſſiſe of *Mortdaunceſter*, the words of which writ be, *Si* R. *pater fuit ſeiſitus die quo obiit in dominico ſuo ut de feodo*; which cannot bee ſaid of him that hath but a remainder expectant upon an eſtate for life; but in reſpect that he is ſeiſed of a fee ſimple, and of a joynt eſtate in poſſeſſion, the words in the writ be true, that he was ſeiſed *in dominico ſuo ut de feodo* (4). Likewiſe the heir may have a writ of right, which alſo in ſome ſort proves the fee ſimple executed; or the heir may have a *ſcire facias* to execute the fine, by which the heir ſuppoſeth that the fee was not executed, or he may maintaine a writ of intruſion where the heire maketh the like ſuppoſition, and ſhall terme it a remainder. (1) And yet when land is given

[*n*] 42. E. 3. 9, 10. 11. H. 4. 55. 31. E. 3. ſcire facias 19. 29. H. 8. Mortd. B. 59. 4. E. 3. 37. F. N. B. 196. & 219. 4. E. 3. Itinere Derby. 24. E. 3. 70. (2. Co. 61.) (1. Ro. Abr. 686.) (Poſt. 281.)

[184. b.]

(2) See Dy. 326. a.

(3) Ant. 182. b. See alſo poſt. 297. b. Fearne on Conting. Rem. 23, 24. 26. 28, 29. Bro. Nouv. Caſ. pl. 260. 303. 387. Theſe references will introduce the reader to moſt of the learning on this curious point.

(4) See however Bro. Nouv. Caſ. pl. 115, which is *contra*.

[184. b.]

(1) [See Note 64.]

given to two and to the heires of one of them, he in the rem cannot grant away his fee ſimple, as hath beene ſaid. (2)

Sect. 286.

ITEM, ſi deux joyntenaunts ſont ſeiſies d'eſtate en fee ſimple, et l'un graunt un rent charge per ſon fait a un auter hors de ceo que a luy affiert (3), *en ceſt caſe durant la vie le grantor le rent charge eſt effectuall; mes apres ſon deceſſe le grant de le rent charge eſt void, quant a charger la terre, car celuy que ad la terre per le ſurvivor tiendra tout la terre diſcharge. Et la cauſe eſt, pur ceo que celuy que ſurveſquiſt clayma et ad la terre per le ſurvivor,* (4) *et nemy ad, ne poet de ceo claymer rien per diſcent de ſon compaignion, &c. Mes auterment eſt de parceners, car ſi ſoient deux parceners des tenements en fee ſimple, et devant aſcun partition fait l'un charge ceo que a luy affiert per ſon fait d'un rent charge, &c. et puis moruſt ſans iſſue, per que ceo que a luy affiert diſcend a l'auter parcener, en ceſt caſe l'auter parcener tiendra la terre charge, &c. pur ceo que il vient a cel moitie per diſcent, come heire, &c.*

ALSO, if two joyntenants be ſeiſed of an eſtate in fee ſimple, and the one grants a rent-charge by his deed to another out of that which belongeth to him, in this caſe during the life of the grantor the rent charge is effectuall; but after his deceaſe the grant of the rent charge is void, as to charge the land, for he which hath the land by ſurvivor ſhal hold the whole land diſcharged. And the cauſe is, for that he which ſurviveth claimeth and hath the land by the furyivor, and hath not, nor can claime any thing by deſcent from his companion, &c. But otherwiſe it is of parceners, for if there be two parceners of tenements in fee ſimple, and before any partition made the one chargeth that which to her belongeth by her deed with a rent charge, &c. and after dieth without iſſue, by which that which belongeth to her deſcends to the other parcener, in this caſe the other parcener ſhall hold the land charged, &c. becauſe ſhee came to this moity by deſcent, as heir, &c.

F. N. B. 204. E. 207. 7. H. 6. 2. 13. H. 7. 22. 10. E. 3. 34. 17. R. 2. tit. charge 15. 5. H. 5. 8. Vide Sect. 289. (6. Co. 79. a.)

"*CLAIMER riens per diſcent de ſon compagnion, &c.*" By which, *&c.* is implyed, that ſo it is if one joyntenant acknowledge a recogniſance or a ſtatute, or ſuffreth a judgment in an action of debt, &c. and dieth before execution had, it ſhall not bee executed afterwards. (5) But if execution be ſued in the life of the conuſor, it ſhall bind the ſurvivor. And it is further implyed, that both in the caſe of the charge and of the recogniſance ſtatute and judgement, if he that chargeth, &c. ſurvive, it is good for ever.

[o] 9. H. 6. 32. (Hob. 3. Plowd. 418. b.)

And ſo it is [o] if a man be poſſeſſed of certaine lands for term of yeares in the right of his wife, and granteth a rent charge, and dyeth, the wife ſhall avoyd the charge; (6) but if the huſband had ſurvived, the charge is good during the terme.

[p] 8. E. 3. tit. execution Statham.

If a villeine purchaſe lands, and binde himſelfe in a recogniſance, if the lord enter before [p] execution, the lord ſhall avoyde the

(2) [See Note 65.]
(3) *&c.* in L. and M. & Roh.
(4) *&c.* in L. and M. & Roh.
(5) See acc. 7. H. 7. 13. b. & 2. Ro. Abr. 88.
(6) [See Note 66.]

the ſame, as hath beene ſaid. But otherwiſe it is if he had made a leaſe for yeares, for the reaſon that *Littleton* here yeeldeth in this Section. (7)

If two joynetenants bee of a terme, [q] and the one of them grant to *I. S.* that if he pay to him ten pound before *Michaelmaſſe*, that then he ſhall have his terme, the grantor dyeth before the day, *I. S.* payes the ſumme to his executors at the day, yet hee ſhall not have the tearme, but the ſurvivor ſhall hold place; for it was but in nature of a communication: (1) but if he had made a leaſe for yeares, to begin at *Michaelmaſſe*, it ſhould have bound the ſurvivor. (2)

[185. a.]

[q] 14. H. 8. 22. Pl. Com. 263. b. in dame Hales caſe. (Finch's L. 97. 6. Co. 35. 2. Ro. Abr. 88, 89. Cro. Jam. 91, 92.)

And where *Littleton* putteth the caſe of a rent charge, it is ſo likewiſe implyed, that if one joyntenant granteth a common of paſture, or of turbary, or of eſtovers, or a corody, or ſuch like, out of his part, or a way over the land, this ſhall not bind the ſurvivor: for it is a maxime in law, that *jus accreſcendi præfertur oneribus*; and there is another maxime, that *alienatio rei præfertur juri accreſcendi*.

45 E. 3. 13. Vide Sect. 289.

If one joyntenant in fee ſimple be indebted to the king, and dyeth, [r] after his deceaſe no extent ſhall be made upon the land in the hands of the ſurvivor.

[r] 40. Aſſ. 36. 50. Aſſ. 5. F. N. B. 149. q. Pl. Com. 321. (1. Co. 86. Poſt. 352. a.)

If a recovery be had againſt one joyntenant, who dyeth before execution, the ſurvivour ſhall not avoid this recovery: becauſe that the right of the moitie is bound by it.

If one joyntenant in fee take a leaſe for yeares of an eſtranger by deed indented and dyeth, the ſurvivour ſhall not be bound by the concluſion; becauſe he claymes above it, and not under it.

"*Et la cauſe eſt, pur ceo que celuy que ſurveſquiſt claime et ad la terre per ſurvivor, &c.*" Here againe *Littleton* ſheweth the reaſon: and the cauſe, wherefore the ſurvivour ſhall not hold the land charged, is, for that he claymeth the land from the firſt feoffor, (3) and not by his companion, which is *Littleton*'s meaning when he ſaith, (that he claimeth by ſurvivor) for [s] the ſurviving feoffee may plead a feoffment to himſelfe without any mention of his joynt feoffee. (4) And this is the reaſon, that if two joyntenants bee in fee, and the one maketh a leaſe for yeares, reſerving a rent and dyeth, the ſurviving feoffee [t] ſhall have the reverſion by ſurvivor, but he ſhall not have the rent, becauſe he claimeth in from the firſt feoffor, which is paramount the rent. (2) If there be two joyntenants in fee, and the one joyntenant granteth a rent charge out of his part, and after releaſeth to his joynt companion and dyeth, he ſhall hold the land charged, for that he is out of the reaſon and cauſe ſet downe by *Littleton*, becauſe he claimeth not by ſurvivor, in as much as the releaſe prevented the ſame. And of this opinion was *Littleton* himſelfe [u] before the edition of his booke. (2) But all men agree, that if *A. B.* and *C.* be joyntenants in fee, and *A.* chargeth his part, and then releaſeth to *B.* and his heirs, and dyeth, that the [w] charge is good for ever: becauſe in that caſe *B.* cannot be in from the firſt feoffor, becauſe he hath

[s] 14. E. 4. 1 b. 18. E. 2. briefe 830. 8. E. 2. entry 77. 18. E. 3. 28. 38. E. 3. 26. 8. H. 6. 25. Vide 46. E. 3. 77. 35. H. 6. 39.

[t] Dier Mich. 2. & 3. Eliz. 187. lib. 1. fol. 96. Vide lib. 6. fol. 78, 79. (Poſt. 318 a.)

[u] 33. H. 6. 5. a. 9. Eliz. Dyer 263.

[w] 37. H. 8. tit. alienation Br. 31.

(7) See alſo the reaſon given in Sect. 289.

(2) See poſt. Sect. 289.

(3) [See Note 67.]

[185. a.]

(4) Acc. F. N. B. 219. B.

(1) See Dy. 337. a.

10. E. 4. 3. b. 40. E. 3. 41. b. 33. H. 6. 5. 22. H. 6. 42. b. per Pole. 35. E. 3. releaſe 43. 33. E. 3. avowry 195. 14. H. 8. 2. (6) (Cro. Jam. 696. Plowd. 198. 6. Co. 79. a. 8. Co. 145. 9. Co. 107. b. Poſt. 233. b.)

hath a joynt companion at the time of the releaſe made, and ſeveral writs of *præcipe* muſt be brought againſt them. (5) And albeit the releaſe of one joyntenant to the reſidue of the joyntenants makes no degree in ſuppoſition of law, neither is there any ſeverall eſtate between them, but the eſtate of him that releaſeth is as it were extinguiſhed and drowned in their eſtate and poſſeſſion, ſo as one *præcipe* lyeth againſt them, (7) yet ſhall they hold the land charged as is aforeſaid. As if tenant for life grant a rent charge, and after ſurrendreth his eſtate to the leſſor, albeit the eſtate charged be drowned, and the leſſor is not in by him, yet hee ſhall hold it charged. (8)

"*Mes auterment eſt de parceners, car ſi ſont deux parceners, &c.*" This is to be intended as well of parceners by cuſtome as of parceners by the common law; and here is implyed the reaſon of the diverſitie, for that the ſurvivor doth claime above the charge, and the heire by deſcent under the charge. (9)

Sect. 287.

ITEM, ſi ſont deux joyntenant sdes terres en fee ſimple deins un burgh, lou les terres et tenements ſont deviſables per teſtament, et ſi l'un de les dits deux joyntenants deviſe ceo que a luy affiert per ſon teſtament, &c. et moruſt, ceo deviſe eſt voide. Et la cauſe eſt, pur ceo que nul deviſe poit prender effect mes apres la mort le deviſor, et per ſa mort tout la terre maintenant devient per la ley a ſon compagnion, que ſurveſquiſt, per le ſurvivor; le quel il ne claime, ne ad riens en la terre per my le deviſor, mes en ſon droit demeſne per le ſurvivor ſolonque le courſe de ley, &c. et pur cel cauſe tiel deviſe eſt voide. Mes auterment eſt de parceners ſeiſies des tenements deviſables en tiel caſe de deviſe, &c. cauſâ quâ ſuprà.

ALSO, if there bee two joyntenants of land in fee ſimple within a borough, where lands and tenements are deviſable by teſtament, and if the one of the ſaid two joyntenants deviſeth that which to him belongeth by his teſtament, &c. and dieth, this deviſe is voide. And the cauſe is, for that no deviſe can take effect till after the death of the deviſor, and by his death all the land preſently commeth by the law to his companion, which ſurviveth, by ths ſurvivor; the which hee doth not claime, nor hath any thing in the land by the deviſor, but in his owne right by the ſurvivor according to the courſe of law, &c. and for this cauſe ſuch deviſe is void. But otherwiſe it is of parceners ſeiſed of tenements deviſable in like caſe of deviſe, &c. *cauſâ quâ ſuprà.*

"*PER ſon teſtament, &c.*" Either in writing, or nuncupative, according to the cuſtome.

"*Et*

(5) As to the partial effect of ſuch a releaſe on the jointenancy, ſee poſt. Sect. 304.

(6) It ſhould be 12. a.

(7) See the caſe of waſte in Brownl. Rep. 238.

(8) Acc. 338. b. 233. b.

(9) In Calthrope's reading on Copyholds 64. the doctrine of admiſſion on the death of copyholders being jointenants or parceners is ſtated according to this diverſity.

[185. b.] "*Et la cauſe eſt, pur ceo que nul deviſe poet prender effect mes apres le mort le deviſor* (10) *et per ſa mort tout la terre maintenant devient per la ley a ſon compagnion, &c.*" Here both their claimes commence at one inſtant: and although an inſtant *eſt unum indiviſibile tempore quod non eſt tempus nec pars temporis, ad quod tamen partes temporis connectuntur*, and that *inſtans eſt finis unius temporis et principium alterius*; (1) yet in conſideration of law there is a prioritie of time in an inſtant, as here the ſurvivor is preferred before the deviſe; for *Littleton* ſaith, that the cauſe is that no deviſe can take effect till after the death of the deviſor, and by his death all the land preſently commeth by the law to his companion. Whereby it appeareth, that *Littleton* by theſe words *poſt mortem et per mortem*, though they jump at one inſtant, yet alloweth priority of time in the inſtant which he diſtinguiſheth by *per* and *poſt*. And the reaſon of this prioritie is, that the ſurvivour claymeth by the firſt feoffor (as hath bin ſaid) and therefore in judgment of law his title is paramount the title of the deviſee, and conſequently the deviſe void, and the rule of law is, that *jus accreſcendi præfertur ultimæ voluntati.* (2)

Pl. Com. in Fulmerſton's caſe.

(Plowd. 258. b. Ant. 30. a.)

Two feme joyntenants of a leaſe for yeares, one of them taketh huſband and dieth, yet the terme ſhall ſurvive; for though all chattels reals are given to the huſband, if he ſurvive, yet the ſurvivor between the joyntenants is the elder title, and after the marriage the feme continued ſole poſſeſſed; for, if the huſband dyeth, the feme ſhall have it, and not the executors of the huſband. (3) But otherwiſe it is of perſonall goods.

(Plowd. 418. Hob. 3. Cro. Eliz. 33.)

If a man be ſeiſed of a houſe, and poſſeſſed of divers heirlomes, that by cuſtome have gone with the houſe from heire to heire, and by his will deviſeth away the heirelomes, this deviſe is void; for, as *Littleton* here ſaith, the will taketh effect after his death, and by his death the heirlomes by ancient cuſtome are veſted in the heire (4), and the law preferreth the cuſtome before the deviſe. And ſo it is if the lord ought to have a herriot when his tenant dieth, and the tenant deviſeth away all his goods, yet the lord ſhall have his herriot for the reaſon aforeſaid. And it hath been anciently ſaid, that the herriot ſhall bee paid before the mortuary. [x] *Imprimis autem debet quilibet, qui teſtaverit, dominum ſuum de meliore re quam habuerit recognoſcere, et poſtea eccleſiam de aliâ meliore, &c.* wherein the lord is preferred, for that the tenure is of him. This dutie to the lord is very antient; for in the lawes before the Conqueſt it is ſaid, *ſive quis incuriâ, ſive morte repentinâ, fuerit inteſtat' mortuus, dominus tamen nullam rerum ſuarum partem (præter eam quæ jure debetur herioti nomine) ſibi aſſumito* (6). In the Saxon tongue it is called *heregeat*, as much to ſay (as I take it) as the lord's [beſte]; for *here* is lord, and *geat* is [beſte]. But let us returne to *Littleton*.

1. H. 5. executors 108.

[x] Fleta lib. 2. cap. 50. (5) Bracton lib. 2. fol. 60. Britton fol. 178. Lamb. fol. 119. 58.

"*Mes*

(10) Acc. ant. 112. a. b. as a reaſon for the goodneſs of a deviſe by huſband to wife.

[185. b.]

(1) [See Note 68.]

(2) Acc. as to *goods*, Office of Exec. ed. 1676. p. 26. Perk. ſect. 526. Swinb. on Teſtam. part 3. ſect. 6.

(3) See ant. 46. b. poſt. 351. a. and the caſe of a purchaſe by huſband and wife jointly, the former being a villein, in 2. Ro. Abr. 733. D. pl. 2.

(4) Acc. ant. 18. b.

(5) It ſhould be cap. 57.

(6) See this ſame paſſage cited ant. 176. b.

" *Mes auterment eſt de parceners ſeiſies des tenements deviſable en tiel caſe del deviſe, &c.* cauſâ quâ ſuprà."

The reaſon is evident, for that there is no ſurvivour between coparceners, but the part of the one is deſcendible, and conſequently may be deviſed.

Sect. 288. [186. a.]

ITEM, il eſt comunement dit, que cheſcun joyntenant eſt ſeiſie de la terre qu'il tient joyntment (1) *per my et per tout; et ceo eſt autant a dire, qu'il eſt ſeiſie per cheſcun parcel et per tout, &c. et ceo eſt voier, car en cheſcun parcel, et per cheſcun parcel, et per touts les terres et tenements, il eſt joyntment ſeiſie oveſque ſon compagnion.* (2)

ALSO, it is commonly ſaid, that every jointenant is ſeized of the land which hee holdeth joyntly *per my et per tout*; and this is as much to ſay, as he is ſeiſed by every parcell and by the whole, &c. and this is true, for in every parcell, and by every parcell, and by al the lands and tenements, he is joyntly ſeiſed with his companion.

Vide Sect. 697. " *ITEM, eſt communement dit, &c.*" That is, it is the common opinion, and *communis opinio* is of good authoritie in law. *A communi obſervantiâ non eſt recedendum,* (3) which appeareth here by *Littleton.*

(Poſt 350. a. 2. Co. 66. b. 2. Ro. Abr. 86.) Vide Bracton lib. 5. fo 430. Britton cap. 35. Fleta lib. 3. cap. 4. 40. E. 3 40. 18. E. 2. bre. 831. 35. H. 6. 39.

" *Per my et per tout.*" *Et ſic totum tenet et nihil tenet, ſcil. totum conjunctim, et nihil per ſe ſeparatim.* And albeit they are ſo ſeiſed (as for example, where there bee two joyntenants in fee) yet to divers purpoſes each of them hath but a right to a moitie; as to enfeoffe give or demiſe, or to forfeit (4) or loſe by default in a *præcipe.* (5) If my villein [*y*] and another purchaſe lands to them two and their heires, I may enter into a moity.

Vide the ſecond part of the inſtitutes upon the 6. chapter of the ſtatute de bigamis. Fleta lib. 1. cap. 28. 40. Aſſ. 79. 48. E. 3. 16. [*y*] Vid. 6. E. 3. 4. 7. E. 4. 29. 11. El. Dyer 183. (2. Co. 58. a. Cro. Jam. 91. 1. Leon. 47.)

And where all the joyntenants joyne in a feoffment, every of them in judgment of law doth give but his part. (6) If an alien and a ſubject purchaſe lands joyntly, the king upon office found ſhall have but a moity. (7) And *Littleton* afterwards in this Chapter (8) ſaith, that one joyntenant hath one moity in law, and the other the other moity. And therefore if two joyntenants be [*z*] and both they make a feoffment in fee upon condition, and that for breach thereof one of them ſhall enter into the whole, yet he ſhall enter but into a moitie, becauſe no more in judgment of law paſſed from him: (9) and ſo it is of a gift in taile or a leaſe for life, &c.

[*z*] Pl. Com. in Browning's caſe. fol. (133. a.) (Poſt. 192. a.)

Yet

(1) *&c.* in L. & M. & Roh.
(2) *&c.* in L. & M. & Roh.
(3) [See Note 69.]
(4) Acc. as to copyholders being jointenants Calthrope's Reading 97. Kitch. French ed. 82. a.
(5) See ant. 125. b.
(6) Acc. 11. H. 7. a. pl. 5.
(7) See ant. 180. and note 2. there.
(8) Poſt. Sect. 291.
(9) See ant. 47. a. & poſt 214. a. the caſe of a leaſe by two jointenants with reſervation of rent to one, and the difference there taken between ſuch a leaſe, by *parol* and one by *deed indented.* See alſo Dy. 263. a.

Yet every joyntenant may warrant the whole; [a] becauſe a man may warrant more then paſſeth from him. (10)

If two joyntenants make a feoffment in fee [b] and one of the feoffors dye, the feoffee cannot plead a feoffment from the ſurvivor of the whole, becauſe each of them gave but his part; but otherwiſe it is on the part of the feoffees, as hath beene ſaid before.

And where two joyntenants be, the one of them [c] may make the other his baylife of his moity, and have an action of account (11) againſt him. And one joyntenant [d] may let his part for yeares or at will to his companion.

If two joyntenants be of certaine lands, and the one of them by deed indented [e] bargaineth and ſelleth the lands, and the other joyntenant dyeth, and then the deed is inrolled, there ſhall paſſe nothing but the moity which the bargainor had at the time of the bargain. (12)

(Cro. Cha. 217. 569.

[a] Vide the ſecond part of the Inſtitutes upon the 6. chapter of the ſtatute of bigamis.

[b] 14. E. 4. 5. and the other bookes above-ſaid.

[c] 21. E. 3. 60. (Poſt. 200. b.)

[d] 11. H. 3. 60. 33. (Poſt. 193. b. 335. a.)

[e] 6. E. 6. tit. Faits inroll. 9. Br. 1. Co. 173.)

Sect. 289.

ITEM, ſi deux joynt-tenants ſont ſeiſies de certain terres en fee ſimple, et l'un leſſa ceo que a luy affiert a un eſtranger pur terme de 40 ans, et
[186. b.] *devie devant le term commence, ou deins le terme, en ceſt caſe apres ſon deceaſe le leſſee poet enter et occupier la moitie a luy leſſe durant le terme, &c. coment que le leſſee n'avoit unques poſſeſſion de ceo en la vie le leſſor, per force de meſme le leaſe, &c. Et le diverſitie perenter le caſe de grant de rent charge* (1) [*avantdit, et ceſt caſe, eſt ceo. Car en grant de rent charge per*] *joyntenaunt, &c. les tenements demurgent touts foits come ils fueront adevant, ſans ceo, que aſcun ad aſcun droit d'aver aſcun parcell de les tenements forſque eux meſmes, et les tenements ſont en tiel plyte come ils fueront devant le charge, &c. Mes ou leaſe eſt fait per un joyntenant a un auter pur terme des ans, &c. maintenaunt per force de le leaſe le leſſee ad droit en meſme la terre, c'eſt aſçavoir, de tout ceo que a ſon leſſour affiert, et d'aver ceo per force de meſme*

ALSO, if two joyntenants bee ſeiſed of certain lands in fee ſimple, and the one letteth that to him belongeth to a ſtranger for terme of forty yeares, and dyeth before the term beginneth, or within the terme, in this caſe after his deceaſe the leſſee may enter and occupie the moitie let unto him during the terme, &c. although the leſſee had never the poſſeſſion thereof in the life of the leſſor, by force of the ſame leaſe, &c. And the diverſitie betweene the caſe of a grant of a rent charge aforeſaid, and this caſe, is this. For in the grant of a rent charge by a joyntenant, &c. the tenements remaine alwayes as they were before, without this, that any hath any right to have any parcell of the tenements but they themſelves, and the tenements are in the ſame plight as they were before the charge, &c. But where a leaſe is made by a joyntenant to another for terme of yeares, &c. preſently by force of the leaſe the leſſee hath right in the ſame land,

(10) See poſt. Sect. 700.
(11) See ant. 172. a.
(12) See ant. 147. b.

[186. b.]
(1) The following words between brackets not in L. & M. nor Roh.

meſme le leaſe durant ſon terme. Et ceo eſt la diverſitie. (3)

(2) *Vie* inſtead of *terme* in L. & M. & Roh.

(3) *&c.* in L. & M. & Roh

land, (*videlicet*) of all that which to the leſſor belongeth, and to have this by force of the ſame leaſe during his terme. And this is the diverſitie.

"*PER force de meſme le dit leaſe, &c.*" By this *&c.* is implyed, [*f*] that where our author ſpeaketh of joyntenants ſeiſed in fee, that ſo it is if two be ſeiſed for life, and one make a leaſe to begin preſently or *in futuro*, and dieth, this leaſe ſhall binde the ſurvivor, as it hath been adjudged. (4) [*g*] And if one joyntenant grant *veſturam terræ*, or *herbagium terræ*, for yeares, and dieth, this ſhall binde the ſurvivor; for ſuch a leſſee hath right in the land. So it is if two joyntenants be of a water, and the one graunteth the ſeverall piſchary.

[*f*] Vid. Sect. 286. & 660. & Sect. 2. (Dy. 187. a. 2. Ro. Abr. 89.)
[*g*] 11. H. 4. 90. 14. H. 8. 6. 17. E. 4. 6. a. 9. H. 6. 52. 21. H. 7. 29. 14. H. 7. 4.

18. E. 3. execution 56. 11. El. Dy. 285. Plow. Com. 160. a. Temps E. 1. Aſſ. 422. 20. H. 6. 4. 7. H. 7. 13. 10. H. 7. 24. (Ant. 4. b.)

"*L'un leſſa*," The one letteth. If two joyntenants bee of an advowſon, and [*h*] the one preſenteth to the church, and his clerke is admitted and inſtituted, this in reſpect of the privity ſhall not put the other out of poſſeſſion; (5) but if that joyntenant that preſenteth dieth, it ſhal ſerve for a title in a *quare impedit* brought by the ſurvivor. (6) But yet if one joyntenant or tenant in common preſent, or if they preſent ſeverally, the ordinary may either admit or refuſe to admit ſuch a preſentee, unleſſe they joyn in preſentation, and after the ſixe moneths he may in that caſe preſent by lapſe (7).

[*h*] 6. E. 3. 38, 39. 52. 7. E. 3. 20, 21. 17. E. 3. 37. b. 22. E. 3. 9. 30. E. 3. 16. 11. H. 4. 54. 15. E. 3. Dar. preſentment 11. 10. E. 4. 94. 1. H. 7. 1. b.

2. R. 3. Quar. Imp. 102. 9. El. Dy. 259. 36. H. 8. Br. preſent. 27. H. 8. fo. 11. 5. H. 7. 8. 6. E. 4. 10. b. Doct. & Stud. 116. 34. H. 6. 40. 20. E. 3 Quar. Imp. 63. F. N. B. 34. V. (2. Ro. Abr. 355.)

But if two or more coparceners bee, [*i*] and they cannot agree to preſent, the eldeſt ſhall preſent; and if her ſiſter doth diſturbe her, ſhe ſhall have a *quare impedit* againſt her; and ſo ſhall the iſſue and the aſſignee of the eldeſt, and yet he is tenant in common with the youngeſt. (8) And in the ſame manner the tenant by the curteſie of the eldeſt ſhall preſent. But if there bee foure coparceners, and the eldeſt and the ſecond preſent, and the other two preſent joyntly or ſeverally, the ordinary may refuſe them all; for the eldeſt did not preſent alone, but ſhe and one other of her ſiſters. But now let us returne to *Littleton*. (9)

[*i*] Bract. li. 4. fo. 238. 245. 247. Brit. fo. 223. 45. Ed. 3. Fines 41. 18. E. 2. Quar. Imp. 176. 38. H. 6. 9. 19. E. 3 ib. 50. 5. H. 5. 10. F. N. B. 34. V. (Plowd. 332. b. 333. a. 10. Co. 135. b. 2. Ro. Abr. 346.

F. N. B. 33. E. Ant. 166. b. Poſt. 243. a. & Sect. 299.)

(4) See acc. Cro. Jam. 91. & 2. Brownl. 175.

(5) See poſt. 243. a. 249. a.

(6) [See Note 70.]

(7) See 5. H. 7. 8. a. Burn. Ecc. L. tit. *advowſon* Watſ. Compl. Incumb. c. 8.

(8) See my note on this ſubject ant. 166. b. Hob. 119. Dy. 55. a.

(9) See further on preſentation where more than one have an intereſt in an advowſon, 2. Gibſ. Cod. 1ſt ed. 804. ant. 17. b. 18. a. 17. Vin. Abr. 325. Mallory's *Quare Impedit* 71 to 75.

Sect.

[187. a.]

Sect. 290.

ITEM, joyntenants (s'ils voilent) poient faire partition enter eux, et la partition eſt aſſets bon; mes de ceo faire ils ne ſerront compels per la ley; mes s'ils voylent faire partition de lour proper volunt et agreement, le partition eſtoiera en ſa force.

ALSO, joyntenants (if they will) may make partition betweene them, and the partition is good enough; but they ſhall not bee compelled to doe this by the law; but if they will make partition of their own will and agreement, the partition ſhal ſtand in force.

"*POYENT faire partition.*" But this partition muſt bee [*k*] by deed, as hath beene ſaid before. But joyntenants for yeares may [*l*] make partition without deed.

(Poſt. 198. b.) [*k*] Vid. Sect. 259. 318. (Ant. 169. a. F. N. B. 62. f.) [*l*] 18. El. Dyer 350.

"*Ils ne ſerra compell.*" This is true regularly; but, by the cuſtome of ſome cities and boroughs, one joyntenant or tenant in common may compell his companion, by writ of partition grounded upon the cuſtome, to make partition. (1) But ſince *Littleton* wrote jointenants and tenants in common generally are compellable to make partition by writ framed upon the ſtatutes [*m*] of 31. & 32. H. 8. as before hath been ſaid. (2) And albeit they be now compellable to make partition, yet ſeeing they are compellable by writ, they muſt purſue the ſtatutes, and cannot make partition by *parol*, for that remaines at the common law. And by *Littleton*'s authoritie herein it ſeemeth to me, that if one joyntenant or tenant in common diſſeiſe another, and the diſſeiſee bring his aſſiſe for the moytie, that in this caſe, though the plaintife prayeth it, yet no judgement ſhall bee given to hold in ſeveraltie, for then at the common law there might have beene by compulſion of law a partition between joyntenants and tenants in common, and by rule of law the plaintife muſt have judgement according to his pleint or demand.

F. N. B. 62. b.

[*m*] 31. H. 8. ca. 1. 32. H. 8. ca. 32. Vid. Sect. 264. 247. 259. Mich. 16. & 17. El. 1. 340. inter Harris & Eden adjudge. acc. 18. El. Dyer 350. b. Vide before in the Chapter of Partition, many bookes cited concerning this matter. (Ant. 175. a. Sect. 250. Mo. 29. Dy. 350. Ant. 167. b.)

If two joyntenants be [*n*] of land with warranty, and they make partition by writing, the warrantie is deſtroyed; but if they make partition by writ of partition upon the ſtatute, the warrantie remaines, becauſe they are compellable thereunto. (3)

3. E. 3. 48. 12. Aſſ. 15. 17. F. N. B. 9. b. 7. Aſſ. 10. 7. E. 3. 29. 10. Aſſ. 17. 10. E. 3. 40. 43. 12. E. 3. judgement 102. 20. E. 3. Aſſ. 62. 28. Aſſ. 35. 23. Aſſ. 10. 7. H. 6. 4. 19. H. 6. 45. 3. E. 4. 10. Vid. Sect. 247. Brit. fo. 112. lib. 6. fo. 12. & 13. Morrice's caſe. [*n*] 29. E. 3. tit. Garr.

(1) For inſtances of ſuch cuſtom, ſee for London F. N. B. 62. b. and for gavelkind land ant. Sect. 265. and Robinſ. on Gavelk. 108.

(2) [See Note 71.]

(3) Acc. ant. 165. a. and b. as to parceners, becauſe they are compellable to make partition at common law. See the caſe of aid between parceners after partition, ant. 174. a. and b.

Sect. 291.

ITEM, ſi un joynt eſtate ſoit fait de terre a le baron et a ſa feme et a un tierce perſon, en ceo cas le baron et ſa feme n'ont en ley en lour droit forſque le moitie, &c. (4) [*et le tierce perſon avera tant come le baron et ſa feme ont, ſcil. l'auter moitie, &c.*] *Et la cauſe eſt, pur ceo que le baron et ſa feme ne ſont forſque un perſon en ley, et ſont en ſemblable caſe ſicome eſtate ſoit fait a deux joyntenants, ou l'un ad per force de joynture l'un moitie en ley, et l'autre, l'auter moitie, &c.* (1) *En meſme le maner eſt lou eſtate eſt fait a le baron et a ſa feme et as auters deux homes, en tiel cas le baron et ſa feme n'ont forſque la tierce part, et les auters deux homes les auters deux parts, &c.* cauſa quâ ſuprà.

ALSO, if a joynt eſtate be made of land to a huſband and wife and to a third perſon, in this caſe the huſband and wife have in law in their right but the moity, and the third perſon ſhall have as much as the huſband and wife, viz. the other moity, &c. And the cauſe is, for that the huſband and wife are but one perſon in law, and are in like caſe as if an eſtate be made to two jointenants, where the one hath by force of the joynture the one moity in law, and the other, the other moity, &c. In the ſame manner it is where an eſtate is made to the huſband and wife and to two other men, in this caſe the huſband and wife have but the third part, and the other two men the other two parts, &c. *cauſa quâ ſuprà.*

PLUIS ſerra dit del matter touchant joyntenancie, en le Chapter de Tenants en Common, et Tenant per Elegit, et Tenant per Statute Marchant.

MORE ſhall be ſaid of the matter touching jointenancy, in the Chapter of Tenants in Common, and Tenant by Elegit, and Tenant by Statute Merchant.

(Poſt. 299. b. 351. a. 2. Co. 68.)

[o] Mich. 33. E. 3. coram rege Salop. in Theſaur.

(Poſt. 326. a. 1. Ro. Abr. 388, 389. 9. Co. 140.)

"*LE baron et ſa feme n'ont en ley en lour droit forſque le moitie, &c.*" *William Ocle* and *Joane* his wife [o] purchaſed lands to them two and their heires; after *William Ocle* was attainted of high treaſon for the murther of the king's father E. 2. and was executed; *Joan* his wife ſurvived him; E. 3. granted the lands to *Stephen de Bitterly* and his heires: *John Hawkins* the heire of the ſaid *Joan* in a petition to the king diſcloſeth this whole matter, and upon a *ſcire facias* againſt the patentee hath judgement to recover the lands, for the reaſon here yeelded by our author. [187. b.]

Vide Sect. 665.

But if an eſtate be made to a man and a woman and their heires before marriage, and after they marry, the huſband and wife have moities between them, which is implyed in theſe words of our author, *baron et ſa feme.* (2)

"*Forſque*

(4) The words following between brackets not in L. and M. nor Roh.

[187. b.]

(1) No *&c.* in L. and M. nor Roh.

(2) See acc. as to this difference between joint eſtate to huſband and wife *before* marriage and one *after*, Caltbrope's Read. on Copyh. 92. F. N. B. 194. B. See further caſe of Butler and Baker 3. Co. the caſe of Margery More ant. 133. a. the caſe of 4. Aſſ. 4. cited in 1. Ro. Abr. 271. and the caſe of Ward and Walthew Yelv. 101.

"*Forſque un perſen en ley.*" *Bract.* ſaith [p] *vir et uxor ſunt quaſi unica perſona, quia caro una et ſanguis unus.* (3) It hath bin ſaid, that if a reverſion bee granted to a man and a woman and their heires, and before attornment they entermarrie, and then attornment is made, that the huſband and wife ſhall have no moities in this caſe, (4) no more than if a charter of feoffment be made to a man and a woman, with a letter of atturnie to make livery, they entermarry, and then liverie is made *ſecundum formam chartæ*, in which caſe it is ſaid that they have no moities. But certain it is, that if a feoffment were made before the ſtat. of 27. H. 8. of uſes to the uſe of a man [q] and a woman, and their heirs, and they entermarry, and then the ſtatute is made, if the huſband alien it is good for a moity; for the ſtatute executes the poſſeſſion according to ſuch qualitie, manner, forme, and condition, as they had in the uſe, ſo as though it veſt during the coverture, yet the act of parliament executes ſeverall moities in them, ſeeing they had ſeveral moities in the uſe. (5)

[p] Bract. li. 5. fo. 416. 20. H. 3. Diſcent 52. lib. 4. fo. 68. Toker's caſe. Pl. Com. 483. Nichols caſe.

[q] 4. Mar. Dyer 149. 3. Mar. Dyer 122. 29. H. 8. Dyer 32.

If an eſtate be made to a villeine and his wife [r] being free, and to their heires, albeit they have ſeverall capacities, viz. the villeine to purchaſe for the benefit of the lord, and the wife for her owne, yet if the lord of the villeine enter, and the wife ſurviveth her huſband, ſhe ſhal injoy the whole land, becauſe there be no moities betweene them.

[r] 40. Aſſ. p. 7.

A man makes a leaſe to *A.* and to a baron and feme, viz. to *A.* for life, to the huſband in taile, and to the feme for yeares, in this caſe it is ſaid, that each of them hath a third part in reſpect of the ſeveraltie of their eſtates.

If a feoffment be made to a man and a woman and their heires with warrantie, [s] and they entermarrie, and after are impleaded and vouch and recover in value, moities ſhall not be betweene them; for though they were ſole when the warrantie was made, notwithſtanding at the time when they recovered and had execution they were huſband and wife, in which time they cannot take by moities.

[s] Pl. Com. 483. Nichols caſe.

Albeit baron and feme (as *Littleton* here ſaith) be one perſon in law, ſo as neither of them can give any eſtate or intereſt to the other, (6) yet if a charter of feoffment bee made to the wife, the huſband as atturney to the feoffor may make liverie to the wife; (7) and ſo a feme covert, that hath power to ſell land by will, may ſell the ſame to her huſband, becauſe they are but inſtruments for others, and the ſtate paſſeth from the feoffor or deviſor.

10. H. 7. 20.

If a huſband, wife, and a third perſon purchaſe lands to them and their heires [t] and the huſband before the ſtatute of 32. H. 8. cap. 1. had aliened the whole land to a ſtranger in fee, and died, the wife and the other joyntenant were joyntenants of the right, and

[t] 11. E. 3. cui in vita 9. 16. E. 3. ibid. 36 E. 3. ib. 20. F. N. B. 193. k.

35. Aſſ. pl. 15. 31. H. 6. tit. Ent. congeable 54. 19. H. 6. 45.

if

(3) See ant. 112. a. where the ſame paſſage from Bracton is cited.

(4) See acc. poſt. 310. a. and there the doctrine is more poſitively expreſſed. See further the caſe of a leaſe for life to baron and feme and afterwards Confirmation, poſt. 299. b.

(5) See Dy. 200. a.

(6) Acc. ant. 112. a. and obſerve note 6. there.

(7) Acc. ant. 52. a.

if the wife had died, the other joyntenant ſhould have had the whole right by ſurvivor (1), for that they might have joyned in a writ of right (2), and the diſcontinuance ſhould not have barred the entrie of the ſurvivor, for that he claymed not under the diſcontinuance, but by the title paramount above the ſame by the firſt feoffement (3), which is worthie of obſervation. But if the huſband had made a feoffment in fee but of the moity, and he and his wife had dyed, their moity ſhould not have ſurvived to the other. [188. a.]

And for the better underſtanding of this diverſity divers things are worthy of obſervation.

Vide Sect. 302. (Poſt. 327. b.)

Firſt, that a right of action and a right of entrie may ſtand in joynture; for at the common law the alienation of the huſband was a diſcontinuance to the wife of the one moity, and a diſſeiſin of the other, ſo as after the death of the huſband, the wife hath a right of action to the one moity, and the other joyntenant a right of entrie into the other, but they are jointenants of the right, becauſe they may joyne in a writ of right.

* Vide the ſtatute of 32. H. 8. 2. It is no diſcontinuance at this day.

Secondly, that a right of action or a bare right of entrie cannot ſtand in joynture with a freehold or inheritance in poſſeſſion, and therefore if the huſband make a feoffment of the moitie, this was a diſcontinuance of that moity, * and the other jointenant remained in poſſeſſion of the freehold and inheritance of the other moity, which for the time was a ſeverance of the joinsture (4); and ſo are all the bookes, which ſeemed to varie amongſt themſelves, cleerely reconciled.

[u] Pl. Com. 419. Bratchbridges caſe.

If two joyntenants be of a rent, and the one of them diſſeiſe the tenant of the land, [u] this is a ſeverance of the joynture for a time; for the moitie of the rent is ſuſpended by unitie of poſſeſſion (5), and therefore cannot ſtand in joynture with the other moitie in poſſeſſion. And this is to be obſerved, that there ſhall never bee any ſurvivor, unleſſe the thing be in joynture at the inſtant of the death of him that firſt dyeth: (6) for the rule is, *nihil de re accreſcit ei, qui nihil in re quando jus accreſceret habet.*

46. E. 3. 21. 19. H. 6. 45. 37. H. 8. 8. 3. E. 4. 10.

Alſo if a man demiſeth lands to two, to have and to hold to the one for life, and the other for yeares, they are no joyntenants; for a ſtate of freehold cannot ſtand in joynture with a terme for yeares: and a reverſion upon a freehold cannot ſtand in joynture with a freehold and inheritance in poſſeſſion, as ſhall be ſaid in the next Chapter (7). Neither can a ſeiſin in the right of a politique capacity ſtand in joynture with ſeiſin in a natural capacity, as ſhall be ſaid hereafter (8).

If two femes be joyntly ſeiſed, and they take barons, and the barons joyne in an alienation and dye, the wives are joyntenants of the right, and may joyne in a writ of right; and yet they may have ſeverall writs of *cui in vitâ* at their election; but when they have recovered in thoſe ſeverall writs, they ſhall be joyntenants againe. But if the barons had aliened ſeverally, this had bin a ſeverance of the joynture for a time, for the reaſon aboveſaid.

If two joyntenants, the one for life, and the other in fee, loſe by default, the one ſhall have a writ of right, and the other a *quòd ei deforceat*; and yet when they have ſeverally recovered, they ſhall be joyntenants

(1) Acc. 2. Ro. Abr. 88. D. pl. 3.
(2) See poſt. 337. a.
(3) See poſt. 364. b. and ant. 185. a.
(4) Acc. poſt. 337. b.
(5) See ant. 148. b.
(6) Acc. poſt. 193. a.
(7) Poſt. Sect. 302. near the end.
(8) Poſt. Sect. 297.

joyntenants againe (9). So it is if two joyntenants bee diſſeiſed, and an aſſiſe is brought, and the one is ſummoned and ſevered, and the other recover the moitie, and after another aſſiſe is brought, and he that recovereth is ſummoned and ſevered, and the other recover, albeit they ſeverally recover, yet they are joyntenants againe (10).

And in all caſes where the joyntenants purſue one joynt remedy, and the one is ſummoned and ſevered and the other recover, he that is ſummoned and ſevered ſhall enter with him; but where their remedies be ſeverall, there the one ſhall not enter with the other, till both have recovered: and the ſame law is of coparceners. If lands [w] be demiſed for life, the remainder to the right heires of *I. S.* and of *I. N.* *I. S.* hath iſſue and dieth, and after *I. N.* hath iſſue and dieth, the iſſues are not joyntenants, becauſe the one moity veſted at one time, and the other moity veſted at another time (11). And yet in ſome caſes there may be joyntenants, and yet the eſtate may veſt in them at ſeverall times.

Vid. Lit. cap. Remitter, the laſt caſe. (Poſt. 364. b.) 10. H. 6. 10. 31. H. 6. tit. Entre congeable. 46. E. 3. 21. b. 3. E. 4. 10. 37. H. 6. 8. [w] 24. E. 3. 29. 18. E. 3. 28. 38. E. 3. (Cro. Jam. 259.)

If a man [x] make a feoffement in fee to the uſe of himſelfe and of ſuch wife as he ſhould afterwards marrie, for terme of their lives, and after he taketh wife, they are joyntenants, and yet they come to their eſtates at ſeverall times (13).

[x] 17. El. Dyer Brent's caſe (12)

And ſo it is if I diſſeiſe one to the uſe of two, and the one agrees at one time, and the other at another, yet they are joyntenants.

In this Section are three &c. The firſt and ſecond are at large explained before; the laſt is intended where more parties take then three.

(9) See poſt. 214. a. and Bro. Abr. *jointenants* 6.

(10) A like caſe of parceners is ſtated before, and reſolved in the ſame way. Ant. 164. a. See further 19. H. 6. 45. b.

(11) For other caſes, where *joint* words are conſtrued to operate *ſeverally* for the like reaſon, ſee the arguments in mr. juſtice Windham's caſe, 5. Co. 7. a.

(12) It is in Dy. 339. b. pl. 48. but without any name. It is alſo much at large in 2. Leon. 14.

(13) [See Note 72.]

(Noy 13.) CHAP. 4. Of Tenants in Common. Sect. 292. [188. b.]

TENANTS en Common ſont ceux, que ont terres ou tenements en fee ſimple, fee taile, ou per terme de vie, &c. les queux ont tielx terres ou tenements per ſeverall titles, et nemy per joint title, et nul de eux ſçavoit de ceo ſon ſeverall, mes ils doient per la ley occupier tiels terres ou tenements en common, et pro indiviſo *a prender les profits en common. Et pur ceo que ils aviendront a tielx terres ou tenements per ſeverall titles, et nemy per un joynt title, et lour occupation et poſſeſſion ſerra per la ley perenter eux en common, ils ſont appels tenaunts en common. Sicome un home enfeoffa deux joyntenants en fee, et l'un de eux alien ceo que a luy affiert a un auter en fee, ore le alienee et l'auter joyntenant ſont tenants en common; pur ceo que ils ſont eins en tiels tenements per ſeverall titles, car l'alienee vient eins en la moitie per la feoffement d'un des joyntenants, et l'auter joyntenant ad l'auter moitie per force de la primer feoffment fait a luy et a ſon compagnion, &c.* (1). *Et iſſint ils ſont eins per ſeverall titles, c'eſt-aſçavoir, per ſeverall feoffements, &c.* (2)

TENANTS in Common are they, which have lands or tenements in fee ſimple, fee taile, or for terme of life, &c. and they have ſuch lands or tenements by ſeverall titles, and not by a joynt title, and none of them know of this his ſeverall, but they ought by the law to occupie theſe lands or tenements in common, and *pro indiviſo* to take the profits in common. And becauſe they come to ſuch lands or tenements by ſeverall titles, and not by one joynt title, and their occupation and poſſeſſion ſhall be by law betweene them in common, they are called tenants in common. As if a man infeoffe two joyntenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common; becauſe they are in ſuch tenements by ſeverall titles, for the alienee commeth to the moytie by the feoffement of one of the joyntenants, and the other joyntenant hath the other moitie by force of the firſt feoffement made to him and to his companion, &c. And ſo they are in by ſeverall titles, that is to ſay, by ſeverall feoffements, &c.

Flet. li. 3. ca. 4. LITTLETON having ſpoken of parceners, which are onely by deſcent, and of joyntenants, which are onely by purchaſe and by joint title, ſpeaketh now of tenants in common, which may be by three meanes, viz. by purchaſe, by deſcent, or by preſcription, as hereafter in this Chapter ſhall appeare (3).

"*Ou pur terme de vie, &c.*" Here *&c.* implyeth *pur terme d'auter vie,* or for tearm of yeares, or for any other fixed eſtate in the land. [189. a.]

And here it appeareth, that the eſſential difference betweene joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right, (1) and tenants in common

(1) No *&c.* in L. & M. nor Roh.
(2) No *&c.* in L. & M. nor Roh.
(3) See Sect. 310. which gives an inſtance of tenancy in common by preſcription.

[189. a.]
(1) See poſt. 299. b. the firſt line.

mon by ſeverall titles, or by one title and by ſeverall rights; which is the reaſon, that joyntenants have one joint freehold, and tenants in common have ſeverall freeholds. Onely this propertie is common to them both, viz. that their occupation is individed, and neither of them knoweth his part in ſeverall. Vide Sect. 296.

The example that *Littleton* putteth in this Section is perſpicuous, and needeth no explication.

Sect. 293.

(Ant. 1. b. 11. Co. 38.)

ET eſt aſçavoir, que quant il eſt dit en aſcun livre que home eſt ſeiſie en fee, ſauns pluis dire, il ſerra entendue en fee ſimple; car il ne ſerra entendue per tiel paroll (en fee) que home eſt ſeiſie en fee taile, ſinon que ſoit mis a ceo tiel addition, fee tayle, &c.

AND it is to bee underſtood, that when it is ſaid in any booke that a man is ſeiſed in fee, without more ſaying, it ſhall bee intended in fee ſimple; for it ſhall not bee intended by this word (in fee) that a man is ſeiſed in fee tayle, unleſſe there bee added to it this addition, fee tayle, &c.

THIS is evident, and *ſecundum excellentiam* it ſhall be taken for the higheſt and beſt fee, and that is fee ſimple. Vide devant Sect. 99. (Ant. 73. a.)

"*Addition, fee tayle, &c.*" Here is implyed a maxime in law, viz. that *additio probat minoritatem*, as it is vulgarly ſaid, the younger ſonne giveth the difference. (2)

Sect. 294.

ITEM, ſi trois joyntenants ſont, et un de eux alien ceo que a luy affiert a un auter home en fee, en ceſt cas l'alienee eſt tenant en common oveſque les auters deux joyntenants; mes uncore les auters deux joyntenants ſont ſeiſies des deux parts joyntment que remayne (3), *et de ceux deux parts le ſurvivor enter eux deux tient lieu, &c.* (4)

ALSO, if three joyntenants bee, and one of them alien that which to him belongeth to another man in fee, in this caſe the alienee is tenant in common with the other two joyntenants; but yet the other two joyntenants are ſeiſed of the two parts which remain joyntly (5), and of theſe two parts the ſurvivor between them two holdeth place, &c.

THIS needeth no explication, onely the *&c.* in the end of this Section implyeth, that the ſame law is where there be more joyntenants than three.

(2) The difference of arms is meant. See more particularly as to this ant. 140. b.

(3) *Que remayne* not in L. & M. nor Roh.

(4) No *&c.* in L. and M. nor Roh.

(5) See Sect. 304. & 312.

Sect.

which cannot ſtand in joynture with the ſeiſin of the ſubject in his naturall capacitie. So likewiſe if there be two joyntenants, and the crowne deſcend to one of them, the joynture is ſevered, and they are become tenants in common. But if lands be given to *A. de B.* biſhop of *N.* and to a ſecular man, to have and to hold to them two and to their heires, in this caſe they are joyntenants; for each of them take the lands in their naturall capacitie.

(Poſt. 310. b. 2. Ro. Abr. 91.) [d] 13. H 8. 14. 16. H. 7. 15. 9. H. 6. 25. 45. E. 3. 25.

If lands be given to *John* biſhop of *Norwich* and his ſucceſſors and to *John Overall* doctor of divinity and his heires, being one and the ſame perſon, he is tenant in common [d] with himſelfe. But our author's rules doe not hold in chattels reals or perſonals; for if a leaſe for yeares be made or a ward granted to an abbot and a ſecular man, or to a biſhop and a ſecular man, or if goods be granted to them, they are joyntenants, becauſe they take not in their politique capacity. (2)

Sect. 298. (1) [190. b.]

ITEM, ſi terres ſoient dones a deux a aver et tener, ſcil. l'un moitie a l'un et a ſes heires, et l'auter moity a l'auter et a ſes heires, ils ſont tenants en common.

ALSO if lands bee given to two to have and to hold, *ſcil.* the one moity to the one and to his heires, and the other moity to the other and to his heires, they are tenants in common.

(Cro. Cha. 75. Ant. 183. a. b.)

AND the reaſon is, becauſe they have ſeverall freeholds and an occupation *pro indiviſo*.

(2. Ro. Abr. 89, 90. Ant. 183. b.)

Here is to bee obſerved, that the *habendum* doth ſever the premiſes that *primâ facie* ſeemed to be joynt; for an expreſſe eſtate controlls an implyed eſtate as hath beene ſaid.

Sect. 299.

ITEM, ſi home ſeiſie de certaine terres enfeoffa un auter de le moitie de meſme la terre ſans aſcun parlance de aſſignment ou limitation de meſme la moitie en ſeveraltie al temps del feoffment, donques le feoffee et le feoffor tiendront lour parts de la terre en common.

ALSO, if a man ſeiſed of certaine lands infeoffe another of the moitie of the ſame land without any ſpeech of aſſignement or limitation of the ſame moity in ſeveraltie at the time of the feoffment, then the feoffee and the feoffor ſhall hold their parts of the land in common (2).

11. Aſſ. pl. 16. 45. E. 3. 12. 44. Aſſ. 11.

AND the like law is, if the feoffment bee made of a third part or a fourth part, &c. And if there be an advowſon appendant, they are alſo tenants in common of the advowſon. (3) And albeit

(2) [See Note 75.]

[190. b.]

(1) In L. and M. and Roh. this Section is placed immediately after Sect. 300.

(2) Brooke in his Abridgment title *feoffements de terres* pl. 75. cites this Section of Littleton, and in ſupport of it refers to various cases in Fitzherbert's Abridgment. See further Bro. Nouv. Caſ. 154. 124. 6. Co. 1. and Dy. 187. a. pl. 5.

(3) See poſt. 307. a.

albeit it is ſaid, that ſuch a feoffment of a moitie or third part, &c. is not good without writing, for that (as they ſay) a man cannot create an uncertain eſtate in land by parol; yet is the law cleere, that ſuch a feoffment is good by parol without writing, and ſuch an uncertaine eſtate ſhall paſſe by livery, and ſo it appeareth in our bookes. 21. E. 4. 22. b.

If a verdict finde, that a man hath *duas partes manerii, &c. in tres partes diviſas*, this ſhall not be intended to be in common; but if the verdict bee *in tres partes dividendas*, then it ſeemeth that they are tenants in common by the intendment of the verdict. (4) 21. E. 4. 22. b. 5. E. 3. 23. 67. Temps E. 1. Feoffments 115. 34. E. 1. quar. imped. 179.

But if a man be ſeiſed of a mannor whereunto an advowſon is appendant, and maketh a feoffment of three acres parcell of the mannor together with the advowſon to two, to have and to hold the one moity together with the moitie of the advowſon to the one and his heires, and the other moity together with the other moity of the advowſon to the other and his heires, this cannot bee good without deed; for the feoffor cannot annex the advowſon to theſe three acres, and diſannex it from the reſt of the mannor, without deed. (5) 10. Eliz. Dyer 28. 22. E. 3. 6. Feoffments 116. 6. E. 3. 50. 39. E. 3. 38. 9. E. 3. 16. 17. E. 3. 3. 18. E. 3. 43. 43. E. 3. 26. 23. Aſſ. 8.

33. H. 6. 5. a. (Poſt. 333. b. Cro. Cha. 433. Cro. Jam. 15.)

Sect. 300.

*ET eſt aſçavoir, que en meſme le maner come eſt avantdit de tenants en common, de terres ou tenements en fee ſimple, ou en fee taile, en meſme le maner poit eſtre de tenants a terme de vie. Sicome deux joyntenants ſont en fee, et l'un leſſa a un home ceo que a luy affiert pur terme de vie, et l'auter joyntenant leſſa ceo que a luy affiert a un auter pur terme de vie, &c. les deux leſſees ſont tenants en common pur lour vies, &c. **

[191. a.] ‡

AND it is to bee underſtood, that in the ſame manner as is aforeſaid of tenants in common, of lands or tenements in fee ſimple, or in fee taile, in the ſame manner may it be of tenants for terme of life. As if two joyntenants bee in fee, and the one letteth to one man that which to him belongeth for terme of life, and the other joyntenant letteth that which to him belongeth to another for terme of life, &c. the ſaid two leſſees are tenants in common for their lives, &c.

Vid. Sect. 295. where this is ſufficiently explaned before.

Sect. 301.

ITEM ſi home leſſa terres a deux homes pur terme de lour vies, & l'un granta tout ſon eſtate de ceo que a luy affiert a un auter, donques l'auter tenant a terme de vie, et † celuy a que le

ALSO if a man let lands to two men for terme of their lives, & the one grants all his eſtate of that which belongeth to him to another, then the other tenant for terme of life,

[191. a.]

(4) [See Note 76.]

(5) Beſides the references in the margin, ſee Dy. 48. b. pl. 3. and Doderidge on Advowſons 30.

‡ [At this page Mr. BUTLER's notes commence. See Note 77.]

* *&c.* not in L. and M. or Roh.

† *Meſme* added L. and M. but not in Roh.

le graunt eſt fait ſont tenants en common, durant le temps que ambideux les leſſees ſont en vie.

Et memorandum, *que en touts* ‡ *auters tiels caſes, coment que ne ſont icy expreſſement moves ou ſpecifies, ſi ſont en ſemblable reaſon, ſont en* ‖ *ſemblable ley.*

life, and he to whom the grant is made, are tenants in common during the time that both the leſſees be alive.

And *memorandum*, that in all other ſuch like caſes, although it be not here expreſſely moved or ſpecified, if they be in like reaſon, they are in the like law.

(2. Roll. Abr. 89, 90. 11. Rep. 84. b.)

AND ſo it is if lands bee letten to two for terme of their lives, *et eorum alterius diutiùs viventi* (1), and one of them granteth his part to a ſtranger, whereby the joynture is ſevered, and dyeth, here ſhall bee no ſurvivour, but the leſſor ſhall enter into the moity,

30. Aſſ. 18.

(4. Rep. 72. b. 2. Cro. 378. 417. 696.)

and the ſurvivour ſhall have no advantage of theſe words, *et eorum alterius diutiùs viventi*, for two cauſes. Firſt, for that the joynture is ſevered. Secondly, for that thoſe words are no more then the Common Law would have implyed without them, and *expreſſio eorum quæ tacitè inſunt nihil operatur.* Hereby it appeareth that in caſe of leaſes for life it is more beneficiall for the leſſor to have the joynture ſevered then to have it continue.

(Poſt. 205. a. Hob. 170. 208.)

Vid. Sect. 1.

"*Si ſoient en ſemblable reaſon ſont en ſemblable ley.*" Here Littleton citeth one of the Maximes of the Common Law. That whereſoever there is the like reaſon, there is the like law. *Ubi eadem ratio, ibi idem jus*; or *ubi eadem ratio, ibi idem jus eſſe debet*; for *ratio eſt anima legis.* And therefore *ratio poteſt allegari deficiente lege.* But it muſt be *ratio vera et legalis et non apparens.* And here it appeareth that *argumentum à ſimili* is good in law. *Sed ſimilitudo legalis eſt caſuum diverſorum inter ſe collatorum ſimilis ratio, quod in uno ſimilium valet, valebit in altero, diſſimilium diſſimilis eſt ratio.*

Sect. 302. [191. b.]

ITEM ſi deux joyntenants en fee ſont, et l'un leſſa ceo que a luy affiert a un auter pur terme de ſa vie, le tenant a terme de vie durant ſa vie, et l'auter joyntenaunt que ne leſſa pas, ſont tenants en common. Et ſur ceo caſe un queſtion puit ſurder*; † *ſi come en tiel caſe mittomus que le leſſor ad iſſue et devie vivant l'auter joyntenant ſon companion, et vivant le tenant a terme de vie, le queſtion poet eſtre tiel: Si le reverſion de la moitie* ‡ *que le leſſor avoit diſcendra al iſſue le leſſor, ou que l'auter joyntenant*

ALSO if there bee two joyntenants in fee, and the one letteth that to him belongeth to another for terme of his life, the tenant for term of life during his life, and the other jointenant which did not let, are tenants in common. And upon this caſe a queſtion may ariſe; as in ſuch caſe admit that the leſſor hath iſſue and die, living the other joyntenant his companion, and living the tenant for life, the queſtion may be this, Whether the reverſion of the moity which

‡ *les* added in L. and M. but not in Roh.
‖ *Semble* L. and M. and Roh.
(1) [See Note 78.]

[191. b.]
* *Si deux* not in Roh. but in L. and M.
† *Si* not in L. and M. or Roh.
‡ *&c.* added in L. and M. and Roh.

joyntenant avera ‖ *cel reverſion per le ſurvivor? Aſcuns ont dit en ceſt caſe, que l'auter joyntenant avera cel reverſion per le ſurvivor: et lour reaſon eſt tiel,* ſcilicet *que quant les joyntenants fueront joyntment ſeiſies* § *en fee ſimple, &c. coment que l'un de eux fiſt eſtate de ceo que a luy affiert pur terme de* ¶ *ſa vie, et coment que il ad ſever le franktenement de ceo que a luy affiert per le leaſe, uncore il n'ad ſever le fee ſimple, mes le fee ſimple demurt a eux joyntment come il fuyt adevant. Et iſſint ſemble a eux, que l'auter joyntenant que ſurveſquiſt, avera le reverſion per le ſurvivour, &c. Et auters ont dit le contrarie, & ceo eſt lour reaſon,* ſcilicet, *que quaunt l'un des joyntenants leſſa ceo que a luy affiert a un auter pur terme de ſa vie, per tiel leaſe le franktenement eſt ſever de le joynture. Et per meſme le reaſon le reverſion que eſt dependant ſur meſme le franktenement, eſt ſever de le joynture. Auxy ſi le leſſour uſt reſerve a luy un annuall rent ſur le leas, le leſſor ſolement averoit le rent, &c. le quel eſt un proofe que le reverſion eſt ſolement en luy, et que l'auter n'ad riens en cel reverſion, &c. Auxy ſi le tenant a term de vie fuit impleade, &c. & fiſt default apres default, donques le leſſor ſerroit de ceo ſolement receive a defender ſon droit, et ſon compagnion en ceſt caſe en nul manner ſerroit receive, le quel prove* le reverſion del moity d'eſtre tantſolement en le leſſor:* et ſic per conſequens, *ſi le leſſour moruſt vivant le leſſee per terme de vie, le reverſion diſcendra al heire de leſſour, et nemy deviendra a l'auter joyntenant per le ſurvivor,* Ideo quære. *Mes en ceſt caſe ſi celuy joyntenant que ad le franktenement ad iſſue et devie, vivant le leſſor & leſſee, donques il ſemble, que meſme l'iſſue avera ceſt moitie en demeſne, et en fee per diſcent, pur ceo que* † *un franktenement ne poet per nature de*

which the leſſor hath ſhall deſcend to the iſſue of the leſſor, or that the other jointenant ſhall have this reverſion by the ſurvivor? Some have ſaid in this caſe, that the other jointenant ſhall have this reverſion by the ſurvivor: and their reaſon is this, *ſcil.* That when the jointenants were jointly ſeiſed in fee ſimple, &c. although that the one of them make an eſtate of that to him belongeth for term of his life, and although that hee hath ſevered the freehold of this which to him belongs by the leaſe, yet he hath not ſevered the fee ſimple, but the fee ſimple remains to them jointly as it was before. And ſo it ſeemeth to them, that the other joyntenant which ſurviveth ſhall have the reverſion by the ſurvivor, &c. And others have ſaid the contrary, and this is their reaſon, *ſcilicet,* that when one of the join-tenants leaſeth that to him belongeth, to another for terme of his life, by ſuch leaſe the freehold is ſevered from the joynture. And by the ſame reaſon the reverſion which is depending upon the ſame freehold is ſevered from the joynture. Alſo if the leſſor had reſerved to him an annual rent upon the leaſe, the leſſor onely ſhould have had the rent, &c. the which is a proofe, that the reverſion is onely in him, and that the other hath nothing in the reverſion, &c. Alſo if the tenant for terme of life were impleaded, & maketh default after default, the leſſor ſhall be only received for this, to defend his right, and his companion in this caſe in no manner ſhall be received, the which proveth the reverſion of the moitie to be onely in the leſſor: and ſo by conſequent, if the leſſour dieth living the leſſee for terme of life, the reverſion ſhall deſcend to the heir of the leſſour, and ſhall not come to the other joyntenant

Cel reverſion, ceo in L. and M. and Roh.

§ *En—de* in L. and M. and Roh.

¶ *Sa* not in L. and M. or Roh.

* *que* added in L. and M. and Roh.

† *un* not in L. and M. or Roh.

de joynture eſtre annexe a un reverſion, &c. Et il eſt certaine, que celuy que leſſa fuit ſeiſie de le moitie en ſon demeſne come de fee, et nul avera aſcun joynture en ſon franktenement, Ergo *ceo diſcendra a ſon iſſue, &c.* Sed quære.

tenant by the ſurvivor, *Ideo quære.* But in this caſe if that jointenant which hath the freehold hath iſſue, & dies living the leſſor and the leſſee, then it ſeemeth that the ſame iſſue ſhall have this moity in demeſne, and in fee by deſcent, for that a freehold cannot by nature of joynture bee annexed to a reverſion, &c. And it is certaine, that hee which leaſed was ſeiſed of the moitie in his demeſne as of fee, and none ſhall have any joynture in his freehold, therefore this ſhall deſcend to his iſſue, &c. *Sed quære.*

"*SI deux joyntenants en fee, &c.*"
This needeth no explanation.

"*Et ſur ceo caſe un queſtion poet ſurder, &c.*"

Vid. 33. H. 6. 4. b.

Here Littleton maketh a queſtion, and ſheweth the reaſons on both ſides, and concludes with a Quære. When Littleton maketh a queſtion, and ſheweth the reaſon on both ſides, the latter is ever his owne, [*a*] and the better. But time hath made this queſtion without queſtion; for now all agree, that the joynture is ſevered for the time, according to the latter opinion here ſet down in Littleton, whoſe reaſons are unanſwerable: for many times the change of the freehold makes an alteration or change of the reverſion. As if tenant in taile, or the huſband ſeiſed in the right of his wife, or tenant for life, make a leaſe for life of the leſſee, in everie of theſe caſes the leſſour doth gaine a new reverſion by wrong, as ſhall be ſaid more at large in the chapter of Diſcontinuance; and if the elder brother grant the reverſion (expectant upon a freehold) for life, it ſhall cauſe *poſſeſſio fratris*, as hath beene ſayd.

[*a*] Vide Sect. 340. 375. 439, 440. 462, 463, 464. 482, 483. 648. 720. 729. Vid. Sect. 170.

Vid. Sect. 8. 7. H. 5. (Ant. 15. a)

"*Per meſme le reaſon le reverſion que eſt dependant ſur meſme le franktenement eſt ſever de le joynture, &c.*"

7. H. 7. 9.

(Ant. 189. b.)

If two joyntenants in fee be, and they both joyne in a leaſe to an abbot and a ſecular man for term of their lives, here the reverſion that is dependant upon ſeverall freeholds is ſevered. And ſo it is if they joine in a leaſe to two ſecular men, to have and to hold the one moity to the one for life, and the other moity to the other for life, for both theſe caſes are warranted by the authority of *Littleton.* [192.

(Poſt. Sect. 319. 199. a.)

If two joyntenants be of a leaſe for twenty one years, and the one of them letteth his part for certaine yeares, part of the terme, the joynture is ſevered, and ſurvivor holdeth not place, for a terme for a ſmall number of yeares is as high an intereſt as for many more years; and ſo was it reſolved *Hil.* 18. *El. Reginæ, in Communi Banco,* * which I myſelfe heard.

* Hil. 18. Eliz.

If two coparceners be in fee, and the one make a leaſe for life, this is no ſeverance of the coparcenary, for notwithſtanding the lord ſhall make one avowrie upon them both.

(Ant. 167. a.)

But if two joyntenants be, and one maketh a leaſe for life, this is a ſeverance of the joynture, as *Littleton* here taketh it, and ſeveral avowries ſhall be made upon them (1).

"*Auxy*

(1) [See Note 79.]

" *Auxy ſi le leſſor uſt reſerve un annual rent, le leſſor ſolement avera le rent, &c.*" But if two joyntenants make a leaſe for life, reſerving a rent to one of them, the rent ſhall enure to them both, becauſe the reverſion remains in jointure, unles the reſervation be by deed indented, and then he onely to whom it is reſerved ſhall have it. But if they make a leaſe by deed indented, reſerving or ſaving the reverſion to one of them, that is void, becauſe they had the reverſion before, but the rent is newly created. 5. E. 4. 4. 2. 27. H. 8. 16. 2. 7. E. 4. 25. 14. Ed. 3. Br. 282. (Ant. 47. a.) (Poſt. 214. a.)

And ſo it is if ſuch a leſſee for life ſhould ſurrender to one of them, it ſhall enure to them both, for that they have a joynt reverſion. But if the leſſee grant his eſtate to one of them, no part of it ſhal enure to his companion, becauſe for the moity belonging [192. b.] to his companion, it is in *eſſe* in him to whom the grant is made, the reverſion to the other in fee. 5. E. 4. 4. (2 Rep. 66. Poſt. 214. a.) (2. Cro. 611. Perk 31.)

If two joyntenants make a leaſe for life, the remainder to his companion in fee, this is a good remainder of his moitie to his companion. 38. H. 6. 24 b. 2. R. 3. tit. Extinguiſhment 3. (4. Leo. 187.)

" *Donques le feoffor ſerra de ceo ſolement receive, &c.*"

" *Receive,*" *Receit, Receptio,* is in many caſes where a perſon, partie to a writ, or an eſtranger thereunto, to whom a reverſion or remainder appertaineth, ſhall in default of another perſon be received to defend his or her freehold or inheritance, the law ſaith, *Admittatur, &c.* And this admiſſion or receipt is gived by ſundry ſtatutes (*f*) (and this is that which the civilians call, *Admiſſio tertiæ perſonæ pro intereſſe*). *Et in caſibus prædictis duæ concurrunt actiones: una inter petentem & tenentem, & alia inter tenentem, ius ſuum oſtendentem & petentem.* (Poſt. 352. b.) (*f*) W. 2. cap. 3. 20. E. 1. Statute de defenſione Juris. 13. R. 2. cap. 16.

" *Pur ceo que un frankteñement ne poet per nature de joynture, eſtre annexe a un reverſion.*" And this is the principall reaſon, and of this ſufficient hath beene ſaid in the chapter of Joyntenants, *Sect.* 291.

" *&c.*" This *&c.* in the end of this ſection, implieth any other heir lineal or collaterall.

[193. a.]

Sect. 303.

MES ſi iſſint ſoit que la ley en ceſt cas eſt tiel, que ſi le leſſor devie vivant le leſſee, et vivant l'auter joyntenant que ad le frankteñement de l'auter moitie, que le reverſion diſcendra al iſſue del leſſor, donque eſt le joynture et title que aſcun de eux poit aver per le ſurvivor, et le droit de le joynture anient, et tout ouſterment defeat a touts jours. En meſme le maner eſt, ſi celuy joyntenant que ad le frankteñement devie vivant le leſſor et le leſſee, ſi la ley ſoit

BUT if it be ſo that the law in this caſe bee ſuch, that if the leſſor die living the leſſee, and living the other joyntenant which hath the freehold of the other moity, that the reverſion ſhall deſcend to the iſſue of the leſſor, then is the joynture and title which any of them may have by the ſurvivour, and the right of the joynture taken away, and altogether defeated for ever. In the ſame manner it is, if that joyntenant which hath the freehold

ſoit tiel que ſon franktenement et fee que il ad en le moitie diſcendra a ſon iſſue, donques le joynture ſerra defeat a touts jours.

freehold dye living the leſſor and the leſſee, if the law bee ſo as his freehold and fee which he hath in the moity ſhall deſcend to his iſſue, then the joynture ſhall be defeated for ever.

"*DONQUE eſt le joynture et title, &c. et le droit de le jointure anient, &c.*"

And the reaſon of this is, for if the joynture be ſevered at the time of the death of him that firſt deceaſed, the benefit of the ſurvivor is utterly deſtroyed for ever, as hath beene ſaid [*] afore in the Chapter of Joyntenants. But in the caſe aforeſaid, if tenant for life dyeth in the life of both the joyntenants, they are joyntenants againe as they were before.

[*] Vide Sect. 201. (Poſt. 214. a.)

If two joyntenants be in fee, and the one letteth his part to another for the life of the leſſor, and the leſſor dieth, ſome ſay that his part ſhal ſurvive to his companion, for by his death the leaſe was determined. And others hold the contrary; and their reaſon is, firſt, for that at the time of his death the joynture was ſevered, for ſo long as he lived the leaſe continued. And ſecondly, that notwithſtanding the act of any one of the joyntenants there muſt bee equall benefit of ſurvivor as to the freehold. But here if the other joyntenant had firſt died, there had been no benefit of ſurvivor to the leſſor without queſtion.

Sect. 304.

*ITEM, ſi trois joyntenants ſont, et l'un releſſa per ſon fait a un de ſes companions tout le droit que il avoit en le terre, donques ad celuy a que le releas eſt fait, le tierce part de les terres per force de le dit releas, et il et ſon companion teigneront les auters deux parts * en joynture. Et quant al tierce part, que il ad per force de releas, il tient cel tierce part ove luy meſme et ſon companion en common.*

AND, if three joyntenants be, and the one releaſe by his deed to one of his companions all the right which he hath in the land (1), then hath he to whom the releaſe is made, the third part of the lands by force of the ſaid releaſe, and he and his companion ſhall hold the other two parts in joynture. And as to the third part, which he hath by force of the releaſe, he holdeth that third part with himſelfe and his companion in common.

(Poſt. 318. a. 6. Rep. 78. b. Ant. 185. a.) [*] 9. Eliz. Dyer 263. 19. H. 6. 17. [a] 40. E. 3. 41. 13 E. 3. tit. Garr. 35. E. 3. releaſe 43. 22 H. 6. 42. 14. E. 3. Briefe 28. 19. H. 6. 17. 33. H. 6. 5. 28. H. 6. 2. 37. H. 8. Alienation 31. 9. H 4. 8. 10. E. 4. 3.

UPON this caſe theſe two things are to be obſerved. Firſt, that in this caſe this releaſe doth enure by way of *mitter l'eſtate*, and not [*] by way of extinguiſhment, for then the releaſe ſhould enure to his companion alſo, and he is in the *per* by him that maketh the releaſe. [a] But if hee had releaſed to the other two, then had it wrought no degree but in ſuppoſition of law, for many purpoſes they to whom the releaſe is made (as hath beene ſaid) ſhall bee ſuppoſed in from the firſt feoffor, as they ſhall deraigne [193. b.]

* *enjointure—jointment*, in L. and M. and Roh.

(1) [See Note 80.]

raigne the first warrantie for the whole. [b] The second thing to bee observed is, that he to whom the release is made hath a fee simple without this word (heires), as hath beene touched in the first chapter of the first booke, for that he to whom the release is, is seised *per my et per tout*, of the fee and inheritance, as hath been said in the Chapter of Joyntenants. And note, the like law is between coparceners: and further, if there be two coparceners, and the one hath issue twentie daughters and dieth, the other may release to any one of the daughters, her whole part, albeit she to whom the release is, hath not an equall part; but for the privitie and the individed estate, the release is good.

(Post. 385. a.)
[b] 9. Eliz. Dyer 263. 19. H. 6. 17. (Ante 9. b.)

But if two joyntenants be of twenty acres, and the one maketh a feoffment of his part in eighteene acres, the other cannot release his entire part, but only in two acres, for that the joynture is severed for the residue.

Sect. 305.

ET est assavoir, que ascun foits † *un releas prendra effect, et urera pur mitter l'estate de celuy que fist le releas a celuy a que le releas est fait, sicome en le cas avant dit, et auxy, sicome joynt estate soit fait a le baron et sa feme, et a la tierce person* ‡, *et la tierce person releassa tout son droit que il ad* ‖ *a le baron, adonque ad le baron la moitie que le tierce avoit, et la feme de ceo n'ad riens. Et si en tiel case le tierce releassa* § *a la feme nient nosmant le baron en le releas, donques ad la feme le moitie que le tierce avoit, &c. et le baron n'ad riens de ceo forsque en droit sa feme, pur ceo que en tiel case le release urera de faire estate a celuy a que le release est fait, de tout ceo que affiert a celuy que fait le release, &c.*

AND it is to be observed, that sometimes a deed of release shal take effect, and enure to put the estate of him which makes the release to him to whom the release is made, as in the case aforesaid, and also, as if a joynt estate bee made to the husband and wife, and of a third person, and the third person release all his right which hee hath to the husband, then hath the husband the moitie which the third had, and the wife hath nothing of this. And if in such case the third release to the wife not naming the husband in the release, then hath the wife the moitie which the third had, &c. and the husband hath nothing of this but in right of his wife, because that in this case the release shal enure to make an estate to whom the release is made, of all that which belongeth to him which maketh the release, &c.

THIS is evident upon that which hath beene said before. [c] And it is to bee understood, that a release may enure foure manner of wayes. First, by way of *mitter l'estate*, as here it appeareth. Secondly, by way of *mitter le droit*. Thirdly, by way of extinguishment. Fourthly, by way of creation or inlargement of an estate, as hereafter in this Chapter shall appeare. And it is to bee observed, that upon a release that creates or inlargeth an estate, or enures by way of *mitter l'estate*, a rent may bee reserved, but

[c] 10. Eliz. Bendloes. 9. Eliz. Dier 263. (2. Roll. Abr. 403.) See more of this in the Chapter of Releases. (Post. 273. b.)

10. E. 4. 3. b. 21. H. 6. 8. b. (Ant. 144. a.)

† *un fait est*, added in L. and M. and Roh.

‡ *que* added in L. and M.

‖ *&c.* added in L. and M. and Roh.

§ *&c.* added in L. and M. and Roh.

but not upon a releaſe that enureth by way of *mitter le droit*, or which enures by way of extinguiſhment.

The (*&c.*) in the end of this Section implieth a diverſitie between a releaſe which enures by way of *mitter l'eſtate* (whereof *Littleton* here ſpeaketh) and a releaſe that enures by way of extinguiſhment: for of a releaſe enuring by way of extinguiſhment made to the huſband, the wife ſhall take benefit, or to the wife, the huſband ſhall take benefit, as hereafter ſhall more at large be ſaid. [194. a.

Sect. 306.

*ET en aſcun cas un releas urera de mitter tout le droit que il que fait le releas ad a celuy a que le releaſe eſt fait. Sicome home ſeiſie de certain tenements eſt diſſeiſie per deux diſſeiſors, ſi le diſſeiſee per ſon fait releſſa tout ſon droit, &c. a un des diſſeiſors donque celuy a que le releas eſt fait, avera et tiendra touts les tenements a luy ſolement, et ouſtera ſon companion de cheſcun occupation de ceo. Et le cauſe eſt, pur ceo que les deux diſſeiſors fueront eins * encounter la ley, et quant un de eux happe le releas de celuy que ad droit d'entre, &c. ceſt droit en tiel cas † veſtera en celuy a que le releas eſt fait, et eſt en tiel plyte, ſicome ‡ il que avoit droit ‖ avoit enter, et luy enfeoffa &c. Et la cauſe eſt, pur ceo que il que avoit adevant eſtate per tort, ſcilicet, per diſſeiſin, &c. ad ore per le releas un eſtate droiturel.* §

AND in ſome caſe a releaſe ſhal enure to put all the right which he who maketh the releaſe hath to him to whom the releaſe is made. As if a man ſeiſed of certaine tenements is diſſeiſed by two diſſeiſors, if the diſſeiſee by his deed releaſe all his right, &c. to one of the diſſeiſors, then hee to whom the releaſe is made, ſhall have and hold al the tenements to him alone, and ſhal ouſt his companion of every occupation of this. And the reaſon is, for that the two diſſeiſors were in againſt the law, and when one of them happeth the releaſe of him which hath right of entry, &c. this right in ſuch caſe ſhall veſt in him to whom the releaſe is made, and he is in like plite, as hee which hath the right had entred and enfeoffed him, &c. And the reaſon is, for that he which before had an eſtate by wrong, *ſcilicet*, by diſſeiſin, &c. hath now by the releaſe a rightful eſtate.

(2. Roll. Abr. 409. 414. Poſt. 276. a.)

HERE *Littleton* purſueth the ſecond part of his diviſion, viz. where a releaſe ſhall enure by way of *mitter le droit*.

"*Diſſeiſie per deux diſſeiſors, &c.*" The like law is, where there bee two joynt abators or intruders which come in meerely by wrong. But if two men doe uſurpe by a wrongfull preſentation to a church, and their clarke is admitted, inſtituted and inducted, and the rightfull patron releaſeth to one of them, this ſhall enure to them both, for that the uſurpers come not in meerely by wrong, but their clarke is in by admiſſion, and inſtitution, which are judiciall

* *ſes tenements per tort, per cux fait*, added in L. and M. and Roh.

† *veſtera—veſt* in L. and M. and Roh.

‡ *il—ſil* in L. and M. and Roh.

‖ *&c.* added: *avoit enter, et*, not in L. and M. nor Roh.

§ *&c.* added in L. and M. and Roh.

ciall acts. (*d*) And therefore an usurpation shal worke a *remitter* to one that hath a former right.

(*d*) Fitz. N. B. 35. in 11. R. 2. quare Imp. 144. (1. Roll. Abr. 661, 662. Post. 368. a. Ant. 180. b. 181. a.)

"*Donques celuy a que le release est fait avera et teignera touts les tenements, &c.*" Here by operation of law presently upon the deliverie of the release the whole freehold and inheritance is vested in him to whom the release is made, and al the state that the other disseisor had, wholly devested: for right and wrong cannot consist together, but the wrongfull estate giveth place to the rightfull. And the reason hereof is for that, as hath been said, the disseisor [194. b.] to whom the release was made was seised *per my et per tout*, whereunto when the right commeth it excludeth the wrong (*e*); for right which is lawfull, and wrong that is contrary to law, cannot stand together.

(*e*) Brit. fol. 116. 26. Ass. pl. 39. 39. E. 3. 29. 21. H. 6. 41. 22. H. 6. 22. 7. E. 4. 25. 9. E. 4. 6. 11. H. 7. 12. 20. H. 7. 5. 21. H. 7. 18. 12. E. 4. tit. Discontin. 1. 9. H. 6. 37. 21. H. 6. 52.

"*En tiel plite, sicome il que avoit droit avoit enter, et luy enfeoffa, &c.*" This (*&c.*) doth implie that this is true *secundum quid* (1), but not *simpliciter* (2); for as to the holding out of the joynt disseissor, it amounts to as much as if he had entred and infeoffed him to whom the release is made, but it doth not amount to an entrie and feoffment *simpliciter* to all purposes, as shall be said hereafter in his proper place in the Chapter of Releases.

Sect. 307.

ET en ascun cas un releas urera per voy d'extinguishment, et en tiel case tiel releas aydera le joyntenant a que le release ne fuit fait, auxybien come † luy a que le release fuit fait. Sicome ‡ un home soit disseisie, et le disseisor fait feoffment a deux homes en fee, § si ‖ le disseisee releassa per son fait a un de les feoffees, donques ¶ cel release urera a ambideux les feoffees, pur ceo que les feoffees ont estate per la ley, scilicet, per feoffment, et nemy per tort fait a nulluy, &c. (3)

AND in some case a release shall inure by way of extinguishment, and in such case such release shal aide the joyntenant to whom the release was not made, as well as him to whom the release was made. As if a man be disseised, and the disseisor makes a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees, this release shal enure to both the feoffees, for that the feoffees have an estate by the law, *scilicet*, by feoffment, and not by wrong done to any, &c.

HERE *Littleton* speaketh of the third kind of releases. And the reason of this diversitie (implied in the (*&c.*) in the end of this Section) between the disseisors and their feoffees, is for that the feoffees comming in by title and purchase, are intended in law to have a warrantie (which is much esteemed in law); and therefore

† *luy—a celuy* in L. and M. and Roh.
‡ *si* added in L. and M. but not in Roh.
§ *si* not in L. and M. nor Roh.
‖ *et* added in L. and M. and Roh.
¶ *cel—tiel* in L. and M. and Roh.

(1) i. e. in some respects;—as to some persons.
(2) i. e. absolutely.
(3) [See Note 81.]

fore leſt the warrantie ſhould be avoided, the releaſe ſhall enure to both the feoffees in favour of purchaſors, and ſo the right and benefit of every one ſaved. (*f*) And in ancient time if the diſſeiſor had made a feoffment in fee, or a gift in taile, or a leaſe for life, and the feoffee, donee, or leſſee had continued in ſeiſin quietly a yeare and a day, the entrie of the diſſeiſee had not been lawfull upon him; and the reaſon was, for the benefit and ſafegard of the warranty (which was intended by law) ſhould have beene deſtroyed by the entrie. But hereof alſo more ſhall be ſaid in his proper place in the Chapter of Releaſes.

(*f*) 2. H. 3. Aſſ. 432. 1. Aſſ. 13. 9. Aſſ. 15. 21. 21. Aſſ. 28. 27. Aſſ. 68. 32. 29. Aſſ. 54. 43. Aſſ. 17. 40. E. 3. 24. 50. E. 3. 21. 3. R. 2. entry cong. 38. 13. E. 3. tit. Aſſ. 9. 12. Aſſ. 20.

(2. Roll. Abr. 400.)

Sect. 308.

EN meſme le maner eſt, ſi le diſſeiſor fait un leaſe a un home pur terme de ſa vie, le remainder ouſter a un auter en fee, ſi le diſſeiſee releſſa a le tenant a terme de vie tout ſon droit, &c. cel releaſe urera auxybien a celuy en le remainder, come a le tenant a terme de vie. Et la cauſe eſt, pur ceo que le tenant a terme de vie vient a ſon eſtate per courſe de ley, et pur ceo cel releaſe urera et prent effect per voy d'extinguiſhment de droit de celuy que releſſa, &c. Et per cel releaſe le tenant a terme de vie n'ad pluis ample ne greinder eſtate que il avoit devant le releaſe fait a luy, et le droit celuy que releſſa eſt tout ouſterment extinct. Et entant que ceſt releaſe ne poit enlarge l'eſtate de le tenant a terme de vie, il eſt reaſon que cel releaſe urera a celuy en le remainder, &c.

Pluis ſerra dit de releaſes en le Chapiter de Releaſes.

IN the ſame manner it is, if the diſſeiſor maketh a leaſe to a man for terme of his life, the remainder over to another in fee, if the diſſeiſee releaſe to the tenant for terme of life all his right, &c. this releaſe ſhall inure as well to him in the remainder, as to the tenant for terme of life. And the reaſon is, for that the tenant for life commeth to his eſtate by courſe of law, and therefore this releaſe ſhall enure and take effect by way of extinguiſhment of the right of him which releaſeth, &c. And by this releaſe the tenant for life hath no ampler nor greater eſtate than hee had before the releaſe made him, and the right of him which releaſeth is altogether extinct. And inaſmuch as this releaſe cannot inlarge the eſtate of the tenant for life, it is reaſon that this releaſe ſhal enure to him in the remainder, &c. [19]

More ſhall be ſaid of releaſes in the Chapter of Releaſes.

"*CEST releaſe urera auxibien a celuy en le remainder, come a le tenant a terme de vie, &c.*" Of this and the reſt of this Section, for avoyding of repetition, more ſhall be ſaid in his proper place in the Chapter of Releaſes.

"*Tout ſon droit, &c.*" Here by this (*&c.*) is implied, title, demand, and other words which may transferre the right, &c. Alſo here is implyed of in or to the land.

Sect.

Sect. 309.

ITEM, ſi ſoient deux parceners, et l'un alien ceo que a luy affiert a un auter, donques l'auter parcener et l'alienee ſont tenants en common.

ALSO, if two parceners be, and the one alieneth that to her belongeth to another, then the other parcener and the alienee are tenants in common.

This is evident, and needeth no explication.

Sect. 310. (Ant. 114. a.)

*ITEM, * nota, que tenaunts en common poient eſtre per † title de preſcription, ſicome l'un et ſes aunceſtors, ou ceux que eſtate il ad en un moity ont tenus en common meſme le moitie ove l'auter tenant que ad l'auter moitie, et ove ſes aunceſtors, ou ove ceux que eſtate il ad* pro indiviſo ‡, *de temps dont memory ne curt, &c. Et divers auters manners poient faire et cauſer homes d'eſtre tenaunts en common, que ne ſont icy expreſſes, ‖ &c.*

195. b.]

ALSO, note, that tenants in common may bee by title of preſcription, as if the one and his anceſtors, or they whoſe eſtate hee hath in one moitie have holden in common the ſame moitie with the other tenant which hath the other moity, and with his anceſtors, or with thoſe whoſe ſtate he hath undivided, time out of minde of man. And divers other manners may make and cauſe men to be tenants in common, which are not here expreſt, &c. (1)

OF this, beſides *Littleton*, there is as good authoritie in law, as there is for all his other caſes throughout his three bookes; but joyntenants cannot be by preſcription, becauſe there is ſurvivor betweene them, but not betweene tenants in common.

11. E. 3. Trans. 212. 13. E. 5. Briefe 674. 8. H. 6. 16. b. lib. intrat. 23.

The two (&c.) in this Section are evident.

Sect. 311.

ITEM, en aſcun cas tenants en common doyent aver de lour poſſeſſion ſeveralx actions, et en aſcun cas ils joyndront en un action. Car ſi ſont deux tenants en common, et ils ſont diſſeiſies, ils

ALSO, in ſome caſe tenants in common ought to have of their poſſeſſion ſeveral actions, and in ſome caſes they ſhall joyne in one action. (2) For if two tenants in common be,

* *nota que* not in L. and M. nor Roh.
† *title de* not in Roh.
‡ *&c.* added in Roh.
‖ *&c.* not in Roh.

(1) [See Note 82.]

(2) The reader will find what Littleton and his commentator ſay on this ſubject confirmed and exemplified by the caſes cited in Viner and Bacon's Abridgments, and Comyn's Digeſt, under the proper Titles.

ils doyent aver ‡ deux assises, et nemy un assise; car chescun de eux covient aver un assise de son moitie, &c. Et la cause est, pur ceo que tenants en common fueront seisies, &c. per severalx titles. Mes autrement est de joyntenants; car si soyent vint joyntenants, et ils sont disseisies, ils averont en touts lour noſmes forsque un assise, pur ceo que ils n'ont forsque un joynt title.

be, and they be disseised, they must have two assises, and not one assise; for each of them ought to have one assise of his moity, &c. And the reason is, for that the tenants in common were seised, &c. by severall titles. But otherwise it is of jointenants; for if twenty jointenants be, and they bee disseised, they shall have in al their names but one assise, because they have not but one joynt title.

(Post. 200. Cro. Jac. 231. Noy 13. Post. Litt. Sect. 314.)

IN this Section wee learne two things: first, that in reall actions, and in actions also that are mixt with the personalty, tenants in common shall sever in action, because they have several freeholds, and claime in by severall titles; and therefore as they shall bee severally by others impleaded, so shall they severally implead others in al real and mixt actions, unlesse it be in case of necessity for a thing entire, as hereafter in this Chapter shall appeare. And *Littleton* here putteth the case of the assise which is mixt with the personaltie, and therefore hee needeth not to put any case of any *præcipe quòd reddat*; for if it bee so in case of assise, *à fortiori* in writs of higher nature, which is necessarily implyed in the (*&c.*) Now of suits that sound in the realty, and of personall actions, *Littleton* speaketh hereafter in this Chapter. The second thing here to bee learned, is the diversitie betweene tenants in common and joyntenants, which both of it selfe, and upon that which hath been said, is apparant.

4. E. 4. 18. b. (Ant. 180. b.)

(Noy 13. Ant. 193.)

Sect. 312. [196. a.]

*ITEM, si soient trois joyntenants, et un release a un de ses companions tout le droit que il ad, &c. et puis les *auters deux sont disseisies de l'entierties, &c. en cest case les deux auters averont † severalx assises, &c. en cest forme*, scilicet, *ils averont en lour ambideux noſmes un assise de les deux parts, &c. pur ceo que les deux parts ils teignont jointment al temps de le disseisin. Et quant a le tierce part, celuy a que le release fuit fait, covient aver de ceo un assise en son noſme demesne, pur ceo que ‡ il (quaunt a mesme le tierce part) est de ceo tenant in common, &c. pur ceo que*

ALSO, if three joyntenants bee, and one release to one of his fellowes all the right which hee hath, &c. and after the other two be disseised of the whole, &c. in this case the two others shall have severall assises, &c. in this manner, viz. they shall have in both their names an assise of the two parts, &c. because the two parts they held jointly at the time of the disseisin. And as to the third part, he to whom the release was made, ought to have of that an assise in his own name, for that hee (as to the same third part) is thereof tenant in

‡ *envers le disseisor* added in Roh.
* *auters* not in Roh.
† *&c.* added in Roh.
‡ *il* not in Roh.

que il vient a cel ‖ *tierce part per force del releaſe, et nemy tantſolement per force del joynture.*

in common, &c. becauſe hee commeth to this third part by force of the releaſe, and not only by force of the joynture.

This is put for an example (which ever doth illuſtrate the rule) and is evident of itſelfe, and the (*&c.*) in this Section needeth no further explication.

Sect. 313.

(Ant. 164. a.)
(8. Rep. 86. b.)

ITEM, quant a ſuer des actions que touchant § *le realty, y ſont diverſities perenter parceners que ſont eins per divers diſcents, et tenaunts en common. Car ſi* ¶ *home ſeiſie de certaine terre en fee ad iſſue deux* ** *files* †† *et moruſt, et les files entront, &c. et cheſcun de eux ad iſſue un fits, et devieront ſauns partition fait enter eux, per que l'un moity diſcendiſt a le fits*
96. b.] *d'un parcener, et l'auter moitie diſcendiſt al fits d'auter parcener, et ils entront et occupiont en common et ſont diſſeiſies, en ceſt caſe ils averont en lour deux noſmes un aſſiſe, et nemy deux aſſiſes. Et la cauſe eſt, que coment que ils veignont eins per divers diſcents, &c. uncore ils ſont parceners, et briefe de* partitione faciendâ *giſt enter eux. Et ils ne ſont parceners, eyant regarde ou reſpect tantſolement a* * *le ſeiſin et poſſeſſion de lour meres, mes ils ſont parceners pluis, eyant reſpect a l'eſtate que diſcendiſt de lour ayel a lour meres, car ils ne poyent eſtre parceners ſi lour meres ne fueront parceners adevant,* ‡ *&c. Et iſſint a tiel reſpect et conſideration,* ſcilicet, *quant a le primer diſcent que fuit a lour meres, ils ont un title en parcenarie, le quel fait eux parceners. Et auxy ils ne ſont forſque come un heire a lour common aunceſtor,* ſcilicet, *a lour ayel, de que la terre diſcendiſt a lour meres. Et*

ALSO, to the ſuing of actions which touch the realty, there bee diverſities betweene parceners which are in by divers deſcents, and tenants in common. For if a man ſeiſed of certain land in fee hath iſſue two daughters and dyeth, and the daughters enter, &c. and each of them hath iſſue a ſonne, and die without partition made between them, by which the one moity deſcends to the ſonne of the one parcener, and the other moity deſcends to the ſonne of the other parcener, and they enter and occupie in common and bee diſſeiſed, in this caſe they ſhall have in their two names one aſſiſe, and not two aſſiſes. And the cauſe is, for that albeit they come in by divers deſcents, &c. yet they are parceners, and a writ of partition lieth betweene them. And they are not parceners, having regard or reſpect onely to the ſeiſin and poſſeſſion of their mothers, but they are parceners rather, having reſpect to the eſtate which deſcended from their grandfather to their mothers, for they cannot bee parceners if their mothers were not parceners before, &c. And ſo in this reſpect and conſideration, viz. as to the firſt deſcent which was to their mothers, they have a title in parcenarie, the which makes them parceners.

‖ *tierce* not in Roh.
§ *en* added in Roh.
¶ *home—deux parceners* in Roh.
** *files—ſi.es* in Roh.
†† *et moruſt, et les files entront, &c. et cheſcun de eux ad iſſue un fits,* not in Roh.
* *le—lour* in Roh.
‡ *&c.* not in Roh.

Et pur ceux cauſes devant partition enter eux, &c. ils averont un aſſiſe, coment que ils veignont eins per ſeveralx diſcents ‡.

parceners. And alſo they are but as one heire to their common anceſtor, viz. to their grandfather, from whom the land deſcended to their mothers. And for theſe cauſes, before partition between them, &c. they ſhall have an aſſiſe, although they come in by ſeverall deſcents.

(Ant. 164. a.) Vid. Sect. 241.

This, upon that which hath beene ſaid in the Chapter of Parceners, is evident: where you may reade excellent points of learning, and diverſities concerning this matter; all which are here either expreſſed or implyed, as the ſtudious and diligent reader will obſerve.

Sect. 314.

ITEM, ſi ſont deux tenants en common de certaine terre en fee, et ils doneront cel terre a un home en le taile, ou leſſeront a un home pur terme de vie, rendant a eux annuelment un certaine rent, et un liver de pepper, et un eſperver ou un chival, et ils ſont ſeiſies de ceſt ſervice, et puis tout le rent eſt aderere, et ils diſtreigneront pur ceo, et le tenant a eux fait reſcous. En ceſt cas quant a le rent et liver de pepper ils averont deux aſſiſes, et quant a l'eſperver ou le chival forſque un aſſiſe. Et la cauſe pur que ils averont deux aſſiſes quant a le rent et liver de pepper eſt ceo, entant que ils fueront tenants en common en ſeverall titles, et quant ils fieront un done en le tayle ou leas pur terme de vie, ſavant a eux le reverſion, et rendant a eux certaine rent, &c. tiel reſervation eſt incident a lour reverſion; et pur ceo que lour reverſion eſt en common, et per ſeverall titles, ſicome lour poſſeſſion fuit devant le rent et auters choſes que poient eſtre ſeveres, et fueront a eux reſerves ſur le done, ou ſur le leas, queux ſont incidents per le ley a lour reverſion, tiels choſes iſſint reſerves fueront de la nature del reverſion. Et entant que le reverſion eſt a eux en common per ſeverall titles, il covient que le rent et le liver de pepper, queux poient eſtre ſevers, ſoyent a eux en common, et per ſeverall titles. Et

ALSO, if there bee two tenants in common of certaine land in fee, and they give this land to a man in taile, or let it to one for terme of life, rendring to them yearely a certaine rent, and a pound of pepper, and a hawke or a horſe, and they bee ſeiſed of this ſervice, and afterwards the whole rent is behind, and they diſtraine for this, and the tenant maketh reſcouſe. In this caſe as to the rent and pound of pepper they ſhall have two aſſiſes, and as to the hawke or the horſe but one aſſiſe. And the reaſon why they ſhall have two aſſiſes as to the rent and pound of pepper is this, inſomuch as they were tenants in common in ſeverall titles, and when they made a gift in taile or leaſe for life, ſaving to them the reverſion, and rendering to them a certaine rent, &c. ſuch reſervation is incident to their reverſion; and for that their reverſion is in common, and by ſeverall titles, as their poſſeſſion was before the rent and other things which may be ſevered, and were reſerved unto them upon the gift, or upon the leaſe, which are incidents by the law to their reverſion, ſuch things ſo reſerved were of the nature of the reverſion. And in as much as the reverſion is to them in common by ſeverall titles,

‡ &c. added in Roh.

Et de ceo ils averont deux aſſiſes, et cheſcun de eux en ſon aſſiſe ferra ſon pleint de le moitie de le rent, et de le moitie del liver de pepper. Mes de l'eſperver ou de chival, que ne poyent eſtre ſevers, ils averont forſque un aſſiſe, car home ne poit faire un pleint en aſſiſe de le moitie d'un eſperver, ne de le moitie d'un chival, &c. En meſme le maner eſt d'auter rents et d'auter ſervices que tenants en common ount en groſſe per divers titles, &c.

titles, it behoveth that the rent and the pound of pepper, which may be ſevered, be to them in common, and by ſeverall titles. And of this they ſhall have two aſſiſes, and each of them in his aſſiſe ſhall make his plaint of the moitie of the rent, and of the moitie of the pound of pepper. But of the hawke or of the horſe, which cannot be ſevered, they ſhal have but one aſſiſe, for a man cannot make a plaint in an aſſiſe of the moitie of a hawke, nor of the moitie of a horſe, &c. In the ſame manner it is of other rents and of other ſervices which tenants in common have in groſſe by divers titles, &c.

"*EN ceſt caſe quant a le rent et liver de pepper, ils averount deux aſſiſes, et quaunt a l'eſperver ou le chival forſque un aſſiſe.*"

But for the better underſtanding hereof it is to bee knowne, that

197. a.] if two tenants in common bee, and they grant a rent of 20 ſhillings *per annum* out of their land, the grantee ſhall have two rents of 20 ſhillings, for that every man's grant ſhall be taken moſt ſtrongly againſt himſelfe, and therefore they be ſeveral grants in law. (Ante 147. b.) Pl. Com. Hill. & Granges caſe 171. Vide Sect. 219. (5. Rep. 7. b. Plowd. 289. b.)

But if they two make a gift in taile, a leaſe for life, &c. reſerving twenty ſhillings rent to them and their heires, they ſhall have but one 20 ſhillings, for they ſhall have no more then themſelves reſerved: and the donee or leſſee ſhal pay but 20 ſhillings according to their own expreſſe reſervation: and albeit the reſervation of rents ſeverable bee in joynt words, yet in reſpect of the ſeveral reverſions the law make thereof a ſeverance. Now for the rent, as namely 20 ſhillings or a pound of pepper may bee ſevered, the one tenant in common may have an aſſiſe for the moity of 20 ſhillings, and the moitie of a pound of pepper, *de medietate unius libr' piperis*, but he cannot have an aſſiſe of ten ſhillings, or *de dimidio libræ piperis*. (5. Rep. 111. Ant. 148. b.) Vide 16. Aſſ. pl. 1. 16. E. 3. Joyndre en action. 27.

But for the hawke or horſe, albeit they be tenants in common, they ſhal joyne in an aſſiſe, for otherwiſe they ſhould bee without remedie, for one of them cannot make his plaint in aſſiſe of the moitie of a hawke, or of a horſe, for the law will never ſuffer any

197. b.] man to demand any thing againſt the order of nature or reaſon, as before it appeareth by *Littleton*, Section 129. *Lex enim ſpectat naturæ ordinem.* Alſo the law will never enforce a man to demand that which he cannot recover, and a man cannot recover [*l*] the moytie of a hawke, horſe, or of any other entire thing: *Lex neminem cogit ad vana, ſeu inutilia.* But in that caſe they ſhall joyne in an aſſiſe, and the reaſon is, *Ne curia Domini Regis deficeret in juſtitiâ exhibendâ*, or, *Lex non debet deficere conquerentibus in juſtitiâ exhibendâ.* And if they ſhould not joyne, they ſhould have *damnum et injuriam*, and yet ſhould have no remedie (*) by law, which ſhould be inconvenient, but the law will, that in every caſe where a man is wronged, and endammaged, that he ſhall have remedie. *Aliquid conceditur ne injuria remaneret impunita quod aliàs non concederetur.* Regula. Vide Sect. 129. [*l*] Lib. 5. fol. 21. Regula. (2. Cro. 159. Ant. 137. a. Hob. 43. 267.) (*) 3. E. 3 19. a. (1. Rol. Abr. 107. Noy 184. Ant. 137. 2. Rep. 68.) 38. E. 3. 35. Regula.

And

[m] 5. H. 7. 8. 13. E. 2. quare imp. 170. 33. H. 6. 11. 6. E. 4. 10. 15. E. 3. darr. preſentment. 10.

[m] And tenants in common ſhall joyne in a *quare impedit*, becauſe the preſentation to the advowſon is entire.

[n] Alſo tenants in common of a ſeigniory ſhall joyne in a writ of right of ward, and raviſhment of ward for the bodie, becauſe it is entire.

[n] 6. H. 4. 6, 7. 45. E. 3. 10. 30. H. 6. Aſſ. 39. 18. E. 3. 56. (Moor 184. 1. Roll. Rep. 243.)

If two tenants in common be of the wardſhip of the bodie, and one doth raviſh the ward, and the one tenant in common releaſes to the raviſher, this ſhall goe in benefit of the other tenant in common, and he ſhall recover the whole, and this releaſe ſhall not be any barre to him. And ſo it is if two tenants in common be of an advowſon, and they bring a *quare impedit*, and the one doth releaſe, yet the other ſhall ſue forth, and recover the whole preſentment.

Two tenants in common ſhall joyne in a detinue of charters, and if the one be nonſuit, the other ſhall recover.

18. E. 3. 56.

It is ſaid that tenants in common ſhall joyne in a *Warrantia Chartæ*, but ſever in voucher.

"*Moitie de chival, &c.*" Here is implyed or any other entire rent or ſervice.

"*Per divers titles, &c.*" That is by ſeverall titles, and not by one joynt title, as hath beene ſaid.

Sect. 315.

*ITEM, quant al actions perſonals tenants en common averont tiels actions perſonals joyntment en touts lour noſmes, * ſicome de treſpas, ou † de offence que touche lour tenements en common, ſicome de bruſer ‡ lour meaſons, ‖ de enfreinder de lour cloſes, de paſture, degaſter, et de fouler § des herbes, de couper lour bois, ** de piſcher en lour piſcharie, & hujuſmodi. †† Et en ceſt cas tenants en common averont un action joyntment et recoveront joyntment lour damages, pur ceo que l'action eſt en le perſonaltie, et nemy en le realtie, ‡‡ &c.*

ALSO, as to actions perſonals tenants in common may have ſuch action perſonals joyntly in all their names, as of treſpaſſe, or of offences which concerne their tenements in common, as for breaking their houſes, breaking their cloſes, feeding, waſting, and defowling their graſſe, cutting their woods, for fiſhing in their piſchary, and ſuch like. In this caſe tenants in common ſhall have one action joyntly, and ſhall recover jointly their damages, becauſe the action is in the perſonalty, and not in the realtie, &c.

29. E. 3. 51. 43. E. 3. 24. 46 E. 3. 27. 5. H. 4. 3. 14. H. 4. 31. 3. H. 6. 57.

"*AVERONT tiels actions perſonals joyntment en touts lour noſmes, &c.*" By this it appeareth that tenants in common ſhall have perſonall actions joyntly. And it is to be obſerved, that where dammages are to be recovered for a wrong done to tenants [198. a.] in

* *ſicome—ceſt aſſavoir* in Roh.
† *de* not in Roh.
‡ *de* added in Roh.
‖ *de* not in Roh.
§ *des—de lour* in Roh.
** *et* added in Roh.
†† *et* not in Roh.
‡‡ *&c.* not in Roh.

in common, or parceners in a perſonall action, and one of them die, the ſurvivor of them ſhall have the action; for albeit the property or eſtate be ſeverall betweene them, yet (as it appeareth here by *Littleton*) the perſonall action is joynt. 12. H. 6. 22. 22. H. 6. 14. 18. E. 4. 30. 2. R. 3. 16. 10. H. 7. 27. 21. H. 7. 22. 37. H. 6. 35. 21. E. 4. 12. (1. Sid. 157. Cro. Ja. 231. 1. Sid. 49. 2. Roll. Abr. 91. 10. Rep. 134. a.)

"*Et hujuſmodi.*" Hereby is implied a diverſity between a chattle in poſſeſſion, and a perſonall *choſe* in action belonging unto them. As if two tenants in common be of land, and one doth a treſpaſſe therein, of this action they are jointenants, and the ſurvivor ſhall hold place. So it is if two tenants in common be of a manor, and they make a bailife thereof, and one of them dieth, the ſurvivor ſhall have the action of account, for the action given unto them for the arrerages upon the account was joint. So it is if two tenants in common ſow their land, and one doth eate the ſame with his cattle, though they have the corne in common, yet the action given to them for treſpaſſe in the ſame is joynt, and ſhall ſurvive. For the treſpaſſe and damage done to them was joynt, all which here is implyed by *Littleton*, who ſaith, that they ſhall have an action joyntly, and the ſame law is of coparceners. Vide Sect. 319, 320, 321. (2. Cro. 19.) 22. H. 6. 12. 38. E. 3. 7. 13. E. 3. account 126. 45. E. 3. 13, 14. 37. H. 6. 32. 38. (1. Noy 135. 2. Roll. Abr. 90. Moor 40. 71. 667.)

But if two tenants in common be of goods, as of an horſe or of any other goods perſonall, there if one dye, his executors ſhall be tenant in common with the ſurvivor. (Poſt. 200. a. 7. Rep. Hall's caſe ſub fin. 10. Rep. 134.

Ant. 185.) 38. E. 3. 5. 17. E. 3. 11. 3. H. 5. Quare Imp. 71. 14. H. 4. 12. 9. H. 6. 30. 22. H. 4. 14. 37. H. 6. 9. b. 10. Eliz. Dyer 279. F.N.B. 35. 9. E. 3. 36, 37. Pl. Com. Seignior Barkley's caſe.

"*Et nemy en le realtie, &c.*" If two tenants in common be of an advowſon, and a ſtranger uſurpe, ſo as the right is turned to an action, and they bring a writ of *Quare impedit* which concernes the realtie, the ſixe months paſſe, and the one dyeth, the writ ſhall not abate, but the ſurvivor ſhall recover, otherwiſe there ſhould be no remedie to redreſſe this wrong. And ſo it is of coparceners, and this is one exception out of our author's rule.

[*a*] But if three coparceners recover land and dammages in an aſſiſe of *Mordanceſter*, albeit the judgement be joynt, that they ſhall recover the land and dammages, yet the dammages being acceſſory, though they bee perſonall, doe in judgement of law depend upon the freehold being the principal, which is ſeverall. And though the words of the judgement be joint, yet ſhall it be taken for diſtributive. And therefore if two of them dye, the entire dammages doe not ſurvive, but the third ſhall have execution according to her portion; and this is another exception out of our author's rule. But if all three had ſued execution by force of an *Elegit*, and two of them had dyed, the third ſhould have had the whole by ſurvivor, till the whole damages be paid. [*a*] 14. E. 3. Execution 75. 45. E. 3. 3. b. (5. Rep. 7. 2. Roll. Abr. 86. 3. Rep. 14. b. Ant. 154. b. 1. Roll. Abr. 888.)

If the aunt and niece join in an action of waſte, for waſte done in the life of the other ſiſter, the aunt ſhall recover the dammages onely, becauſe the ſame belongs not by law to the neice. And ſome hold the dammages in that caſe to be the principall. 45. E. 3. 3. b. 48. E. 3. 14. 11. H. 4. 16. b. 35. H. 6. 23. b. 11. E. 2. Waſt. Ant. 53. b.

115. 2. Cro. 19.

Sect.

(Cro. Jac. 231. 1. Sid. 49.)

Sect. 316.

*ITEM, ſi deux tenants en common font un leaſe de lour tenements a un auter pur terme des ans, rendant a eux certaine rent annualment durant le terme, ſi le rent ſoit aderere, &c. les tenants en common averont un action de debt envers le leſſee, et nemy divers actions, pur ceo que l'action eſt en * la perſonalty.*

ALSO, if two tenants in common make a leaſe of their tenements to another for terme of yeares, rendring to them a certaine rent yearely during the terme, if the rent bee behind, &c. the tenants in common ſhall have an action of debt againſt the leſſee, and not divers actions, for that the action is in the perſonalty. [198. b.]

This upon that which hath been ſaid is evident.

Sect. † 317.

MES en avowry pur le dit rent ils covient ſever, car ceo eſt en le realtie, come le aſſiſe eſt ſupra.

BUT in an avowry for the ſaid rent they ought to ſever, for this is in the realty, as the aſſiſe is above.

Vid. 9. 3. 36, 37. Pl. Com. Seignior Barkley's caſe.

This being an addition to *Littleton*, albeit it be conſonant to law yet I omit it.

(Stat. 32. H. 8. Ant. 167. a. 187. a.)

Sect. 318.

ITEM, tenants en common poyent bien faire partition enter eux s'ils voilent, coment que ils ‡ ne ſerront compelles de faire partition per la ley; mes s'ils font enter eux partition per lour agreement et conſent, tiel partition eſt aſſets bone, come eſt adjudge en le liver d'aſſiſes ‖.

ALSO, tenants in common may well make partition between them if they will, but they ſhall not be compelled to make partition by the law; but if they make partition betweene themſelves by their agreement and conſent, ſuch partition is good enough, as is adjudged in the booke of aſſiſes.

* Vid. Sect. 259. 290. 247. 264. 19. Aſſ. p. 1. 30. Aſſ. p. 8. 47. E. 3. 22.

Of this ſufficient hath beene ſaid in * the Chapter of Parceners and Joyntenants.

"*En le liver d'aſſiſes.*" This booke is of great authoritie in law, and is ſo called becauſe it principally containeth the proceedings upon writs of aſſiſe of *novel diſſeiſin*, which in thoſe dayes was *feſtinum et frequens remedium*.

* *la* not in L. and M. nor Roh.
† No part of this Section in L. and M. nor Roh.
‡ *ne* not in Roh. but in L. and M.
‖ *&c.* added in L. and M. and Roh.

Sect. 319.

*ITEM, ſi come y ſont tenants en common de terres et tenements, &c. come eſt avantdit, en meſme le manner y ſont § de chattels reals et perſonals. Sicome ** leaſe ſoit fait de certaine terres a deux homes pur terme de 20 ans, et quant ils ſont de ceo poſſeſſes l'un de les leſſees grant ceo que a luy affiert durant le terme a un auter, donque meſme celuy a que le grant eſt fait et l'auter tiendront et occupieront en common.*

ALSO, as there bee tenants in common of lands and tenements, &c. as aforeſaid, in the ſame manner there be of chattells reals and perſonals. As if a leaſe bee made of certaine lands to two men for terme of 20 yeares, and when they be of this poſſeſſed, the one of the leſſees grant that which to him belongeth to another during the terme, then hee to whom the grant is made and the other ſhall hold and occupie in common.

[199. a.]

"*GRANT ceo que a luy affiert.*" The ſame law it is if the one leſſee in this caſe make a leaſe for part of the terme, the ſecond leſſee and the other are tenants in common, as hath been ſaid in the Chapter of Joyntenants. The (*&c.*) in this Section, implyeth other hereditaments whereof men may be tenants in common, whereof ſufficient hath beene ſaid before. Vid. Sect. 315. (Cro. Eliz. 33. Ant. 192. a.)

Sect. 320.

*ITEM, ſi deux * ont † joyntment le garde de corps et de terre d'un enfant deins age, et l'un de eux granta a un auter ceo que a luy affiert de meſme le garde, donque le grantee, et l'auter que ne granta pas, averont et tiendront ceo en common, &c.*

ALSO, if two have joyntly the wardſhip of the body and land of an infant within age, and the one of them grant to another that which to himſelfe belongeth of the ſame ward, then the grantee, and the other which did not grant, ſhall have and hold this in common, &c.

HEREBY it appeareth, that there may bee tenants in common as well of chattels reall entire, as wardſhip of the body, &c. as of chattels perſonal, as a hawke or a horſe. If two tenants in common be of a ſeigniory, and a ward fall, they are tenants in common of the wardſhip aſwel of the body as land. And ſo it is if the land it ſelfe eſcheat to them, they ſhall be tenants in common thereof, and ſo it is of parceners. 16. E. 3. tit. Aid.

"*En common, &c.*" Here (*&c.*) implyeth any other entire chattell. Vid. devant, Sect. 315.

§ *poſſeſſions et proprietors* added in L. and M. and Roh.

** *ſi* added in L. and M. and Roh.

[199. a.]

* *joyntenants* added in L. and M. and Roh.

† *joyntment* not in L. and M. nor Roh.

Sect. 321.

EN meſme le maner eſt de chateux perſonals. Sicome deux ont ‡ *joyntment per done ou per achate un chival ou boefe, &c. et l'un grant ceo que a luy affiert* ‖ *de meſme le chival ou boefe a un auter, donques le grantee, et l'auter que ne granta pas, averont et poſſideront tiels chateux perſonals en common* §. *Et en tiels caſes, ou divers perſons ont chateux reals ou perſonels en common* ¶, *et per divers titles, ſi l'un de eux moruſt, les auters que ſurveſquont n'avera ceo per le ſurvivor, mes les executors celuy que moruſt tiendront et occupieront ceo oveſque eux que ſurveſquont, ſicome lour teſtator fiſt ou devoit en ſa vie, &c. pur ceo que lour titles et droits en ceo fueront ſeverals, &c.*

IN the ſame manner it is of chattels perſonals. As if two have joyntly by gift or by buying a horſe or an oxe, &c. and the one grant that to him belongs of the ſame horſe or oxe to another, the grantee, and the other which did not grant, ſhall have and poſſeſſe ſuch chattels perſonals in common. And in ſuch caſes, where divers perſons have chattels real or perſonall in common, and by divers titles, if the one of them dieth, the others which ſurvive ſhal not have this as ſurvivor, but the executors of him which dieth ſhall hold and occupie this with them which ſurvive, as their teſtator did or ought to have done in his life time, &c. becauſe that their titles and rights in this were ſeverall, &c. [199. b.

Vid. devant, Sect. 315. This is evident enough, and hereof ſufficient hath beene ſaid before.

Sect. 322.

ITEM, en le caſe avantdit, ſicome deux ont eſtate en common pur terme d'ans, &c. l'un occupie tout, et miſt l'auter hors de poſſeſſion et occupation, &c. donques celuy que eſt miſe hors de occupation avera envers l'auter briefe de ejectione firmæ *de la moitie, &c.*

ALSO, in the caſe aforeſayd, as if two have an eſtate in common for terme of yeares, &c. the one occupy all, and put the other out of poſſeſſion and occupation, hee which is put out of occupation ſhall have againſt the other a writ of *ejectione firmæ* of the moitie, &c.

Sect. 323.

EN meſme le maner eſt lou deux teignont le gard des terres ou tenements durant le nonage d'un enfant, ſi l'un

IN the ſame manner it is where two hold the wardſhip of lands or tenements during the nonage of an enfant,

‡ *joyntment—joint eſtate,* in L. and M. and Roh.

‖ *de meſme le chival ou boefe* not in L. and M. nor Roli.

§ *&c.* added in L. and M. and Roli.

¶ *&c.* added in L. and M and Roh.

*l'un ouſta l'auter de ſon poſſeſſion, il que eſt ouſte avera briefe de ejectment de gard de le moitie, &c. pur ceo que ceux choſes ſon chateaux realx, et poyent eſtre apportions et ſevers, &c. Mes nul * action de treſpas, c'eſtaſcavoir,* Quare clauſum ſuum fregit, et herbam ſuam, &c. conculcavit et conſumpſit, &c. et hujuſmodi actiones, &c. *l'un ne poet aver envers l'auter, pur ceo que cheſcun de eux poet entrer et occupier en common, &c. per my et per tout, les terres et tenements § queux ils teignont en common. Mes ſi deux ſont poſſeſſes de chattels perſonalx en common per divers titles, ſicome d'un chival, ou boef, ou vache, &c. ſi l'un prent ceo tout a luy hors de poſſeſſion d'auter, l'auter n'ad nul auter remedie mes de prender ceo de luy que ad fait luy le tort pur occupier en common, &c. quant † il poet veier ſon temps, &c. En meſme le manner eſt de chattels realx que ne poyent eſtre ſevers, ſicome en le caſe avantdit, que deux ſont poſſeſſe d'un gard de corps d'un enfant deins age, ſi l'un prent l'enfant hors de poſſeſſion d'auter, l'auter n'ad aſcun remedie per aſcun action per la ley, mes de prendre l'enfant hors de le poſſeſſion d'auter quaunt il veit ſon temps ‡.*

fant, if the one ouſt the other of his poſſeſſion, he which is ouſted ſhal have a writ of *ejectment de gard* of the moitie, &c. becauſe that theſe things are chattels reals, and may be apportioned and ſevered, &c. but no action of treſpaſſe *(videlicet) Quare clauſum ſuum fregit, et herbam ſuam, &c. conculcavit, et conſumpſit, &c. et hujuſmodi actiones, &c.* the one cannot have againſt the other, for that each of them may enter and occupie in common, &c. *per my et per tout*, the lands and tenements which they hold in common. But if two be poſſeſſed of chattells perſonalls in common by divers titles, as of a horſe, an oxe, or a cowe, &c. if the one take the whole to himſelfe out of the poſſeſſion of the other, the other hath no other remedie but to take this from him who hath done to him the wrong to occupie in common, &c. when he can ſee his time, &c. In the ſame manner it is of chattels realls, which cannot be ſevered, as in the caſe aforeſaid, where two be poſſeſſed of the wardſhip of the bodie of an infant within age, if the one taketh the infant out of the poſſeſſion of the other, the other hath no remedie by an action by the law, but to take the infant out of the poſſeſſion of the other when he ſees his time.

"PUR *terme de ans, &c.*" For one yeare, half a yeare, &c. (Sid. 49.)

"*L'un occupie tout et miſt l'auter hors de poſſeſſion.*" Theſe are words materially added, for albeit one tenant in common take the whole profits, the other hath no remedie by law againſt him, for the taking of the whole profits is no ejectment: (1) But if he drive out of the land any of the cattell of the other tenant in common, or not ſuffer him to enter or occupy the land, this is an ejectment or expulſion, whereupon he may have *ejectione firmæ*, for the one moitie, and recover damages for the entrie, but not for the meane profits. (Hob. 120. Plo. 247. Sid. 33. Mo. 123. 375.) (1. Roll. Abr. 741. Noy. 14.) (Cro. Jac. 611.)

"Ejectione firmæ *de la moity, &c.*" Here by this and the other (*&c.*) in theſe two Sections, are to be underſtood divers diverſities between (2. Rep. 68. F. N. B. 197.)

* *tiel* added in L. and M. and Roh.
§ *&c.* added in L. and M. and Roh.
† *il* not in L. and M. nor Roh.
‡ *&c.* added in L. and M. but not in Roh.
(1) [See Note 83.]

between actions which concerne right and intereſt, (as of *ejectione firmæ*, *ejectment le gard*, *quare ejecit infra terminum* of a chattell real upon an expulſion or ejectment) and actions concerning the bare taking of the profits riſing off the land or doing of treſpaſſe upon the land, as here by the examples doe appeare, for the right is ſeverall, and the taking of the profits in common. The ſecond diverſity is betweene chattells reals that are apportionable or ſeverable, as leaſes for yeares, wardſhip of lands, intereſt of tenements by *elegit*, ſtatute merchant, ſtaple, &c. of lands and tenements, and chattels reals entire, as wardſhip of the body, a villeine for yeares, &c. for if one tenant in common take away the ward, or the villeine, &c. the other hath no remedie by action, but he may take them againe. Another diverſitie is betweene chattells realls and chattells perſonalls, for if one tenant in common take all the chattells perſonalls, the other hath no remedy by action, but he may take them againe; and herein the like law is concerning chattells realls entire, and chattells perſonall for this purpoſe. But of chattels entire, as of a ſheep, horſe, or any other entire chattell, reall or perſonall, no ſurvivor ſhall be betweene them that hold them in common: and tenants in common ſhall not joyne in an *ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, &c. for that theſe actions concerne the right of lands which are ſeverall. [200. a.]

21. E. 4. 11. 22. 43. E. 3. 24. 45. E. 3. 13. 22. H. 6. 50. 58. 8. H. 6. 17. 19. H. 6 57. 32. H. 6. 16. 2. E. 4. 23. 14. E. 4. 8. 18. E. 4. 30. 37. H. 6. 33. 21. E 3. 29. 12. Aſſ. 28. 47. E. 3. 22. b. 10. H. 7. 16. F. N. B. 117. a. 17. E. 2. Account 122. (Ant. 198. a.) 10. H. 4. Treſpas 178. 11. H. 4. 3. (Sir Tho. Ray. 15. 1. Lev. 29.) 21. E. 4. 11, 12.

(Ant. Sec. 311. & fol. 197. b.)

13. E. 3. Brieſe 674. (2. Roll. Abr. 566.)

If two tenants in common be of a mannor, to the which waiſe and ſtray doth belong, a ſtray doth happen, they are tenants in common of the ſame, and if the one doth take the ſtray, the other hath no remedie by action, but to take him againe. But if by preſcription the one is to have the firſt beaſt happening as a ſtray, and the other the ſecond, there an action lieth if the one take that which pertaines to the other.

47. E. 3. 22. b.

If two tenants in common be of a dove-houſe, and the one deſtroy the old doves, whereby the flight is wholly loſt, the other tetant in common ſhall have an action of treſpaſſe, *quare vi et armis columbare le pl' fregit et ducentas columbas pretij* 40. *s. interfecit, per quod volatum columbaris ſui totaliter amiſit*: for the whole flight is deſtroyed, and therefore hee cannot in barre plead tenancie in common. And ſo it is if two tenants in common bee of a parke, and one deſtroyeth all the deere, an action of treſpaſſe lieth. [200. b]

4. E. 2. Treſpas 233.

[c] 1. H. 5. 1. 2. H. 5. 3.

[c] If two tenants in common be of land, and of mete ſtones, *pro metis et bundis*, and the one take them up and carrie them away, the other ſhall have an action of treſpaſſe *quare vi et armis* againſt him, in like manner as he ſhall have for the deſtruction of doves.

[d] 13. E. 3. Treſpas 212. 19. R. 2. Br. 927. 11. E. 3. Treſpas 212. Vi. 18. H. 6. 5.

[d] If two tenants in common be of a folding, and the one of them diſturbe the other to erect hurdles, he ſhall have an action of treſpaſſe *quare vi et armis* for this diſturbance.

[e] If two ſeverall owners of houſes have a river in common betweene them, if one of them corrupt the river, the other ſhall have an action upon his caſe.

[e] 13. H. 7. 26.

[f] F. N. B. 127. Reg. 163 (Ant. 54. b.)

[f] If two tenants in common, or jointenants, be of an houſe or mill, and it fall in decay, and the one is willing to repaire the ſame, and the other will not, he that is willing ſhall have a writ *de reparatione faciendâ*; and the writ ſaith, *ad reparationem et ſuſtentationem ejuſdem domûs teneantur*; whereby it appeareth, that owners

are

are in that caſe bound *pro bono publico* to mainetaine houſes and mills which are for habitation and uſe of men.

If one jointenant or tenant in common of land maketh his companion his baylife of his part, he ſhall have an action of account againſt him, as hath bin ſaid. But although one tenant in common or jointenant without being made baylife take the whole profits, no action of account lieth againſt him; for in an action of account he muſt charge him either as a guardian, baylife, or receiver, as hath beene ſaid before, which he cannot doe in this caſe, unleſſe his companion conſtitute him his bailife. And therefore all thoſe bookes which affirme that an action of account lieth by one tenant in common, or jointenant, againſt another, muſt be intended when the one maketh the other his bailife, for otherwiſe never his baylife to render an account is a good plea.

17. E. 2. tit. Account 22. 8. E. 2. Account 115. 30. E. 1. Account 127. 45. E. 3. 10. 47. E. 3. 22. b. 38. E. 3. 9. 22. E. 3. 60. 3. E. 3. 27. 39. E. 27. 82. F. N. B. 118. i. 10. H. 7. 16. 2. E. 4. 25. (Ant. 172. a.

If there be two tenants in common of a wood, turbarie, piſcharie, or the like, and one of them doth waſt againſt the will of his companion, his companion ſhall have an action of waſt, and he that did the waſt before judgement, hath election either to take his part in certaintie by the ſherife and the oath of men, &c. or that he grant, that from thenceforth he ſhal not do waſt but according to his portion, &c. and if he make choice of a certain place, then the place waſted ſhall be aſſigned to him. [*g*] But this extends not to coparceners, becauſe they were compellable to make partition by the common law: and this, as it is ſaid, doth extend as well to tenants in common and joyntenants for life, as to an eſtate of inheritance. But if one tenant in common, or joyntenant of a dovehouſe deſtroy the whole flight of doves, no action of waſt doth lie in that caſe upon the ſaid ſtatute, * as ſome doe hold.

F. N. B. 118. 1. Roll. Abr. 118. 2. Inſt. 379.) W. 3. ca. 23.

[*g*] 27. H. 8. 13. 21. E. 3. 29. 29. E. 3. 39. 3. E. 2. Waſt. 35. F. N. B. 59. d. F. N. B. 49. i.

* 47. E. 3. 22. 50. E. 3. 3.

If lands be given to two, and to the heires of one of them, and the tenant for life doth waſt, he that hath the inheritance ſhall have no action of waſt by the ſtatute of *Glouceſter*, but upon the ſtatute of *W.* 2. he ſhall have an action of waſt. And it is to be knowne, that one tenant in common may infeoffe his companion, but not releaſe, becauſe the freehold is ſeverall. Jointenants may releaſe, but not infeoffe, becauſe the freehold is joynt; but coparceners may both infeoffe and releaſe, becauſe their ſeiſin to ſome intents is joynt, and to ſome ſeverall (1).

10. E. 4. 3. b. 22. H. 6. 42. 21. E. 3. 47. 17. E. 3. 47. 18. E. 4. 27. 28. E. 3. 4. (2. Inſt. 403. 11. Rep. 49. Ant. 53. b. F. N. B. 59. d.

2. Roll. Abr. 86. 403. Ant. 186. b. Poſt. 335. a.)

Sect. 324.

*ITEM, quant un home * voile monſtrer un feoffement fait a luy, ou un done en le taile, ou un leaſe pur terme de vie d'aſcun terres ou tenements, la il dirra, per force de quel feoffement, done, ou leas, il fuit ſeiſie, &c. mes lou un voile pleade un leas ou grant fait a luy de*

ALSO, when a man will ſhew a feoffement made to him, or a giſt in taile, or a leaſe for life of any lands or tenements, ther he ſhal ſay, by force of which feoffement, gift, or leaſe, he was ſeiſed, &c. but where one will plead a leaſe or grant made to him

(1) [See Note 83 †.]

* *en pledaunt* added in L. and M. and Roh.

de chattel real ou perſonal, la il dirra, per force de quel il fuit poſſeſſe, &c.

him of a chatell real or perſonal, ther he ſhal ſay, by force of which he was poſſeſſed, &c.

Pluis ſerra dit de tenants en common en le Chapter de Releaſes † et Tenant per Elegit.

More ſhall be ſaid of tenants in common in the Chapters of Releaſes and Tenant by *Elegit*.

"*IL fuit ſeiſie, &c.*" *Seiſin* is a word of art, and in pleading is onely applied to a freehold at leaſt, as *poſſeſſe* for diſtinction ſake is to a chattell reall or perſonall. As if *B.* plead a feoffement in fee, he concludeth, *virtute cujus prædict.*' B. *fuit ſeiſitus, &c.* But if he plead a leaſe for yeares, he pleadeth, *virtute cujus prædictus* B. *intravit, et fuit inde poſſeſſionatus*; and ſo of chattells perſonalls, *virtute cujus fuit inde poſſeſſionatus.*

(Plowd. Com. 503. a. - Poſt. 303. a. Plow. 149. b. Poſt. 310. b. Noy 26.)

And this holdeth not only in caſe of lands or tenements which lie in liverie, but alſo of rents, advowſons, commons, &c. and other things that lie in grant, whereof a man hath an eſtate for life or inheritance.

Alſo when a man pleads a leaſe for life, or any higher eſtate which paſſeth by liverie, he is not to plead any entrie, for he is in actuall ſeiſin by the liverie it ſelfe. Otherwiſe it is of a leaſe for yeares, becauſe there he is not actually poſſeſſed untill an entrie.

† *et confirmacions* added in L. and M. and Roh.

END OF THE FIRST VOLUME.